UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS GOVERNMENT CLAIM DENIED: March 10, 2011

CBCA 1695, 2156

SERCO, INC.,

Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

Rebecca E. Pearson and Jeffery M. Chiow of Venable LLP, Washington, DC; and J. Scott Hommer, III of Venable LLP, Vienna, VA, counsel for Appellant.

Mark L. Hansen, Kimberly A. Manganello, Scott D. Sadler, and Andrew J. Seff, Office of the General Counsel, Pension Benefit Guaranty Corporation, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **SHERIDAN**, and **WALTERS**.

BORWICK, Board Judge.

This, with apologies to Charles Dickens, is a tale of two appeals, both involving government claims for refunds as set forth in separate decisions of the contracting officer. Serco, Inc. (appellant or Serco) moves the Board to summarily dismiss the second government claim -- in CBCA 2156 -- and to deny the related amended complaint in CBCA 1695 on various grounds, including estoppel and impermissible splitting of claims. Appellant's motion is not well taken, and its motion to summarily dismiss the government claim in CBCA 2156 is denied.

Background

The first appeal, filed on August 14, 2009, and docketed as CBCA 1695, was from the contracting officer's decision of May 18, 2009, seeking $115,773 from appellant for alleged overcharges in two labor hour contracts for database management and technical services. As part of that decision, the contracting officer sought from appellant $84,769 for alleged improperly billed subcontract labor. On January 14, 2011, the Board granted respondent's partial motion for summary relief as to entitlement on the issue of over-billed subcontract labor, but found disputed factual issues as to quantum and reserved the quantum issue for further proceedings. *Serco, Inc. v. Pension Benefit Guaranty Corp*., CBCA 1695, 11-1 BCA ¶ 34,662.

The second appeal, filed on September 22, 2010, was from a decision dated July 13, 2010, of respondent's contracting officer. In claim one of that decision, respondent seeks a refund from appellant of $286,282.26 for additional erroneously billed subcontract labor. In claim two, respondent seeks a refund from appellant of $131,309.99 for amounts charged for contractor employees who were actually subcontractor labor and who arguably should have been billed to respondent at a lower rate under the applicable contract clauses.

According to counsel for respondent, respondent notified appellant of the alleged overcharges on May 5, 2010, and continued settlement negotiations through early July 2010. When those negotiations failed, respondent issued its second contracting officer's decision.

On July 11, 2010, respondent submitted a motion to amend its complaint in the first appeal to raise the issues presented in the second contracting officer's decision. Respondent did this to protect itself against any possible running of the six-year statute of limitations contained in 41 U.S.C. § 7103(a). Respondent's Opposition to Appellant's Motion (Respondent's Opposition) at 3. As noted above, on September 22, 2010, appellant filed the second appeal, contesting the second contracting officer's decision.

Contentions of the parties

Appellant argues that "it is well settled that once a contractor has appealed a claim to the Board, the Board has sole jurisdiction over the matter and a [contracting officer] may not unilaterally divest the Board of jurisdiction." Appellant's Motion at 4. Appellant maintains that the second claim "at base" is a reassertion of the same claim for overcharges based upon identical facts as in CBCA 1695. *Id*. Appellant posits that respondent is estopped from issuing the second decision of the contracting officer, and

that respondent is impermissibly splitting claims based upon the same set of transactional facts. Appellant's Motion at 5-6. Appellant argues that in the first decision, the contracting officer represented that respondent sought the "total universe of questioned costs" and that the second final decision was based upon the same records available to the auditors on which respondent based its first contracting officer's decision. Appellant's Motion at 7. Appellant sees significance in the fact that the second final decision increases appellant's exposure by over 490%. Appellant implies that it has been prejudiced. Appellant's Motion at 4.

Respondent argues that the Contract Disputes Act (CDA) authorizes contracting officers to issue decisions on government claims and disputes appellant's notion that the first and second claims are the same. Respondent's Opposition at 4. The contracting officer explains in the second decision that the additional amounts claimed were revealed during document exchange arising from ordered discovery in the first appeal, CBCA 1695, resulting in a re-examination of appellant's records in light of the information received from appellant. Decision of Contracting Officer, Board File, CBCA 2156.

In response to appellant's motion, respondent's counsel explained that, during discovery in the first appeal, respondent received information from appellant that it did not have when it issued its first contracting officer's decision: (1) discovery admissions that most of Serco's subcontracted employees did not join Serco as full time employees and (2) dates marking the beginning and end of employment for those few subcontractor employees who had in fact joined Serco's permanent labor force. This additional information allowed respondent to cross-reference employment dates with other invoices, including those not questioned by previous audits, to identify additional alleged overcharges. Respondent's Opposition at 3.

Discussion

Appellant's arguments are not persuasive. Appellant has not identified authority that prohibits respondent's contracting officer from issuing a second decision in this case. The CDA requires that "each claim by the Federal Government against a contract relating to a contract shall be the subject of a written decision by the contracting officer." 41 U.S.C. § 7103(a)(3). Indeed, under the CDA, if this claim is distinct from the first claim because it is based on a different set of operative facts, a second contracting officer's decision is required. *Wheeler Logging, Inc. v. Department of Agriculture*, CBCA 97, 08-2 BCA ¶ 33,984 (second certified contractor claim required to be submitted to contracting officer if the claim is based on a different set of operative facts developed during litigation of first claim). The second claim also falls squarely within the Federal Acquisition Regulation's definition of a claim, i.e., "a written demand or written assertion

by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain." 48 CFR 2.101 (2010).

Appellant also argues that the second claim is the same as the first one, because it is based on the same records in respondent's possession when it issued the first decision. We disagree that the claims are the same or that the claims are based on the same set of transactional facts. That respondent may have possessed most of the records currently in its possession when it issued the first claim is not relevant in this case. The two claims differ in respondent's substantive analysis of those documents, based upon discovery information appellant provided respondent in litigation on CBCA 1695. The two claims are fact-intensive and distinct as to employee numbers, employee identity, dates of employment, and employment capacity (i.e., whether the employees were subcontractors or direct labor). The second claim is partially based on an analysis of different invoices as well. The distinct aspect of the two claims explains why appellant's potential exposure was increased in the second claim by 490%.

Respondent is not estopped from issuing a second decision by any unreasonable delay, as the Government was in *Roberts v. United States*, 357 F.2d 938 (Ct. Cl. 1966). In *Roberts*, the court refused the Government recovery on its cost-savings counterclaim when the savings were well known to the Government by the time the contract was completed and the timing of the adjustment prejudiced the contractor from appealing the dispute when the facts were readily available and before final settlement with its subcontractors and creditors. *Id.* at 946-47. Here, there was no undue delay by respondent. Nor do we conclude that appellant has been prejudiced by the issuance of a second contracting officer's decision. It is true that the stakes in the litigation have been considerably increased by the additional amounts respondent seeks. However, appellant will have full opportunity to challenge respondent's calculation of additional overcharges, including whatever discovery may be necessary for a calculation of quantum.

According to appellant, respondent has unfairly split its claims. The cases cited by appellant are inapposite. In *Wood & Co. v. Department of the Treasury*, GSBCA 12534-TD, 94-1 BCA ¶ 26,445 (1993), the board held that a contractor could not avoid the ninety day statute of limitations by filing a second claim with the contracting officer that merely restated the time-barred original claim. *Wood* is not applicable, because we have found that the claims are distinct. In *Phillips/May Corp. v. United States*, 524 F.3d 1264 (Fed. Cir. 2008), the United States Court of Appeals for the Federal Circuit applied claim preclusion to a final judgment of the Armed Services Board when the contractor sought to appeal a related claim to the United States Court of Federal Claims. The Court concluded that a contractor could not seek to litigate related claim in a different forum. *Id.* at 1270. We know of no authority that holds that claim preclusion is applicable to appealed

decisions of contracting officers. Indeed, the parties here are doing what the Court of Appeals stated should have been done in *Phillips/May*, i.e., litigate all related claims before one forum. *Id*. at 1270-71.

Finally, appellant argues that the issuance of a second decision is an attempt unilaterally to divest the Board of jurisdiction over the first claim. The cases upon which appellant relies, such as *AT&T Corp. v. Department of the Treasury*, GSBCA 13931-TD, 98-2 BCA ¶ 29,897, and *Triad Microsystems, Inc*. ASBCA 48763, 00-1 BCA ¶ 30,876, involve withdrawal of a final decision, not, as in this case, the issuance of a second final decision.

Decision

Appellant's motion for summary denial of respondent's second contracting officer's decision in CBCA 2156 is **DENIED**. The Board consolidates CBCA 1695 and 2156.

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ANTHONY S. BORWICK
Board Judge

We concur:

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PATRICIA J. SHERIDAN
Board Judge

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RICHARD C. WALTERS
Board Judge