UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION TO DISMISS DENIED: March 10, 2020

CBCA 6563, 6564

SRA INTERNATIONAL, INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

D. Joe Smith, Umer M. Chaudhry, and Eric K. Herendeen of Jenner & Block LLP, Washington, DC, counsel for Appellant.

Dennis J. Gallagher, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **SHERIDAN**, and **LESTER**.

LESTER, Board Judge.

In response to the complaints that respondent, the Department of State (DOS), filed in these now-consolidated appeals, appellant, SRA International, Inc. (SRA), filed a motion to dismiss the appeals with prejudice for lack of jurisdiction or, in the alternative, for failure to state a claim. Previously, the Board had directed DOS to file the initial complaints in these appeals, which involve two separate DOS contracting officer decisions asserting government claims, for efficiency purposes. In response to DOS's designation of the contracting officers' decisions as its complaints, SRA contends that the complaints are deficient and that these

appeals should be dismissed with prejudice. For the reasons set forth below, we deny SRA's motion.

Background

I. DOS's Factual Allegations

The following facts are taken from the allegations in the contracting officers' final decisions at issue in these appeals, which DOS has designated as its complaints, and documents referenced and/or incorporated into the decisions:

A. The Contracts At Issue

On December 13, 2011, DOS awarded SRA task order no. SAQMMA12F0156 (task order 0156), through which SRA was to provide services related to the enhancement and maintenance of the Worldwide Refugee Admissions Processing System (WRAPS). Subsequently, on August 17, 2012, DOS awarded contract no. SAQMMA12C0204 (contract 0204) to SRA for cyber security operations support services that SRA was to perform for the Bureau of Diplomatic Services. Both the task order and the contract are subject to incurred cost audits under the clause at Federal Acquisition Regulation (FAR) 52.215-2 (48 CFR 62.215-2 (2012)), titled "Audits and Records–Negotiation."

B. The Audit

On April 6, 2018, following a November 7, 2017, audit entrance conference, SRA received a formal notice from the Defense Contract Audit Agency (DCAA) about DCAA's plan to examine SRA's incurred cost proposals under both task order 0156 and contract 0204 for fiscal years 2012, 2013, 2014, and 2015. The formal notice indicated that DCAA expected to start its audit on April 20, 2018, and to issue a report on "approximately August 18, 2018."

DCAA issued its audit report on August 29, 2018. In that report, DCAA represented that "SRA was unable to provide sufficient appropriate evidence to support the claimed costs with regards to time and material (T&M) labor, direct material, subcontracts, other direct costs (ODCs) and indirect costs in accordance with FAR 31.201-2(d), "Determining Allowability." DCAA indicated that SRA, though having been given adequate time, "did not provide the requested documentation to support the audit procedures." DCAA also reported that it was "unable to complete the procedures for testing [SRA's] compliance with FAR 52.216-7(b)(1), Allowable Cost and Payment," because SRA was able to provide payment support only for ODCs and direct material transactions for FY 2014 and 2015. DCAA,

"[b]ased on the limited procedures performed," then "identified . . . noncompliances" for FY 2012, 2013, 2014, and 2015 "which warrant the attention of those charged with governance," including unsupported and/or FAR-noncompliant charges for T&M labor, direct materials, subcontracts, and ODCs, as well as an inability to reconcile particular costs claimed and billed in the fiscal years in question with amounts identified in project status reports for those years. DCAA calculated and identified the amount of questioned charges in each category for each of the fiscal years at issue, ultimately questioning a total of $29,184,741.62 in costs under task order 0156 and contract 0204.

C. The Contracting Officers' Final Decisions

On June 28, 2019, DOS, through two different contracting officers, issued final decisions asserting government claims against SRA seeking repayment of a total of $29,184,741.62 in disallowed costs, one decision under task order 0156 for $6,209,475.97 and one decision under contract 0204 for $22,975.267.66. In the decision relating to contract 0204, which essentially mirrors the decision relating to task order 0156 except for the dollar amounts being sought, the contracting officer identified the following facts:

> The [DCAA] completed a multi-year incurred cost audit of [SRA's] 2012-15 fiscal years on August 29, 2018 and issued Audit Report Numbers 09811-2012G10100001, 09811-2013G10100001, 09811-2014G10100001, and 0981-2015G10100001 in which DCAA identified $29,184,741.62 of [DOS] direct cost to be noncompliant with Federal Acquisition Regulation (FAR) 31.201-2(d) (See attached Audit Report). Of that total amount, $22,975,265.66 specifically pertains to [DOS] contract SAQMMA12C0204.
>
> The noncompliant cost[s] are the result of SRA failing to provide DCAA supporting documentation required to substantiate that claimed cost for subcontracts and other direct cost (ODCs) in SRA's incurred cost proposal were reasonable, allocable, and allowable. The lack of supporting documentation was so egregious that DCAA, after numerous requests for information (timeline detailed below), were forced to disclaim an audit opinion. Note, of the total $29,184,741.62 noncompliant cost detailed in DCAA's report, over 99.5% pertain to subcontractor cost with less than $140,000 pertaining to ODCs. Therefore, the following timeline and record retention guidelines pertain specifically to subcontractor cost. Similar retention guidelines and timeline apply to the ODCs but, for the sake of brevity, only the subcontract details are espoused upon further review.

Timeline of Information Requests by DCAA for Subcontract Support:

- October 17, 2017 – DCAA provides audit notification to SRA.
- November 7, 2017 – DCAA and SRA hold audit entrance conference.
- April 2, 2018 – Initial document request sent with a due date of April 23, 2018. No support provided.
- April 24, 2018 – DCAA follows up and SRA states they need more time to locate files and will try to provide by May 8, 2018. DCAA provides extension to May 8, 2018.
- May 8, 2018 – No support provided. DCAA agrees to one last extension until May 21, 2018.
- May 21, 2018 – No support provided. DCAA supervisor provides additional final extension until July 20, 2018.
- July 20, 2018 – No support was provided.
- August 29, 2018 – DCAA issues audit report with disclaimed opinion.

Appeal File Exhibit 9 at 1-2.

In the decision, the contracting officer discussed an in-person negotiation that DOS had conducted with representatives of SRA on June 28, 2019, after DCAA had provided DOS with the audit report, and acknowledged that, "[d]uring the negotiation meeting, SRA attempted to provide what it claimed to be the required supporting documentation it otherwise never submitted to DCAA." Exhibit 9 at 3. Nevertheless, the contracting officer opined that SRA's "action and the response copied above fail to comply with the [FAR]," going so far as to identify and highlight various sections of the FAR dealing with record retention that the contracting officer believed SRA had failed to satisfy. *Id.* at 3-4.

In addition, as indicated above, a copy of DCAA's August 29, 2018, audit report was referenced in and attached to each of the two contracting officers' final decisions.

II. Activity Before the Board

On July 18, 2019, SRA filed notices of appeal from the two contracting officers' decisions, which the Board docketed as CBCA 6563 and 6564.

In orders issued on July 29, 2019, the Board directed DOS to file the initial complaint on the government claims and, in each complaint, to "identify[] the bases for its repayment demand." Consistent with the Board's rules, though, the Board also indicated that DOS could designate the contracting officers' decisions or other documents as the complaint. On

August 23, 2019, DOS designated the June 28, 2019, contracting officers' decisions as its complaints, and the Board subsequently consolidated CBCA 6563 and 6564.

On September 20, 2019, SRA, in lieu of filing an answer, filed a motion seeking "to dismiss the Government's claims with prejudice for lack of jurisdiction and failure to state a claim upon which relief can be granted." Motion at 1. In its motion, to which SRA attached numerous emails as evidentiary exhibits, SRA asserted that, contrary to the representations in the contracting officers' decisions, SRA actually responded to DCAA's document requests between April and July 2018 and "communicated with DCAA regarding SRA's inability to provide certain requested documents, specifically because these documents were stored at an off site location," such that "SRA did not have immediate access to them." Motion at 3. SRA also alleged that, in August 2018, a DCAA supervisory auditor told SRA that DCAA was no longer accepting supporting documentation from SRA, but that, if SRA held its documentation, DCAA would accept it when SRA met with the DOS contracting officers for negotiation purposes. SRA alleges that it then attempted to provide supporting documentation to DOS at a June 25, 2019, negotiation, but that DOS refused to take it.

The parties have fully briefed SRA's motion.

Discussion

SRA's Jurisdictional Motion

SRA argues that the Board lacks subject matter jurisdiction to entertain the two government claims at issue in these appeals because the contracting officers' decisions fail to provide adequate notice as to the basis and amounts of DOS's claims.[1]

The Board derives its jurisdiction to consider contract disputes from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). Pursuant to the CDA, we possess jurisdiction to consider a dispute over a government claim only if a contracting officer issues a final decision asserting the government claim and the contractor timely appeals it. *National*

[1] SRA asserts that, if we dismiss these appeals for lack of jurisdiction, we should dismiss them with prejudice. This we could not do. "A dismissal with prejudice effectively renders an adjudication on the merits." *Scott Aviation v. United States*, 953 F.2d 1377, 1378 (Fed. Cir. 1992). Without jurisdiction, we lack the ability to render a merits determination and therefore "cannot presume to dismiss the complaint," or the appeal, "with prejudice." *Id.* Any dismissal for lack of jurisdiction is, by necessity, without prejudice.

Fruit Product Co. v. Department of Agriculture, CBCA 2445, 12-1 BCA ¶ 34,979, at 171,932; *see* 41 U.S.C. § 7103(a)(3)-(4) (under the CDA, "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer" and "submitted within 6 years after the accrual of the claim"). Although the CDA does not define the term "claim," we look for guidance to the CDA's implementing regulation, the FAR, *see Magwood Services, Inc.*, CBCA 4975, 16-1 BCA ¶ 36,520, at 177,908 (2015), which defines a monetary "claim" as "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." FAR 2.101 (48 CFR 2.101 (2019)). On its face, each of the two contracting officers' decisions at issue here satisfies the FAR's definition of a "claim: each is in writing, identifies a specific amount of money that the contracting officer asserts SRA owes DOS, and demands that SRA pay DOS that amount.

SRA argues that more is required and that, to be valid, the decision asserting the government claim must also contain a "clear and unequivocal statement that gives . . . adequate notice of the basis and amount of the claim." Motion at 8 (quoting *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)). Although most decisions discussing this "adequate notice" requirement address contractor claims submitted to the contracting officer, several tribunals have applied the same "adequate notice" requirement to government claims set forth in contracting officers' final decisions. *See, e.g.*, *Raytheon Co. v. United States*, 105 Fed. Cl. 236, 298 (2012) (applying "adequate notice" requirement to a government claim); *Johnson Controls World Services, Inc. v. United States*, 43 Fed. Cl. 589, 592 (1999) (same); *Volmar Construction, Inc. v. United States*, 32 Fed. Cl. 746, 752 (1995) (same); *L-3 Communications Integrated Systems, L.P.*, ASBCA 60713, et al., 17-1 BCA ¶ 36,865, at 179,625 (same); *Keany Square Associates Limited Partnership*, VABCA 3228, 91-1 BCA ¶ 23,371, at 117,252 (1990) (same). We agree that the "adequate notice" requirement applies equally to both contractor and government claims.

Nevertheless, SRA is seeking to impose an "adequate notice" standard upon government claims that is significantly higher and more burdensome than that typically applied to contractor claims. Here, SRA complains that each of the two contracting officers' decisions "essentially has one generic reference to the amount demanded, with no additional information regarding the Government's basis for the demand or a breakdown of the disallowed costs," which SRA views as insufficient to support a claim. Motion at 9. Contrary to SRA's description, though, both of the final decisions clearly indicate that DCAA conducted an incurred cost audit covering specific fiscal years, that SRA did not provide supporting documentation to justify its costs during the audit, and that the Government finds the amount of the unsupported and/or FAR-noncompliant costs that SRA must reimburse DOS to be $6,209,475.97 under task order 0156 and $22,975.267.66 under contract 0204.

For a *contractor* claim, "[t]he minimal amount of information sufficient to provide adequate notice is quite low." *L-3 Communications*, 17-1 BCA at 179,626. A valid contractor claim "need not include a detailed breakdown of costs" or "account[] for each cost component." *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). SRA has identified no reason for imposing a more demanding notice standard upon government claims than upon contractor claims or to demand cost breakdowns only in government claims. SRA's mere "desire for more information" is insufficient to strip the contracting officers' decisions of their jurisdictional effectiveness. *Id.*

Further, even if the language contained in the final decisions, in and of itself, was less than clear about the basis of DOS's claims, that would not defeat the claims' effectiveness for jurisdictional purposes. In such circumstances, we would look to correspondence surrounding and leading up to SRA's receipt of the Government's claims, coupled with the actual language in the contracting officers' decisions, to determine whether, in fact, SRA understood or should have understood the basis of those claims. *See, e.g.*, *K-Con Building Systems, Inc. v. United States*, 107 Fed. Cl. 571, 588-89 (2012); *Valco Construction Co.*, ASBCA 47909, et al., 96-2 BCA ¶ 28,344, at 141,552; *C.F. Electronics, Inc.*, ASBCA 44282, 93-3 BCA ¶ 25,971, at 129,153-54; *General Construction Co.*, ASBCA 39983, 91-1 BCA ¶ 23,314, at 116,917 (1990); *Marshall Construction, Ltd.*, ASBCA 37014, et al., 90-1 BCA ¶ 22,597, at 113,390. That type of determination is made on a case-by-case basis, depending on the specific situation at hand. *B.L.I. Construction Co.*, ASBCA 40857, et al., 92-2 BCA ¶ 24,963, at 124,394. Here, attached to, if not incorporated into, the two contracting officers' decisions was the DCAA audit report that formed the basis of the Government's claims. That audit report breaks down the total amount of questioned costs into categories and subcategories for each of the four fiscal years at issue. Certainly, SRA understands, or should understand, the basis of DOS's claims. SRA's argument that the audit report "fails to provide any clarity" regarding that basis, Motion at 9, ignores the information actually contained in the audit report.

Relying upon a decision of one of our sister boards, SRA further argues that the statement of claim in a contracting officer's decision must, but in this case fails to, "provide a basis for meaningful dialogue between the parties aimed toward settlement or negotiated resolution of the claim if possible, or for adequate identification of the issues to facilitate litigation should that be necessary." Motion at 10 (quoting *Blake Construction Co.*, ASBCA 34480, et al., 88-2 BCA ¶ 20,552, at 103,890). Yet, in its reply brief, SRA specifically states that it "is certainly aware of the costs questioned by DCAA and is ready to address these issues on their merits." Reply at 3 n.2. In such circumstances, we cannot understand SRA's position that the decisions here provide no basis for a meaningful dialogue. Further, the Court of Appeals for the Federal Circuit, in reversing a lower court decision that had relied in part upon *Blake Construction* in finding a lack of "adequate notice" in a claim, made clear

that a letter alleging a breach of specific contractual provisions and containing a demand for a specific amount in damages provides enough information to meet any "dialogue" requirements that the CDA and the FAR impose. *See Northrop Grumman Computing Systems, Inc. v. United States*, 709 F.3d 1107, 1112-13 (Fed. Cir. 2013) (reversing 99 Fed. Cl. 651 (2011)). To the extent that *Blake Construction* purports to impose higher or more burdensome notice requirements, it would conflict with Federal Circuit precedent, and we would not be bound by it.

SRA has no basis for contesting the jurisdictional validity of the two June 28, 2019, contracting officers' final decisions.[2]

SRA's Motion for Failure to State a Claim

SRA alternatively argues that we must dismiss these appeals because the two contracting officers' final decisions at issue fail to state a claim upon which the Board can grant relief.

DOS has elected to rely upon the final decisions as its complaints in these appeals. In a complaint, a party "must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *American Bankers Association v. United States*, 932 F.3d 1375, 1380 (Fed. Cir. 2019) (quoting *Acceptance Insurance Cos. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting *Bell Atlantic Corp. v Twombly*, 550 U.S. 544, 557 (2007))). "A claim has facial plausibility when the plaintiff pleads factual content that allows the [tribunal] to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In reviewing a motion to dismiss for failure to state a claim, "we accept as true the complaint's well-pled factual allegations," though not its "asserted legal conclusions." *Id.*

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[2] SRA also asserts that the "sum certain" dollar amounts that the DOS contracting officers identified in their decisions are slightly different than the total amounts that the DCAA questioned. Although SRA argues that this slight variation defeats the Board's jurisdiction, the contracting officers' decisions clearly demand payment in a "sum certain," satisfying the requirements of the CDA. *444 Brickell Partners, LLC v. General Services Administration*, CBCA 6199, et al., 19-1 BCA ¶ 37,271, at 181,363. We have found no court or board decision dismissing an appeal based upon a slight mathematical variation in the claim's stated "sum certain" and dollar amounts identified in prior communications. Any slight variations between the DCAA audit figure and the contracting officers' demands can be explored during discovery, but do not affect jurisdiction.

SRA interprets DOS's claims as being based upon the fact "that SRA failed to make certain documents available to DCAA during the audit period (approximately four months)." Motion at 11. According to SRA, DOS is complaining that SRA "violated FAR 4.703 and 52.215-2 by failing to make documents available during the audit period to DCAA." Motion at 12-13. SRA asserts that the FAR provisions, although they mandate that the contractor make its records available for audit, do not specify a length of time within which the contractor must respond to an inspection or audit notice and that, as a matter of law, four months' notice is too short. *Id.* at 13. SRA, relying upon evidentiary documents that it has attached to its motion, also alleges that, at the end of that four-month period, DCAA said that it was too late at that point to deliver documents, but represented that SRA would be allowed to do so when negotiations began. That representation, SRA says, turned out to be false.

We deny SRA's motion to dismiss for failure to state a claim for several reasons:

First, SRA's argument depends, in part, upon evidence (in the form of contemporaneous email communications) that SRA attached to its motion. SRA argues that the emails conflict with the DOS contracting officers' representations that SRA did not provide support for its incurred costs and reflect DCAA's instruction to SRA in mid-2018 to hold, rather than submit, documents. We cannot consider the submitted material on a motion to dismiss for failure to state a claim. "In general, a case can only be dismissed for failure to state a claim upon which relief may be granted when that conclusion can be reached by looking solely upon the pleadings." *A to Z Wholesale v. Department of Homeland Security*, CBCA 2110, 11-1 BCA ¶ 34,674, at 170,811. Although, in appropriate circumstances, we might also consider materials attached to or essentially incorporated into a complaint in considering such a motion, *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789, other outside materials, like the emails upon which SRA is relying, are not permissible. *See A to Z*, 11-1 BCA at 170,811. SRA cites nothing to support its representation that, because DOS has not challenged the outside documents' authenticity, they are admissible on a motion to dismiss for failure to state a claim.

Second, we disagree with SRA's interpretation of the timing requirements of the applicable FAR provisions. The contract clause at FAR 52.215-2, titled "Audit and Records–Negotiation," provides that the contracting officer or an authorized representative "shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or

indirectly in the performance of this contract"[3] and that the contractor shall make requested documents "available at its office at all reasonable times." 48 CFR 52.215-2(b), (f). According to DOS's complaints in these appeals, DCAA gave SRA four months to provide access to documents supporting SRA's incurred costs, but SRA did not provide any documents during that time. Although SRA argues that it is entitled to judgment as a matter of law because the FAR establishes no time limit within which a contractor must respond to an audit request, the FAR clause plainly grants DOS a contractual right to access SRA's documents "at all reasonable times." Accepting as true the factual allegations that DOS makes in its complaints, as we must, we reject SRA's assertion that DOS has not alleged "a facially plausible claim" that SRA failed to support its incurred costs. The evidence that SRA wishes to present challenging DOS's factual allegations is not properly before us on the type of motion that SRA has filed.

Third, even if we were to agree with SRA that the amount of time that DCAA and DOS gave SRA to provide access to SRA's cost support was unreasonable, that would not mean that SRA would suddenly be entitled to judgment as a matter of law. Although the contracting officers' decisions identify various FAR provisions that required SRA to preserve and make available documents to support SRA's incurred costs, the crux of DOS's repayment claim is that DOS has seen no support for $29,184,741.62 in costs for which SRA invoiced DOS and that DOS paid. DOS wants the unsupported and/or FAR-noncompliant costs back. If we find the amount of time that SRA was given to provide cost support unreasonable, and if SRA has actual support for questioned costs, SRA may attempt to present that support as evidence in this litigation.[4] Nevertheless, under its contracts, SRA is subject to incurred cost audits, and it does not get to retain all $29 million in questioned costs unless it provides appropriate cost support for them. To date, at least as alleged by DOS, SRA has never provided DOS or DCAA with such support. A finding that the DCAA or DOS should have given SRA more time to submit that support would mean only that SRA is not barred from submitting it now.

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[3] Similarly, FAR 4.703 provides that "contractors shall make available records . . . to satisfy contract negotiation, administration, and audit requirements of the contracting agencies" and shall maintain those records for specific periods of time. 48 CFR 4.703(a).

[4] We recognize that one of our predecessor boards held that "[a] litigant may not freely withhold records during audit and then produce them during a Board trial to support a claim for recompense." *TDC Management Corp.*, DOT BCA 1802, 91-2 BCA ¶ 23,815, at 119,323, *aff'd sub nom. Skinner v. TDC Management Corp.*, 975 F.2d 869 (Fed. Cir. 1992) (table). We do not decide here the extent to which, if SRA's failure to provide cost support access during the four-month DCAA audit period was not reasonable, SRA would still be entitled to provide that support as part of this litigation.

Fourth, SRA argues that the DOS decisions are internally contradictory and, as a result, fail to state a viable claim. In their decisions, the DOS contracting officers acknowledged that, during negotiations in June 2019, SRA attempted to provide what SRA claimed was at least some of the missing cost support documentation, but that DOS would not accept it. DOS asserts in its response that, because the CDA's statute of limitations was about to expire on its right to reclaim at least some of DOS's unsupported costs, DOS could no longer accept new material from SRA or recommence the audit.[5] Regardless of DOS's reasons for rejecting material presented in June 2019, the cited statements in the final decisions do not necessarily defeat DOS's claim. SRA cannot establish at this point in the litigation that the documents which it allegedly wanted to provide DOS in June 2019 actually provide full support for the questioned costs. Further proceedings will be necessary to determine the extent to which SRA has such support.

Decision

For the foregoing reasons, SRA's motion to dismiss is **DENIED**. SRA shall file its answers to DOS's complaints no later than March 24, 2020.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

[5] SRA complains that, if DOS "had actually been concerned about the CDA's statute of limitations, it could have asked [SRA] to enter into a tolling agreement." Reply at 6. SRA neither suggests that SRA ever brought up the idea of a tolling agreement before filing its reply brief nor identifies any authority requiring agencies to offer CDA tolling agreements to contractors. In any event, SRA's argument is irrelevant to its dispositive motion.