UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION:
September 7, 2021

CBCA 6926

ANGLIN CONSULTING GROUP, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Yashieka S. Anglin, President of Anglin Consulting Group, Inc., Washington, DC, appearing for Appellant.

Gabriel D. Soll, Korey J. Barry, and Seiji Ohashi, Office of Procurement Law, United States Coast Guard, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **GOODMAN**, and **DRUMMOND**.

GOODMAN, Board Judge.

Appellant, Anglin Consulting Group, Inc., filed this appeal from a final decision issued by a contracting officer of respondent, United States Coast Guard, Department of Homeland Security. Respondent has filed two motions to dismiss claims which respondent maintains are new claims not previously presented to the contracting officer for decision. The first motion asks to dismiss appellant's claims for economic duress and breach of the duty of good faith and fair dealing, asserted in appellant's complaint. The second motion asks to dismiss appellant's claim alleging that respondent failed to follow its in-sourcing policy, asserted in appellant's amended complaint filed in response to the first motion to

dismiss. We grant respondent's motion to dismiss the claim alleging respondent's failure to follow its in-sourcing policy, and hold further that appellant may assert the claims for duress and breach of the covenant of good faith and fair dealing to rebut respondent's assertion of accord and satisfaction but must submit these claims to the contracting officer for a decision if it intends these claims to support its affirmative claim.

Background

In August 2016, respondent awarded appellant a contract for accounting and general clerk services. The firm-fixed-price contract, awarded for $1,562,911, had one base year with four one-year options. Respondent exercised two of the option years. During performance of the contract, the parties executed bilateral modifications, two of which are relevant to this appeal. Modification P00001, executed May 4, 2017, removed the position of finance clerk. Modification P00004, executed August 13, 2018, removed two of the remaining three positions on the contract.

The contract expired in August 2019. In January 2020, appellant submitted a request for equitable adjustment (REA) seeking $111,442.13. The REA cited modifications P00001 and P00004 as compensable government acts, asserting that the descoping and deletion of work by the modifications caused appellant to absorb losses for costs incurred and lose profits.

In March 2020, the contracting officer denied appellant's REA. In denying the REA, respondent highlighted that the contract was a fixed-price, and not a cost-reimbursable, contract and that the modifications had the effect of decreasing, not increasing, contract work. The contracting officer further asserted that appellant executed the contractual modifications without reservation or mentioning a claim and that the REA provided no reason or justification for an upward price adjustment.

On March 9, 2020, appellant submitted a certified claim to respondent that sought a contract price increase of $108,742.23 and stated:

> This was a firm-fixed price contract where fixed costs were built into the rate provided to the government. The deletion of work for the contract by the government under the [modifications] required us to absorb costs and lose profits.

The claim stated further that neither of the modifications contained release language which prevented appellant from asserting a claim and that a change to the contract had occurred as the result of deletion of the work.

On June 26, 2020, respondent's contracting officer issued a final decision denying the claim, stating that the claim provided no basis for a price adjustment as the contract was fixed-price and, therefore, appellant's cost realizations were not relevant to its claim. Additionally, the contracting officer stated that no unilateral changes had been made to the contract, as both modifications at issue were bilateral and executed by both appellant and respondent.

On September 2020, appellant filed a notice of appeal of the contracting officer's final decision with the Board, seeking $108,000 plus interest. Later that month, appellant filed its complaint, which referred to its REA and certified claim. However, for the first time, appellant asserted in its complaint that it entered into the bilateral modifications due to economic duress and that the Government had breached its duty of good faith and fair dealing, stating:

> Appellant maintained it is entitled to the claim for equitable adjustment relief outlined by the terms and conditions [of] the contract, because the appellant did not waive its right to seek equitable adjustment relief and the appellant singed (sic) the bilateral modifications as the result of economic duress and the government breached its duty of good faith and fair dealing.

Complaint ¶ 7.

On November 2, 2020, respondent filed a motion to dismiss for lack of jurisdiction the assertions of economic duress and breach of the duty of good faith and fair dealing as new claims that had not previously been presented to the contracting officer for a decision.

On November 30, 2020, in response to the motion to dismiss, appellant filed an amended complaint. In the amended complaint, appellant revised the previously-quoted paragraph of the initial complaint as follows:

> Appellant maintained it is entitled to the claim for equitable adjustment relief outlined by the terms and conditions [of] the contract, because the appellant did not waive its right to seek equitable adjustment relief and the appellant singed (sic) the bilateral modifications because they felt they didn't have a choice. As evidenced by the email submitted to the Small Business Administration on July 9, 2018. The words "I feel like the modification proposed by the USCG [United States Coast Guard] is being stuffed down our throats" were used . . . . The Government failed to follow their own in-sourcing policy, Balanced Workforce Strategy Guidance Version 2.0, 10/31/2011. The Government failed to submit their sourcing decision documents for approval at the Department level, please see . . . Key

> Differences in Tools for Evaluating Functions Requiring Heightened Management Attention from GAO report GAO-20-417 . . . .

Amended Complaint ¶ 7.

On December 14, 2020, respondent filed a second motion to dismiss, asserting that the Board lacks jurisdiction over the new allegations in appellant's amended complaint with regard to respondent's alleged failure to follow its own in-sourcing policy, because this was also a new claim not previously presented to the contracting officer for decision.

On April 7, 2021, appellant filed a response to the motions to dismiss. Appellant alleged that various information supporting the allegations challenged as new claims by respondent was transmitted to respondent verbally at a meeting on March 9, 2020, the date it submitted its certified claim. Additionally, appellant alleges that because respondent received a Congressional Inquiry as the result of its request to its Congressional Representative, respondent should have been aware of the basis of these claims. On June 4, 2021, respondent filed its reply to appellant's response to the motions.

Discussion

Respondent argues in its motions to dismiss that we lack jurisdiction over appellant's claims that appellant signed the two modifications that were the subject of its certified claim under economic duress, that respondent breached the covenant of good faith and fair dealing, and that respondent failed to follow its own in-sourcing policy, as these are new claims that were never presented to respondent's contracting officer for consideration. *See NVS Technologies, Inc. v. Department of Homeland Security*, CBCA 4775, et al., 18-1 BCA ¶ 37,070. We therefore must determine if these assertions are new claims.

"Each 'claim' brought under the CDA must be submitted in writing to the contracting officer, with adequate notice of the basis for the claim." *Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539 (citing *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). While a contractor may increase the amount of its claim, it may not "raise any *new* claims not presented and certified to the contracting officer." *Santa Fe Engineers*, 818 F.2d at 858. In determining whether a contractor is presenting a new claim, tribunals consider "whether the new issue is based on the same set of operative facts" as the claim submitted to the contracting officer. *Foley Co. v. United States*, 26 Cl. Ct. 936, 940 (1992), *aff'd*, 11 F.3d 1032 (Fed. Cir. 1993). In determining whether various theories involve the "same set of operative facts," courts and boards have generally identified whether the facts necessary to establish the elements of the legal theories underlying each "claim" are essentially the same or interrelated. *Crane & Co*.

Respondent states in its reply to appellant's response to the motions to dismiss:

> Here, the Appellant asks the Board to consider the appeal of a claim that would require the consideration of operative facts and evidence not presented to the contracting officer. As noted in the initial and amended Motion to Dismiss, the allegation of duress is not raised in any filing made to the contracting officer . . . . Similarly, despite some discussion of the Balanced Workforce guidelines, the REA . . . did not raise the failure to follow this policy as a legal basis to support the claim or appeal. . . .
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> . . . [T]o review the underlying REA would only require a review of the contract file and the plain language of the modifications at issue. . . . [Appellant] failed to present evidence supporting/refuting the allegation of bad faith and duress as a theory of recovery with the REA. Likewise, the issue of the Balanced Workforce Guidelines only arose in the contexts of this appeal and the Congressional Inquiry–not presented to the contracting officer . . . . Therefore, consideration of these issues would not be an appeal of a final decision, but rather an initial tribunal on the matters. Such is not contemplated under the Board's grant of jurisdiction under the Contract Disputes Act.

The certified claim does not assert respondent's failure to follow its in-sourcing policy, duress, or breach of the covenant of good faith and fair dealing. These claims do not derive from the same operative facts as the basis of the claim submitted, that deletion of work caused appellant to absorb costs and lose profits.

Appellant's claim of respondent's failure to follow its in-sourcing policy is dismissed, as it is offered to support the affirmative claim and has not been previously submitted to the contracting officer for decision. If appellant wishes to assert this claim to support its affirmative claim, appellant must first submit it to the contracting officer for a decision.

Appellant's claims of duress and breach of the covenant of good faith and fair dealing in the complaint appear to be offered in response to respondent's affirmative defense of bilateral modifications, i.e., accord and satisfaction. Appellant is not barred in making these allegations to rebut respondent's assertion of accord and satisfaction. However, if appellant wishes to assert these claims to support its affirmative claim, it must submit them to the contractor officer for a decision, as we only have jurisdiction in that circumstance if the claims are the subject of a contracting officer's decision. *See Securiforce International America, LLC v. United States*, 879 F.3d 1354, 1362-63 (Fed. Cir. 2018); *M. Maropakis Carpentry, Inc. v. United States*, 84 Fed. Cl. 182, 195-96 (2008), *aff'd*, 609 F.3d 1323 (Fed. Cir. 2010).

Decision

The claim for respondent's failure to follow its in-sourcing policy is **DISMISSED FOR LACK OF JURISDICTION**. Appellant may assert the claims for duress and breach of the covenant of good faith and fair dealing to rebut respondent's assertion of accord and satisfaction but must submit these claims to the contracting officer for a decision if it intends these claims to support its affirmative claim.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge