UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: October 5, 2020

CBCA 6742

TKC GLOBAL SOLUTIONS, LLC,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

C. Peter Dungan and Roger V. Abbott of Miles & Stockbridge P.C., Washington, DC, counsel for Appellant.

Brian A. Quint, Office of the Solicitor, Department of the Interior, Washington, DC; and Murphy H. Peterson, Jr., Office of the Solicitor, Department of the Interior, Herndon, VA, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **VERGILIO**, and **SULLIVAN**.

SOMERS, Board Judge.

TKC Global Solutions, LLC (TKCG) has appealed a contracting officer's final decision denying its claim for damages, asserting that the Department of the Interior, Bureau of Indian Affairs (the agency) unlawfully retained certain equipment and software after the expiration of its contract. The agency has filed a motion to dismiss this appeal for lack of jurisdiction. For the reasons set forth below, we deny the motion.

Background

On September 24, 2015, the agency awarded contract A15PC00204 to TKCG. The contract provided that the agency would lease certain equipment, software, maintenance and services for data storage and management (the products) from TKCG. A subcontractor, ePlus Government, Inc. (ePlus) provided a portion of the products. The contract required the agency to give TKCG written notice ninety days prior to the end of the contract that the agency was either (1) renewing the contract, (2) purchasing the products at the current fair market value, or (3) returning the products to TKCG. After contract performance had been completed, the agency failed to give TKCG notice as required. Instead, the agency held the products past the end of the contract and failed to renew the contract, purchase or return the products.

On February 13, 2019, the agency received TKCG's claim. Brought in the name of TKCG, ePlus, and Wilmington Trust National Association (Wilmington), the claim asserted: (1) that the agency failed to inform TKCG whether it intended to exercise one of three possible options under the contract, (2) that the agency improperly retained the equipment as a holdover tenant without paying TKCG for the retention and (3) that the agency had wrongfully continued to retain the items or failed to follow the proper procedure for returning them. The claim sought damages for "$1,522,663.00 for the first holdover year currently in effect and, in the event of failure to give timely notice during this year, additional holdover years' rents, or, if the agency gives timely notice, the amounts required by such notice."

After evaluating the claim for several months, the contracting officer contacted TKCG by email on September 30, 2019, to ask whether TKCG was bringing the claim on behalf of itself or ePlus, and whether there had been an assignment of claims from ePlus to TKCG. On October 17, 2019, TKCG responded that it was sponsoring the claim on behalf of ePlus, and that ePlus had confirmed that there had been no assignment of claims from ePlus to Wilmington.

In a decision dated November 22, 2019, the contracting officer provided a summary of facts that involved the contract that is the focus of the claim (referred to as Contract 1), as well as a second contract (referred to as Contract 2 or, later, as a purchase order). After providing an extensive chronology for both contracts, the contracting officer denied the claim. First, the contracting officer stated that, while the claim had been presented under the name of the contractor, TKCG and others, the contractor had failed to present evidence of an assignment of claims to ePlus and/or Wilmington. Second, the contracting officer rejected the contractor's "holdover tenant" claim because the amount sought by TKCG far exceeded the market price that a buyer would pay to a seller for the equipment at issue, leading to a "windfall." Third, the contracting officer denied that TKCG was entitled to any

compensation, "however calculated and to whomever assigned," because the agency could not be held responsible for delays between the two contracts:

> To the extent that BIA did not meet any obligation under Contract 1 (and to the extent that TKC, by its own conduct and communications, did not fully or partially waive any such non-performance by BIA), by its performance failures and delays under Contract 2, TKC interfered with BIA's ability to perform under Contract 1. We note that a possible measure of damages for TKC's delay in performance could be BIA's cost of renting equipment. As such, even assuming for argument's sake that ePlus incurred cognizable damages under Contract 1, BIA could off-set any damages allegedly owing under Contract 1 due to TKC's performance failures and delays under Contract 2.

TKCG timely filed its appeal in its own name on February 20, 2020.

Discussion

I. Jurisdiction is Proper

The agency has moved to dismiss the contractor's appeal for lack of jurisdiction, pursuant to Board Rule 8(b), 48 CFR 6101.8 (2020). The agency asserts that "TKCG's allegation of material operative facts are different from those presented to the contracting officer; those facts could have led the CO to reach a different conclusion on the claim; or because the facts certified as accurate in the claim were inaccurate or incomplete."

As we have noted previously, each "claim" brought under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7010-7109 (2018), must be submitted in writing to the contracting officer, with adequate notice of the basis for the claim. *Strawberry Hill, LLC v. General Services* Administration, (CBCA 5149), 16-1 BCA ¶ 36,561 (citing *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). An action brought under the CDA "must be 'based on the same claim previously presented to and denied by the contracting officer.'" *Qwest Communications Co. v. General Services Administration*, CBCA 3423, 14-1 BCA ¶ 35,655 (citing Scott Timber Co. v. United States, 333 F.3d 1358, 1365 (Fed. Cir. 2003)). "It must arise from the same operative facts and claim essentially the same relief." *Id.*; see also *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 14-1 BCA ¶ 35,630.

In the notice of appeal and the complaint, appellant contends that the agency breached the contract by failing to abide by the contract terms and conditions. The facts alleged in the notice of appeal and the complaint are the same facts that had been presented in the claim before the contracting officer. The contracting officer's decision detailed the same operative

facts in denying the claim. We reject the agency's argument and find no distinction between the claim presented and denied by the contracting officer, and the action brought here.

The fact that the contractor asserted the initial claim under three names (TKCG, ePlus and Wilmington) but later filed its notice of appeal under a single name (TKCG) does not change the operative facts underpinning the claim. Although the certified claim requested that payment be made to the "assignee," the thrust of the claim always focused on whether the agency breached the contract requirements. It identifies the damages to the contractor arising from the alleged breach of contract. The reference to an assignee was not material to the claim or the contracting officer's decision.

The agency refers to *Merlin International Inc. v. Department of Homeland Security*, CBCA 1012, 11-2 BCA ¶ 34,869, which quotes from *Northrop Grumman Computing Systems, Inc. v. United States*, 99 Fed. Cl. 651 (2011), to show that the contracting officer's decision was informed in part by TKCG's designation of an assignee. The agency is misguided. The contracting officer's denial of the claim "however calculated and to whomever assigned" confirms that the validity of the assignment did not impact the analysis. Further, to the extent that the agency relies upon the *Merlin* citation to the Court of Federal Claims decision, that reference does not represent the current state of the law; subsequent to the Board's decision in *Merlin*, the Federal Circuit reversed the Court of Federal Claims. *See Northrop Grumman Computing Systems, Inc. v. United States*, 709 F.3d 1107 (Fed. Cir. 2013).

In the absence of any evidence that the contractor was acting as an agent or pass-through entity, we conclude that the agency is only liable to TKCG for the retention of the Products past the contract date, and not to other potential claimants. Thus, even if TKCG improperly assigned its claim, as the agency asserts, this does not bar TKCG from pursuing its breach of contract claim.

II. Certification is Adequate

The CDA requires that for claims over $100,000, a certification is made that the claim is in good faith and that the supporting data is accurate and complete to the best of the contractor's knowledge. 41 U.S.C. § 7103(b) (2018). Without appropriate certification, the contracting officer does not have a claim to consider under the CDA. *See, e.g., Foxy Construction, LLC v. Department of Agriculture*, CBCA 5632, 17-1 BCA ¶ 36,687 (2017).

The agency contends that by assigning the claim to Wilmington, TKCG could not properly certify the claim. Assuming for the sake of argument that TKCG's attempt to assign its claim to Wilmington was ineffective, this attempted assignment did not cause TKCG to forfeit its breach of contract claim. The agency's concerns regarding the merits of the claim

do not equate to a defective certification. *See Group Health Inc. v. Department of Health and Human Services*, CBCA 3407, 14-1 BCA ¶ 35, 487. Because TKCG is the party who contracted with the agency, we conclude that TKCG properly certified the claim.

Decision

For these reasons, the motion to dismiss the appeal for lack of jurisdiction is **DENIED.**

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge