



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER DIRECTING RESPONDENT TO FILE COMPLAINT:
March 1, 2018

CBCA 6049

TRANSWORLD SYSTEMS INC.,

Appellant,

v.

DEPARTMENT OF EDUCATION,

Respondent.

Paul A. Debolt and Chelsea B. Knudson of Venable LLP, Washington, DC; and James Y. Boland of Venable LLP, Tysons Corner, VA, counsel for Appellant.

Sara Falk and Jose Otero, Office of the General Counsel, Department of Education, Washington, DC, counsel for Respondent.

LESTER, Board Judge.

ORDER

On February 26, 2018, appellant, Transworld Systems Inc. (TSI), filed a notice of appeal with the Board, challenging a contracting officer's decision, dated December 22, 2017, demanding that TSI repay more than \$1.3 million to respondent, the Department of Education (ED) (acting through one of its offices, Federal Student Aid (FSA)), under contract no. ED-FSA-09-O-0014 (the contract). In its notice of appeal, TSI requests that,

because TSI is challenging a government claim arising out of an alleged overpayment, the Board direct ED, rather than TSI, to file the complaint in the appeal. TSI asserts that “ED’s determination that TSI owes a debt to ED and demand for repayment is based upon facts and allegations known only to ED” and that, when TSI asked for supporting information to aid in TSI’s evaluation of ED’s debt determination, ED did not provide that information. Although we will not always shift responsibility for filing the complaint in appeals of government claims, we grant TSI’s request here because it appears that, in this instance, doing so will facilitate the development and resolution of the appeal.

Background

The documents accompanying TSI’s notice of appeal indicate that, on or about March 6, 2017, ED provided TSI with a demand letter seeking repayment of more than \$1.3 million that ED asserts it overpaid NCO Financial Systems, Inc. (to which TSI is the successor-in-interest), upon a September 2011 invoice. By letter dated March 16, 2017, TSI notified ED of its belief that any overpayment had been addressed and resolved through modification no. 52 to the contract, which the parties bilaterally executed in April 2014, but that TSI’s analysis of ED’s demand was limited by the information available to it. TSI asked in its letter that ED provide it with further details that would allow TSI, on an account-by-account basis, to determine how ED had calculated the alleged overpayment and to reconcile ED’s data with TSI’s own.

On March 24, 2017, ED provided TSI with a redacted copy of an audit report that ED indicated it had used to verify its overpayment assessment. TSI requested by letter dated April 14, 2017, that ED provide it with more detailed account-level information than ED had previously provided to allow TSI to attempt to reconcile prior chargebacks that TSI had provided in accordance with its repayment obligations under modification no. 52. TSI has alleged in its notice of appeal that ED did not provide TSI with such data.

The ED contracting officer issued a decision asserting a government claim on December 22, 2017, demanding that TSI repay \$1,355,737.84 and notifying TSI of its appeal rights under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). In the decision, the contracting officer indicated her belief that ED had provided TSI with detailed information about overpayments, including a listing of the invoices for which ED had paid TSI’s predecessor-in-interest and a detailed explanation of ED’s invoice reconciliation process, by email on March 8, 2017, and through the audit report delivered on March 24, 2017.

TSI filed its appeal of the contracting officer’s decision on February 26, 2018, and, in its notice of appeal, requested that we require ED to file the complaint.

Discussion

Board Rule 6(b) provides that, within thirty days after a contractor's appeal of a contracting officer's decision is docketed by the Clerk of the Board, the appellant will file a complaint "setting forth its claim or claims in simple, concise, and direct terms." 48 CFR 6101.6(b) (2017). "This rule is designed both to establish the parameters of the appeal and to apprise the Board and the Government of the information and material facts on which the appellant relies to support its claim." *Northrop Grumman Corp.*, DOT BCA 4041, 99-1 BCA ¶ 30,191, at 149,413 (1998).

TSI is appealing ED's claim, not its own. As the Board has previously recognized, "[i]t is '[o]nly because of the unique procedural requirements of the [CDA] that all appeals to the Board [must] be initiated by the contractor,' even if the appeal is from a government claim and even if the Government, rather than the contractor, bears the ultimate burden of proof." *Ralph Muhammad v. Department of Justice*, CBCA 5188, 16-1 BCA ¶ 36,267, at 176,917 (quoting *JR Services, LLC v. Department of Veterans Affairs*, CBCA 4826, 16-1 BCA ¶ 36,238, at 176,808 (citing 41 U.S.C. § 7104)). Although Board Rule 6(b) references the contractor's need to set forth "its claim" in a complaint and does not expressly allocate responsibility for a government claim, we typically expect the contractor initiating the appeal to file the complaint. *Ralph Muhammad*, 16-1 BCA at 176,918-19; *Northrop Grumman*, 99-1 BCA at 149,413.

There are exceptions to the general presumption that the appellant should file the complaint. "To ensure that the tribunal has sufficient notice of the claim and its grounds, and as our rules permit, the Board may, '[i]n appropriate cases, . . . exercise its discretion to direct the government to file the complaint, if doing so will facilitate efficient resolution of the appeal.'" *Ralph Muhammad*, 16-1 BCA at 176,918 (quoting *JR Services*, 16-1 BCA at 176,808 (quoting *BAE Systems Land & Armaments Inc.*, ASBCA 59374, 15-1 BCA ¶ 35,817, at 175,146 (2014)). "Such situations can arise if relevant information concerning the basis for the claim resides with the government, and not the appellant." *BAE Systems Land*, 15-1 BCA at 175,146.

The mere fact that an appeal involves a government claim or that the Government has the burden of proof in an appeal is insufficient, in and of itself, to justify a shift in responsibility to the Government for preparing and filing the complaint. *Highland Al Hujaz Co.*, ASBCA 59746, et al., 15-1 BCA ¶ 36,041, at 176,030. Boards have often denied requests to require the Government to file complaints in contractors' appeals of government claims, even where appellants have alleged that they lacked sufficient information to craft a useful complaint. See, e.g., *General Dynamics Corp.*, ASBCA 49339, 96-1 BCA ¶ 28,244, at 141,018; *American Home Assurance Co.*, DOT BCA 2972, 96-1 BCA ¶ 28,233, at

140,981; *Times Mirror Land & Timber Co.*, AGBCA 86-312-1, 87-1 BCA ¶ 19,505, at 98,600-01 (1986). In those situations, the boards have sometimes relied upon the notion that a complaint is a very basic document that “need only ask for relief from” the Government’s monetary assessment “and set forth the reasons [the contractor] considers the Government’s assessment improper, unsupported by fact or law, or otherwise lacking based upon the contract provisions, precedent, statute, or other authority.” *Times Mirror Land*, 87-1 BCA at 98,600. Even where the appellant is pursuing its own claim rather than challenging a government claim, it has been recognized, “[t]he party filing the complaint [would] normally not [be] aware of all the facts necessary to prove its case,” and, despite the absence of perfect information, an appellant can meet the pleading requirements for a complaint merely by identifying the government claim in dispute and the fact that the appellant is challenging it. *American Home Assurance*, 96-1 BCA at 140,981.

Nevertheless, the main goals in deciding which party should submit the complaint are ensuring that all parties have “fair notice of the grounds” of the government claim, *Ralph Muhammad*, 16-1 BCA at 176,919, and maximizing efficiency in the process of developing and resolving the appeal. *BAE Systems*, 15-1 BCA at 175,146. To meet those goals, the key component in allocating that responsibility is whether the appellant possesses sufficient information about the government claim to allow it to craft a complaint that will be useful in defining and narrowing the issues in dispute. *General Dynamics*, 96-1 BCA at 141,018. It may be difficult for the Board to determine, at the very outset of an appeal, whether the appellant truly lacks sufficient information to form a viable complaint and whether sufficient efficiency will result from shifting responsibility for preparing the complaint. Yet, because the complaint’s entire purpose is to assist in setting early parameters for facilitating resolution of the appeal, no purpose would be served in requiring detailed submissions from the parties about which one truly ought to file the complaint. The Board’s goal is “to the fullest extent practicable [to] provide informal, expeditious, and inexpensive resolution of disputes,” *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,604 (quoting 41 U.S.C. § 7105(g)(1) (2012)), and a request for full briefing by the parties about which one should file the complaint – a complaint that, given the importance of the contracting officer’s decision in defining the parameters of this appeal, may have only a limited influence on setting the parameters of the appeal – would be inconsistent with that goal. In the interest of minimizing the parties’ costs and moving the appeal forward, we can make a judgment call about early procedures in the appeal based upon the limited information presented in the notice of appeal.

Here, TSI asserts that it lacks sufficient detailed account-level information about ED’s overpayment demand to allow it to craft a viable complaint. The level of detail that TSI suggests it desires is not typically necessary to support a basic complaint. Although a complaint should identify the “circumstances, occurrences, and events in support of the claim

being presented,” “great generality in the statement of these circumstances will be permitted as long as the [opposing party] is given fair notice of what is claimed.” 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1215, at 194 (3d ed. 2004). The contracting officer, in her decision, suggests that TSI has ample information about the basis of ED’s overpayment claim, and, since TSI has been provided a copy of ED’s audit report (albeit redacted), it is hard to understand why TSI would lack the basic information necessary for preparing a simple complaint disputing ED’s refund demand.

Nonetheless, it was ED that prepared the claim at issue here, and there can be no doubt that “[t]he government should be fully conversant with its own claim.” *Beechcraft Defense Co.*, ASBCA 59173, 14-1 BCA ¶ 35,592, at 174,396. In the circumstances here, the burden to ED of having to prepare the initial pleading outlining that claim should be minimal. Further, ED informed the Board on February 27, 2018, that there is another case currently pending before the Board, *Collecto, Inc. v. Department of Education*, CBCA 6001 (docketed Jan. 19, 2018), that, according to ED, “may have common issues of law or fact” as those in this appeal. The appellant in *Collecto* has already filed a complaint, and ED’s answer is due no later than March 23, 2018. Because ED has informed us that it is considering requesting consolidation, it makes sense to have ED file the complaint (along with the appeal file) in this case since it will be due near or about the same time that ED files its answer in *Collecto*. Having ED file the complaint in this appeal offers the best chance of providing the Board with an understanding of ED’s claims in both appeals at an earlier stage of proceedings (which will be necessary if ED requests consolidation or coordination of the appeals) and ultimately of streamlining the dispute process. Given the lack of significant burden that preparing the complaint here will impose upon ED and the benefit that may be gained by an early submission from ED about its claim, we exercise our discretion to shift responsibility for the complaint to ED. Because TSI will now be the party to file an answer, it will have an obligation to identify in its responsive pleading any affirmative defenses to ED’s claim, *see* 48 CFR 6101.6(c), subject to a possible waiver of any defenses not identified.

Decision

For the foregoing reasons, ED is directed to file the complaint in this appeal. A schedule for submitting the complaint, answer, and appeal file will be issued by separate order.

HAROLD D. LESTER, JR.
Board Judge