

DELFOUR, INC.

CONTRACT NO. V523C-1050

**VABCA-3803, 3832,
and 3897-3901**

**VA MEDICAL CENTER
BOSTON, MASSACHUSETTS**

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OPINION BY ADMINISTRATIVE JUDGE KREMPASKY

Respondent, Department of Veterans Affairs ("VA" or "Government") has filed a Motion to Dismiss Counts III and IV of Appellant's, Delfour, Inc. ("Delfour"), nine count Complaint in VABCA No. 3832 for lack of jurisdiction. In addition, the Board, *sua sponte*, on July 15, 1993, ordered Delfour to show cause why the quantum portion of Counts I, VII and VIII and all of Counts II, III, IV, and V of its Complaint should not be dismissed for lack of jurisdiction.

On May 24, 1993, the Board received and docketed as VABCA No. 3832, Delfour's appeal from the VA's May 18, 1993, termination of Contract No. V523C-1050 for default. On June 2, 1993, the Board received Delfour's Complaint in VABCA No. 3832; the VA's Answer and Motion to Dismiss were both filed on July 9, 1993. Delfour responded to the Motion to Dismiss and the Order to Show Cause on August 10, 1993. The VA replied to the Appellant's responses to the Motion and Order on August 30, 1993.

By Order dated July 15, 1993, the Board consolidated VABCA No. 3832, for the purpose of further processing, with the appeal in VABCA No. 3803 and suspended all proceedings in the two appeals except for the parties' responses to the Motion to Dismiss and Order to Show Cause. The appeal in VABCA No. 3803, docketed on March 9, 1993, is from a Contracting Officer's final decision denying Delfour's \$15,109 equitable adjustment claim relating to flooring installation under Contract No. V523C-1050.

On September 29, 1993, the Board received and docketed five appeals of the CO's deemed denial of Delfour's monetary claims relating to the VA's alleged breach of contract. These appeals were docketed as VABCA Nos. 3897-3901. By Order, dated October 1, 1993, the Board consolidated these appeals with the appeals in VABCA Nos. 3803 and 3832 for further processing and incorporated the relevant counts of the Complaint and Answer in VABCA No. 3832 as the pleadings in those appeals.

Appellant maintains that we have jurisdiction over the entirety of its Complaint in VABCA No. 3832 and over VABCA Nos. 3897-3901 since Delfour is simply responding to the Government's default claim. The VA avers that we have jurisdiction only over the

portions of the Complaint in VABCA-3832 dealing with the propriety of the termination for default.

The record before the Board consists of the Complaint and Answer in VABCA No. 3832 (cited as "Cmplnt. Cnt. __, ¶ __" or "Answer. Cnt. __ ¶ __"); the Appeal File (cited as "R4, tab __") consisting of 252 exhibits (Exhibits 1-180 were submitted by the Government and Exhibits 181-252 were submitted by Delfour); the VA's Motion to Dismiss; Delfour's Response to the Motion to Dismiss; Delfour's Response to the Order to Show Cause; Government's reply to Appellant's Response to the Motion to Dismiss; and, the Government's Response to the Order to Show Cause. For the purposes of this opinion, we will consider the applicable portions of the Complaint and the entire Appeal File submitted for VABCA No. 3832 as the record in VABCA Nos. 3897-3901. References to the Federal Acquisition Regulations ("FAR") and the Department of Veterans Affairs Acquisition Regulations ("VAAR"), refer, respectively, to the acquisition regulations published in 48 C.F.R. Chapters 1 and 8.

FINDINGS OF FACT FOR THE PURPOSES OF RULING ON THE JURISDICTION OF THE BOARD

The following findings of fact are made for the purposes of this decision only.

Contract No. V523C-1050 ("Contract") for the renovation of the animal facility at the VA Medical Center, Boston, Massachusetts ("VAMC Boston") was awarded to Delfour on October 5, 1992. The Contract was a firm fixed-price construction contract with an initial Contract price of \$294,928. (R4, tab 4)

The Notice to Proceed with the construction was received by Delfour on October 23, 1992; the Contract provided for completion 300 days after this date. Thus, the initial Contract completion date was August 19, 1993. (R4, tab 5)

The Contract contained the usual provisions found in VA construction contracts including the following clauses:

WITHHOLDING OF FUNDS, FAR 52.222-7 (FEB 1988);

CONTRACT TERMINATION-DEBARMENT, FAR 52.222-12 (FEB 1988);

DISPUTES CONCERNING LABOR STANDARDS, FAR 52.222-14 (FEB 1988);

DISPUTES (ALTERNATE I), FAR 52.233-1 (DEC 1991);

TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (ALTERNATE I), FAR 52.249-2 (APR 1984)

DEFAULT (FIXED-PRICE CONSTRUCTION), FAR 52.249-10 (APR 1984).

(R4, tab 180)

On March 26, 1993, the Regional Administrator of the U.S. Department of Labor Employment Standards Administration, Wage and Hour Division ("DOL") notified the

VA Contracting Officer ("CO") that it was investigating whether Delfour's wage payments complied with the applicable requirements of the *Davis-Bacon Act*. In light of this investigation, DOL requested that the CO withhold \$12,840 from payments due Delfour under the Contract "until the matter of back wages is resolved." DOL increased its withholding request to \$30,877 on May 13, 1993. (R4, tabs 120, 165)

On March 31, 1993, Delfour submitted its Payment Requisition ("PR") No. 4 in the amount of \$8,875. The CO, in an April 6, 1993, letter, cited the DOL's withholding request and informed Delfour that the entire amount of PR No. 4 was being withheld. Delfour's response, by letter dated April 15, 1993, requested the payment of the full amount requested in PR No. 4 and stated that it would not proceed with the work until such payment was made. (R4, tabs 121, 122, 133) Responding to Delfour's letter, the CO issued a Cure Notice on April 19, 1993. (R4, tab 136) Delfour replied to the Cure Notice with an April 26, 1993, letter stating that Delfour would proceed with the work if the VA would release certain areas of the project site for construction. (R4, tab 143)

In an April 27, 1993, letter, entitled: "Resolution of Problems, Contract Administration, Request for a Written Decision", Delfour stated, in pertinent part, as follows:

With reference to the above captioned project, subject and pursuant to the Contract Disputes Clause, Title 41 USCA Section, 601-613, inclusive, the contractor, Delfour, Inc., herein requests a written decision from the contracting officer in regards to the following:

1. government's failure to process paperwork;
2. government's failure to approve shop drawings and/or submittals;
3. government's failure to turn over work areas;
4. government's failure to process change order requests;
5. government's failure to answer and attempt to resolve and/or respond to ongoing job problems;
6. government's failure to timely process payment requests;
7. government's issuance of defective and/or incomplete specifications;
8. government's overall administration of the contract.

(R4, tab 145)

The CO responded to this request for final decision on April 30 as follows:

Acknowledgment is made of your request for a written decision from the Contracting

Officer in regards to the various ways the Government has allegedly failed to proceed administratively or otherwise. To assist in generating a decision, please provide the Contracting Office with specific supporting documentation so that the issues may be properly addressed. (R4, tab 150)

On the same day, responding to the CO's request, Delfour suggested that the CO review all of Delfour's Contract correspondence to ascertain the specifics of its claim. Delfour concluded this letter by stating its willingness to meet to resolve the problems outlined in its correspondence. (R4, tab 151)

Delfour submitted PR No. 5 on May 3, 1993, in the amount of \$8,000. On May 13, 1993, the CO informed Delfour that the validity of \$7,000 of PR No. 5 was being questioned and that payment of the remaining \$1,000, acknowledged by the VA as otherwise being due, was being withheld pursuant to the DOL request. (R4, tabs 152, 166)

By letter, dated May 13, 1993, Delfour informed the CO that it considered the VA to be in breach of the Contract because of the VA's failure to release areas on the 2nd floor of the building for Delfour's performance, the VA's failure to process Delfour's pay requisitions, change order requests, shop drawings, and Contract submittals in a timely manner. Because of these alleged breaches of contract, Delfour asserted that it had no choice but to leave the project. In its letter, Delfour stated that it was "tabulating" its costs resulting from the Government's breach and that it would submit those costs for payment upon their calculation. (R4, tab 169)

In a letter dated May 17, 1993, entitled: "Monies due Delfour," Delfour, referencing its May 13, 1993, letter, detailed four categories of claims for which it was owed \$171,778.27. The four categories included: Contract Balance, Work and Materials Not Paid For, Change Order Work, and Delays. The May 17 letter neither demanded a CO's final decision nor was it accompanied by a *Contract Disputes Act (CDA)* claim certification. (R4, tab 171)

The VA terminated the Contract for default by letter dated May 18, 1993; as stated in the letter, the reasons for the default termination were "[f]or failure to perform the contract in accordance with the requirements thereof by abandoning the project as you stated you would in your letter dated May 13, 1993, and violating the *Davis-Bacon Act* as has been determined by the Department of Labor." (R4, tab 172)

On May 19, Delfour furnished a letter to the VA which stated:

In accordance with our letters and our requests that areas be released so that our work can move forward, and in spite of your failure to comply, Delfour is still ready, willing and able to complete its work. The areas included in Phase II and III of the contract must be released so that our work may proceed forthwith.

This request, in addition to our other needs to get this project moving, are detailed in our many letters to you.

Please advise our office when you will vacate these areas so that we may enter and complete our work.

(R4, tab 173)

The Government replied to Delfour's May 19 letter by stating, in a letter dated May 21 and received by Delfour on May 25, 1993:

The Contracting Office is in receipt of your faxed letter dated May 19, 1993, stating "Delfour is still ready, willing and able to complete its work." You are hereby notified that the Government remains by it's Notice of Termination for Default dated May 18, 1993.

(R4, tabs 174, 175)

Delfour responded on May 26, 1993, stating:

Referencing your letter dated May 21, 1993, postmarked on 5-24-93 and received by our office on May 25, 1993, our only comment is that this has been your attitude throughout this project. Your continued refusal to act in the best interest of the government is the reason why this project has been plagued with the problems it has.

(R4, tab 175)

Delfour appealed the default termination to the Board; the appeal was received and docketed as VABCA No. 3852 by the Board on May 24, 1993.

On May 25, 1993, Delfour submitted its "Termination Claim" to the CO as follows:

Pursuant to the Code of Federal Regulations please accept the following as Delfour's Termination Claim.

Contract Balances

Pay Requisition No. 4 \$ 8,875.00

Pay Requisition No. 5 8,000.00

Work in Progress 45,000.00

Change Order Work 63,828.07

Costs of Delays 87,825.20

Claim for Losses

Due for Governments Breach

and Improper Termination 2,000,000.00

TOTAL TERMINATION CLAIM 2,213,528.27

The "Termination Claim" was certified in accordance with the requirements of the *Contract Disputes Act (CDA)*. (R4, tab 176) The CO has yet to respond to the "Termination Claim."

Delfour filed its nine count, 67 paragraph Complaint in VABCA No. 3852 on June 2, 1993. Count I of the Complaint asserts that Delfour's performance was delayed because of the VA's refusal, in breach of the Contract, to allow Delfour access to the work site from October 26-December 7, 1992. This count demands \$12,000 for "delay damages." (Cmplnt. Cnt. I, ¶¶ 1-11)

Count II alleges the VA's breach of the Contract by reason of the VA's unreasonable failures to discharge its responsibilities to properly administer the Contract. These unreasonable actions by the VA, it is asserted, hindered Delfour's performance. Delfour placed the VA on notice that the VA's unreasonable actions jeopardized completion of the Contract; in the face of this notice the VA improperly terminated the Contract. (Cmplnt. Cnt. II, ¶¶ 12-27)

In Counts III and IV of the Complaint, Delfour asserts its right to be paid for PR Nos. 4 and 5 and that the VA's failure to pay the PRs in full was improper. (Cmplnt. Cnts. III & IV, ¶¶ 28-42)

Count V alleges that Delfour had satisfactorily completed work on the Contract for which it is entitled to be paid for \$45,000. (Cmplnt. Cnt. V, ¶¶ 43-46)

Delfour alleges Contract changes in Count VI not recognized by the VA. Delfour claims entitlement to payment of \$63,828.07 as an equitable adjustment for this extra work. (Cmplnt. Cnt. VI, ¶¶ 47-50)

Count VII asserts the VA's delay, for numerous reasons, of the project from October, 1992-May, 1993. For this delay, Delfour claims \$87,825.20. (Cmplnt. Cnt. VII, ¶¶ 51-57)

Delfour alleges the VA's wrongful, bad faith termination of the Contract in Count VIII. Also asserted is Delfour's claim for \$2,000,000 for damages suffered by Delfour as a consequence of the VA's wrongful termination. (Cmplnt. Cnt. VIII, ¶¶ 58-63)

Finally in Count IX, Delfour asserts that VA wrongfully terminated the Contract for default solely to avoid responding to the changes and questions raised by Delfour. (Cmplnt. Cnt. IX, ¶¶ 63-67)

On July 9, 1993, the Government filed its Answer to Count's I, II, V, VI, VII, VIII, and IX and its Motion to Dismiss Counts III and IV for lack of jurisdiction.

DISCUSSION

We face, once again, the problem of determining whether an appellant has met the jurisdictional prerequisites necessary to permit us to adjudicate what is obviously a serious dispute between the parties arising out of the Contract. In making our determination, we look to the requirements placed upon an appellant for the submission of claims and the concurrent obligations of the VA to issue a final decision under the CDA, 41 U.S.C §§ 605-613 and the regulatory implementation of the CDA in FAR

33.201 together with the applicable Contract clauses.

In this case, we must look at Delfour's submissions to the CO and the CO's actions in the 31 day period between April 27-May 27, 1993, to determine our jurisdiction. During this period each party took numerous actions. Delfour requested a final decision on numerous alleged Government Contract administration "failures." Delfour asserted that the VA had breached the Contract, due to which, Delfour was leaving the project and for which it would quantify its damages at a later date. The CO informed Delfour that he was considering terminating the Contract for default. Delfour informed the VA that it was owed \$171,778.27 for the VA's breach of contract. The VA terminated the Contract for default. Delfour told the VA that it was still willing to complete the project. The VA rejected Delfour's offer to complete and reiterated its termination. Delfour appealed the default termination to the Board. Finally, Delfour submitted its \$2,213,528.28 "Termination Claim" to the VA.

We examine this intense flurry of activity over an approximate period of one month to determine whether the monetary demands contained in the Complaint in Delfour's appeal of the VA's default termination are properly before the Board. In doing so, we must first define the relevant parameters with which we must deal in this case. There is no question that the VA terminated the Contract for default by a proper final decision of the CO and that Delfour has filed a timely appeal of that final decision with the Board. However, here, we also have a circumstance where, along with the appeal of the default termination, Delfour has included in its pleading submitted in VABCA No. 3832 monetary claims, not apparently considered in the final decision terminating the Contract for default, relating to its allegations of breach of contract.

The Contract **DEFAULT (FIXED-PRICE CONSTRUCTION)** clause contains no provisions for monetary recovery by an appellant. The Contract provides that, if a default termination is adjudged improper, the termination will be converted to one for the convenience of the Government. In that case, Delfour's monetary recovery will be measured under the Contract **TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (ALTERNATE I)** clause. Here we have a circumstance where Delfour has clearly claimed that the VA has breached the Contract and where Delfour has demanded damages based upon its breach claim.

Delfour's claims for damages resulting from the alleged breach of contract are separate and distinct from the appeal of the default termination and Delfour's assertion that the default termination was improper because of the VA's breach of contract. That the jurisdictional requirements, in VABCA No. 3832, over the appeal of the default termination, including Delfour's breach defense, have been met, do not, in themselves, satisfy the jurisdictional prerequisites necessary for our jurisdiction to decide Delfour's affirmative money claims arising out of the alleged breach. *The Sharman Co., Inc. v. United States*, No. 92-5150, 1993 WL 309171 (Fed. Cir. Aug 17, 1993). Consequently, we must examine the record to determine whether Delfour's monetary demands meet the necessary prerequisites to our exercise of jurisdiction over those demands.

Before embarking on the discussion of our jurisdiction to consider Delfour's damage claims, two counts of Delfour's Complaint relate to issues involving the administration of the Contract labor provisions. Since there are separate jurisdictional issues involved in

our ability to consider labor disputes, we will first deal with the two counts of Delfour's Complaint relating to the Contract labor provisions.

COMPLAINT COUNTS III AND IV, PR NOS. 4 AND 5

In Counts III and IV of the Complaint, Delfour demands full payment of its PR Nos. 4 and 5, a total of \$16,875. The VA withheld payment of these PRs based on a notice from DOL to withhold an initial amount of \$12,840, later increased to \$30,877, against Delfour's potential liability for payment of back wages due to Delfour's failure to pay required *Davis-Bacon Act* wage rates to its work force.

Delfour maintains that the VA had no right to withhold payments otherwise due Delfour against its liability for payment of back wages until Delfour had both exhausted its appeal rights provided in 29 C.F.R. Parts 5, 6, and 7 and after a court of competent jurisdiction had found Delfour to have violated wage rate requirements. Consequently, Delfour maintains that the Board has jurisdiction over Delfour's payment claims, under the CDA and the *Prompt Payment Act*.

Appellant misapprehends the VA's rights under the Contract to withhold payments for back pay. The applicable terms of the Contract provide, *inter alia*, that: "The Contracting Officer shall...upon the written request of an authorized representative of the Department of Labor, withhold...from the Contract..." amounts "...as may be considered necessary..." to pay back wages. Nothing in the terms of this Contract requires that there be final judgment of liability for payment of back wages before the CO can withhold payments against potential wage liabilities. We thoroughly explored the issue of Government withholding of contract payments based on a notice directing such withholding from DOL and the Board's jurisdiction over matters relating to issues of the administration and enforcement of labor standards in *Sealtite Corporation*, VABCA No. 2398, 86-3 BCA ¶ 19,173 where the Board held that the **DISPUTES CONCERNING LABOR STANDARDS** clause precluded our jurisdiction over a dispute involving the withholding of contract payments due to the contractor's underpayment of wages. Here, Counts III and IV are grounded entirely on Delfour's position that it did not violate the Contract *Davis-Bacon* wage requirements. As we expressed in *Sealtite*, we are without jurisdiction to determine whether or not Delfour paid the proper wages; therefore we have no subject matter jurisdiction over Counts III and IV of the Complaint in VABCA No. 3832. In addition, Delfour on September 29, 1993, appealed the deemed denial of its May 25, 1993, claim for payment of PR Nos. 4 and 5 which the Board docketed as VABCA No. 3897. For the reasons expressed above, we dismiss VABCA No. 3897.

However, the dismissal of Counts III and IV of the Complaint in VABCA No. 3832 and VABCA No. 3897, does not preclude our jurisdiction over the issue of whether the VA's termination for default based on Delfour's labor violations was proper. The **DISPUTES CONCERNING LABOR STANDARDS** clause provides that resolution of "disputes concerning labor standards" will be through DOL under the procedures contained in 29 CFR Parts 5, 6, and 7 and not the Contract **DISPUTES** clause. In contrast, the **CONTRACT TERMINATION-DEBARMENT** clause simply provides that a breach of the labor standards provision may be grounds for termination of the contract. Regulatory guidance for dealing with labor disputes and contract termination for labor violations is provided at FAR 22.406-10 and 22.406-11. FAR 22.406-10 provides

instructions to COs on the handling of labor standards disputes through DOL procedures. That guidance identifies six "areas of possible differences of opinion" that may be encountered in the enforcement of construction labor standards; termination of a contract for labor standards violations is not one of these six areas. FAR 22.406-11 distinguishes termination of contracts for labor standards violations from those listed in FAR 22.406-10 by requiring only that a CO notify DOL instead of requiring that appeals of such actions be forwarded to DOL for its action. At the heart of the termination of a Contract for default are the parties' contractual rights and obligations, not the enforcement or administration of wage provisions. Therefore, an appeal of a default termination of a contract for violation of labor provisions is not a dispute "concerning" labor standards and, therefore, the issue of the VA's default termination of Delfour by reason of Delfour's alleged labor violations is properly before us under both the CDA and the Contract **DISPUTES** clause. *Burnside Ott Aviation Training Ctr., Inc.*, 985 F.2d 1574, 1580 (Fed. Cir. 1993); *Sealtite, supra.* at 96,966-67; *Corban Industries, Inc.*, VABCA Nos. 2181, 2559T, 88-3 BCA ¶ 20,843.

COMPLAINT COUNTS I, II, V, VI, VII, VIII, AND IX

In these six counts of its Complaint, Delfour includes demands for a total of \$2,208,653.27 for delays, changes, completed work in place, and breach of contract damages. At the outset, we note that we see no question of our jurisdiction concerning the portions of the Complaint asserting Government delays and the VA's breach of contract as *defenses* to the VA's default termination claim. Here, we are concerned with our jurisdiction over the portions of the Complaint concerning Delfour's entitlement to monetary judgments for delays, changes and breach of contract.

Our appellate jurisdiction is predicated on the existence of an appeal from a CO's actual or deemed final decision denying a valid claim. A claim on which a final decision is based must meet certain prerequisites. For a valid claim to exist, at least three conditions must be satisfied: 1) a contractor must assert in writing, with sufficient specificity as to any amount claimed, its right to seek additional compensation; 2) the government must dispute that right; and, 3) the contractor must communicate a demand for a contracting officer's final decision. *George Hyman Construction Company, Inc.*, VABCA No. 3677, 93-2 BCA ¶ 25,823; *Transamerica Ins. Corp., Inc. v. United States*, 973 F.2d 1572 (Fed. Cir. 1992). For claims exceeding \$50,000, a proper certification must also be provided. *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989); *W.H. Moseley Co. v. United States*, 677 F.2d 850, 852 (Ct. Cl.), *cert. denied*, 459 U.S. 836, 103 S.Ct. 81 (1982).

There are four documents on which our jurisdiction over Delfour's monetary demands will stand or fall: 1) the April 27, 1993, demand for final decision on a variety of issues; 2) Delfour's May 13, 1993, notice to the VA that it considered the VA to be in breach of contract and that Delfour was leaving the project; 3) the May 17, 1993, "Monies Due Delfour" letter to the CO; and 4) the May 25, 1993, "Termination Claim."

Delfour's April 27 letter demanded a final decision from the Contracting Officer on a litany of eight broad categories of "government failures." This letter contained no monetary claims. Three days later, the CO's response to Delfour's letter requested more specificity of Delfour's claims to permit him to render a final decision. Delfour cavalierly

responded to CO's request by referring him to the entire Contract correspondence file while maintaining its willingness to meet for the purposes of resolving the problems it had identified.

Delfour's April 27 letter was not a valid claim since it included no "sum certain" for what were, by their very nature, monetary claims. *George Hyman, supra.*; *Winding Specialists Co.*, ASBCA No. 37765, 89-2 BCA ¶ 21,737. Moreover, the claims made in the letter were too vague and general to meet the necessary specificity prerequisites for a claim that would obligate the CO to issue a final decision. *Bridgewater Construction Corp.*, VABCA Nos. 2866 *et al.*, 90-2 BCA ¶ 22,764; *R&R Enter.*, ASBCA No. 41382, 91-2 BCA ¶ 23,707. Thus, the April 27 letter cannot support our jurisdiction over the monetary demands in Delfour's Complaint.

On May 13, 1993, Delfour explicitly notified the VA that it considered the VA to be in breach of the Contract and, as a result, Delfour was terminating its performance. The May 13 letter contained no monetary demand; rather, it informed the VA that Delfour would be submitting its costs resulting from the breach at a later date. Because of the absence of a monetary demand in a sum certain, Delfour's May 13 letter cannot serve as a claim under the CDA. The letter serves only as a notice to the VA of Delfour's exercise of its common law right to unilaterally abandon its performance because of the Government's material breach of the Contract. **RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).**