INTERNATIONAL BUSINESS SYSTEMS, INC.

VABCA-6955

CONTRACT NO. V101(93)P-1582

VA MEDICAL CENTER
MURFREESBORO, TENNESSEE

Sandeep Kathuria, Esq., Chantilly, Virginia, for the Appellant.

Rheba C. Heggs, Esq., Trial Attorney; ***Charlma J. Quarles, Esq.,*** Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.,*** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE PULLARA ON GOVERNMENT MOTION TO DISMISS

At the time of filing its Answer to Appellant's Complaint in the captioned appeal, the Government also filed a MOTION TO DISMISS for lack of jurisdiction asserting that Appellant's Complaint fails to state a claim cognizable under the *Contract Disputes Act* (*CDA*), 41 U.S.C. §601, *et seq.* The Government avers that Appellant seeks payment for alleged additional contract work ordered by persons without legal authority and that the appeal is untimely.

Appellant opposes the Government's MOTION arguing that it has properly invoked the Board's jurisdiction under the *CDA*. Appellant asserts that under its contract to install and maintain a central telephone switch, it was entitled to general and administrative costs for acquisition of equipment added to the switch and that its appeal is timely.

FINDINGS OF FACT

For purposes of deciding this MOTION only, the following findings are made.

Contract No. V101(93)P-1582 (Contract), dated September 12, 1996, for a Replacement Telephone System at the Department of Veterans Affairs Medical Center (VAMC), Murfreesboro, Tennessee, was awarded to International Business Systems, Inc. (IBSI) in the amount of $2,323,229. The VA issued the Notice to Proceed on October 17, 1996, with a completion date of February 14, 1997, for installation, cutover and acceptance of the system. The Contractor, under the Contract terms, also performed maintenance on the system for five years, through March 2002. According to Appellant, it was entitled, under the Contract, to general and administrative costs for acquisition of equipment added to the switch.

On March 18, 2002, IBSI proposed rates for an extension of the Contract from April 1, 2002 through September 30, 2002. The VA through Purchase Order 626-C20334 accepted the Contractor's proposal.

In Paragraph 1 of the Complaint, Appellant asserts as follows:

> In December 2000, the VA Contracting Officer's Technical Representative ("COTR") as to the above referenced contract [No. V101(93)P-1582], Mary Drennan, asked Manbir Kathuria, President of IBSI, to obtain a price quote to procure an

> automatic call distribution system ("ACD") for the VA Medical Center in Murfreesboro, Tennessee. Mr. Kathuria consulted with IBSI's supplier and provided a price quotation to Ms. Drennan. See Exhibit 1. At this time, VA did not purchase the ACD system.

Exhibit 1 to the Complaint is also contained in the Appeal File and is a December 7, 2000 letter from IBSI to the VAMC, which includes a quote from NEC Business Network Solutions, Inc. (NEC), for an ACD in the amount of $85,344.20. (R4, tab 3)

The Complaint, Paragraph 2 with additional text taken from Appellant's Opposition to the Government's Motion included in brackets, states:

> Thereafter, Richard Anderson assumed the role of COTR for IBSI's contract. In or about October 2001, Mr. Anderson asked IBSI's technician, Charles Puffenbarger to procure an ACD system. [In its Opp. to Mot., Appellant states that the COTR asked Mr. Puffenbarger to *provide the design and pricing* of an ACD system *for the switch* and that Mr. Puffenbarger is *certified to work as a technician by NEC*, IBSI's supplier with regard to the *acquisition of equipment for the switch*.] [Following the COTR's *directive*, over the period of the next *several months*,] Mr. Puffenbarger [did *research* and] spent approximately 12-14 hours gathering VA's requirements by talking to VA staff and negotiating with IBSI's supplier as to price. [Further, he provided a baseface layout to NEC to assist in the design of the ACD system and attended meetings at VA regarding the ACD system.] Mr. Puffenbarger obtained a final quote from the supplier. However, instead of buying the ACD system through IBSI, VA bought the ACD system directly from IBSI's supplier based on the price quote provided to Mr. Puffenbarger. See Exhibit 2. (Underlining in original; italics added)

Exhibit 2 to the Complaint, also included in Appeal File, consists of an October 4, 2001 transmittal from NEC to Mr. Puffenbarger of IBSI including an ACD quote in the amount of $47,130.20. (R4, tab 9)

On May 24, 2002, the VAMC Johnson City, Tennessee, issued a Purchase Order, P.O. No. 621-A29062, directly to NEC for an ACD in the total amount of $47,130.20, referencing Contract No. GS-35F-0245J, a GSA Federal Supply Service Contract. (R4, tab 12A)

In Paragraphs 3 & 4 of the Complaint, Appellant asserts that the "ACD system purchased by VA was integrated into the telephone switch that IBSI maintained for VA" and that "IBSI, through Mr. Puffenbarger, verbally asked William Dunn, IBSI's contracting officer, to be compensated for its general and administrative ("G&A") costs" but "VA did not pay."

By letter dated July 25, 2002, IBSI wrote Contracting Officer Dunn regarding its "claim . . . as to VA's purchase of ACD system for VA-Murfreesboro." IBSI referenced its five-year contract, V101(93)P-1582, to install and maintain the VAMC's telephone system from February 1997 through February 2002, and the VA's extension of that contract via PO No. 626-C20334 until September 30, 2002. IBSI stated:

> It has come to my attention that VA has bought an ACD system (see Attachment 1) directly from NEC. This violates our contract, which provides that IBSI shall make such purchases and charge G&A & profit for its work.
>
> IBSI's technician, Charlie Puffenbarger, was asked to help in the procurement of this ACD system a number of months ago. Mr. Puffenbarger spent countless hours in gathering the requirements by talking to the VA staff and negotiating with NEC as to the pricing information.

> Therefore, I respectfully request that VA pay IBSI G&A and profit on this ACD system. The G&A and the profit on this procurement of $47,130.20 is $7,069.53.
> In addition, IBSI will charge $309.70 per month effective August 1, 2002 for the maintenance of the ACD system.

(R4, tab 20)

In a September 30, 2002 letter to CO Dunn, which also addressed two unrelated issues, IBSI stated the following regarding it's July 25, 2002 ACD claim:

> **Issue 2 – IBSI's claim of VA's purchase of ACD equipment directly from NEC**
>
> IBSI filed a claim (see attachment 2) on July 25, 2002 as defined by Section 52.233-1 of the referenced FAR for VA's purchase of ACD system directly from NEC thus violating IBSI's contract with IBSI. This claim was filed pursuant to the Contracts Disputes Act of 1978 (41 U.S.C. §§ 601-613) or as modified thereafter (The "Act"). IBSI has not received the *contracting officer's decision* in a timely fashion. IBSI also received an invoice for $36,262.68 from NEC for the ACD system that VA bought directly from NEC (without going through IBSI). Copy attached. (Emphasis added)

(Complaint, Attachment 3; R4, tab 24)

On October 7, 2002, CO Dunn replied to all three issues, addressing the ACD issue as follows:

* * * *

> The ACD you refer to as Issue 2 was not procured by this office. The procurement was conducted by the Acquisition Section, VA Medical Center, Mountain Home, Tennessee for the Veteran Integrated Services Network (VISN) 9, Chief Information Officer (CIO). The VISN 9 CIO has informed me that this piece of equipment is a stand alone unit that is co-located with the switch.

* * * *

If you have further questions, please contact me at . . . .

(R4, tab 25)

In Paragraph 6 of the Complaint, Appellant asserted that upon information and belief, VAMC Johnson City is the regional office for VAMC Murfreesboro and that Mr. Dunn and Mr. Anderson are supervised by the Johnson City office. Appellant also asserts in Paragraph 7 of the Complaint that Mr. Dunn sent a courtesy copy of the October 7 letter to Mr. Anderson, thereby establishing that Mr. Anderson was involved in procuring the ACD system through IBSI.

On October 8, 2002, IBSI wrote to CO Dunn as follows:

> IBSI filed a claim on July 25, 2002 as defined by Section 52.233-1 of the referenced FAR for VA's purchase of ACD system directly from NEC thus violating IBSI's contract with IBSI. This claim was filed pursuant to the Contracts Disputes Act of 1978 (41 U.S.C. §§ 601-613) or as modified thereafter (The "Act"). IBSI *still has not received the contracting officer's decision* in a timely fashion. (Emphasis added.)

(R4, tab 26)

By letter dated October 11, 2002, IBSI replied to CO Dunn's October 7, 2002 letter as follows:

> The information you provided regarding ACD is not correct. It is not a stand-alone piece of the equipment as you said in your letter. Four cards were added in the switch to provide ACD capability. Two cards out of these four are the ACD cards and the other two cards are the announcement cards. Switch software had to be upgraded to provide the ACD capability in the switch. NEC has one-year warranty for the ACD system and after that switch technician will be maintaining the ACD system along with the switch.

> Therefore your contention of the stand-alone equipment is incorrect.
>
> IBSI was asked to assist VA in selection of the ACD system. IBSI's technician spent 12-14 hours in communicating to NEC to come with a correct design. VISN 9's CIO must have used IBSI's design to buy the equipment. IBSI is entitled to its G&A and Profit on the ACD equipment VISN 9's CIO bought for VAMC.

(R4, tab 27)

On November 14, 2002, IBSI wrote to CO Dunn regarding the lack of response to his phone messages or to his October 11, 2002 letter above. He noted that he pointed out in his October 11 letter regarding his ACD claim that the CO's information was incorrect and that he would like to get the contracting officer's final decision. (R4, tab 29)

On December 2, 2002, IBSI wrote to Pamela McGuire, Acquisition & Material Management Service, Line Manager, VAMC, to confirm their conversation that day where Ms. McGuire "promised that I would be receiving Contracting Officer's final decision on ACD issue soon." (R4, tab 30)

By letter dated December 5, 2002, the CO Dunn issued his final decision, Subject: Telephone Switch Maintenance Claim, as follows:

> This letter constitutes the Contracting Officer's Final Decision on your claim pursuant to the Contract Disputes Act.
>
> Your contract was for maintenance of the telephone switch at the York Campus of the Tennessee Valley Healthcare System. After installation of the initial switch there was no provision for additional equipment procurement. The government had a requirement for an ACD and opted to deal with this procurement as a separate issue from maintenance.
>
> This is the final decision of the Contracting Officer. . . .

(R4, tab 31)

There is nothing before the Board to indicate that IBSI received that December 5, 2002 final decision prior to filing the instant appeal. IBSI maintains states that VA mailed the letter to its prior office address and that it had no knowledge of the letter until it was included in the Appeal File.

In the Complaint, Paragraph 10, Appellant asserted that the contracting officer had not responded to IBSI's October 11, 2002 letter. IBSI's appeal, from the Contracting Officer's alleged failure to issue a final decision, was received by fax and docketed on February 3, 2003, and assigned docket number VABCA-6955. IBSI's Notice of Appeal and Complaint were based on the "contracting officer's deemed denial of IBSI's claim for payment" regarding the ACD. (R4, tabs 33 and 34)

In Paragraphs 12 and 13 of the Complaint, Appellant asserts that "VA violated Section I.6 of IBSI's contract by ordering equipment that IBSI procured for VA directly from IBSI's supplier" and that "[a]fter asking IBSI to do the work associated with the procurement, VA circumvented its contract through its direct order of the equipment." Asserting this to be a breach of its contract, ISBI asserts that as a consequence of "VA's breach of contract, IBSI has been damaged in the amount of $7,069.53, which is IBSI's lost G&A."

Subsequently, the Government filed the Rule 4 Appeal File, its Answer and the Motion to Dismiss, which motion is the subject of this decision. Thereafter, Appellant's counsel filed his appearance and IBSI's Opposition to VA's Motion to Dismiss.

DISCUSSION

The Government moved, pursuant to Board Rule 5, that the Board dismiss the captioned appeal for lack of jurisdiction, asserting that Appellant's Complaint fails to state a claim cognizable under the *Contract Disputes Act of 1978* (*CDA*), 41 U.S.C. § 601 *et seq*. The VA bases its Motions on the assertion that "Appellant attempts to use the contract appeals administrative process to obtain payment for alleged additional contract work allegedly ordered by persons without legal authority to do so." The Government sets forth a "Statement of Facts" and attaches certain exhibits, which are noted to be documents from the Rule 4 Appeal File. In a "Memorandum of Points and Authorities," the Government argues, first, that the allegations in the Complaint fail to state a claim under the *CDA* and, second, that the Board lacks jurisdiction over the appeal because it is untimely.

A. Alleged Failure to State a Claim Under the CDA

The Government's MOTION TO DISMISS is in the nature of either a Federal Rules of Civil Procedure, Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted or a Federal Rules of Civil Procedure, Rule 12(c) motion for judgment on the pleadings. When such motions are accompanied by assertions of material facts found outside the pleadings, we will treat it as a motion for summary judgment. ***Bradford F. Englander Trustee for Dulles Networking Associates, Inc.***, VABCA Nos. 6473 & 6474, 01-2 BCA ¶ 31,466. In effect, we may rule on the merits of the appeal. ***Thai Hai***, ASBCA No. 53,375, 02-2 BCA ¶ 31,971. Other Boards give similar treatment to such motions for failure to state a claim. ***Rural Community Insurance Company***, AGBCA No. 2000-154-F, 02-1 BCA ¶ 31,761; ***Charter Services, Inc.***, DOTCAB No. 4094, 00-1 BCA ¶ 30,911; ***Southwestern Public Service Company***, EBCA No. 344-11-85,

87-2 BCA ¶ 19,772; ***Walker Equipment***, GSBCA No. 11527-IBWC, 93-3 BCA ¶ 25,954.

The Government argues that the Complaint "alleges that VA's procurement of the automatic call system in October 2002 resulted in violation of the terms of Appellant's contract, which expired February 2002," and that such allegations fail to state a claim cognizable under the *CDA*. In essence, the Government argues, Appellant cannot complain about a Government action that occurred after Appellant's contract had expired. The problem with that argument is two-fold: First, VA's procurement of the ACD occurred in May 2002, not October 2002 as cited by Government Counsel, and, the Contract had been extended through September 2002. Thus, the Contract was in effect when the VA breach is alleged to have occurred. Second, the Government actions and Contractor actions forming the basis of the claim, *i.e.*, the incurrence of costs by IBSI in connection with obtaining the NEC quotes, had occurred in December 2000 and October 2001, long before either IBSI's original contract expiration date in February 2002 or the extended expiration date of September 2002.

Next the Government argues that, when IBSI undertook the pricing of the system at the behest of VA's technical representatives in December 2000 and October 2001, IBSI "apparently did not believe this work to be additional to its system maintenance duties at the times this direction was given; rather, the subsequent addition of this system by VA in October 2002 [*sic*] is the sole origin of its belief of entitlement." However, we do not consider the Government's representation of Appellant's beliefs to be determinative.

The Government also argues that "Appellant does not aver that this work was directed by the contracting officer, the only actor authorized to bind the Government," asserting that "only persons with actual authority can bind the

Government", citing ***Federal Crop Insurance Corp. v. Merrill***, 332 U.S. 380 (1947), and ***Appeal of 21st Century Technology***, VABCA No. 3418, 92-1 BCA ¶ 24,445.

Appellant responds that this is a misleading argument because the COTR "merely invoked the Contract to obtain IBSI's help with the pricing, design, and acquisition of the ACD system." Appellant points out that the COTR was listed as the point of contact for VA's direct order from NEC and not a contracting officer, suggesting that the COTR placed the order rather than unnamed "VISN 9 procurement officials." Appellant argues that it seems to be within the COTR's authority to assist with the purchase of equipment, although his delegation of authority was not contained in the Rule 4 Appeal File. Appellant argues, nevertheless, that the COTR was acting within the scope of his duties when he asked an IBSI employee to do the work leading up to the purchase of the ACD system, *citing* ***Integrated Clinical Systems, Inc.*** for the proposition "that a COTR's delegation of authority typically authorizes the furnishing of technical guidance and advice or the coordination of work performed under the contract." Appellant characterizes the cases cited by the Government as inapplicable and as not supporting the argument that the COTR lacked authority to procure the ACD system. According to Appellant, the Contract was invoked by the COTR to cause IBSI to do all the work leading up to the acquisition of the ACD system and, at the eleventh hour, VA ordered the ACD system directly from NEC to deprive IBSI of its rightful compensation. ***Integrated Clinical Systems, Inc.***, VABCA No. 3745, 95-2 BCA ¶ 27,902.

Finally, the Government argues that the NEC equipment was ordered by VISN 9 procurement officials, using a Federal Supply Schedule (FSS) contract, and not by the Contracting Officer at the Murfreesboro VAMC. The VA avers that "Because such FSS purchases are required and authorized by Part 8 of the Federal Acquisition Regulation, there is no dispute, arising under a federal

contract, over which the Board has jurisdiction under the *CDA*." The argument continues that "[e]ven if the Contracting Officer had issued the purchase order purchasing the call distribution system, nothing in Appellant's expired contract or the follow-on, six-month purchase order precluded the concurrent or subsequent purchase from a firm Appellant characterizes as its supplier." Motion at p. 4.

In the final analysis, this case is simply a claim by IBSI for the payment of an equitable adjustment under the Contract for the costs of preparing a change proposal for the ACD that VA elected not to implement through the Contract. Generally, a contractor is not entitled to recover the costs of preparing a proposal for a change that is not adopted. ***Campos Construction Co.***, VABCA No. 3019, 90-3 BCA ¶ 23,108, *citing* ***Blake Construction Company, Inc.***, VABCA No. 1725, 83-1 BCA ¶ 16,431. This general rule is based on the rationale that a Contractor usually has no obligation to provide a change proposal upon request and that, if it does so, a Contractor is furthering its own interest. This rationale is tied to the well-recognized cost principle that bid and proposal preparation costs are usually considered as indirect overhead costs. ***Blake***, at 81,739. However, there are exceptions to this general rule. Decisions allowing compensation find one or more of the following elements: (1) a strong element of Government compulsion which alters the traditionally voluntary nature of the contractor's efforts, ***Century Engineering Corporation***, ASBCA No. 2932, 57-2 BCA ¶ 1419; (2) the contractor has expended significant efforts or incurred substantial costs beyond that which would normally be contemplated, ***Harman-B.J. Gladd Construction Company***, VABCA No. 1093, 75-1 BCA ¶ 11,262; (3) the proposed change is often intended to correct a Government error, ***Baltimore Contractors, Inc.***, GSBCA No. 3425, 72-2 BCA ¶ 9622; ***Acme Missiles & Construction Corporation***, ASBCA No. 11786, 69-2 BCA ¶ 8057. The Board in ***Blake***, at 81,740, *citing* ***Greenhut Construction***

Company, Inc., ASBCA No. 14354, 70-1 BCA ¶ 8209, explained the exceptions thus:

> If a principle may be articulated from the foregoing, it is that costs of unadopted proposals will not be separately compensated unless the contractor is compelled to undertake extensive and costly efforts which exceed the parties contemplation.

Blake Construction Company, Inc., 83-1 BCA ¶ 16,431.

Other exceptions recognized in ***Campos*** are where the proposed change is beyond the scope of the contract, ***Mac-Well Company***, ASBCA No. 23097, 79-2 BCA ¶ 13,895, and where there has been some agreement, or the contract provides, that costs of proposal preparation would be paid, ***CML-Macarr, Inc.***, ASBCA No. 21190, 78-2 BCA ¶ 13,240. We also stated that "there may be a basis for Campos' entitlement to an equitable adjustment if the VA requested the asbestos abatement proposal from Campos for the purpose of its internal deliberations of how to accomplish the work or, if it *utilized the proposal for accomplishing the work with a party other than Campos*." ***Campos*** at 116,013. (Emphasis added)

In its MOTION, while setting forth a "Statement of Facts," the Government does not provide a statement of the undisputed material facts. Based on our examination of the pleadings and the sparse preliminary record before us, we find, as in ***Campos***, that there are genuine issues of material facts here concerning the complexity and magnitude of the ACD proposal, whether the ACD proposal was within the scope of the Contract, and whether the proposal was utilized by the VA in its separate acquisition of the ACD system. All of these disputed facts might affect the entitlement of IBSI to an equitable adjustment for preparation of the ACD proposal. Thus, the Government MOTION TO DISMISS for failure to state

a cause of action cannot prevail, nor can a deemed MOTION FOR SUMMARY JUDGMENT since there are material facts in question.

B. Alleged Untimeliness of Appeal

The Government argues that the letter allegedly triggering the requirement for a final decision, dated July 25, 2002, demanded payment but cited no contract provision as the basis for relief, did not expressly or impliedly request a final decision and did not seek an equitable adjustment of either the expired contract or the ongoing purchase order. According to the Government, the Appellant invited the CO to "call to discuss the letter," and further included a proposal for monthly maintenance of the automatic call system. The Government appears to challenge this letter as failing to contain the elements of a *CDA* claim. However, the Government does recognize in a footnote that, in ***Southeast Enterprise Group, Inc.***, VABCA No 6002, 00-1 BCA ¶ 30,795, this Board has held that a submission for additional money contains the elements of a *CDA* claim if it contains (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain. We find that the July 25, 2002 claim meets those requirements.

Further, by letter dated September 30, 2002, the Contractor referenced the July 25, 2002 claim, specifically sought a CO's final decision and, according to the Government, a final decision was issued on December 5, 2002. However, there is no evidence in the record that the Contractor ever received that decision and IBSI denies ever receiving the December 5, 2002 letter. Moreover, the Board received the appeal on February 3, 2003, within 90 days after the December 5, 2002 final decision.

The Government also argues that, in effect, the CO actually denied Appellant's claim by letter dated October 7, 2002, that the 90-day period to

appeal to the Board began to run on that date and expired on January 7, 2003, and that Appellant's right to appeal to the Board expired January 7, 2003. The Government argues that, in his October 7, 2002 letter, the CO reiterated earlier replies to IBSI's allegations and addressed Appellant's demand for payment by stating that "[a]ll valid invoices for services through September 2002, will be processed for payment." According to the Government, this language "certainly implies a denial of the demand for payment in response to Appellant's July 25, 2002 demand." The Government admits that the letter does not contain the language mandated by VA and Federal Acquisition Regulations for a final decision on a contract claim, but suggests that "this Board has found that the language need not be present to find that a contractor submitted a *CDA* claim," citing ***Specialty Transportation, Inc.*** the Government avers:

> In that appeal, Judge McMichael examined the contract provisions and circumstances of the dispute, and, in a case of first impression, rejected a contractor's appeal as untimely, notwithstanding the procedural defect—the absence of language informing the contractor of its appeal rights under the CDA. The Board thus had no jurisdiction and the appeal was dismissed.

Specialty Transportation, Inc., VABCA No. 6211, 02-2 BCA ¶ 30,978.

We note that there is nothing in the letter indicating that it is a final decision with respect to the ACD claim and the letter addresses two unrelated matters, something that would be highly unusual in the rendering of a final decision. Appellant also argues, with great persuasion, that VA counsel cannot reasonably claim that the October 7, 2002 letter was the CO's final decision because the CO sent a letter on December 5, 2002, that clearly stated it was the Contracting Officer's final decision.

We agree. There is nothing to indicate the Contracting Officer intended the October 7, 2002 letter to be a final decision. Moreover, the Government has completely misread ***Specialty Transportation, Inc.,*** and our holding therein. In ***Specialty***, the Board recognized that a final decision that does not give a contractor adequate notice of its appeal rights is defective and does not trigger the running of the 90-day appeal period. However, ***Specialty*** itself did not involve inadequate notice of appeal rights but, rather, involved an allegation that the decision did not include sufficient information regarding the logic thereof and the contractor could not determine whether it agreed or disagreed with the decision. There, the contractor's appeal was beyond the 90 days and it attempted to persuade the Board, unsuccessfully, that the final decision was defective so that the 90-day limit would not apply. In the instant case, the purported "final decision" of October 7, 2002, exhibits none of the trappings of a final decision and is devoid of language informing the contractor of its appeal rights. There is nothing in that letter to indicate that the Contracting Officer had the remotest intention of that letter constituting a final decision. This argument is either spurious or just plain ill conceived. The Government's untimeliness arguments are rejected. ***Specialty Transportation, Inc.***, 02-2 BCA ¶ 30,978.

DECISION

For the foregoing reasons, the Government's MOTION TO DISMISS is ***DENIED***.

DATE: **May 23, 2003**

_____
MORRIS PULLARA, JR.
Administrative Judge
Panel Chairman

We Concur:

_____
RICHARD W. KREMPASKY
Administrative Judge

_____
WILLIAM E. THOMAS
Administrative Judge