

When does money talk? ASBCA says claims with financial impact not automatically monetary claims

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On May 15, 2023, the Armed Services Board of Contract Appeals ("ASBCA" or "the Board") in *J&J Maintenance, Inc., d/b/a J&J Worldwide Services*, ASBCA No. 63013¹ issued an instructive analysis of its jurisdiction to hear monetary and nonmonetary claims.

Partially granting a government motion to dismiss, the ASBCA explained that, if a contractor does not seek monetary relief in its claim to the contracting officer ("CO"), then the contractor cannot seek monetary relief on appeal to the Board.

Addressing the contractor's claim for contract interpretation, however, the Board denied the government's motion to dismiss and held that, where a contractor can reasonably articulate "significant consequences" of its claim *other than* the recovery of money, the fact that the claim may also have a financial impact on the parties does not strip the Board of jurisdiction.

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In 2020, the Defense Commissary Agency awarded *J&J Maintenance, Inc., d/b/a J&J Worldwide Services* ("J&J") three task orders to perform preventative maintenance and repair services for commissary facilities. Under the task orders, certain repairs would be compensated on a time-and-materials basis, with the government to reimburse J&J for the actual cost of materials. To receive these reimbursements, the task orders required J&J to provide "supply house invoices" as evidence of the actual costs.

During performance, a dispute arose over the reimbursement of material costs when subcontractors performed the repair work. J&J contended that the actual, reimbursable material costs were those that J&J paid to the subcontractor, including the subcontractor's markup on material purchases. The agency disagreed, requiring J&J to submit proof of the amount paid by the subcontractor when it purchased the material, without further markup.

J&J submitted a claim to the contracting officer seeking confirmation that subcontractors were permitted to charge markup on materials and that J&J was not required to submit proof of the prices that the subcontractors paid. In response, the contracting officer's final decision ("COFD") asserted that J&J had not submitted a proper claim, because J&J did not submit a monetary claim for a sum certain.

The fact that a claim may have a financial impact does not render it fundamentally a monetary claim.

Nevertheless, addressing the merits of the claim, the COFD asserted that: (a) "[s]ubcontractor markup for profit is not an allowable expense under the contract, where subcontractor is providing services and is not a merchant or supplier of relevant materials;" and (b) when invoicing for its material costs, J&J "must submit supply house invoices or other appropriate documentation as approved by the contracting officer."

J&J appealed the COFD, asking the ASBCA to: (1) award J&J monetary damages of \$5,861.40; and (2) issue a declaratory ruling that subcontractor markup was allowable under the task orders and that J&J was not required to submit supply house invoices for materials used by subcontractors. The agency then moved to dismiss J&J's appeal for lack of jurisdiction.

The Board addressed the motion to dismiss in two parts. First, the Board held that it lacked jurisdiction over J&J's request for monetary damages. J&J's claim to the CO expressly stated that it was *not* seeking monetary relief. The Board thus held that a claim for money damages was a new claim that could not be raised for the first time at the Board. Moreover, the original claim did not include a sum certain, which the Board found "fatal" to jurisdiction under the Contract Disputes Act.

Second, the Board addressed J&J's request for rulings interpreting the contract. The Board observed that it would have jurisdiction to hear these claims as long as they were not "monetary claims masquerading as nonmonetary claims." The ASBCA further

explained that, under *Securiforce Int'l Am., LLC v. United States*, if the “only significant consequence” of the claim would be entitlement to money damages, then the claim is, in essence, a monetary one.”

The Board denied the agency’s motion to dismiss for lack of jurisdiction, but stopped short of actually reaching a conclusion on J&J’s claims for declaratory relief.

J&J argued that jurisdiction was proper because the Board’s grant of declaratory relief could have significant nonmonetary consequences — asserting, for example, that it “could cause J&J to change its approach to using subcontractors to perform work, such as by self-performing more of the work or purchasing materials directly that it would otherwise obtain through its subcontractors.”

In contrast, the agency argued that J&J’s identification of potential nonmonetary consequences was immaterial and that, so long as one significant consequence could be monetary, the claim was in essence a monetary one.

Finding that the government’s position “sweeps far too broadly,” the ASBCA noted that nearly every contract interpretation dispute ultimately has monetary consequences; indeed, parties rarely expend resources arguing about interpretation issues that have no financial impact.

But the fact that a claim may have a financial impact does not render it fundamentally a monetary claim. To find otherwise “would dramatically curtail, if not completely nullify, contractors’ ability to bring claims that seek only ‘the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.’”

That J&J plausibly contended that a ruling on the contract interpretation issues could have “significant consequences” other than the recovery of money was sufficient to demonstrate that its claims were not barred by the *Securiforce* rule. The Board accordingly denied the agency’s motion to dismiss for lack of jurisdiction, but stopped short of actually reaching a conclusion on J&J’s claims for declaratory relief.

This case serves as an important reminder of the distinction between fundamentally monetary and nonmonetary claims, as well as the requirements for the Board’s jurisdiction to hear such claims.

Notes

¹ <https://bit.ly/3NbK7UO>

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