

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Schnider's of OKC, Inc.) ASBCA No. 53947
)
Under Contract No. F34650-96-F-0036)

APPEARANCE FOR THE APPELLANT: Debby Walden, Esq.
Midwest City, OK

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Leonard M. Cohen, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE COLDREN

This appeal was taken by Schnider's of OKC, Inc. (appellant) from the rejection by the contracting officer of appellant's value engineering proposal. The Government has moved to dismiss the appeal arguing that appellant's value engineering proposal was not a contract disputes claim under the Contract Disputes Act (CDA), 41 U.S.C §§ 601 *et seq.* As discussed more fully below, the motion is granted and the appeal dismissed.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. In April 1996, appellant entered into a contract with the Government to replace floorboards on KC-135 aircraft. The contract called for the use of 5 ply exterior or marine grade plywood. (Compl., ¶ 1)
2. Appellant alleges in its complaint that checking and splitting in the floorboards of the KC-135 aircraft arose from using the contractually specified plywood. Appellant's representatives along with those of the contracting officer went to observe these problems. (Compl., ¶ 2)
3. In February 1997, appellant proposed the use of MDO, in what it describes as a value engineering change proposal (VECP), to replace the contract designated plywood (compl., ¶¶ 3-4). MDO is Medium Density Overlay board which is a phenol-based phenolic resin plywood composite (Gov't mot., attach. 1).
4. Apparently, the contract was eventually modified to provide for the use of MDO at a price increase of 60 cents per square foot (compl., ¶ 5).

5. On 17 May 2001, appellant submitted another VECP regarding the use of MDO. The proposal stated that the substitution of MDO for the 5 ply marine or exterior grade plywood resulted in significant estimated cost savings to the Government amounting to \$20,000 to \$23,000 per aircraft. Based on a fleet of 400 to 450 aircraft, appellant estimated a total savings of over \$20,000,000. (Gov't mot., attach. 1)

6. The VECP was not certified in accordance with § 6 of the CDA. It failed to request a final decision of the contracting officer. (Gov't mot., attach. 1)

7. By a letter dated 24 June 2002, the Government responded to appellant's VECP by rejecting it "in its entirety." The Government indicated that it had not found a significant difference, as to damage or wear resistance, between the plywood originally specified in the contract and the MDO. (Gov't mot., attach. 2)

8. Appellant filed a notice of appeal in September 2002. Its complaint was filed in October 2002, asserting that appellant's proposal resulted in savings of \$18,000,000 to \$22,000,000. At the end of its complaint, appellant's president certified that its claim was made in good faith, that the supporting data on which it was based was accurate and complete, that the amount requested accurately reflected the amount he believed appellant was entitled to, and that he was authorized to certify the claim. (Compl. at 2)

9. The Government filed a motion to dismiss the appeal for lack of jurisdiction. The motion has been briefed.

DECISION

The Government asserts that the Board does not have jurisdiction because appellant did not submit a claim to the contracting officer, and the contracting officer did not issue a final decision. It alleges that appellant's 17 May 2001 submission was only a request for consideration of its VECP, that appellant did not seek a sum certain in its VECP, that the VECP did not request a contracting officer's final decision, and that the VECP was not certified.

In response, appellant argues that all that is needed for the submission of a CDA claim is enough information to allow proper evaluation by the contracting officer. It then says that the amount of its claim could be calculated arithmetically because it provided a range of savings per plane which could be applied to the entire fleet.

The CDA requires that "[a]ll claims by a contractor against the government shall be in writing and shall be submitted to the contracting officer for decision." 41 U.S.C. § 605(a). It further requires that claims of more than \$100,000 be certified to the contracting officer. 41 U.S.C. § 605(c)(1). A monetary claim must be stated in a sum certain. FAR 33.201.

The Government's motion raises a number of serious issues. However, we do not need to address all of those issues because there is a fatal defect which precludes our finding that appellant's VECP reached the status of a CDA claim.

Nothing in the pre-appeal record, including appellant's 17 May 2001 VECP, qualifies as the certification required by the CDA (findings 5-6). Although a defective certification can be corrected, the complete absence of a certification cannot. *Eurostyle, Inc.*, ASBCA No. 45934, 94-1 BCA ¶ 26,458. Appellant's inclusion of a certification in its complaint cannot cure its failure to provide one when it submitted its alleged claim to the contracting officer. *IMS P.C. Environmental Engineering*, ASBCA No. 53158, 01-2 BCA ¶ 31,422 (the filing of a certification after an appeal has been initiated has no bearing on the Board's jurisdiction).

Because appellant's VECP was not certified, we lack jurisdiction to hear the appeal. Accordingly, the Government's motion is granted and the appeal is dismissed without prejudice.

Dated: 29 January 2003

JOHN I. COLDREN, III
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)
I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53947, Appeal of Schnider's of OKC, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals