

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Zafer Taahhut Insaat ve Ticaret A.S.) ASBCA No. 56770
)
Under Contract No. W912GB-04-C-0029)

APPEARANCE FOR THE APPELLANT: Sam Z. Gdanski, Esq.
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OPINION BY ADMINISTRATIVE JUDGE PAGE
ON THE GOVERNMENT'S MOTION FOR RECONSIDERATION

The Board on 14 September 2011 denied the government's motion to dismiss (MTD) the subject appeal for lack of jurisdiction. We held that the 1 August 2007 request for equitable adjustment (REA) and accompanying transmittal letter, submitted to the contracting officer (CO) by Zafer Taahhut Insaat ve Ticaret A.S. (Zafer, appellant or the contractor), qualify as a cognizable claim. *Zafer Taahhut Insaat ve Ticaret A.S.*, ASBCA No. 56770, 11-2 BCA ¶ 34,841. Familiarity with that decision is presumed. The government moves for reconsideration, or, in the alternative, for the Board to direct clarification from appellant of the amounts enumerated in Sections E, I and M of its 12 April 2008 letter.

We assess the government's motion for reconsideration "against the familiar standard of whether the motion is 'based upon any newly discovered evidence or legal theories which the Board failed to consider in formulating its original decision.'" *Thai Hai*, ASBCA No. 53375, 03-1 BCA ¶ 32,130 at 158,829, *citing Danac, Inc.*, ASBCA No. 33394, 98-1 BCA ¶ 29,454 at 146,219, *quoting Sauer, Inc.*, ASBCA No. 39372, 96-2 BCA ¶ 28,620 at 142,897.

The government raises a new ground for dismissal by contending that Zafer did not couch its 1 August 2007 REA in a sum certain, because the "REA contained an unambiguous qualification at the conclusion of the submission namely, that it reserved

the ‘right to revisit these and other matters until a release of claims is executed.’” Specifically, the REA stated:

The above Total Entitlement to Additional Payment in respect of increased costs incurred by Zafer as a result of the Events described in this Request is believed to be correct as at the date of this Request, but Zafer reserves the right to revisit these and other matters until a release of claim is executed.

(Gov’t mot. at 8, *citing* R4, tab 2 at 162)

The government “respectfully submits that this syntax should be viewed as coterminous with that of the rejected language” in *McElroy Machine & Manufacturing Co.*, ASBCA No. 39416, 92-3 BCA ¶ 25,107, which the Board dismissed for want of jurisdiction, and that the “Appellant has not retracted or otherwise clarified the impact of this phrase” (gov’t mot. at 8). The government argues that “a claim that expresses a sum certain but which reserves the right to include additional line items to ‘modify the presentation’ is, in fact, a ‘predicate for negotiations,’ and thus not a Contract Disputes Act [CDA] claim” (*id.* at 7, *citing* *McElroy*).

In the case of a monetary claim, the CDA, 41 U.S.C. §§ 7101-7109, and implementing Federal Acquisition Regulation (FAR) provisions, premise jurisdiction over an appeal upon a contractor’s furnishing the CO with a written submission that is stated in a sum certain and properly certified if that amount exceeds \$100,000. *Zafer*, 11-2 BCA ¶ 34,841 at 171,391. A “sum certain” is a “determinable amount.” *Precision Standard, Inc.*, ASBCA No. 55865, 11-1 BCA ¶ 34,669 at 170,787 *citing* *Northrop Grumman Systems Corp.*, ASBCA No. 54774, 10-2 BCA ¶ 34,517 at 170,233; 41 U.S.C. §7103(b); FAR 33.201 Definitions. In ascertaining whether there is a cognizable claim sustaining jurisdiction, we “examine[] the ‘totality of the circumstances’ to ascertain whether the contractor has asserted a cognizable claim.” *Precision Standard*, 11-1 BCA ¶ 34,669 at 170,787, *citing* *J.M.T. Machine Co.*, ASBCA No. 29739, 86-1 BCA ¶ 18,684 at 93,944. “Whether a communication from a contractor constitutes a CDA claim is determined on a case by case basis, and we employ a common sense analysis.” *Todd Pacific Shipyards Corp.*, ASBCA No. 55126, 06-2 BCA ¶ 33,421 at 165,687, *citing* *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992); *ACEquip Ltd.*, ASBCA No. 53479, 03-1 BCA ¶ 32,109 at 158,767.

We disagree that Zafer’s reservation of the right to “revisit these and other matters until a release of claim is executed” jeopardized the clearly stated sum certain of appellant’s 1 August 2007 REA. Although the contractor in *McElroy* “reserve[d] the right to modify in whole or in part this claim presentation and attendant monetary claim,” 92-3 BCA ¶ 25,107 at 125,190, this reservation did not form the basis for the Board’s dismissal of that appeal; rather, jurisdiction was rejected because that appellant qualified

its purported claim in “that ‘certain line item exclusions as required by applicable procurement regulation standards’ had not been made” as of the date of the claim and there was no showing “that the government reasonably could have quantified those required exclusions.” *Id.* The *McElroy* decision, and reasons the Board rejected the appeal, must also be placed in historic context. It was issued at a time when, under the rubric of *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991), a demand accompanied by a willingness to continue negotiations did not qualify as a claim because there was no impasse and thus no CDA dispute upon which to rest jurisdiction. The Board in *McElroy* focused upon the statement in that contractor’s claim that it was “‘presented in its present form for negotiation purposes’ and that the claim was ‘prepared in an effort to achieve a compromise and settlement.’” 92-3 BCA ¶ 25,107 at 125,190. The Board held that this language signaled nothing more than a “spur to, and a predicate for, negotiations” and “did not give rise to a claim under the CDA.” *McElroy*, 92-3 BCA ¶ 25,107 at 125,190, *citing, inter alia, Dawco*, 930 F.2d 872, 878-79. After *McElroy* was decided, *Dawco* was overruled in relevant respect by *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1578-79 (Fed. Cir. 1995). Nor does a party’s willingness to continue settlement attempts destroy jurisdiction over a cognizable claim. “Continued offers to negotiate a settlement do not impair an existing CDA claim, because there is no inconsistency between a valid claim and an expressed desire to resolve a dispute.” *AAA Engineering & Drafting, Inc.*, ASBCA Nos. 47940, 48575, 99-2 BCA ¶ 30,443 at 150,424, *citing Transamerica Ins. Corp. v. United States*, 973 F.2d at 1579.

Zafer’s 1 August 2007 REA was stated in a sum certain, as it contains a certified request for precisely \$4,909,396.28.¹ *Zafer*, 11-2 BCA ¶ 34,841 at 171,391. This sum is an unqualified “‘determinable’ amount.” *Precision Standard*, 11-1 BCA ¶ 34,669 at 170,787 (citations omitted). The wording of Zafer’s reservation of the right, “until a release of claim is executed,” to “revisit” the items claimed in the 1 August 2007 REA as well as “other matters” (R4, tab 2 at 162) does not disturb or bring into question the exact sum sought in the claim. Zafer’s “reservation of future claims did not vitiate its certification or make it uncertain.” *Craft Machine Works, Inc.*, ASBCA No. 47227, 95-1 BCA ¶ 27,534; *see also Sentara Health System*, ASBCA No. 51540, 99-1 BCA ¶ 30,323. A contractor submitting a cognizable claim is neither barred from properly amending that claim, *Southwest Marine, Inc.*, ASBCA No. 39472, 91-3 BCA ¶ 24,126 at 120,745, nor disenfranchised from separately asserting a new claim based upon different operative facts.

¹ The government’s assertions regarding computation of the “amount claimed by Appellant” are incorrect, and erroneously conflate the sum certain of \$4,909,396.28 stated in Zafer’s 1 August 2007 claim with the amount remaining at issue after the parties’ subsequent partial settlement of the REA (gov’t mot. at 1-2). Further, the government misreads that portion of the Board’s 14 September 2011 ruling which conveyed the parties’ relative contentions with respect to the motion but did not express the Board’s findings.

The government's reliance upon *Rohr, Inc.*, ASBCA No. 44773, 93-2 BCA ¶ 25,787 and *Southwest Marine*, 91-3 BCA ¶ 24,126 (gov't mot. at 7-8), is also misplaced, as the facts underlying those appeals do not sufficiently align with the instant appeal for the holdings to apply. In *Rohr*, which (unlike here) involved an appeal from a termination for default, the Board dismissed an uncertified request for monetary relief that lacked a sum certain but sought "all damages and remedies provided at law for breach of contract by the government." 93-2 BCA ¶ 25,787 at 128,314. Here, Zafer properly quantified its claim and made no such request. Nor does *Southwest Marine* support the government's motion. There, the Board retained jurisdiction over the properly certified REA for \$96,368, but rejected that contractor's attempt to include subsequent "alternative quantifications" that were properly viewed as "prayers for relief in their own right" and not encompassed by the 23 March 1987 claim. 91-3 BCA ¶ 24,126 at 120,744.

The government's other arguments on motion for reconsideration echo its MTD. There is no need to discuss them further. Its alternative request for clarification with respect to Sections E, I and M of Zafer's 12 April 2008 letter will be considered as necessary in connection with prehearing proceedings.

CONCLUSION

For the reasons stated, the government's motion for reconsideration of our 14 September 2011 decision is denied.

Dated: 17 February 2012



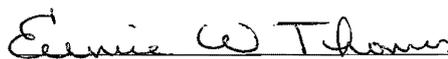
REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

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. 56770, Appeal of Zafer Taahhut Insaat ve Ticaret A.S., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals