

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Pete Vicari General Contractor, Inc. ) ASBCA No. 53943  
)  
Under Contract No. N62467-96-C-0969 )

APPEARANCE FOR THE APPELLANT: Stephen J. Caire, Esq.  
Metairie, LA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Ellen M. Evans, Esq.  
Trial Attorney  
Naval Facilities Engineering Command  
Litigation Headquarters  
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE REED  
ON GOVERNMENT MOTION FOR PARTIAL DISMISSAL

The government contends that the claims underlying this appeal, of which there are at least eight separately identified matters, include a claim related to so-called “wick drains.” The government argues that a claim was earlier submitted concerning wick drains, was denied by a contracting officer final decision (COFD), has not been reconsidered by the CO, and was not timely appealed to the Board by the contractor. Therefore, avers the government, the unappealed COFD is final and the Board has no jurisdiction over that claim under the captioned appeal. To that extent, the government contends that the appeal should be dismissed in part.

Appellant opposes the motion, suggesting that the COFD was improper because (1) the CO waited too long to issue it and (2) the claim had been withdrawn by revision prior to issuance of the COFD. The government submitted a response to appellant’s opposition.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 21 May 1998, Contract No. N62467-96-C-0969 (the contract) was awarded by a CO for the U.S. Navy, Naval Facilities Engineering Command (the government) to Pete Vicari General Contractor, Inc. (appellant, the contractor, or PVGC). The contract, as relevant here, is for construction of “a new Base Civil Engineering [BCE] Complex and renovation of the existing BCE Building.” The Board does not yet have a complete copy of the contract in the record; however, each party refers to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as applicable to this matter. (R4, tab 1 at specifications § 01110, ¶ 1.1.1, tab 4; gov’t mot. at 3; gov’t mot. ex. A at 2)

2. By two letters dated 25 April 2000, PVGC submitted a request for a COFD “pertaining to PVGC Change Order Proposal No. 016 for additional cost and time associated with excessive water due to the wick drain installation.” The claim demanded payment of extra costs amounting to \$53,035.81 and a time extension of 33 calendar days. The contractor attributed the additional time and cost to “excessive water infiltration at the pile cap excavation due to the wick drains installation which was part of the contract requirements of Phase A of this project.” Government personnel earlier had informally denied that the matter required an equitable adjustment pursuant to FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984). PVGC asserted differing site conditions in its claim. (R4, tab 4 at 1, 3; gov’t mot. ex. A at 1, 3)

3. With a letter dated 26 March 2001, PVGC, in support of its claim dated 25 April 2000, submitted a copy of a report of a geotechnical investigation. Appellant referred to a paragraph in the report by which the report author(s) appear to summarize reasons that favor or disfavor the use of wick drains at the site of the work. In relevant part, the contractor’s letter stated: “For this reason, your own engineer stated that the wick drains would cause an excessive amount of water. If we would of had [sic] this information during the bidding process we could have adjusted our bid price.” No particular amount by which the bid price might have been adjusted was mentioned. (R4, tab 5 at 1; gov’t mot. ex. B at 1)

4. On or about 18 July 2001, PVGC submitted claims seeking additional payment of \$331,046.01 and a time extension of 148 days. Among other matters alleged, the contractor stated the following:

In regards to the Wick Drain Delay, on April 25, 2000, we submitted a Request For [a COFD] for the additional cost and time associated with excessive water infiltration at the pile cap excavation due to the wick drain installation. This claim was in the amount of \$53,035.81 with a time extension of thirty-three (33) days. On March 26, 2001, we submitted supplemental documentation which provided additional information supporting our position for this claim. This claim was submitted more than a year ago and as of this date we have not received a decision. . . .

According to the expert report . . . the total impact of delay was forty[-]five (45) calendar days. Our original Request for [a COFD] dated April 25, 2000, only included a time extension of thirty[-]three (33) calendar days and the Extended General & Administrative Cost and Extended Job Overhead Cost for the thirty[-]three days.

We are therefore revising the original claim to include a forty[-]five (45) calendar[-]day time extension and the following costs: . . . .

|  |                    |
|--|--------------------|
| Direct Cost per PVGC's Change Order Proposal |                    |
| No. 016                                      | \$15,034.00        |
| Extended G & A and Extended Job Overhead     |                    |
| Cost (45 days)                               | <u>\$44,212.05</u> |
|  | \$59,246.05        |

(R4, tab 7 at 3; gov't mot. ex. E at 3)

5. In COFD No. 02-S-05, dated 2 November 2001, the CO denied the merits of the differing site conditions claim set out in PVGC's letters dated 25 April 2000. The COFD included a paragraph, substantially the same as the then-current version of FAR 33.211(a)(4)(v), setting forth appellant's right to appeal to the Board from the COFD. On 6 November 2001, the contractor received COFD No. 02-S-05. (Gov't mot. exs. C, H) The record indicates no appeal to the Board from COFD No. 02-S-05.

6. In response to the claim letter dated 18 July 2001, COFD No. 02-S-19 dated 8 July 2002 was issued. With regard to wick drains, the COFD provided the following:

***Wick Drain Delay:*** COFD number 02-S-05, issued November 2, 2001, denied in total your April 25, 2000 claim for alleged wick drain delay costs resulting from excessive groundwater encountered at the project site. Accordingly, this issue is not properly before the [CO] at this time. No further action is necessary regarding this item.

(R4, tab 20 at 2; gov't mot. ex. F at 2)

7. By letter dated 16 September 2002, PVGC appealed to the Board from COFD No. 02-S-19 (gov't mot. ex. G).

### DECISION

The Board's subject matter jurisdiction, pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-13, is dependent on a written claim by one of the contracting parties, a COFD (either a written COFD or a so-called deemed denial), and a timely appeal to the Board by the contractor from a COFD. Following receipt of a written COFD, a contractor has ninety days to appeal the decision to the Board. If a timely appeal is not submitted, the COFD is final, conclusive, and not subject to review by the Board. If no appeal to the Board is taken within the ninety-day statutory period, the Board has no authority to adjudicate the merits of the claim. *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Mitch Moshtaghi*, ASBCA No. 53711, 03-2 BCA ¶ 32,274 at 159,669; *M&E Fuel Oil Co.*, ASBCA No. 28701, 84-2 BCA ¶ 17,403 at 86,680; 41 U.S.C. §§ 605(a), (b), (c)(5), 606.

Appellant submitted a differing site conditions claim for additional costs and a time extension related to alleged excessive water caused by or resulting from wick drain installation. Almost a year later, the contractor supplemented the supporting documents addressing the claim by submitting a geotechnical report. No changes to the claim were made, although PVGC alluded to adjustments in its bid if it had known of the report's content. About four months later, in a separate submittal of several claims in a single document, including further supplementation of the wick drain claim, the contractor amended and increased the dollar amount and the time extension demanded in connection with the wick drain claim based on an "expert report." Both documents by which the contractor supplemented the wick drain claim made specific reference to the claim dated 25 April 2000. (Findings 2-4)

The supplements and amendments to the wick drain claim did not change the nature of the claim, the basic underlying facts by which the differing site conditions allegedly were established, or the theory of recovery. The only adjustments were to the amounts sought in money and time based on more accurate information. No new claim was presented. *McDonnell Douglas Services, Inc.*, ASBCA No. 45556, 94-3 BCA ¶ 27,234 at 135,706-07.

In its opposition at 2, appellant construes its 26 March 2001 supplement to the claim as a statement of a new claim for "reformation of the contract because the Navy withheld its superior knowledge of the site conditions." Later argument in appellant's opposition at 4, characterizes this matter as a "claim for reformation based on a mistake in [PVGC's] bid." Because the cover letter dated 26 March 2001 refers to the claim dated 25 April 2000 and the supplemental information relates to the site conditions, we conclude that appellant was providing additional information in support of its extant differing site conditions claim related to wick drains, not stating a new claim. However, even if a new and separate claim of reformation based on superior knowledge or bid mistake was intended, there is no indication that appellant abandoned the wick drain differing site conditions claim. Instead, the supplemental statement dated 18 July 2001, submitted after the purported new reformation claim, shows the opposite - that the wick drain differing site conditions claim was viable. Further, the purported new claim of reformation was not ripe for consideration by a CO because it lacked a statement of the monetary relief demanded.

The CO denied the wick drain differing site conditions claim in COFD No. 02-S-05 dated 2 November 2001, received by the contractor on 6 November 2001 (finding 5). To be timely, an appeal from COFD No. 02-S-05 would have to be taken not later than 4 February 2002. The earliest notice of appeal that can be said to be related in any way to the wick drain claim was taken on or about 16 September 2002 (findings 5, 7). That appeal was not timely as to COFD No. 02-S-05. COFD No. 02-S-19 dated 8 July 2002 did not consider or reconsider the merits of the wick drain claim (finding 6).

Appellant argues that the CO "was divested of jurisdiction by the passage of time" because the COFD was not issued until about 18 months after the claim was submitted (app. opp'n at 1-2). Appellant also contends that it withdrew its claim by revising it. There is no authority for these positions. As to the former argument, if a COFD is not forthcoming within a reasonable time, the CO is not divested of authority. Instead, the contractor is empowered to

take an appeal from a deemed denial or to petition the Board to direct that a COFD be issued within a specified time. The latter assertion concerning withdrawal of the claim is not supported by the facts. At all relevant times, appellant continued to relate back to the claim dated 25 April 2000. Absent withdrawal of the claim, the CO had a duty to consider and decide it.

There is no requirement that the CO decide the wick drain claim either separately, as occurred here, or in a decision that addresses more than one claim. *Honeywell, Inc.*, ASBCA No. 47103, 95-2 BCA ¶ 27,835 at 138,792. It is clear that appellant made a single wick drain differing site conditions claim as indicated by the references, from both parties, to the substance of the claim as stated in the letters dated 25 April 2000. That single claim was addressed in a single COFD that was not appealed to the Board by PVGC. (Findings 2-5) *See Braughler*, 127 F.3d at 1483 n.9 (that the claim remained the same is evidenced by the contractor's reference back to earlier correspondence setting out the substance of the claim).

### CONCLUSION

The notice of appeal dated 16 September 2002, as it relates to the wick drain differing site conditions claim submitted by the contractor in letters dated 25 April 2000, supplemented on or about 26 March and 18 July 2001, and denied by a COFD dated 2 November 2001, is untimely. Accordingly, the Board lacks the authority to adjudicate that claim. The government's motion for partial dismissal is granted and the appeal is dismissed to that extent.<sup>1</sup>

Dated: 11 August 2004

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STEVEN L. REED  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

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<sup>1</sup> The government also moved to strike all references in the complaint to the wick drain claim. We deny that aspect of the motion because this appeal and related claims, appeals, and other legal proceedings under or related to the contract are intertwined. For clarity and historical reference, assertions related to the wick drain claim may remain in the complaint; however, we will not consider the merits of the claim.

I concur

I concur

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

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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. 53943, Appeal of Pete Vicari General Contractor, Inc., rendered in conformance with the Board's Charter.

Dated:

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