

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Sandoval Plumbing Repair, Inc.)
d/b/a Sandoval Construction Co.) ASBCA No. 54640
)
Under Contract No. DACA27-02-C-0016)

APPEARANCES FOR THE APPELLANT: Jason Speights, Esq.
Speights Law Firm LLP
San Antonio, TX

John C. Dulske, Esq.
Law Offices of Dulske and
Fiorino, PC
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Dava-Kay Kaitala, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Fort Worth

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT’S MOTION TO DISMISS

Appellant (Sandoval) appeals a default termination and assessment of liquidated damages for its failure to make progress on a construction contract. Sandoval’s complaint states four claims for relief. The first and third claims are for relief from the default termination and from the assessment of liquidated damages. The second and fourth claims are for an award of delay damages and payment for completed work. (Compl. at 9-11) The government moves to dismiss both the second and fourth claims on the ground that they have not been submitted properly for a contracting officer’s decision as required by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (gov’t mot. at 7).

Section 6(a) of the CDA requires that: “All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 605(a). A contracting officer’s decision,

or failure to decide a properly submitted claim, is a prerequisite to Board jurisdiction. *Morrison-Smith, Inc.*, ASBCA No. 38028, 89-2 BCA ¶ 21,848 at 109,927. A claim for purposes of the CDA is defined by the FAR 52.233-1 DISPUTES (DEC 1991) clause of the contract as “a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract” (R4, tab 67 at 106).

Sandoval concedes that the fourth claim in its complaint, the claim for payment for completed work, was not submitted for a contracting officer’s decision. Sandoval opposes the government’s motion only as to the second claim, the claim for delay damages. (App. resp. at 2, n.2) Sandoval alleges that a proper CDA claim for delay damages was submitted as a certified claim to the contracting officer in a letter dated 27 October 2004. That letter alleged that government delays in answering requests for information (RFIs) and approving submittals prevented Sandoval from completing the work within the specified time. The letter claimed damages for that delay as follows:

As of November 1, 2003 [Sandoval] was entitled to an award of damages consisting in the payment of delay damages, including without limitation, direct job costs, job overhead, and home office overhead, in an amount of no less than \$1,072,957.05, plus all additional days of delay at \$3,612.65 per day until the date of termination on March 8, 2004.

(App. resp., attach. A at 1, 4)

The government argues that Sandoval’s demand for an amount of “no less than \$1,072,957.05, plus all additional days of delay at \$3,612.65 per day until the date of termination on March 8, 2004” was not a demand for sums certain (gov’t mot. at 4-6). Sandoval replies that the sum certain requirement was satisfied by the fact that \$1,072,957.05 is divisible by the claimed daily rate (\$3,612.65) into exactly 297 days of delay up to 1 November 2003. Sandoval further replies that a sum certain for the “additional days of delay” may be derived by multiplying the \$3,612.65 daily rate times the 127 days from 2 November 2003 through 8 March 2004. (App. resp. at 4-7)

We agree with the government. No matter what certainty might be present in the calculation of the \$1,072,957.05 amount, or in the calculation of an amount for the additional days of delay, Sandoval’s claim letter qualified those amounts by the phrase “no less than.” We have held that a “not less than” amount is not a sum certain for purposes of the CDA. *Atlantic Industries, Inc.*, ASBCA No. 34832, 88-1 BCA ¶ 20,244 at 102,472. Nor is it distinguishable from an “in excess of” amount which we have also

held not to be a sum certain for purposes of the CDA. *See Godwin Equipment, Inc.*, ASBCA No. 53462, 02-1 BCA ¶ 31,674 at 156,530. Moreover, we are not dealing here with an increase in the amount of a claim after it has been submitted in a sum certain to the contracting officer. The rule in *Tecom, Inc. v. United States*, 732 F.2d 935, 937-38 (Fed. Cir. 1984), allowing such increases in certain circumstances is not applicable here where no claim in a sum certain was submitted initially to the contracting officer.

Although not raised by the government, we note an additional jurisdictional defect. The present appeal from the default termination and assessment of liquidated delay damages was filed 8 June 2004. Sandoval's claim for monetary compensation was dated 27 October 2004. There has been no contracting officer's decision on that claim, and no appeal from a deemed denial of that claim. While the absence of a proper notice of appeal might be readily cured, the jurisdictional defect in the underlying claim would remain. That defect requires a resubmission of the claim in a sum certain to the contracting officer and a decision on the claim, stipulated decision or failure to decide by the contracting officer before an appeal on the claim can be taken.

The government's motion to dismiss the second and fourth claims in the complaint is granted without prejudice to Sandoval filing proper delay damages and payment for completed work claims in sums certain for decision by the contracting officer.

Dated: 14 September 2005

MONROE E. FREEMAN, JR.
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. 54640, Appeal of Sandoval Plumbing Repair, Inc. d/b/a Sandoval Construction Co., rendered in conformance with the Board's Charter.

Dated:

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