

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Phoenix Management, Inc.) ASBCA No. 54715
)
Under Contract No. F05603-01-C-0001)

APPEARANCE FOR THE APPELLANT: Johnathan M. Bailey, Esq.
Bailey & Bailey, P.C.
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
MAJ Teresa G. Love, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE PARTIES' MOTIONS TO DISMISS

Phoenix Management, Inc. (PMI) appeals the denial of its claim for vehicle costs incurred in performing a services contract at Warren Air Force Base, Wyoming. The government moves to dismiss with prejudice. PMI moves to dismiss without prejudice. We deny both motions.

The contract was awarded to PMI on 27 August 2001 for supply support services at specified Air Force bases. The contract included a base year and several option years. The services at Warren AFB were specified to begin in option year II. PMI's bid price mistakenly allocated \$86,000 for vehicles and \$30,860 for related services at Warren AFB to the base year and option year I (R4, tab 18 at 3). Since there were no billings for Warren AFB in those years, the awarded contract provided no compensation for the vehicles and related services provided at Warren AFB in option year II.

On 7 January 2004, PMI requested reformation of the contract to allow recovery of the intended price (\$86,000) for the vehicles at Warren AFB in option year II (R4, tab 18). Although PMI did not expressly ask for a contracting officer's final decision, the contracting officer considered the request to be a claim under the Contract Disputes Act of 1978, 41 USC §§ 601 *et seq.* (CDA).^{*} On 5 March 2004, he issued a final CDA

^{*} FAR 33.205(b) stated in relevant part: "A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the [CDA]"

decision denying the request (R4, tab 19). PMI received the decision on 8 March 2004 (Stip. 12/2/04). The decision included a notice of CDA appeal rights, 90 days for an appeal to the Board and one year for an appeal to the United States Court of Federal Claims. PMI did not appeal the decision to this Board within the 90 days specified in the notice.

On 8 April 2004, PMI submitted a claim to the government in the amount of \$19,584 for “the actual costs” of the vehicles used at Warren AFB in option year II. The claim letter did not state a specific legal basis for the claim and did not expressly request a contracting officer’s final decision. (R4, tab 21) On 18 June 2004, the contracting officer issued a final decision denying the 8 April 2004 claim on the ground that there was no legal or contractual basis for relief (R4, tab 28). PMI timely appealed this decision to the Board, and that appeal (ASBCA No. 54715) is the only appeal before us on these motions.

The government moves to dismiss with prejudice on the grounds that: (i) the 8 April 2004 claim is a “subset” of the earlier reformation request that was denied by the 5 March 2004 contracting officer’s decision; and (ii) since the 5 March 2004 decision was not timely appealed to the Board, the Board is without jurisdiction to consider the appeal of a “subset” claim (gov’t mot. at 9-10). This motion is without merit. Although characterized as such by both parties, the 8 April 2004 claim was not a “subset” of the 7 January 2004 request. The 7 January 2004 request was for reformation of the contract for mistake in allocation of the intended price for the services at issue. The 8 April 2004 submission was a claim for the actual cost incurred (not the intended price) for performing those services. While the legal basis for the 8 April 2004 claim was not expressly stated, it was not in substance a claim for reformation of mistake, but a claim for actual costs. Assuming *arguendo*, that the 7 January 2004 reformation request for the intended price was a proper claim, the unappealed final decision on that request does not bar the appeal on the 8 April 2004 actual cost claim.

For its part, PMI moves to dismiss the appeal without prejudice on the grounds that neither its reformation request nor its actual cost claim were proper CDA claims. It contends that: (i) neither the request nor the claim were for the total amount (\$116,860) of its mistake in bid; (ii) a proper claim for a \$116,860 mistake required certification; and (iii) neither the request nor the claim expressly requested a contracting officer’s final decision. (App. resp. at 5-8; compl. ¶ 14) This motion is also without merit. There is no indication that appellant’s claim for its actual costs exceeds the certification threshold. Moreover, an express request for a contracting officer’s decision is not required for a valid claim as long as what PMI desired by the submission was a final decision. See *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996). In contrast to the 7 January 2004 reformation request, the 8 April 2004 actual cost claim was expressly designated by PMI as a “claim,” and an affidavit of the PMI officer

denying an intent to submit a claim in the 7 January 2004 reformation request does not make any similar allegation with respect to the 8 April 2004 actual cost claim (app. resp., attach.).

The motions to dismiss are denied.

Dated: 6 January 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. 54715, Appeal of Phoenix Management, Inc., rendered in conformance with the Board's Charter.

Dated:

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