

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Alutiiq, LLC) ASBCA No. 55672
)
Under Contract Nos. N65236-02-P-4187)
N65236-02-P-4611)
N65236-03-V-1055)
N65236-03-V-3047)
N65236-03-V-4103)
N65236-03-V-0088)
N65236-03-V-0092)
N65236-03-V-0093)
N65236-03-V-0119)
N65239-03-V-4154)
N65236-03-V-1181)
N65236-03-V-0158)
N65236-04-V-1220)
N65236-04-V-1227)
N65236-02-P-5616)
N65236-02-V-2773)
N65236-02-V-5071)
N65236-03-P-0300)
N65236-03-P-2610)
N65236-03-P-2611)
N652361-D-7832)
N65236-02-D-6603)
DASG60-01-C-0045)
DACA87-03-P-0022)
DACA87-03-P-0041)
N652360-D-5722)
DAHA09-03-P-0153)
223-03-3001/TO 3)
223-03-3001/TO 8)
DACA87-03-D-0033)
DAHA90-03-D-0008)
1435-04-04-CT-32888)
N6893604-D-0008)
SBAHQ-01-D-0177)
N00174-04-D-0006)

N66001-04-D-5024)
 W9124P-04-D-0009)
 N00189-05-C-0031)
 N00174-05-D-0006)
 N00174-05-D-0007)
 W56HZV-04-D-0125)
 HSSCCG-05-D-0022)
 S-AQMPD-05-D-1122)
 W9113M-05-C-0127))
 W9124P-06-D-0001)
 N00178-06-C-1011)
 W9124P-06-D-0005)
 W912DY-06-D-0002)
 HSFEHQ-06-D-0592)
 N00174-06-D-0024)
 N00174-06-D-0026)
 HQ0006-06-0005)
 AE92B02000)
 DOLJ04-RA-00001)

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON GOVERNMENT'S MOTION TO DISMISS WITHOUT PREJUDICE

The government has moved to dismiss this appeal without prejudice, contending that appellant Alutiiq, LLC (Alutiiq) failed to submit a valid claim by not affording the contracting officer with adequate notice of the basis of the claim or, alternatively, that there is no valid “deemed denied” predicate for jurisdiction. Alutiiq opposes the motion, disputing both arguments. We deny the motion in part and grant it in part.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On various dates in between 2001 and 2006, the government awarded Alutiiq and its subsidiaries 63 cost-type contracts to perform security and other services (complaint (compl.) at 1-2). Alutiiq alleges that it is an Alaskan Native Corporation organized pursuant to the Alaska Native Settlement Claims Act, 43 U.S.C. § 1606 (compl. ¶ 4).

2. By audit report dated 16 March 2005, the Defense Contract Audit Agency (DCAA) reported on its examination of a 14 January 2005, \$36,448,877 cost-plus-fixed-fee proposal for law enforcement services that Alutiiq had submitted in response to a request for proposals from the U.S. Army Space and Missile Defense Command for security and law enforcement services. In its audit report, DCAA determined that Alutiiq “has submitted adequate cost or pricing data” for the proposal. DCAA questioned approximately \$2,400,000 of the proposed costs, an unspecified amount of which was for “Success and Management Consulting Fees” (success fees) included in the general and administrative (G&A) cost pool. According to DCAA, these costs should have been charged as direct costs under FAR 31.202 for commissions paid in securing government contracts, or were either unallowable selling costs under FAR 31.205-38 or unallowable contingent fees under FAR 3.402, or were unreasonable under FAR 31.201-3. (R4, tab 2 at 9-10)

3. Thereafter, by letter dated 28 December 2005, the administrative contracting officer advised Alutiiq that she understood that:

DCAA has determined that Alutiiq paid \$446,562 in [success fees] in FY 2004 and proposed approximately \$1.4 million in success fees in FY 2005. Based on the information I have evaluated to date, I find the allowability of these [success costs] very much subject to question. Therefore, I have instructed DCAA to ensure that these costs are not reimbursed if included in provisional billing rates. You should also be aware that these costs will also be questioned if they are included in your incurred cost submissions[.]

(R4, tab 3)

4. By letter dated 16 August 2006, DCAA notified Alutiiq of the “billing rates for calendar year (CY) 2006 [that] are approved for interim reimbursement of overhead expenses under . . . cost-type contracts pending determination of final overhead rates.” DCAA stated that the general and administrative billing rate was 5.9 percent:

[L]ess than proposed due to continued questioned costs for “Success” fees from prior DCAA audit efforts. The costs for these success fees pertain to fees and bonuses paid to Alutiiq employees and consultants in assistance in obtaining Government contracts. The “Success” fees budgeted for 2006 were excluded from the G&A pool in calculating the G&A rate.

(R4, tab 4 at 1)

5. Alutiiq responded with a 12 September 2006 letter to the contracting officer, which it described as a claim. In its 18-page, single spaced letter, Alutiiq “request[ed] . . . a contracting officer’s final decision . . . finding that the success fees at issue here, questioned by DCAA in the amounts stated in your December 28, 2005, letter, and excluded from Alutiiq’s indirect rates by DCAA’s August 16 [2006] letter are allowable costs and not subject to penalties.” (R4, tab 5 at 12) Alutiiq set forth a factual statement, explaining that it:

[P]ays success fees to persons engaged in marketing efforts. These persons pursue multiple prospective business opportunities and contracts at any given time, and receive compensation for all of their efforts based on the success in obtaining contracts. Their efforts include contacting potential customers with agencies, educating potential customers on Alutiiq’s capabilities, analyzing procurement needs of agencies, and analyzing agency funding and programs. The success fees pay for marketing activities such as: briefings on potential business opportunities; identification of contract and other business opportunities; development of joint venture and teaming opportunities with other contractors; assistance in selling Alutiiq’s capabilities to various government agencies; and assistance in development of capture strategies and technical and cost proposals. . . . Success fee payments of this type are common in Alutiiq’s line of business and the amount of fees is well within the range of industry standards.

(*Id.* at 1-2) Alutiiq also provided two schedules. The first set forth the cost-type prime contracts, by contract number, procuring agency and Alutiiq subsidiary, that ended on or after 1 January 2003 and were said to be affected by the questioned success fee costs. The second schedule detailed, by transaction description and amount, the success fees

recorded by Alutiiq and its subsidiaries for fiscal years 2004 (\$932,675.62) and 2005 (\$1,214,084.71). (*Id.* at 14-18) Alutiiq included a certification signed by its president and chief executive officer (*id.* at 13).

6. In its letter, Alutiiq also included a four-part legal argument to support its position. In particular, Alutiiq explained its contentions that: (a) the success fees are properly classified as G&A costs, rather than as direct costs; (b) contingent fees are allowable under FAR 3.401 and applicable case law; (c) the success fees are reasonable costs; and (d) the success fees are not subject to penalties under the FAR, any agency FAR supplement, or the guidance in the DCAA Contract Audit Manual. (R4, tab 5 at 2-12)

7. The administrative contracting officer did not issue a decision. Instead, by letter dated 20 October 2006, the administrative contracting officer advised Alutiiq that she had “set March 30, 2007 as the date” by which she would render her final decision (R4, tab 6 at 1). The present record does not contain evidence that she rendered a decision. She also asserted that Alutiiq had not specified “a dollar amount in dispute” and afforded the contractor the opportunity to submit additional supporting data (*id.*). Considering the date of 30 March 2007 unreasonable, Alutiiq brought this appeal on 7 December 2006. In its notice of appeal, Alutiiq listed 63 affected contracts. It appears from the contract numbers that the overwhelming majority are with components of the Department of Defense. Some contracts, however, appear to be with agencies as to which the Board does not typically have jurisdiction.

8. In its complaint, Alutiiq alleged that we have jurisdiction pursuant to 41 U.S.C. § 605(c)(5). Alutiiq sought “a ruling that the costs at issue are reasonable and allowable under the Federal Acquisition Regulation and the terms of the affected contracts.” Alutiiq further sought “a ruling that the government pay the claimed costs with interest pursuant to the Contract Disputes Act.” (Compl. ¶ 3, Request for Relief, 5-6)

DECISION

The government’s motion to dismiss rests upon two propositions. First, the government argues that Alutiiq did not submit a valid claim under 41 U.S.C. § 605(a) because the 12 September 2006 letter (*see* findings 5, 6) “fails to establish that any specific success fees are actually ‘at issue,’ and in fact, no specific success fees are currently ‘at issue’ because the contracting officer has not disallowed any such fees.” (Government Motion to Dismiss Without Prejudice (gov’t mot.) at 7) Second, the government contends that, even if the letter constitutes a valid claim, the administrative contracting officer’s response (*see* finding 7) precludes a “deemed denied” appeal because her specified decision date is not unreasonable (gov’t mot. at 13). For its part,

Alutiiq rejoins that its letter constituted a valid claim because it “is a fourteen page, single-spaced document that discusses in detail each of the ACO’s arguments concerning the allowability of the success fees at issue in this litigation” (Appellant’s Opposition to Respondent’s Motion to Dismiss (app. opp’n) at 4). In addition, Alutiiq asserts that the contracting officer’s specified decision date is unreasonable, given that she “had already decided, and instructed DCAA, to treat the costs at issue as not allowable for payment under current contracts” (app. opp’n at 9).

With respect to the government’s first argument, we conclude that Alutiiq’s 12 September 2006 letter constituted a valid claim in part. Whether a communication is a “claim” within the meaning of the Contract Disputes Act is a question of judgment to be exercised on a case by case basis. *E.g., Holmes & Narver, Inc.*, ASBCA No. 51430, 99-1 BCA ¶ 30,131 at 149,054. In addition, “cases involving cost disallowance are not automatically considered government claims.” (*Id.*)

Viewing Alutiiq’s 12 September 2006 letter (*see* findings 5, 6), we first reject the government’s arguments that Alutiiq has not: “provided basic factual information regarding the success fees for which it seeks a determination of allowability;” “described the business or experience of any sales consultant such that the contracting officer could determine that the consultant was a ‘bona fide agency;’” or provided evidence either of performing the same activities by Alutiiq employees or of industry standards (Government’s Reply to Appellant’s Opposition to the Government’s Motion to Dismiss Without Prejudice (gov’t reply br.) at 4). We cannot reconcile these current professions of puzzlement with the administrative contracting officer’s certitude in her 28 December 2005 letter that Alutiiq had paid \$446,562 in success fees in FY 2004, that the costs were “very much subject to question,” or with her instruction to DCAA “to ensure that these [proposed FY 2005] costs are not reimbursed if included in provisional billing rates” (*see* finding 3). We also cannot reconcile the government’s present position with DCAA’s position in its audit report regarding the proper accounting treatment of the success fees or its statement that Alutiiq has “submitted adequate cost or pricing data” with its proposal (*see* finding 2).

We are not persuaded by cases upon which the government relies to argue that Alutiiq’s letter lacks the requisite specificity. These cases involve conclusory assertions of entitlement that are not comparable to the detailed letter challenged here (*see* findings 5, 6). *E.g., Logus Manufacturing Co.*, ASBCA No. 26436, 82-2 BCA ¶ 16,025 at 79,416 (holding purported first article delay claim deficient for failure to specify both “the length of delay claimed and the amount of monetary adjustment [sought]”). One case, *Compcourts, Inc.*, ASBCA No. 30290, 85-2 BCA ¶ 18,027, affords little guidance because the Contract Disputes Act was inapplicable. In any event, all the cases relied upon by the government preceded the decision in *H.L. Smith, Inc. v. Dalton*, 49 F.3d

1563, 1565 (Fed. Cir. 1995), holding that, for a valid claim, “the contractor need not include a detailed breakdown of costs. The contractor may supply adequate notice of the basis and amount of the claim without accounting for each cost component.”

While we thus conclude that Alutiiq’s disputed letter provides sufficient factual information for a decision, we also conclude that it otherwise constitutes a valid claim regarding FY 2004 and FY 2005 costs. We read the letter in context, “by considering the totality of previous correspondence between the parties.” *Holmes & Narver, supra*, 99-1 BCA at 149,054 (internal quotation marks omitted). By its terms, the letter refers back to “the success fees at issue here, questioned by DCAA in the amounts stated in [the administrative contracting officer’s] December 28, 2005, letter, and excluded from Alutiiq’s indirect rates” (finding 5). The “amounts stated” in the administrative contracting officer’s letter are the sum certain of \$446,562 paid in FY 2004, which Alutiiq quantified in its letter as \$932,675.62 (finding 5), and the “proposed [amount of] approximately \$1.4 million . . . in FY 2005” (finding 3), which Alutiiq quantified in its letter as \$1,214,084.71 (finding 5). For the FY 2004 and FY 2005 amounts, Alutiiq’s letter undeniably “invoked the [Contract Disputes Act] . . . [,] referred to prior communications between the parties setting forth their respective positions on the . . . cost issue [, and] sought the ACO’s decision.” *Holmes & Narver, supra*, 99-1 BCA at 149,054. By contrast, for CY 2006, Alutiiq’s letter challenged the 5.9 percent reduction of the G&A rate (findings 4, 5). For CY 2006, the letter does not constitute a valid claim because it does not contain a sum certain, as required by FAR 2.101. We cannot say that the present record affords a sufficient basis, in a schedule or otherwise, for us to find that Alutiiq has stated a sum certain.

With respect to the government’s second argument, we conclude that we have “deemed denied” jurisdiction under 41 U.S.C. § 605(c)(5). The administrative contracting officer stated in October 2006 that she would render a decision by the extended date of 30 March 2007, but failed to do so (finding 7). Assuredly, “by now a reasonable time has elapsed for issuance of an entitlement decision” on FY 2004 and FY 2005 costs, conferring “deemed denied” jurisdiction. *Holmes & Narver, supra*, 99-1 BCA at 149,055.

In addressing the jurisdictional issues briefed by the parties, as we have above, we do not address any possible jurisdictional issues with respect to contracts between Alutiiq and agencies over whose contracts we would not typically have jurisdiction (*see* finding 7).

CONCLUSION

The government's motion to dismiss without prejudice is denied with respect to costs claimed for FY 2004 and FY 2005, and granted with respect to costs claimed for CY 2006.

Dated: 5 December 2007

ALEXANDER YOUNGER
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. 55672, Appeal of Alutiiq, LLC, rendered in conformance with the Board's Charter.

Dated:

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