

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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United Healthcare Partners, Inc. ) ASBCA No. 58123  
 )  
Under Contract No. FA4877-12-C-0002 )

APPEARANCE FOR THE APPELLANT: Mr. David D. Cooper  
CEO

APPEARANCES FOR THE GOVERNMENT: Alan R. Caramella, Esq.  
Air Force Chief Trial Attorney  
Skye Mathieson, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAGE  
ON THE GOVERNMENT'S MOTION TO DISMISS IN PART

United Healthcare Partners, Inc. (UHP, appellant or the contractor) appealed from the government's termination for cause of Contract No. FA4877-12-C-0002. The government filed a "Motion for Partial Dismissal" (gov't mot.), asking the Board to "strike the monetary portion of Appellant's complaint...for lack of jurisdiction" for appellant's failure to comply with the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. The government argues that UHP has not submitted a monetary claim to the contracting officer (CO) for final decision (COFD) in accordance with 41 U.S.C. § 7103. (Gov't mot. at first page, and at 1-2)

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

The United States Air Force (AF or government) issued Contract No. FA4877-12-C-0002 to UHP on 1 October 2011 (R4, tab 1). The purpose of the contract was "to perform a 1-800 telephone-based Nurse Triage Answering Service on a 24/7 basis." This required the contractor to "provide clinical assessment and appropriate level of care support services for beneficiaries in the Davis-Monthan [Air Force Base, AZ] Catchment Area" from 1 October 2011 - 30 September 2012 for the base period. The firm fixed-price contract was in the total amount of \$254,259, with an estimated quantity of 19,710 and a unit price of \$12.90 per call. (*Id.* at 3)

The contract contains standard Federal Acquisition Regulation (FAR) clauses that are incorporated by reference, including 52.233-1, DISPUTES (JUL 2002) – ALTERNATE 1 (DEC 1991) and 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) (R4, tab 1 at 7-8).

Contract clause FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010) also appears in the contract.<sup>1</sup> Paragraph (a), Inspection/Acceptance, states that the government “reserves the right to inspect or test any supplies or services that have been tendered for acceptance” and permits the government to “require repair or replacement of nonconforming supplies or reperformance of nonconforming services.” Paragraph (i), Payment, provides that “Payment shall be made for items accepted by the Government.” Paragraph (m), Termination for Cause, allows the government to “terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions...” (R4, tab 1 at 8-11). The “Performance Work Statement” (PWS) detailed particular nurse triage services to be provided by UHP (R4, tab 1 at 26-32).

On 25 November 2011, the government accepted and paid UHP’s invoice for services rendered during October 2011 (R4, tab 11). Thereafter, the AF and contractor engaged in an exchange in which the government contested the reported call volumes and UPH disagreed with the government’s basis for rejecting its invoices. The government insisted that UHP provide additional documentation for the level of call services performed, including a monthly report, whereas appellant denied that this measure was necessary under the contract to support its invoices.

The government on 23 November 2011 issued a “Show Cause” notice to UHP, advising that “the Government considers your failure to maintain the standards outlined in the [PWS] in the aforementioned contract unacceptable.” The notice warned that “unless this condition is addressed within 14 calendar days after receipt of this notice,” the government “may terminate for default” under “contract clause 52.249-8 ‘Default (Fixed-Price Supply and Service).’” The government’s specific concerns were UHP’s failure to: respond to the government’s corrective action report (CAR) of 14 November 2011; meet performance standards under PWS § 1.1.5; or to “provide Data Collection IAW contract terms and conditions” that “placed patients in an unsafe situation.” (R4, tab 21 at 1)

By email of 17 January 2012, the government notified appellant that it was “holding up acceptance of invoice’s [sic] for Nov and Dec pending verification of call volume.” The government asked for the “rational[e] for the disparity between the government’s reported call volume and your company’s reported call volume.” (R4, tab 35) On 26 January 2012, the government rejected UHP’s pending invoices due to purported discrepancies in call volume (R4, tab 37).

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<sup>1</sup> The fact that both the standard FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause and the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010) clause (*see* paragraph (m)) appear in the contract is not material to the pending motion. We express no opinion on the materiality to the merits of the appeal.

UHP responded to the government on 31 January 2012 with an explanation concerning the questioned calls and again criticized the government's basis for rejecting its invoices (R4, tab 38). The contractor contended that: "We again, stated in the revised report, that the submission of the Monthly Clinical Statistics Report is NOT stipulated to, as a contingency to invoice approval in the [Statement of Work] or in the Contract language, nor is it (typically) a true and accurate representation for accounting and invoicing purposes" (*id.* at 291) (emphasis in original).

Subsequent correspondence continued in the same vein, with the government insisting that the call volume billed by the contractor had not been adequately substantiated by UHP, and appellant responding that it was not required to justify the calls to the level of detail and frequency demanded by the government as a condition precedent to payment of UHP's invoices (*see, e.g.*, R4, tabs 38-39, 41). On 2 February 2012, the government advised the contractor that another CAR had been submitted against the contract and required UHP to respond (R4, tab 42). The same date, appellant replied that "The Contract does not stipulate to ANY specific requirement for accounting verification or justification purposes with exception to WAWF invoicing, as an accounting representation for billing and compensation." UHP stated that due to the government's continued "suspension of compensation to our Firm for Triage Services rendered, now (3) three month[s] to date, we have no option but to suspend all services to Davis-Monthan Air Force Base immediately and until it can be determined, if a resolution can be reached." (R4, tab 43) The government also rejected UHP's invoice dated 6 February 2012 for work done in January 2012 (R4, tab 47).

The CO's Final Decision dated 6 February 2012 entitled "NOTICE OF TERMINATION FOR CAUSE" advised UHP that the contract was terminated in accordance with "contract clause 52.249-8" (R4, tab 46). The termination was justified by UHP's alleged "failure to maintain the standards required by the [PWS]," specifically "sections 1.1.2, 1.1.5, 1.1.6[,] 1.1.7, 1.1.8, and 1.1.9." UHP was advised that the termination "is the final decision of the [CO]." (*Id.* at 361)

## DECISION

### *UHP's Appeal and the Government's Motion for Partial Dismissal*

UHP's "Notice of Appeal" was received by the Board on 7 May 2012. The contractor appealed the CO's 6 February 2012 termination of the subject contract for cause, and asserted that the government "additionally, improperly denied payment for Nurse Triage Services performed, in breach of Contract No. FA4877-12-C-0002." The second page of UHP's 21 June 2012 complaint contends that appellant "remain[ed] uncompensated" for services rendered "in the amount of \$71,659.30." Among unnumbered attachments to that pleading is a 21 June 2012 "Request for Fair

Compensation” for \$71,659.30 in alleged unpaid invoices, but the document is not characterized by UHP as a claim or addressed to the CO for a decision. The Chief Executive Officer signed below the words: “I certify that the request is made in good faith, and that the supporting data is accurate and complete to the best of my knowledge and belief.” Appellant did not contend in its response to the instant motion that this document was its monetary CDA claim to the CO.

The government on 5 October 2012 filed a “Motion for Partial Dismissal,” seeking to have the monetary portion of UHP’s complaint dismissed. The AF argues that the Board lacks “jurisdiction over an appeal for \$71,659.30 in unpaid invoices when Appellant never requested nor received a [COFD], Appellant’s monetary request first appeared in its Complaint, and the invoices cannot be ‘converted’ into a claim because they were neither in dispute at the time of submittal nor presented to the CO for a decision” (gov’t mot. at 2). The parties fully briefed the motion. Although UHP responded by submission dated 8 March 2013 to the Board’s 31 January 2013 Order to furnish a copy of its affirmative claim for unpaid invoices, the materials provided did not identify a claim to the CO seeking a monetary amount and a COFD.

For purposes of this motion, we are concerned solely with that part of UHP’s complaint pertaining to a monetary demand. We treat the government’s motion to dismiss only that portion of UHP’s complaint seeking a monetary amount as a motion to strike that part of the pleading, as the government does not challenge our jurisdiction over the entire appeal. *ERKA Construction Co.*, ASBCA No. 57618, 12-2 BCA ¶ 35,129 at 172,473 (citing *Joiner Systems, Inc.*, ASBCA No. 57097, 11-2 BCA ¶ 34,782 at 171,181, 171,184 n.1).

### *Discussion*

Appellant, as the proponent of our jurisdiction over its monetary claim, bears the burden of establishing jurisdiction. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993); see also *Tiger Enterprises, Inc.*, ASBCA No. 57447, 11-2 BCA ¶ 34,818 at 171,340-41. The CDA at 41 U.S.C. § 7103(a) (1) requires that “Each claim by a contractor against the Federal Government relating to a contract shall be submitted to the [CO] for a decision.” The claim “shall be in writing” pursuant to 41 U.S.C. § 7103(a)(2).

Although the term “claim” is not defined in the CDA, FAR 2.101 defines it in relevant part as follows:

*Claim* means 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 the contract... A voucher, invoice, or other

routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the [CO] as provided in [FAR] 33.206 (a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(Emphasis in original)

The CDA does not dictate a particular wording for a claim or the precise format it must take, provided the writing furnishes “a clear and unequivocal statement that gives the [CO] adequate notice of the basis and amount of the claim.” *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1997). The “CDA also requires that all claims be submitted to the [CO] for a decision.” *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996).

Although appellant’s “Request for Fair Compensation” appended to its complaint seeks \$71,659.30 for unpaid invoices, neither this document nor other assertions in the complaint suffice as a cognizable CDA claim. There is no proof that UHP’s demand was properly submitted to the CO for decision, and appellant cannot first assert a claim as part of its complaint. It is “the claim, and not the complaint, [that] determines the scope of our jurisdiction in this appeal” as a “CDA claim cannot properly be raised for the first time in a party’s pleadings before the Board.” *American General Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,639 (citations omitted).

Nor is there any evidence that UHP’s regularly-submitted invoices comprise a cognizable CDA claim. Under FAR 2.101 a claim is distinguished from a routine request made in the ordinary course of business that is not in dispute at the time of submission. Our jurisdictional inquiry in assessing whether a request is routine or non-routine is a factual one, “dependent on the circumstances in which the requested costs arose.” *Parsons Global Services, Inc. v. McHugh*, 677 F.3d 1166, 1170 (Fed. Cir. 2012). A contractor’s request for payment, such as a voucher or an invoice that is “submitted for work done...in accordance with the expected or scheduled progression of contract performance” is routine and not a claim unless converted to one in accordance with FAR 2.101, which did not happen here. *See Ellett*, 93 F.3d at 1542-43 (quoting *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1577 (Fed. Cir. 1995) (en banc)).

CONCLUSION

Appellant did not submit a \$71,659.30 or other CDA claim to the CO for payment of its invoices in question and did not seek a COFD. Neither UHP's "Request for Fair Compensation" attached to its complaint nor its routine invoices meet the requirements for a cognizable CDA claim. The government's motion to strike that portion of appellant's appeal asserting a monetary demand is granted, without prejudice to UHP's further submission of a cognizable claim to the CO.

Dated: 2 April 2013



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REBA PAGE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

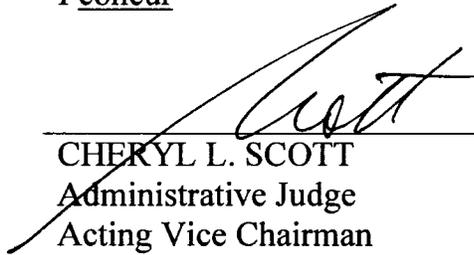
I concur



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

I concur



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CHERYL L. SCOTT  
Administrative Judge  
Acting 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. 58123, Appeal of United Healthcare Partners, Inc. rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals