

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Environmental Safety Consultants, Inc.) ASBCA No. 58221
)
Under Contract No. N62470-95-C-2399)

APPEARANCE FOR THE APPELLANT: Mr. Peter C. Nwogu
President

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Senior Trial Attorney

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

Environmental Safety Consultants, Inc. (ESCI), appeals a contracting officer's refusal to approve a request for a progress payment for work performed under the captioned contract (hereinafter "Contract 2399"). The government moves to dismiss for lack of jurisdiction on the grounds, among others, that (i) the request was never submitted to the contracting officer for a decision under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109, and (ii) if the request was otherwise a valid CDA claim, it was barred by the CDA statute of limitations. Since we agree with the government on its first ground, we do not reach the other grounds and accordingly dismiss the appeal.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. We incorporate by reference the Findings of Fact in our decision of 28 September 2011 sustaining ESCI's appeal from the government's default termination of Contract 2399 and converting that termination to one for convenience. Familiarity with those facts is presumed. See *Environmental Safety Consultants, Inc.*, ASBCA No. 51722, 11-2 BCA ¶ 34,848. The facts stated below are those most pertinent to this appeal.

2. The request for payment that ESCI characterizes in its notice of appeal as a "non-routine request for payment in accordance with Contract Dispute [sic] Act of 1978" was in fact a routine progress payment request (Invoice No. 7) in the amount of \$138,506.50 for work performed on Contract 2399 from 19 April through 23 June 1997. Neither Invoice No. 7 nor the 23 June 1997 transmittal letter stated that the invoice was a claim under the CDA, nor did they expressly or by implication request a contracting

officer's CDA decision on the invoiced amount, nor was the invoice certified as required by the CDA for claims in excess of \$100,000.¹ (R4, tab 4; app. opp'n, ex. 20)²

3. Invoice No. 7 was not in dispute when received by the contracting officer on 24 June 1997. However, by letter dated 30 June 1997 she returned the invoice to ESCI on the grounds that: "Your prompt payment certification is invalid as we have received notification from your surety that they have paid several of your subcontractors on this project" (R4, tab 13(a)). ESCI replied to this rejection of Invoice No. 7 by letters dated 7 July, 17 July and 15 August 1997. These letters presented ESCI's reasons why Invoice No. 7 should be paid. However, none of these letters gave written notice to the contracting officer that ESCI was converting Invoice No. 7 to a CDA claim. None of these letters provided Invoice No. 7 with the CDA certification required for claims exceeding \$100,000. (R4, tabs 13(b), 13(c); app. opp'n, ex. 10)

4. Fourteen years later, ESCI submitted to the contracting officer a payment request with an invoice dated 29 November 2011 for the original amount of Invoice No. 7 (\$138,506.50) plus \$433,381.33 for interest on that original amount from 1 January 1997 through 31 December 2011.³ The transmittal letter stated that the request was "in accordance with contract specification section 01400." Neither the transmittal letter nor the revised Invoice No. 7 stated that the request was a claim under the CDA, nor did they provide a CDA certification for the revised Invoice No. 7. (R4, tab 29) There is no evidence in the record on the motion of any response by the contracting officer to ESCI's submission.

5. Contract 2399 included, among other provisions, the FAR 52.232-27, PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (MAR 1994) clause (R4, tab 1 at 28). Paragraph (a)(1)(i)(A) of that clause provided that "The due date for making [progress payments] shall be 14 days after receipt of the payment request by the designated billing office." The original Invoice No. 7 was received by the billing office on 24 June 1997 (R4, tab 13(a)). Accordingly, the due date for payment of Invoice No. 7, if it had not been disputed by the government, would have been 8 July 1997.

¹ See 41 U.S.C. § 7103(b).

² In response to the government's motion to dismiss, ESCI filed a document entitled "Appellant's Motion to Government's Motion to Dismiss." That document opposes the government motion and we will refer to it as such.

³ ESCI cites the Prompt Payment Act (PPA), 31 U.S.C. §§ 3901-3907, as the basis for its request for 14 years of interest. However, § 3907(b) of the PPA states: "An interest penalty under this chapter does not continue to accrue...for more than one year."

DECISION

Submission of a claim in writing for a contracting officer's decision, and an appeal of the decision or an appeal of a failure of the contracting officer to issue a timely decision, is a prerequisite under the CDA for Board jurisdiction to entertain the appeal. *Madison Lawrence, Inc.*, ASBCA No. 56551, 09-2 BCA ¶ 34,235 at 169,206. The CDA does not define "claim," but FAR 2.101 provides the following definition:

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. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under the Contract Disputes Act of 1978 until certified as required by the Act. 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 contracting officer 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.

We have found above that what ESCI states was a "non-routine" payment request was in fact a routine monthly progress payment request (Invoice No. 7) that was not in dispute when submitted to the contracting officer for payment on 24 June 1997. There was nothing in the invoice or transmittal letter indicating that the invoice was intended as a CDA claim. On 30 June 1997, the contracting officer put Invoice No. 7 in dispute by rejecting it for an alleged "invalid" certification of payment of subcontractors. ESCI responded to the rejection with three argumentative letters, but none of these letters informed the contracting officer that ESCI was converting the invoice to a CDA claim. (SOF ¶¶ 2, 3)

ESCI's submission on or about 29 November 2011 requesting payment of Invoice No. 7 (\$138,506.50), plus PPA interest penalty (\$433,381.33), was not a routine invoice but it neither expressly nor by implication presented the request as a CDA claim, and it did not provide in any form the required CDA certification for claims exceeding \$100,000 (SOF ¶ 4). Without such certification, the Board lacks jurisdiction to entertain the appeal. *Tefirom Insaat Enerji Sanayi ve Ticaret A.S.*, ASBCA No. 56667, 11-1 BCA ¶ 34,628 at 170,630.

The appeal is dismissed without prejudice for lack of jurisdiction.⁴

Dated: 6 June 2013



MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



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. 58221, Appeal of Environmental Safety Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

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

⁴ Since we lack subject matter jurisdiction, we do not reach the government's Statute of Limitations argument.