ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Lael Al Sahab & Co. | ) | ASBCA No. 58346 |
| | ) | |
| Under Contract No. W91GET-07-M-0063 | ) | |

APPEARANCE FOR THE APPELLANT: Mr. Alie Sufan
Owner

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Tudo Pham, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MELNICK ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This appeal involves a contract between the government and Lael Al Sahab & Co. for work in Iraq. The government has moved to dismiss the appeal. The motion is granted in part and denied in part.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 21 March 2007, the Joint Contracting Command – Iraq/Afghanistan (government) entered into a commercial items contract with Lael Al Sahab for street cleaning and grounds maintenance in the International Zone in Baghdad, Iraq. Appellant was to be paid $15,000 per month. The initial period of the contract extended from 20 March 2007 to 19 July 2007. The contract included an option period of 20 July 2007 to 18 November 2007 also at $15,000 per month. (R4, tab 1 at 1, Statement of Work (SOW) at 1)

2. The contract contained FAR clause 52.212-4, CONTRACT TERMS AND CONDITIONS — COMMERCIAL ITEMS (SEP 2005). Subsection (a), *Inspection/Acceptance,* required that appellant only tender for acceptance those items that conformed to the requirements of the contract. It also reserved the right of the government to inspect the services tendered for acceptance. (R4, tab 1 at 4)

3. Subsection (i) of FAR 52.212-4, *Payment*, provided that payment would be made for items accepted by the government (R4, tab 1 at 6). Also as to payment, the SOW stated that the government would not make a full payment if appellant did not "perform to the specification of the contract," or if "only partial work was completed."

Partial payments would be made if appellant did not "provide the stated workforce or [did] not clean each street outlined." (R4, tab 1, SOW at 4)

4. Subsection (m) of FAR 52.212-4, *Termination for cause*, allowed the government to terminate the contract for cause in the event the contractor defaulted or failed to comply with any of the terms and conditions of the contract (R4, tab 1 at 6).

5. Subsection (d) of FAR 52.212-4, *Disputes*, stated that the contract was subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, as amended (R4, tab 1 at 5).

6. The contract does not appear to designate a particular contracting officer (CO) to be a point of contact for appellant or to issue decisions on claims.

7. Lael Al Sahab asserts that it provided the services required by the contract (*see, e.g.*, notice of appeal dated 4 October 2012 at 1-2; compl. at 1-2). The record includes four invoices submitted by Lael Al Sahab to the government, Joint Contracting Command. The first invoice was not dated, covered the period 21 March 2007 to 20 April 2007, and sought $15,000 ($500 per day for 30 days). It appears from the payment voucher that the government paid appellant $11,250 on the first invoice in early May 2007. The 20 May 2007 second invoice, for the period 20 April 2007 to 21 May 2007, also sought $15,000 ($500 per day for 30 days). It appears from the payment voucher that the government paid appellant $10,500 on the second invoice in late May 2007. (R4, tab 3)

8. The record incorporates a number of documents indicating government dissatisfaction with some of appellant's work. On 9 May 2007, the government public works project officer sent appellant a memorandum complaining that certain roads, surrounding areas, and a burn area had not been properly cleaned (R4, tab 4). The daily checklists for most of the period 12 May 2007 through 31 May 2007 each show a number of uncompleted tasks (R4, tab 5).

9. On 3 June 2007, CO MAJ Robert W. Hearon, met with appellant to warn that a termination was possible (R4, tab 13).

10. CO TSgt Eric Jordan sent appellant a cure notice on 4 June 2007. It notified Lael Al Sahab that its failure "to pick up debris in designated areas, maintain tree & shrub trimming in designated areas, properly dispose of trimmings at the end of each work day, sweep streets clear of dirt, debris and litter" were endangering performance under the contract. CO Jordan indicated at the bottom of the notice that appellant's point of contact "for this memorandum" was CO LCDR Anthony Grow. At the bottom of the notice is a hand written note apparently by or for appellant stating "I will not perform unless paid first." (R4, tab 6) By memorandum dated 5 June 2007, CO Jordan notified

appellant that the contract was being terminated for cause. The memorandum provided appellant with a statement of its appeal rights under the CDA. Appellant was again notified that its point of contact "for this memorandum" was CO Grow. (R4, tab 7) On the same day, the government issued Modification No. P0002 terminating the contract which was signed by CO Jordan (R4, tab 2).

11. In apparent response to the government's memorandums of 4 and 5 June 2007, Lael Al Sahab wrote in a 5 June 2007 email to CO Grow that the government had "detained" money from the first two invoices. It asked, among other things, that the government pay the following amounts: $3,750 for the first month; $4,500 for the second month; $7,000 for work performed between 21 May and 3 June 2007; and $500 for a day not billed in March 2007. Appellant sent a copy of the email to CO Jordan. (R4, tab 8) CO Grow responded by requesting a "final" invoice for the period from the end of the second invoice to the last day appellant worked (but not later than the termination date). As to the withheld payments, the government stated that it had the right, under SOW § 11.1, to make partial payments where only partial work had been done. A copy of this email was also sent to CO Jordan. (R4, tab 9)

12. On 6 June 2007, appellant submitted its third invoice, requesting a total of $15,750 comprised of: $7,000 for the period 21 May 2007 to 3 June 2007; $3,750 withheld under the first invoice; $4,500 withheld under the second invoice; and $500 apparently for a day not billed in March 2007, or $7,500 in new billings (R4, tab 3 at 7). In response to that invoice, the public works project officer sent a 6 June 2007 email stating that the amount requested was not acceptable. The invoice should cover the period 22 May to 3 June 2007 (13 days). Because 25 percent of the work had not been done, in the government's view, it would pay $4,875 (13 days x $500 x .75). (R4, tab 10) Later that day, appellant submitted its fourth invoice, for a "Partial Payment" in that amount, expressing the hope that payment could be collected soon (R4, tab 3 at 8, tab 11). The payment voucher indicates that the government paid appellant $4,875 on that invoice in early June 2007 (R4, tab 3 at 8-9).

13. In total, appellant invoiced the government for $37,500 ($15,000 + $15,000 + $7,500), was paid $26,625 ($11,250 + $10,500 + $4,875), leaving $10,875 unpaid (R4, tab 3).

14. Lael Al Sahab has provided a copy of an email it sent to the government on 21 October 2007. Among other things, it mentions a balance due of "around $11,000." (App. filing dtd. 20 February 2013, attach. 6) Appellant has also provided a copy of an undated "EFT Form" with bank information for a payment to appellant of $1,011,000 (*id.*, attach. 2).

15. By email dated 4 October 2012, Lael Al Sahab filed a notice of appeal seeking its "claim money" of $1,000,000 for the impact on the company of a "FAKE" report by

the government and an "outstanding balance" of $11,000. The appeal was docketed as ASBCA No. 58346. Lael Al Sahab has not appealed the termination for cause. There is no evidence appellant submitted the $1,000,000 "claim" to a CO before filing this appeal. In addition, the record does not include a certification meeting the requirements of the CDA.

16. By email dated 13 October 2013, appellant filed a document that the Board accepted as the complaint. As in the notice of appeal, Lael Al Sahab asserted that it was entitled to $1,000,000 for the impact to the company of a "FAKE" report by the government and for an "outstanding balance" of $11,000. After appellant's complaint was filed, the government issued a 31 October 2012 CO final decision (R4, tab 13; gov't mot., ex. 1, Wysoske aff. ¶¶ 3-4). The final decision said that termination of the contract was proper and denied the claim for $1,011,000 (R4, tab 13). The Board did not receive a copy of the final decision until the government submitted the 14 February 2013 Rule 4 file.

17. On 25 February 2013, the government filed a motion to dismiss the appeal for lack of jurisdiction. Appellant has responded.

18. Attached to the motion to dismiss is an affidavit from Joan F. S. Wysoske, one of the government COs for Contract No. W91GET-07-M-0063. In pertinent part, she states the following:

> 3. In October 12, 2012, the appellant submitted a claim to the ASBCA.
>
> 4. On October 31, 2012, due to appellant's failure to provide substantiating documentation that allowed for meaningful settlement discussion or enough information to conduct a meaningful review, I denied the appellant's claim for $1,011,000.00.
>
> 5. To date, the appellant has failed to submit a valid claim or any settlement documentation that substantiates its allegations. Further, to date, the appellant has failed to submit a valid claim that is in the form or contains sufficient substantiating information required by the Contract Disputes Act, 41 U.S.C. § 7103 and FAR 52.233-1 DISPUTES (JUL 2002).

(Gov't mot., ex. 1, Wysoske aff. ¶¶ 3-5) We view these statements as conclusory. Ms. Wysoske provides no description of the interactions between appellant and the government regarding the contract.

## DECISION

In its motion to dismiss, the government simply asserts that there "is no record that appellant filed a claim prior to filing a notice of appeal or complaint with the Board." For that reason, the government concludes, the Board lacks jurisdiction to hear this appeal. The government also argues that the appeal should be dismissed because appellant claims more than $100,000 and the claim was not certified. (Gov't mot. at 3) Appellant's submissions focus on the facts relating to the appeal.

Our jurisdiction to decide an appeal from a contractor claim depends on the prior submission of the claim to a CO for decision and a final decision on, or deemed denial of, the claim. 41 U.S.C. § 7103; *see also Taj Al Safa Co.*, ASBCA No. 58394, 13 BCA ¶ 35,278. In addition, where the claim exceeds $100,000, it must be certified in accordance with the CDA. 41 U.S.C. § 7103(b). The Federal Acquisition Regulation defines "Claim" 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. 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 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

FAR 2.101 (italics in original).[1] While a *pro se* appellant is entitled to a liberal reading of its pleadings, it must still meet, and show that it meets, the requirements for Board jurisdiction. *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988); *United Healthcare Partners, Inc.*, ASBCA No. 58123, 13 BCA ¶ 35,277.

It appears to be the government's position that this appeal involves one "claim" in the amount of $1,011,000. In our view, appellant seeks $1,000,000 for harm to its business based on a "FAKE" report that led to the termination, and separately seeks

[1] FAR 33.206(a) requires a written submission to the contracting officer within 6 years after accrual of the claim.

$11,000 which is the approximate total of the invoiced amounts that the government refused to pay – $10,875 (SOF ¶ 13).

Based on the record, the request for $1,000,000 is not properly before the Board because appellant never submitted a claim for it to the CO before filing this appeal (SOF ¶ 15). The fact that the CO issued a final decision in response to the complaint appellant filed with the Board is irrelevant (SOF ¶ 16). An appellant cannot first assert a claim in its complaint. *United Healthcare Partners,* 13 BCA ¶ 35,277 at 173,154; *see also Sharman Co. v. United States,* 2 F.3d 1564, 1569 (Fed. Cir. 1993) (jurisdiction is determined based on the facts existing upon commencement of the action), *overruled on other grounds by Reflectone v. Dalton,* 60 F.3d 1572 (Fed. Cir. 1995) (en banc). Additionally, a final decision issued in the absence of a proper claim fails to provide a basis for jurisdiction. *Northeastern Commc'n Concepts, Inc.,* ASBCA No. 39053, 91-2 BCA ¶ 24,042 at 120,345.

The requests totaling $11,000 in unpaid invoices are a different matter. We see two separate sets of requests. The first set includes the two invoices for $15,000 each (SOF ¶ 7). The second set, which totals $7,500, includes the request for payment for the period from the end of the second invoice to the termination, and the request for $500 in payment for a day in March 2007 not previously billed (SOF ¶ 11). These were certainly requests for relief under the contract. Lael Al Sahab made the requests before the appeal was filed (SOF ¶¶ 12-14). And, the amounts sought, individually and in total, were less than $100,000 so appellant was not required to certify them.

At least as first made, appellant's requests and invoices must be viewed as routine requests for payment and not claims. *See* FAR 2.101; *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1542 (Fed. Cir. 1996); *Reflectone,* 60 F.3d at 1575-76; *Kalamazoo Contractors, Inc. v. United States*, 37 Fed. Cl. 362, 368 (1997). If, however, those requests were disputed as to liability or amount, they could have been converted into claims by written notice to the contracting officer. *Id.* Here, the requests were disputed by the government. As explained below, the requests relating to the first two invoices were converted by Lael Al Sahab into a claim totaling $8,250. The requests for the period of time after the second invoice, and the missed day in March 2007, although initially disputed, were not converted into a claim.

A claim "need not contain any particular language or conform to any specific format." *Kalamazoo Contractors*, 37 Fed. Cl. at 368 (quoting *Pevar Co. v. United States*, 32 Fed. Cl. 822, 824 (1995)). In assessing whether a claim has been submitted, it is appropriate to look at the "totality of the correspondence" and the "continuing discussions between the parties." *Vibration & Sound Solutions Ltd.*, ASBCA No. 56240, 09-2 BCA ¶ 34,257 at 169,270. In addition, the expression of interest in a CO decision may be made implicitly. *CleanServ Executive Services, Inc.,* ASBCA No. 47781, 96-1 BCA ¶ 28,027 at 139,923.

Appellant submitted a $15,000 invoice, apparently in April 2007, for work done from 21 March 2007 to 20 April 2007, and a $15,000 invoice in May 2007 for work done from 20 April 2007 to 21 May 2007 (SOF ¶ 7). The government clearly questioned the amount and quality of the work covered by the invoices, disputing what was owed (SOF ¶ 8). As a result, the government paid appellant $11,250 on the first invoice and $10,500 on the second invoice in May 2007, withholding a total of $8,250 (SOF ¶ 7). On 5 June 2007, appellant sent an email to the participating COs complaining, in part, about the money withheld from the first two invoices and requesting that the government pay the $8,250 it had withheld (SOF ¶ 11). *See, e.g., Roy McGinnis & Co.*, ASBCA Nos. 40004, 40005, 91-1 BCA ¶ 23,395 at 117,395 (a claim should be submitted "in a manner reasonably calculated to be received by the 'contracting officer' authorized to decide the claim"); *United States Logistics and Supply, Inc.*, ASBCA No. 51790, 99-2 BCA ¶ 30,465. At that point, there was a dispute as to $8,250 and a writing from appellant demanding payment of that amount in a sum certain, in other words, a claim. *Cf. JWA Emadel Enterprises, Inc.*, ASBCA No. 51016, 98-2 BCA ¶ 29,960 (resubmission of a request for payment that had been denied constituted a claim); *accord Westinghouse Electric Corp.*, ASBCA No. 25787, 85-1 BCA ¶ 17,910, *aff'd,* 782 F.2d 1017 (Fed. Cir. 1986).

Appellant's 5 June 2007 email also sought payment of $7,000 for work done from the end of the period covered by the second invoice to the date of termination, and $500 for a day not previously billed. A government CO responded by requesting a final invoice limited to the period from the end of the second invoice to the termination date. (SOF ¶ 11) Lael Al Sahab complied by submitting its third invoice that included work performed after the last invoice and before the termination, and the missed workday in March (SOF ¶ 12). The government responded with an email indicating that appellant should invoice only for the period 22 May to 3 June 2007 and only at 75 percent of the contract rate. Lael Al Sahab submitted its fourth invoice for that amount, $4,875, which the government paid. (SOF ¶ 12) Although the government clearly disputed part of the billing for the last period of work, and the billing for the missed day in March 2007, there is no evidence in the record that Lael Al Sahab challenged the government's position and converted its request for the remaining funds into claims. Indeed, appellant sent in its partial payment invoice with a note saying appellant hoped it could collect payment soon (SOF ¶ 12). This, along with the invoices themselves, does not reflect an intent by appellant to continue the dispute or assert a claim.

## CONCLUSION

For the reasons set out above, the government's motion to dismiss is granted as to the $1,000,000 claim, denied as to the claim for $8,250, and granted as to the claims totaling $2,625.

Dated: 19 August 2013

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

ELIZABETH M. GRANT
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. 58346, Appeal of Lael Al Sahab & Co., rendered in conformance with the Board's Charter.

Dated:

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