ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Naseem Al-Oula Company	)	ASBCA Nos. 61321, 61322, 61323
	)	61324, 61325, 61326
	)	
Under Contract No. W56KGZ-16-D-8012	)	

APPEARANCE FOR THE APPELLANT: Ms. Shireen Jaffar Fadhil
Owner

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Brian C. Habib, JA
Trial Attorney

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

In these six consolidated appeals, a contractor seeks a total of $16,900 for damage to six vehicles leased by the U.S. Army in Iraq. The Army moves to dismiss for lack of subject matter jurisdiction, contending that appellant failed to specify a sum certain, to assert a demand as a matter of right, and to request a contracting officer's final decision. Appellant responds with a factual argument, insisting that the damage to the vehicles was caused by intentional or negligent acts by the Army. We grant the motion and dismiss the appeals.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. By date of October 6, 2015, the U.S. Army Contracting Command awarded Contract No. W56KGZ-16-D-8012, an Indefinite Delivery, Indefinite Quantity contract to appellant for the delivery of a variety of vehicles, including large up-armored SUVs, for use by Air Force personnel in Iraq. The contract had a total estimated value of $12,000,000. (R4, tab 1 at 1-17)

2. Thereafter, by date of January 26, 2016, the contracting officer issued a delivery order to appellant requiring it to deliver 14 of the up-armored SUVs for the use of the Air Force from February 5, 2016 to February 4, 2017, with an option for one additional year (through February 5, 2018). (R4, tab 2 at 1, 3-7)

3. The basis for appellant's purported claim is damage to the windshields and windows of six of the vehicles covered under this contract (R4, tabs 23, 36). The record

includes accident and damage reports for each of the damaged vehicles; one is dated October 21, 2016, and the remaining five range in date from April 9 to April 17, 2017. Each of the reports identifies the relevant vehicle by its vehicle identification number (VIN) and license plate number, and includes photographs of the purported damage. (R4, tabs 3, 6-8, 15-16)

4. In addition to those six accident and damage reports, the record includes documents that appear to show estimates of repair costs for each vehicle, with dates that correspond to the dates identified on the accident and damage reports. These apparent "estimates" appear on invoice-type forms from three different companies – appellant, Superstar, and Barakat – for a total of three forms per vehicle. (R4, tabs 4-5, 9-14, 17-20, 24-35)

5. While the forms from appellant and Superstar are titled "estimations," it is unclear what the documents from Barakat are intended to show. They appear in the record in both English and in an untranslated format. The VIN and license plate numbers appear in English on the untranslated versions[1] but the dollar figures do not. (R4, tabs 24-35)

6. The English versions of the Barakat documents are not titled "estimation" or "estimate." Instead, they indicate they are receipts, that the vehicles were repaired, and that the customer paid cash. (*Id.* at tabs 30-35) The untranslated versions include, in English, the phrase "received this vehicle repaired in accordanco[sic]" (*id.* at tabs 24-29).

7. Appellant first notified the Army of the vehicle damage by email dated April 14, 2017 (R4, tab 23 at 1). A copy of that email was not included in the Army's Rule 4 file and there is no indication in the record that the Army responded to it.

8. Approximately one month later, in an email dated May 19, 2017, appellant's project manager contacted Major Jay Parker, a Contract Support Plans and Operations officer, regarding the damaged vehicles (R4, tab 36). In that email, appellant stated:

> For this contract we have some damage cases . . . caused by the end user I'm here [sic] submitting here these cases one by one with our and thirty [sic] parties estimations and accident reports, please let me know when any more information required.

(*Id.* at 1) The email contained no further narrative beyond the paragraph recited above.

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[1] For ASBCA No. 61325, although the untranslated Barakat document submitted to the contracting officer does not include the plate number and the VIN is off by one letter (R4, tab 41 at 5), the Army's motion appears to concede that it was for the vehicle with license plate number 299272 (gov't mot. at 7).

9. MAJ Parker responded by email of the same date, advising appellant to "submit all claims through the [contracting officer's representative]." He also ordered a subordinate to "consolidate claim data, verify the US Government had a part in the damages and provide documentation to the contracting officer or contracting specialist." (R4, tab 37 at 1)

10. Appellant's May 19 email, included, as attachments, the accident and damage report, the estimates from appellant and Superstar, and the untranslated version of the Barakat document corresponding to the vehicle at issue in ASBCA No. 61321. Later that same day, appellant sent a series of follow-up emails to MAJ Parker which forwarded the accident and damage reports and estimates from appellant and Superstar, along with the Barakat documents, for the four vehicles at issue in ASBCA Nos. 61322 through 61325. Only the untranslated versions of the Barakat documents were provided with these emails, and aside from a signature block, the only text contained in these emails was "Case#3," "Case#4," "Case#5," "Case#6," and Case#7." (R4, tabs 36-41)

11. The following table identifies the dollar value shown on the documents appellant provided to the Army on May 19, 2017, by ASBCA number, license plate number, and company:

ASBCA No.	Plate No.	Appellant	Superstar	Barakat	R4 tabs
61321	171821	$4,900	$5,200	untranslated	36
61322	181938	3,950	4,400	untranslated	38
61323	316875	1,150	1,300	untranslated	39
61324	181589	2,900	3,500	untranslated	40
61325	299272	2,900	3,200	untranslated	41

12. Although English versions of the Barakat documents were not provided in appellant's May 19, 2017 emails, their dollar value is listed below:

ASBCA No.	Plate No.	Barakat Amount (English version)	R4 tabs
61321	171821	$5,300	30
61322	181938	4,500	33
61323	316875	1,250	31
61324	181589	3,200	32
61325	299272	3,500	34

13. None of the emails appellant sent to MAJ Parker included any reference to or documentation for the vehicle involved in ASBCA No. 61326 (license plate number 183445) (R4, tabs 36, 38-41). The information for that vehicle does appear elsewhere in the record, however, and consists of an accident and damage report and estimates of $1,100 (appellant), $1,200 (Superstar), and an English and non-English version of the

Barakat document (English – $1,200) (R4, tabs 16, 19-20, 28, 35). There is nothing in the record explaining how the information for this vehicle came to be in the Army's possession.[2]

14. We find that, in the aforementioned emails (*see* SOF ¶¶ 8-13), appellant did not assert a demand as a matter of right, or any demand whatsoever. Instead, appellant simply submitted the aforementioned emails to the contracting officer and asked to be advised if more information were required (*see* SOF ¶¶ 8, 10). Appellant did not explicitly cite any statutory provision or contract clause as the basis of claimed entitlement in any of the aforementioned emails. We further find that appellant did not request a contracting officer's final decision in any of the aforementioned emails.

15. The record contains an unsworn statement from the contracting officer's representative dated June 1, 2017. He denied government responsibility for the damage to the vehicles and asserted that it resulted from normal wear and tear. (R4, tab 21) The record also includes an email from a product specialist supervisor speculating that improper window installation may have played a role in the vehicle damage (R4, tab 22).

16. By date of August 12, 2017, the contracting officer rendered her final decision. She listed the VINs for six vehicles, but did not assign separate dollar figures to them, stating only that appellant had submitted "six (6) claims for a total of $16,900 for the repair of windshields and windows on the leased vehicles." (R4, tab 23) Finding that the damage resulted from wear and tear (and possibly vehicle defect), for which the Army was not responsible, she denied the claims. As prescribed by regulation, the contracting officer also advised appellant of its appeal rights to this Board or to the Court of Federal Claims. (*Id.*)

17. By date of September 11, 2017, appellant filed its notice of appeal, which identified the "controversy amount" as $16,900 and enclosed the contracting officer's decision and the accident and damage reports for all six vehicles. We docketed and consolidated the claims as ASBCA Nos. 61321 through 61326.

18. On November 16, 2017, the appellant filed its complaint, which was dated a month earlier, on October 16, 2017. Appellant alleged that it claimed "$16,900 for six vehicles as a compensation for armored window and front windshield damaged during operation, the claims were denied by the COR" and argued that the Army had made partial payment for similar damage on an unrelated vehicle. The complaint was accompanied by photographs and documentary evidence regarding the damage to the six

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[2] The Army states in its motion that "[s]ometime later, appellant apparently provided documents for" the vehicle with plate number 183445, but that "the government has not yet located a copy of the transmitting email" (gov't mot. at 7). Appellant's opposition to the government's motion was silent on this issue.

vehicles at issue in these appeals, along with the estimates on appellant's company form, which total $16,900.

DISCUSSION

In moving to dismiss the appeal for lack of jurisdiction, the Army advances three major contentions. First, the Army urges that appellant "failed to specify a sum certain" (gov't mot. at 9). Second, the Army insists that appellant "failed to assert any demand, much less one as a matter of right" (*id.* at 10). Third, the Army urges that the appeal should also be dismissed because appellant failed to request a contracting officer's final decision (*id* at 11.).

Appellant opposes the Army's motion in an undated letter, which the Board received on February 21, 2018. In its opposition, appellant disputed the Army's position regarding the cause of the damage (*see* SOF ¶ 16), stating as follows:

> The contracting officer did not give us a chance to talk about negotiation and his final was to submit appeal upon his decision, and here we can accept negotiation to get a part of this amount if the government would like to submit a suggestion, the important thing for us is not to lose the all [sic] amount.

(App. opp'n at 2) Appellant also stated that "we would like to appear here the total amount of the cases submitted," and provided a table that lists dollar figures that correspond to the six estimates in the record on appellant's company form. That table identifies the sum of those figures as $16,900. (*Id.*)

We begin by stating the well-settled principles that govern our analysis of jurisdictional questions. Appellant bears the burden of establishing the Board's jurisdiction by a preponderance of the evidence. *CCIE & Co.*, ASBCA Nos. 58355, 59008, 14-1 BCA ¶ 35,700 at 174,816. "The facts supporting jurisdiction are subject to our fact-finding upon a review of the record." *Id.* (internal citations omitted). Under the Contract Disputes Act (CDA), our jurisdiction depends upon the contractor's submission of a claim to the contracting officer. *Government Services Corp.*, ASBCA No. 60367, 16-1 BCA ¶ 36,411 at 177,537; *see* 41 U.S.C. 7103(a)(1). The Federal Acquisition Regulation (FAR) defines "claim" as "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 the contract." FAR 2.101. While a claim need not be submitted in any particular form or use any particular wording, it still must provide adequate notice of the basis and the amount of the claim. *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). In determining whether the contractor's submission qualifies as a claim, we apply "a common sense analysis on a case-by-case basis, examining the totality

of the correspondence between the parties." *Rover Constr. Co.*, ASBCA No. 60703, 17-1 BCA ¶ 36,682 at 178,614 (citations omitted).

The Army's argument focuses upon appellant's May 19, 2017 emails to MAJ Parker and the documentation those emails forwarded, and appellant does not dispute that those emails constitute its purported claim. Those emails are the only evidence in the record of any actual communications between the parties related to the six vehicles involved in these appeals.

After careful consideration of the record and the parties' motion papers, we conclude that we lack jurisdiction over these appeals.

First, we agree with the Army that appellant failed to submit a claim in a sum certain, which is required by the CDA. *Todd Pacific Shipyards Corp.*, ASBCA No. 55126, 06-2 BCA ¶ 33,421 at 165,687. While it is true that if a claim amount can be calculated with reasonable effort, a contractor's submission is sufficient to satisfy the sum certain requirement, *see Madison Lawrence, Inc.*, ASBCA No. 56551, 09-2 BCA ¶ 34,235 at 169,207, appellant did not submit anything to the contracting officer that meets that standard.

Appellant's initial email from May 19, 2017, indicated it was submitting what it described as "our and thirty [sic] party estimations" for the cost of repairs to the vehicles (SOF ¶ 8). Neither that email nor the subsequent ones identify a specific dollar amount being sought for any of the vehicles, either individually or in total (SOF ¶ 10). The attached estimates from appellant and Superstar quoted different dollar figures for five of the vehicles, the Barakat documents were untranslated but contain no dollar figures, and nothing was submitted for the sixth vehicle (SOF ¶¶ 10-13). On the basis of these submissions, it is impossible to identify a sum certain for jurisdictional purposes for any of these appeals. *See Southwest Marine, Inc.*, ASBCA No. 39472, 91- 3 BCA ¶ 24,126 at 120,744.

In *Southwest Marine*, the contractor submitted a request for equitable adjustment to the contracting officer that proposed three alternative quantifications resulting in three different dollar figures, but requested reimbursement only for the lowest figure. (*Id.* at 120,743) The contractor subsequently requested a final decision on its request for equitable adjustment but for the lowest figure only, and provided a certification for that claim three months later. *Id.* at 120,743-44. After the government failed to issue a decision, the contractor appealed, and in its complaint, sought recovery for the lowest amount included in its request for equitable adjustment and claim. (*Id.* at 120,744) The complaint also included, however, alternative prayers for relief seeking higher dollar figures that were calculated using the alternative quantifications described in its request. (*Id*) We held that we had jurisdiction over the lowest figure only because a "'pick one' claim is not a claim for a sum certain, and is not a claim under the contract and under the CDA." (*Id.*)

Here, appellant did not even "pick one" of the three amounts for each of the vehicles – until it submitted its opposition to the Army's motion to dismiss, when it provided a table with dollar figures corresponding to the six estimates on appellant's company form and identifying the sum of those figures as $16,900 (app. opp'n at 2). While this is the same amount appellant indicated it was seeking in its notice of appeal and complaint (SOF ¶¶ 17-18), "our jurisdiction is determined by 'the adequacy or sufficiency of the submission to the contracting officer,'" not by what is contained in submissions to the Board. *See Government Services Corp.*, 16-1 BCA ¶ 36,411 at 177,537 (quoting *Hibbits Constr. Co.*, ASBCA No. 35224, 88-1 BCA ¶ 20,505 at 103,673). Appellant has not established that it ever communicated that specific figure (or its component parts) to the contracting officer as the sum certain for which it wished to be reimbursed.

The fact that the contracting officer identified the claim amount as $16,900 does not change our decision. The record does not explain how she arrived at that figure, and speculation cannot be a substitute for appellant's obligation to meet its burden of proof. Moreover, our review of a contracting officer's decision is *de novo*, and her findings of fact are neither entitled to deference nor binding upon the Board. *See LeBolo-Watts Constructors 01 JV, LLC*, ASBCA Nos. 59738, 59909, 19-1 BCA ¶ 37,301 at 181,453; 41 U.S.C. § 7103(e).

Second, on this record we cannot say that appellant has satisfied the requirement that its purported claim assert a demand as a matter of right, a well-established requirement for a valid claim under the Act, 41 U.S.C. § 7103. *See ERKA Construction Co., Ltd.*, ASBCA No. 57618, 12-2 BCA ¶ 35,129 at 172,473; FAR 2.101. A demand "as a matter of right" must "specifically assert entitlement to the relief sought . . . [and] must be a demand for something due or believed to be due[.]" *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1265 (Fed. Cir. 1999).

In its May 19, 2017 emails, appellant did not make a demand or even an explicit request for payment; nor did it cite a statutory provision or contract clause or otherwise assert legal entitlement to payment. Appellant simply announced that "[f]or this contract we have some damage cases caused by the end user. I'm here submitting here [sic] these cases one by one with our thirty [sic] parties estimations and accident reports . . . ." (SOF ¶ 14) None of these statements may be fairly characterized as a demand as a matter of right.

Third, appellant has also failed to establish that its purported claim satisfies the jurisdictional requirement that claims submitted to the contracting officer include a request for a final decision. *See M. Maropakis Carpentry, Inc. v. United States*, 609 F. 3d 1323, 1327-28 (Fed. Cir. 2010). Although a request for a contracting officer's final decision can be implied rather than explicit, *see James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996), there is nothing in the record that

approaches such a request (SOF ¶¶ 8-13).

CONCLUSION

The Army's motion to dismiss for lack of subject matter jurisdiction is granted. The appeals are dismissed.

Dated: December 20, 2019

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

OWEN C. WILSON
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 Nos. 61321, 61322, 61323, 61324, 61325 and 61326, Appeals of Naseem Al-Oula Company, rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals