ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Development & Evolution Construction Company	)	ASBCA No. 58342
	)	
Under Contract No. W5KA4N-11-C-0128	)	

APPEARANCE FOR THE APPELLANT: Domenic Senger-Schenck, Esq.
Rosenstock Legal Services
Kabul, Afghanistan

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Nicholes D. Dembinski, JA
Trial Attorney

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

Development & Evolution Construction Company (DECC) had a contract with the government that was terminated for convenience. Its first termination settlement proposal exceeded the Contract Disputes Act (CDA) certification threshold of $100,000. Its second proposal, submitted during negotiations, was under the threshold. After the parties reached an impasse, the government issued a unilateral determination that was appealed to this Board. DECC's complaint seeks over $100,000. The government moves to dismiss the appeal for lack of jurisdiction. We dismiss the appeal.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 28 June 2011, the Herat Regional Contracting Office, Afghanistan, awarded Contract No. W5KA4N-11-C-0128 to DECC. The contract was for construction of a combat outpost for the Afghanistan National Army. (R4, tab 1) The contract incorporated the FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (May 2004) — ALTERNATE I (SEP 1996) clause (R4, tab 1 at 19). On 13 July, the contracting officer (CO) issued a notice to DECC to proceed with the project (R4, tab 11). On 21 September 2011, the CO notified DECC by emails that the project was no longer required, it should stop all work, and the contract was cancelled (R4, tabs 14-15).

2. On 3 November 2011, the CO forwarded a notice of termination to DECC and a contract modification. The CO advised DECC that it had one year to submit a termination settlement proposal, but requested that one be provided within 30 days or as

soon as possible. (R4, tab 26) DECC returned the signed notice and modification on 15 November (R4, tab 27).

3. On 11 December 2011, DECC submitted a settlement proposal to the CO. It listed line item costs for personnel, transportation, machinery, and material. The proposal sought a total of AFN6,308,493. The proposal was not provided on any standard government forms for this purpose, such as SF 1435 or 1436, and therefore did not provide the certifications included on those forms. (R4, tab 28) The amount sought converted to $128,456.38 (compl. ¶ 15; gov't 12 June mot. ¶ 13).

4. On 7 March 2012, the CO responded to DECC's proposal, challenging it. He proposed paying $12,453 based upon the government's estimate of the percentage of DECC's completion of contract tasks. (R4, tab 38) DECC rejected the government's proposal on 22 March (R4, tab 40). In a 2 April 2012 email, the CO referred to discussions that had taken place with DECC, but stated he stood by his prior offer. He explained that DECC would have to justify any additional amount with receipts or invoices. He stressed that, in the event of a failure to reach agreement, he would be "within [his] rights to complete this termination settlement without [DECC's] endorsement." (R4, tab 42)

5. On 9 April 2012, DECC submitted a new settlement proposal. It was broken into categories of incurred costs, which were mobilization, design, excavation, installation, and demobilization. The new proposal sought AFN3,777,477. It was not on any standard government forms containing any certifications. (R4, tab 44) The amount sought converted to approximately $75,833 (Bd. corr. ltr. dtd. 29 March 2013 at 1; gov't 12 June mot. ¶ 17).

6. On 10 April 2012, the CO increased his offer to $19,652.49 (R4, tab 45). On 25 April, DECC rejected that offer. It explained that its first settlement proposal had reflected its actual expenses. It had ignored most of those costs in its second proposal in the interest of ending the process. DECC requested the CO to "refer our issue to a third party." (R4, tab 47) By email dated 1 July 2012, the CO notified DECC that his last offer was the "best and final offer you will receive from the Government." He explained that if DECC would not agree then its "only course will be to file a claim." He closed by declaring that if DECC did not accept his offer then "there is no need for us to communicate further." (R4, tab 50)

7. On 2 July 2012, the CO issued a "Notice of Settlement by Determination" to DECC, stating that, in accordance with FAR 49.109-7, DECC would be paid AFN563,500.05. Further, the CO stated that "this is the contracting officer's final decision from which the contractor may appeal under the Disputes clause." (R4, tab 51) The figure converted to approximately $11,500 (compl. and answer ¶ 17).

8. The Board received a notice of appeal from DECC on 1 October 2012. DECC's complaint contends that its original $128,456.38 settlement proposal was reasonable and seeks an award of termination for convenience costs in that amount.

9. On 1 March 2013, the Board observed in a letter to the parties that DECC's claim exceeded $100,000. It therefore questioned its jurisdiction, given that there was no indication in the record that DECC provided a CDA certification pursuant to 41 U.S.C. § 7103. The Board invited DECC to show that the claim was certified. Otherwise, the Board considered the appeal subject to dismissal. DECC responded by letter dated 29 March 2013, followed by a government motion to dismiss for lack of jurisdiction.

DECISION

The government contends the appeal must be dismissed for lack of jurisdiction because DECC did not submit its $128,456.38 claim to a CO for a decision, as required by 41 U.S.C. § 7103, nor did it certify the claim, as that statute requires for claims exceeding $100,000. DECC responds that the second termination settlement proposal that it submitted to the CO on 9 April 2012, for $75,833, ripened into a claim when negotiations reached an impasse. It contends that its appeal now from the CO's subsequent unilateral determination can seek an amount that exceeds $100,000 without having to be certified because the claim before the CO was beneath that threshold.

We begin with the basic requirements of our jurisdiction. Under the CDA, for a contractor to pursue an appeal here it must first submit a written claim to the CO for a decision or deemed denial. To the extent the claim exceeds $100,000, it must be accompanied by a certification that it is made in good faith, the supporting data are accurate and complete to the best of the contractor's knowledge and belief, the amount requested accurately reflects the contract adjustment for which it believes the government is liable, and the certifier is authorized. Though a defective certification does not deprive us of jurisdiction (it must be corrected), the complete absence of one when it was required does and dictates dismissal. 41 U.S.C. §§ 7103-7105; *Taj Al Safa Co.*, ASBCA No. 58394, 13 BCA ¶ 35,278.

Obviously, if a certification is required for claims exceeding $100,000, then one is not necessary for claims of $100,000 or less. Early on in the application of this statutory scheme, the question was presented whether a contractor can increase the recovery it seeks here to an amount exceeding $100,000 if its claim to the CO was for less and therefore not certified. The guiding precedent has been *Tecom, Inc. v. United States,* 732 F.2d 935 (Fed. Cir. 1984). There, a contractor submitted an uncertified claim to the CO for slightly more than $11,000, but later pursued an appeal before this Board in excess of $72,000, exceeding the $50,000 CDA certification threshold that existed at the time. The court ruled that when an uncertified claim is properly considered by the CO because it was below the threshold, the contractor can increase its demand above the

threshold in its appeal here when the increase is based on further information reasonably developed during the litigation. *Tecom,* 732 F.2d at 936-38. We have construed *Tecom* to only permit increases in the amount demanded here above the certification threshold when an appellant establishes that the increase is based on further information not reasonably available when the original claim was submitted. *See Jema Corp.,* ASBCA No. 40985, 93-3 BCA ¶ 26,076; *E.C. Morris & Son, Inc.,* ASBCA No. 30385, 86-2 BCA ¶ 18,785.

We now consider how the conditions necessary to our jurisdiction apply to this appeal seeking termination for convenience costs. Under the contract's Termination for Convenience clause, within one year after a contract is terminated the contractor is required to submit to the CO a final termination settlement proposal for the purpose of negotiation. FAR 52.249-2(e). Upon its initial submission, the proposal is not a CDA claim. *James M. Ellett Constr. Co. v. United States,* 93 F.3d 1537, 1543-44 (Fed. Cir. 1996); *Triad Mechanical, Inc.,* ASBCA No. 57971, 12-1 BCA ¶ 35,015. If the negotiation reaches an impasse, the proposal can then ripen into a claim. *Ellett,* 93 F.3d at 1544. At that point, the CO must issue a unilateral determination, under terms dictated by the FAR, which constitutes a CO's final decision. That decision is appealable to this Board. FAR 52.249-2(g) (Alternate I), (j); *Ellett,* 93 F.3d at 1544.

Although the termination for convenience clause does not refer to whether a termination settlement proposal exceeding $100,000 must be certified to ripen into a claim, case law makes clear that it must. *Ellett,* 93 F.3d at 1545 ("We agree that the termination settlement proposal must be certified in accordance with the CDA"); *Consolidated Defense Corp.,* ASBCA No. 52315, 03-1 BCA ¶ 32,112 at 158,780; *Cubic Defense Sys., Inc.,* ASBCA No. 39859, 91-2 BCA ¶ 23,748 at 118,919-20. DECC's complaint seeks the $128,456.38 that it sought in its initial 11 December 2011 settlement proposal. Because that proposal was never certified, it could not ripen into a claim upon which our jurisdiction can be premised.

DECC contends that the appropriate proposal to consider is not its 11 December 2011 submission, but its subsequent 9 April 2012 proposal for $75,833. It argues that proposal was submitted in the spirit of compromise to comply with its obligation to negotiate a settlement in good faith, and that it is that proposal that ripened into a claim when the parties subsequently encountered an impasse. DECC suggests that because its second proposal was under $100,000, it need not have been certified to become a claim. Upon the proposal's rejection by the CO, DECC says this Board can exercise jurisdiction over an appeal demanding the full $128,456.38 DECC initially sought, even though the proposal was never certified. We disagree.

It is true that, upon a contractor's submission of its termination settlement proposal, it is obligated, along with the government, to attempt to negotiate a settlement. However, when a contractor knows its claim exceeds the CDA certification threshold, it

cannot avoid the certification prerequisite to our jurisdiction because it has offered to accept less than that threshold during the settlement negotiation. In *Consolidated Defense Corp.,* the contractor's termination settlement proposal included $30,852.64 in "pre-contract" costs. After an impasse arose, the CO issued a unilateral determination. On appeal here, the contractor demanded more pre-contract costs, totaling $431,921. *Consolidated Defense*, 03-1 BCA ¶ 32,112 at 158,777-78. In considering whether we could exercise jurisdiction over a demand for more than the CDA certification threshold, arising from a termination settlement proposal seeking less, we applied the *Tecom* standard. We concluded the contractor had not established that the increase was based upon further information not reasonably available to it when it submitted its proposal. *Id.* at 158,780. Accordingly, the portion of the complaint seeking the additional pre-contract costs was dismissed without prejudice to the submission of a certified claim. *See also Mediax Interactive Techs., Inc.,* ASBCA Nos. 43961, 46408, 96-1 BCA ¶ 28,247 (denying a request to amend a complaint to add $981,678 above what was sought in the termination proposal, given that the additional costs were known at the time of the proposal but not sought in the interest of achieving a settlement).

Here, DECC originally submitted a $128,456.38 settlement proposal that exceeded the CDA certification threshold (SOF ¶ 3). During subsequent negotiations, it reduced that proposal below the threshold to $75,833 in the interest of reaching a resolution (SOF ¶¶ 5-6). Upon the failure of that negotiation, it now demands in this appeal the amount it originally sought (SOF ¶ 8). The increase is not because of new information previously unavailable to DECC. DECC is simply seeking the amount to which it always believed it was entitled (SOF ¶ 6). DECC's $75,833 proposal did not ripen into a claim upon which our jurisdiction to entertain this appeal can be based because that proposal did not submit to the CO "the full and certified amount of [DECC's] alleged recoverable...costs." *Consolidated Defense,* 03-1 BCA ¶ 32,112 at 158,780. To recover the $128,456.38 it now seeks, DECC must submit a certified claim for that amount to the CO.[1] *See E.C. Morris & Son, Inc.,* 86-2 BCA ¶ 18,785 at 94,653.

[1] We take no position on whether the result would be different had DECC submitted its proposals on either SF 1435 or 1436, with their required certifications.

CONCLUSION

The appeal is dismissed for lack of jurisdiction, without prejudice to the submittal of a certified claim to the CO.

Dated: 7 November 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

OWEN C. WILSON
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. 58342, Appeal of Development & Evolution Construction Company, rendered in conformance with the Board's Charter.

Dated:

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