ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Duncan Aviation, Inc. | ) | ASBCA No. 58733 |
| | ) | |
| Under Contract No. N00019-06-D-0018 | ) | |

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APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
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OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Duncan Aviation, Inc. (Duncan) seeks $1,568,496.91 for "over and above" costs allegedly incurred in connection with a contract to overhaul landing gear systems for T-34 and T-44 aircraft. The Navy moves to dismiss for lack of jurisdiction, asserting that Duncan has failed to submit a proper claim. Duncan opposes the motion. The contract is subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 1 June 2006, the Navy awarded Duncan a firm fixed-price, indefinite delivery, indefinite quantity contract in the amount of $675,096.56 to overhaul landing gear systems for T-34 and T-44 aircraft (R4, tab 1 at GOV1-8). The performance period was 1 July 2006 through 30 September 2006 with four one-year option periods (*id.* at GOV20).

2. The contract contained the Naval Air Systems Command (NAVAIR) clause 5252.217-9507, OVER AND ABOVE WORK REQUESTS (NAVAIR) (OCT 2005), which provided, in part, as follows:

> (a) These procedures apply when the Contractor identifies needed repairs that are over and above the requirements of the contract and recommends corrective action during contract

performance in accordance with DFARS 252.217-7028, "Over and Above Work."[1]

(b) The Contractor shall prepare and submit the applicable Over and Above Work Request (OAWR) Form...for authorization to proceed. The Contractor shall use the OAWR to describe the over and above work that needs to be performed, including any parts and materials, in such detail as necessary to permit a thorough evaluation. The Contractor shall...justify the total cost by specifying direct hours by labor category, as well as the type, quantity and cost of the material needed to perform the repair or replacement.

(R4, tab 1 at GOV38)

3. The contract incorporated FAR 52.243-1, CHANGES – FIXED-PRICE (AUG 1987) – ALTERNATE II (APR 1984) and FAR 52.233-1, DISPUTES (JUL 2002) – ALTERNATE I (DEC 1991) by reference (R4, tab 1 at GOV47).

4. On 22 February 2007, Duncan submitted its actual overhaul history for 1 July 2006 through 23 January 2007. Duncan stated that the information was based solely on parts and the significant increase in parts replacement above what its experience had been on similar type gear. Duncan also stated that it did not make any adjustments to the labor portion of its quoted firm fixed-price for overhaul. (R4, tab 30 at GOV499, 501-11)

5. By letter dated 15 June 2007, the Navy confirmed that the parties had agreed in principle to treat the following costs as over and above costs: (1) approximately $186,000 in landing gear components that the Navy had not properly stored/preserved while awaiting shipment to Duncan; (2) the cost of repairing parts that had been previously subjected to aggressive maintenance; and (3) the cost of replacing "Tired Iron" (parts that could no longer be repaired) (R4, tab 31 at GOV513).

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[1] DFARS 252.217-7028 was not in the contract. The clause defines over and above work as work discovered during the course of performing overhaul, maintenance, and repair efforts that is (i) within the general scope of the contract; (ii) not covered by the line item(s) for the basic work; and (iii) necessary in order to satisfactorily complete the contract. Subparagraph (b)(1) requires OAWRs to contain data on the type of discrepancy disclosed, the specific location of the discrepancy, and the estimated labor hours and material required to correct the discrepancy. Subparagraph (f) states that failure to agree on the price of an OAWR is a dispute within the meaning of the Disputes clause.

6. On 3 July 2007, Duncan sent the Navy a spreadsheet outlining the over and above costs incurred as of that date (R4, tab 32).

7. On 11 September 2007, Duncan submitted a Request for Equitable Adjustment (REA), in the amount of $1,293,399.84 for over and above costs incurred from 1 July 2006 through 1 August 2007. Duncan estimated that it would incur an additional $329,797.63 in such costs from 1 August 2007 through 30 September 2007 and stated that it would definitize the estimated portion of its REA after 30 September 2007. Duncan did not include any labor costs or markups or fees on the parts or labor for installing the parts. The REA was not certified. (R4, tab 34)

8. On 1 June 2009, Duncan resubmitted its REA, updating it for actual costs incurred from 1 July 2006 until 30 September 2007. The updated REA requested $1,568,496.91 for over and above costs incurred during the base year and option year 1. The REA included a spreadsheet which listed the platform, part number, part names, delivery order, CLIN number, and the number of parts overhauled broken out for FY06 and FY07. The REA did not include any labor or handling fees to install the parts or profit. (R4, tab 36)

9. Duncan attempted to certify its claim on 1 June 2009 (R4, tab 35).

10. On 20 August 2010, the contracting officer (CO) rejected Duncan's 1 June 2009 certification (R4, tab 37). The CO's letter referenced Duncan's "Claim Letter Dated 01 June 2009" and stated, in part, as follows:

> The Government received subject claim on 3 June 2009 and has been reviewing facts and coordinating to prepare the written Contracting Officer's decision.... All claims exceeding $100,000 must be properly certified. Your document met these thresholds; however, [it] was not properly certified.
>
> To be properly certified in accordance with FAR 33.207, a (claim/REA) must: (1) be made in good faith; (2) include supporting data that are accurate and complete to the best of your knowledge and belief; and (3) request the sum which you believe accurately reflects the government's liability. The certification must be signed by an official duly authorized to bind the Contractor with respect to the claim.
>
> ....

> The Decision will be issued after acceptance of contractor certification, technical reviews and legal reviews are complete. A final decision is expected by 17 April 2011.

11. Duncan certified its claim on 25 August 2010 (SOF ¶ 10) (R4, tab 38). No supporting data accompanied the certification. The certification referenced the CO's letter of 20 August 2010 and provided, in part, as follows:

> I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

12. In January and February of 2011, the Navy issued three Requests for Information (RFI) to Duncan in connection with the processing of Duncan's claim:

> RFI CONTROL #: 001 dated 25 January 2011 requested a detailed explanation of how the Quoted Percentage Estimates in Attachments (a) and (b) of [Duncan's] 22 February 2007 letter were developed (R4, tab 39).
>
> RFI CONTROL #: 002 dated 17 February 2011 requested Attachments (a) and (b) of the 22 February 2007 letter in MSEXCEL format with original formulas and any referenced data sets (R4, tab 40).
>
> RFI CONTROL #: 003 dated 25 February 2011 requested a detailed cost breakdown of actual expenses incurred ($1,568,496.91) in MSEXCEL format with applicable formulas (R4, tab 41).

13. The CO did not issue a final decision.

14. On 17 June 2013, Duncan appealed the deemed denial of its claim to this Board. We docketed the appeal as ASBCA No. 58733 on 19 June 2013.

15. On 16 July 2013, the Navy moved to dismiss for lack of jurisdiction. Duncan opposes the motion.

## DECISION

The Navy moves to dismiss the appeal for lack of jurisdiction, alleging that Duncan has failed to submit a proper claim. The Navy argues that Duncan's claim is not proper because: (1) Duncan's 25 August 2010 certification "is a bare certification lacking any information about the claim or amount being certified"; (2) Duncan's 1 June 2009 REA did not request a final decision and was not certified; (3) even if the 25 August 2010 certification and the 1 June 2009 REA are taken together, the Navy argues that the claim is still invalid because Duncan did not seek recovery of all its costs. (Gov't mot. at 7-9) Duncan argues that its 25 August 2010 certification, taken together with the 1 June 2009 REA, is a proper claim, that neither the CDA nor the FAR requires it to seek recovery of all possible costs, and that a request for a final decision was implicit in the communications between the parties.

FAR 2.101 defines a 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...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.

We agree with Duncan that the 1 June 2009 REA and the 25 August 2010 certification, taken together, constitute a proper claim. The 1 June 2009 REA was a written demand for a sum certain as a matter of right. It provided adequate notice of the basis and amount of Duncan's claim and was accompanied by detailed supporting data. Duncan converted the 1 June 2009 REA into a claim on 25 August 2010 by submitting a proper certification. Contrary to the Navy's assertion, the fact that Duncan did not certify its claim until 25 August 2010 did not render the claim invalid. Duncan's 25 August 2010 certification references the CO's letter of 20 August 2010, and the CO's 20 August 2010 letter references Duncan's REA of 1 June 2009. Reading these documents together, we are satisfied that Duncan properly certified its claim. *United States v. General Electric Corp.*, 727 F.2d 1567, 1569 (Fed. Cir. 1984). Although Duncan did not explicitly request a final decision, we are persuaded that such a request was implicit in the communications between Duncan and the CO. *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996). In her letter of 20 August 2010, the CO stated as follows:

> The Government received subject claim on 3 June 2009 [Claim Letter Dated 01 June 2009] and has been reviewing

> facts and coordinating to prepare the written Contracting Officer's decision....
>
> ....
>
> The Decision will be issued after acceptance of contractor certification, technical reviews and legal reviews are complete. A final decision is expected by 17 April 2011.

(SOF ¶ 10)

The Navy's argument that Duncan's claim is not proper because it failed to seek all of the costs to which it was potentially entitled is without merit. We are not aware of any requirement in the CDA or the FAR that a contractor seek all possible costs in a claim in order for this Board to exercise jurisdiction over the claim that is submitted. Duncan addressed this argument as follows:

> The Navy asserts that Duncan's claim is not "proper" because Duncan could have requested additional costs in its claim but did not do so. Duncan, in its REA of June 1, 2009...did not seek reimbursement of direct labor costs, indirect costs, or profit. Duncan decided to only request an equitable adjustment for direct material costs because the vast majority of the costs to which Duncan is entitled are direct material costs. The Navy would have the Board impose a requirement that a claim is only "proper" if it seeks all costs to which the company is entitled in an equitable adjustment. In effect, the Navy is asserting that since Duncan did not ask for reimbursement for all the costs that it was entitled to recover, it is not entitled to recover anything. [Citation omitted]

(App. resp. at 12-13)

We see nothing improper in Duncan's decision to limit its claim to the cost of parts.

## CONCLUSION

The Navy's motion to dismiss is denied.

Dated: 3 December 2013

ELIZABETH A. TUNKS
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

CRAIG S. CLARKE
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. 58733, Appeal of Duncan Aviation, Inc., rendered in conformance with the Board's Charter.

Dated:

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