ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
J & J Maintenance, Inc.	)	ASBCA No. 50984
	)	
Under Contract No. DAHC92-95-C-0085	)	

APPEARANCES FOR THE APPELLANT: Donald E. Barnhill, Esq.
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San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
MAJ David Newsome, JA
Trial Attorney

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

The Government moves to dismiss the above-captioned appeal for lack of jurisdiction on the grounds that the underlying claim submitted to the contracting officer lacked both a sum certain and a Contract Disputes Act (CDA) certification. In addition, the Government asserts that appellant's complaint raises additional matters that were not submitted to the contracting officer for a final decision.

Appellant responds that the requirement for a sum certain was satisfied because the amount in issue was easily calculated from appellant's claim and that the required certification was submitted to the contracting officer at the time the Notice of Appeal was filed.

We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 24 April 1995, the Government awarded a cost plus award fee (CPAF) Contract No. DAHC92-95-C-0085 (contract) to appellant to maintain and repair various military installations in the Republic of Panama. Schedule "A" of this contract, designated "U.S. Army," contemplated a three-month, phase-in period following contract

award, a 12- month base performance period, and four option periods. Schedules "B" and "C" were designated as options for the U.S. Air Force and U.S. Navy, respectively, to be exercised, if at all, by the end of the base period under Schedule A. Schedules B and C contemplated a two-month, phase-in period, a base performance year, and three option periods. (R4, tab 1)

2. The contract solicitation contained six contract line items (CLINs) which were to be proposed by prospective contractors for the base year and each option period under each of the three Schedules. The first four CLIN were: (1) "AA"- services, defined in pertinent part as "labor cost and subcontract costs that are directly related to providing the services;" (2) "AB"- contractor furnished supplies and materials; (3) "AC"- contractor furnished property and equipment; and (4) "AD"- General and Administrative expenses (G&A). The contract designated the labor CLIN AA as "fee bearing" with CLIN AB, AC, and AD as being "non-fee bearing." CLIN "AE" was for a "base fee" and CLIN "AF" was for an "award fee. (R4, tab1)

3. Appellant proposed the "base" and "award" fees CLINs "AE" and "AF" as follows:

> 0002AE BASE FEE 3 % of CLIN 0002AA
>
> 0002AF AWARD FEE 7 % of CLIN 0002AA

Appellant proposed 3% and 7% of the "CLIN 002AA" for the base and award fees, respectively, for each of the base and option periods in Schedules A, B, and C. (R4, tab 1)

4. Clause B.4 of the contract described the base and award fees as follows:

> FEE. Pursuant to Federal Acquisition Regulation (FAR) and Department of Defense FAR Supplement (DFARS), the amount of the base fee shall not exceed three percent of the estimated cost of the contract exclusive of the fee, and the maximum fee (base fee plus award fee) shall not exceed ten (10%) of the contract's estimate [sic] cost, excluding fee.

(R4, tab 1)

5. Amendment No. 0008 of the contract solicitation, incorporated into the contract, stated:

> REF: AMENDEMENT No. 0006, QUESTION No. 56: CLAUSE B.4 FEE. This clause provides guidelines for establishing fee amounts. The maximum base fee is limited to 3% for contract cost, exclusive of fee and G&A expense and the total fee is limited to 10% of contract cost exclusive of fee and G&A. Does this means [sic] that the contractor may bid a higher percentage applied to the fee bearing cost as long as the resultant fee amount remains under the stated maximums (i.e. 3% and 10% total of the contract cost exclusive of fee and G&A)?
>
> A. Yes. Offerors attention is called to the following Federal Acquisition Regulation (FARs): (i) 15.903(d); (ii) 16.301-3, and (iii) 16.404-2.

(R4, tab 1)

6. The contract contemplated that changes in appellant's workload would occur during contract performance. Clause H.50 of the contract provided in this regard:

> a. The workload displayed in this contract will fluctuate during the course of the contract year. Contract workload increases or decreases will not be negotiated more often than quarterly.
>
> b. The Changes clause will be used to make significant changes in services.
>
> c. The base fee and available award fee will not be automatically increased or decreased for each change in workload, but will be negotiated on the basis of the overall effect on the Contractor and the Government.

(R4, tab 1)

7. Technical Exhibit 10, in the "General Notes," stated:

> 3. The Total Estimated Hours and Work Quantities . . . are intended only to give a idea of the possible manpower and scope of work that can be expected in a given year. In no way do they limit the amount of work to be performed under this contract. It is anticipated that the first year of operation will

> be a start up period in which the full scope of work described in the PWS and this Technical Exhibit will not be issued in its entirely [sic]. . . . Full scope is planned to be reached in the first option year. The amount of work issued in the Base Year is anticipated to be approximately 60-80% of the total work described. Significant fluctuations can also be expected in yearly work load . . . .

(R4, tab 22)

8. After award, and during the base year performance period, the contract workload exceeded what was solicited and proposed. The parties negotiated and executed bilateral Modification No. P00029, which incorporated new ceiling rates on the estimated costs for the base year CLINs. The base fee was increased to $94,583.89, which was 2.81% of CLIN "AA." The award fee increased to $220,695.76, which was 6.55% of CLIN "AA." Modification P00029 stated that "[a]ward and base fee only applied to labor was [sic] mutually agreed upon." (R4, tabs 13, 14, 25-29)

9. On 19 June 1996, the Government requested that appellant propose costs for the Schedule A's four option periods, including proposed base and award fees, based on the base year's performance data because of the many changes to the contract during the base year (R4, tabs 15, 16).

10. On 2 July 1996, appellant submitted its proposal to the Government seeking the same 3% and 7% rates for the base and award fees, respectively, but proposing that they be applied to CLINs "AA", "AB" and "AC" rather than just to CLIN "AA" (R4, tab 17). Its proposal stated:

> **Fee Structure** - J&J proposes a base fee of three percent (3%) and an award fee of seven percent (7%). Base and award fee will be applied to labor, subcontract and contractor furnished properties and equipment/other direct costs. Award fee will no [sic] be applied to CLIN AB - Contractor Furnished supplies and materials costs. Base fee is applied to CLIN AB - Contractor Furnished supplies and Materials costs. No fee will be applied to CLIN AD - G&A costs. The percentage of fee proposed is consistent with J&J's original proposal.

An attachment to the proposal calculates the base fee as $232,269.79 and the award fee as $541,962.85 for each of the first three option years and $174,202.34 for the base fee and $406,472.14 for the award fee for the fourth option year (R4, tab 17).

11. On 10 September 1996, appellant submitted a revised proposal, which included a base fee of 5.92% and an award fee of 11 %, both fee percentages to be applied to CLIN "AA" only. Its amended proposal provides:

> **Fee Structure** - J&J proposes a base fee of five point nine two percent (5.92%) and an award fee of eleven percent (11%). Base and award fee will be applied to CLIN AA, only. Our proposed fee structure is in accordance with FAR and your direction provided in your 19 June 1996 request for proposal. No fee will be applied to G&A costs and the fee amount is within the statutory ceilings in FAR 15.903(d), of 10 percent (10%) of the estimated costs, excluding fees.

An attachment to the proposal computes the base fee as $216,185.98 and the award fee as $401,696.91 for each of the first three option years and $162,139.48 for the base fee and $301,272.68 for the award fee for the fourth option year which, while not expressly stated, can be arithmetically computed to be $2,317,060.83 (R4, tab 19).

12. By bilateral Modification No. P00039 dated and executed by the parties on 23 July 1996, the Government exercised the first option year under Schedule A extending the term of the contract from 24 July 1996 through 23 July 1997 with incremental funding of $4,404,000. Appellant in the modification agreed to initiate negotiations with the Government within 14 work days to establish revised estimated costs for all option performance periods pursuant to the Changes clause and contract clause H.50. (R4, tab 18)

13. The parties failed to reach agreement on base fee and award fee.

14. By unilateral Modification No. P00048 dated 28 September 1996, the contracting officer definitized Modification No. P00039 under "FAR 52.243-2 ALT II Changes Cost-Reimbursement" to establish new estimated costs for the first through the fourth option periods under Schedule A, which were lower than appellant's 10 September 1996 proposal. The Government kept the base and award fee percentages at 3% and 7%, respectively, applicable to the services CLIN only. The services CLIN was increased to $3,286,611.10, the base fee was increased to $98,598.33 and the award fee to $230,062.77 for the first option period. Similar adjustments were made for the three remaining option periods. The total increased fee was $1,232,479.13, which was $1,084,581.70 less than appellant had proposed. (R4, tab 20)

15. By a letter dated 8 April 1997 to the contacting officer, appellant protested the contract's limitation of the base and award fees to 10% of the services CLIN rather than

to all of the estimated costs and requested a contracting officer's final decision declaring that the base and award fee be based on total estimated costs and not be limited to the services CLIN (Gov't mot. at tab 1). The letter pointed out that the FAR did not limit the fees to labor costs but permitted the recovery of up to 10% of all estimated costs and contended that the limitation unfairly reduced its profit under the contract due to the greatly increased workload. It did not contain a certification under the CDA.

16. On 6 June 1997, the Government issued a contracting officer's final decision denying appellant's claim (R4, tab 2). The decision pointed out that the contract provision limiting the fees to a percentage of CLIN "AA" did not violate the FAR limitation of a percentage of total costs because CLIN "AA" was less than the FAR maximum. It further pointed out that the contract was competitively awarded based on "best value" without any protests from bidders on how the fees were to be structured.

17. On 2 September 1997, appellant mailed its notice of appeal to the Board, and on or about that date, hand-delivered a copy of that notice to the contracting officer. The notice of appeal included a proper certification of appellant's claim under the CDA, 41 U.S.C. §§ 601-613, as amended. Appellant's 8 April 1997 letter expressly requesting a contracting officer's find decision and marked "Formal Claim" was attachment 6 and its proposal dated 10 September 1996 qualifying the claim was attachment 1 to the notice of appeal. There is no evidence in the record that the Government thereafter issued a contracting officer's final decision.

18. On 5 June 1998, appellant filed its first amended complaint alleging that the Government's refusal to negotiate the appropriate percentages of fees for the base year during the execution of Modification No. P00029 constituted a violation of clause H.50 due to the four-to five-fold increase in the workload during that year. (Complaint at ¶¶ 27-31) Further, the Government's refusal to negotiate the base and award fees for Schedule A's option years, and subsequent application of 3% and 7% to CLIN "AA" only, constituted a violation of FAR 15.901 and FAR 15.905's prohibition of an administrative cap or procedure that created a ceiling on profit, violated the Changes clause and Clause H.50 by failing to equitably adjust the fee. Appellant also asserted that the drastic alteration in work constituted a cardinal change, and was an improper exercise of the option. (Complaint at ¶¶ 43-59) Appellant sought $598,746.49 in its Complaint "based on the same set of operative facts that [had] previously been presented to the contracting officer" in its 10 September 1996 proposal and its 8 April 1997 letter converting its 10 September 1996 proposal into a claim (Complaint at ¶¶ 63-65).

DECISION

The Government argues that the Board lacks jurisdiction over this appeal because appellant (1) filed a monetary claim without stating a sum certain; (2) failed to certify the

claim; and (3) filed a complaint, portions of which had not been the subject of a final decision (Gov't mot. at 1). We address each stated basis for dismissal in turn.

(1) **Failure to State a Sum Certain**

The CDA does not contain specific language defining a "claim." However, FAR 52.233-1 defines a "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 or relating to the contract." Claims in excess of $100,000.00 must be certified. 41 U.S.C. § 605(c); FAR 52.233-1.

The parties' disagreement centers upon whether or not appellant has submitted a "sum certain" to the contracting officer. The Government argues that appellant's 8 April 1997 letter cannot be a proper claim under the CDA because it did not request a sum certain or demand anything as a matter of right as required by FAR 52.233-1. (Gov't mot. at 2-3) Appellant does not dispute that a sum certain is required in this instance, but asserts that the contracting officer was able to reasonably determine the amount of the claim from the information in the 8 April 1997 letter, which amounts have been set forth in appellant's first amended complaint (app. resp. at 3).

Our jurisdiction over contractor claims derives from claims which have been presented to the contracting officer for a final decision. *Trepte Construction Company, Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595; *accord*, *Shams Engineering and Contracting Company/Ramli Co.*, ASBCA No. 50618, 50619, 98-2 BCA ¶ 30,019 at 148,524. While it is true that appellant's 8 April 1997 letter does not state a sum certain, multiple documents may be construed together to form a claim under the statute. *See Blake Construction Co., Inc., v. United States*, 28 Fed. Cl. 672, 681 (1993), *aff'd without op.*, 29 F.3d 645 (Fed. Cir. 1994); *Metric Construction Co. v. United States*, 1 Cl. Ct. 383 (1983). Whether a communication from a contractor constitutes a claim on which the contracting officer is obligated to act depends upon the totality of the contractor's communications. *Dave's Excavation*, ASBCA No. 35533, 88-2 BCA ¶ 20,745; *Fuel Storage Corporation*, ASBCA No. 26994, 83-1 BCA ¶ 16,418.

This dispute commenced when the Government requested that appellant submit an equitable adjustment proposal due to the many contract changes (SOF 9). In response, appellant submitted its 2 July 1996 proposal seeking that the 3% base fee and 7% award fee be applied to all of the cost CLINs rather than just the services CLIN (SOF 10). Appellant then submitted a revised 10 September 1996 proposal seeking a base fee of 5.92% and an award fee of 11% applied solely to the services CLIN (SOF 11). Both these proposals calculated the amount of the award and base fees for all option years which could be arithmetically calculated to be $2,317,060.83 (SOF 10, 11).

The contracting officer rejected appellant's proposal by issuing a unilateral contract modification setting the base fee at 3% and the award fee at 7% of CLIN "AA" only, totaling $1,232,479.13, or $1,084,581.70 less than appellant proposed (SOF 14). Appellant reacted to the rejection of its proposal by requesting a contracting officer's final decision in a letter dated 8 April 1997 (SOF 15). We conclude that appellant presented a properly quantified CDA claim. *Mulunesh Berhe*, ASBCA No. 49681, 96-2 BCA ¶ 28, 339 (amount determined by simple calculation). We turn now to the certification issue.

(2) <u>Failure to Certify</u>

The CDA requires that "all claims by a contractor against the government relating to a contract" "be submitted to the contracting officer for a decision" and that claims exceeding $100,000.00 be certified. 41 U.S.C. § 605. It also requires the contracting officer within 60 days of receipt of a submitted certified claim over $100,000 to either issue a decision or notify the contractor of the time within which a decision will be issued. 41 U.S.C. § 605(c)(2).

On 10 September 1996, appellant submitted an uncertified proposal to the contracting officer seeking a base fee of 5.92% and an award fee of 11% which were both to be applied only to CLIN AA (SOF 11). By a letter dated 8 April 1997, appellant requested a final decision of the contracting officer but still did not certify its claim (SOF 15). The contracting officer issued a final decision denying the uncertified claim on 6 June 1997 (SOF 16). Appellant filed a notice of appeal with this Board on 2 September 1997 (SOF 17).

It is well established that a claim for over $100,000 which is not certified is not a valid claim under the CDA and is a "legal nullity." *Fidelity Construction v. United States*, 700 F.2d 1379, 1384 (Fed. Cir. 1993); *Skelly and Loy v. United States*, 685 F.2d 414 (Ct. Cl. 1982). Without a valid CDA claim, the contracting officer's final decision also was not valid under the CDA and was a "legal nullity." *Skelly and Loy v. United States*, *supra*; *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352 (Ct. Cl. 1982). Thus, no valid appeal was taken under the CDA at that time since there was no valid contracting officer decision from which to appeal.

While the September 1997 notice of appeal was not a valid appeal, a copy of this appeal notice was submitted to the contracting officer (SOF 17). It contained a copy of the 8 April 1997 claim expressly seeking a final decision of the contracting officer and the 10 September 1996 proposal quantifying appellant's claim as well as, for the first time, a proper CDA certification of appellant's 8 April claim (*id.).* This raises the issue as to whether these items constituted a new valid claim under the CDA.

The claim and its CDA certification do not have to be submitted at the same time and a 26 month separation when the underlying data and claim elements had not changed was held to satisfy the CDA. *D. L. Braughler Co. v. West*, 127 F.3d 1476, 1483 (Fed. Cir. 1997). *See also A&J Construction Co.*, IBCA No. 2376-F, 88-2 BCA ¶ 20,525 (letter seeking final decision, separate letter quantifying claim with supporting data, and final letter certifying claim); *IPS Group, Inc.*, ASBCA No. 33182, 87-1 BCA ¶ 19,482 (uncertified claim followed by separate certification). The items at issue include a request for a final decision of the contracting officer, a quantification of the claim, and a CDA certification. We hold that these combined items constituted a new CDA claim.

Of course, the perfection of appellant's claim by a subsequent certification does not revive the final decision of the contracting officer under the CDA since the certification did not precede the issuance of that final decision. *Skelly and Loy v. United States, supra*; *Paul E. Lehman, Inc. v. United States, supra*, *W. H. Mosely Company, Inc. v. United States*, 677 F.2d 850 (Ct. Cl. 1982); *Troup Bothers, Inc. v. United States*, 231 Ct. Cl. 703 (1982). Thus, a new final decision of the contracting officer or a "deemed denial" with respect to the perfected CDA claim is necessary under the CDA before a right to appeal would exist.

Appellant's CDA claim was hand delivered to the contracting officer on 2 September 1997 (SOF 17). Under the CDA, the contracting officer was obligated to either issue a decision or indicate when a decision would be issued within 60 days of 2 September 1997 which was 1 November 1997. 41 U.S.C. § 605(c)(2). The contracting officer apparently still has not issued a final decision or indicated when one would be issued. Thus, we find a "deemed denial" of appellant's CDA claim.

While the notice of appeal filed on 2 September 1997 was premature, filings by both the Government and appellant subsequent to the docketing of this appeal make it clear that both parties are seeking a Board decision on the merits of the claim. A valid CDA claim has been pending with the contracting officer for several years without the issuance of a contracting officer final decision. Under the circumstances, the matter is now considered to be properly before the Board, and we see no useful purpose in dismissing the appeal. *See R.W. Electronics Corp.* ASBCA Nos. 46592, 46662, 95-1 BCA ¶ 27,327 at 136,212; *Western States Management Services, Inc.*, ASBCA No. 34268, 87-2 BCA ¶ 19,852 at 100,441.

(3) <u>Portions of the Complaint have not been submitted to the Contracting Officer for a Final Decision</u>

The Government argues that the appellant's claim addressed only fee determination, and that the complaint's assertions that a drastic alteration in the work

constituted a cardinal change, a violation of the Changes clause, and an improper option exercise must be dismissed because they were never the subject of a claim (Gov't mot. at 5-6). Appellant asserts that the amounts in the complaint arise from the same set of operative facts as presented in the claim (app. resp. at 5).

It is settled that under the CDA, the Board only has jurisdiction over disputes arising from claims which have first been presented to the contracting officer for decision. The determination of whether allegations raised in pleadings before the Board constitute new claims or are merely extensions of claims which the contracting officer had the opportunity to consider turns on whether the matter raised before the Board differs from the essential nature or the basic operative facts of the original claim. The mere introduction of additional facts or the assertion of a new legal theory of recovery, when based upon the same operative facts as included in the original claim, does not constitute a new claim. However, where the proof of the new legal theory of recovery contains operative facts which differ from those asserted in the original claim, the essential nature of the claim has been changed and we do not have jurisdiction over the new claim until it is presented to the contracting officer for decision. *Shams Engineering & Contracting Co./Ramli Co.*, *supra*, 98-2 BCA at 148,525.

Appellant's claim presents two issues for decision: contract interpretation as to the application of the base and award fee percentages to the sum of the CLIN, and contract interpretation as to the base and award fees in light of the dramatic increase in workload in the base year, and the subsequent solicitation by the Government of a proposal to revise the estimated costs for the base and award fees for the option years under Schedule A. The latter issue requires an examination of the scope of work in the contract as contrasted with that during actual performance, of the subsequent modifications to the contract and the parties' response, and of the impact of such changed work scope on the base and award fees.

Appellant's complaint alleges a violation of the changes clause, or alternatively, a cardinal change in that the drastic alternation has effectively required appellant to perform duties materially different than those bargained for, and an improper exercise of options which we conclude constitute new theories that arise out of the same operative facts as presented to the contracting officer in the claim and do not alter the basic fee amounts claimed. (*Id.*)

CONCLUSION

We deny the motion. The parties shall have 30 days from the date of receipt to respond to the Board's request for elections in this appeal, being sent under separate cover.

Dated: 15 February 2000

JOHN I. COLDREN, III
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

DAVID W. JAMES
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. 50984, Appeal of J&J Maintenance, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals