

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
MDP Construction, Inc.) ASBCA Nos. 52769, 52869, 52870
)
Under Contract No. DACA45-98-C-0042)

APPEARANCE FOR THE APPELLANT: Mr. Lawrence W. Luecking
Vice President

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
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U.S. Army Engineer District, Omaha

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

These appeals were taken from the alleged deemed denial of three separate demands for payment filed by appellant, MDP Construction, Inc., for increased costs incurred in performing a U.S. Army Corps of Engineers construction contract. The Government has moved to dismiss the appeals for lack of jurisdiction on the ground that appellant' s payment demands do not qualify as cognizable "claims" pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601 *et seq.* In the alternative, the Government seeks consolidation. We deny the motion to dismiss and consolidate the appeals.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

General

1. On 26 June 1998, the U.S. Army Corps of Engineers (Corps or Government) awarded contract DACA45-98-C-0042 to MDP Construction, Inc. (MDP or appellant). The contract was a firm fixed-price agreement for the construction of a "Close Combat Tactical Trainer" facility at Fort Carson, Colorado. The value of the contract at award was \$6,904,861. The contract included, *inter alia*, the clauses FAR 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997) (Payments clause), which provides for monthly payments to appellant based on estimates of work completed, and FAR 52.233-1 DISPUTES (OCT 1995) (Disputes clause). The Disputes clause provides in relevant part:

A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the [Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended]. The submission may be converted to a claim under the [CDA], by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(R4, tab 3)

2. After performance was underway, MDP identified a problem involving the design of the piping supports and roof joists. Specifically, there was concern as to whether the initial design was adequate to support the weight of pipes that would be used in the plumbing and fire protection systems. (App. supp. R4, tabs A, B, AA, JJ)

3. The parties made several unsuccessful attempts to negotiate a resolution to this issue. Finally, on 15 December 1999, the Corps issued unilateral Modification No. P00041 (“Mod 41”) (R4, tab 37). The modification incorporated various changes to the design of the piping support system, authorized a time extension of 36 days, and increased the contract price by \$412,436 (*id.*). According to the modification, the price increase was intended to compensate MDP for all costs “incurred by the contractor as a consequence of this modification,” including the costs of “labor, materials, equipment, delay, labor inefficiency, and extended field overhead” (*id.*). Subsequently, the Corps amended the price of Mod 41 to \$414,869 (App. supp. R4, tab X).

4. On 17 December 1999, MDP advised the Corps that it would perform the work called for by Mod 41, but that it strongly disagreed with the price of the modification. MDP maintained that the value of the modification was “flagrantly inadequate” to compensate MDP for its costs and for protracted delays to the project. MDP stated that it “will proceed with [the] strict understanding that it will initiate a detailed cost monitoring system and will cease work and wait for direction when all cumulative contract costs of the associated work reach the authorized spending level specified by the Mod.” (R4, tab 41)

5. The Corps responded that “the funding and time issued under Modification P00041 were adequate, fair, and reasonable.” The Government directed MDP to continue performance of the contract, including work that had been added by Mod 41, and warned that MDP might be terminated for default if it refused to do so. The Corps suggested that “[i]f you disagree with the monetary amounts of the modification, your recourse is to [file a] claim under Contract Clause 80, FAR 52.233-1, Disputes.” (R4, tab 50)

6. Beginning in January 2000, MDP began to provide the Corps with monthly invoices of expenditures that had allegedly been incurred in the performance of Mod 41. By letter dated 18 January 2000, MDP alleged that it had incurred direct costs of \$385,023

in performing Mod 41 (R4, tab 64). The Corps approved payment in the amount of \$385,000 for MDP's work under Mod 41 (R4, tab 125).

ASBCA No. 52769

7. On 16 February 2000 MDP submitted a letter enclosing its "NAS Update and Payestimate" for costs from 19 January 2000 through 15 February 2000. The "NAS Update" appears to be an activity schedule with activities sorted a variety of ways, including one showing budgeted and actual costs to date. The "Payestimate" and the letter (hereinafter "invoice no. 21") showed and sought payment for costs to date of \$572,958 for Mod 41. (R4, tab 83) The Corps understood this to be a formal pay request, which it referred to as "pay request No. 21" and "invoice No. 21," seeking an additional payment of \$187,958 for work from 19 January 2000 through 15 February 2000 on Mod 41 (R4, Tab 125).

8. By letter dated 9 March 2000, MDP submitted to the Government a certified claim in the amount of \$187,958. Attached was a Form 93-E titled "Pay Estimate . . . Estimate No: 21 - Partial," and showing, *inter alia*, payment to date for Mod 41 as \$385,000. The letter sought a contracting officer's decision, alleged that the Corps had failed to make complete payment on MDP's invoice no. 21, and advised that:

[I]nasmuch as you have not, within a reasonable time disputed that Invoice, either as to liability or amount, and moreover have not disputed the work as to completeness or quality, MDP Construction, Inc., by copy of this letter, converts that Invoice to a Claim pursuant to the provisions of the CONTRACT DI[S]PUTES ACT

(R4, tab 111)

9. On 6 April 2000, the Government prepared an internal memorandum analyzing MDP's demand for payment under invoice no. 21. The Corps observed that "the contractor indicated a total cost spent to date of \$572,958.00 for Modification No. P00041. Of this amount \$385,000 had been paid previously; thereby indicating a request for payment under invoice No. 21 of \$187,958.00." According to the memorandum, the Corps was of the opinion that MDP's recovery for work under Mod 41 should be limited to a maximum of \$414,869, the total price of the modification. (R4, tab 125) We find the Corps understood the amount at issue and the derivation of the claim.

10. On 9 May 2000, the contracting officer advised MDP that he would not issue a final decision on MDP's letter of 9 March 2000, because he was "unable to determine the exact amount of the claim or the specific basis for it" (R4, tab 134). MDP appealed to this Board on the basis of a deemed denial. We docketed the appeal as ASBCA No. 52769.

ASBCA Nos. 52869 and 52870

11. By letter dated 15 March 2000, MDP submitted a narrative breakdown of costs showing costs to date of \$654,712. The letter shows “Costs Breakdown for Expenses on Mod P00041 for 15 March 2000” on the subject line, but, apparently in error, indicates the costs are through 15 February 2000 in the text. The letter states “[t]he direct amount for this Mod P00041 billed this month is \$654,712, which has been revised on the NAS schedule for this line item.” In addition to these direct costs, MDP contended that it was also entitled to recover at least \$694,089 for unabsorbed home office overhead expenses. MDP indicated that it planned to submit a formal claim for home office overhead at a later time “when all the delays have been stopped by the Corps of Engineers.” (R4, tab 115) By letter to the Corps dated 20 March 2000 appellant referred to an enclosed 15 March 2000 “NAS Update and Payestimate.” Neither are in the record. The narrative listed a change to the NAS Update for Mod 41 increasing the costs to date to \$654,712. (App. supp. R4, tab KK)

12. On 18 April 2000, MDP submitted to the Government a certified claim in the amount of \$51,885. The claim alleged that the Corps had failed to make complete payment on MDP’s invoice no. 22 which, according to the claim letter, was in the Corps’ possession. With the letter was a Form 93-E titled “Pay Estimate . . . Estimate No: 22 - Partial,” and showing the approved amount due to MDP as \$206,413 and Mod 41 total payments to date as \$414,869 (\$412,436 + \$2,433). Although not specifically explained in the claim letter, the amount claimed can be calculated as follows:

\$654,712	(MDP’s alleged direct costs per invoice no. 22)
- \$414,869	(Price of Mod 41)
- <u>\$187,958</u>	(MDP’s first claim)
\$ 51,885	

(R4, tab 130)

13. By letter dated 14 April 2000, subject “Costs Breakdown for Expenses on Mod P00041 for 14 April 2000,” MDP informed the Corps that costs to date for Mod 41 were \$764,816, which had been “billed this month [and] revised on the NAS Schedule for this line item.” In addition to these direct costs, MDP maintained that it was entitled to recover at least \$1,034,969 for unabsorbed home office overhead expenses. MDP indicated that it planned to submit a formal claim for home office overhead at a later time. (R4, tab 128) In a letter dated 16 April 2000 appellant enclosed its “NAS Update and Payestimate” for costs through 16 April 2000. Those items are not in the record. The letter notes an increase in Mod 41 costs to \$764,816. (App. supp. R4, tab MM)

14. By letter of 26 April 2000, MDP submitted to the Government a certified claim in the amount of \$118,150. A Form 93-E showing payment on Mod 41 of \$414,869 was with the claim letter. The claim alleged that the Corps had failed to make complete payment on MDP's invoice no. 23. The claim further stated that MDP had calculated the amount of the claim by deducting amounts already sought in MDP's two prior claims. However, that calculation results in a discrepancy of \$8,046 (\$118,150 - \$110,104):¹

\$764,816	(MDP's alleged direct costs per invoice no. 23)
- \$414,869	(Price of Mod 41)
- \$187,958	(MDP's first claim)
- \$ 51,885	(MDP's second claim)
<u>\$110,104</u>	

(R4, tab 133)

15. By letters of 30 May 2000 appellant filed a claim in the amount of \$17,895 for the Corps' failure to pay invoice no. 24 and \$1,950, related to a "partnering agreement" (R4, tab 137). Neither claim is before us.

16. By letter dated 19 June 2000, the contracting officer advised MDP that he would not issue a final decision on MDP's claims of 18 April 2000, 26 April 2000 and 30 May 2000 (invoice nos. 22 and 23, and the "partnering agreement" claim) (R4, tab 140). The contracting officer explained that, insofar as these claims pertained to alleged costs incurred under Mod 41, "you must consolidate the supporting documents and provide them to me with a final claim amount" (*id.*). MDP appealed to this Board on the basis of a deemed denial with respect to invoice nos. 22 and 23. The appeals were docketed as ASBCA Nos. 52869 and 52870 (R4, tabs 141 and 142).

17. The Corps has moved to dismiss these appeals, contending that we lack jurisdiction because MDP failed to submit proper "claims" to the contracting officer. Alternatively, the Corps requested that the three appeals be consolidated into one single proceeding.

DECISION

Jurisdiction

The Corps contends that MDP's claims do not constitute "sums certain" because "each invoice which Appellant attempts to convert to a claim merely represents a portion of the amount Appellant alleges is due under [Mod 41]." (Motion at 7) In particular, the

¹ The Form 93-E shows a deletion in that amount, but we cannot determine whether it is mere coincidence or relevant to the claim amount.

Corps objects to the fact that MDP repeatedly expressed an intent to submit, at some future time, a sizable claim for unabsorbed home office overhead expenses. (Findings 11 and 13) Since these home office overhead expenses were not yet finalized or quantified, the Corps maintains that none of MDP's allegations pertaining to Mod 41 can properly be considered a "sum" sufficiently "certain" to be a claim. "Only after Appellant provides the Government with a package which sets forth all of the costs allegedly incurred as a result of [Mod 41], will the Contracting Officer be able to prepare a timely final decision on the merits of the claim." (Motion at 6, emphasis in original)

The contract's DISPUTES clause clearly provides for a disputed invoice to be converted to a claim (finding 1). Here, the disputed invoices meet the facial requirements in that clause (findings 8, 12, 14). Under the CDA, there are three criteria for a valid contractor monetary claim: "(1) the contractor must submit the demand in writing to the contracting officer, (2) the contractor must submit the demand as a matter of right, and (3) the demand must include a sum certain." *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995); FAR 33.201. In this case, the Corps contends that MDP's three purported claims do not meet the "sum certain" requirement, and consequently do not constitute proper "claims" within the meaning of the CDA. The *sine qua non* of the Corps' position, as we understand it, is that the "sum" cannot be "certain" so long as work remains to be done on a particular modification - here, Mod 41. While we are not unsympathetic to this position from the standpoint of judicial efficiency,² we must nonetheless reject it. The Corps position is inconsistent with the DISPUTES clause, which

² We suspended proceedings for a time to provide appellant the opportunity to file an omnibus claim, which appellant ultimately declined to do.

specifically provides that unpaid invoices may become claims, and the PAYMENTS clause, under which the contractor is to be paid monthly based on estimates of work completed. Those two clauses combine to make the payment requests at issue claims under the facts in these appeals.

Moreover, all three claims are certified, sought a specific monetary recovery and a contracting officer's decision. The first claim was for \$187,958; the second claim was for \$51,885; and the third claim was for \$118,150. (Findings 8, 12, 14) Thus, each of MDP's claims demands a "sum certain." The dispute over the alleged inadequacy of funds allotted through Mod 41 predates the claims, and the narrative submissions with the invoices all repeat that same theme. We cannot conclude that the Corps did not understand the genesis of the claims, particularly given its analysis of invoice no. 21 and the fact that the Corps unilaterally ordered the work at issue to be performed. While there is a question as to how appellant calculated the claim amount in ASBCA No. 52870, that claim also asserts the right to a sum certain, and we do not think the \$8,046 anomaly between the claim and the underlying invoice is a fatal blow to the status of the 26 April 2000 letter as a claim. We hold that we have jurisdiction over the appeals, and deny the Government's motion.

Consolidation

The Government asks that we stay proceedings until all claims arising from Mod 41 have been filed and consolidate all appeals once all claims have been presented and contracting officer's decisions rendered. We do not believe a stay is warranted at this point. However, each of these appeals arises from work performed on Mod 41 and each is based on the same issue - that performance is more expensive than the \$414,869 price of Mod 41 unilaterally imposed by the Corps. Consolidation of these three appeals is therefore warranted and we grant the Government's motion to that extent.

Dated: 23 March 2001

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

EUNICE W. THOMAS
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. 52769, 52869, and 52870, Appeals of MDP Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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