ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Landmark Construction Corporation	)	ASBCA No. 53139
	)	
Under Contract No. DACA63-94-C-0024	)	

APPEARANCES FOR THE APPELLANT: Herman M. Braude, Esq.
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APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
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Fort Worth

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON RESPONDENT' S MOTION TO DISMISS

Appellant has filed three appeals arising from the captioned contract. Several motions are pending in the appeals. In ASBCA Nos. 52622 and 52623, the Government has moved to strike complaint allegations "concerning the discovery of asbestos containing materials." In ASBCA No. 53139, the Government has moved to dismiss the entire appeal for lack of jurisdiction. Appellant has opposed those motions. Finally, appellant has moved to consolidate ASBCA No. 53139 with ASBCA Nos. 52622 and 52623, which have already been consolidated. We deny the motion to dismiss.[*]

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. On 20 December 1996, appellant filed a certified request for an equitable adjustment (REA) of $1,321,587,28 "for the increased direct costs of demolition and removal due to the increased amounts of hazardous" lead-based paint materials. The request was based upon differing site conditions. There is no mention of a claim for materials containing hazardous asbestos (hereinafter, "asbestos claim"). Appellant

[*] The Government's motions to strike and appellant's motion to consolidate, filed in conjunction with the motion to dismiss, are addressed in a separate order.

requested a response by 4 February 1997, but did not specifically ask for a contracting officer's decision. (R4, tab 109)

2. On 13 March 1997, appellant submitted a "comprehensive" REA for impact costs arising from differing site conditions, "superheated" labor market, and constructive changes. As to differing site conditions, appellant alleged that the Government had failed "to accurately survey site conditions concerning the presence of hazardous substances – asbestos and lead based painted materials." The claim was certified, sought recovery of $5,192,999 and requested a contracting officer's decision. (R4, tab 110)

3. On 30 October 1997, appellant submitted a certified "amended" REA which, according to the submission, was a follow-up to a meeting with the Government held 2 July 1997. The REA amended the 20 December 1996 REA and incorporated it by reference. The request is for alleged additional costs due to an increase in hazardous lead-based paint materials. The amended REA seeks recovery of $3,710,652 and requests a contracting officer's decision. There is no mention of an asbestos claim. (R4, tab 111)

4. On 11 December 1997, appellant filed a second certified "amended" REA which, according to the submission, was also a follow-up to a meeting with the Government held 2 July 1997. This submission included a claim for a "super heated labor market." The amended REA states:

> This request totaling $6,826,602 amends our previous request in the amount of $5,192,999 which was dated and certified on March 13, 1997, a copy of which prior request is incorporated herein by reference, and accordingly, we are reserving our rights for interest effective March 13, 1997.

There is no mention of an asbestos claim. A contracting officer's decision was sought. (R4, tab 110

5. The parties agree that submission of both amended REAs was initiated at the Government's request. (Gov' t mot. at 2; app. resp. at 2) Appellant contends that the original claim was split merely to facilitate negotiations in an attempt to settle the dispute (app. reply at 2, 3, 5). Neither amended REA mentions appellant's earlier asbestos claim.

6. Contracting officer's decisions were issued addressing the amended REAs. On 21 January 2000, the 11 December 1997 superheated labor market claim (finding 4) was denied in its entirety. A 24 January 2000 decision on the 30 October 1997 lead-based paint claim found appellant due a portion of its claim. The contracting officer's decisions only reference appellant's amended claims of 30 October 1997 and 11 December 1997. Neither decision alludes to the "comprehensive" REA appellant submitted on 13 March 1997. (R4, tab 2) No contracting officer's decision was issued in response to the

comprehensive claim (Gov' t mot. at 4). The record does not reveal that the contracting officer ever notified appellant of when a final decision on the comprehensive claim would be issued.

7. On 8 February 2000, appellant timely filed appeals of the two contracting officer's decisions on the superheated labor market and the lead-based paint materials claims. Those appeals were docketed as ASBCA Nos. 52622 and 52623, respectively. On 8 November 2000, appellant filed an appeal, on a deemed denial basis, of the comprehensive claim. That appeal was docketed as ASBCA No. 53139. Accompanying that notice of appeal was a motion to consolidate that appeal with the two earlier appeals.

8. The Government subsequently filed motions to strike those portions of the complaints in ASBCA Nos. 52622 and 52623 which deal with the asbestos claim allegations on the basis that those allegations were not submitted for the contracting officer's consideration in the "amended" claims of 30 October 1997 and 11 December 1997. The Government also filed a motion to dismiss ASBCA No. 53139, alleging the Board lacks jurisdiction to hear the appeal. The basis of that motion is that the "amended" claims "replaced and superseded" appellant's comprehensive claim, so that, in effect, appellant abandoned the asbestos claim. (Gov' t mot. at 5)

9. The complaints in all three appeals contain allegations and monetary claims that overlap substantially.

DECISION

Our jurisdiction derives from the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. In order for a claim to be properly before us, it must have been submitted in writing to the contracting officer for a decision. 41 U.S.C. § 605(a). The burden of proof for jurisdiction falls on appellant. *Do-Well Machine Shop v. United States*, 870 F.2d 637, 639 (Fed. Cir. 1989).

The claims, amended claims, complaints, and final decisions in ASBCA Nos. 52622, 52633 and 53139 combine to create a confusing landscape which is difficult to navigate. The Government's motions, however, are less concerned with clarifying just what it is appellant seeks in each appeal than with removing the asbestos claim from consideration. The Government argues with respect to ASBCA No. 53139 "the contracting officer was not obligated to issue a decision on [the 13 March 1997 claim] because it was replaced and superseded by the amended claims of October 30, 1997, and December 11, 1997." The Government then goes on to move the dismissal of that appeal, which arises from the only claim to specifically raise the issue of a differing site condition based on asbestos. Appellant points out that the comprehensive claim was split into two "amended" claims at the Government's request, allegedly to facilitate settlement, and that the split claims

amended but did not replace the 13 March 1997 claim, which specifically lists undisclosed asbestos as a differing site condition. We agree with appellant on that point.

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. The 13 March 1997 claim met these criteria. That claim was not withdrawn by the amended claim dated 11 December 1997. To the contrary, it was expressly included and expressly sought a contracting officer's decision (finding 4).

Under the terms of the CDA, a contracting officer shall issue a final decision either within 60 days of receipt of a claim over $100,000, or "notify the contractor of the time within which a decision will be issued." 41 U.S.C. § 605(c)(2). If a contracting officer fails to do either one, a contractor is entitled to consider the claim denied and take an appeal in accordance with the CDA. 41 U.S.C. § 605(c)(5); *see also* ASBCA Rule 1(c). For the comprehensive claim docketed as ASBCA No. 53139, the contracting officer neither issued a decision nor informed appellant when a decision would issue. Therefore, appellant was entitled to take a "deemed denial" appeal. We deny respondent's motion to dismiss and take jurisdiction.

Dated: 28 March 2001

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

(Signatures continued)

I concur

I concur

MARK N. STEMPLER
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 No. 53139, Appeal of Landmark Construction Corporation, rendered in conformance with the Board's Charter.

Dated:

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