ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
AEC Corporation, Inc.	)	ASBCA No. 42920
	)	
Under Contract No. N62467-88-C-0646	)	

APPEARANCE FOR THE APPELLANT: Vivian Katsantonis, Esq.
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OPINION BY ADMINISTRATIVE JUDGE LIPMAN
ON THE GOVERNMENT'S MOTION TO DISMISS

Appellant, AEC Corporation, Inc. (AEC), contracted through the Small Business Administration to construct a training center for the Navy. The contract was terminated for default in 1991. On appeal, the Board ruled that the termination was invalid. We found that AEC had not repudiated the contract and that it was entitled to time extensions based on the Government's actions. The Federal Circuit reversed our decision and remanded the matter for further proceedings. Appellant has now requested a schedule for resolution of affirmative claims for Government-caused changes and delays. In response, the Government has moved for dismissal of the appeal arguing that AEC did not file affirmative claims with the contracting officer.[1] As discussed more fully below, the Government's motion to dismiss is granted.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

AEC Contract Performance and Termination

1. In May 1989, the Naval Facilities Engineering Command, Southern Division, contracted with the Small Business Administration (SBA) for construction of a Naval and Marine Corps Reserve Training Center in Miami, Florida. *AEC Corporation*, ASBCA No. 42920, 98-2 BCA ¶ 29,952 at 148,187.[2] The SBA subcontracted the work to AEC at a firm fixed-price of $4,361,631. *Id.*

2. Work on the project had been started by a previous contractor who was terminated for default. Under its contract, AEC was to complete a two-story building, construct a vehicle maintenance training facility, and make various site improvements, including an underground fire line (fire loop). *Id.* Appellant was to start work on 22 June 1989 and to complete work by 19 October 1990. *Id.* at 148,189. The contract provided for liquidated damages at a rate of $2,200 per day for every day that completion was delayed. *Id.* at 148,187.

3. The contract contained the clause DEFAULT (FIXED-PRICE CONSTRUCTION), FAR 52.249-10 (APR 1984). *AEC Corporation*, 98-2 BCA at 148,187. This clause gave the Government the right to terminate the contract if AEC refused or failed to prosecute the work required under the contract so as to insure its completion within the time specified in the contract or if it failed to actually complete the work in that time. FAR 52.249-10(a). It also provided that appellant and its sureties would be liable to the Government for any damage resulting from the default. *Id.*

4. AEC was required to furnish payment and performance bonds. *AEC Corporation*, 98-2 BCA at 148,189. Because the project exceeded appellant's normal bonding capacity, it had some difficulty in obtaining bonds. After the Government issued a cure notice and threatened default, AEC entered into an agreement with Kimmins Contracting Corp. (Kimmins) and Surety Specialists, Inc. (SSI). Kimmins and SSI were to help appellant obtain bonds. Under the agreement, Kimmins was allowed to oversee contract performance, and Kimmins and appellant set up a joint bank account for the deposit of progress payments. AEC also agreed to defend and indemnify Kimmins and SSI from and against all losses, claims, and suits arising out of the bonds or contract performance. *Id.*

5. As a result of the agreement with Kimmins and SSI, Cumberland Casualty & Surety Company (Cumberland) issued performance and payment bonds for the contract work. *Id.* at 148,190. In a separate agreement, AEC agreed that Cumberland had the right to "take possession of any part or all of the work" under appellant's contract with the Government "in the event of any breach, delay or default asserted by the obligee" in the bonds. *Id.* When the Government received the bonds, it withdrew its cure notice and issued Modification No. P00001. *Id.* at 148,191. The modification required that work start by 14 August 1989 and be completed by 12 December 1990. *Id.*

6. The Government was concerned about the pace of appellant's work from the outset. *Id.* at 148,192. AEC experienced problems with its subcontractors and in dealing with Kimmins and Cumberland. *Id.* Over the course of 1990, the Government and appellant corresponded about the schedule for completion of the contract. *Id.* at 148,193-94. The parties met in December 1990. *Id.* at 148,194. Based on the meeting, it was the Government's understanding that contract performance could extend into April 1991. The Resident Officer in Charge of Construction (ROICC) asked AEC to

document any requests for time extensions. Appellant responded to the ROICC's request on 19 December 1990. AEC sent him a "preliminary" list of items to which "time extensions appear to be warranted." In reply, the Government noted a lack of documentation for the time extensions requested. The ROICC also warned appellant that because the original contract completion date had passed, liquidated damages could be assessed. *Id.*

7. On 31 December 1990, the ROICC issued an order requiring AEC to show cause why the contract should not be terminated for default. In a letter dated 22 January 1991, appellant stated that it would prepare a revised CPM schedule and present the analysis in a meeting to be held on 23 January 1991. Mr. George Robinson prepared the schedule analysis for AEC and Kimmins.[3] Mr. Robinson's analysis was sent to the Government on 22 January 1991.[4] In the analysis, he concluded that the Government had caused the contract delay and he forecast completion of the contract on 16 April 1991. AEC requested a time extension to 16 April 1991. *Id.* at 148,194.

8. Mr. Robinson discussed his report at the 23 January 1991 meeting. *Id.* He later testified that the discussion included his opinion that a large part of the time extensions were compensable and that the Government owed AEC between $400,000 and $500,000. He said that about half of that amount was the cost per day for the time period of compensable delay and that the remainder represented direct costs. He said he used an overhead rate of about $1,000 per day "for purposes of discussion." (Tr. 5/371-73) Mr. Kurt Musser, the Resident Engineer in Charge of Construction, testified that Mr. Robinson did not discuss any costs associated with his CPM analysis at the 23 January 1991 meeting and that the only documentation he provided was the CPM schedule and cover letter (tr. 10/140-43). Appellant has not pointed to and we are not aware of any further documentation or support provided by Mr. Robinson. Mr. Musser later testified that he did not remember details of parts of the meeting (tr. 10/178). The Government's contract specialist stated that she did not recall money being discussed at the 23 January 1991 meeting (tr. 7/74). The testimony of AEC's President, Mr. Manuel del Campo, was equivocal on this point (tr. 8/269, 285). The Government asked AEC for documentation in support of the conclusion that the Government had caused the delay. *AEC Corporation*, 98-2 BCA at 148,194.

9. Also at the 23 January 1991 meeting, Cumberland requested that the Government not withhold liquidated damages. *Id.* at 148,195. The ROICC asked for a letter from Cumberland indemnifying AEC. The surety agreed to pay some of appellant's suppliers and subcontractors, and the Government agreed not to assess liquidated damages at that time. *Id.* The Government had withheld $33,000 as liquidated damages from its payment of AEC's Invoice No. 14 in December 1990. That withholding was released in the next payment to appellant in February 1991. In that and the following payments to AEC, the

Government noted that potential liquidated damages were not being held "pursuant to indemnification by Surety." (Gov't resp., exs. 9, 10, 11)

10. By letter dated 31 January 1991, AEC submitted additional information on the fire loop, storefront, and cold water insulation issues which, it said, contributed to the contract delay. It also stated that it would provide more information. *AEC Corporation*, 98-2 BCA at 148,195. In response, the ROICC requested a date by which AEC would provide additional information and said that his office would not respond to the delay issues until all documentation for all issues was received. *Id.* The record does not contain any indication that appellant provided the ROICC with additional information.

11. We have examined the four documents relied upon by appellant to establish jurisdiction: (1) the 19 December 1990 letter from AEC to the ROICC, (2) the 22 January 1991 letter from AEC to the ROICC, (3) the 22 January 1991 letter from AEC to the ROICC transmitting George Robinson's analysis and Mr. Robinson's analysis, and (4) the 31 January 1991 letter from AEC to the ROICC with enclosures (R4, sec. 1, tabs N, S, T, V). None contain a request for a final contracting officer decision. None specify an amount being claimed as monetary compensation. None specify a daily overhead rate, contain any data regarding an overhead rate, or indicate how an overhead rate would be calculated. And, none include the certification required for certain claims by the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(1).

12. In February 1991, the ROICC told AEC that he had decided not to continue termination for default proceedings but that his office would closely monitor appellant's progress. *AEC Corporation*, 98-2 BCA at 148,195-96. The ROICC believed 26 April 1991 to be a realistic completion date. *Id.* at 148,196.

13. AEC continued to have problems in dealing with Kimmins and SSI/Cumberland. Among other things, appellant asserted that Kimmins was interfering with its performance of the contract. SSI alleged that appellant had breached their agreement and threatened to take over the contract. *Id.*

14. On 20 March 1991, the Government issued a cure notice to AEC. The Government complained about the progress of work and the declining number of man-hours used on the job. It said that its earlier decision not to terminate the contract was based on appellant's assurances that it would complete the contract by the end of April 1991. *Id.*

15. In Modification A00032, the Government extended the contract completion date to 22 January 1991. *Id.*

16. On 3 April 1991, appellant responded to the Government's cure notice. *Id.* at 148,197. Appellant asserted that Government-caused changes and delays made an April 1991 completion impossible. AEC also pointed to its problems with Kimmins and

Cumberland. In response, the Government directed appellant to substantiate its "vague" allegations of Government-caused changes and delay by 5 April 1991. The Government also noted that appellant had been ordered to cure its slow work pace. *Id.*

17. AEC responded to the Government's letter on 5 April 1991. Appellant stated that it could not cure the deficiency nor give assurances as to when the project would be completed. *Id.* With regard to its assertion of Government-caused delay, appellant referred the Government to the correspondence sent in anticipation of the 23 January 1991 meeting and said that although some items had been resolved others had not. Appellant specifically mentioned the fire loop issue but said it could not prepare a complete claim package at that time. *Id.* It stated that it reserved its rights and would "formulate a claim position . . . once the full impact of the delay is known." AEC went on to say that it hoped frivolous litigation could be avoided but it needed to reserve its right to pursue a claim "should our negotiations fail." (R4, sec. 2, tab Q)

18. In a separate 5 April 1991 letter to the Government, AEC complained about its inability to obtain funds from its joint bank account with Kimmins and Cumberland. *AEC Corporation*, 98-2 BCA at 148,198.

19. The parties met on 9 April 1991. The ROICC stated that, based on "all known modifications," the contract completion date would be 3 March 1991. He went on to discuss a 7 June 1991 actual completion date. *Id.* Regarding the fire loop issue, the ROICC said that the Government was waiting for a detailed cost breakdown from appellant. *Id.* at 148,199. At the end of the meeting, the Government gave appellant an unsigned show cause letter. AEC received a signed copy on 11 April 1991. The letter said that the Government was considering a termination for default and asked for appellant's response. *Id.*

20. Following the meeting, the ROICC asked Cumberland whether it would complete work on the contract following a termination and Cumberland responded in the affirmative. *Id.* The Government sent Cumberland a draft takeover agreement on 11 April 1991. *Id.* at 148,200. The cover letter stated that it was anticipated that a default termination of AEC would be issued around 20 April 1991. *Id.*

21. In Modification No. A00033, dated 17 April 1991, the contract completion date was extended to 3 March 1991. *Id.* at 148,201

22. On 18 April 1991, the ROICC requested that the contracting officer terminate the contract for default. *Id.* The contracting officer issued a termination for default on 22 April 1991 in Modification No. P00037. *Id.* The modification did not assess liquidated damages against AEC (R4, sec. 2, tab S).

23. AEC responded to the show cause letter on 22 April 1991. *AEC Corporation*, 98-2 BCA at 148,201-02. It referred to its 22 January 1991 letter and subsequent correspondence on the claimed causes of delay. *Id.* at 148,202. The fire loop and storefront issues were identified as the primary reasons for delay. It also said that the Government's refusal to consider compensable delays had had a devastating impact on appellant's financial strength. *Id.*

Completion of the Contract by Cumberland and Its Appeal

24. On 2 May 1991, the Government and the surety, Cumberland, entered into a takeover agreement for completion of the contract. *Id*. at 148,202.

25. Cumberland completed the contract. *AEC Corporation*, ASBCA No. 42920, 95-2 BCA ¶ 27,750. The Government took beneficial occupancy of the Reserve Training Center on 9 October 1991 (Gov't resp., ¶ 2; ex. 4). Cumberland later submitted a claim seeking additional compensation, a time extension, and remission of liquidated damages. The Government claimed 219 days of liquidated damages at $2,200 per day or $481,000. (Gov't resp., ¶ 3) Based on the beneficial occupancy date of 9 October 1991, the Government claimed liquidated damages back to the 3 March 1991 completion date on AEC's contract. The contracting officer denied Cumberland's claims in October 1993 (Gov't resp., ¶ 3; ex. 5). Cumberland appealed the contracting officer's decision to the Court of Federal Claims in June 1994. Among other things, Cumberland argues that it is entitled to the remission of all liquidated damages. (Gov't resp., ¶ 3; ex. 6) The Court of Federal Claims litigation is on-going (Gov't mot. at 5).

AEC's Appeal and Remand from the Federal Circuit

26. AEC filed this appeal of the default termination of its contract on 9 May 1991. *AEC Corporation*, 98-2 BCA ¶ 29,952 at 148,202. The sole issue before the Board was the propriety of the termination for default. *Id.* at 148,187.

27. Cumberland attempted to intervene in this appeal in 1992. We denied the motion. *AEC Corporation*, ASBCA No. 42920, 93-2 BCA ¶ 25,793. We concluded that Cumberland was not asserting a claim against the Government under either the defaulted contract or under the takeover agreement and that the interests of Cumberland and AEC in overturning the default termination were the same. *Id.*

28. At about the same time that this appeal was filed, appellant sued Kimmins, Cumberland, and SSI in state court in Florida. *AEC Corporation*, ASBCA No. 42920, 95-2 BCA ¶ 27,750. The suit was settled in late 1992. *Id.* As part of the settlement, AEC purported to assign its rights in this appeal to Cumberland. *Id.* The Government then filed a motion to dismiss arguing that the attempted assignment violated the anti-assignment statutes. *Id.* We denied the motion in 1995 and we ruled that, although the settlement

agreement violated 31 U.S.C. § 3727, AEC did not forfeit its appeal rights and it could continue to pursue them here. *Id.*

29. The appeal proceeded as a challenge to the propriety of the termination for default. A hearing was held in 1995 which resulted in the Board's decision on the merits. *AEC Corporation*, 98-2 BCA ¶ 29,952.

30. Our decision addressed six items that appellant claimed required time extensions or had otherwise adversely affected its performance. As to the fire loop, storefront, and electrical work issues, we determined that AEC was entitled to time extensions of the contract completion date to 16 May 1991. *Id.* at 148,202-05, 148,208-09. We found that AEC was not entitled to time extensions for the cold water insulation, roof plywood, or floor patching and ceramic tile issues. *Id.* at 148,204-05, 148,208-09. We further decided that appellant had not repudiated the contract. *Id.* at 148,210. Because the time extensions extended the contract completion date beyond the date of the termination for default and because there was no evidence that AEC could not have completed the contract by the new completion date, we found that the termination for default was improper. *Id.* at 148,211. In December 1998, we denied the Government's request for reconsideration. *AEC Corporation*, ASBCA No. 42920, 99-1 BCA ¶ 30,181.

31. The Government appealed our decision to the United States Court of Appeals for the Federal Circuit. The Federal Circuit ruled that AEC had failed to adequately respond to the Government's requests for assurances of timely performance. *Danzig v. AEC Corporation*, 224 F.3d at 1338-39. Appellant's failure was a breach of the contract, and the termination for default was justified on that ground. *Id.* at 1339-40. The court did not address the time extensions granted in our 1998 decisions.

32. Following the Federal Circuit's decision, AEC sent a letter to the Board requesting that we set a briefing and hearing schedule "related to the quantum that AEC is entitled to recover as a result of the Government-caused changes and delays." Shortly thereafter, the Government moved for dismissal of the appeal. A conference call was held with the parties in August 2002, and appellant was requested to submit a summary account of the claims still being asserted and the Government was requested to respond.

33. In its Summary of Claims dated 10 September 2002, appellant says that it is entitled to $663,843.10 as a result of our 1998 decision in this appeal. This total is composed of the following amounts.

Fire Loop Delay (159 days)	$218,354.70
Excavation costs for Fire Loop	20,000.00
Storefront Delay (78 days)	107,117.40
Electrical Work Delay (30 days)	41,199.00
Remission of Liquidated Damages (74 days)	162,800.00

CDA Interest on Liquidated Damages 114,372.00

The three delay claims were calculated using the time extensions granted in our 1998 decision and a daily overhead rate of $1,373.30. Because the time extensions changed the contract completion date to 16 May 1991, appellant asserts that the liquidated damages that have been assessed against Cumberland should be remitted from the original completion date of 3 March 1991 through 16 May 1991 (74 days at $2,200 per day).

34. The Government's motion has been fully briefed and the parties have responded to the request for submissions made in the August 2002 conference call.

DECISION

Appellant has asked the Board to proceed with the adjudication of its affirmative claims for time extensions and costs. Appellant contends that the Federal Circuit's decision did not affect our ruling that AEC should receive time extensions and that we can now rule on how much it is entitled to as a result of the time extensions. The Government has moved for dismissal of the appeal. In essence, it argues that the Board's subject matter jurisdiction was limited to the propriety of the termination for default (which has been decided), that appellant has not submitted any affirmative monetary claims to the contracting officer, and that the contracting officer has not assessed liquidated damages against appellant.

In remanding the *AEC* appeal, the Federal Circuit directed the Board to "address the remaining issues of liability based on our holding that the default termination was valid." *Danzig v. AEC Corporation*, 224 F.3d at 1340. Appellant considers the "remaining issues" to relate to the monetary relief and remission of liquidated damages resulting from the time extensions granted in our 1998 decision. Each of those issues is addressed below.[5]

We agree with appellant that the default termination of its contract does not automatically preclude AEC's ability to pursue affirmative claims under the contract. At the same time, such claims must have been presented to the contracting officer in accordance with the CDA, 41 U.S.C. §§ 601-613. That is a jurisdictional prerequisite to the Board's consideration of the claims. *American Consulting Services, Inc.*, ASBCA No. 52923, 00-2 BCA ¶ 31,084. Because the requirement goes to our jurisdiction, it cannot be waived by the Government or excused by the Board. *See, e.g., The Swanson Group, Inc.*, ASBCA No. 53496, 02-1 BCA ¶ 31,800, and appellant has the burden to demonstrate that the requirement was met. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994) (where the Government makes a factual challenge to jurisdiction, the contractor has the burden to demonstrate facts supporting its jurisdictional contentions.).

The CDA requires a Government contractor seeking redress to submit a written claim to a contracting officer for a final decision. 41 U.S.C. § 605(a). In interpreting the CDA and its implementing regulation on this point, FAR 33.201, the Federal Circuit has identified three requisites for a valid claim: (1) the contractor must submit the demand in writing to the contracting officer; (2) the demand must be made as a matter of right; and, (3) the writing must set out a sum certain. *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1580 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992); *H.L. Smith v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). No particular form is needed except that the "contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987); *H.L. Smith*, 49 F.3d at 1565. In addition, in 1991 claims exceeding $50,000 had to be certified in accordance with 41 U.S.C.A. § 605(c)(1) (1987).[6]

Appellant lists the fire loop, storefront, and electrical work items as extant claims for monetary relief (finding 33). AEC has identified four documents in which, it says, these items were presented to the contracting officer (app. opp. at 13-14; app. summ. at 3-4, exs. 3-6). The documents are a 19 December 1990 AEC letter to the ROICC (app. summ., ex. 3; R4, sec. 1, tab N), a 22 January 1991 AEC letter to the ROICC (app. summ., ex. 4; R4, sec. 1, tab S), the 22 January 1991 George Robinson CPM analysis sent to the ROICC by AEC on the same day (app. summ., ex. 5; R4, sec. 1, tab T), and notes on the items sent to the ROICC by AEC on 31 January 1991 (app. summ., ex. 6; R4, sec. 1, tab V). (Findings 6, 7, 10, 33) We have examined these documents, and we conclude that they do not constitute claims for affirmative monetary relief within the meaning of the CDA.

The documents did not set out a sum certain or otherwise provide enough information for evaluation by the contracting officer (finding 11). The most that can be said is that the documents approximated the number of delay days that appellant thought was appropriate. Even then, however, the initial numbers were "preliminary," they appeared to change between December 1990 and January 1991, and, in the latest document, appellant said that its research was continuing (findings 6, 7, 10). The Government told AEC that it would not respond to the issues appellant had raised until appellant provided all of the documentation for all of AEC's issues (finding 10). Appellant has not pointed to any additional documentation that it provided to the contracting officer, and we see none in the record. In fact, the Government was continuing to request information in April 1991 (finding 16). In addition, the documents relied upon by AEC do not contain an express or implied request for a contracting officer's final decision (finding 11). *Winding Specialists Co., Inc.*, ASBCA No. 37765, 89-2 BCA ¶ 21,737. This is not inconsistent with the indication in appellant's 5 April 1991 letter that it had not yet formulated a claim position and that it was still in negotiations with the Government (finding 17).

Even assuming that AEC's documents could be read to request a specific number of delay days, such a request would not quantify an affirmative money claim. Not only did

appellant not state the total amount it was claiming, it did not specify an overhead rate that could have been used to calculate that number (finding 11).[7] The fact that appellant has now quantified the amount sought and provided the calculation of its overhead rate does not cure its failure to submit a proper claim at the appropriate time. *Logus Manufacturing Company*, ASBCA No. 26436, 82-2 BCA ¶ 16,025.[8]

There is an additional problem with the fire loop and storefront delay "claims." In 1991, the CDA required the certification of claims that exceeded $50,000. 41 U.S.C.A. § 605(c)(1) (1987). As recently quantified, AEC seeks more than $50,000 for the fire loop and storefront items. However, there is no evidence that it certified those items in the documents identified as its claims (finding 11). Thus, even if those items had been the subject of otherwise valid claims, they would have to be dismissed for lack of certification. *James Reedom, dba J&M Electronic*, ASBCA No. 30226, 85-1 BCA ¶ 17,879; *FKW, Incorporated*, ASBCA No. 42834, 92-1 BCA ¶ 24,651.

The fact that appellant asserted, the parties litigated and the Board granted time extensions is of no benefit to AEC. Requests for time extensions under the Default clause may be asserted without a corresponding request for money. We have allowed the assertion of such requests as "nonmonetary" claims. *Skip Kirchdorfer, Inc.*, ASBCA Nos. 40515 *et al.*, 93-3 BCA ¶ 25,899. We have also allowed their assertion as affirmative defenses where they had not been submitted to the contracting officer as claims. *Oni Construction, Inc.*, ASBCA No. 45394, 93-3 BCA ¶ 26,063; *see also E. Huttenbauer & Son, Inc.*, ASBCA No. 44639, 94-2 BCA ¶ 26,903; *Anchor Fabricators, Inc.*, ASBCA No. 40893, 91-3 BCA ¶ 24,231. It was in the latter context that AEC's requests for time extensions were before us and that we decided them.[9] That we did so does not mean that we now have jurisdiction to decide associated monetary claims that were not properly presented to the contracting officer.[10]

Appellant's affirmative money claims must be dismissed. The dismissal is without prejudice to the proper submission of such claims to the contracting officer. It would be premature for us to rule on whether our previous ruling on time extensions would bind the parties under law of the case, collateral estoppel, or some other theory. That issue will undoubtedly arise if AEC submits proper claims from which an appeal is taken.

Appellant also asserts the time extensions granted in our 1998 decision as a defense to a Government claim for liquidated damages. The first problem facing appellant here is that the Government did not assess liquidated damages against AEC under the contract with AEC.

As a general matter, the scope of an appeal is circumscribed by the parameters of the claim, the contracting officer's decision, and the contractor's appeal. The Government did withhold liquidated damages from AEC in December 1990. Based on an agreement with

Cumberland, however, the money withheld was released in the next payment and the Government did not make a further attempt to impose liquidated damages against appellant. (Finding 9) The contracting officer's decision was limited to terminating the contract for default (finding 22). AEC's appeal was limited to challenging the propriety of the termination (finding 26). Apparently in reliance on the agreement with the surety, the Government later assessed liquidated damages against Cumberland for a period of time that included appellant's performance under its contract with the Government. Cumberland appealed the entirety of that assessment to the Court of Federal Claims. (Findings 24, 25)

AEC contends that because of the time extensions granted in our decision on the default termination at least some of the previously assessed liquidated damages should be remitted. The record reflects that the modification terminating the contract for default did not assess liquidated damages and there is no other contracting officer decision under this contract assessing liquidated damages against AEC. Under these circumstances, we lack jurisdiction to consider appellant's remission claim. *Sandonato Construction Corp.*, ASBCA No. 40160, 92-1 BCA ¶ 24,754 at 123,512; *C.T. Builders*, ASBCA No. 51615, 99-1 BCA ¶ 30,319; *Peter Bauwens Bauunternehmung GmbH & Co. KG*, ASBCA No. 44679, 98-1 BCA ¶ 29,551, *aff'd*, 194 F.3d 1338 (Fed. Cir. 1999) (table).

The Government did impose liquidated damages on Cumberland in a decision under Cumberland's takeover contract. That decision is on appeal before the Court of Federal Claims. (Finding 25) AEC argues that we should remit the liquidated damages that were assessed against Cumberland for the time period before the termination of appellant's contract and the takeover by Cumberland. However, appellant has provided no authority under which we could rule on the propriety of the assessment of liquidated damages against an entity not before us, under a contract not before us, and the merits of which are being litigated in another forum. We know of no such authority. The most that we can do is what we have already done – grant the time extensions to which AEC was entitled. The impact of those time extensions on a different contractor and under a different contract must be decided by the tribunal in which that contractor filed its appeal. *Cf. DWS, Inc.*, ASBCA No. 33245, 87-3 BCA ¶ 20,133 (*on reconsid.*); *see also DWS, Inc. v. United States*, 18 Cl. Ct. 453 (1989).

CONCLUSION

Because appellant did not submit an affirmative money claim to the contracting officer, no such claim is before the Board. Because the Government did not assess liquidated damages against appellant, we have no reason or basis to rule on the remission of liquidated damages. Accordingly, there is nothing further for the Board to address, and this appeal is dismissed.

Dated: 20 November 2002

RONALD JAY LIPMAN
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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] The Government also requests that its motion be referred to the Board's Senior Deciding Group. The Chairman has determined that the issues raised by the motion are not of such unusual difficulty, significant precedential importance, or dispute within the normal decision process as to justify referral to the Senior Deciding Group. Accordingly, he has denied the Government's request.

[2] That *AEC* decision was affirmed on reconsideration in *AEC Corporation*, 99-1 BCA ¶ 30,181, and reversed on a narrow legal ground in *Danzig v. AEC Corporation*, 224 F.3d 1333 (Fed. Cir. 2000), *cert. denied sub nom., AEC Corporation v. Pirie*, 532 U.S. 995 (2001). The Federal Circuit's decision did not disturb our factual findings in 98-2 BCA ¶ 29,952.

[3] Mr. Robinson is a scheduling consultant (tr. 5/316-320). His firm was hired by Kimmins to prepare the CPM analysis (tr. 6/629-333).

[4] This document refers to exhibits A through G. The exhibits are not included with the copy of Mr. Robinson's letter in either the Rule 4 file or the attachments to appellant's summary of claims. Some of the exhibits appear to be in hearing exhibit G-9. AEC does not appear to argue that exhibits A through G were a part of its claim.

[5] In the 1998 decision, we granted time extensions on the fire loop, storefront, and electrical work items. We denied time extensions on the cold water insulation, roof plywood, and floor patching / ceramic tile matters. (Finding 30)

[6] Congress changed the threshold amount for certification to $100,000 in 1994. 41 U.S.C.A. § 605(c)(1) (West Supp. 2002).

[7] There is a dispute in the testimony as to whether George Robinson's presentation at the 23 January 1991 meeting included his view of the amount of compensation due appellant (finding 8). Even if we were to find that he did discuss compensation, we could still not find that appellant submitted a money claim. Mr. Robinson's presentation on this issue was oral and, as such, would not satisfy the requirement that a claim be written. *Cf. International Business Investments, Inc.*, ASBCA No. 31076, 85-3 BCA ¶ 18,407 (oral request for a contracting officer decision at a meeting between the parties did not meet the CDA). In addition, Mr. Robinson's statements that appellant was owed between $400,000 and $500,000 and that its overhead rate was "about" $1,000 per day (finding 8) cannot be considered a request for a sum certain. *See Corbett Technology Company, Inc.*, ASBCA No. 47742, 95-1 BCA ¶ 27,587. This is especially true where, as here, Mr. Robinson did not submit any documentation or support for his figures (finding 8).

[8] Although we focus on the purported delay claims, the documents relied upon by AEC also fail, in our view to state an affirmative claim for the fire loop excavation costs. They have the same shortcomings as do the delay items.

[9] As noted above, we do not dispute appellant's contention that it may assert affirmative claims despite the termination of its contract. We are simply saying that such claims must comply with the CDA. We do not read the decisions cited by appellant (app. opp. at 6-7) to be inconsistent with that proposition.

[10] The issue is not, as AEC suggests (app. opp. at 9-10), whether the contracting officer issued a final decision on the affirmative claims but whether the claims were presented to him in the manner required by the CDA.

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. 42920, Appeal of AEC Corporation, Inc., rendered in conformance with the Board's Charter.

Dated:

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