ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Weststar Engineering, Inc.	)	ASBCA No. 52484
	)	
Under Contract No. N44255-93-C-4195	)	

APPEARANCE FOR THE APPELLANT: James G. Ehlers, Esq.
Hecht, Solberg, Robinson & Goldberg, LLP
San Diego, CA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Stephen R. O'Neil, Esq.
Assistant Director

OPINION BY ADMINISTRATIVE JUDGE PAGE

Appellant, Weststar Engineering, Inc., appealed to the Board after the contracting officer failed to issue a decision on its "claim" which requested a final decision "on four issues of contract interpretation and involves no monetary amount" (app. notice of appeal at 1). Subsequently, appellant received a final decision and filed an amended notice of appeal from that decision. The Government has moved that we dismiss the appeal without prejudice because, *inter alia*, appellant's claim is not a valid "request for a declaration of rights" under the Contract Disputes Act (CDA), 41 U.S.C. § 605 (Gov't mot. at 1). For purposes of the motion only, the Government has taken facts stated in appellant's claim letter, which has been designated as its complaint, as true (*Id*.). We do the same.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. The captioned contract, for repainting of a large crane at the Navy's Puget Sound shipyard, was completed approximately nineteen months after the original contract completion date (compl. at 2; *see also* R4, vol. 1, tab 1; vol. 2, tab 16). The fixed-price contract incorporates by reference standard clauses for such contracts, including the Federal Acquisition Regulation (FAR) 52.233-1 DISPUTES (DEC 1991) - ALTERNATE I (DEC 1991) clause and the FAR 52.243-4 CHANGES (AUG 1987) clause. As a result of the delay to completion, the Navy withheld $670,000 in liquidated damages (compl. at 2; *see also* R4, vol. 2, tabs 14, 16).

2. On 11 June 1998, appellant submitted requests for equitable adjustment (REAs), subsequently described as seeking "recovery of the additional labor, equipment and

overhead costs, and profit thereon, incurred by" appellant during the "19-month delay in completion" (SR4, vol. 2, tab 9). In calculating delay costs, Weststar chose not to use its actual equipment costs but adopted instead unit prices taken from rate schedules referred to as the Contractors Equipment Cost Guide, published by Dataquest, Inc. Use of the rate schedules resulted in equipment costs comprising a significant component of appellant's delay claims. For example, in its REA for Environmental Plan Delay (PC 3), the total amount sought was $2,005,641. This included prime contractor extended field overhead of $1,147,581 which partly consisted of equipment costs of $1,055,240, based upon the commercial rate schedules. (R4, vol. 2, tab 9, IV at A and *passim*; R4, tab 29, Fichtelman decl. ¶ 9)

3. The number of REAs raised by Weststar and total amount asserted are variously stated. The Executive Summary of Weststar's 11 June 1998 Request for Equitable Adjustment listed nine "individual requests" and amounts claimed for each. These were: Environmental Plan Delay (PC 3, $2,005,641); Preparation of Costs Proposals Requested by Navy (Resubmittal of PC 6, $29,367); Crane Rotation/Building 839 Roof Restrictions (PC 7, $1,338,813); Environmental Plan Forced Compliance (PC 8, $658,233); Bolt-on versus Weld-on Outrigger Attachment (PC 12, $1,343,745); Clean Southeast Leg and Elevator Shaft (PC 14, $20,071); Clean Substations (PC 15, $25,319); Second Ceiling (PC not yet issued, $112,014); and Loss of Productivity (PC not yet issued, $765,975). The "total amount" for these nine "individual requests" is asserted to be $6,299,124, although the correct sum of the stated amounts is $6,299,178.[1] Two additional alleged delay items were listed in the table of contents, which suggested there were eleven individual requests; however, there were no claimed amounts for either Bird Droppings (PC 11) or Hyster Damage Repair (PC 13) although both were considered in alleged delay. At section IV, the REA's "Cost Summary Sheet" listed ten individual claims, but did not include PC 6. The cost summary sought the slightly different total of $6,279,722. (SR4, vol. 2, tab 9)

4. As stated in the REA Executive Summary, the total amount requested was $6,299,124. Appellant included in its REA a "Certificate of Current Cost/Pricing Data." It did not provide a certification using the terminology of the certification provision in the CDA, 41 U.S.C. § 605(c)(1). All but three of the individual REAs exceeded $100,000. (SR4, vol. 2, tab 9, cost certification) Appellant and the Government subsequently met on 19 June 1998 to discuss the REAs, but did not reach a resolution (Compl. at 2).

5. An audit by the Defense Contract Audit Agency (DCAA) was requested as a prelude to further negotiations. In her request for the audit, the contracting officer (CO) identified several "Pending Changes (PC's)" for which audit assistance was requested. For

[1] In filings associated with the motion, it is stated that appellant seeks approximately $4.2 million (app. resp. at 9). Appellant submitted revisions to its REAs on 14 August 2000 (SR4, vol. 5, tab 10).

four of the "PC's," as well as for "Loss of Productivity," the CO stated, "[E]ntitlement has been realized for each of the above actions." (R4, vol. 2, tab 9)

6. At some point after completion of the audit, the Department of Justice (DOJ), represented by the U.S. Attorney's Office (USAO) for the Southern District of California, began a civil investigation as to whether any portion of appellant's REAs involved fraud. The Navy and appellant effectively ceased any negotiations on the REAs. (Gov't mot. ¶ 3; compl. at 2, 4; *see also* R4, vol. 2, tab 11) Appellant's alleged unilateral use of equipment rate schedules, rather than actual costs, was one of the USAO's concerns. According to the USAO, the use of equipment rate schedules in lieu of actual costs is permitted by FAR 31.105(d)(2)(i)(A) CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS when actual cost data are not available and the contracting agency has directed use of a schedule. The USAO contended Weststar possessed sufficient actual cost data; there had been no agreement with the agency to use a rate schedule; and the claimed amount exceeded the contractor's actual costs by more than 700%. (R4, vol. 2, tab 17)

7. Despite numerous exchanges of correspondence and at least one meeting, appellant and the USAO were not able to resolve those concerns (R4, vol. 2, tabs 11-14, 16-25, 27). Appellant's letter of 29 April 1999 responded to the USAO's contention that Weststar should have used actual costs by advising that those records were incomplete, and did not reflect all its costs. The contractor asserted it could not adequately determine both ownership and operations costs for each piece of equipment from its records, and that this difficulty is recognized by the industry's use of rate schedules which allegedly represent a more reasonable approximation of all costs incurred for contractor-owned equipment. (R4, vol. 2, tab 16)

8. On 30 September 1999, appellant submitted a request for a CO's decision "on certain limited issues of contract interpretation" (R4, vol. 2, tab 29 at 1). Appellant enumerated four issues:

> 1. For a determination by the contracting officer that the cost records of [appellant] are not adequate or complete to prove <u>all</u> of the ownership and operating costs associated with each piece of its owned equipment assigned to the project during the periods of delay and therefore resort to a rate schedule as contemplated in FAR 31.105(d)(2)(i)(A) is permissible to prove such costs.
>
> 2. That in the circumstances of this case, the use of an equipment rate schedule in compiling REAs to prove contractor-owned equipment costs is not, ipso facto,

inappropriate, particularly where, as here, the entitlement to recovery was not conceded.

3. For a declaration by the contracting officer identifying those equipment rate schedules which are, properly applied, acceptable in calculating the costs of contractor-owned equipment.

4. That in the circumstances of this case, the contractor violated no terms of its contract or any applicable cost regulation by presenting its Request for Equitable Adjustment to the Contracting Officer without first seeking permission from the Contracting Officer to use an equipment rate schedule. And, in any event, failure to first seek permission does not preclude the use of an otherwise appropriate equipment rate schedule as contemplated in FAR 31.105(d)(2)(i)(a) [sic].

(R4, vol. 2, tab 29 at 5; *see also* R4, vol. 2, tab 16)

9. On 30 November 1999, the CO issued a decision on the four issues, and found no merit to the contractor's request. As to the first issue, she stated that DCAA's audit had determined that Weststar had adequate records of actual equipment costs; therefore "reliance upon an equipment rate is not appropriate." She continued with respect to the next two issues that use of an equipment rate schedule was "not proper" and would not be "acceptable." As to the fourth issue, the decision acknowledged that use of equipment rate schedules is permitted, and "there is no prohibition against alleging that equipment rates [sic] schedules should be applied"; and that the "mere proposal" to use such schedules does not violate the FAR. The CO stated that appellant's "failure to seek prior concurrence regarding the use of a rate schedule was premature." The contracting officer included a notice of appeal rights. (R4, vol. 2, tab 32 at 2-3)

10. On 2 December 1999, appellant filed its initial notice of appeal, which was docketed as ASBCA No. 52484, and on 8 December 1999, appellant filed its amended notice of appeal. However, appellant has not filed any appeal with respect to the REAs themselves.

DISCUSSION

The jurisdiction of the Board is predicated upon the existence of a valid claim. Under the provisions of the CDA, we have jurisdiction to consider the appeal of a CO's decision relative to a contract. 41 U.S.C. § 607(d). Although the statute does not define "claim," the regulatory definition in FAR 33.201 DEFINITIONS provides in relevant part:

> *Claim*, as used in this subpart, 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 or interpretation of contract terms, or other relief arising under or relating to a contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. 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 and 33.207. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

Hence, a monetary claim must be stated in a sum certain and certified if it exceeds $100,000; otherwise, the Board is without jurisdiction.

Where the gravamen of a claim is money, the contractor cannot avoid the requirement for a sum certain and certification by casting it as a claim for contract interpretation. The Board has "refused to grant declaratory relief where we found the real issue was money." *McDonnell Douglas Corp.*, ASBCA No. 50592, 97-2 BCA ¶ 29,199 at 145,292 citing *Woodington Corp.*, ASBCA No. 37272, 89-2 BCA ¶ 21,602.

The Government contends that Weststar failed to identify either the legal or factual bases for the alleged claim underlying this appeal. It asserts that the facts associated with the REAs are not part of this appeal. The Government's motion argues that what appellant really seeks is not an "interpretation of contract terms," as it never identifies the contract clause to be construed. It maintains that the appeal should be dismissed for failure to state a valid claim for a declaration of rights under the contract. The Government also suggests that we use our discretion to decline to issue the requested declaration of rights because appellant has failed to meet the factors stated in *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271, *reh. den.*, 186 F.3d 1379 (Fed. Cir. 1999), that a tribunal may consider in determining whether to grant declaratory relief. (Gov't mot. at 1, 4-7). The court stated:

> In responding to [a request for declaratory relief], the court or board is free to consider the appropriateness of declaratory relief, including whether the claim involves a live dispute

> between the parties, whether a declaration will resolve that dispute, and whether the legal remedies available to the parties would be adequate to protect the parties' interests.

Appellant vigorously opposes the Government's motion and cites several cases allegedly supporting its position that it merely seeks an interpretation (app. resp. at 5).

None of the cases relied upon by Weststar supports a finding of jurisdiction under the facts presented here. In each case cited by appellant, the dispute centered around the application of a specific contract provision and the dispute could be fully resolved by an interpretation of a contract term or a declaration of contract rights. The present dispute would not be resolved even if we did as appellant asks. At this point in the dispute, appellant has not filed any claim certified using the terminology in the CDA even though it repeatedly refers to its "claim" as being "$4.2 million." (*See*, *e.g.*, app. reply br. at 9, 10; app. amendment to opposition to Gov't reply at 2, 3 (hereinafter "app. am. oppos.")) And although appellant insists otherwise, there has been no concession (or determination) of entitlement.[2]

Appellant urges that since the CO issued a decision, the Government cannot be heard to argue that the appeal should be dismissed (app. reply br. at 3-4). The mere fact that a final decision is issued does not determine whether a matter is properly before us. *Cf*. *Woodington Corp*., ASBCA No. 37272, 89-2 BCA ¶ 21,602 (CO issued final decision in ignorance of monetary claim; appeal dismissed for lack of jurisdiction).

Here it is clear that the gravamen of the claim is money because appellant's so-called interpretative claim simply requests a ruling on how the equipment costs included in the REAs may be calculated. Appellant candidly admits it is trying to avoid presentation of its monetary claim because of the USAO's concerns, that it has not filed a claim with respect to the REAs, as contemplated by the CDA, and that the appeal is not an assertion of entitlement under the REAs previously filed. It characterizes "THE DILEMMA FACING [WESTSTAR]" in its 30 September 1999 request for a final decision as follows:

> The resolution of [Weststar's] various REA's, which total approximately $4.2 million, are stalled because of the investigation by the DOJ. The DOJ has instructed you, the contracting officer, to cease any further negotiations.

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[2] Evidence offered by appellant as proof entitlement has been conceded by the Government is merely a CO's statement in a letter to DCAA (app. reply to Gov't reply at 3; app. am. oppos. at 1-2; R4, vol. 2, tab 9; *see also* finding 5). Under the CDA, even the findings of fact in a CO's final decision are not "binding in any subsequent proceeding." 41 U.S.C. § 605(a); *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994) (*en banc*); *see also* Gov't reply to app. am. oppos. at 1-2.

> Notwithstanding the threat of the DOJ that [Weststar] may have violated the anti-fraud provision of the Contract Disputes Act, that threat is without foundation because no claim as contemplated by the Contract Disputes Act has yet been submitted by [Weststar]. However, [Weststar] cannot afford, and does not intend, to forego the filing of a claim as contemplated by the Contract Disputes Act. But, given the threats of the DOJ, [Weststar] is reluctant to present a claim pursuant to the Contract Disputes Act without first resolving important contract interpretation issues which are fundamental to the concerns of the DOJ and its allegations of possible False Claims Act violations. Primarily the DOJ has questioned the use by [Weststar] of a rate schedule published by Dataquest, Inc. to calculate the costs of its contractor-owned equipment assigned to the project for the period of delay. The DOJ has taken the position that [Weststar] had actual costs which it should have used and did not, that it used a rate schedule without obtaining prior permission from the Department of the Navy and that taken together this constitutes a violation of the False Claims Act.

(R4, vol. 2, tab 29 at 4)

Appellant must, however, comply with the requirements for submission of a monetary claim if it wishes to pursue its rights under the CDA. While the Board has authority to adjudicate claims for certain nonmonetary relief, *Garrett v. General Electric Company*, 987 F.2d 747 (Fed. Cir. 1993), it will not find jurisdiction where appellant attempts to bypass submission of a properly certified claim by carving out a subsidiary quantum issue of whether it may substitute a standard equipment rate for actual costs, cloaking it as a request for contract interpretation. Since we agree that appellant does not seek an interpretation of contract terms, we need not resort to our "discretion to grant declaratory relief only in limited circumstances . . . ." *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999).

To place the matter properly before us, appellant must certify cognizable claims and submit them in writing to the contracting officer for a final decision. 41 U.S.C. §§ 605-607.

DECISION

The appeal is dismissed for lack of jurisdiction.

Dated: 11 February 2002

REBA PAGE
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

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. 52484, Appeal of Weststar Engineering, Inc., rendered in conformance with the Board's Charter.

Dated:

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