ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Eaton Contract Services, Inc.	)	ASBCA Nos. 52888, 53069, 53070
	)	
Under Contract Nos. DACW01-94-C-0185	)	
DACA21-96-C-0009	)	
DACA21-95-C-0165	)	

APPEARANCE FOR THE APPELLANT: Mr. Glen L. Eaton
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE PAGE

Eaton Contract Services, Inc. (ECS) seeks both direct and consequential damages under three contracts, each administered by the Savannah District of the U.S. Army Corps of Engineers. ECS appealed final decisions by the contracting officer (CO) denying a purported claim under each contract. The Board raised *sua sponte* the issue of whether the "claims" underlying the appeals were stated in a sum certain, a jurisdictional prerequisite of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (as amended) and implementing regulations. The parties submitted briefs, and in ASBCA No. 52888 the Government supplemented the record. We do not reach the merits of any of the appeals. We find the claim underlying ASBCA No. 52888 was stated in a sum certain, and the Board does not lack jurisdiction over the appeal on that basis. We dismiss ASBCA Nos. 50369 and 53070 for want of jurisdiction, as the contractor failed in each to state a claim in a sum certain.

STATEMENT OF FACTS
FOR THE PURPOSE OF DETERMINING JURISDICTION

ASBCA No. 52888

ECS was awarded Contract No. DACW01-94-C-0185, CFC Removal and Fume Hood Vent Modifications, Athens, Georgia, on 28 September 1994 by the Mobile District of the U.S. Army Corps of Engineers. The work, described as the replacement of "two 150 ton chillers and manifold all ventures to five large exhaust fans," was to be performed at the U.S. Environmental Protection Agency. The initial contract amount was $408,936, with a performance time of 210 days. (R4, tab 3)

ECS acknowledged receipt of the notice of award on 3 October 1994, and by letter dated 10 October 1994 forwarded its performance and payment bonds to the Government. Contract Modification No. P00001 transferred contract administration to the Savannah District on 25 October 1994. On 15 November 1994, the Government notified the contractor of an error in its bonds, in that the contractor failed to state its name as it appeared on the corporate seal.* Corrected bonds were furnished to the Government on 17 November 1994. The contractor acknowledged receipt of the notice to proceed on 7 December 1994. (Parties' Stipulation of Facts ¶¶ 4-7, 9-11; R4, tabs 3-4, 6)

The contract contained *inter alia* the following standard contract clauses: FAR 52.233-0001 DISPUTES (DEC 1991) and 52.243-0004 CHANGES (AUG 1987) (R4, tab 3).

On 16 February 1998, the contractor submitted a certified "claim" to the CO. Part one alleged, among other things, defective specifications and delays and sought direct damages totaling $145,601. Part two sought "consequential damages" in the amount of $2,088,026 for breach of contract which allegedly was the "proximate result" of the problems described in part one. (R4, tab 5 at 102, 104-05, 120)

Appellant's "Quantum Summary" at page 118 of the 16 February 1998 submission sought an equitable adjustment of $145,601 for part one, plus $2,088,026 in consequential damages in part two for a total of $2,233,627. However, the Board expressed concern over page 119 which stated the discrete cost elements of part one. As presented in the Rule 4

* In responding to the solicitation for Contract No. DACW01-94-C-0185, the contractor listed its name as "Eaton Contract Services." According to ECS's claim in ASBCA No. 52888, the company's bonds were in that name, which differed from the name "Eaton Contract Services, Inc." used on the company's seal. When the company replied to the solicitations for Contract Nos. DACA21-96-C-0009 and DACA21-95-C-0165, it stated its name as "Eaton Contract Services, Inc." There is no dispute that these are the same company. For ease of reference in all three appeals, the company will be referred to as "ECS."

file, page 119 contained several notations made by hand, including different amounts for some of the elements. It was unclear whether these numbers, or those printed on page 118, represented appellant's damages. (R4, tab 5) By subsequent letter, the Government stated that these changes were made by its employee during the review process and were not part of the contractor's submission. The Government furnished copies from appellant's original claim, which did not contain notations and clarified the contractor's intent to assert the amounts stated on the previous page. (Bd. corres. file)

ASBCA No. 53069

The Government awarded Contract No. DACA21-96-C-0009 to Eaton Contract Services, Inc. on 29 December 1995. The purpose of the contract was to "Construct Metal Building SOTF Facility" at Ft. Bragg, NC and the contract was originally in the fixed price amount of $253,901. Although the solicitation listed several options, only the base bid for the metal building was awarded. (R4, tab 3)

Standard contract clauses incorporated by reference included FAR 52.233-1 DISPUTES (MAR 1994); 52.243-4 CHANGES (AUG 1997); and 52.252-2 CLAUSES INCORPORATED BY REFERENCE (JUN 1988). (R4, tab 3)

ECS submitted a certified "claim" dated 6 March 2000, asserting the Government materially had breached the contract. Allegations included defective specifications, delay, and wrongful withholding of progress payments. The contractor asserted the Government was unjustly enriched by ECS's efforts, and that it was entitled to recover under the theory of *quantum meruit*. The contractor sought field and home office overhead, plus interest, in the amount of $117,592. (R4, tab 6)

ECS also alleged material breach of contract by the Government, and sought consequential damages:

> . . . well over $2,000,000. Their apportionment between ECS's three (3) Claims against the Corps is still under study. Their sum-certain, to the fullest extent then known and thus possible of calculation at the time, was asserted in ECS's Claim for DACW01-94-C-0185, CFC Removal and Fume Hood Vent Modification, Athens Georgia. Their proportional part attributable to the Corps' actions as described in the Claim is herewith asserted as included in this Claim exactly as if it were physically included.

(R4, tab 6 at 26-27, underlining in original)

ECS filed an appeal based upon the contracting officer's alleged "deemed denial" of its claim; this was dismissed by the Board as premature as the CO was not afforded a reasonable time to issue a decision. *Eaton Contract Services, Inc.*, ASBCA Nos. 52686, 52796, 00-2 BCA ¶ 31,039. The contracting officer's final decision dated 31 July 2000 denied ECS's request for additional compensation of $117,592 plus "an apportionment of an amount in excess of $2,000,000 for damages related to the contract." The Board docketed ECS's timely notice of appeal as ASBCA No. 53069. (Bd. corres. file)

ASBCA No. 53070

ECS was awarded fixed price contract No. DACA21-95-C-0165, "Construct Training Facility, SOTF Fort Bragg, North Carolina" on 28 September 1995. The base bid for construction of the facility was in the unit price of $213,241; the Government did not exercise either of the contract's two options. (R4, vol. 1, tab 3)

The contract contained the following clauses: DISPUTES (MAR 1994) [FAR 52.333-1]; and CHANGES (AUG 1987) [FAR 52.243-4]. (R4, vol. 1, tab 3 at 00700-78, -104)

The contractor's certified "claim" dated 24 January 2000 raised 30 separate issues including defective specifications, constructive changes, and delay. ECS included a one-page summary of its "quantum calculations - quantum meruit theory of recovery" seeking "project field costs" and "home office G&A" plus profit and interest totaling $155,266. (R4, vol. 2, tab 5)

The contractor also sought "extraordinary business damages" (consequential damages) as follows:

> Accordingly, ECS claims the sum certain of damages in excess of $2,000,000 in consequential damages. The calculation of these damages is not included here yet as they are yet to be reviewed by ECS's accountant and ruling on entitlement is paramount. Therefore they are stated and claimed in the sum certain as above.

(R4, vol. 2, tab 5, at 22)

Although the CO notified the contractor of a date a final decision was anticipated, ECS filed an appeal alleging its "claims" should be "deemed denied." The Board also dismissed this appeal as premature. *Eaton Contract Services, Inc.*, ASBCA Nos. 52686, 52796, 00-2 BCA ¶ 31,039. Subsequently, ECS timely appealed the contracting officer's denial of direct damages of $159,266 and "an apportionment of an amount in excess of $2,00,000 for consequential damages." The appeal was docketed as ASBCA No. 53070. (Bd. corres. file)

DISCUSSION

The issue raised *sua sponte* by the Board is whether each of the underlying "claims" failed to state a sum certain, thereby depriving the Board of jurisdiction. In ASBCA No. 52888, the claim provided by the Government in the Rule 4 file contained a quantum summary with notations indicating amounts other than those sought in the claim narrative; this brought into question which amount was correct, and whether a fixed, sum certain was asserted. The "claims" underlying ASBCA Nos. 53069 and 53070 sought direct costs in a stated amount associated with each contract, plus a nonspecified portion of consequential damages in excess of $2,000,000 allegedly arising from the Government's breach of all three contracts.

Positions of the Parties

After supplementing the record with an unaltered copy of ECS's original claim, the Government concedes that ASBCA No. 52888 is stated in a sum certain. However, it contends that the Board is without jurisdiction over ASBCA Nos. 53069 and 53070 because ECS failed to state a sum certain in the underlying claims.

ECS makes several arguments in support of a finding of jurisdiction. As we understand these, they generally may be categorized as follows: (1) it was impossible for the contractor to state the claims in a sum certain; (2) appellant substantially complied with legal requirements; (3) the Board has jurisdiction over claims for "other relief;" (4) a sum certain can be found where it can be mathematically calculated; and (5) appellant's claims construed together comprise a consolidated claim establishing jurisdiction.

Jurisdiction

Jurisdiction is a matter over which the Board lacks discretion, as "jurisdiction is an absolute concept; it either exists or it does not." *McDonnell Aircraft Co.*, ASBCA No. 37346, 96-1 BCA ¶ 28,164 at 140,573 citing *Universal Canvas, Inc. v. Stone*, 975 F.2d 847, 850 (Fed. Cir. 1992); *see also UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1022 (Fed. Cir. 1992), *aff'd sub nom. Keene Corp. v. United States*, 508 U.S. 200 (1993). The burden of proving jurisdiction is on appellant as the party seeking the exercise of jurisdiction in its favor. *McNutt v. General Motors Acceptance Corp. of Indiana, Inc.*, 298 U.S. 178, 189 (1936); *United States v. Newport News Shipbuilding and Dry Dock Co.*, 933 F.2d 996, 999 (Fed. Cir. 1991); *Landmark Constr. Corp.*, ASBCA No. 53139, 01-1 BCA ¶ 31,372 at 154,908. The Board may raise the issue of jurisdiction at any time. *Eng'g Tech. Consultants, S.A.*, ASBCA Nos. 43374 *et seq*., 92-3 BCA ¶ 25,099; Board Rule 5(a).

The Board's jurisdiction as to these appeals, if any, is derived from the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-13, as amended. The Board is without jurisdiction if the contractor does not submit a cognizable claim under the CDA, and the appeal must be dismissed. *D.L. Braughler Co., Inc. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (*en banc*); *J&J Maint., Inc.*, ASBCA No. 50984, 00-1 BCA ¶ 30,784; *Trepte Constr. Co., Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595. Jurisdiction will be determined by examining the "claim" as it was submitted to the contracting officer, not by subsequent correspondence with the Board. *TRESP Assoc., Inc.*, ASBCA No. 53702, 02-2 BCA ¶ 31,889 at 157,580; *Morgan & Son Earthmoving, Inc.*, ASBCA No. 53524, 02-2 BCA ¶ 31,874 at 157,482; *Hibbits Constr. Co.*, ASBCA No. 35224, 88-1 BCA ¶ 20,505 at 103,673. Furthermore, even if the CO purports to make a final decision, that decision is null if there is no cognizable claim. *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981).

The CDA and its implementing regulations require claims for the payment of money to be submitted to the CO in a sum certain. 41 U.S.C. § 605(a); FAR 33.201; *Essex Electro Eng'rs, Inc. v. United States*, 960 F.2d 1576, 1581-82 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992). The legislative history shows the purpose to be so "[G]overnment representatives can readily examine and evaluate" contractor claims; otherwise "there is no sound basis for evaluation, negotiation or legal claim settlement." *Newell Clothing Co.*, ASBCA No. 24482, 80-2 BCA ¶ 14,774 at 72,917-19 citing H.R. Rep. No. 95-1118, 95th Cong., 2d Sess. Final and fair resolution of a claim is the goal. Under the rubric of the CDA and FAR, a claim stating a sum certain which is fully settled precludes the contractor from taking an appeal under the doctrine of accord and satisfaction. *Metric Constr. Co., Inc. v. United States*, 14 Cl. Ct. 177, 179 (1988). A claim may contain an estimate of anticipated costs, as long as it includes a sum certain for the overall demand. *Manhattan Constr. Co.*, ASBCA No. 52432, 00-2 BCA ¶ 31,091 at 153,521. The contractor must provide the contracting officer with "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). While a contractor may later change the amount sought, a new claim cannot be presented for the first time upon appeal. *See J.F. Shea Co., Inc. v. United States*, 4 Cl. Ct. 46, 54 (1983) citing *Aden Music Co.*, ASBCA No. 26361, 82-1 BCA ¶ 15,723.

The failure to meet jurisdictional requirements remains even if, as here, the "claims" contain one component (direct costs) which were stated in a sum certain but the overall "claim" is not. We will not entertain that portion of a claim stated in a fixed amount and discard the remainder, as an "entire claim is in a sum certain, or it is not." *Manhattan Constr. Co.*, ASBCA No. 52432, 00-2 BCA ¶ 31,091 at 153,521. Use of qualifying language in stating the amount sought defeats the submission of a valid claim, as it fails to state a sum certain and renders any required certification invalid. *Eastern Car Constr. Co.*, ASBCA No. 30955, 86-2 BCA ¶ 18,909 at 95,365.

Analysis of Appellant's Arguments

1. It Was Impossible for the Contractor to State the Claims in a Sum Certain

ECS asserts it was unable unilaterally to allocate the consequential damages among the three claims in a sum certain, as "proper allocation is not possible mathematically" and to have done so "would have placed it in jeopardy of the False Claims Act." (App. initial br. at 2)

Appellant's argument that it need not state a sum certain because it did not know that amount ignores its legal obligations addressed above, as well as the contracts' DISPUTES clauses. Information on the measure of costs incurred, or damages suffered, is within the purview of the contractor, which must make a good faith demand accordingly. In the "claim" underlying ASBCA No. 53069, ECS sought direct damages in a fixed amount. Although the contractor made a present demand for consequential damages, no amount was specified, just that it exceeded $2,000,000, nor was a total stated for the overall claim; ECS only advised it would later seek some unapportioned part of the consequential damages sought in all three claims. The claim in ASBCA No. 53070 is similarly provisory, where the contractor seeks "in excess of $2,000,000 in consequential damages" and advised only that "the calculation of these damages is not included here yet as they are yet to be reviewed by ECS's accountant." The contractor's use of equivocating language in asserting the amount sought renders a claim invalid for failure to state a sum certain. For example, claims which seek recovery "in excess of" a particular amount do not satisfy the requirement for a sum certain, nor do those claiming "an unspecified amount but anticipated to be in excess of" a noted sum. *Godwin Equip., Inc.*, ASBCA No. 53462, 02-1 BCA ¶ 31,674 and citations therein. Use of such qualifying language does not satisfy the requirement for a sum certain, and deprives the CO of the opportunity for meaningful consideration. *Metric Constr. Co., Inc. v. United States*, 14 Cl. Ct. 177, 179 (1988); *Godwin Equip., Inc.*, ASBCA No. 53462, 02-1 BCA ¶ 31,674; *Corbett Tech. Co., Inc.*, ASBCA No. 47742, 95-1 BCA ¶ 27,587; *Rohr, Inc.*, ASBCA No. 44773, 93-2 BCA ¶ 25,787; *Harnischfeger Corp.*, ASBCA Nos. 23918, 24733, 80-2 BCA ¶ 14,541. The manner in which ECS framed its "claims" in ASBCA Nos. 53069 and 53070 does not meet the requirement of a sum certain, and the contractor's fear of potentially fraudulent claims does not excuse that failure.

2. Appellant Substantially Complied with Legal Requirements

ECS argues that it is sufficient to be in substantial compliance with legal requirements, contending that "no stated claim amount (sum certain) was required" and that "some elements specifically mentioned in the CDA can be absent." (App. final br. at 14-15). In support of its "substantial compliance argument," appellant relies upon *Transamerica Ins. Corp., Inc. v. United States*, 973 F.2d 1572, 1580 (Fed. Cir. 1992) (certification of a claim does not require particular language), which cites *United States v.*

Gen. Elec. Corp., 727 F.2d 1567, 1569 (Fed. Cir. 1984) (unlike a claim, a claim certification need not state a sum certain). These cases are inapposite as they dealt with claim certification, a different claim requirement, and do not advance appellant's argument that the claim need not state a sum certain.

Appellant also cites *Raven Indus., Inc. v. Kelso*, 62 F.3d 1433 (Fed. Cir. 1995) (table) for the proposition that failure to state a claim in a sum certain may be remedied by including that information in other documents, or in subsequent submissions to the Board (app. final br. at 16). However, that decision may be distinguished from the instant appeals, as the Court decided only that the sum certain stated in the claim need not previously have been disputed by the parties. *See Raven Indus., Inc. v. Kelso*, No. 93-1374, 1995 WL 45309 (Fed. Cir. Jul. 31, 1995); *rev'g Raven Indus., Inc.*, ASBCA Nos. 44048, 44049, 93-3 BCA ¶ 26,031. Even if the Court's decision had been on point (which it was not), the unpublished decision is without precedential value. Fed. Cir. R. 47.6, Fed. Cir. R. App. V, IOP 9.

3. The Board Has Jurisdiction Over Claims for "Other Relief"

ECS contends the Board has jurisdiction over its "claims" because it sought "other relief," *i.e.*, "entitlement to apportionment of the special damages between [sic] the three contract claims" (app. final br. at 12-13). ECS relied upon *William D. Euille & Assoc., Inc. v. General Services Administration*, GSBCA No. 15261, 00-1 BCA ¶ 30,910, which found jurisdiction over a nonmonetary claim for contract interpretation. We agree the Board has jurisdiction over certain nonmonetary claims. *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 749-51 (Fed. Cir. 1993). That does not mean we have jurisdiction over ASBCA Nos. 53069 and 53070 as the facts do not support that conclusion. *Cf. Westinghouse Elec. Corp.*, ASBCA No. 47868, 95-1 BCA ¶ 27,364 at 136,355 (citing examples of qualified nonmonetary claims). Where the gravamen of the claim is money, the contractor cannot avoid the requirement for a sum certain and attempt to avoid the ramifications of certifying a false claim by casting its claim as one for the interpretation of contract terms or other relief. *Weststar Eng'g, Inc.*, ASBCA No. 52484, 02-1 BCA ¶ 31,759 at 156,851 citing *McDonnell Douglas Corp.*, ASBCA No. 50592, 97-2 BCA ¶ 29,199 and *Woodington Corp.*, ASBCA No. 37292, 89-2 BCA ¶ 21,602. The Board consistently has rejected attempts to cloak a monetary claim as a request for contract interpretation. *Int'l Creative and Training, Ltd.*, ASBCA No. 42833, 93-3 BCA ¶ 26,009. We assess the primary purpose of a claim on a case by case basis after reviewing correspondence between the parties. *Holmes & Narver, Inc.*, ASBCA No. 51430, 99-1 BCA ¶ 30,131 at 149,054. The remedy sought in ASBCA Nos. 53069 and 53070 is monetary, seeking both direct costs and consequential damages for alleged breach. Despite a general request for "other relief," appellant's failure to state a sum certain deprives the Board of jurisdiction over ASBCA Nos. 53069 and 53070.

4. A Sum Certain Has Been Found Where It Can be Mathematically Calculated

Appellant cites *Hamza v. United States*, 31 Fed. Cl. 315, 322 (1994), for the proposition that the requirement of a sum certain "is satisfied when the amount in dispute can be determined by a simple mathematical calculation." While we agree generally with that premise, *Mohammad Darwish Ghabban Est.*, ASBCA No. 51994, 00-2 BCA ¶ 31,114, appellant has not provided a formula in the "claims" by which we could do so for ASBCA Nos. 53069 and 53070. ECS states that a sum certain allocation of consequential damages sought in ASBCA No. 52888 could be "made by anyone" in a number of different ways, such as dividing the total damages into thirds, or allocating damages based on contract price or contract performance duration. (App. initial br. at 3) None of these theoretical allocation methods were presented in the "claims" nor was any information provided that would permit a simple calculation; even appellant acknowledged that "[p]roper allocation is not possible mathematically." (*Id*. at 2) In any event, allocating the damages in ASBCA No. 52888 would not resolve the uncertainty created by the wording of the "claims" in ASBCA Nos. 53069 and 53070.

5. Appellant's Claims Construed Together Comprise a Consolidated Claim Establishing Jurisdiction

ECS argues that construing appellant's multiple documents (including the three "claims") together clearly constitutes a "consolidated proper claim, in a sum certain, meeting the jurisdictional requirement under the CDA statute" and that only the "three separate allocations of the sum certain were not provided" (app. final br. at 3, 10; emphasis in original). This suggests that ECS intended a consolidated claim spanning multiple contracts, undifferentiated with respect to the consequential damages sought. While jurisdiction may be found over a claim relating to more than one contract, we first determine whether the submissions to the contracting officer met the requisites of a claim. *Harbert Int'l, Inc.*, ASBCA No. 44873, 97-1 BCA ¶ 28,719, *aff'd on recon*., 97-2 BCA ¶ 29,234. Even reading all claims together, there is no evidence ECS intended or ever submitted to the CO a proper consolidated claim in a sum certain over which we have jurisdiction. On the contrary, appellant's claims in ASBCA Nos. 53069 and 53070 stated that the sum certain in ASBCA No. 52888 was valid as of the date of that claim, and that the damages were currently "well over $2,000,000" or in the course of being reviewed. Appellant's argument is unpersuasive and does not support a finding of jurisdiction.

CONCLUSION

In ASBCA No. 52888, ECS properly stated its claim in a sum certain, and the Board is not deprived of jurisdiction on that basis. Neither ASBCA No. 53069 nor ASBCA No. 53070 met legal and contractual requirements that the underlying "claims" be stated in a sum certain. We cannot bestow jurisdiction where there is none. We have considered all arguments advanced by appellant in the latter appeals and find these to be without merit.

ASBCA Nos. 53069 and 53070 are dismissed for lack of jurisdiction; these dismissals are without prejudice to the filing of proper claims and subsequent appeals.

Dated: 9 October 2002

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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 Nos. 52888, 53069 and 53070, Appeals of Eaton Contract Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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