ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| ACEquip Ltd. | ) | ASBCA No. 53479 |
| | ) | |
| Under Contract No. F33600-99-C-0081 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE ROME
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant has timely moved for reconsideration of that portion of our decision in *ACEquip, Ltd.*, 02-2 BCA ¶ 31,978, that granted the Government's motion to strike paragraphs 92, 125-145 and the last paragraph of page 30 of the complaint on the ground that we lack jurisdiction over issues pertaining to liquidated damages because the Government has not yet asserted a claim for them. Appellant alleges that the Board did not have before it for consideration appellant's 19 December 2000 letter to the contracting officer (CO), said to "contes[t] the assessment of liquidated damages based upon a claim of entitlement to an equitable adjustment to the period of performance" (mot. at 1). Appellant contends that the CO failed to respond directly to its claim, such that the continued assessment of liquidated damages might be a deemed denial, but it also alleges that the CO "clearly denied" its claim in his final decision terminating its contract (mot. at 2). Appellant states that it contested the termination and the assessment of liquidated damages, and reasserted its claim for an equitable adjustment, in its 5 July 2001 letter to the CO, prior to appealing to the Board when the CO declined to reconsider. Appellant also appears to contend that, in addition to a claim for an equitable adjustment to the contract's performance period, it filed other claims under the Contract Disputes Act (CDA), 41 U.S.C. § 605(a), that bear upon the legitimacy of the Government's assessment of liquidated damages, and that the subject appeal is not only from the CO's assertion of Government claims in his final decision, but is also from his denial of appellant's affirmative claims (mot. at 3).

The Government responds that appellant's motion is not based upon newly discovered evidence or legal theories that the Board failed to consider; appellant continues to disregard that the Government has not attempted to collect liquidated damages; appellant did not previously suggest that its 19 December 2000 letter contained an affirmative contractor claim over which the Board has jurisdiction; the CO has not issued a final decision regarding the letter; and appellant did not file a notice of appeal citing it.

Appellant is correct that the Board did not consider its 19 December 2000 letter. Neither party had cited it and, through an administrative error, the Government's supplement to the Rule 4 file, which contained the letter, had not reached the presiding judge by the time of the Board's decision. Accordingly, although it was appellant's obligation to direct the Board to any material it wished it to consider, we augment the factual statement in our prior decision to include the letter. Moreover, because we are to satisfy ourselves as to the scope of our jurisdiction in this appeal, *see, e.g., Fanning, Phillips and Molnar v. West*, 160 F.3d 717, 720 (Fed. Cir. 1998), we also expand upon our factual statement to include other matters relevant to appellant's new contention that it submitted affirmative claims to the CO that would preclude the assessment of liquidated damages; that the claims were denied; and that appellant has appealed that denial to the Board.

STATEMENT OF ADDITIONAL FACTS FOR PURPOSES OF GOVERNMENT'S MOTION TO STRIKE AND ASCERTAINING SCOPE OF BOARD'S JURISDICTION

Commencing in the spring of 2000, when it first raised the prospect, culminating in a specific request dated 2 November 2000, and continuing thereafter, appellant sought a contract modification based upon alleged differing site conditions or contract change requiring that it provide a pile foundation for a pallet storage canopy at Kadena Air Base, Okinawa, Japan, rather than a spread foundation. Appellant alleged delays and increased costs but, despite requests from the CO for impact and cost information, it did not specify the extent of the delay or the amount of the increased costs. (*See, e.g*., R4, tabs 47, 52-53, 56-58, 61-64, 66-68.) Appellant did not submit any claim certification, required by the CDA for contractor claims in excess of $100,000 (*see* 41 U.S.C. § 605(c)(1)).

By letter to the CO dated 17 November 2000, appellant requested a modification adding $12,960 to the contract and extending it by 135 days, based upon alleged additional time and cost incurred in validating new soil boring sample results. Appellant also noted its pending request for a contract modification to allow for a pile foundation. (R4, tab 70)

Beginning in October 2000, the CO wrote to appellant about the prospect of liquidated damages should the site access date pass without appellant's starting work, and subsequently wrote several times that they were being assessed. *ACEquip., id.* at 158,018. In addition to referring to liquidated damages in his 29 November 2000 memorandum to appellant (*id*.), the CO stated that "we have reviewed the information you

submitted and do not find sufficient evidence to support your request for a modification to the contract based on a differing site condition." He did not describe the memorandum as a final decision and did not include appeal rights. (R4, tab 71 at 2) In his 1 December 2000 memorandum to appellant, which again noted liquidated damages (*ACEquip, id.*), the CO denied appellant's request for a contract modification for $12,960 and a 135-day time extension. He did not characterize the memorandum as a final decision and did not include appeal rights. (R4, tab 74)

By letter dated 19 December 2000 to the CO, appellant responded to the CO's 29 November and 1 December 2000 memoranda. Appellant requested reconsideration of the CO's denial of its requests for a modification concerning the pallet foundation; for the alleged additional time and cost of its soil borings research; and for relief from liquidated damages. (R4, tab 127)

By memorandum dated 30 January 2001, the CO replied to appellant's 19 December 2000 letter, stating:

> 1. Your letter did not provide any additional documentation which would support your claim of a differing site condition . . . . Therefore, our position denying your claim remains unchanged.
>
> . . . .
>
> 5. You've requested relief from the liquidated damages for failure to start on-site work 23 Oct 00 (site access) as well as a 135-day extension and $12,960.00 for the time and cost to analyze/validate the new soil boring samples. In our opinion, the delays and costs incurred are of your own making. . . .
>
> . . . .
>
> 7. In summary, you have not provided any additional information that supports a differing site condition or an extension with additional funds for soil boring analysis. Therefore, our position denying both requests remains unchanged.

(R4, tab 83) The CO did not describe the memorandum as a final decision or include appeal rights.

In addition to challenging the Government's assessment of liquidated damages and requesting an appeal in the event the CO did not reconsider, appellant's 7 February 2001

reply to the CO's 30 January 2001 memorandum (*ACEquip, id.*) stated that appellant had asked its subcontractor, American Engineering Corporation (AEC), to submit additional support for a contract modification calling for a pile foundation and that "the issue of appropriate foundation has been the predominant factor for concerns, disputes and delays among all parties." Appellant requested that the CO "reconsider your prior responses/determinations and/or that we be provided with the opportunity to appeal any negative determinations." (R4, tab 87 at 2/7/01 letter at 3)

On 15 March 2001, appellant issued a monthly report to the CO which stated that, at a 22 February 2001 meeting with the CO, it had been agreed that appellant, in consultation with AEC, would submit a proposal to the Air Force that would "address the problems surrounding delays and Liquidated Damages, cost for piles foundation and effects on schedule" (R4, tab 99 at 2). We have not been directed to, or located, any such proposal in the record.

The CO's 30 March 2001 Show Cause notice (*ACEquip, id.*) gave appellant the opportunity to demonstrate whether its failure to perform arose from causes beyond its control and without its fault or negligence (R4, tab 104). In addition to continuing to dispute liquidated damages, appellant's 24 April 2001 response to the notice (*ACEquip, id.*) stated that AEC was concerned:

> . . . about the additional costs to it in providing a different foundation as well as the liquidated damages resulting from the length of time it has taken to verify the type of foundation required and to seek additional funds from the USAF for such additional costs.
>
> . . . .
>
> In the event that AEC (or its replacement) can justify to the USAF that an "appropriate" foundation requires a change or modification to the contract, we would ask that the USAF revise the contract price to fund the change in foundation. Even if a contractual change were not approved by the USAF, we have proposed a method for all parties to share in the extra foundation cost in an effort to advance the overall completion of this project.

(R4, tab 110)

In addition to the matters addressed in *ACEquip*, the Termination Contracting Officer's (TCO) 1 June 2001 **"**Notice of Termination for Cause, Final Decision of the Contracting Officer" stated:

> c. The foundation issue surfaced in April 00, and has been frequently discussed. Your two letters (2 Nov and 17 Nov 00), citing differing site conditions, requested a contract modification and additional time and money for the foundation. You did not notify the [CO] in a timely manner. Since you have not, after repeated request, been able to show that there is a substantial difference between the soil situation as known at bid, and as shown more than a year later by your new data, your request for additional costs and time have not been agreed to . . . . Both of your *claims* were denied by the Government's letter, 30 Jan 01.

(R4, tab 113 at 4)(Emphasis added.)

In its 5 July 2001 letter to the TCO disputing the termination (*ACEquip* at 158,019), appellant addressed each paragraph of the TCO's final decision. Appellant disclaimed detailed knowledge of Government payments to its predecessor[1] and stated that it had not received project monies. It again raised the foundation issue, alleging excusable delay. Appellant concluded that, if the parties could not reach an agreement, the 5 July letter would serve as its notice of appeal. (R4, tab 120) The TCO's 18 July 2001 response that he did not intend to reconsider his final decision (*ACEquip*, *id*.) also stated that he did not consider the 5 July letter to be a proper appeal (R4, tab 122).

The "subject" of appellant's notice of appeal to the Board, received 31 July 2001, was the "Notice of Termination for Cause, Final Decision of the Contracting Officer." Appellant wrote:

> With respect to the subject Notice of Termination, please accept this letter as written notice of an appeal from ACEquip Ltd to the decision of the Termination Contracting Officer to Terminate for Cause the referenced Contract.

(R4, tab 123)

Appellant's complaint, filed on 4 February 2002, focuses upon the foundation and alleged associated delay issues. It suggests a potential claim of $1 million (¶ 73), but does not cite to the record for, or make, any such monetary demand. The complaint describes appellant's request for a 135-day extension and $12,960 as covering "only the time and costs associated with the soil sample research and validation" (¶ 75). The complaint alleges that appellant's requests for equitable adjustment were denied (¶¶ 76-77). It identifies appellant's bases for appeal as: defective specifications; the

Government's breach of its implied duty of good faith and fair dealing; differing site conditions; appellant's entitlement to an equitable adjustment; excusable delay due to the Government's interference and poor contract administration; invalidity of the contract's liquidated damages clause (¶¶ 125-131, 142-45); the Government's waiver of the clause (¶ 132-35); and the Government's failure to mitigate liquidated damages, (¶¶ 136-141) (at 22-29). With respect to the alleged waiver and mitigation of liquidated damages, the complaint alleges that the Government prevented or delayed appellant from performing within the contract's time period (¶¶ 134-135, 137).

Paragraphs 125-145 of the complaint, struck in *ACEquip*, fall under appellant's heading "The Liquidated Damages Clause is Invalid" and under subheadings pertaining to such damages. However, paragraphs 132-134 and 137 relate to appellant's delay, defective specifications, and other defenses to its failure to perform within the contract period and do not mention liquidated damages. Paragraphs 138 and 139 allege, respectively, that the Air Force stated that it had been assessing liquidated damages and that it terminated appellant's contract for cause.

The relief requested in the complaint is that the termination of appellant's contract for cause be converted to a termination for convenience and that appellant be compensated for the costs it incurred up to, and as a result of, the termination, including attorney fees and expenses (¶¶ 96, 102, 109, 117, 124, compl. also at 30)[2] The complaint concludes with an "alternative" request that appellant's "appeal with respect to liquidated damages be sustained" (compl. at 30).[3]

DISCUSSION

A contractor's submission of a cognizable CDA claim to the CO is a prerequisite to the Board's jurisdiction under the Act to entertain its appeal from the CO's denial, or deemed denial, of the claim. Even if the CO purports to issue a final decision on the claim, the decision is null if the claim does not satisfy the criteria for a CDA claim. *Paragon Energy Corporation v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981); *Eaton Contract Services, Inc.*, ASBCA Nos. 52888 *et al*., 02-2 BCA ¶ 32,023 at 158,267. The CDA requires that contractor claims be submitted to the CO in writing for decision. Implementing regulations define "claim" as "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" under or related to the contract. FAR 33.201; *ACEquip* at 158,019. A contractor's money claim does not qualify as a CDA claim unless it is submitted to the CO in a sum certain. *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1581-82 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992); *Eaton*, *id*.

Whether a communication from a contractor constitutes a CDA claim is determined on a case by case basis. *PAE GmbH Planning and Construction*, ASBCA Nos. 39749, 40317, 92-2 BCA ¶ 24,920 at 124,255. We "employ a 'common sense' analysis." *Ebasco Environmental*, ASBCA No. 44547, 93-3 BCA ¶ 26,220, *citing Transamerica Insurance Corporation v. United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992). All that is required is that the contractor submit "a clear and unequivocal statement that gives the [CO] 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). A contractor's desire to work with the Government to resolve an adjustment request does not render the request invalid as a CDA claim. *Transamerica*, *id*.; *see also Marine Construction & Dredging, Inc.*, ASBCA Nos. 38412, 38538, 90-1 BCA ¶ 22,573 at 113,286.

Appellant never quantified its request to the CO for an equitable adjustment concerning the pallet foundation, either as to monetary amount or time sought. Moreover, any monetary claim over $100,000 would have had to have been certified in accordance with 41 U.S.C. § 605(c)(1) to qualify as a CDA claim. FAR 33.201; *Eurostyle, Incorporated*, ASBCA No. 45934, 94-1 BCA ¶ 26,458. Thus, even though the TCO's final decision stated that appellant's claim concerning the pallet foundation had been denied, it is evident that appellant never submitted a qualifying CDA claim concerning that issue. Accordingly, we have jurisdiction to consider it only in the context of the Government's contract termination claim and appellant's alleged excusable delay and other defenses to it. Our decision is without prejudice to appellant's timely filing an affirmative claim with the CO if appellant deems it warranted and supported.

On the other hand, appellant's 17 November 2000 quantified request to the CO for $12,960 and a 135-day extension in connection with its soil testing qualifies as a CDA claim. It was addressed to, and sought a determination by, the CO. While not dispositive, the TCO considered the 17 November 2000 letter to be a "claim," and so described it in his final decision. Although appellant did not explicitly ask for a CO's "decision," no "magic words" are required. *PAE GmbH Planning and Construction*, *id*. A request can be implied, as we deem it was here. *Transamerica Insurance Corporation*, *id*. at 1576; *Triad Microsystems, Inc.*, ASBCA Nos. 39478, 42349, 99-1 BCA ¶ 30,234 at 149,575. In his "final decision," the first decision to be so-described and to include appeal rights, the TCO confirmed that the claim was denied.

Nonetheless, the Government asserts that appellant has not appealed from the denial of an affirmative claim. It is true that appellant's notice of appeal stated that it was appealing from the TCO's decision to terminate its contract for cause, but that appears to be merely a reflection of the title of the final decision, which the notice included in full. The Government has not contended, for example, that appellant failed to appeal from the portion of the decision demanding the return of milestone payments. Appellant's 5 July 2001 letter to the TCO, which preceded its appeal to the Board, addressed each paragraph of his final

decision and stated that the letter should be deemed to be an appeal, if agreement were not reached.

An appeal from a final decision is considered to cover all claims decided in it, unless the contractor expressly indicates a contrary intent. *Anchor Fabricators, Inc.*, ASBCA No. 40893, 91-3 BCA ¶ 24,231. We find no such express contrary indication and conclude that appellant was appealing from the decision as a whole. Thus, we have jurisdiction to entertain appellant's appeal from the TCO's denial of its claim for $12,960 and a 135-day extension of the contract period.

This does not resolve the question of whether appellant is currently pursuing that affirmative claim. Although the allegations in appellant's complaint do not affect our jurisdiction, *Hibbitts Construction Company*, ASBCA No. 35224, 88-1 BCA ¶ 20,505, a complaint is to state each of appellant's claims, the basis therefor, and the dollar amount claimed, to the extent known. Board Rule 6(a). Appellant's complaint has not clearly advanced any affirmative claim. It addresses matters discussed in the CO's entire final decision, including appellant's request for $12,960 and 135 days, and contends that the Government delayed appellant and prevented it from performing within the contract's time period. However, the complaint's prayers for relief do not include any specific monetary demand or time extension request, but seek only a conversion of the termination of appellant's contract for cause to one for convenience and compensation for costs incurred up to, and as a result of, the termination. This issue will be addressed by separate order.

Finally, we reaffirm our decision that the Government has not issued a claim for liquidated damages, and that the validity of any such assessment is not before us, but we conclude that our prior grant of the Government's motion to strike was overly broad. As we noted above, although they fell under appellant's "liquidated damages" rubrics, paragraphs 132-134 and 137 of the complaint do not mention liquidated damages and paragraphs 138 and 139 are merely accurate statements of events. Thus, we modify our decision and deny the Government's motion to strike paragraphs 132-134, 137-139.

## DECISION

We have reconsidered our decision on the Government's motion to strike, *ACEquip, Ltd.*, 02-2 BCA ¶ 31,978, and augment and modify it as set forth above. In all other respects, we reaffirm it.

Dated: 18 December 2002

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board

of Contract Appeals

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

NOTES

[1] Appellant had become the contractor through a novation agreement (R4, tab 47).

[2] Although the Government did not move to strike the attorney fees and expenses requests, we note that they are premature. *Rig Masters, Inc.*, ASBCA No. 52891, 01-2 BCA ¶ 31,468.

[3] On 30 September 2002, appellant filed a "First Amended Complaint," which is not relevant to our decision.

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. 53479, Appeal of ACEquip Ltd., rendered in conformance with the Board's Charter.

Dated:

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