ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Morgan & Son Earthmoving, Inc.	)	ASBCA No. 53524
	)	
Under Contract No. DACA67-99-C-0007	)	

APPEARANCE FOR THE APPELLANT: James A. Perkins, Esq.
Larson & Perkins P.L.L.C.
Yakima, WA

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Ann M. Gerner, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Seattle

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This appeal arises from a contracting officer's decision denying a certified claim for $242,874.74 in additional costs allegedly incurred in connection with a contract to upgrade roads. The Government moves to dismiss for lack of jurisdiction, alleging that "subsequent actions amending this amount removed the Board's jurisdiction because it was no longer a quantifiable amount" (Gov' t reply at 3). The motion was originally filed as a motion for summary judgment, but has been restyled as a motion to dismiss at the request of the Government (Gov' t reply at 1). We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 9 March 1999, the U.S. Army Corps of Engineers (Government) awarded Contract No. DACA67-99-C-0007 in the amount of $1,799,838.40 to Morgan & Son Earthmoving, Inc. (appellant) to upgrade roads at Yakima Training Center, Washington (R4, tab D-3).

2. According to appellant, the contract provided that appellant could use four designated wells in performing the work. When work commenced, however, only two of the wells were available. As a result, appellant had to truck in water from substitute wells that were farther away and less convenient. (R4, tabs B at ¶ 7, C at ¶ 1, D-5)

3. On 1 September 2000, appellant submitted a claim in the amount of $242,874.74 for additional costs allegedly incurred as a result of the unavailability of the wells. In addition to a cost break-down, spreadsheets, invoices and delivery slips documenting the number of trips made by each truck, the claim included the certification required by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c) (R4, tab C).

4. The parties met on 14 November 2000 in an attempt to settle the claim. On 29 November 2000, the Government sent appellant questions and comments concerning the claim and requested appellant to "respond . . . with a revised proposal that incorporates consideration of [its] questions and comments." (R4, tab E-7)

5. As a result of the settlement discussions, appellant submitted a proposal in the amount of $259,710.85 to the Government on 7 February 2001 (R4, tab E-8).

6. On 2 May 2001, the Government requested appellant to certify its 7 February 2001 proposal (R4, tab E-14).

7. On 16 May 2001, appellant replied that the 7 February 2001 proposal had been submitted for settlement purposes only and was not to be construed as a revised claim. Appellant also stated that since the Government had not accepted its proposal, appellant "intended to stand . . . by the certified claim issued September 1, 2000." (R4, tab E-15)

8. On 10 August 2001, the contracting officer denied appellant's 1 September 2000 claim (R4, tab B at 1, 16). In the decision, the contracting officer acknowledged that appellant's 7 February 2001 proposal "was an offer to settle the dispute and . . . not . . . a certified claim" (R4, tab B at 8-9).

9. Appellant timely appealed the contracting officer's decision to this Board on 18 September 2001.

10. In paragraph 9 of its complaint, appellant alleges that it has been damaged "in amounts to be proven at hearing," but which it believes to be "no less than" $242,874.74. Paragraphs 13, 19, 29, 33, 37 and 40 of the complaint contain substantially the same language.

11. The Government admits that appellant's 1 September 2000 claim stated a sum certain and otherwise met the requirements of the CDA (Gov' t mot. at 12-13).

DECISION

Although it admits that appellant's 1 September 2000 claim stated a sum certain when it was submitted to the contracting officer, the Government asserts that "subsequent actions amending this amount removed the Board's jurisdiction" (Gov't reply at 12-13). According to the Government, appellant's use of the phases "no less than" and "in amounts to be proven at hearing" in the complaint render the amount of the claim uncertain. The Government also argues that appellant's 7 February 2001 submission was an uncertified revised claim, that appellant may not increase the amount of its claim after issuance of a final decision and that any damages to which appellant may be entitled are limited to the amount of its certified claim. Appellant alleges that the Government's motion is in bad faith and has cost "appellant thousands of dollars in additional attorney's fees and [delayed] getting this appeal heard, all of which is devastating to a small family owned business" (app.'s surreply at 10).

Appellant's use of the phrases "no less than" and "in amounts to be proven at hearing" in the complaint do not render the amount of appellant's 1 September 2000 claim uncertain. Section 605(c) of the CDA requires that all claims be certified and submitted to the contracting officer for a decision. FAR 33.201, which implements the CDA, further requires that the claim be stated 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). The purpose of these requirements is to give "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). Thus, the time for determining whether a contractor has submitted a valid CDA claim is when the claim is submitted to the contracting officer, not when the complaint is filed. Since appellant's 1 September 2000 claim admittedly met the requirements of the CDA when it was submitted to the contracting officer, we have jurisdiction over the appeal. *Hibbits Construction Co*., ASBCA No. 35224, 88-1 BCA ¶ 20,505 at 103,673.

In the Government's view, the phrase "in excess of" is "barely distinguishable" from the phrase "no less than," which appellant used in its complaint (Gov' t mot. at 10). As a result, the Government argues that the outcome of this case should be governed by *Godwin Equipment, Inc.*, ASBCA No. 53462, 02-1 BCA¶ 31,674; *Corbett Technology Co., Inc.*, ASBCA No. 47742, 95-1 BCA ¶ 27,587; *Rohr, Inc.*, ASBCA No. 44773, 93-2 BCA ¶ 25,787; and *Metric Construction Co., Inc. v. United States*, 1 Cl. Ct. 383 (1983). These cases are inapposite. They hold that a claim *submitted to the contracting officer* for payment "in excess" of a designated amount is not a CDA claim because it does not state a sum certain. They do not stand for the proposition that later changes in amount deprive the Board of jurisdiction.

The Government next argues that appellant's 7 February 2001 proposal was an uncertified revised claim. We disagree. Appellant submitted its 7 February 2001 proposal to the Government as a result of settlement discussions held in November 2000. Following those discussions, appellant's counsel clearly advised the Government that the proposal was for settlement purposes only and not to be considered as a revised claim. Moreover, the contracting officer understood that the 7 February 2001 claim was not an uncertified revised claim because his final decision responded to appellant's 1 September 2000 claim.

The Government next argues that appellant may not increase the amount of its claim without recertifying it after the contracting officer has issued a decision. This assertion is incorrect. "[A] monetary claim *properly* considered by the contracting officer . . . need not be certified or recertified if that very same claim (but in an increased amount reasonably based on further information) comes before a board of contract appeals or a court." *Tecom, Inc. v. United States*, 732 F.2d 935, 938 (Fed. Cir. 1984) (emphasis in original); *see also Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858-59 (Fed. Cir. 1987); *Toombs & Co., Inc.*, ASBCA Nos. 35085, 35086, 89-3 BCA ¶ 21,997 at 110,607; *D.E.W., Inc.*, ASBCA No. 35173, 89-3 BCA ¶ 22,008 at 110,640.

Finally, the Government's contention that the Board is without authority to award damages in excess of the amount of the certified claim is also incorrect. So long as a new claim is not being asserted, revision or refinement of the certified amount claimed while on appeal and/or proof of a greater amount have been permitted without further certification. *D.J. Barclay Co.*, ASBCA No. 28908, 85-1 BCA ¶ 17,922.

Lastly, we address appellant's assertion that the Government brought this motion in bad faith. Government officials are presumed to act in good faith. In order to overcome that presumption, appellant must prove by clear and convincing evidence that the Government had a specific intent to injure appellant. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002); *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995). While we agree that the Government's motion is devoid of merit, appellant has failed to present any evidence that the Government intended to injure appellant. If appellant prevails on the merits and otherwise qualifies under the Equal Access to Justice Act, 5 U.S.C. § 504, it may seek payment of appropriate attorney's fees and expenses as provided therein.

The motion is denied.

Dated: 20 May 2002

ELIZABETH A. TUNKS
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

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. 53524, Appeal of Morgan & Son Earthmoving, Inc., rendered in conformance with the Board's Charter.

Dated:

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