

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Eaton Contract Services, Inc. ) ASBCA No. 52888  
)  
Under Contract No. DACW01-94-C-0185 )

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

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
Susan K. Weston, Esq.  
James R. Thornton, Esq.  
Engineer Trial Attorneys  
U.S. Army Engineer District,  
Savannah

OPINION BY ADMINISTRATIVE JUDGE PAGE  
ON THE PARTIES' MOTIONS FOR RECONSIDERATION

The parties timely have filed for reconsideration of that portion of our decision in *Eaton Contract Services, Inc.*, ASBCA Nos. 52888, 53069 and 53070, 02-2 BCA ¶ 32,023 pertaining to ASBCA No. 52888. That decision addressed the Board's *sua sponte* concern over whether the claims underlying each of the appeals was stated in a sum certain; familiarity with that decision is presumed. We found that jurisdiction was lacking in the claims underlying both ASBCA Nos. 53069 and 53070 because each sought an unspecified portion of the consequential damages asserted in ASBCA No. 52888, and the overall amount of the claims could not be determined. 02-2 BCA ¶ 32,023 at 158,266. ASBCA No. 52888 was found to be stated in a sum certain and jurisdiction was retained.

Our basis for questioning jurisdiction in ASBCA No. 52888 was that the claim, as found in the Government's Rule 4 file, contained handwritten notations including different amounts for some elements which did not comport with printed amounts found elsewhere in the document. 02-2 BCA ¶ 32,023 at 158,265. On 20 May 2002, during the briefing period, the Government supplemented the Rule 4 file with a copy of the contractor's claim without the notations, advised that a Government employee had made the alterations, and clarified appellant's intent to assert a claim consistent with the printed amounts.\* Our

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\* Jurisdiction is determined by examining the "claim" as it was submitted to the contracting officer. *TRESP Associates, Inc.*, ASBCA No. 53702, 02-2 BCA ¶ 31,889 at 157,580. Therefore, appellant's motion dated 27 February 2003 for dismissal of

decision stated that “[a]fter 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.” *Id.* at 158,266.

By letter of 18 October 2002, appellant questioned whether the Government actually conceded that the subject claim was stated in a sum certain. On 23 October 2002, the Board requested the Government to advise what its position was. The Government’s response of 12 November 2002 clarified that while its letter of 20 May 2002 noted the alterations to the claim were made by a Government employee, it did not intend to “concede” the claim was stated in a sum certain. The Government asserted the Board did not consider its argument that the consequential damages sought in ASBCA No. 52888, including lost salaries and lost business worth, were not in a sum certain because these were future amounts which could not be documented. (Gov’t br. 28 June 2002 at 4-6) We treat appellant’s letter and the Government’s response as motions for reconsideration.

### DECISION

Upon reconsideration, we agree with the parties’ position that the Government did not concede that ASBCA No. 52888 was stated in a sum certain. The Government’s admission that one of its employees marked up the claim submitted in the Rule 4 file made clear that appellant had made an internally consistent statement with respect to the costs claimed. We find that this was not a “concession,” but rather an acknowledgment that the markings on the claim were attributable to the Government. Our decision is modified to that extent.

We next consider the Government’s argument that we lack jurisdiction because the claim underlying ASBCA No. 52888 allegedly was not stated in a sum certain. The portion of the claim in controversy is that amount characterized by appellant as “consequential damages” totaling \$2,088,026. The Government raises specific objection to the contractor’s inclusion in the damages of lost anticipated salaries of ECS’s principals of \$597,000, and \$588,289 as the lost reasonable worth of the business. The Government’s brief notes that the latter amounts are based upon projections of independent and collateral undertakings which are too uncertain and remote to be considered by the contracting officer as part of the claimed damages. It argues that the claim fails to state a sum certain because these damages “could never be quantified because they are based on predictions of the future,” that ECS cannot “document these amounts so that the Contracting Officer could determine the exact amount of the claim,” and that “damages relating to future work are too remote and indirect to be recoverable.” Gov’t br. 5 Dec. 2002 at 3-4 citing *Wells Fargo*

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that portion of its appeals claiming entitlement to \$597,000 in “Principals’ Salaries Lost” and \$588,289 in “Lost Future Profits from Collateral Undertaking” does not affect our evaluation of whether the submission underlying ASBCA No. 52888 was a valid claim.

*Bank, N.A. v. United States*, 88 F.3d 1012, 1023 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741 (1980); and *William Green Construction Co., Inc. v. United States*, 477 F.2d 930 (Ct. Cl. 1973), *cert. denied*, 417 U.S. 909 (1974).

The Government contends that because the amount claimed is uncertain, the contracting officer's efforts to settle could be for naught if the contractor filed yet another claim on the same basis but for an allegedly unsatisfied amount. Citing *Executive Court Reporters, Inc. v. United States*, 29 Fed. Cl. 769 (1993), the Government notes that without a sum certain, the claim cannot be fully resolved, as the amount in question is the crux of the dispute between the parties. The Government concludes that the overall claim fails because of the uncertainty attached to such amounts. (Gov't br. 5 Dec. 2002 at 2-4)

ECS responds that the requirement of a sum certain is not defeated because the claim contains an estimated element, and contends it reasonably calculated the amount sought as lost future profits and anticipated salaries. ECS asserts it provided a clear and unequivocal statement which afforded the contracting officer adequate notice of the basis and amount of its claim. App. br. 3 Dec. 2002 at 2, citing *Inca Contracting Co., Inc.*, ASBCA No. 52697, 01-1 BCA ¶ 31,255; *Manhattan Construction Co.*, ASBCA No. 52432, 00-2 BCA ¶ 31,091; and *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987).

The Government is correct that if there is no sum certain, there is no claim and we are without jurisdiction. *D.L. Braughler Co., Inc. v. West*, 127 F.3d 1476, 1489 (Fed. Cir. 1997); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (*en banc*); *J&J Maintenance, Inc.*, ASBCA No. 50984, 00-1 BCA ¶ 30,784; *Trepte Construction Co., Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595. We apply the standard used in our prior decision, noting that we will not entertain only that portion of a claim which is stated in a sum certain and discard the rest, as an "entire claim is in a sum certain, or it is not." *Manhattan Construction Co.*, 00-2 BCA at 153,521.

While we do not dispute the holdings of these decisions, they are inapposite as none hold that a claim containing consequential damages may not be stated in a sum certain, nor has the Government cited any authority for that proposition. The issue now before us is whether appellant made a proper claim. Whether ECS can prove its claim is another matter, which can be addressed at trial, or by motion following reasonable time for discovery. The fact that the contested lost salaries and lost business opportunities are estimated does not defeat a claim otherwise stated in a sum certain. *Inca Contracting Co., Inc.*, 01-1 BCA at 154,361; *Manhattan Construction Co.*, 00-2 BCA at 153,521. A contractor is required only to provide "adequate notice of the basis and amount of the claim." *Collette Contracting, Inc.*, ASBCA No. 53706, 03-1 BCA ¶ 32,056 quoting *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). ECS has done so. We are not deprived of jurisdiction over ASBCA No. 52888 on the basis of a failure of the

contractor to state its claim in a sum certain due to the inclusion of consequential damages. The Government's motion that we reconsider our decision on that basis is denied.

CONCLUSION

The parties' cross motions for reconsideration regarding whether the Government conceded that ASBCA No. 52888 was stated in a sum certain are granted, and the decision is modified to that extent. That change does not, however, alter the outcome of the decision. We have reconsidered our decision on the basis of the Government's argument that the claim underlying ASBCA No. 52888 does not contain a sum certain because it includes consequential damages. That argument is without merit, and our decision is affirmed except as modified above.

Dated: 1 April 2003

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REBA PAGE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER  
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. 52888, Appeal of Eaton Contract Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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