ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Southern Automotive Wholesalers, Inc.	)	ASBCA No. 53671
	)	
Under Contract No. DAAK01-96-D-0079	)	

APPEARANCE FOR THE APPELLANT: Nancy M. Camardo, Esq.
Law Offices of Joseph A. Camardo, Jr.
Auburn, NY

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Parag J. Rawal, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MOED ON
APPELLANT'S MOTION FOR A DECLARATION
AS TO JURISDICTION OVER THE APPEAL

Appellant Southern Automotive Wholesalers, Inc. (SAW) contends that its request for equitable adjustment (REA) dated 1 August 2000 did not qualify as a claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, and, accordingly, the contracting officer's decision on the REA was a nullity. In this motion, SAW asks that the Board issue a declaration to the foregoing effect and also declare that a document submitted by SAW subsequent to the contracting officer's decision was the first valid claim submitted as to which the first valid contracting officer's decision should be issued.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION[*]

1. This appeal relates to a contract awarded to SAW by the U.S. Army Aviation and Troop Command (Government) on 22 October 1996 to supply the requirements for AA starter generators for three successive one-year ordering periods (1997, 1998, and 1999). Orders for requirements were issued in 1997 and 1999. No orders were issued in 1998. (App. mot. at 1; Gov't br. at 2; exs. G-1, -2)

2. In a letter, dated 27 January 2000, titled "Notice of Claim," SAW's attorney informed the contracting officer that SAW intended to submit a request for equitable adjustment (REA). This was followed by another letter to the contracting officer, dated

[*] Nineteen exhibits are attached to the Government's opposition to the motion. These are referred to herein as Exhibits G-1 through G-19.

4 February 2000, also titled "Notice of Claim," stating that SAW was "currently in the process of quantifying the costs" involved and would be filing "a comprehensive [REA] incorporating financial and factual support for the claimed amount." (Exs. G-2, -3)

3. By letter dated 1 August 2000, appellant submitted a document titled "Request for Equitable Adjustment" to the contracting officer. SAW asserted that it was entitled to compensation for delays and disruptions caused by defective Government specifications and also for an alleged breach of contract on the part of the Government in that the estimated quantities in the solicitation and resulting contract were "grossly overstated and negligently prepared" (ex. G-4 at 16). SAW sought an equitable adjustment for these matters in the total amount of $294,220.12. There was no express request for issuance of a contracting officer's decision.

4. The REA was not accompanied by a certification of claim pursuant to CDA § 6(c)(1), 41 U.S.C. § 605(c)(1) and the FAR 52.233-1(d)(2)(iii) Disputes clause of the contract. On 28 August 2000, the contracting officer asked SAW to provide that certification (ex. G-5). SAW initially declined to do so on the ground that "this was a Request for Equitable Adjustment." On that basis, SAW offered to submit a certification pursuant to DFARS 252.243-7002, Requests for Equitable Adjustment. (Ex. G-6) The Government responded on 11 September 2000 that it considered the REA to be a claim and, as such, required to be certified in accordance with FAR 33.207 (ex. G-7). On 22 September 2000, SAW submitted a certification which conformed with FAR 33.207. The forwarding letter simply identified the enclosure without expressing any objection or reservations as to the contracting officer's requirement for submittal of the certification. (Ex. G-8)

5. The contracting officer thereafter sent several letters to SAW reporting on the progress of evaluation of information supplied by SAW with respect to "subject claim" and giving an expected date for completion of that process and issuance of a "final decision" (exs. G-9 through -11, -13). In one such letter, the contracting officer asked SAW to furnish certain additional information which was needed "[i]n order to properly evaluate your claim and provide a decision with[in] the required timeframe" (ex. G-11). SAW's letter responding to that request did not object to the characterization of the compensation request as a "claim" nor did SAW take issue with the planned issuance of a contracting officer's decision (ex. G-12).

6. By letter dated 18 July 2001, the contracting officer informed SAW that it had been determined that "there is very little entitlement on the claim." The letter proceeds to detail the Government's views as to the merits of the "claim," finding entitlement only as to costs associated with SAW's repetition of a first article test. The letter ends with an invitation to SAW to contact the contracting officer no later than a stated date "[s]hould you still be interested in discussing settlement of the claim." Otherwise the contracting officer would "assume that [SAW] is no longer interested in pursuing settlement of the claim, and a Contracting Officer's final decision will be issued no later than August 17, 2001." (Ex. G-

14) In the record on the motion, there is no indication of a response to that letter from SAW.

7. The contracting officer issued a written decision dated 15 November 2001, denying the REA except for the amount of $6,303.91 which was allowed for costs related to the first article test. "[P]ursuant to the Disputes Clause of the subject contract and the Contract Disputes Act of 1978", SAW filed a timely notice of appeal, dated 24 January 2002, from "the . . . final decision . . . denying [SAW's] [c]laim for [e]quitable [a]djustment." (Exs. G-15, -16)

8. Subsequently, in a letter to the contracting officer dated 11 February 2002, SAW asserted that:

> [W]e consider the issuance of a Final Decision to be improper. . . . Nowhere in its communications with the Government did SAW demand a sum certain, or demand a Contracting Officer's Final Decision. All communications specifically delineated SAW's submittal as a REA, not a Claim. The only reason SAW submitted a Claim certification was because the Government demanded such under a threat that the REA would not even be reviewed unless the certification was issued. . . .
>
> Therefore, please be advised that this letter constitutes a conversion of the previously submitted REA, into a Claim for Equitable Adjustment under the Contract Disputes Act of 1978 [(CDA)] and the Disputes Clause [of the] Contract. . . . The required executed Certification is attached hereto. Pursuant to the terms of the [CDA] and the Disputes Clause of the Contract, demand is hereby made for compensation in the amount of $294,220.12 and for a Contracting Officer's Final Decision.

(Ex. G-17)

9. The Government responded, in a letter dated 8 April 2002, that the matter was already properly before the Board by virtue of SAW's initial, properly certified claim and the contracting officer's written decision thereon. Accordingly, an additional decision would not be issued in response to SAW's 11 February 2002 submission. (Ex. G-18) The present motion for a "Board Decision as to ASBCA Jurisdiction" was submitted on 29 April 2002.

THE MOTION

The motion requests declarations by the Board: (a) that the REA "did not constitute a valid Claim" so that the contracting officer's decision dated 15 November 2001 was "invalid and ineffective"; (b) that SAW's letter of 11 February 2002 (finding 8) constituted a valid claim entitling SAW to a contracting officer's decision within the prescribed time; (c) in the alternative, that the initial submission was an REA until it was converted into a valid claim upon submission of the certification of claim (finding 4) (app. mot. at 8-9). We regard the motion as requesting the Board to dismiss the appeal for lack of jurisdiction and to direct the contracting officer to issue a decision on the claim contained in SAW's letter of 11 February 2002. 41 U.S.C. § 605(c)(4).

DECISION

The REA made a demand, as a matter of right, for the payment of money in a sum certain (finding 3) and, to that extent, met the definition of a "claim" set forth in FAR 33.201. To be eligible for a contracting officer's decision, however, a claim exceeding $100,000 must also have been certified and presented to the contracting officer with a request for a decision. CDA § 6(a), 41 U.S.C. § 605(a), (c)(1); FAR 33.206, 33.207. That request need not be expressed in a particular form of words. The requirement, instead, is that the intention to obtain such a decision from the contracting officer be manifested to the Government by the contractor. SAW's submission of the certification of claim required by CDA § 6(c)(1), 41 U.S.C. § 605(c)(1), and FAR 33.207 on 22 September 2000 (finding 4) signified that SAW intended that the REA serve as a claim and, in turn, that the contracting officer either grant or deny the claim in a written decision. *Transamerica Insurance Corp., Inc. v. United States*, 973 F.2d 1572, 1578 (Fed. Cir. 1992).

We therefore hold that the prerequisites for issuance of a valid contracting officer's decision had been satisfied at the time of issuance thereof. As a result, upon timely filing of the notice of appeal from that decision, the Board acquired jurisdiction over that appeal.

In its letter of 11 February 2002, SAW contended, for the first time, that the certification of the REA as a claim (finding 4) was effected under economic duress, namely, a threat by the Government that "the REA would not even be reviewed unless the certification was issued" (finding 9). SAW's letter forwarding the certification says nothing about duress and there is no other support in the record for that allegation. The allegation of duress is not credible on other bases. The first one is the long interval between the making of the alleged threat, which would have been on or about 11 September 2000 when the certification was requested (finding 4), and the first assertion of the complaint of duress on 11 February 2002. "[T]he long delay before [SAW] spoke out and claimed duress" is "a telling indication that no duress was practiced." *Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1043 (Ct. Cl. 1976).

Secondly, the "failure to raise a claim of duress soon after fear of its consequences had been removed is compelling evidence that there was no duress in fact." *Id*. In the present case, the fear that the Government would refuse to evaluate the REA if the certification were not given was removed no later than 18 July 2001 after the contracting officer had completed the evaluation of the REA and informed SAW of the results (finding 6). SAW did not assert duress at that time and did not make that complaint until 11 February 2002 (finding 8).

On the foregoing record, we conclude that the certification of claim submitted by SAW on 22 September 2000 (finding 4) was valid, voluntary, and effective. On that date, the REA qualified as a claim.

CONCLUSION

For the reasons set forth above, the motion is denied in all respects except that we determine that there was a valid claim as of 22 September 2000.

Dated: 29 January 2003

PENIEL MOED
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 No. 53671, Appeal of Southern Automotive Wholesalers, Inc., rendered in conformance with the Board's Charter.

Dated:

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