ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Magnum, Inc.	)	ASBCA No. 53890
	)	
Under Contract No. DACA51-96-C-0022	)	

APPEARANCE FOR THE APPELLANT: J. Robert Steelman, Esq.
Procurement Assistance Corporation
Mount Holly, NJ

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Lorraine Lee, Esq.
District Counsel
Donald M. Harris, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, New York

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

This is an appeal from the deemed denial of a request for an equitable adjustment (REA). The government moves to dismiss for lack of jurisdiction under section 605(a) of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended, on the grounds that appellant failed to request a contracting officer's final decision or, in the alternative, failed to submit its claim to the contracting officer.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 15 March 1996, the U.S. Army Corps of Engineers, New York District (Corps), awarded Contract No. DACA51-96-C-0022 in the amount of $6,108,520 to appellant, Magnum, Inc., to construct a squadron operations/aircraft maintenance facility at McGuire Air Force Base, New Jersey (R4, tab B at 2).

2. In addition to FAR 52.233-0001 DISPUTES (DEC 1991), the contract included the following relevant clauses:

> DFARS 252.233-7000 CERTIFICATION OF CLAIMS AND
> REQUESTS FOR ADJUSTMENT OR RELIEF (DEC 1991)

(a) Any contract claim, request for equitable adjustment to contract terms, request for relief under Pub. L. 85-804, or other similar relief exceeding $100,000 shall bear, at the time of submission, the following certificate given by a senior company official in charge at the plant or location involved:

I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable.

. . . .

(e) If this is a request for equitable adjustment under a substantially completed contract or a completed contract, the certification will be expanded to include the following:

This claim includes only costs for performing the alleged change, and does not include any costs which have already been reimbursed or which have been separately claimed. All indirect costs claimed are properly allocable to the alleged change in accordance with applicable acquisition regulations. I am aware that the submission of a false claim to the Government can result in the assessment of significant criminal and civil penalties and fines.

H-25 SUBMISSION OF CLAIMS

The following shall be submitted to the Contracting Officer at the following address: U.S. Army Corps of Engineers, New York District, 26 Federal Plaza, New York, New York 10278-0090:

a. claims referencing or mentioning the Contracting [sic] Disputes Act of 1978

b. requests for a written decision by the Contracting Officer

c. claims certified in accordance with the Contract Disputes Act of 1978

> No other Government representative is authorized to accept such requests. . . .

(R4, tab B at H-18, I-75, I-77)

3. On 11 June 1999, appellant submitted an REA on behalf of its subcontractor, G&G Electrical Contractors, Inc. (G&G), in the amount of $227,203.75. The REA was addressed to the contracting officer's representative (COR), Mr. Joe Chupa, U.S. Army Corps of Engineers, 2404 Tuskegee Airmen Avenue, McGuire AFB, NJ 08641. The REA did not request a final decision, but contained the following certification signed by the presidents of appellant and G&G:

> I certify that this Request for Equitable Adjustment/Proposed Change Order No. 27 is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief and that the amount requested accurately reflects the equitable contract adjustment for which G&G believes the Government is liable.
>
> This claim includes only costs for performing the changes, and does not include any costs which have already been reimbursed or which have already been separately claimed. All indirect costs claimed are properly allocable to the changes in accordance with applicable acquisition regulations. I am aware that the submission of a false claim to the Government can result in the assessment of significant criminal and civil penalties and fines.

(R4, tab C)

4. On 26 July 1999, Mr. Chupa advised appellant that the certification was defective and that the REA contained substantive defects. He concluded that the REA was "without merit" and requested appellant to withdraw it. (R4, tab N at 2)

5. On 14 April 2000, appellant submitted a revised REA in the amount of $213,322.16. Appellant did not include a request for a final decision in the revised REA. A revised certification, signed by the presidents of appellant and G&G, stated, in part, as follows:

> I certify that this Resubmission of Request for Equitable Adjustment/Proposed Change Order No. 27 is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief and that the amount requested

> accurately reflects the equitable contract adjustment for which G&G and Magnum, Inc. believe the Government is liable.
>
> . . . .
>
> This claim includes only costs for performing the changes and does not include any costs which have already been reimbursed or which have already been separately claimed. All indirect costs claimed are properly allocable to the changes in accordance with applicable acquisition regulations. I am aware that the submission of a false claim to the Government can result in the assessment of significant criminal and civil penalties and fines.

(R4, tab D at 3)

6. On 7 August 2000, Mr. J. Robert Steelman, G&G's attorney, wrote appellant as follows:

> [Please] request the Corps . . . to advise [us] by August 18, 2000 whether it intends to review the REA in detail with a goal of settlement in mind. If it is the intent of the Corps . . . to not do so, it is . . . requested that [we] . . . be advised of that fact and when a Contracting Officer's decision may be expected. . . .

(R4, tab P)

7. Appellant telefaxed Mr. Steelman's letter to the Corps on 15 August 2000 and requested it to "review [the letter] and advise us if you are willing to meet in an effort to resolve the issue" (R4, tab P).

8. On 28 September 2000, Mr. Steelman, who now represented both G&G and appellant, requested a meeting with the Corps to discuss settlement (R4, tab Q).

9. The parties met on 17 January 2001, but were unable to settle the dispute (R4, tab R).

10. On 1 May 2001, Ms. Lorraine Lee, District Counsel, wrote appellant that most of the REA was barred by bilateral releases (R4, tab S).

11. On 18 July 2001, Mr. Steelman replied that, in his opinion, the REA was not barred by bilateral releases (R4, tab T at 2).

12. On 27 August 2001, Mr. Steelman advised the Corps that if it did not contact him to schedule a meeting by 7 September 2001, he would "immediately advise [his] client to file an appeal with the ENGBCA" (R4, tab U). The Corps of Engineers Board of Contract Appeals has since been merged with this Board.

13. On 21 November 2001, appellant submitted a second revised REA in the amount of $211,807.69 (R4, tab E).

14. On 6 March 2002, Mr. Steelman wrote the Corps as follows:

> It is respectfully requested that I be advised by March 25, 2002 of the direction the Corps . . . intends to pursue with respect to the REA. If negotiations are intended, REA rejection, issuance of a Contracting Officer's decision, an intention not to issue a formal decision or some other administrative action, I would most appreciate being advised of your intended action. This will then enable me to advise my client of its options, a discussion that will enable Magnum/G&G to make an informed business decision.

(R4, tab V)

15. On 19 April 2002, Ms. Lee advised appellant as follows:

> The Contracting Officer does not intend to issue a decision in response to Magnum Inc. and G&G Electrical Contractors' April 14, 2000 Request For Adjustment, since no request for a Decision has been submitted . . . .
>
> I do not believe this case can be settled at this time . . . .

(R4, tab W at 1)

16. Appellant appealed the deemed denial of its claim to this Board on 26 July 2002 (R4, tab A).

DECISION

The Corps moves to dismiss for lack of jurisdiction, alleging that appellant failed to request a final decision as required by section 605(a) of the CDA. In the alternative, the Corps argues that appellant failed to submit its claim to the contracting officer as required

by clause H-25 of the contract. Appellant concedes that it did not explicitly request a contracting officer's decision, but argues that it implicitly requested a decision.

Section 605(a) of the CDA requires that "all claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." Neither the CDA nor the FAR explains what is meant by the submission requirement. The case law has interpreted the requirement to mean that the contractor must communicate--either explicitly or implicitly--a desire for a final decision. *Transamerica Insurance Corp., Inc. v. United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992).

G&G's letter of 7 August 2000, which appellant telefaxed to the Corps on 15 August 2000, asked the Corps whether it intended to settle the REA. In the event the Corps did not intend to settle the REA, the letter requested that appellant and G&G "be advised of that fact and when a Contracting Officer's decision may be expected." We find that this communication contained an implicit request for a contracting officer's final decision within the meaning of section 605(a) of the CDA.

The Corps also argues that appellant's REA is not a CDA claim because it was not submitted directly to the contracting officer as required by clause H-25. The Corps does not argue that the contracting officer failed to receive the REA and related correspondence. The Court of Appeals for the Federal Circuit rejected a similar argument in *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 880 (Fed. Cir. 1991), *overruled in part on other grounds*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) *(en banc):*

> The Act simply requires the contractor's claim to be "submitted" to the contracting officer. Neither the Act, nor its implementing regulations, instructs the contractor how this must be accomplished. . . . Congress deliberately left the language concerning submission to the contracting officer "broad . . . to permit appropriate Government officers to receive written claims and forward them to the [contracting officer]."
>
> In context, the Act's requirement that a claim must be "submitted" does not govern how the letter asserting the claim is to be addressed, or to whom it must first be given. It simply identifies the person to whom the dispute is to be "submitted" for a final decision.

The government's motion to dismiss is denied.

Dated: 18 December 2003

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

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. 53890, Appeal of Magnum, Inc., rendered in conformance with the Board's Charter.

Dated:

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