ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Eaton Contract Services, Inc.	)	ASBCA Nos. 54054, 54055
	)	
Under Contract Nos. DACA21-96-C-0009	)	
DACA21-95-C-0165	)	

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

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE PAGE
ON THE GOVERNMENT'S MOTION TO DISMISS

ASBCA Nos. 54054 and 54055 were filed on the basis of a "deemed denial" after the refusal of the contracting officer (CO) to render a final decision (COFD). The Government filed a motion to dismiss, alleging that the Board is without jurisdiction as the appeals were premature, and because the CO determined the underlying submissions were not proper claims after the contractor supposedly "recanted" the amounts asserted. There is considerable history behind these appeals, which are substantially the same as those previously filed. Familiarity is presumed with those decisions.[1] We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION[2]

By letter dated 25 October 2002, ECS submitted to the CO claims under both Contract No. DACA21-95-C-0165, Construct Training Facility, SOTF, Ft. Bragg, NC and Contract No. DACA21-96-C-0009, Construct Metal Building, SOTF, Ft. Bragg, NC. The CO by letters dated 20 December 2002 advised that the Government intended to conduct an audit of the claims, and that a final decision was expected "no later than March 15, 2003."

On 26 December 2002, the Board docketed ECS's notice of appeal (NOA) as ASBCA No. 54054. Appellant contended the CO failed timely to render a decision upon its 25 October 2002 claim under Contract No. DACA21-95-C-0165, and included a copy of

the claim. The claim made clear that, with certain exceptions, this was a "re-certification of the same claim [previously] certified on 24 January 2000" which the CO denied on 31 August 2000. (Claim at 1) That appeal previously was docketed as ASBCA No. 53070, but was dismissed for want of jurisdiction for failure to state a sum certain in that the "consequential" or "special" damages were not quantified in the underlying claims. *Eaton Contract Services, Inc.*, ASBCA Nos. 52888, 53069, 53070, 02-2 BCA ¶ 32,023. The exceptions to, or differences from, ECS's submission in the prior appeal included a revised quantum calculation seeking direct damages of $155,658. ECS also asserted "special damages" comprised of reliance damages (corporate losses and debts) and consequential damages (lost salaries and lost projected business worth) of $494,115 in this claim. The total amount sought was $649,773, based upon a *quantum meruit* theory of recovery.

In the same NOA, ECS also appealed the CO's failure to render a decision on its 25 October 2002 claim under Contract No. DACA21-96-C-0009; that appeal was docketed as ASBCA No. 54055. ECS objected to the CO's letter of 20 December 2002, contending that the CO failed to give proper notice of the date the final decision would be issued. Appellant took exception to the COFD being made contingent upon completion of an audit, and asserted the CO left "open-ended" the date on which a decision could be issued. The underlying claim previously was docketed as ASBCA No. 53069, but was dismissed for want of jurisdiction for failure to state a sum certain. *Id.* Under a *quantum meruit* theory, appellant sought a total of $694,404 comprised of direct damages of $106,073, and special damages in the amount of $588,331.

The Government's letter of 6 January 2003 stated that it had made preparations to audit the claims, and had informed ECS that it reasonably anticipated issuing a COFD on 15 March 2003. The letter also stated that the Government continued to review the claims, that a "valid claim must show liability, causation, and damages" and advised ECS that a showing of "merit" included both entitlement and quantum elements.

ECS's letter of 6 January 2003 to the Government's auditor expressed concern that the Government had elected to audit only the "Ft. Bragg" claims, excluding any inquiry into ASBCA No. 52888, which arose under Contract No. DACW01-94-C-0185 for work at the U.S. Environmental Protection Agency laboratory in Athens, GA. Appellant stated that the "financial documentation and supporting calculations" for "special damages entitlement" resided "almost exclusively" in the claim underlying ASBCA No. 52888. ECS noted the previous dismissal of ASBCA Nos. 53069 and 53070 for failure to state a sum certain, reiterated its position that it was improper for it to "arbitrarily distribute the special damages across all three claims," contended that such distribution was "not a mathematical problem but a judgmental one," and that it had avoided making "any firm special damages dollar distribution across all three claims" to avoid possible False Claims Act violations. Concluding that claims under its three Government contracts were "interdependent, intertwined and overlapped," appellant stated it would "revisit all damages calculations" looking for any "overlaps or other mistakes."

The CO's letter to ECS dated 8 January 2003 advised that because appellant indicated there may be revisions to its claims at the end of January or early February, she was unsure the submissions were proper claims, and expressed a reluctance to expend additional resources on costs which were "not definitized [sic] as final and 'certain' figures."

The Government's letter of 27 January 2003 to the Board advised that although the captioned appeals were filed as "deemed denials" after the lapse of 60 days without issuance of a COFD, the CO had notified appellant of the reasonable time in which a final decision would be made. It contended that, unless the 15 March 2003 date projected for issuance of the COFD was unreasonable, the Board lacked jurisdiction over the appeals. The Government argued that although it was prepared immediately to conduct an audit, the audit was "on hold" until appellant provided revised amounts.

The letter dated 11 February 2003 from the CO to appellant stated that ECS had repeatedly "disavowed the sum certain which you presented to me in two claims filed 25 October 2002" and had failed despite repeated requests to furnish new amounts. The CO found that the 25 October 2002 requests were not claims within the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, and stated she would not issue final decisions as the amounts sought had been "recanted." She concluded that at such future time as the contractor filed claims in a sum certain, an audit would be conducted and final decisions issued.

ECS responded to the Government on 14 February 2003, taking the position that the CO was divested of authority after a complaint was filed. Appellant relied upon *Sharman Co., Inc. v. United States*, 2 F.3d 1564, 1571 (Fed. Cir. 1993) which held in part that once a claim was in litigation, the U.S. Department of Justice had exclusive authority to act in pending litigation.

By letter dated 27 February 2003, ECS filed a motion to dismiss that portion of its appeals claiming entitlement to damages for lost profits on future contracts ($597,000) and entitlement to principals' lost salaries ($588,289); that motion was granted 22 April 2003. By letter of 8 April 2003, ECS stated the revised claimed amounts under Contract No. DACA21-96-C-0009 (ASBCA No. 54055) as $389,723 in special damages and $106,073 in direct damages totaling $495,797 (the total apparently should be $495,796) and under Contract No. DACA21-95-C-0165 (ASBCA No. 54054) as $327,313 in special damages and $155,658 in direct damages totaling $482,971. Appellant cited several cases for the proposition that the Government cannot condition issuance of a COFD upon an audit.

The Government on 28 February 2003 responded to the contractor's position that the CO was divested of authority once a complaint was filed in a CDA action. The Government stated that there are two issues now before the Board. The first is whether the CO "fulfilled her obligations under the CDA" when she notified ECS that a COFD would be

issued "no later than March 15," and the second is "whether the Board has jurisdiction of the appeals when the underlying claims have been determined by the CO not to be claims under the Contract Disputes Act." (Letter at 2-3)

On 7 May 2003, the Board received appellant's "Revision of Damages." According to information provided under the tab labeled "Summary of Consequential Damages," ECS now seeks "Expectancy Damages from Material Breach/Recissionable Contracts" in the amount of $838,020 and "Present Value of Destroyed Business at Date of Destruction" in the amount of $542,974. These damages total $1,380,994, and are allocated to the three appeals as follows: ASBCA No. 52888, $644,621; ASBCA No. 54055, $400,233; ASBCA No. 54054, $336,140. *Id*. at 2.

DISCUSSION

We determine on a case by case basis whether a communication from a contractor constitutes a claim under the CDA. *PAE GmbH Planning and Construction*, ASBCA Nos. 39749, 40317, 92-2 BCA ¶ 24,920 at 124,255. In determining jurisdiction, we evaluate the claim as it was submitted to the CO, *TRESP Associates, Inc.*, ASBCA No. 53702, 02-2 BCA ¶ 31,889 at 157,580, and apply a common sense analysis in determining whether there is a valid claim. *ACEquip Ltd*., ASBCA No. 53479, 03-1 BCA ¶ 32,109 at 158,767; *Ebasco Environmental*, ASBCA No. 44547, 93-3 BCA ¶ 26,220 at 130,490 citing *Transamerica Insurance Corp., Inc. v. United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992).

We address first the Government's argument that the appeals are premature because they were filed before the time asserted by the CO as necessary to first conduct an audit, *i.e*., no later than 15 March 2003 (Gov't letters dated 6, 27 January and 28 February 2003).[3] An audit can aid (or not) the contractor in proving its claim by a preponderance of evidence. The Government correctly points out that even in the entitlement phase of an appeal, the contractor must show liability, causation, and resulting injury. *Intercontinental Manufacturing Co.*, ASBCA No. 48506, 03-1 BCA ¶ 32,131 at 158,865 citing *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*); *John T. Jones Construction Co.*, ASBCA Nos. 48303, 48953, 98-2 BCA ¶ 29,892 at 147,975, *aff'd sub nom. John T. Jones Construction Co. v. Caldera*, 178 F.3d 1307 (Fed. Cir. 1998) (table); *Planning and Human Systems, Inc.*, ASBCA No. 29725, 90-2 BCA ¶ 22,821 at 114,596 and cases cited. We look to the requirements of the law, and to the facts underlying the appeals, to determine whether the Government is correct that these appeals are premature.

The CDA mandates that the CO shall issue a decision on any claim of $100,000 or less within 60 days of receipt. 41 U.S.C. § 605(c)(1). If the certified claim exceeds $100,000, then the CO must, within the same period, either issue a decision or notify the contractor of the time within which a decision will be issued. 41 U.S.C. §§ 605(c)(2)(A), (B). *See Defense Systems Co., Inc.*, ASBCA No. 50534, 97-2 BCA ¶ 28,981; *Eaton Contract Services, Inc.*, ASBCA Nos. 52686, 52796, 00-2 BCA ¶ 31,039. Decisions on

claims exceeding $100,000 must still be issued within a reasonable time of receipt, "taking into account such factors as the size and complexity of the claim and the adequacy of the information provided by the contractor." 41 U.S.C. § 605(c)(3). The Government may not indefinitely or unreasonably delay in issuing a decision, or the failure to act will be regarded a "deemed denial" and the Board will take jurisdiction over an otherwise valid appeal. *Fru-Con Construction Corp.*, ASBCA No. 53544, 02-1 BCA ¶ 31,729.

The Government contends that because it provided the contractor with notice of the date the COFD was anticipated to be issued, an appeal prior to that time is premature. While the Government was correct in giving that notice, the appropriate question here is whether that date was reasonable. Had this been the first time the Government had seen these claims, it might have been reasonable to enlarge the time for a decision and subsequent appeal. However, the claims underlying these appeals were submitted to the Government on at least two earlier occasions over a period spanning over two years, and appeals therefrom were in fact once dismissed as premature to permit the CO additional time to render a decision. *See Eaton Contract Services, Inc.*, ASBCA Nos. 52686, 52796, 00-2 BCA ¶ 31,039 and *Eaton Contract Services, Inc.*, ASBCA Nos. 52888, 53069, 53070, 02-2 BCA ¶ 32,023, *recon. granted in part*, 2003 WL 1795676 (1 April 2003). While it is not unreasonable *per se* for the Government to seek an audit, these unique circumstances persuade us that delaying a decision for an additional three months (20 December to 15 March) for completion of an audit was not reasonable. *See Dillingham / ABB-SUSA, a Joint Venture*, ASBCA Nos. 51195, 51197, 98-2 BCA ¶ 29,778 at 147,557. Although the Government expresses concern about committing constrained resources to analyze submissions that may not be proper claims, the CO can simply deny the claim, especially where the documentation is regarded as inadequate. *Fru-Con Construction Corp*., 02-1 BCA at 156,755.

In any event, it is clear the parties are in sharp disagreement regarding the merits of the claims, and no useful purpose would be served by dismissing the appeals as premature. *See Emerson Electric Co.*, ASBCA No. 31184, 86-2 BCA ¶ 18,979; *Atherton Construction, Inc.*, ASBCA No. 41414, 91-1 BCA ¶ 23,635; and *Cessna Aircraft Co.*, ASBCA No. 43196, 92-1 BCA ¶ 24,425.

The Government next argues that the Board is without jurisdiction, and there is no requirement that a COFD be issued, where the CO determines the claims are "improper." This argument raises two points: whether it is within the authority of a CO to decide that the contractor has not submitted a valid claim and refuse to address it, thereby depriving the Board of jurisdiction, and whether the contractor's subsequent changes in amounts sought vitiated the claims by depriving them of being stated in a sum certain.

The CDA envisions a logical progression for resolving disputes between a contractor and the Government; if the CO does not fully resolve a claim, the contractor may at its option elevate it as an appeal to the appropriate agency board of contract appeals or the U.S.

Court of Federal Claims.[4] The CO retains authority to settle appeals to the Board and is in fact encouraged to do so. *See Sayco, Ltd.,* ASBCA No. 39366, 92-1 BCA ¶ 24,573 at 122,588. However, that authority in no way limits the jurisdiction of the Board to hear an appeal founded upon an unresolved dispute. *Cf. Hettich, GmbH,* ASBCA Nos. 42602, 42604, 93-3 BCA ¶ 26,035.

The CDA makes clear that where the CO fails timely to act, not only does the contractor have the right of appeal, but the tribunal has the authority to direct the CO to issue a decision. 41 U.S.C. §§ 605-609. What the CO cannot do is frustrate the contractor's right of appeal by refusing to decide the matter, nor can the CO divest the Board of jurisdiction by determining the claim is improper. It is the responsibility of the CO timely to accede to a claim in whole or in part, or deny it. Where the CO refuses to do either, the Board will docket the contractor's appeal as a deemed denial and exercise our jurisdiction. Whether the contractor can prove its claim, or whether there is jurisdiction, are matters properly decided by the tribunal. We reject the Government's contention that these appeals were premature because an audit, which the CO determined was necessary prior to issuing the COFD, had not taken place, or that the CO may continue to condition issuance of a COFD upon the contractor's submission of additional information. This would invest the CO with discretion to withhold a decision for an indefinite period, in violation of the letter and spirit of the CDA. *Aerojet General Corp.,* ASBCA No. 48136, 95-1 BCA ¶ 27,470.

Finally, the Government alleges the claims are jurisdictionally defective because they are no longer stated in a sum certain. There are three requisites for a valid claim: the contractor must submit its written demand to the CO, the demand must be made as a matter of right, and the writing must set forth a sum certain. *AEC Corp., Inc.,* ASBCA No. 42920, 03-1 BCA ¶ 32,071 at 158,486 citing *Essex Electro Engineers, Inc. v. United States,* 960 F.2d 1576, 1580 (Fed. Cir. 1992), *cert. denied,* 506 U.S. 953 (1992); *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). A claim exceeding $100,000, must be certified. 41 U.S.C. § 605(c)(1); FAR 33.207. Of these requirements, the Government complains only that the claims are not stated in a sum certain.

The Government's letter of 28 February 2003 contends, among other things, that the CO initially "had before her a claim for money that she believed was for a sum certain"; however, when the contractor later allegedly "recanted" the sum sought and did not submit a new sum during the period set aside for the audit, the CO determined the submissions were not claims meriting a final decision.

A valid claim must furnish the CO a "clear and unequivocal statement that gives 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). The claim "need not include a detailed cost breakdown," and the CO's desire for more information to conduct an audit does not change the status of the contractor's claim.

Community Consulting International, ASBCA No. 53489, 02-2 BCA ¶ 31,940 at 157,785 citing *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). Even if the claims contained estimates, the sum certain requirement is not defeated. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861-62 (Fed. Cir. 1991); *Manhattan Construction Co*., ASBCA No. 52432, 00-2 BCA ¶ 31,091 at 153,521.

We are not deprived of jurisdiction if appellant reduces the amount of a properly certified claim, as we determine the validity of a contractor's "claim" against the Government at the time the claim is submitted to the CO. *Harbert International, Inc.*, ASBCA No. 44873, 97-1 BCA ¶ 28,719 at 143,357, *recon. denied*, 97-2 BCA ¶ 22,234. The reduction in the amount claimed goes to the merits, for which the contractor bears the burden of proof, and not to the validity of the underlying claim. 97-2 BCA at 145,433.

DECISION

We have considered all the arguments advanced by the Government in support of this motion to dismiss ASBCA Nos. 54054 and 54055, and reject each. The motion is denied.

Dated: 28 May 2003

REBA PAGE
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

NOTES

[1] Essentially the same claims underlying ASBCA Nos. 54054 and 54055 have been dismissed twice for want of jurisdiction and a petition for a COFD voluntarily withdrawn. *See Eaton Contract Services, Inc.*, ASBCA Nos. 52686, 52796, 00-2 BCA ¶ 31,039; *Eaton Contract Services, Inc.*, ASBCA Nos. 52888, 53069, 53070, 02-2 BCA ¶ 32,023, *recon. granted in part*, 2003 WL 1795676 (1 April 2003), and *Eaton Contract Services, Inc.*, ASBCA Nos. 54040, 54041 (20 February 2003), unpublished.

[2] All documents referenced are found in the Board's correspondence files.

[3] This contention arguably is mooted by the CO's subsequent refusal to issue a COFD at all. (Gov't letter dated 28 February 2003)

[4] Appellant's reliance upon *Sharman Co., Inc. v. United States*, 2 F.3d 1564, 1571 (Fed. Cir. 1993), for the jurisdiction of the Board over an appeal (as opposed to that of the CO) is misplaced, as is the Government's contention that the CO may deprive the Board of jurisdiction by determining a submission is not a valid claim. It is true that *Sharman*, like *Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct. Cl. 1976) and *Durable Metal Products, Inc. v. United States*, 21 Cl. Ct. 41 (1990), recognizes the limitations on a CO's authority on a matter in litigation. If a contractor appeals the COFD to the U.S. Court of Federal Claims, the Attorney General alone may settle a case in litigation. 28 U.S.C. §§ 516, 519.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 54054 and 54055, Appeals of Eaton Contract Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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