ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Engineered Demolition, Inc.	)	ASBCA No. 54924
	)	
Under Contract No. DACW05-02-C-0003	)	

APPEARANCE FOR THE APPELLANT: John C. Person, Esq.
Person & Craver LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Robert W. Scharf, Esq.
Engineer Trial Attorney
Michael Shields, Esq.
Assistant Engineer Trial Attorney
U.S. Army Engineer District,
Sacramento

OPINION BY ADMINISTRATIVE JUDGE TING

After receiving a letter from someone identifying himself as the authorized representative of the contracting officer stating that two of the items in its revised equitable adjustment proposal were not compensable and there was no point in further discussions, the contractor appealed. The government moved to dismiss for lack of jurisdiction contending that there was no claim and no contracting officer decision, as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

FINDINGS OF FACT

1. In December 2001, the Army Corps of Engineers (the Corps) awarded Contract No. DACW05-02-C-0003 to Engineered Demolition, Inc. (EDI). The contract, in the amount of $1,089,424.65, required EDI to demolish approximately 62 structures of various types of construction and configuration as a part of the Napa River Flood Protection Project, Napa River, California. It told EDI that "[a]sbestos and lead paint abatement will be required in many of the structures." The contract included FAR 52.233-1, DISPUTES (DEC 1998). (R4, tabs 3A, 3C at 106)

2. The contract required EDI to complete work within 260 calendar days after receiving the notice to proceed (NTP) (R4, tab 3A). The NTP was issued on 25 January 2002 (compl., ¶ 5).

3. Under the contract, the Corps was required to provide surveys describing the locations of asbestos and lead based paint at the project site. EDI's performance was allegedly delayed when the Corps was late in providing the asbestos surveys. (Gov't mot. at 2, ¶ 5)

4. By letter dated 29 November 2002, EDI submitted a "Request for Equitable Adjustment" (REA). The cover letter to the REA stated:

> For your convenience we have attached five copies of the subject REA, generated primarily from the Corps caused delays over late production of Asbestos Surveys. Due to the devastating financial effect this issue has had on ENDE, we respectfully request an early Mediation for settlement of this REA, by Mid January 2003.
>
> Please advise us immediately if Mediation is not an option, in order to allow ENDE expedient pursuit of alternate and final legal remedies.

(R4, tab 5B) The REA sought an equitable adjustment of $1,722,574 (R4, app. 1, tab A).

5. The REA was accompanied by the following certification by EDI's president:

> In regard to the Request for Equitable Adjustment submitted by Engineered Demolition, Inc. for the above contract, I, ANNA CHONG, President, hereby certify to the following:
>
> 1. The claim is made in good faith;
>
> 2. The supporting data are accurate and complete to the best of my knowledge and belief;
>
> 3. The amount request [sic] accurately reflects the contract adjustment for which I believe the government is liable; and
>
> 4. The person submitting the claim is duly authorized to certify the claim on ENDE's behalf.

(R4, app. 1, tab K)

6. The Corps was apparently confused as to whether EDI had submitted an REA or whether it had submitted a certified claim. To clear up this confusion, EDI's president sent a letter, dated 13 January 2003, in which she stated:

> This is to clear up the confusion regarding the nature of our REA. The certification was included because it was required by the DFARS clause of the prime contract even in the case of an REA, and was not meant to indicate we intended the submittal to be a "claim" within the meaning of the Contract Disputes Act. The use of the term "claim" in connection with the portion of the REA dealing with delays was intended to be synonymous with "assertion" or "allegation." It was a pure inadvertence and was employed for no other reason.

(Gov't mot., ex. 1)

7. We read this letter to say that EDI did not mean to submit a CDA claim, and to the extent it submitted a CDA certification, it was not submitted in support of a CDA claim but to satisfy a regulatory requirement in submitting a request for equitable adjustment.[1]

8. After having been told by EDI that its REA was not a claim, the contracting officer (CO) advised EDI by letter dated 18 March 2003 that he was sending the REA to Defense Contract Audit Agency (DCAA) for audit. The letter stated that "[d]uring this time, however, we will continue to review and analyze the merits of your REA in order to expedite a decision as to any negotiable items as soon as we receive the results of the audit." (R4, tab 5C at 1, 2)

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[1] As explained in Department of Defense FAR Supplement (DFARS) 243.204-70, the certification required by 10 U.S.C. § 2410(a) as implemented in the clause at DFARS 252.243-7002 is different from the certification required by the CDA (41 U.S.C. § 605(c)). DFARS 243.204-70(c) states, in part, that "[i]f the contractor has certified a request for equitable adjustment in accordance with 10 U.S.C. 2410(a), and desires to convert the request to a claim under the Contract Disputes Act, the contractor shall certify the claim in accordance with FAR Subpart 33.2." *See Advanced Engineering & Planning Corporation*, 03-1 BCA ¶ 32,157 at 158,989, *aff'd*, 292 F. Supp. 2d 846 (E.D. Va. 2003).

9. The parties negotiated pending receipt of the DCAA audit. As reflected in Modification No. P00007 which both parties executed in July 2003, the Corps agreed to pay EDI $275,000 as "an interim payment to the contractor for delay costs associated with the contractor's late receipt of the asbestos surveys." The modification made clear that "[a] second modification will be issued containing the final adjustment for the delay costs based upon the findings of a DCAA audit of contract costs." (R4, tab 4A)

10. The parties continued to negotiate. They entered into Modification No. P00008 in September 2003. As reflected in this modification, the parties settled several more items, including, "Partial Settlement of Forced Account Work Items (Item 4), Lost Seasonal Discounts (Item 5), Claim Relief (Item 11) and REA Preparation Costs - Partial (Item 8)," for $83,009 (R4, tab 4B).

11. By letter dated 7 November 2003, the CO advised EDI that DCAA had determined that the documentation attached to its proposal (REA) was inadequate. The CO asked that EDI revise its REA to provide the information needed by DCAA to complete the audit. (R4, tab 5E)

12. EDI submitted a revised proposal in January 2004. The revised proposal was divided into two volumes. Volume I set forth its delay costs (Section I) and its REA preparation costs (Section II). Volume II set forth "ADDITIONAL COPENSIBLE [sic] COSTS NOT YET SETTLED." They included (1) Impaired Bonding cost, (2) Unsettled Work of a Forced Account Nature, and (3) Lost Profit from Forgone Work. (R4, app. 2, tab 2)

13. DCAA issued its audit report in July 2004. In the meantime, the parties continued to negotiate. As reflected in the CO's letter of 20 October 2004, as a result of negotiations held on 19 October 2004, the Corps agreed to pay EDI:

> [T]he additional sum of $600,000.00 as the final settlement of all current and/or future costs associated with their delay and proposal preparation requests. Payment will be contingent of the availability of funds. In return Engineered Demolition agrees to sign a modification releasing the Government from further liability for all items contained in Volume I, Sections 1 and 2 of their 23 January 2004, Request for Equitable Adjustment.

(R4, tab 5I)

14. The parties were not able to reach agreement with respect to two items of EDI's revised REA. The two items were a part of Volume II of EDI's revised REA:

(1) impaired bonding costs and, (2) lost profit from foregone work. In a letter dated 9 November 2004, the Corps advised EDI:

> As we agreed during the negotiations on 19 October we have reviewed your requests for Impaired Bonding and Lost Profits From Forgone Work. Our position that they are not compensable remains unchanged. As a result we do not believe there is anything to be gained from further discussions on these issues.
>
> Should you wish to pursue these items you are directed to the DISPUTES Clause (FAR 52.233-1) of your contract.
>
> Sincerely,
> /s/
> H.T. (Dave) Wong, P.E.
> Chief, Construction Branch
> Authorized Representative of
> the Contracting Officer

(R4, tab 5J)

15. EDI's counsel, by notice dated 9 February 2005, appealed "the November 9, 2004 decision of the Authorized Representative of the Corps's Contracting Officer." The notice said that "[t]he amount in dispute is at least $400,000, which is composed of at least $250,000 for the impaired bonding capacity claim and at least $150,000 for the lost profits on foregone work claim." (App. Notice of Appeal)

16. After pleadings were filed, the Corps on 14 July 2005 filed a motion to dismiss. The motion contends that we lack jurisdiction because EDI never submitted a claim and never requested a decision from the CO (gov't mot. at 6, ¶ 16). The motion also took the position that there was no CO decision because "Mr. Wong is neither a contracting officer nor an authorized representative of the contracting officer." According to the Corps, "He does not possess contracting officer authority either directly or through delegation. The title included in his signature block is erroneous." (Gov't mot. at 5, ¶ 10)

17. Attached to the Corps' motion is a declaration signed by Shauna L. Martinez (Martinez). Martinez is a CO with a $10 million warrant. She was the one who awarded the contract to EDI. According to her declaration, the authority to issue a CO decision was never delegated, and Mr. Wong was not a CO. The declaration further stated that the

term "Authorized Representative of the Contracting Officer" is not a term used by the Contracting Division of the Sacramento District of the Corps. (Gov't mot., ex. 3)

18. In opposition, EDI argues that the Corps' motion was "the latest of a number of obstructionist efforts . . . to deny Appellant substantive relief," and "it would be fundamentally unfair" for us to grant the motion. EDI's opposition asks us, if we were to grant the motion, to place the appeal in suspense "with the condition that Appellant file its 'certified claim' on the two claim issues . . . within 60 days . . . ." (App. opp'n at 1, 4)

DECISION

The CDA requires that "[a]ll 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." 41 U.S.C. § 605(a). The CDA does not define the term "claim." The Federal Acquisition Regulation (FAR) defines the term "claim" to mean "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." FAR 33.201; *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (*en banc*). If the claim exceeds $100,000, it must be certified in accordance with 41 U.S.C. § 605(c)(1). *See* FAR 33.207. To invoke our jurisdiction under the CDA, there must first be a "decision" (or failure to decide) by the CO. The CO, however, has no authority to issue a decision until a "claim" in writing has been properly submitted to him for a decision. "Absent this 'claim', no 'decision' is possible – and, hence, no basis for jurisdiction." *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981).

In November 2002, EDI submitted a $1.7 million REA certified in accordance with the requirement of the CDA. The cover letter asked if a mediated resolution was an option. When asked whether it intended its REA to be a CDA claim, EDI replied that it did not intend its REA to be a "claim" within the meaning of the CDA. Based on this representation, no CO decision was rendered and the parties proceeded with a series of negotiations which resulted in the settlement of several issues. In November 2003, the CO asked EDI to revise its REA to provide the information DCAA needed to complete an ongoing audit. EDI submitted a revised proposal in January 2004. The revised proposal set forth its delay costs in Volume I, and its impaired bonding cost and lost profit in Volume II. After DCAA issued its report, the parties resumed negotiation and were able to settle the Volume I costs.

In a letter dated 9 November 2004, H.T. Wong, identifying himself as the authorized representative of the CO, advised EDI that the Corps' position was that the impaired bonding cost and lost profit were not compensable. The letter directed EDI to the contract Disputes clause if it wished to pursue the two remaining unsettled items. By

directing EDI to the Disputes clause, we believe Mr. Wong was implicitly telling EDI to address its claim to the CO for decision if it chose not to accept what the letter stated.

From the foregoing facts, we are unable to conclude that there was or had been a proper claim before the CO. As EDI itself indicated, its November 2002 REA was not a CDA claim. Since then, the parties proceeded with negotiation as if no claim was pending before the CO. The Corps tells us that Mr. Wong is neither a CO nor the authorized representative of the CO, and he had no authority to issue a CO decision. We have no reason to question this representation. With respect to EDI's impaired bonding cost and lost profit, there is presently no claim or CO decision. Without a claim, there is no basis for jurisdiction pursuant to the "deemed denied" provision of the CDA, 41 U.S.C. § 605(c)(5).

Because there is no certified claim and no CO decision with respect to the two remaining unresolved items in EDI's revised REA (or proposal), we hold that we have no jurisdiction. Accordingly, ASBCA No. 54924 is dismissed for lack of jurisdiction.[2]

Dated: 17 November 2005

PETER D. TING
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

[2] Since we have no jurisdiction, we will not suspend proceedings as EDI has requested.

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. 54924, Appeal of Engineered Demolition, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals