ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Environmental Safety Consultants, Inc.	)	ASBCA No. 54995
	)	
Under Contract No. DACW38-95-C-0102	)	

APPEARANCE FOR THE APPELLANT: Mr. Peter C. Nwogu
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Lanny R. Robinson, Esq.
Deputy District Counsel
U.S. Army Engineer District,
Vicksburg

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

This appeal was taken from a contracting officer's (CO) January 2005 letter which declined to reconsider appellant's claim and stated that the time to appeal the CO's 2003 final decision on the same claim had elapsed. The government moves to dismiss the appeal as untimely due to appellant's failure to appeal the CO's April 2003 final decision to the ASBCA within 90 days after its receipt, pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 606. For the reasons discussed below, we grant the motion.

FINDINGS OF FACT

1. On 29 September 1995, the government awarded contract No. DACW38-95-C-0102 (contract 102) to Environmental Safety Consultants, Inc. (ESC) for constructing four Riverine Aquatic Habitat Units and riprap protection for two bridges on the Yalobusha River, Mississippi, for the fixed price of $230,000 (R4, tab D4 at 1-4).

2. On 9 November 1995 ESC received notice to proceed issued on contract 102 (R4, tab D6). The original contract completion date was 120 calendar days after 9 November 1995, *viz.*, 8 March 1996 (R4, tab D4 at SC-1). That date was adjusted for weather delays to 4 July 1996 (R4, tab D8).

3. On 22 August 1996 the CO notified ESC that the contract was terminated for default (R4, tab C34, *i.e.*, sub-tab 34 of Tab C). In support of that termination notice, the CO's 10 October 1996 final decision properly notified ESC of its appeal rights (R4, tab C36). ESC received that CO's final decision not later than 22 October 1996, on which date ESC's attorneys requested the CO to convert the default termination to a "no cost termination settlement" (R4, tab C37). The CO's 4 December 1996 letter declined ESC's attorneys' request (R4, tab C38). The record contains no evidence that ESC ever appealed the CO's 10 October 1996 final decision to the ASBCA.

4. ESC submitted a $98,639.18 "REQUEST FOR EQUITABLE ADJUSTMENT (REA)" to the CO by letter dated 23 September "2003" (R4, tab E3 at 9), which ESC later re-dated "2002" (compl. tab 4 at 2). On 16 March 2003 ESC re-submitted its $98,639.18 REA pursuant to "52-233-1 Disputes" (sic) with an unsigned CDA certification, alleging that there was an increase "in the cost of performing (1) placement of riprap rocks at two bridges and (2) placement of 100 trees . . . at 4-sites for fishery mitigation" (R4, tab C at 1, 26). The REA alleged the following costs: (1) $7,000 for the Avalon Bridge; (2) $20,625 for the Whaley Bridge ($8,395 in Dec. 1995-Feb. 1996 + $12,230 in Mar.-Apr. 1996); (3) $14,000 in unanticipated subcontractor costs; (4) $38,240.88 for unpaid invoice No. 4 dated 28 May 1996; (5) $4,253.25 for rental equipment; and, (6) $14,520 for placement of 100 trees ($5,000 + 4,290 + 230 + 1,500 + 3,500) (R4, tab C at 15-17, 20-22, 26). ESC's foregoing costs totaled $98,639.13, without explanation of the 5 cent discrepancy.

5. The final decision of CO Shirley M. Wilson, sent by certified letter dated 23 April 2003, denied ESC's 16 March 2003 request and advised ESC of its right to appeal the decision within 90 days to this Board, or to bring an action directly on a claim in the United States Court of Federal Claims within 12 months, of the date of receipt of the decision. ESC received that final decision on 20 May 2003. (R4, tab B at 1, 20-21, 25) The 90-day period in which to appeal therefrom to this Board ended 18 August 2003.

6. ESC's 30 May 2003 letter to CO Wilson stated:

> We have received your partial answer to the request for equitable adjustment (REA) that was submitted to you on September 23, 2002. However, your responses made many references to Tab 1 through Tab 12. The tabs information is not included in the document . . . . We ask that you complete your answer to our REA by including all information that are [sic] missing for [sic] which you relied on to make your decision. . . .

. . . .

> As soon as we receive an answer with all supporting referenced materials to our REA, we will review your answer and take the necessary step allowed by law.

(R4, tab E1)

7. The CO Wilson's 4 June 2003 letter in reply to ESC's 30 May 2003 letter stated:

> . . . . Your letter categorizes my April 23, 2003 Contracting Officer's Final Decision as a "partial answer" to your September 23, 2002 request for equitable adjustment (REA). Let me make it perfectly clear that my April 23, 2003 . . . Final Decision was not a partial answer to your REA. Instead, it was a total and uncategorical [sic] denial of your REA. . . .
>
> You stated that the tabs referred to in the decision were not supplied. As stated on page 22 [of the final decision], all of the tabs referred to in the decision are within your possession except for Tabs 10 and 11. Copies of those two tabs were attached to the decision. . . .

(R4, tab E2) The record contains no other correspondence between the parties in the period 20 May to 18 August 2003, and no evidence that ESC appealed to this Board from the CO's 23 April 2003 final decision before 29 April 2005.

8. ESC's 10 January 2005 letter to the CO, entitled "Reconsideration of Request for Equitable Adjustment (REA)" sought payment of $98,639.18 and did not identify any new operative facts or proof of government liability other than the information ESC included in ESC's 23 September 2002 and 16 March 2003 REA (R4, tab E3).

9. In reply to ESC's 10 January 2005 letter, the CO's 14 January 2005 letter, received by ESC on 22 January 2005, stated that the 23 April 2003 final decision had denied ESC's 16 March 2003 REA and advised it of its appeal rights, the time to appeal that decision had passed, and "I will not reconsider . . . . I will not make an offer to settle [or] consider any [ADR] procedures" with respect to the REA (R4, tab E4).

10. ESC's 24 January 2005 letter to the CO referred to the CO's 14 January 2005 letter refusing to reconsider the CO's 23 April 2003 final decision, and suggested that--

> you pay only for the wrongful [sic] withheld invoices and earned contract funds prior to termination and takeover contract by you. This includes but is not limited to non-payments of our approved invoices, and the actual cost for the work we did in June, July and August 1996, respectively. Here is the breakdown for our new offer and request for $78,889.130.00 [sic] . . . :
>
> 1. April 1, 1996 through May 28, 1996 unpaid invoices in the amount of $38,240.88
> 2. Avalon Bridge extra costs $7,000.00
> 3. Whaley Bridge extra costs $8,395.00
> 4. Avalon and Whaley Bridges Subcontract increased costs $14,000.00
> 5. Completion of site #4 and work on sites #3, #2 & #1 Trees Placement Job Labor only $7,000.00 (June through July 31, 1996)
> 6. Equipment rental based on Mr. Gordon O. Inman directions on August 12, 1996: $4,253.25
>
> The total actual labor and material costs is [sic] $78,889.130
>
> The information supporting this new request for payments for actual costs are [sic] presented in our series of communications already filed with you. . . .

ESC's letter made no statement about the government's decision not to complete the contract 102 work. (R4, tab E5) We find that ESC's 24 January 2005 "new offer" of $78,889.13 was premised on the same operative facts alleged in ESC's 16 March 2003 REA, and its six cost items were contained in that REA, including gross labor costs of about $7,240.50 in June-July 1996 for employees Meredith, Jones, Grice, Causey and Vickers (finding 4; R4, tab C41).

11. The CO responded on 27 January 2005, reiterating his 14 January letter, and stated that he would not reconsider the matter and the time for appealing the CO's previously issued final decision had passed (R4, tab E6).

12. On 29 April 2005, appellant filed an appeal based upon its alleged 24 January 2005 request for reconsideration and the government's subsequent refusal "to reconsider its previous decision based on new and reduced cost owed to ESCI" (R4, tab A).

DECISION

Movant argues that ESC's 24 January 2005 letter was not a new claim from which an appeal could be filed, but was a belated request for reconsideration of the CO's 23 April 2003 final decision for which the statutory 90-day time period for filing an appeal had expired, and thus the Board lacks jurisdiction to entertain this appeal.

ESC argues *inter alia* that: (1) its 23 September 2002 or 16 March 2003 REA was not a CDA "claim" because that REA did not request a final decision from the CO, and thus the CO's 23 April 2003 final decision did not start the appeal period; (2) ESC timely appealed the 23 April 2003 final decision by its 30 May 2003 letter to the CO; (3) ESC's 24 January 2005 letter was a new claim from which it has the right to appeal, since the $78,889.13 it sought was not a subset of its $98,639.18 claim, but was based upon new facts, namely, the government's decision not to complete the contract work; and (4) ESC appealed within 90 days of receiving the CO's 27 January 2005 "final decision" and movant has offered no proof of the date of receipt to show the appeal was untimely.

The CDA prescribes 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). Section 605(a) does not require an explicit request for a CO's final decision. Although a contractor's written claim submitted to the CO does not explicitly request the CO's final decision, as long as the contractor implicitly desires a final decision the CDA test for a claim is satisfied. *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1576, 1578 (Fed. Cir. 1992) ("This court is loathe to believe that . . . a reasonable contractor would submit to the [CO] a letter containing a payment request after a dispute had arisen solely for the [CO]'s information and without at the very least an implied request that the [CO] make a decision as to entitlement.")

In *Southern Automotive Wholesalers, Inc.*, ASBCA No. 53671, 03-1 BCA ¶ 32,158 at 158,998, the contractor asserted that its 1 August 2000 REA made no express request for issuance of a CO's decision and so was not a valid CDA claim and the ensuing CO's final decision was not valid. Citing *Transamerica*, we held that the request for a CO's decision need not be expressed in a particular form of words, and the contractor's intention to obtain a CO's decision was manifested in its action of submitting a claim certification that the CO required for the contractor's $294,220.12 REA.

In this appeal, the circumstances relevant to the issue of whether ESC's REA impliedly requested a CO's decision are that ESC submitted its REA to the CO on

23 September 2002 and re-submitted it on 16 March 2003; ESC requested $98,639.18 pursuant to the FAR 52.233-1 Disputes clause and enclosed an unsigned CDA certification (though not statutorily required for the REA's dollar amount) (finding 4); and no pre-existing dispute was required for such a non-routine request for payment, *see Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1583 (Fed. Cir. 1995). Therefore, we hold that ESC's 16 March 2003 REA impliedly requested a CO's decision and was a proper CDA claim.

ESC's argument that its 30 May 2003 letter to the CO timely appealed the 23 April 2003 final decision is untenable. ESC's 30 May 2003 letter characterized that CO's decision as a "partial answer" and stated it would "take the necessary step allowed by law" once the CO identified the documents to which his decision referred. (Finding 6) That letter did not clearly express an election to appeal to this Board from such decision. *See Stewart-Thomas Industries, Inc.*, ASBCA No. 38773, 90-1 BCA ¶ 22,481 at 112,836. The CO's 4 June 2003 reply letter stated that his decision was a "total and uncategorical [sic] denial of your REA" and ESC had all the documents referenced in the final decision (finding 7), a statement ESC has not disputed thereafter. Thus, ESC's 30 May 2003 letter did not come within the rule in *Contraves-Goerz Corp.*, ASBCA No. 26317, 83-1 BCA ¶ 16,309 at 81,080 (valid timely appeal to CO is tantamount to appeal to the ASBCA), and the CO's 23 April 2003 final decision triggered the running of the 90-day appeal period to this Board. ESC's only appeal that the ASBCA has received under contract 102 was dated 29 April 2005, long after the time to appeal the CO's 23 April 2003 final decision had expired (findings 5, 7, 12).

The remaining issue is whether ESC's 24 January 2005 letter was a "new" claim. The established test for what constitutes a "new" claim is whether "claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists." *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990).

ESC argues that its 24 January 2005 claim is "new" because it requested a reduced sum of money, and the government denied its original claim before it decided not to complete the project. ESC's 24 January 2005 claim did not present new operative facts, but relied wholly on the factual contentions in its September 2002-March 2003 REA (finding 10). The fact that ESC reduced its claim from $98,639.18 to $78,889.13 did not make the 2005 claim "new." *See Aerojet Ordnance Tennessee*, ASBCA No. 36089, 91-3 BCA ¶ 24,130 at 120,773 (as long as the essential character of a claim remains the same, revision of the amount is permitted). That the government did not complete performance of contract 102 after terminating ESC for default is immaterial to the operative facts of ESC's REA, which requested payment of its allegedly added costs incurred prior to termination. We hold that ESC's 24 January 2005 letter did not present a new claim, but

rather a monetary revision of ESC's March 2003 claim. *See SMS Agoura Systems, Inc.*, ASBCA Nos. 50878 *et al.*, 97-2 BCA ¶ 29,321 at 145,792-93:

> The introduction of additional facts which do not alter the nature of the original claim, a dollar increase in the amount claimed before the Board, or the assertion of a new legal theory of recovery, when based upon the same operative facts as included in the original claim, do[es] not constitute new claims.

We have considered ESC's other arguments and find them to be without merit. Since ESC did not timely appeal the CO's 23 April 2003 final decision, we grant the government's motion to dismiss.

Dated: 7 March 2006

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
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. 54995, Appeal of Environmental Safety Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

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