ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Todd Pacific Shipyards Corporation	)	ASBCA No. 55126
	)	
Under Contract No. N00024-01-C-4115	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON MOTION TO DISMISS

Appellant Todd Pacific Shipyards Corporation (Todd) has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the denial by the contracting officer (CO) of Todd's claim under its contract with the Navy for costs principally pertaining to Todd's dry dock No. 3, also referred to as the "Emerald Sea Dry Dock". The government's motion to dismiss, as amended, seeks partial dismissal of the appeal on the ground that portions of appellant's complaint request indeterminate amounts that were not in its claim to the CO, resulting in new claims that are not in a sum certain which the Board does not have jurisdiction to consider. Because we are to satisfy ourselves as to the scope of our jurisdiction in this appeal, *see, e.g., Fanning, Phillips and Molnar v. West*, 160 F.3d 717, 720 (Fed. Cir. 1998), we have fully examined the claim to assure that it satisfies CDA claim requirements. For the reasons set forth below, we conclude that we have jurisdiction to entertain this appeal in its entirety and we deny the government's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On 14 June 2001, the Naval Sea Systems Command (NAVSEA) awarded the captioned contract to Todd. It included base services to be performed in fiscal years (FYs) 2001 and 2002 and 24 options, extending through FY 2007. The contract involved, *inter alia*, planning, design review and repairs and alterations to certain U.S. Navy Auxiliary Oiler Explosive (AOE) vessels. (R4, tab 1 at 1, B-1 - B-26, C-1, *et seq*.)

By letter to the CO dated 5 March 2004 from Todd's chief financial officer (CFO), Todd submitted an $8.9 million "Drydock # 3 Settlement Proposal," requesting an arrangement with the Navy, such as an advance agreement, to settle all outstanding issues related to dry dock No. 3. Todd stated that, upon concluding contract negotiations in June, 2001, it had undertaken a five-year repair and maintenance project to ensure that dry dock No. 3 would remain certified and ready to support all scheduled and potential dockings covered by the contract. It alleged that, since nearly all of its non-Navy customers could be accommodated on a mid-sized dry dock, its continuing need for a dock as large as dry dock No. 3 was driven by this AOE contract and the Navy's representations and commitments as to the future work. It alleged that the project cost was $16 million; it was clearly understood that the Navy would pay for the dry dock costs through direct charges or as unrecovered costs included in overhead; and Todd had engaged in the project because of the Navy's representations and commitments and the $8.9 million in support Todd expected from it. However, after signing the contract, the Navy decided to transfer two vessels elsewhere and to decommission the U.S.S. Sacramento early. Todd alleged that it and the Navy had been discussing the need to change Todd's dry dock No. 3 cost recovery methodology for three years, and that the Navy's decisions had damaged it. (R4, tab 35) Todd's proposal was not certified in any manner. By memorandum dated 10 May 2004, the CO requested "a certified proposal based on data that is current, accurate, and complete" (R4, tab 39).

By letter from Todd's CFO to the CO dated 18 June 2004, Todd referred to its 5 March 2004 submission and submitted its "Drydock No. 3 Settlement Proposal (Revised)" in the sum certain amount of $9,318,462. Todd stated that the rationale for its proposal remained the same but that it had updated the underlying cost and revenue details. Although similar to Todd's letter of 5 March, the 18 June submission used the term "claim" as well as settlement proposal references. It also added several theories of recovery, including: the costs were reimbursable under the contract's Federal Acquisition Regulation (FAR) Allowable Cost and Payment clause, and as pre-contract costs under the FAR where applicable; Todd was entitled to reimbursement based upon the Navy's constructive change of the contract; the Navy's decision to transfer two vessels and to decommission another early had the effect of a partial termination for convenience of Todd's contract; the Navy and Todd had a contract implied-in-fact under

which the Navy had failed to meet its obligations; the Navy had accepted the benefits of the availability of a certified dry dock, knowing that Todd expected to be reimbursed for the costs of maintaining its availability; or, as an equitable matter, Todd was entitled to reimbursement pursuant to Pub. L. 85-804 and FAR Part 50. (R4, tab 43)

Todd's 18 June 2004 submission included a "Contractor Certification" whereby its CFO certified that Todd's claim was made in good faith; the supporting data were accurate and complete to the best of his knowledge and belief; the amount requested accurately reflected the contract adjustment for which Todd believed the government was liable; and he was duly authorized to certify the claim on Todd's behalf. The certification language was that required by the CDA, 41 U.S.C. § 605(c)(1), for claims exceeding $100,000. (R4, tab 43 at Encl. No. 1)

By letter from Todd's CFO to the CO dated 28 March 2005, which referred to "Todd's Drydock #3 Certified Claim Dated June 18, 2004" and to numerous meetings with the Navy and the Defense Contract Audit Agency (DCAA), Todd submitted its "Drydock # 3 Settlement Proposal (Revision 2)" in the sum certain amount of $5,990,000. Todd again used both claim and settlement terms, stating that the proposal was a means of resolving the issues and claims in its 18 June 2004 certified claim, and that the proposed settlement amount and cost allocation approaches had been substantially revised from that claim to reflect guidance received from the Navy and DCAA. Todd sought a contract modification to settle all issues related to dry dock No. 3. Todd identified the $5,990,000 in costs it sought to recover as including $4,502,000 in NAVSEA certification-related costs; $620,000 for a revised, two-rate, AOE dry dock allocation methodolgy; $267,000 to correct billing errors in 2002 and 2004; and $600,000 in unabsorbed dry dock costs during the planned U.S.S. Sacramento availability period. (R4, tab 60)

Todd referred to its 18 June 2004 certified claim and elaborated as follows:

> The core of the issue is that Todd was required to incur costs to maintain drydock #3 in accord with the Navy's contract requirements, and is entitled to payment of those costs by the Navy. The Navy's transfer of the AOEs to the maritime fleet, and consequent reduction of AOE repair work at Todd, has made it impossible for Todd to recover these costs through charges on AOE repair work. However, the Navy's elimination of AOE work does not mean Todd is no longer entitled to recover these costs it incurred to maintain drydock #3 under the contract. Rather, the lack of AOE work merely means that it is necessary to provide for Todd's recovery of these costs in some other way.

> . . . Todd's unrecovered drydock #3 costs are recoverable under the AOE contract directly or under the Changes Clause; the lack of AOE work amounts to a partial termination for convenience for which Todd is due its costs; and, at a minimum, there is an implied-in-fact contract that the Navy would pay these costs.

(R4, tab 60 at 5) In addition to the grounds contained in its 18 June claim, Todd alleged two additional bases for recovery: (1) the Cost Accounting Standards (CAS) and the FAR provided for an equitable adjustment based upon "desirable changes" to cost accounting practices and Todd's "settlement proposal" included three such changes, *i.e.*, charging $4,502,000 of incremental costs as direct contract costs; changing Todd's traditional allocation of dry dock No. 3 overhead costs to a two-rate allocation, resulting in $620,000 due from the Navy; and allocating to the AOE contract $600,000 in dry dock No. 3 costs that otherwise would have been absorbed during the 9-week dry docking of the U.S.S. Sacramento; and (2) Todd was entitled to an equitable adjustment for its unabsorbed overhead due to the Navy's delay in, or elimination of, the contract's AOE work requirements (R4, tab 60 at 5-7).

On 27 May 2005, Todd submitted to the CO a CDA claim certification executed by its CFO, dated 28 March 2005, citing Todd's prior submission of that date (R4, tab 60). By final decision dated 31 May 2005, the CO denied Todd's claim (R4, tab 66 at ex. A). The CO concluded, *inter alia*, that Todd's proposed cost allocation methodology did not comply with the FAR or CAS, and that Todd's constructive contract change, partial termination for convenience, and implied-in-fact arguments all related to the "underlying issue of the non-exercise of un-priced contract options" which the government was not required to exercise (*id*., at 2). Todd timely appealed to the Board on 24 August 2005.

Count one of Todd's 23 September 2005 complaint alleged that unrecovered costs incurred to upgrade, alter, repair and maintain the Emerald Sea Dry Dock were due Todd under the contract's Allowable Cost and Payment clause and other contract provisions, and that "[t]his includes all amounts requested in Todd's latest settlement proposal, and all additional amounts that may be due and owing" (compl., ¶54). Todd alleged, alternatively, that the costs were due pursuant to an implied-in-fact contract with the Navy (compl., ¶ 55). It further alleged that the CO "breached the Contract" by refusing to pay Todd's costs and, as a result, Todd had incurred "substantial breach of contract damages in an amount to be determined" (compl., ¶ 56). This was followed by a "WHEREFORE" clause stating:

> WHEREFORE, Todd requests that the ASBCA sustain this appeal, hold that the Navy breached the Contract, award to Todd the amounts requested in the settlement proposal that the Navy has treated as a claim, and award to Todd such additional amounts as may be due to Todd stemming from the Navy's breach of the Contract.

(Compl., at 18)

Count two of the complaint alleged that Todd and the Navy had agreed to develop and implement a new methodology for reimbursing dry dock costs under the contract. Among other things, Todd would be reimbursed for its Emerald Sea Dry Dock costs in an equitable and timely manner that was not dependent upon subsequent performance of repairs and alterations in the dry dock, and the Navy and Todd would work together to reduce this advance agreement to writing. Todd asserted that the Navy had failed to meet its promise to reduce the advance agreement to writing, but that Todd had justifiably relied upon the Navy's representations as to the agreement's terms. Todd alleged that "[a]s an alternative basis for recovery, the advance agreement should be given full force and effect and, if necessary, should be deemed to have been implied-in-fact" (compl., ¶ 59). The associated WHEREFORE clause stated:

> WHEREFORE, Todd requests that the ASBCA sustain this appeal, hold that Todd is entitled to recover its costs, and award to Todd the amounts requested in the settlement proposal that the Navy has treated as a claim, and award to Todd such additional amounts as may be due to Todd stemming from the Navy's breach of the advance agreement.

(*Id*., at 19)

In Count three of the complaint, Todd sought recovery of its costs on the alternative ground that the FAR allowed a contractor pre-contract costs under certain conditions and that the same principles applied to pre-option costs (compl., ¶¶ 60-63). In Count four, Todd alleged that its $620,000 claim based upon its revised two-rate AOE dry dock allocation method represented a desirable change to its cost accounting practices for which it was entitled to an equitable adjustment (compl., ¶¶ 64-66). In Count five, Todd alleged that it was entitled to recover its costs due to the Navy's constructive termination for convenience of the contract to the extent that it failed to deliver AOE vessels to Todd for alterations and repairs using the Emerald Sea Dry Dock (compl., ¶¶ 67-69). Counts three, four and five ended with similar WHEREFORE clauses as Count two. The clauses varied only with respect to the cause of action alleged and the related additional amounts "as may be due."

Count six alleged as an alternative theory that the Navy had superior knowledge concerning the timing of its transfer of AOE vessels to the Military Sealift Command; its decommissioning of other AOEs; and its failure to deliver them to Todd for alterations and repairs, entitling Todd to recover under the doctrines of superior knowledge and constructive change (compl., ¶¶ 70-72). The associated WHEREFORE clause was similar to the others, except that it did not ask for costs and sought such additional amounts as may be due to Todd "under the [CDA], including interest" (compl., at 22). In count seven, Todd alleged that the Navy had been unjustly enriched by its failure to reimburse Todd for "the costs in question in this proceeding" (compl., ¶ 76). The WHEREFORE clause again did not ask for costs but asked for amounts due "under theories of unjust enrichment and equitable estoppel" (compl., at 23).

The government's 15 December 2005 answer to appellant's complaint asserted among its responses that appellant's requests for legal costs were premature and should be stricken from the complaint, and that the Board lacks jurisdiction over appellant's requests for "such additional amounts as may be due to Todd" and these requests must also be stricken (answer at ¶¶ 56, 59, 63, 66, 69, 72). The government similarly asserted among its affirmative defenses that the Board lacks jurisdiction over appellant's claim on the ground that appellant's requests for unspecified additional amounts as may be due render the claim one that is not for a sum certain, and that the Board lacks jurisdiction over and should strike the premature prayers for legal costs (answer at 17, affirmative defenses 1 and 2). By letter of 21 December 2005, the Board notified the parties that, should the government wish to pursue the jurisdictional allegations in its affirmative defenses, it should file a motion to dismiss, and to the extent that appellant's requests for costs referred to attorney fees, the request was premature under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(2), and was not properly before the Board.

On 2 March 2006 the government filed its motion to dismiss, alleging that the Board lacked jurisdiction over the appeal because appellant's complaint had revised its claim by demanding additional indeterminate amounts and by seeking unquantified future legal costs, rendering the claim one that was not in a sum certain. The government further alleged that the request for legal costs was both premature under EAJA and a new claim because it had not been presented to the CO. In its 15 March 2006 opposition, appellant acknowledged that its request for legal fees was premature, but it asserted that its claim to the CO was in a sum certain and that the Board's jurisdiction was unaffected by the fact that the complaint had requested any other amounts the Board found due. By order of 24 March 2006 the Board, among other things, confirmed that appellant's request for legal costs had been stricken. On 5 April 2006 the government modified its motion to dismiss. It now accepted that the Board had jurisdiction over the matters set forth in appellant's claim to the CO, but it compared the "additional indeterminate amounts" in the complaint to "new matters" that had not been in that claim. Thus, the

government currently appears to contend that appellant's complaint seeks amounts that are not in a sum certain and that the unspecified amounts constitute new claims.

In its 26 May 2006 opposition, appellant urged that because its complaint is based upon the same operative facts included in its sum certain claim to the CO, there is no jurisdictional impediment to asserting new legal theories of recovery or to changing the amount of damages sought, and that those portions of its complaint that seek any additional amounts proven in this appeal are within the Board's jurisdiction because they are not new claims.

DISCUSSION

Preliminarily, we consider whether appellant filed a cognizable CDA claim, which is a prerequisite to the Board's jurisdiction to entertain its appeal. The CO's final decision is a nullity if the claim did not satisfy CDA criteria. *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981). The CDA requires that contractor claims be submitted to the CO in writing for decision and that claims exceeding $100,000 be certified. 41 U.S.C. §§ 605(a), (c). The CDA does not define "claim," but FAR 33.201 defines "claim", in part, as a written demand or assertion seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief under or related to the contract. A contractor's money claim does not qualify as a CDA claim unless it is submitted to the CO in a sum certain. *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1581-82 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992). Whether a communication from a contractor constitutes a CDA claim is determined on a case by case basis, and we employ a common sense analysis. *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992); *ACEquip Ltd.*, ASBCA No. 53479, 03-1 BCA ¶ 32,109 at 158,767. The contractor must submit a clear and unequivocal statement that gives the CO 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). A contractor's desire to work with the government to resolve an adjustment request does not render the request invalid as a CDA claim. *Transamerica*; *ACEquip Ltd.*

Appellant certified its 28 March 2005 submission to the CO as a CDA claim and incorporated therein what it described as its certified claim dated 18 June 2004. Both submissions were in a sum certain. The government has not disputed, and appellant has affirmed to the Board that it does not question, that Todd's 28 March 2005 certified submission to the CO was a CDA claim, and, based upon our review, we so conclude.

Once a claim has been submitted to the CO in a sum certain, an increase (or reduction) on appeal in the amount claimed does not render the monetary claim a new one, as long as the same operative facts are at issue. A contractor can increase the

amount sought in its proper CDA claim to the CO when the increase is reasonably based upon further information developed in litigation before the Board. *See Tecom, Inc. v. United States*, 732 F.2d 935, 937-38 (Fed. Cir. 1984). As we have stated:

> A recurring issue is whether allegations raised in pleadings or otherwise before the Board constitute new claims or are merely extensions of claims which the [CO] had the opportunity to consider. That determination turns on whether the matter raised before the Board differs from the essential nature or the basic operative facts of the original claim. . . . 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 not constitute new claims. [Citations omitted.]

Trepte Construction Co., Inc., ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385. *Accord, Lockheed Martin Librascope Corp.*, ASBCA No. 50508, 00-1 BCA ¶ 30,635 at 151,249-151,250; *see also S.A.S. Bianchi Ugo fu Gabbriello*, ASBCA No. 53800, 05-2 BCA ¶ 33,089 at 164,027.

While the government does not appear to allege that appellant's complaint is based upon different operative facts or legal theories than those in its 28 March 2005 claim to the CO, in keeping with our need to satisfy ourselves as to our jurisdiction, we have reviewed the complaint's allegations, summarized above, and have concluded that they are based upon those same operative facts. Although many of appellant's legal theories of recovery remained the same, it expanded upon them in the complaint to articulate such theories as breach of contract and superior knowledge. However, appellant essentially alleged the operative facts necessary to those theories in its 28 March 2005 claim, in the 18 June 2004 claim referenced therein, and in the 5 March 2004 submission to which the 18 June claim, in turn, referred.

As to the "indefinite" aspect of appellant's requests in its complaint for any additional amounts as may be due, the Board's Rules contemplate that the amounts sought in a complaint need not be precise. Board Rule 6 (a) provides that an appellant's complaint is to set forth the basis of each claim and the dollar amount claimed "to the extent known", and Board Rule 7 allows the amendment of pleadings to conform to the proof.

To summarize, appellant's certified claim to the CO was a valid CDA claim in a sum certain. Its complaint does not assert new claims that were not submitted to the CO.

The complaint's requests for legal costs are stricken, but its requests for any additional amounts that may be due are not stricken.

DECISION

The government's motion to dismiss is denied.

Dated: 18 October 2006

CHERYL L. SCOTT
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

JACK DELMAN
Administrative Judge
Acting 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. 55126, Appeal of Todd Pacific Shipyards Corporation, rendered in conformance with the Board's Charter.

Dated:

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