ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
AquaTerra Contracting, Inc.	)	ASBCA Nos. 55160, 55161
	)	
Under Contract No. DACW29-03-C-0001	)	

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

Appellant, AquaTerra Contracting, Inc. (ATI), has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the failure of the contracting officer (CO) to render a decision on, and thus deemed denial of, its claims for costs incurred as a result of two unilateral contract modifications. In its answer to appellant's complaint, the government asserted that the Board lacks jurisdiction over these appeals on the ground that appellant filed them prior to the submission of proper claims to the CO and prior to the CO's issuance of final decisions. The Board treated this as a motion to dismiss for lack of jurisdiction and directed the parties to brief the issue. For the reasons that follow, we deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

On 21 October 2002 the U.S. Army Corps of Engineers (the Corps), New Orleans Area Office, awarded ATI the captioned contract for construction of a Hurricane Protection Project at Cousins Pumping Station Complex in Jefferson Parish, Louisiana (R4, tab 8). On 24 January 2005 the Corps issued unilateral contract Modification

No. A00018 (Mod. 18), pertaining to the removal of a waterline. ATI submitted a "Price Proposal" dated 14 March 2005, requesting a time extension and a $63,650.77 equitable adjustment, based upon Mod. 18. It supported its request with documentation, including a narrative statement and cost-related materials. By letter to the CO dated 5 July 2005, which it described as a CDA claim, ATI sought $63,650.77, referring to its equitable adjustment request and stating that attempts to negotiate costs had been unsuccessful and the matter was in dispute. ATI alleged that the Corps had had an extended time to review the issues and it sought an immediate CO's final decision. (R4, tab 2; supp. R4, tab 1)

In the meantime, on 27 January 2005, the Corps had issued unilateral Modification No. A00019 (Mod. 19), pertaining to sand fill at certain walls. On 15 March 2005, ATI had submitted a "Price Proposal" to the Corps, requesting a time extension and a $73,774.40 equitable adjustment, based upon Mod. 19. It supported its request with documentation, including a narrative statement and cost-related materials. By letter to the CO dated 5 July 2005, which it described as a CDA claim, ATI sought $70,384.13, referring to its equitable adjustment request. The claim letter was essentially the same as the other, above, and it sought an immediate CO's final decision. (R4, tab 3; supp. R4, tab 2)

In two letters dated 27 July 2005 the CO advised ATI that he did not deem its 5 July 2005 submissions to be "proper" CDA claims, alleging: he did not consider the matters involved to be in dispute; the parties had not reached an impasse in negotiations; and ATI had not submitted supporting data or an explanation of the cause and effect of alleged damages. The CO contended that, if the parties later reached an impasse, ATI could submit claims with supporting data and an explanation sufficient to allow him to make a reasoned analysis. (R4, tabs 4, 5)

On 23 August 2005, ATI's president sent an e-mail to the Corps, stating that he had not heard anything about resolution of the sand fill issue and asking, "[p]lease let me know where we are at on the outstanding Mods" (supp. R4, tab 2, penultimate page). There is no response of record from the Corps.

ATI's appeals to the Board from the CO's failure to issue a decision on its claims were filed on 16 September 2005. The government has not submitted any sworn statement by the CO. To date, he has not issued a final decision on ATI's claims.

DISCUSSION

In briefing, the government no longer contends that there had to be an impasse in negotiations before appellant filed its CDA claims, but it alleges that, in each case, appellant submitted a "negotiating position," rather than a valid CDA claim. The government cites to appellant's use of the phrase "Price Proposal" in its requests for

equitable adjustment, and to its e-mail to the Corps inquiring about the status of matters, as indicia that appellant had not filed actual claims. (Gov't br. at 4-5)

The government's position is baseless. The CDA requires that contractor claims be submitted to the CO in writing for decision. 41 U.S.C. § 605(a). The implementing regulations define "claim" as "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" under or related to the contract. FAR 33.201. There is no requirement that a claim be submitted in a particular format or use particular wording (apart from any certification requirements, not applicable here). All that is required for a valid CDA claim is that a contractor 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). Appellant's 5 July 2005 claims, which are so designated, are in sums certain, request the CO's final decision, and incorporate prior requests for equitable adjustment, with a narrative explanation and alleged quantum support, clearly qualify as CDA claims. The contractor's use of the term "Price Proposal" in the equitable adjustment requests, and its post-claims e-mail inquiry, do not convert its claims into mere negotiating positions.

Under the CDA, a CO is to issue a decision on a claim of $100,000 or less, such as those at issue, within 60 days from receipt of a written request from the contractor that a decision be rendered during that period. Any failure by the CO to do so will be deemed to be a decision denying the claim, and will authorize the commencement of an appeal. 41 U.S.C. § 605(c)(1) and (5). In this case, if the CO believed appellant's claims to be inadequately supported, he could have issued a final decision denying them on that basis. *See Fru-Con Construction Corp.*, ASBCA No. 53544, 02-1 BCA ¶ 31,729 at 156,757. Instead, the CO did not issue a decision within the required 60 days and appellant properly appealed to the Board.

DECISION

The motion to dismiss is denied.

Dated: 13 March 2006

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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 Nos. 55160, 55161, Appeals of AquaTerra Contracting, Inc., rendered in conformance with the Board's Charter.

Dated:

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