ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
KAMP Systems, Inc.	)	ASBCA No. 54253
	)	
Under Contract No. F41608-97-D-0862	)	

APPEARANCE FOR THE APPELLANT: Mr. Mel McCullough
Secretary/Treasurer

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
Chief Trial Attorney
Carol L. Matsunaga, Esq.
Senior Trial Attorney
Srikanti Dixit, Esq.
Trial Attorney
Defense Contract Management Agency
Carson, CA

OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON GOVERNMENT'S MOTION TO STRIKE REVISED COMPLAINT

The government has moved to strike appellant KAMP Systems, Inc.'s (KAMP's) revised complaint on the ground that the Board lacks jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, to consider it because KAMP added factual allegations and a monetary demand that it had not first submitted to the contracting officer (CO) as a CDA claim. KAMP opposes the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On 18 November 1997 the Department of the Air Force, specifically the SA-ALC (Air Logistics Center)/Support Equipment Branch, Kelly Air Force Base (AFB), San Antonio, Texas, awarded the subject 100% small business set-aside firm-fixed-price requirements contract to KAMP, a small woman-owned business, to supply munitions trailers. The Defense Contract Management Command, renamed the Defense Contract Management Agency (DCMA) in 2000, administered the contract from its Santa Ana (Ontario, California) office. At some point SA-ALC was closed due to a BRAC directive and the trailer mission was transferred to WR-ALC, Warner Robins AFB, Georgia, although the DCMA office remained the same throughout the contract term. Commencing in January 2001 the administrative contracting officer (ACO) changed from

Mr. Dean Hatch to Ms. Deborah Pattengell. (R4, tab 1 at first page; *see*, *e.g.*, R4, tab 7 at DCMA 25 Oct. 2000 letter; supp. R4, tab 17; compl.[1] and answer ¶¶ 1, 6)

The contract incorporated the Federal Acquisition Regulation (FAR) 52.232-16, PROGRESS PAYMENTS (JUL 1991), ALTERNATE I (AUG 1987), and 52.233-1, DISPUTES (OCT 1995) clauses by reference. (R4, tab 1 at 13 of 19) The Disputes clause notes that the contract is subject to the CDA and it implements the CDA's certification requirements for claims exceeding $100,000, 41 U.S.C. § 605(c)(1), stating that the contractor shall submit the following certification for such CDA claims:

> I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.

FAR 52.233-1(d)(2)(iii). FAR 33.207, CONTRACTOR CLAIM CERTIFICATION, at paragraph (c), contains the same certification requirement for CDA claims exceeding $100,000.

The contract also incorporated by reference the Department of Defense FAR Supplement (DFARS) 252.243-7002, CERTIFICATION OF REQUESTS FOR EQUITABLE ADJUSTMENT [REA] (JULY 1997), clause (R4, tab 1 at 17 of 19), which provides in part that an authorized individual is to certify that an REA is made in good faith, and that the supporting data are accurate and complete to the best of his knowledge and belief.

The Air Force ultimately issued delivery order (DO) Nos. 0001 through 0007 in the total amount of $5,826,611 for a first article and 181 munitions handling trailers. The DOs involved foreign military sales (FMS) and Air Force deliverables. During first article production, there were problems with sole source vendors identified in the government's drawing package. Pursuant to a bilateral contract modification issued on 26 October 1998 KAMP was to update the drawing package and redesign the MHU-110/M Model 50 munitions handling trailer called for by the contract. KAMP did so, resulting in a Model 60 trailer. In January, 2000, the government accepted the first article of the newly-designed trailer. A bilateral modification dated 31 May 2000 increased the contract price by $565,094, to $970,294, for KAMP's engineering efforts and drawing updates. (R4, tabs 1, 2, 6, 11 at 1, 26, 46; supp. R4, tabs 1-4, 8, 10 at 1-1, tabs 17, 21 at 2; gov't mot. at fact 1, app. opp'n at fact 1; *see also* ASBCA No. 55317 (55317), R4, tab 17 at 1[2])

---

[1] We cite the original complaint as "compl." and the revised complaint as "rev. compl."

[2] We cite to some pertinent documents in the Rule 4 file in ASBCA No. 55317, KAMP's appeal from the termination contracting officer's (TCO's) unilateral determination on its termination for convenience proposal.

On 3 April 2000, KAMP notified CO Larry Brehm that it had received an order, not under the instant contract, from the Australian Air Force for a munitions handling trailer. KAMP had produced a trailer under the instant contract that was not committed to a current order, but for which it had received progress payments. It sought approval to sell the trailer to Australia and to reimburse the U.S. Air Force for the progress payments. On 10 April 2000, CO Brehm granted approval subject to that reimbursement. In or about December 2000, with the CO's approval, KAMP sold five more trailers to Australia produced under the instant contract, subject to the same progress payment reimbursement conditions. (R4, tabs 4, 5, 11 at 28)

In 2000 KAMP delivered 19 FMS trailers under the subject contract (supp. R4, tab 17 at 1, tab 21 at 2).

During February 2001, apparently based upon certain allegations of former employees, the Air Force's Office of Special Investigations (OSI) removed two trailers, software, and KAMP's records, from its premises. This occurred during the transition of the contract work from SA-ALC in Texas to WR-ALC in Georgia. In or about March 2002, the government determined that the trailers were being made as required. (Supp. R4, tab 10 at 1-2, ¶ 4, tab 17 at 1, tab 21 at 2 of 4)

By memorandum to DCMA dated 3 October 2001, the Air Force expressed "serious concern" about KAMP's contract progress, estimating that it had paid much more than progress warranted and it asked DCMA to review the matter (R4, tab 8 at 1).

On 24 October 2001 CO Judith A. Sparks (sometimes referred to as the procurement contracting officer (PCO)) issued a 90-day stop work order, with work to resume upon successful completion of additional first article testing on the newly-configured trailer units. The order was extended on 22 January 2002. On 29 January 2002 the CO canceled it, requiring no further testing but requesting certain no-cost engineering change proposals (ECPs) and a revised delivery schedule. (Supp. R4, tabs 8, 9, 17; *see also* R4, tab 11 at 44, 47) On or about 28 February 2002 WR-ALC approved KAMP's ECP covering changes to the munitions handling trailer (*see* 55317, R4, tabs 2, 17 at 7, Oct. 2005 ltr. at 1-2). The government assessed that there had been a year and a half's delay in trailer production (supp. R4, tab 21 at 3 of 4).

On or about 10 April 2002 KAMP submitted an REA in the amount of $5,256,072, to increase the total contract price to $10,989,902. The amount sought was said to include KAMP's contract performance costs to date and its estimate of its costs to complete remaining trailers on order. KAMP alleged that the complexities of its redesign efforts, schedule impacts, and associated costs warranted a total cost approach. In addition to re-design efforts, alleged extra work, and uncertain new schedule, the proposal addressed costs and effects of OSI's seizure of KAMP's trailers and the

stop work order. The REA was certified in substantial conformance with DFARS 252.243-7002. (Supp. R4, tab 10)

On 26 April 2002 the CO asked the Defense Contact Audit Agency (DCAA) to audit KAMP's REA (supp. R4, tab 11). By memorandum dated 13 June 2002 to WR-ALC, DCAA advised that it would cease work on the REA. It considered the proposal to be inadequate and listed several issues it recommended that KAMP address in a new REA. (Supp. R4, tab 20)

An internal government "UPWARD OBLIGATION ADJUSTMENT FORM" dated 23 July 2002, noted that there had been a constant change of government contracting personnel, engineers, logisticians, etc., under the contract, resulting in delays and some insufficient documentation. It stated that the government had determined to terminate the contract for convenience, for several reasons. The termination for convenience estimate was $6.7M, with $4.6M paid in progress/delivery payments and a net estimated amount due of $2.1M. (Supp. R4, tab 21)

On 9 August 2002 the CO issued a notice to KAMP of termination of the contract for convenience (R4, tab 9). At the time, KAMP had delivered the 19 trailers, above, under the contract and had other units in various stages of completion (R4, tab 11 at 5).

By e-mail to KAMP dated 15 August 2002 the CO stated that its REA had been unacceptable to DCAA and the Air Force and she attached DCAA's list of issues (supp. R4, tab 22). By letter to KAMP dated 24 August 2002 the CO stated that the government wished to enter into negotiations on KAMP's REA, to proceed separately from the termination for convenience. She stated that KAMP was required to submit a "revised proposal" that corrected inadequacies found by DCAA. (Supp. R4, tab 24) By letter to the CO dated 26 August 2002 KAMP responded to DCAA's list of issues but DCAA persisted in its view that the REA was not acceptable (supp. R4, tabs 25, 26, 30). KAMP continued to attempt to support of its REA and the government continued to find it inadequate (*e.g.*, supp. R4, tabs 29, 30, 34, 35, 37).

By letter to CO Sparks dated 30 October 2002 KAMP submitted a "formal certification, as a claim," of its REA, in the amount of $6,205,088, said to consist of the REA amount ($5,256,072) and additional delay costs of $949,016 through the 9 August 2002 contract termination. The certification, signed by KAMP's representative in this appeal, Mr. Mel McCullough, as KAMP's controller, was in the format required by the CDA. (Supp. R4, tab 36)

By letter dated 6 November 2002 the CO acknowledged receipt of KAMP's certification and asked it to provide a "fully supported proposal" substantiating all claimed costs (supp. R4, tab 38). Thereafter, KAMP and the government continued to dispute the adequacy of KAMP's claim (supp. R4, tabs 39-41, 43).

In a 20 December 2002 internal government e-mail, the CO reported that she had informed KAMP by telephone the previous night that she would deny its claim on 20 December 2002 because, without an adequate proposal, she had no basis for negotiations. She stated that she had advised KAMP that she could deny the claim and KAMP could resubmit it, or KAMP could withdraw its claim, but she could not proceed without an adequate proposal. KAMP stated that it would withdraw its claim and she asked for a signed withdrawal. (Supp. R4, tab 44)

By memorandum to the CO signed on 31 December 2002 by KAMP's president, KAMP stated:

> This message is sent in response to recent conversations about the referenced Claim and the related [REA] under the subject contract. [KAMP] has considered the best way to reach the goal of establishing a fair and reasonable Contract price upon which to enter into termination negotiations and has decided to withdraw its claim and resubmit a compliant REA proposal.

(Supp. R4, tab 46)

By letter dated 13 January 2003 to the CO, KAMP submitted a revised REA in the amount of $5,437,708, and responded to DCAA comments upon its April 2002 REA. There is no evidence that KAMP certified the revised submission as a CDA claim (or that it submitted an REA certification). (R4, tab 10)

By letter to KAMP of 4 February 2003 the CO stated that certification of its "new REA proposal" was required (supp. R4, tab 56). There is no evidence that KAMP responded or submitted any certification.

DCAA issued a 1 April 2003 audit report on KAMP's revised REA, finding it unacceptable for negotiation of a fair and reasonable price (55317, R4, tab 7 at 1, 8). By letter to KAMP dated 17 April 2003, the CO denied the revised REA (55317, R4, tab 8).

On 2 May 2003 DCAA issued an audit report concerning KAMP's progress payment requests, noting that KAMP contested several issues raised by DCAA. DCAA examined $3,782,761 in total progress payments and concluded that KAMP's progress payment requests had been overstated by $1,293,230. (R4, tab 12)

By letter to KAMP dated 20 May 2003 the ACO demanded payment in the amount of $643,915.74 in alleged overpaid progress payments. Of that amount, $194,752.74 was based upon KAMP's sale of six trailers to Australia and its failure to adjust progress payments, and $449,163 was based upon an approved subcontract progress payment billing when it appeared upon audit that the alleged subcontract costs

could not be supported. (R4, tab 13) Subsequently, the parties disputed the calculation of the overpayment (R4, tabs 15-20).

On 10 July 2003 the ACO issued a final decision and demand for payment of $643,915.74, based upon an alleged overpayment of progress payments on DOs 0003 and 0007, with respect to the six trailers KAMP sold to Australia and its alleged subcontractor progress billings reported in the ACO's 20 May 2003 demand letter (R4, tab 21). On 16 July 2003 KAMP timely appealed to the Board from this final decision. The appeal was docketed as ASBCA No. 54253.

On 7 August 2003 KAMP submitted its termination settlement proposal to the TCO seeking a settlement of $5,299,657 and net payment, after deduction of previously paid amounts, of $2,130,512 (55317, R4, tab 9 at cover ltr. and 40-23).

On 18 September 2003 KAMP's counsel withdrew and it continued with its appeal *pro se*. The Board stayed proceedings at KAMP's request to allow for settlement negotiations, which were unsuccessful.

On 27 February 2004 KAMP filed its original complaint which alleged, *inter alia*, that the contract, at the time of its termination for convenience, had numerous amendments that had added tasks, the most significant of which were for KAMP to update and re-design the drawings for the munitions trailer and to manufacture, first article test, and deliver a new trailer (compl. ¶ 5.0). KAMP alleged that, after the close of SA-ALC and the transfer to WR-ALC, the new ACO, Ms. Pattengell, did not fulfill her responsibilities (*id*. ¶¶ 7.0-7.3, 8.0). KAMP alleged that the ACO had overstated the progress payments it had received by $732,796 and understated the amount liquidated by $772,872.50. It identified the amounts liquidated against progress payments as $539,600 for the shipment of 19 trailers on DO 0004; $111,112 for updating the drawing package; $46,666.50 for the first article unit; and $565,094 for drawings and redesign, for a total of $1,262,472.50. KAMP alleged that the government's errors had overstated the unliquidated progress payments by $1,455,926.50, there was no debt to be repaid, and direct costs of the contract exceeded the progress payments advanced by the government, as set forth in KAMP's termination settlement proposal. (*Id*. ¶¶ 8.1, 8.2, 8.4-8.6, 8.21, 9.0) KAMP alleged that it had demonstrated a $40,993.74 overstatement in the government's demand concerning the six trailers sold to Australia and that the government had agreed to reduce its demand accordingly but had not done so. The government so admitted in its 31 March 2004 answer to the complaint and stated its willingness to adjust its demand, but we have not been directed to evidence that it has done so. (Compl. and answer ¶¶ 8.23.4.1, 8.23.4.2) KAMP further alleged that it had asked for deferment of collection of the corrected demand amount until the termination settlement process was concluded because it had applied the Australian sales as a credit to the government in its termination proposal and a government collection would result in a double payment (compl. ¶¶ 8.23.5, 9.0).

In the nature of a prayer for relief, KAMP asked the Board to "review this claim" and to direct the rescission of the ACO's 10 July 2003 demand for repayment (*id*. ¶ 10.0); direct the government to correct misinformation it allegedly had disseminated to government individuals and entities regarding KAMP's financial status under the subject contract (*id*. ¶ 11.0); and direct it to provide documentation absolving KAMP from any allegation that purchases under the contract had not been "procured, received, stored, recorded and utilized (and in inventory, on hand) for their intended purpose" in carrying out the contract (*id*. ¶ 12.0).

On 27 October 2004 the Board set the hearing in this appeal to commence on 14 March 2005. On 11 January 2005, pursuant to appellant's unopposed request, the Board postponed the hearing. The parties' 1 April 2005 joint status report requested further postponement on the ground that the termination for convenience proceedings involved "the same costs that are at issue in this appeal." They asked the Board to refrain from setting a new hearing date until KAMP appealed from the TCO's decision on its termination settlement proposal, so that the appeals could be consolidated. The TCO's decision was said to be expected within 30 days. It did not issue within 30 days and the parties continued to file similar reports, adding that they were attempting settlement.

On 7 October 2005 the TCO issued his final decision/unilateral determination concluding, *inter alia*, that the amount due KAMP as the result of the contract's termination for convenience was $1,418,881, less $3,049,702 in unliquidated progress payments, resulting in a net amount of ($1,630,821). The TCO noted that the ACO had demanded repayment of $643,915.74 in progress payments in her 10 July 2003 final decision and he demanded payment of the $986,905.26 balance. (55317, R4, tab 17 at 6)

By notice dated 12 January 2006, KAMP appealed to the Board from the TCO's final decision. The appeal was filed with the Board on 13 January 2006, designated as ASBCA No. 55317, and consolidated with the instant appeal. On 21 March 2006 the government moved to dismiss ASBCA No. 55317 as untimely. The Board originally found it to be timely. *KAMP Systems, Inc*., ASBCA No. 55317, 07-1 BCA ¶ 33,460. DCMA moved for reconsideration, providing previously unsubmitted evidence. Upon reconsideration, the Board dismissed the appeal as untimely. *KAMP Systems, Inc*., ASBCA No. 55317, 08-1 BCA ¶ 33,748.

The Board directed the parties to propose a new hearing schedule for the instant appeal. In the meantime, KAMP filed a revised complaint which, after a typographical correction, it re-filed on 31 January 2008. The revised complaint contains the same allegations as KAMP's original complaint but adds that the Air Force, DCMA and DCAA hampered KAMP's attempt to present an REA and ensured that it was not fairly considered or timely processed. KAMP alleges a contract loss and seeks reimbursement of $1,985,019, plus interest, expenses and damages due to the government's alleged bad faith. (Rev. compl. ¶ 6.0) The new allegations in KAMP's revised complaint are contained in paragraph 6.0 and subparagraphs 6.0-1 through 6.0-10 and in the major

portion of its prayer for relief. To summarize the new allegations, KAMP alleges that the government is liable to it for the following principal reasons, among others:

(1) As the Air Force was aware, the government issued a faulty solicitation, including inaccurate drawings for trailer manufacture (*id*. ¶ 6.0-1).

(2) DCMA did not conduct pre-award surveys fairly and objectively (*id*. ¶ 6.0-2).

(3) The government's sole source vendors for running gear and tow bars did not provide acceptable components and certifications of compliance with KAMP's purchase orders: (a) the non-compliant sole-source vendor for running gear had been KAMP's competitor and had protested the contract award to KAMP; DCMA refused to intervene; instead, nearly a year after contract award, KAMP was issued a contract modification to design, manufacture and test a new running gear and accompanying systems; and this delayed production for over 15 months and increased KAMP's uncompensated costs by thousands of dollars in various specified areas; and (b) the same problem occurred with the sole source vendor for the lightweight tow bar; it shipped a product with bad welds that KAMP and the government rejected; KAMP was instructed to design a new tow bar when the trailer up-date process was well underway; and KAMP was delayed further and incurred uncompensated extra costs as a result (*id*. ¶ 6.0-3).

(4) The Air Force and DCMA engaged in administrative misdirection, purposeful confusion, and delay, which prevented KAMP from completing the contract and receiving an equitable adjustment for its extra efforts the government had directed. Among other administrative impediments: (a) the government confused whether DO cost accounting was to be combined under one contract, or handled separately by DO; (b) it changed the product delivery sequence and increased the number of monthly deliveries; (c) it combined all FMS DOs into one DO and all domestic DOs into one DO, thereby collapsing seven DOs into two; (d) DCMA did not count the first article trailer unit as an earned effort entitling KAMP to payment; (e) DCMA gave false information to the Air Force regarding one of KAMP's prior contracts; (f) DCMA did not notify KAMP of any trailer deficiencies under the instant contract and, at the same time DCMA was advising the Air Force that matters were fine, DCMA reported KAMP to OSI; KAMP's records were seized; and the case was not dropped until four and one half years later, and (g) in the spring of 2000, DCMA approved KAMP's quality assurance (QA) system but, less than six months later, outside of formal government protocols and reporting processes, DCMA undermined KAMP's manufacturing operations, QA system and corporate credibility; WR-ALC required KAMP to re-validate its trailer design in February 2002 after SA-ALC and DCMA-Ontario had already accepted it in January through June, 2000; and KAMP's costs of this second validation, incurred after a stop work order had issued, were not compensated (*id*. ¶ 6.0-4). The allegation that DCMA had approved KAMP's QA system was in KAMP's original complaint (¶ 8.18) and is reiterated in paragraph 8.19 of its revised complaint, but the elaborations upon the allegation in paragraph 6.0-4 of the revised complaint, including alleged compensation due, are new.

(5) KAMP began to process an REA for its costs associated with the newly designed trailer in July 2000 but suffered strong resistance from the Air Force, DCMA and DCAA (*id*. ¶ 6.0-5).

(6) The Air Force directed KAMP to submit an ECP for the newly-designed trailer, which was approved at a price increase but did not address certain costs, which were included in KAMP's April 2002 REA (*id*. ¶ 6.0-6).

(7) The Air Force issued a stop work order in November 2001 but continued to require numerous trailer support efforts from KAMP during the stop work period through the termination of KAMP's contract for convenience (*id*. ¶ 6.0-7).

(8) The Air Force required KAMP to prepare additional documents and to proceed to a final draft on a new technical order for the new trailer, which required demonstration, training and other work during the stop work period that was not compensated, and KAMP compiled these costs and other additional costs and included them in its April 2002 REA (*id*. ¶ 6.0-8).

(9) DCAA's audits of KAMP's April 2002 REA and of its termination settlement proposal were done in bad faith: (a) DCMA engineers stated that KAMP's costs were reasonable but, in contradiction of the FAR, DCAA managers rejected the REA as not auditable as presented; over the next 11 months KAMP tried to provide further documentation but the government did not want to resolve the REA because WR-ALC had major budget overrun issues; and, during the period the REA was being audited, the contract was terminated for convenience and the REA was then rejected completely, even though a prior audit of the REA had determined that KAMP was owed money; and the prior audit was not released because it was in KAMP's favor; and (b) after KAMP filed its termination settlement proposal, it took the TCO two years and nine months to reach his decision; the delay and repeated audits were due to the government's effort to stall and not to pay KAMP; and the final audit, upon which the TCO's final decision was based, disallowed cost items that had not been disallowed in 19 prior audits and did not take into account all contract circumstances, which resulted in a final amount due KAMP (*id*. ¶ 6.0 to 6.0-10).

(10) Between February 2003 and October 2005 WR-ALC, DCAA and DCMA did everything possible to stop KAMP from collecting funds due on other government contracts in order to shut KAMP down. There was also no basis under the subject contract for ACO Pattengell's demand letter for the repayment of a progress payment for materials. The prior ACO, Mr. Hatch, had instructed KAMP how to file the progress payment request and ACO Pattengell had approved it. At the time of the demand the contract had been terminated for convenience and all materials had been accounted for and reconciled with payments. The sole basis for the demand, which was done in bad faith, was to deprive KAMP of funds. (*Id*. ¶ 6.0-10)

The prayer for relief in appellant's revised complaint begins with the same language as in its original complaint that asks for rescission of the ACO's demand for repayment of progress payments. It omits the demands for declaratory relief concerning the government's alleged dissemination of misinformation and the request for documentation absolving appellant of improper actions concerning contract purchases. It adds appellant's request for an award of $1,985,019, as follows:

> Finally, the Appellant requests that the Board consider all issues relating to [contract] orders 001-007, and award [KAMP] what they have requested ($1,985[,]019.00). [KAMP] did everything in their power to provide the government with the items requested under this contract. [KAMP] was [thwarted] from the beginning of this contract by the government not providing the correct information in the bid package to obtain the proper [competitive] price. During the contract, DCMA and DCAA tried in every way to prevent [KAMP] from being successful in completion of this contract. When WR-ALC was assigned the mission of this contract from SA-ALC, they tried to stop, delay and ultimately not pay out of their budget a contract from SA-ALC. Small businesses rely on contracts from the government and expect that the government will administer the contracts in good faith and give the vendor accurate information. [KAMP] has repeatedly followed the Government's instructions (even recently) just to be thwarted and deceived. This contract was not administered in good faith due to the lack of integrity of the PCO, ACO, TCO, and all related managers.

(*Id*. ¶ 10.0)

By motion dated 25 February 2008 DCMA moved to strike the revised complaint for lack of jurisdiction and KAMP opposed on 20 May 2008. Upon the Board's review, it was apparent that the record was incomplete. The Board directed the government to supplement the Rule 4 file and allowed each party to submit any additional documents it deemed pertinent to the motion or to this appeal.

By letter dated 11 August 2008 appellant advised the Board that it had no further documents to submit and provided the Board with a copy of a certified CDA claim dated 7 August 2008 it had submitted to the TCO.

On 25 August 2008 the Board received the government's Rule 4 file supplement.

DISCUSSION

The government asserts that the Board does not have jurisdiction to entertain KAMP's revised complaint because KAMP did not submit a valid CDA claim to the CO covering its new allegations and its request for $1,985,019. The government contends that Board Rule 7, under which the Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleadings upon conditions fair to both, does not apply because KAMP's new allegations are not based upon the same set of operative facts at issue in the instant appeal and they do not have any connection to the government's demand for the return of unliquidated progress payments. The government alleges that, rather, KAMP is attempting to incorporate facts from its untimely appeal of the TCO's final decision, ASBCA No. 55317, and that it cannot have another opportunity to litigate that dismissed appeal.

KAMP responds, among other things, that "the facts of this case were completely different" at the time it was filed and that the parties had agreed to wait for the outcome of the termination for convenience (app. opp'n at 3). KAMP asserts that the termination decision "changed the facts of this case drastically" and that if the termination had been complete when the complaint was filed in this appeal, the complaint would have been as now revised (*id*.). KAMP states:

> Both cases have the same costs and same documentation. Even the [Board] recognized the similarity by combining the cases. Even the TCO recognized the interrelation by dividing his demand. The true question here is who owes who?

(*Id*.)

KAMP continues that the revised complaint is based upon the same facts that it presented to the ACO in this appeal and to the TCO in ASBCA No. 55317 and that:

> The $1,985,019 is not a new claim. [It] is the adjusted net amount after DCAA had completed their reconciliation of all progress payments in the termination ($2,130,512 - $145,493). [KAMP's] progress payments on this contract were $3,169,145, and after reconciliation was adjusted to $3,314,638 a difference of $145,493….
>
> …[KAMP] is not trying to take two bites of the proverbial apple.…

(*Id*. at 4) KAMP concludes that the Board already has jurisdiction over this appeal, the "facts of the case have changed due to the delay and acts of the Government," and the "documentation is still the same on this contract" (*id*.).

The instant appeal is from the government's claim, embodied in the ACO's 10 July 2003 final decision, that appellant owes it $643,915.74 due to the government's alleged overpayment of progress payments. Appellant's revised complaint asserts its own affirmative claim against the government in the amount of $1,985,019. However, the CDA requires that contractor claims first 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 contractor's submission of a cognizable CDA claim to the CO, and its appeal from the CO's denial or deemed denial of its claim, are prerequisites to the Board's CDA jurisdiction to entertain its affirmative claim. 41 U.S.C. §§ 606, 607(d); *Todd Pacific Shipyards Corp*., ASBCA No. 55126, 06-2 BCA ¶ 33,421 at 165,687. We lack jurisdiction over claims raised during our adjudication of an appeal, whether in a complaint, or otherwise, that were not first submitted to the CO for decision in the form of a qualifying CDA claim. *Lockheed Martin Aircraft Center*, ASBCA No. 55164, 07-1 BCA ¶ 33,472 at 165,933; *Dawkins General Contractors & Supply, Inc*., ASBCA No. 48535, 03-2 BCA ¶ 32,305 at 159,844.

Here, appellant's compensation claim is not "new" in the sense that, for a number years, it has requested that the government reimburse it for its alleged excess contract costs. It submitted two REAs and filed a termination settlement proposal seeking cost reimbursement. Moreover, it submitted an affirmative, certified, CDA claim to the CO for decision. However, appellant withdrew that certified claim, did not certify its revised REA as a CDA claim, and it did not timely appeal from the TCO's unilateral termination for convenience determination.

Thus, the Board lacks jurisdiction over the monetary claim raised in appellant's revised complaint and associated allegations, including those of government misconduct and bad faith. Therefore, the Board strikes paragraph 6.0, subparagraphs 6.0-1 through 6.0-10, and the new portion of the prayer for relief quoted above, from appellant's revised complaint. This does not preclude appellant from raising defenses against the government's claim for unliquidated progress payments that might serve to eliminate, reduce or offset the government's claim, but the Board's jurisdiction over appellant's monetary allegations is limited to those defenses and by the amount of the government's claim. *Omaha Tank & Equipment Co*., ASBCA Nos. 36235, 37905, 89-1 BCA ¶ 21,404 at 107,891.

We do not address appellant's 7 August 2008 certified claim to the TCO because there is no appeal before us from any decision on the claim, or failure to decide. Indeed, the time for rendering a decision on the claim has not yet expired. 41 U.S.C. § 605(c)(2).

DECISION

The government's motion to strike appellant's revised complaint is granted to the extent stated.

Dated: 22 September 2008

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

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. 54253, Appeal of KAMP Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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