ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Atherton Construction, Inc.	)	ASBCA No. 56040
	)	
Under Contract No. W912QR-04-C-0007	)	

APPEARANCES FOR THE APPELLANT: Jared Van Kirk, Esq.
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Seattle, WA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
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U.S. Army Engineer District, Mobile

OPINION BY ADMINISTRATIVE JUDGE HARTMAN
ON THE GOVERNMENT'S MOTION TO DISMISS

Appellant seeks an equitable adjustment under either the Changes or Government Property clause in its contract for supplying kitchen equipment it believes to be beyond contract requirements (complaint counts one and two, respectively). It alternatively seeks the same sum founded upon a mistake in bid (complaint count three). The government moves to dismiss for lack of jurisdiction. It contends all three claims "accrued" before appellant became the "takeover contractor" and obtained "privity of contract" with the government and, alternatively, that the latter two claims (mistake in bid and government-furnished property) were never presented to the contracting officer for issuance of a final decision.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

During 2003, the U.S. Army Corps of Engineers (Corps) issued a request for proposals (RFP) for, among other things, construction of a 48,000 square-foot building at the Nashville U.S. Army Reserve Center, Arnold Air Force Base, Tennessee and provision of "OMAR [Operation and Maintenance Army Reserve] funded equipment such as...moveable kitchen equipment." RFP Specification § 11400, ¶ 1.2 provided:

> Food service equipment shall be of the sizes and types shown. Equipment, materials, and fixtures required for use in conjunction with the items to be furnished by the Government shall be furnished and installed by the Contractor. Equipment, materials, and fixtures indicated on the drawings and schedules shown as Contractor furnished and installed, shall be furnished and installed by the Contractor.

Blacksmith Management Group, LLC (BMG) prepared and submitted a proposal for performance of the work to the Corps. Appellant, Atherton Construction, Inc. (Atherton), a prospective BMG subcontractor, prepared for BMG that part of its proposal "relating to kitchen equipment." The Corps awarded its contract for performance of the work (No. W912QR-04-C-0007) in the amount of $8,089,588.00 to BMG on 31 March 2004. The contract specified that certain submittals, including the one for food service equipment, be approved by the Corps. (Compl. ¶¶ 8, 11, 17, 18, 21; R4, tab 2 at 2-3, tab 3 at 1, 232, 234-35, tab 10)

On 10 August 2004, BMG asked the Corps to furnish it "any cut sheet information...for the equipment to be provided by the Government" in an "effort to coordinate the installation process" since Specification § 11400, ¶ 1.2 states that "Contractor will install the Government furnished equipment as shown in the drawings and schedules" (R4, tab 8; compl. ¶ 23). By letter dated 16 September 2004, the Corps responded to BMG's request by supplying more than 75 pages of "cut sheet information" and copies of three of the contract's drawings, including Drawing No. AKA02 labeled "KITCHEN EQUIPMENT SCHEDULES" (R4, tab 9; compl. ¶ 24). Drawing No. AKA02 attached to the Corps' 16 September letter, however, differed from Drawing No. AKA02 appended to the parties' contract. Among other things, it set forth on the first "kitchen equipment" schedule specific "quantities" for 47 items of kitchen equipment, rather than only for 9 items of kitchen equipment. Neither the drawing nor the Corps' cover letter advised BMG the drawing had been "revised." (*Compare* R4, tab 4 *with* R4, tab 9; compl. ¶¶ 15, 24, 25)

BMG advised the Corps by letter dated 6 October 2004 that it had prepared its bid according to the language of Specification § 11400, ¶ 1.2, which states that equipment "indicated on the [contract] drawings and schedules" as contractor furnished shall be furnished by the contractor and that is "what we plan to provide" (R4, tab 10; compl. ¶ 26). In a letter dated 18 October 2004, the Corps' administrative contracting officer (ACO) stated: he disagreed with BMG's position; BMG's interpretation of the contract requirements is not reasonable; and BMG is "directed to comply with the contract requirements regarding kitchen equipment." He indicated that BMG must provide kitchen equipment regardless of whether a quantity was given on the drawing schedule. (R4, tab 11; compl. ¶ 27)

In response to the ACO's 18 October letter, BMG advised the Corps that the Corps had supplied a "subsequent" schedule "which outlined revised quantities" of kitchen equipment and, if the Corps "wishes [BMG] to provide all of the kitchen equipment, then [it] will do so, but [it] believes this is a change to the contract" (R4, tab 12; compl. ¶ 26) (emphasis in original). By letter dated 29 November 2004, the ACO notified BMG that he did not believe BMG's position was tenable and, if it decided to pursue the matter by requesting a decision from the CO, it should certify its claim and furnish backup data to support its position (R4, tab 13; compl. ¶ 27).

Approximately 10 weeks later, in February 2005, Atherton received a proposal to supply kitchen equipment from Birmingham Restaurant Supply Inc. (BRESCO) stating that, in exchange for $122,900.00, BRESCO will "provide and put in place" over 30 items of equipment in "quantities required" even though those "items were not listed as Contractor furnished" on Drawing No. AKA02 and it will do so pursuant to subsequent "orders made" by Atherton's project superintendent after kitchen equipment submittals have been approved by the Corps. BRESCO and Atherton executed a purchase order on 25 February and 7 March 2005, respectively, setting forth those terms. (R4, tab 16 at 4) During February of 2005, BMG notified the issuer of its Performance and Payment Bond, Travelers Casualty and Surety Company (Travelers), that it "is unable to meet its current obligations on the contract" and that Travelers should "take such steps as it deemed appropriate" (gov't mot., ex. 2 at 1).

On 12 April 2005, Travelers entered into a "Completion Agreement" with Atherton specifying that it "perform, furnish and pay for all testing, labor, materials, equipment cost of any nature, quality control, insurance, and all other things necessary to complete the remaining physical work, including preparation of submittals to the Owner, and all related obligations under the Contract." The Completion Agreement stated that Atherton "shall be bound by all decisions, interpretations, judgments and directives, of every description, issued by the Owner under the Contract with respect to the Remaining Work, including all decisions, interpretations, judgments and directives resulting from any contractual dispute resolution or mediation process established under the Contract." Shortly thereafter, on 29 April 2005, Travelers, Atherton, and the Corps entered into a "Takeover Agreement," which was incorporated into the BMG contract by Modification No. R00009 and provided, among other things, that Atherton would "perform or procure the performance of all work and other obligations of [BMG] not presently completed or fulfilled." (Gov't mot., ex. 2 at 2, 6; R4, tab 6; compl. ¶¶ 1, 28). At approximately the same time, on 26 April, the Corps rejected the food service equipment submittals that Atherton had submitted to it through BMG for lack of shop drawings and a two-page list of other desired revisions (app. surreply, ex. C).

Between 30 December 2005 and 23 February 2006, records reflect the issuance of 13 invoices pursuant to the BRESCO purchase order for Nashville Army Reserve kitchen equipment totaling $118,766.31 and payment of $118,766.31 for those invoices between 23 February and 16 March 2006 (app. surreply, ex. D). Atherton began installing this contract kitchen equipment on 30 January 2006 (app. surreply, ex. E).

In January 2007, Atherton submitted a certified claim to the Corps' CO seeking an equitable adjustment in contract price of $172,206.78 for provision of kitchen equipment it contends was not required to be supplied by the terms of its contract. Atherton asserted in the claim that, by revising the equipment schedule and directing compliance with that schedule, the Corps "constructively changed" the contract and "directed [it] to provide more equipment than was requested of [it] by the Contract." Atherton stated, among other things, that: its interpretation of the contract—that the government was providing an item of kitchen equipment if no quantity was listed for that item on the equipment schedule—was reasonable; where "the Government is furnishing property" (as Atherton interpreted the contract), "the government furnished property clause [Federal Acquisition Regulation (FAR) 52.245-2] is mandatory;" its "contract is reasonably interpreted as incorporating the clause by virtue of the *Christian* doctrine," and thus the clause has "legal effect" here. Atherton's claim did not state that a "mistake in bid" had occurred or request any relief other than an "equitable adjustment." (R4, tab 14; compl. ¶ 4) In a final decision dated 4 May 2007, the CO denied Atherton's claim (R4, tab 2; compl. ¶ 5). Atherton timely appealed the CO's decision to this Board.

In its three count complaint, Atherton alternatively asserts: (1) it is entitled to an equitable adjustment of the contract's price terms for additional kitchen equipment it was required to furnish pursuant to a constructive change, together with associated markups and bond costs, in the amount of $172,206.78; (2) by refusing to supply the government-furnished property referenced in Specification § 11400, ¶ 1.2 and the kitchen equipment schedule, and directing Atherton to supply that equipment, the Corps reduced the amount of "government-furnished property" under the contract to zero, entitling Atherton to an equitable adjustment of $172,206.78 under FAR 52.245-2; and (3) as a result of a mistake in bid regarding kitchen equipment and the Corps' knowing acceptance of that mistake, Atherton is entitled to reformation of the contract's price to compensate it $172,206.78 for additional kitchen equipment furnished. After conduct of discovery, the Corps moved to dismiss Atherton's complaint for lack of jurisdiction (gov't mot.). Thereafter, Atherton filed a response to the Corps' motion (app. opp'n), the Corps filed a reply to Atherton's response (gov't reply), and Atherton filed a surreply (app. surreply).

DECISION

The Corps contends that we lack jurisdiction to entertain Atherton's claims. The Corps asserts Atherton lacks "standing" because each of the claims asserted arose prior to the "takeover agreement" establishing privity of contract between it and the government. According to the Corps, the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-13, only allows "contractors" to bring claims under the CDA and "Atherton was not a contractor when these claims arose." (Gov't mot. at 6-9)

The Corps is correct in asserting that, for the Board to have jurisdiction under the CDA, a claim must be brought by "a contractor" and be one "relating to a contract." 41 U.S.C. §§ 606, 607. The CDA defines a "contractor" as a party to a government contract other than the government. 41 U.S.C. § 601(4); *Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344, 1351 (Fed. Cir. 2002); *accord United Pacific Ins. Co. v. Roche*, 380 F.3d 1352, 1355-56 (Fed. Cir. 2004). Thus, for us to be able to entertain a claim under the CDA by a takeover contractor, such as Atherton, the "operative facts" upon which that claim is based must have occurred after execution of the takeover contract. *United Pacific Ins.*, 380 F.3d at 1355; *accord United Pacific Ins. Co. v. Roche*, 401 F.3d 1362, 1365 (Fed. Cir. 2005).

While Atherton asserts in its complaint that it is pursuing a claim for an equitable adjustment for the performance of additional work as takeover contractor (compl. ¶¶ 1, 3, 38, 39), the Corps' motion to dismiss does not dispute Board jurisdiction based upon the sufficiency of Atherton's complaint allegations. Rather, the motion denies or controverts the complaint allegations which are necessary to establish Board jurisdiction. (Gov't mot. at 3, 8-9, 12; gov't reply at 2, 4-8)

Because the motion challenges the "factual predicate" for the Board's subject matter jurisdiction, the allegations in the complaint do not control in ruling upon that motion. Rather, we must accept as true only the complaint allegations which have not been "controverted." *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994); *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988); *E.M. Scott & Associates*, ASBCA No. 45869, 94-3 BCA ¶ 27,059 at 134,837. The Corps' challenge to the allegations Atherton is pursuing a claim for the performance of additional work as takeover contractor thus imposes upon Atherton the burden to show facts sufficient to support the controverted jurisdictional allegations. *Cedars-Sinai*, 11 F.3d at 1584; *Reynolds*, 846 F.2d at 748; *E.M. Scott*, 94-3 BCA ¶ 27,059 at 134,837.

The Corps asserts Atherton's claims arose prior to the takeover agreement because (1) BMG advised the ACO during fall 2004 that the Corps had supplied a new schedule outlining "revised quantities" of kitchen equipment and that, if the Corps "wishes [BMG]

to provide all of the kitchen equipment," it "believes this is a change to the contract," and (2) was informed by the ACO that it was to supply the quantities set forth and follow the contract's Disputes clause claim procedures if it believed this was a "change" (*see* gov't mot. at 8). Atherton does not dispute that the events the Corps cites transpired prior to it becoming takeover contractor (app. opp'n 1-11). It contends that the events cited are irrelevant to determination of our jurisdiction because "[a] claim under the CDA accrues to a contractor when [it] has actually suffered damage as a result of Government conduct" and "[i]t is undisputed that [it] incurred all the costs of supplying every item of kitchen equipment after it became the contractor pursuant to the takeover agreement" (app. opp'n at 6). The Corps responds that Atherton "executed" purchase orders for the kitchen equipment before it became the takeover contractor, when it was a subcontractor for BMG, and thus "accrued" the "damages" as a BMG subcontractor (gov't reply at 2). Atherton replies that the purchase order it issued in February of 2005 did not "obligate [it] to order any equipment" and provided that no orders for equipment would be issued until the Corps had approved equipment submittals. Atherton adds that kitchen equipment submittals were not approved by the Corps, and no equipment orders issued by it, until after it became the "takeover contractor." (App. surreply at 2)

For purposes of statutes of limitations, a claim accrues on the date when all the events have occurred which fix the liability of the government and entitle the claimant to institute an action. *Hopland Band of Pomo Indians v. United S*tates, 855 F.2d 1573, 1577 (Fed. Cir. 1988); *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988); *Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States*, 373 F.2d 356, 358 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967). In *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475, we explained that FAR 33.201 defines "accrual of a claim" as follows:

> "Accrual of a claim" means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

Accordingly, to determine when liability is "fixed" and a claim accrues, we begin by examining the legal basis for a particular claim. *See, e.g., RGW Communications, Inc. d/b/a/ Watson Cable Co.*, ASBCA Nos. 54495, 54557, 05-2 BCA ¶ 32,972 at 163,331-32.

Two of the three claims here allege a "constructive" change to the contract. Such claims occur where: although the CO has not issued a formal change order, the CO has contractual authority unilaterally to alter the contractor's duties under the agreement; the

contractor's performance requirements are enlarged; and extra work is not volunteered but results from direction of the government's officer. *Len Co. & Assocs. v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967). Under those circumstances, a contractor is entitled to receive an equitable adjustment in contract price for any increase in its costs required to perform. The measure of such an adjustment is the difference between the reasonable cost of performing without the change and the reasonable cost of performing with the change. *Celesco Industries, Inc.*, ASBCA No. 22251, 79-1 BCA ¶ 13,604 at 66,683; *accord Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1348 (Fed. Cir. 2000). Because an equitable adjustment is to safeguard against increased costs engendered by modifications, it must be closely related to (and contingent on) the altered position in which the contractor finds itself by reason of performing the "changed" work. *Nager Electric Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971); *Bruce Constr. Corp. v. United States*, 324 F.2d 516, 518 (Ct. Cl. 1963).

While the drafters of FAR 33.201 apparently contemplated the possibility of CDA claims involving "nonmonetary injury," the appellant here alleges "monetary damages." Atherton seeks an adjustment in contract price for work performed pursuant to informal direction of the Corps that it deems to have been beyond the terms of the parties' contract. Accordingly, it must actually have begun performance of the disputed work and "incurred some extra costs" for liability to become "fixed" and a claim to "accrue." *E.g.*, *Gray Personnel*, 06-2 BCA ¶ 33,378 at 165,476.

Atherton did not incur any cost for kitchen equipment it contends was extra work under the parties' contract until after it was the takeover contractor. As found above, it did not actually order and purchase that equipment until 30 December 2005 or later, *i.e.*, months after it became the "takeover contractor." Accordingly, claims for an equitable adjustment associated with supply of that equipment accrued to Atherton, not BMG, and we have jurisdiction under the CDA to entertain Atherton's equitable adjustment claims.

Atherton concedes its claim for a mistake in bid was not submitted to the Corps' CO for issuance of a final decision (app. opp'n at 1 n.1, 11), a prerequisite for our exercise of jurisdiction over a claim (41 U.S.C. § 605(a)). We, therefore, must dismiss Atherton's mistake in bid claim (complaint count three) for lack of jurisdiction in any event and need not address when that claim accrued.

The Corps contends alternatively that, even if Atherton's claim for an adjustment under the Government Property clause accrued to it as takeover contractor, this Board lacks jurisdiction to entertain that claim because Atherton failed to submit it to the CO for the issuance of a final decision. According to the Corps, although Atherton made factual allegations used in support of its government-furnished property claim, it did not specifically request the receipt of an adjustment under the Government Property clause in seeking issuance of a final CO decision. (Gov't mot. at 10-11)

The CDA does not require that a claim be submitted upon any particular type of form or that a claim use any particular wording. *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). Rather, it simply requires "that the contractor submit in writing to the [CO] a clear and unequivocal statement that gives the [CO] adequate notice of the basis and amount of the claim." *Id.* A "new claim" is one that does not arise from the same set of operative facts as the claim submitted to the CO. *See Glenn v. United States*, 858 F.2d 1577, 1580 (Fed. Cir. 1988); *Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984).

FAR 52.245-2 permits the CO to decrease the amount of government-furnished property to be provided a contractor. *See, e.g., Hart's Food Service, Inc., d/b/a Delta Food Service*, ASBCA Nos. 30756, 30757, 89-2 BCA ¶ 21,789 at 109,641-42; *accord S. S. Mullen, Inc. v. United States*, 389 F.2d 390, 397 (Ct. Cl. 1968). If this occurs, FAR 52.245-2 provides the contractor is entitled to an "equitable adjustment" in contract price "in accordance with the procedures of the Changes clause." The phrase "equitable adjustment" is a "term of art" in federal contracts with a commonly understood meaning. *General Builders Supply Co. v. United States*, 409 F.2d 246, 250 (Ct. Cl. 1969). It is used in a number of contract clauses, including both the standard Government Property and Changes clauses. *Id*. at 249. Those engaged in federal contracting are deemed to have an understanding of its meaning and the body of special contract provisions that developed around it. *Id*. at 250-51.

In the certified claim it submitted to the CO, Atherton presented a detailed statement of operative facts it believed entitled it to an increase in contract price for kitchen equipment it was required to supply and deemed beyond contract requirements. Those facts give rise to claims for an equitable adjustment under either the Changes or Government Property clauses. As found above, Atherton stated it is entitled to this equitable adjustment in contract price because the government "directed [it] to provide more equipment than was required of [it] by the Contract" (R4, tab 14 at 1). It also expressly stated in its claim that the Government Property clause, FAR 52.245-2, "is mandatory" in such contracts and its "contract is reasonably interpreted as incorporating the clause by virtue of the *Christian* doctrine" (R4, tab 14 at 4). Atherton therefore referenced not only the Changes clause, but also the Government Property clause in its claim. We believe Atherton's claim gave the CO adequate notice it was also asserting entitlement to an equitable adjustment under the Government Property clause. *See Contract Cleaning Maintenance*, 811 F.2d at 592; *Tecom*, 732 F.2d at 936-37.

CONCLUSION

The Corps' motion to dismiss is granted in part and otherwise denied. Count three of the appeal is dismissed for lack of jurisdiction.

Dated: 5 November 2008

TERRENCE S. HARTMAN
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. 56040, Appeal of Atherton Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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