ARMED SERVICES BOARD OF CONTRACT APPEALS

Petition of --	)	
	)	
Ironhorse Ltd.	)	ASBCA No. 56455-920
	)	
Under Contract No. N62467-00-D-8276	)	

APPEARANCE FOR THE PETITIONER: Mr. Gaines S. Smith
President

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Richard A. Gallivan, Esq.
Assistant Director
Robert C. Ashpole, Esq.
Senior Trial Attorney

ORDER PURSUANT TO RULE 1(e)
DIRECTING CONTRACTING OFFICER TO ISSUE DECISION

Pursuant to Rule 1(e), Ironhorse Ltd. (Ironhorse) petitions the Board to direct the contracting officer (CO) to issue a decision on its claim. In response, the Navy moves to dismiss for lack of jurisdiction on the grounds that the petitioner has not submitted a proper claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, and that its claim is time barred.

STATEMENT OF FACTS FOR
PURPOSES OF THE PETITION

1. On 27 May 2000, the Naval Facilities Engineering Command, Southern Division (NAVFAC, the Navy or government) awarded Contract No. N62467-00-D-8276 (Contract 8276) to the petitioner. The contract was of the indefinite quantity type for railroad repairs at the Naval Weapons Station in Charleston, South Carolina. (Gov't 23 January 2009 supp., ex. 1)

2. The contract included 129 line items of supplies and services. Each line item specified a minimum guaranteed dollar amount of work which was the product of the maximum quantity that could be ordered multiplied by the unit price of the listed item. (*Id.*)

3. On 20 December 2000, the Navy issued Delivery Order No. 0004 for eight items of supplies and services in the total amount of $426,163.69. It specified 1 June 2001 as the completion date. (*Id.*, ex. 3)

4. On 1 June 2001, Navy contracting officer B.A. Powell (CO Powell) notified Gaines S. Smith (Smith), president of Ironhorse that (1) the rail system for Wharf Alpha must be serviceable as soon as possible but by no later than 11 June 2001, (2) Ironhorse could continue asphalt demolition while rail was being installed but the effort to do so should not be at the expense of completing Wharf Alpha and, (3) no more rail was to be removed until "after the DOE shipment has been accomplished" (*id.*, ex. 4).

5. On 11 June 2001, CO Powell issued a suspension notice. Ironhorse was told that "[s]uspension of work will be in effect 20 days from the date of this letter. During this suspension you are not authorized to perform any work on Wharf Alpha." The notice advised Ironhorse that "you will be entitled to time lost due to this action. Upon resumption of work, a time extension will be negotiated." On 13 June 2001, CO Powell issued unilateral Modification No. 01 to Delivery Order No. 0004 extending the Wharf Alpha completion date to 30 June 2001. By letter dated 28 June 2001, CO Powell cancelled the suspension of work notice and told Ironhorse that "[t]he contractor shall proceed with performance of work on this site." Ironhorse was also told that "[a]ny request for time extension should also be submitted within 30 days after receipt of this letter." (*Id.*, ex. 4)

6. By letter dated 14 July 2001 (RFI-40), Smith requested a 60-day time extension for Delivery Order No. 0004 claiming that Ironhorse had encountered a differing site condition in removing asphalt. CO Powell's 16 August 2001 letter stated that based on the Navy's review and calculation, 5 August 2001 would be the "new completion date." The letter gave Ironhorse 10 days after receipt to present in writing any facts bearing on the question to the Resident Officer in Charge of Construction (ROICC). (*Id.*, ex. 5)

7. In an e-mail to Smith on 29 August 2001, CO Powell stated:

> You have disagreed with the Government's new Completion date of 5 August 2001 but have not provided a proposal supporting your request. You are hereby afforded the opportunity to present in writing a detailed proposal and supporting information. Your failure to present any mitigating circumstances within 10 days of this e-mail will be considered an admission that none exist and we will process the modification unilaterally.

(*Id.*, ex. 5) On 14 September 2001, CO Powell unilaterally issued Modification No. 02 to Delivery Order No. 0004. The unilateral modification extended "the contract completion date 36 calendar days from 30 June 2001 to 5 August 2001 due to ported ship disruptions and suspension of work" (*id.*, ex. 4).

8. On 20 September 2001, CO Powell unilaterally issued Modification No. 03 to Delivery Order No. 0004. This modification reduced the delivery order amount by $48,000, to $378,163.69 from $426,163.69. The modification explained that the deduction was taken because there was no time near the end of a fiscal year "to negotiate deductions for work not performed." The deduction was based upon what the Navy estimated it owed Ironhorse for "adds" ($94,000) and what Ironhorse owed the Navy ($142,000) for work not yet performed. (*Id.*, ex. 6)

9. In her letter dated 25 January 2002, CO Powell proposed a modification pursuant to the Changes clause to account for credits for work ordered but not performed and for extra work performed. The letter identified 14 specific items of work. The letter went on to say:

> In addition, pursuant to DFARS 252.236-7000 "Modification Proposal - Price Breakdown", you are requested to submit a detailed estimate of both credit and cost for the above described work by close of business on 1 February 2002. The estimate should be submitted with sufficiently detailed support to permit analysis and negotiations. Enclosure (1) is provided for your benefit in preparing proposal….
>
> After receipt and evaluation of your proposal, you will be advised as to date of negotiations. Upon issuance of the modifications from this negotiation, this contract will be considered complete.

The letter enclosed a blank NAVFAC Form 4330/43 entitled "Contractor's Proposal for Contract Modification". (*Id.*, ex. 10)

10. In response to CO Powell's letter, Smith initially submitted by e-mail 23 Requests for Equitable Adjustment (REAs) on 15 February 2002 (Ironhorse's ltr. of 2 January 2009, attach. A). By letter dated 21 February 2002 (GC-23), Smith withdrew all REAs sent "prior to February 21, 2002" (*id.*, attach. D-1). On 21 February 2002, Smith resent by e-mail to Jeff Dimit (Dimit) a NAVFAC contract manager and CO Powell 28 REAs. Each of the REAs submitted was on a NAVFAC 4330/43 form. Item 32 on the form provides for the "TOTAL COST" being sought. The form also provides for a line for "Signature & Title of preparer" and the "Date" on which the form is signed. Each of the revised REAs Smith submitted by e-mail on 21 February 2002 included a dollar amount sought. Except for REA No. 22, none of the REAs sought an amount over $100,000 and thus only REA No. 22 needed to be certified. The space for "Signature & Title of preparer" on each form was left unsigned. (*See* Ironhorse's 4 September 2008 submission in response to the Navy's motion to dismiss)

11. Each 4330/43 form Ironhorse electronically transmitted to the Navy on 21 February 2002 was followed by a cover letter electronically transmitted to CO Powell the following day, 22 February 2002.[1] Each cover letter stated that Ironhorse was submitting the following REA, set out the basis for entitlement to equitable adjustment, the amount requested, and a certification, and requested a "prompt decision of the contracting officer." Each cover letter included a signature block for Gaines S. Smith, as president of Ironhorse. Smith, however, did not physically or electronically sign any of the cover letters. (*Id.*)

12. REA No. 22 as originally submitted in February 2002 was in the amount of $30,260. But for an error in addition obvious on the face of the NAVFAC 4330/43 form for REA No. 22, the amount should have been $139,600. Although Ironhorse's 22 February 2002 cover letter for REA No. 22 did contain a certification for the REA, neither the cover letter nor the NAVFAC 4330/43 form was physically or electronically signed by Smith. (*Id.*).

13. CO Powell acknowledged receipt of the REAs by letter dated 28 February 2002. The letter asked Ironhorse to provide (1) documentation to support its labor burden and (2) the most recent Defense Contract Audit Agency (DCAA) audit or documentation so that DCAA could initiate an audit. (Gov't 23 January 2009 supp., ex. 11)

14. In response to the REAs, CO Powell sent Smith by letter dated 26 June 2002 a 7-page document entitled "ANSWER TO 28 REQUEST FOR EQUITABLE ADJUSTMENTS FROM IRONHORSE LTD" ("answer"). The answer reflects that the Navy analyzed the REAs and found that Ironhorse was entitled to an equitable adjustment for 9 of the REAs (REA Nos. 9, 10, 13, 15, 19, 20, 21, 25 and 26). CO Powell's answer also noted that Ironhorse had withdrawn REA No. 18; REA No. 27 should be a part of REA No. 24; and REA No. 28 was an exact duplicate of REA No. 22. CO Powell's letter forwarded a Standard Form 30 – Modification No. 04 to Delivery Order
No. 0004 – proposing the following adjustments:

> The total delivery order amount is…decreased by $98,231.82 from $378,163.69, to $279,931.87. The delivery order completion date is extended by 13 calendar days from 5 August 2001 to 18 August 2001.

(Gov't 23 January 2009 Supp., ex. 12) Smith was asked to sign and date the SF 30 form and to return the original "within 10 days of receipt" to CO Powell's office. The letter

[1] REA No. 18 was withdrawn by Smith's e-mail dated 22 February 2002 (*see* Ironhorse's ltr. of 20 December 2008, attach. C).

went on to say that "[i]f you take exception to the modification, please return the original with a letter stating your exception." (*Id.*)

15. E-mail exchanges between Smith and CO Powell showed that Smith received the "answer" to his REAs and took exception to it but did not provide the reasons for taking exception. CO Powell's 8 July 2002 e-mail acknowledged receipt of Smith's e-mail and pressed for more details: "The Government acknowledges your e-mail taking exception to Delivery 0004 Mod 04 but you didn't attach your reasoning. Please forward your reasoning within 10 days." Smith's reply on the same day said:

> Ms. Powell
>
> I did not say or indicate that I would have a response to all the REA's within 10 days. You only ask [sic] that if I took exception to the Modification, to return the original (which I have never received) with a letter stating my exception.
>
> Additionally, you have taken 120 days to respond to me, but are now mandating to me that I must drop all things I am doing and respond to you within 10 days. If you would be so kind as to send me the location of the FAR clause that indicates that I must respond within 10 days, I would be most appreciative. I cannot find any thing [sic] that says I have to respond within 10 days, I only find where I must respond within 6 years. Please correct me if I am wrong.

(*Id.*, ex. 13)

16. Smith's comment about responding within 6 years would have been derived from Federal Acquisition Regulation (FAR) 33.206, Initiation of a claim:

> (a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

17. We find that as things stood on 8 July 2002, Smith knew he either would have to get back to CO Powell with reasons why she should not issue Modification No. 04 as

proposed, or if CO Powell went ahead and issued the proposed modification unilaterally, he would have to file a claim, and to do so within 6 years of accrual of the claim.

18. On 10 August 2002, CO Powell unilaterally issued Modification No. 04 to Delivery Order No. 0004. The modification unilaterally decreased the delivery order amount by $98,231.82 from $378,163.69 to $279,931.87 and extended the completion date by 13 calendar days to 18 August from 5 August 2001. The cover letter to the modification stated "Enclosed is a Standard Form 30 for a unilateral change to the subject delivery order. The form does not require your signature and is for your files only." (*Id.*, ex. 14)

19. Nearly six years later, in a letter dated 31 January 2008 to CO Powell entitled "ANSWER TO 28 REQUESTS FOR EQUITABLE ADJUSTMENTS FROM IRONHORSE LTD DELIVERY ORDER # 4" Smith stated that Ironhorse disagreed with "your responses to the above referenced 28 requests for equitable adjustment." Smith's letter listed the 28 REAs individually and requested a CO decision for each REA except REA No. 18 and REA No. 22. For REA No. 22, Smith submitted a corrected NAVFAC Form 4330/43 totaling $138,862 to correct a "math error" made in his 2002 submission. He also explained that REA No. 24 was not a duplicate of REA No. 27, and REA No. 28 was not a duplicate of REA No. 22. These issues were raised by CO Powell in her 26 June 2002 7-page "answer." The letter bore Smith's signature. (*See* Ironhorse's 10 July 2008 petition, ex. A)

20. By letter dated 10 July 2008, Ironhorse petitioned the Board to direct the CO to issue a decision. The petition showed $694,774 as the amount of equitable adjustment requested. According to the petitioner, Ironhorse submitted 28 REAs each with a cover letter containing a certification to CO Powell in February 2002. The letter said that on 31 January 2008, it requested by letter a final decision on each REA. The letter went on to chronicle numerous unsuccessful attempts from January until June 2008 to initiate a dialogue through Dimit with NAVFAC representatives. The Board docketed the petition as ASBCA No. 56455-920.

21. On 22 July 2008, the Board directed the Navy to show cause why an order directing the CO to issue a decision should not be issued. The Navy responded by filing on 11 August 2008 a motion to dismiss for lack of jurisdiction contending that Ironhorse's petition should be dismissed for two reasons: (1) the 31 January 2008 letter is not a proper claim because "it has no sum certain or certification" and (2) "[e]ven if the claim were proper, it was submitted more than six years after contract performance ended – too late under the statute of limitation [sic] [41 U.S.C.§ 605(a)]" (gov't mot. at 3). The Navy contends that performance of the contract "was completed on or before September 30, 2001" (*id.* at 1, ¶ 1).

22. Petitioner's 4 September 2008 response contends that it submitted "a proper claim for 28 REA's on 28 [sic] February 2002," and "[e]ach of the 28 certified claims had a cover letter that contained the certification as per the Contract Disputes Act." Petitioner maintains that "[t]he 31 January 2008 submission was not the submittal of a certified claim, but a request for a contracting officer's final decision." (Petitioner's resp. at 1) The Navy's 18 September 2008 reply raised a new issue. The Navy pointed out that there was "no apparent signature anywhere" on the 21 February 2002 e-mail transmittal letter, the NAVFAC Form 4330/43s, and the 22 February 2002 cover letters. The Navy cited a number of Board cases for the proposition that the Contract Disputes Act (CDA) "requires that signed claim certifications be submitted contemporaneously with the claim." (Gov't 18 September 2008 reply at 2)

DECISION

Under Section 6(c)(4) of the CDA, "[a] contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer." 41 U.S.C. § 605(c)(4). Implementing this section of the CDA, Board Rule 1(e) provides that "[i]n lieu of filing a notice of appeal under (b) or (c) hereof, the contractor may request the Board to direct the contracting officer to issue a decision in a specified period of time, as determined by the Board, in the event of undue delay on the part of the contracting officer."

In connection with issuing modifications to delivery orders under Contract 8276, the record shows CO Powell's *modus operandi* was to unilaterally initiate a change through a letter or through a proposed modification on a Standard Form 30. Ironhorse would be asked to sign, date, and return the form if it agreed with the proposed change, or, if it did not agree with the proposed change, to return the form unsigned with a statement explaining the reason for taking exception. Whether Ironhorse responded or not, at some point, CO Powell would simply make up her mind and issue a modification unilaterally and leave Ironhorse to pursue its remedies.

In the case of Modification No. 04 to Delivery Order No. 0004, CO Powell initiated a proposed change by letter dated 25 January 2002 and asked Ironhorse to submit a proposal for "credit and cost" on 14 specific items. Ironhorse responded by submitting 28 REAs on 21 and 22 February 2002 (it later withdrew REA No. 18). These REAs were part of the contract administration process. CO Powell evaluated the REAs and provided a 7-page "answer" and forwarded Modification No. 04 to Delivery Order No. 0004 to Smith by letter dated 26 June 2002 proposing to decrease the delivery order amount by $98,231.82 and to extend the delivery order performance period by 13 calendar days. CO Powell's letter asked Ironhorse to sign, date, and return the Standard Form 30 "within 10 days of receipt" and, "if you take exception to the modification, please return the original with a letter stating your exception." Smith took exception but

did not furnish an explanation. We have found that as things stood on 8 July 2002, Smith knew he would either have to get back to CO Powell with reasons why she should not issue Modification No. 04 as proposed, or if CO Powell went ahead and issued the proposed modification unilaterally, he would have to file a claim and to do so within 6 years of accrual of the claim. On 10 August 2002, CO Powell unilaterally issued Modification No. 04 to Delivery Order No. 0004 decreasing the delivery order amount by $98,231.82, and extending the performance period by 13 calendar days. This left filing a claim as Smith's only recourse to the CO's unilateral action.

Over 5 years after CO Powell issued Modification No. 04 to Delivery Order No. 0004 unilaterally in August 2002, Smith by letter dated 31 January 2008 listed 28 REAs and requested the CO's final decision on each REA. The letter noted that REA No. 18 had been withdrawn, and REA No. 22 had been corrected. For reasons set forth below, we conclude that this letter constituted Ironhorse's claim with respect to all of the REAs except REA No. 22.

Our authority to issue a 1(e) order "presupposes jurisdiction under the CDA." *Charitable Bingo Associates, d/b/a Mr. Bingo,* ASBCA No. 52999-883, 01-1 BCA ¶ 31,194 at 154,022. Under the CDA, "All 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). The CDA does not define the word "claim." FAR 2.101 defines "claim" to mean "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 arising under or relating to the contract…." We have said that "[t]he linchpin of our jurisdiction over a contractor claim under the CDA is the submission of the claim to the CO for decision." *Bruce E. Zoeller,* ASBCA No. 55654, 07-1 BCA ¶ 33,581 at 166,347.

In expressing disagreement with CO Powell's "answer" written in 2002, and in listing the 28 REAs partially rejected by CO Powell's unilateral modification issued in August 2002, Smith essentially incorporated them into his 31 January 2008 letter by reference. Viewed in this light, the Navy's contention that the 31 January 2008 letter was not a proper claim because "it has no sum certain or certification" is without merit. All of the REAs submitted in February 2002 included a specific dollar amount sought. Also, except for REA No. 22 which contained a computational error, none of the REAs submitted in 2002 was over $100,000 and thus had to be certified. We conclude therefore, that except for REA No. 22, Smith's 31 January 2008 letter was a "claim" for all of the REAs.

The Navy points out that there was "no apparent signature anywhere" on Smith's 21 February 2002 e-mail transmittal, the NAVFAC 4330/43s, and the 22 February 2002 cover letters. While this is true, we do not believe the lack of Smith's signatures on these documents is an impediment because Smith did sign his 31 January 2008 claim letter.

It is an impediment, however, for REA No. 22. Because it is over $100,000, REA No. 22 has to be certified. *Hawaii CyberSpace,* ASBCA No. 54065, 04-1 BCA ¶ 32,455 at 160,535 (holding that "to 'execute' a CDA certification requires that the certifier sign the certification document."); *Teknocraft Inc.*, ASBCA No. 55438, 08-1 BCA ¶ 33,846 at 167,505 (holding that "//signed//" was unacceptable for a claim that required certification). The record does not indicate there is a properly executed certification for REA No. 22.

In moving to dismiss for lack of jurisdiction, the Navy also contends that even if the claim was properly submitted, it was "submitted too late to meet the jurisdictional statute of limitations in the Contract Disputes Act, because the claim would have accrued during contract performance, which ended more than six years earlier" (gov't mot. at 1). We have said in *Gray Personnel, Inc.,* ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475, the requirement that a CDA claim be submitted within six years after its accrual is jurisdictional. The statute of limitations is typically raised as an affirmative defense after an appeal has been filed or commenced pursuant to 41 U.S.C. § 605(c)(5). We conclude that consideration of whether a 1(e) petition should be granted ought not to be burdened with the statute of limitations defense at this juncture. If the CO believes she has a statute of limitations defense, she may raise that defense in her decision, and the Board will address that defense as a part of any appeal.

CONCLUSION

Except with respect to REA No. 22 which was not properly certified and with respect to REA No. 18 which was withdrawn, we hold that Ironhorse submitted a claim meeting the requirements of FAR 2.101 with respect to the rest of the REAs listed in its 31 January 2008 letter. Because there has been an undue delay since receipt of petitioner's 31 January 2008 claim in issuing a decision on the part of the CO, we hereby direct the CO, pursuant to 41 U.S.C. § 605(c)(4), to issue a decision within 60 days from the date of this order with respect to the REAs other than Nos. 18 and 22.

This order completes all necessary action by the Board. If the CO fails to comply with this order, such failure will be deemed a decision by the CO denying the claim (REAs) and the petitioner may appeal to this Board or sue in the United States Court of Federal Claims pursuant to 41 U.S.C. §§ 605(c)(5), 606, or 609. The issue of whether the 31 January 2008 claim is barred by the 6-year statute of limitations in the CDA is reserved.

Dated: 5 March 2009

PETER D. TING
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. 56455-920, Petition of Ironhorse Ltd., rendered in conformance with the Board's Charter.

Dated:

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