ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Madison Lawrence, Inc.	)	ASBCA No. 56551
	)	
Under Contract No. N68836-07-C-0018	)	

APPEARANCES FOR THE APPELLANT: Joseph A. Camardo, Esq.
Kevin M. Cox, Esq.
Camardo Law Firm, P.C.
Auburn, NY

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Robert C. Ashpole, Jr., Esq.
Senior Trial Attorney

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

Appellant appealed under the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(5), from the contracting officer's (CO's) deemed denial of its claim under its contract with the Navy. The government has moved to dismiss the appeal for lack of jurisdiction on the grounds that appellant did not submit a valid CDA claim because it did not seek a CO's decision and it did not demand a sum certain. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On 31 January 2007, the Navy's Fleet & Industrial Supply Center in Jacksonville, Florida, awarded the subject 100% section 8(a) set aside fixed price commercial items contract to operate a food service facility at the Naval Air Station in New Orleans, Louisiana, to Madison Lawrence Industries, Inc. (also referred to in the record as Madison Lawrence, Inc. and sometimes referred to hereafter as "Madison")[1] (R4, tab 8 at 180; *see also* R4, tab 8 at 196, incorporating by reference the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (SEP 2005) clause). The contract covered a base period, ending on 30 September 2007, and four option years. The Navy

[1] In its request for equitable adjustment (REA) appellant identified itself as "Madison Lawrence Industries, Inc. ('Madison Lawrence')" (R4, tab 17 at 414). Its notice of appeal was in the name of "Madison Lawrence, Inc." and the appeal was so docketed. Appellant's brief in opposition to the government's motion was submitted on behalf of "Madison Lawrence Industries, Inc." (app. br. at 1). These differences are immaterial to the government's motion.

exercised its first option. That performance period ended on 30 September 2008 and Madison's contract was not extended further. (*See* R4, tab 8 at 195, tab 10 at 396, tab 11; supp. R4, tab 108)

By letter to the CO dated 21 April 2008, Madison submitted an REA. It alleged that the government had issued misleading specifications regarding the number of airmen to be fed, causing Madison to make an error in its proposal that should have been obvious to the government, which should have sought clarification before contract award. Madison also alleged that the government had allowed unauthorized personnel to enter the mess hall and benefit from Madison's food services. The REA sought contract reformation, to increase Madison's pricing based upon the alleged correct number of meals to be served. It included a certification by its president that the REA was made in good faith and that the supporting data were accurate and complete to the best of his knowledge and belief, but it did not contain the additional certification elements required for CDA claims that the amount requested accurately reflected the contract adjustment for which the contractor believed the government was liable and that the certifier was duly authorized to certify the claim on behalf of the contractor, 41 U.S.C. § 605(c)(1). Madison sought an amicable resolution and did not expressly ask for a CO's final decision. (R4, tab 17 at 412, 414, 421-27)

The pricing portion of Madison's REA began with the following summary:

Area of Cost	Calc Rate	Dollar Amount	Sup Ref
Added Labor Costs including Health & Welfare and payroll taxes		$145,771.17	Ref 1
Other Direct Costs		$7,443.38	Ref 2
Indirect to Direct Labor and Consultant fees		$5,401.20	Ref 3
Added Travel Costs		$673.48	Ref 4
Subtotal		$159,289.23	
Adjusted G/A expense	7.00%	$11,150.25	Ref 5
Subtotal		$170,439.48	
Profit	10.00%	$17,043.95	Ref 6
Proposal preparation fees		$9,499.20	Ref 7
Subtotal of Equitable Adjustment		$196,982.62	
Estimated Added costs to complete		To be Negotiated	Ref 8

(R4, tab 17 at 517) Several pages of supporting cost details and Madison's calculations of its estimated additional labor costs followed the summary. The supporting

documentation reflects that the specific amounts in the summary, totaling $196,982.62, were based upon Madison's contract performance between February 2007 and February 2008 (*e.g.*, R4, tab 17 at 521, 523, 525, 538-41).

With respect to the "Estimated Added costs to complete -- To be Negotiated" portion of the summary, Madison stated the following in its Reference 8:

> The number of personnel which Madison is feeding is constantly growing. Madison is entitled to an equitable adjustment for the remaining option time periods. The REA includes the estimated added costs incurred by Madison for approximately the first twelve months of the contract. However, Madison will continue to incur these costs for the remaining option years due to the ongoing government actions and inactions. Thus Madison is entitled to an equitable adjustment for any additional months of contract performance. The following is [sic] the estimated costs on a monthly basis for the remaining months.
>
> Based on March 2008 meal count (Exhibit E) Madison is serving an additional 7,561 meals per month over and above what it had bid. Based on the REA for the approximately first twelve months and factoring what appears to be an increase in future meal serving, Madison calculates its costs to complete at an extra $15,710.87 per month [[2]] based on the following:
>
> Original REA Amount without Indirect to Direct and Consultant fees, proposal preparation costs and added travel = monthly average of $13,871.81.
>
> Total Meals served Feb 2007 – Feb 2008 equaled 164,091 or average of 12,622.38 meals per month.
>
> March 2008 meal count was 16,438, which is an average increase of 30.40% over average monthly meal count for Feb 2007 – Feb 2008. Thus it is anticipated that Madison's costs will increase proportionally to the increased additional number of meals continuing to be served.

[2] Based upon the calculations that followed, we infer that the $15,710.87 per month figure was an error.

Estimated Added costs per Month	$13,871.81[2] Calculated by on [sic] REA to date
Additional meals – 30.40% increase	$4,216.43
Subtotal of additional month costs	$18,088.24 [f]or additional periods of performance

Estimated Added cost per month for continued option periods = $18,088.24 per month. This amount is estimated and is subject to change as the government number of meals change [sic].

_____

[2] Based on added labor, other direct costs, G/A and profit divided by 13 months

(R4, tab 17 at 520-21) Thus, Madison alleged that it was entitled to $196,982.62, plus estimated additional costs of $18,088.24 per month starting in March 2008 and continuing for all additional months of contract performance, subject to change depending upon the number of meals involved.

On 20 May 2008 the CO issued a final decision denying what he described as Madison's "claim" and notifying it of its appeal rights (R4, tab 18 at 553, 554). The CO deemed that Madison was claiming approximately $197,000 to cover its contract performance plus approximately $18,000 per month for the remainder of the contract. He noted, among other things, that Madison had served 102,081 meals during the first seven months of the first option period for an estimated total of 174,996 meals for fiscal year (FY) 2008. He stated that he believed that reformation of Madison's contract would exceed the amount of the next lowest acceptable offer but that he would need to analyze this further and to get clarification from Madison. (R4, tab 18 at 548, 554)

By letter to the CO dated 10 June 2008, appellant's counsel stated that the REA was not a claim, but since a final decision had been rendered, Madison had to preserve its rights and would timely appeal. He enclosed a proper CDA claim certification by Madison's president, stating that it converted the REA into a claim. He noted that Madison would still like to resolve the matter short of litigation; it was preparing additional information regarding its costs; as per the CO's decision, meals for FY 2008 would likely exceed 150,000; and Madison would provide information regarding an equitable adjustment when the meals exceeded that number and "further suggestions for the resolution of the larger situation." (R4, tab 19 at 768, 770)

On 24 June 2008 Madison appealed under the CDA from the CO's "alleged final decision," noting that it had been issued in response to an REA that had not sought a final decision but, now that one had been issued, Madison had submitted a claim certification and had formally converted its REA into a claim. It stated that it was taking the appeal to preserve its rights. On 26 June 2008 the Board docketed the appeal as ASBCA No. 56443. On 8 August 2008 the government moved to dismiss the appeal for lack of jurisdiction on the ground that Madison's REA was not a claim and the CO's final decision was a nullity. It further contended that the converted claim did not meet the requirements for a CDA claim because it was not submitted for the purpose of obtaining a CO's final decision and was not in a sum certain. On 12 August 2008 Madison filed a new notice of appeal, based upon the CO's deemed denial of what appellant described as its 10 June 2008 claim. On 13 August 2008 the Board docketed that appeal as ASBCA No. 56551. Pursuant to the parties' agreement, on 26 August 2008 the Board dismissed ASBCA No. 56443 without prejudice to ASBCA No. 56551.

In its 17 September 2008 complaint in ASBCA No. 56551, appellant alleged that "[t]o date" it had suffered damages of "at least $196,982.62" (compl. ¶ 55) and it requested an award of "at least $196,982.62" plus CDA interest and any other relief the Board considered just and proper (*id* at 9). On 14 October 2008 the government moved to dismiss ASBCA No. 56551 on the grounds that Madison still had not filed a proper CDA claim because its 10 June 2008 submission did not seek a CO's decision and did not demand a sum certain.

Pursuant to the parties' agreement, the Board held the government's motion in abeyance pending Madison's filing an amended or new claim with the CO and ultimately an expected new appeal. On 5 January 2009 Madison filed an amended claim and requested a CO's decision. On 21 March 2009 it received the CO's decision denying its claim and it appealed to the Board on 28 April 2009. The Board docketed that appeal as ASBCA No. 56801. Appellant considered potential interest implications under the CDA, 41 U.S.C. § 611, elected not to withdraw the instant appeal, No. 56551, and opposed the government's motion to dismiss it.

DISCUSSION

In opposing the government's motion to dismiss, appellant asserts that it implicitly communicated its desire for a CO's final decision in its 10 June 2008 letter and certification, which stated that it was converting its REA into a CDA claim, and that its claim requested a sum certain, which could be determined by simple mathematical calculation.

A contractor's submission of a valid CDA claim in writing to the CO for decision, and a contractor's appeal from that decision, or from the CO's failure timely to issue a decision, are prerequisites to the Board's jurisdiction to entertain its appeal. 41 U.S.C. § 605(a), (b), (c), § 606; *Paragon Energy Corp. v. United States*, 645 F.2d 966, 967 (Ct. Cl. 1981); *Todd Pacific Shipyards Corp.*, ASBCA No. 55126, 06-2 BCA ¶ 33,421 at 165,687. If a submission does not satisfy the criteria for a CDA claim, any purported CO's decision on the matter is a nullity. *Paragon Energy Corp.*, 645 F.2d at 971; *Birkart Globistics AG*, ASBCA No. 53458 *et al.*, 06-1 BCA ¶ 33,138 at 164,227. Contractor claims exceeding $100,000 must be certified in accordance with 41 U.S.C. § 605(c)(1). However, a defective certification does not deprive the Board of jurisdiction, although it must require correction prior to its decision. 41 U.S.C. § 605(c)(6).

The CDA does not define "claim," but FAR 2.101 defines it 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 arising under or relating to the contract." As we have summarized:

> 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.*

Todd Pacific Shipyards Corp., 06-2 BCA ¶ 33,421 at 165,687. A request for a CO's final decision need not be explicit, but can be implied. *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996); *Transamerica Insurance Corp.*, 973 F.2d at 1578.

By letter dated 10 June 2008, appellant explicitly stated that it was converting its REA into a claim and it submitted a proper CDA claim certification. Even if we were to assume, without deciding, that appellant's 21 April 2008 partially-certified REA did not qualify as a CDA claim and the CO's 20 May 2008 decision denying it was a nullity, it is obvious, applying common sense, that as of 10 June 2008, appellant was seeking full CDA treatment of its converted REA. Thus, it implicitly expected that the CO's 20 May 2008 decision would now apply, or that a new decision would issue, or that it would appeal, as transpired, from the CO's deemed denial of its claim.

With regard to the sum certain issue, appellant's complaint qualified its damages request with the phrase "at least." As the government notes, we have held that certain qualifying phrases in a purported claim render it invalid as a CDA claim, for failure to state a sum certain. *Sandoval Plumbing Repair, Inc.*, ASBCA No. 54640, 05-2 BCA ¶ 33,072 (referring to "no less than," "not less than," and "in excess of"). However, appellant's claim did not contain such a specific qualification. A contractor's claim, and not the allegations in its complaint, forms the basis for our jurisdiction. *Hibbitts Construction Co.*, ASBCA No. 35224, 88-1 BCA ¶ 20,505.

As noted, the Federal Circuit has required only "adequate notice of the basis and amount of the claim," *Contract Cleaning Maintenance, Inc.*, 811 F.2d at 592. Although appellant did so, a contractor need not include a detailed breakdown of costs. It can supply "adequate notice" of the amount of the claim without accounting for each cost component. *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995); *Lockheed Martin Aircraft Center*, ASBCA No. 55164, 07-1 BCA ¶ 33,472 at 165,933. Moreover, inclusion of an estimated element does not invalidate a CDA claim. *Inca Contracting Co.*, ASBCA No. 52697, 01-1 BCA ¶ 31,255 at 154,361. Even if a claim, as here, does not state the total amount sought, when the amount can be calculated with reasonable effort, a contractor's submission is sufficiently in a sum certain for CDA jurisdictional purposes. *Mohammad Darwish Ghabban Est.*, ASBCA No. 51994, 00-2 BCA ¶ 31,114 at 153,671; *Mulunesh Berhe*, ASBCA No. 49681, 96-2 BCA ¶ 28,339 at 141,520.

Appellant's REA stated that the estimated monthly amount sought was subject to change depending upon the number of meals involved, and its 10 June 2008 letter converting the REA into a CDA claim stated that it would provide more information regarding an equitable adjustment when the meals exceeded 150,000. That the amount of a claim might change as additional information is developed does not invalidate it as a qualifying CDA claim . *See Tecom, Inc. v. United States*, 732 F.2d 935, 937-38 (Fed. Cir. 1984); *Todd Pacific Shipyards Corp.*, 06-2 BCA at 165,687. Further, the CO's statement in his intended final decision that he would need more analysis and

clarification from appellant, concerning whether the requested contract reformation would exceed the amount of the next lowest acceptable offer, did not affect the validity of appellant's claim. A CO's desire for more information does not change the status of a contractor's proper CDA claim. *H.L. Smith*, 49 F.3d at 1565.

Appellant's claim was in the sum certain amount of $196,982.62, plus estimated additional costs of $18,088.24 per month, starting in March 2008 and continuing through the end of contract performance -- an additional amount readily subject to calculation. The CO so understood the claim, reflecting that he had adequate notice of the claim amount.

DECISION

The government's motion to dismiss is denied.

Dated: 13 August 2009

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

PETER D. TING
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. 56551, Appeal of Madison Lawrence, Inc., rendered in conformance with the Board's Charter.

Dated:

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