

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Western Plains Disposal) ASBCA No. 56986
)
Under Contract No. FA4613-05-C-0004)

APPEARANCE FOR THE APPELLANT: Ms. Nadean M. Clifton
President

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
Christopher M. McNulty, Esq.
Capt John M. Page, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT’S MOTION TO DISMISS FOR LACK OF JURISDICTION

This appeal involves a service contract between the U.S. Air Force and Western Plains Disposal (WPD or appellant). On 23 November 2009 the Board asked the parties about the apparent lack of a certification under the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(1), as amended. In January 2010 respondent submitted a Motion for Summary Judgment or Dismissal for Lack of Jurisdiction and a supplemental brief on whether WPD’s Certificate of Current Cost or Pricing Data is correctable under the CDA. Appellant declined to reply to the motion. The government’s motion to dismiss for lack of jurisdiction is denied.

STATEMENT OF FACTS (SOF)

1. Effective 1 March 2005, the U.S. Air Force, 90th Contracting Squadron, awarded the captioned contract to WPD for refuse collection and disposal services at F.E. Warren Air Force Base, Wyoming. Work was to begin on 1 April 2005 and, if all four option years were exercised, to continue to 31 March 2010. (R4, tab 1)

2. On 23 August 2009 appellant submitted to the government a \$128,652.25 request for “equitable reimbursement” due to increased dumping fee costs, illegal dumping, and increased fuel costs, and an immediate cost adjustment, which included the following document (R4, tab 7, italics added):

Certificate of Current Cost or Pricing Data

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 2.101 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.403-4) submitted, either actually or by specific identification in writing, to the Contracting Officer or the Contracting Officer's representative in support of Equitable Reimbursement and Cost Adjustment* are accurate, complete, and current as of August 23rd, 2009**.

This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

Firm Western Plains Disposal Service

Signature [Signed by Nadean Clifton]

Name Nadean Clifton

Title President/Owner

Date of Execution*** August 23rd, 2009

* Identify the proposal, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., RFP No.). *You would insert "request for equitable adjustment". . .*

** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price. *You would insert the date you performed the calculations.*

*** Insert the day, month, and year *you signed the certificate.*

(End of certificate)

FAR 15.406-2(a) prescribed this “Certificate of Current Cost or Pricing Data.” WPD entered its specific data in the blanks. The italicized phrases are not in FAR 15.406-2(a), but were on the certificate form that the contracting officer sent to WPD (Bd. corr. ltr. dtd. 17 December 2009).

3. On 2 September 2009 WPD revised the amount of its “equitable reimbursement” to \$130,720.31 (R4, tab 3).

4. The contracting officer’s 27 October 2009 final decision denied WPD’s equitable reimbursement request on the merits (R4, tab 4 at 2). WPD filed a timely appeal on 16 November 2009.

5. The Board’s 23 November 2009 letter to WPD stated that claims over \$100,000 required CDA certification, gave WPD the opportunity to show that its claim had been so certified, and stated that without a certification the appeal was subject to dismissal. On 28 December 2009 respondent sent the Board a copy of WPD’s 23 August 2009 letter and “Certificate of Current Cost or Pricing Data.” (R4, tab 7)

6. Respondent’s 5 January 2010 “Motion for Summary Judgment or Dismissal for Lack of Jurisdiction” stated: “Appellant has failed to certify its claim as required by the Contract Disputes Act of 1978 and the FAR” (gov’t mot. at 8).

7. On 13 January 2010 the Board asked respondent whether WPD’s “Certificate of Current Cost or Pricing Data” was correctable. On 29 January 2010 respondent sent the Board a brief on that question, in which it stated: “Appellant, a *pro se* small business, may have submitted the Certificate of Current Cost or Pricing Data inadvertently and in good faith...” Respondent argued that because of WPD’s long delay in providing a corrected CDA certification, what initially may have been an inadvertent mistake had become a negligent or intentional disregard of the certification requirements. (Gov’t br. at 3-4)

DECISION

The government’s motion addresses both the merits of the appeal and our CDA jurisdiction to decide it. We decide only the jurisdictional issue: whether appellant’s 23 August 2009 Certificate of Current Cost or Pricing Data (SOF ¶ 2) is correctable to conform to the certification required by 41 U.S.C. § 605(c)(1)–

[T]he contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the

certifier is duly authorized to certify the claim on behalf of the contractor.

In 1992, Congress amended the CDA to add § 605(c)(6), providing: “A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.” FAR 33.207(f) implements that statutory amendment. FAR 33.201 defines a defective certification as “a certificate which alters or otherwise deviates from the language in 33.207(c)...”

James M. Ellett Construction Co. v. United States, 93 F.3d 1537, 1545 (Fed. Cir. 1996), held that a Standard Form 1436 which provided (see FAR 53.301-1436):

This is to certify that the undersigned, individually, and as an authorized representative of the Contractor, has examined this termination settlement proposal [TSP] and that, to the best knowledge and belief of the undersigned:

(a) AS TO THE CONTRACTOR’S OWN CHARGES.

The proposed settlement...and supporting schedules and explanations have been prepared from the books of account and records of the Contractor in accordance with recognized commercial accounting practices; they include only those charges allocable to the terminated portion of this contract; they have been prepared with knowledge that they will, or may, be used directly or indirectly as the basis of settlement of a [TSP] or claim against an agency of the United States; and the charges as stated are fair and reasonable.

was similar to the CDA certification and correctable in accordance with 41 U.S.C. § 605(c)(6), and thus the Court of Federal Claims had CDA jurisdiction to entertain the suit.

SAE/Americon–Mid-Atlantic, Inc. v. General Services Administration, GSBCA No. 12294, 94-2 BCA ¶ 26,890 at 133,852, stated that the criterion for correction of a certification was whether “the flaws in [the] attempted certification are so significant that, rather than treat the certification as ‘defective’...we must effectively conclude that no certification was submitted.” The GSA Board held that a “Certificate of Current Cost or Pricing Data” made the second assertion required by the CDA, was not tantamount to the absence of a certification and was correctable.

We hold that WPD's "Certificate of Current Cost or Pricing Data" was a defective but correctable CDA certification.

We have further considered whether the claim otherwise meets the requirements of the CDA, and hold that it does.

CONCLUSION

We deny respondent's motion to dismiss for lack of jurisdiction.

Dated: 24 November 2010

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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. 56986, Appeal of Western Plains Disposal, rendered in conformance with the Board's Charter.

Dated:

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