ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Shaw Environmental, Inc.	)	ASBCA No. 57237
	)	
Under Contract No. W912P8-06-C-0086	)	

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New Orleans

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

Appellant Shaw Environmental, Inc. (Shaw) appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the contracting officer's (CO's) decision denying its claims for alleged extra costs and time under its contract with the United States Army Corps of Engineers (Corps) for emergency repairs to Mississippi River levees located in Louisiana that were damaged by Hurricanes Katrina and Rita. In the nature of a motion to strike, the Corps has moved to dismiss allegations in appellant's complaint pertaining to alleged increased costs incurred due to the reinstatement during contract performance of Louisiana state hauling permit requirements that previously had been waived. The Corps contends that the permit-related allegations were not part of appellant's claim submitted to the CO and thus the Board lacks jurisdiction to entertain them under the CDA. Appellant opposes the motion. For the reasons stated below, we grant it.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On 3 September 2005, after Hurricane Katrina's 29 August 2005 landfall, the Governor of Louisiana issued an executive order waiving Louisiana Department of Transportation and Development "commercial vehicle regulatory requirements regarding the purchase of trip permits for registration and fuel for commercial motor carriers engaged in disaster relief efforts" in Louisiana (app. opp'n, attach. 1; mot. at 1, ¶ 1).

On 6 January 2006 the Corps' New Orleans District issued a solicitation and request for proposals for a negotiated best value procurement described as the New Orleans to Venice Hurricane Protection Project, Buras Levee District, West Bank River Levee, Emergency Levee Repairs, Contract P14 - B/L Sta. 650+00 to B/L Sta. 906+00, Plaquemines Parish, Louisiana, sometimes referred to as "Project P14" (R4, tab 4 at first through third pages).

The solicitation and resulting contract contained the Federal Acquisition Regulation (FAR) 52.236-7, PERMITS AND RESPONSIBILITIES (NOV 1991) clause, which provides in part that:

> The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work.

(R4, tab 4 at 00700-71 (original), 00700-80 (amendment))

On 26 January 2006 the Corps awarded the contract to Shaw in the amount of $18,246,770 (R4, tab 8 at first page). The contract work at award included, among other things, clearing and grubbing; excavating borrow material; placement of semi-compacted and un-compacted fill, reinforcement geotextile fabric, levee crown surfacing material, and armor stone protection; demolition and removal of uncapped and concrete-capped floodwall; and fertilizing, seeding and mulching (mot. at 2, ¶ 3; *see also* R4, tabs 4 and 8 at 00010-3). The original contract completion date was 30 November 2006 (compl. and answer ¶ 5). On 2 February 2006 Shaw received the notice to proceed with the work (R4, tab 9). Appellant has not disputed the Corps' statement that on 25 February 2006, hauling operations to the levee using dump trucks began (mot. at 2, ¶ 5).

On 31 March and 13 April 2006 new executive orders rescinded the 3 September 2005 waiver and re-established permit requirements for vehicles, trucks and loads

traveling on Louisiana's interstates and highways with storm-damaged and other debris (mot. at 2, ¶ 6; app. opp'n, attachs. 2, 3).

After a levee failure during contract performance, on 21 December 2006 the Corps issued unilateral Modification No. P00011 (Mod. 11) "to revise the landside stability berm geometry and construction grade elevations." The modification revised typical sections and grade elevations at various stations on some of the contract drawings and sought a proposal from Shaw for a definitizing modification to contain an equitable adjustment. (R4, tab 11; mot. at 2, ¶ 7)

By letter to the Corps dated 18 January 2007 Shaw estimated a shortage of borrow material from the contract-specified borrow area, known as the Triumph borrow pit. Shaw stated that another source of borrow material would be necessary to avoid schedule impact. The Corps advised Shaw to continue excavating from the Triumph pit until notified otherwise. (R4, tabs 40, 41)

On 13 April 2007 the Corps issued unilateral Modification No. A00019 (Mod. A19) making an additional 200 feet of borrow available to Shaw on the north side of the Triumph pit. The modification sought a proposal from Shaw for a definitizing modification to contain an equitable adjustment. (R4, tab 43)

The contract was substantially complete on 20 July 2007 (R4, tab 23).

Effective 14 February 2008 the CO issued Modification No. P00019 (Mod. P19) for "Levee Grade Changes", with a net increase in the contract price of $1,300,500 and a 32-day extension of the contract completion date (R4, tab 30).

By letter to the CO dated 3 March 2008, which attached prior communications and documents, Shaw presented its proposal to definitize what it described as the "ADDITIONAL BORROW" Mod. A19 (R4, tab 51 at 1 of 7). It sought $483,448 and a 29-day extension. Shaw summarized major cost and schedule impacts as including additional blending, stockpiling, loss of processing area, and shrinkage. (R4, tab 51 at 2, 4 of 7) The contractor stated that:

> This proposal includes only the additional costs incurred in the borrow area. *Excluded from this proposal are costs of transportation and placement at the levee, costs which will be addressed in a separate proposal*. Shaw has determined that the complex circumstances relating to several changes on this project can be better presented and analyzed by including those costs as part of a wrap-up proposal that includes the cost

> and schedule impact of [Mod. 11] and other factors. [Emphasis added]

(R4, tab 51 at 6 of 7)

By letter to the CO of 2 May 2008, which attached prior communications and documents, Shaw disputed Mod. P19 and presented its proposal to definitize what it described as the "PROFILE REVISIONS" Mod. 11 (R4, tab 32 at 1 of 6). It sought $4,594,437 and a 122-day extension. It summarized the cost and schedule impacts as including defective specifications with respect to cross sections and transition zones, change in work sequence, loss of control due to required field direction by the Corps, required compaction of areas designated for uncompacted fill, and loss of elevation leading to placement of much more embankment on the levee than was reflected in the contract. (R4, tab 32 at 2-4 of 6)

By letter to the CO dated 10 July 2008, in connection with settlement negotiations, Shaw submitted a revised proposal for definitization of Mod. P19. It sought $449,503 and a 29-day extension. (R4, tab 54 at 1 of 7, 7 of 7) By letter to the CO of 24 July 2008 Shaw provided supplemental information. With regard to Mod. P19 "Cost Capture and Inefficiencies", Shaw stated:

> 2) The further we excavate towards the highway, the more we cut out our processing area. This will require hauling more truckloads to the levee to achieve the same placed yardage as well as require more processing at the levee.

(R4, tab 56 at 2 of 5)

Effective 20 May 2009, the CO issued unilateral Modification No. P00021 (Mod. 21) in connection with the additional borrow area, increasing the contract amount by $248,480 and extending the completion date by one day (R4, tab 59). Effective 3 June 2009, she issued unilateral Modification No. P00022 (Mod. 22) in connection with levee grade changes, increasing the contract amount by $212,000 with no time extension (R4, tab 39).

By letter to the CO dated 14 September 2009, Shaw referred to prior communications and documentation, attached numerous e-mails, and converted its 3 March 2008 and 2 May 2008 proposals requesting equitable adjustments (REAs) in connection with Mods. A19 and 11, respectively, "into a single" certified CDA claim (R4, tab 3 at 1, 4 of 9). Shaw claimed $4,048,666.60 and 121 days for the "Profile

Revisions" aspects of its claim and $234,968 and 28 days for "Additional Borrow", for a total of $4,283,634.60 and 149 days (R4, tab 3 at 5 of 9).

By decision dated 11 March 2010 the CO denied Shaw's claim (R4, tab 1) and it timely appealed to the Board on 21 May 2010.

Shaw filed its complaint on 18 June 2010. On 1 October 2010 the Corps filed the subject motion for partial dismissal, alleging that the Board does not have jurisdiction to entertain the following allegations in the complaint because they were not part of Shaw's CDA claim to the CO:

> **O. SHAW INCURRED INCREASED COST OF HAULING TO AND FROM THE LEVEE SITE DUE TO STATE REINSTATEMENT OF LOAD LIMITS**
>
> 95. At the time that the Corps solicited offers, the State of Louisiana issued an executive order relaxing temporarily the then established law imposing weight limitations on trucks hauling on state roads. This was done to help expedite the removal of refuse materials and transport construction materials needed to rebuild damaged areas.
>
> 96. The law imposing weight restrictions on truck loads was still relaxed at the time that Shaw prepared and submitted its offer for Project P14, and thereafter received the contract award. The weight restriction was relaxed for several months during performance.
>
> 97. During the period of performance on Project P14, the State of Louisiana lifted the executive order thereby reinstating the normal weight limitations.
>
> 98. As a result of the reinstatement action by the State, Shaw could not transport as much fill material with each truckload. In turn, Shaw had to make more trips to haul fill material for embankment operations and that resulted in increased cost of hauling.
>
> 99. In its offer and in the resulting contract Shaw agreed to comply with applicable federal, state and local law.

> In order to comply with the state law governing truck hauling, Shaw incurred increased costs for hauling operations. Shaw did not offer, did not agree, and the Contract did not provide, that it would absorb increased costs for complying with applicable laws, including the increased cost associated with complying with state trucking law.
>
> 100. Shaw prepared and submitted to the Corps an estimate for the impact of complying with reinstatement of the trucking load limit. That proposal reflected the need to permit only four scoops of fill per truck load instead of five scoops as originally proposed. In turn, the impact of reinstating the existing load limit was estimated to be 81 calendar days. Shaw was not compensated for the value of operations during that 81 day period.

(Compl. at 24-15)

In its answer, the Corps admitted the allegations in paragraph 100 of the complaint "to the extent supported by the referenced documents, which are the best evidence of their contents" and it otherwise denied the allegations in that paragraph. The parties have not directed the Board to any copy in the record of the "estimate" or "proposal" mentioned in paragraph 100. Appellant did not offer any evidence that it was included in the documentation appended to or referenced in its claim to the CO.

THE PARTIES' CONTENTIONS

The Corps describes Section O of appellant's complaint, entitled "Shaw Incurred Increased Cost of Hauling To and From the Levee Site Due to State Reinstatement of Load Limits", and paragraphs 95 through 100 thereof, as a "change of law" claim (gov't reply at 1; *see also* app. opp'n at 5 n.2). It points out that those allegations relate to Louisiana's rescission of the permit waiver for hauling activities on state roads that was instituted after Hurricane Katrina. The Corps states that, while the waiver cancelation occurred just over a month after hauling operations began on 25 February 2006 and calls for a focus upon the contract's Permits and Responsibilities clause, the operative facts underlying appellant's claim to the CO arose later and involved unrelated costs, delays, and contract provisions associated with profile revisions and borrow. The Corps asserts that no such hauling costs claim was included in the Mods. 11 and A19 REAs upon which appellant's claim to the CO was based.

While appellant concedes that its complaint allegations in question refer to trucking cost increases due to Louisiana's decision to resume enforcement of lower load limits, it alleges that the Permits and Responsibilities clause is irrelevant to its increased hauling costs claim because it was able to comply with Louisiana law by not exceeding the maximum load limit. Appellant contends that it did not incur or seek any costs from the Corps for obtaining trucking permits to haul in excess of the limit. Rather, it alleges that, but for the Corps' nondisclosure of superior knowledge and its directions to appellant to perform many changes associated with defective contract specifications and differing site conditions, appellant would not have had to haul so much additional material over such a protracted period of time—about eight months past the original contract completion date.

Appellant alleges, among other things, that the many problems it encountered during performance were long known to the Corps and were reiterated in the REAs that became the basis of its claim. It contends that:

> [T]he Government should not be entitled to rely on unit pricing developed prior to award when applicable law fully supported such pricing, where, as here, its conduct gave rise to the need for additional work at a time when applicable law no longer supports pre-award unit pricing. In that regard, the allegations of Paragraphs 95-100 merely state the obvious – the impact which the extra work had on Shaw at a time when lower load limits impacted that same work.

(App. opp'n at 7) Appellant states that its additional trucking costs resulted solely from matters complained of elsewhere in the complaint that the Corps has not sought to dismiss and that the allegations in paragraphs 95-100 do not change the nature or the amount of its claim. Appellant represents that its claim is based upon the modified total cost method and that "the inclusion of increased costs of hauling more material over a longer period of time, has already been factored into the computation of the claim value" (app. opp'n at 8).

DISCUSSION

The Board has CDA jurisdiction over disputes based upon claims that a contractor has first submitted to the CO for decision. 41 U.S.C. §§ 605(a), 606. We lack jurisdiction over claims raised for the first time in a complaint. Whether a claim before the Board is new or essentially the same as that presented to the CO depends upon whether the claims derive from common or related operative facts. The assertion of a new legal theory of recovery, when based upon the same operative facts as the original claim, does not constitute a new claim. *Dawkins General Contractors & Supply, Inc.*,

ASBCA No. 48535, 03-2 BCA ¶ 32,305 at 159,844. In determining a claim's scope, we are not limited to the claim document but can examine the totality of the circumstances. *Versar, Inc*., ASBCA No. 56857, 10-1 BCA ¶ 34,437 at 169,957.

However, 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). If a claim raised in a complaint is essentially different in nature from the claim submitted to the CO for decision, even if the additional claim does not increase the claimed amount, it is a new claim that we do not have jurisdiction to consider under the CDA. *Trepte Construction Co*., ASBCA No. 38555, 90-1 BCA ¶ 22,595.

The contested paragraph 98 of appellant's complaint summarizes what the Corps characterizes as appellant's new change of law claim. Appellant alleges that, in its offer and contract, it agreed to comply with applicable federal, state and local law, but it did not agree, and the contract did not require, that it would absorb the increased costs of compliance when state trucking law changed.

We have not been directed to, or found, anything in appellant's referenced REAs, which became the subject of its claim to the CO, or anything in that claim or in its references and attachments (to the extent that they are in the record and are legible) that mentions increased costs due to changes in Louisiana's hauling permit requirements. Although appellant alleges in paragraph 100 of its complaint that it submitted an estimate to the Corps of the impact of complying with the reinstatement of the trucking load limit, said to be 81 days for which it was not compensated, it has not established that the submission was included in its claim to the CO.

In its 3 March 2008 REA pertaining to Mod. A19, appellant stated that it was excluding costs of transportation and placement at the levee, which it planned to address in a separate proposal. If there was such a separate proposal that was incorporated into appellant's CDA claim, appellant has not identified it for us. In its 10 July 2008 revised proposal for definitization of Mod. P19, appellant stated that more excavation towards a highway would require hauling more truckloads to the levee, but it did not mention the change of law issue or allege increased unit costs over those upon which its contract proposal had been based. Appellant contends that its increased costs resulting from the changes in Louisiana hauling permit law are included in its modified total cost claim, but, again, it has not directed us to any supporting evidence.

Appellant bears the burden to establish jurisdiction, *CANVS Corp*., ASBCA No. 56347, 08-2 BCA ¶ 33,892, and it has not done so.

DECISION

We grant the government's motion to dismiss in part for lack of jurisdiction and strike the allegations contained in paragraphs 95 through 100 of appellant's complaint without prejudice.

Dated: 16 December 2010

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. 57237, Appeal of Shaw Environmental, Inc., rendered in conformance with the Board's Charter.

Dated:

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