ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Zafer Taahhut Insaat ve Ticaret A.S.	)	ASBCA No. 56770
	)	
Under Contract No. W912GB-04-C-0029	)	

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

Zafer Taahhut Insaat ve Ticaret A.S. (Zafer, appellant or contractor) on 17 March 2009 appealed on the basis of a "deemed denial" due to the alleged failure of the contracting officer (CO) to issue a final decision (contracting officer's final decision or COFD) upon its claim. The government filed a motion to dismiss (gov't mot.) for want of jurisdiction, contending that neither the contractor's 1 August 2007 nor its 12 April 2008 submission is a cognizable claim. We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

On 28 July 2004, the United States Army Corps of Engineers, Middle East District (government or respondent) awarded firm fixed-price Contract No. W912GB-04-C-0029 in the amount of $5,207,000 to Zafer. Work included the supply, construction, testing, and startup of a wastewater treatment plant (WWTP) at LSA Anaconda, Iraq. Performance was to be completed within 180 days after the contractor received the government's notice to proceed. (R4, tab 3 at 1)

The project was completed 266 days after the scheduled date (R4, tab 2 at 147). The parties modified the contract several times; cumulatively through contract Modification No. A00003 dated 27 July 2006, the total contract amount increased from $5,207,000.00 to

$5,648,210.16 (R4, tabs 4, 5-17). There were difficulties during performance, and only some issues were resolved (*see, e.g.*, R4, tabs 22-136).

By serial letter 095 dated 1 August 2007, Zafer transmitted its request for equitable adjustment (REA) to Ms. Christine Epps, Chief of Contracting/Contracting Officer (app. opp'n, ex. 2). The letter was signed by Mr. Onder Tumer, identified as Zafer's Project Coordinator. Zafer sought "a full extension of time and associated increased costs in the sum of $4,909,396.28," asked for an "expedited review and finalization" of the matter as the "majority of these issues are pending for more than One and a half years," and "kindly request[ed] a Contracting Officer's Decision on this matter." (*Id.* at 1)

In addition to the transmittal letter, Zafer's REA was comprised of a 164-page narrative (R4, tab 2), and supporting documentation in multiple volumes labeled "Appendices A through J" (R4, tab 151). The REA sought a time extension of 266 days (R4, tab 2 at 16), and increased costs of $4,909,306.28 (*id.* at 163), for 17 "events" (REA issues) (*id.* at 4). Zafer's REA included the following:

> **Contract Disputes Act of 1978**
>
> I certify that this *Request* is made in good faith, that the supporting data is accurate and complete to the best of my knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable and that I am duly authorized to certify the *Request* on behalf of the Contractor.

(*Id.* at 164) (Italics supplied) The certification was signed by "Onder Tumer" and hand-dated "Aug. 1, 2007"; typed beneath that signature was "Duly authorized by Zafer Taahhut Insaat ve Tic AS" (*id.*).

The parties engaged in negotiations regarding the REA *(see, e.g.*, R4, tabs 135-36). Zafer on 29 January 2008 agreed regarding three REA issues, but took exception to all other aspects of the government's position (compl., ex. 1). The government's 3 March 2008 Price Negotiation Memorandum evaluated Zafer's REA and memorialized the parties' 1 and 2 March 2008 negotiations (R4, tab 136 at 1-2). The government decided upon a "Final Settlement (unilateral)" of $2,351,634.86 in response to Zafer's "Original Request for Equitable Adjustment" of $4,909,396.28 (*id.* at 9).

CO Prixie Cruz sent an e-mail to the contractor on 7 April 2008 regarding Zafer's REA to advise that a CO "decision has been signed and issued to reflect a settlement amount, as attached." If the parties agreed, the government would "issue a modification reflecting the settled amount." (App. opp'n, ex. 8A)

The government's 7 April 2008 response to the REA, signed by MAJ Charlotte H. Rhee, CO, stated that a "settlement amount" of "**$2,351,634.86, subject to availability of funds**" was "fair and reasonable" (R4, tab 137 at 7) (emphasis in original). She said that the parties had reached "Bilateral agreement" for these issues: project material cost, restricted crane operations, influent/effluent installation, sub-contractor claim, EC Harris, overhead and profit markups, and credits. CO Rhee advised that "This is a unilateral decision due to contractor's non-concurrence" with respect to mutual resolution of all issues. Where only some merit was found, she specified a lesser dollar amount than that sought by Zafer as the "Government's Final Decision to this item." (*Id.* at 1-6) CO Rhee stated that if the contractor did "not agree with the Government's position, Zafer can request a Final Contracting Officer decision IAW FAR Part 33" (*id.* at 7).

Zafer's 12 April 2008 serial letter 096 responded to CO Rhee's "Contracting Officer's decision" and complained that the CO's delay in issuing a "unilateral decision [until] 250 days" after its 1 August 2007 REA "has to be compensated additionally" (R4, tab 138 at 1). Appellant disagreed with the government's proposed $2,351,634.86 settlement, but agreed to resolve REA issues as follows: (B) Project Material Cost ($620,853.50); (F) Restricted Crane Operations ($6,341.82); (G) Influent/Effluent Installation ($88,628.35); (J) Demobilization of site personnel ($102,425.00)[1]; (L) Subcontractors' claims ($194,050.00); (P) EC Harris Costs ($98,600.00); and (S) Credits (-$27,365.00) (*id.* at 1). Zafer's letter discusses these contested REA issues: (A) Extended Overhead (EOH) Costs; (C) Transportation Cost Increases; (E) Security Issues; (H) Unforeseen HV Cable; (I) Duplication of System Startup; (K) Non supply of Water and Power during Construction; (M) Warranty Attendance Cost; (N) Parity Change and Inflation Losses; and (O) Interest Cost (*id.* at 2-8). Zafer disputed CO Rhee's time extension of 185 days (*id.* at 2). The contractor generally disagreed with the CO's unilateral determinations, but did not assert an overall amount or adequately indicate that amounts sought remained the same or that it wanted the difference between the $4,909,396.28 sought in its 1 August 2007 REA and the $2,351,634.86 allowed by the CO (*id.*, *passim*). The only specific monetary demands in Zafer's 12 April 2008 letter were "direct cost[s]" of $29,509.92 for (I) Duplication of System Startup (*id.* at 5), and $324,842.00 for (M) Warranty Attendance Cost (*id.* at 7).

Zafer's 12 April 2008 letter, signed by Mr. Tumer as project coordinator, "request[ed] a Final Contracting Officer's decision on the [remaining disputed items] as per FAR Part 33" (R4, tab 138 at 8). Typed below this signature and his title is the

[1] We note that, to the contrary, CO Rhee's 7 April 2008 letter found no merit and offered no money to resolve this issue (R4, tab 137 at 4).

following undated "certification," although there is no signature or additional text beneath the recitation:

> **CERTIFICATION**
>
> I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(*Id.* at 8)

The parties entered into contract Modification No. A00004 (Mod. A00004) on 13 May 2008 in the amount of $2,351,634.86 to resolve REA issues that they bilaterally agreed upon, and for the government to make unilateral award for issues where some merit was found but quantum remained controverted (R4, tab 19). Zafer agreed to a release of claims for those items of bilateral agreement (*id.* at 2-3).

ZAFER'S APPEAL

On 17 March 2009, the Board received Zafer's notice of appeal filed on the basis of the CO's "Deemed Denial" of "remaining open issues." The contractor did not specify the date of its "claim," but stated that it had submitted an REA on 1 August 2007 in the amount of $4,909,396.28 and that the parties later "agreed to several of the discrete claim items, leaving **$2,557,761.42** in dispute, which is the amount of the Appeal" (*id.* at 1) (emphasis in original).

Zafer's 1 April 2009 complaint states that "substantive entitlement to the elements of the claim are set forth in its initial detail delay package of its REA certified of multi-volumes dated 01 August 2007" (compl. at 2). Enclosed with the complaint is a chart setting forth the amount asserted for each issue in "ZAFER'S CLAIM," the "DISPUTED" amount, and the amount paid by the government in response to appellant's REA "Acc. To CoE letter 07 April 2008 (KO decision)" (compl. ex. 4).

The government's 8 June 2009 answer generally denies Zafer's allegations, and asserts the affirmative defense of accord and satisfaction. The government filed a motion for more definite statement pursuant to Board Rule 7 Amendments of Pleadings or Record, requesting appellant to "set[] forth simple, concise and direct statements of each of its claims" as well as "the basis, and the dollar amount for each claim." Appellant's

10 July 2009 "More Definite Statement" elaborated on Zafer's 1 August 2007 REA and recapitulated key correspondence.

The government's 24 January 2011 "Amended Answer and Supplement to the Rule 4 file" notes that the "genesis of this dispute is the Appellant's letter dated 1 August 2007," Zafer's REA "in the amount of $4,909,396.28" (*id.* at 3, ¶ 8). It denies that the REA is a cognizable claim: "To the extent that the Appellant alleges that the REA constituted a claim, the allegation is denied" (*id.* at 10, ¶ 27). The government asserts that Zafer's 12 April 2008 letter is not a claim because it is not properly certified and does not assert a sum certain (*id.* at 7, ¶ 18).

THE GOVERNMENT'S MOTION TO DISMISS AND APPELLANT'S OPPOSITION

The government's 25 March 2011 "Motion to Dismiss" (gov't mot.) asks the Board to dismiss the appeal "without prejudice" for Zafer's "failure to comply with the requirements of the Contract Disputes Act of 1978," 41 U.S.C. §§ 7101-7109 (the CDA or Act), and implementing regulations (gov't mot. at 1).

The government contends that Zafer's 12 April 2008 certification is incomplete because there is "no signature block, no signature affixed," and it "was undated, and lacked advice as to the authority of the proposed certifier, which rendered the certification incompliant with the CDA, 41 U.S.C. § 7103(b)(1) and...FAR § 33.207." The government argues that the "absence of a signature on a purported CDA certification renders the certification completely ineffective." (Gov't mot. at 6)

The government asserts in the alternative that "Appellant has failed to submit a proper claim" because the letter of 12 April 2008 does not request a "sum certain" (*id*). The government observes that "with two possible exceptions, the Appellant has failed to quantify its demands in specific monetary terms, leaving the Government completely in the dark as to the value of the additional eight elements as well as the total, cumulative value of the CDA claim as a whole" (*id.* at 7).

Zafer's 16 May 2011 "Opposition to Respondent's Motion To Dismiss" argues that its "REA submitted 1 August 2007 was for a sum certain of $4,909,396.28 and was properly certified by a duly authorized representative of Zafer, Mr. Onder Tumer." Appellant alleges that the government was familiar with Mr. Tumer as project coordinator for Zafer, as Mr. Tumer had "executed the majority if not all Serial letters 001-097, including Serial letter 095 and the REA dated August 1, 2007" and Mod. A00004, which resolved in part "Zafer's REA of 1 August 2007." (App. opp'n at 1) Zafer asserts that its serial letter 095, which transmitted its REA, identified the amount requested as $4,909,396.28, and asked for a COFD (*id.* at 2, *citing* ex. 2).

Appellant asserts that its 12 April 2008 serial letter 096 "contains a detailed item by item acceptance and rejection of the Government's offer" to settle the REA, and informs the CO of remaining disputed issues. Zafer disagreed in part with the "proposed total settlement amount," but concurred "with the Government's position" on issues B, F, G, J, L, P, and S. (*Id.* at 3-4) Zafer posits that, taken together, its 12 April 2008 letter and attached documents, 1 August 2007 REA, and the CO's 7 April 2008 correspondence allow "A simple mathematical calculation [which] gives the amount still in dispute which the parties agreed to continue to disagree about" (*id.* at 5-6).

"Respondent's Response to Appellant's Opposition to Respondent's Motion to Dismiss" (gov't resp.) distinguishes between Zafer's "*1 August 2007 REA* and the *12 April 2008 submittal intended to be a claim*," arguing that these served different purposes. The government notes that Zafer's REA certification "conforms to the requirements of 41 U.S.C. § 2410(a) and DFARS 243.204-71," which mandate that a contractor certify that its "*request* is made in good faith." The government asserts that Zafer's language does not comport with FAR 33.207, which requires that a contractor state that the "*claim* is made in good faith," and this was "not applicable at that pre-claim point in time." (*Id.* at 3, emphasis in original) It argues that Zafer's "demand made on 1 August 2007 bears only superficial resemblance to the demand made 12 April 2008"; these "two claims are separate and distinct"; and the Board has "held that the certification of an earlier claim does not qualify as the certification of a later claim where the claim has undergone some sort of revision" (*id.* at 6).

The government takes exception to appellant's position that, because the 1 August 2007 REA was properly certified as an REA, there was no need for Zafer's 12 April 2008 submission to be certified pursuant to the Contract Disputes Act. It continues to criticize Zafer's 12 April 2008 letter as lacking a sum certain, and disagrees that an amount can be determined by means of a simple mathematical calculation. (*Id.* at 4)

"Appellant's Sur Reply" reiterates that its 1 August 2007 REA was a cognizable claim for $4,909,396.28, and that the parties' correspondence shows their contemporaneous understanding that Zafer sought $2,557,761 for items remaining in dispute (*id.* at 3-4). Zafer asks that it be permitted to correct, as necessary, its 1 August 2007 and 12 April 2008 certifications (*id.* at 5).

DECISION

The Board's jurisdiction is derived from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, which allows the government to be sued in its capacity as a contracting party. The Act sets forth requirements that the parties must follow in asserting and responding to claims. 41 U.S.C. § 7103(a)(1) states that "Each claim by a contractor against the Federal Government relating to a contract shall be submitted to the

contracting officer for a decision." The CDA mandates that a contractor seeking a monetary remedy exceeding $100,000 must certify that its "claim is made in good faith" and that its demand "accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable." A certification must be executed by a person "authorized to certify the claim on behalf of the contractor."

In addition to the CDA, which does not define a "claim," FAR requirements must be satisfied for a submission to qualify as a claim. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (*en banc*). FAR 2.101 defines a "claim" in relevant part 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." A monetary remedy is stated in a "sum certain" when the amount sought is identifiable as a "determinable amount." *Northrop Grumman Systems Corp., Space Systems Div.*, ASBCA No. 54774, 10-2 BCA ¶ 34,517 at 170,233.

A "CDA claim need not be submitted in any particular form or use any particular wording," provided it contains "'a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.'" *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) citing *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1997). We employ a common sense analysis in evaluating on a case by case basis whether a demand constitutes an effective claim. *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992), and first assess Zafer's document of 1 August 2007 for compliance with statutory and regulatory requirements.

The government objects to Zafer's 1 August 2007 REA as the basis for our jurisdiction, alleging that the document is a preliminary request for equitable adjustment, and does not adhere to CDA certification requirements because "request" is twice substituted for "claim" and the authority of the certifier is not stated. We find that the REA is a cognizable claim, as it adequately informs the government of the basis and precise amount of the claim and that the use of the word "request" in lieu of "claim" is inconsequential. When read in concert with its transmittal letter of the same date, the contractor asks for a COFD.

Appellant's 1 August 2007 REA sought the sum certain of $4,909,396.28 (R4, tab 2 at 163), and advised the government of longstanding issues upon which this amount is premised (*id., passim*). Serial letter 095 transmitting the REA specifically "request[ed] a Contracting Officer's Decision on this matter" (app. opp'n, ex. 2). Together, these meet the regulatory requirements that a claim be a written demand seeking, as a matter of right, the payment of money in a sum certain. *Reflectone,* 60 F.3d at 1575 *citing* the definition of "claim" in FAR 33.201 (now FAR 2.101). We reject the government's premise that

Zafer's REA is confined in function to fostering preliminary discussions. The *Reflectone* decision determined that an "REA" can serve as a competent claim (*id.* at 1577). "A dispute requirement that allows the government to unilaterally designate when a submission becomes a 'claim' disrupts the balance between the government and contractors that the CDA sought to establish." *Id.* at 1582 (citations omitted).

In view of this conclusion, we need not address the parties' contentions about Zafer's 12 April 2008 submission (R4, tab 138) except to note that it did not have the effect of superseding the valid 1 August 2007 claim for jurisdictional purposes. Rather, it identified which items in the 1 August 2007 claim were still in issue.

CONCLUSION

We deny the government's motion to dismiss the subject appeal for want of jurisdiction, finding that Zafer's 1 August 2007 REA is a cognizable claim and that the contractor properly appealed on the basis of a deemed denial by the contracting officer.

Dated: 14 September 2011

REBA PAGE
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. 56770, Appeal of Zafer Taahhut Insaat ve Ticaret A.S., rendered in conformance with the Board's Charter.

Dated:

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