ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Tiger Enterprises, Inc.	)	ASBCA No. 57447
	)	
Under Contract No. FA3030-10-P-0026	)	

APPEARANCE FOR THE APPELLANT: Ms. Lillian Mauldin
President

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
Maj John C. Degnan, USAF
Maj Heidi L. Osterhout, USAF
Trial Attorneys

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

The government has moved to dismiss this appeal for lack of jurisdiction on the grounds that Tiger Enterprises, Inc. (appellant or Tiger) has failed to submit a claim to the contracting officer (CO) for a decision in a sum certain as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. Appellant has filed in opposition to the government's motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 1 April 2010, the government awarded appellant Contract No. FA3030-10-P-0026 (Contract 0026). Under this contract Tiger was to provide washers and dryers as well as maintenance and repair services on a lease basis to Goodfellow AFB, Texas for three months. (R4, tab 1)[1]

2. The contract included FAR 52.217-8, OPTION TO EXTEND SERVICES (NOV 1999). This provision gave the government the option to extend appellant's services for a limited period. This option could be extended more than once, but the total extension could not exceed three months. (R4, tab 1 at 11-12) It appears that the government used this clause to extend appellant's performance through the months of July and August 2010, but the record does not contain a contract modification to this effect.

[1] The government has furnished a revised Rule 4 file superseding the original file. References herein to the Rule 4 file relate to the revised file.

3. Contract 0026 incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS -- COMMERCIAL ITEMS (MAR 2009). Insofar as pertinent to this motion, subsection (d) provided that the contract was subject to the CDA, and that disputes were to be resolved in accordance with FAR 52.233-1, DISPUTES which was incorporated by reference. (R4, tab 1 at 10)

4. FAR 52.233-1, DISPUTES (JUL 2002), provides in part as follows:

> (c) Claim, as used in this clause, means 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 this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

5. Contract 0026 was characterized as a "bridge contract" in reference to a prior contract for similar services between the parties that was awarded in December 2007, Contract No. FA30030-08-C-0001 (Contract 0001) (R4, tab 5). It appears that shortly after Contract 0001 was awarded, appellant executed an instrument of assignment that assigned to Chain Bridge Bank (CCB) all of appellant's rights and interests to monies due and to become due from the government under Contract 0001 (R4, tab 6 at 6). No similar signed document has been made part of the record related to Contract 0026.

6. As far as the record shows, appellant undertook performance under Contract 0026 and invoiced the government for services provided. Appellant submitted invoices for payment in or around 1 June 2010 for the months of April and May 2010. The government rejected these invoices. (*See* compl., attach., "Receiving Reports") The government was of the view that appellant did not fully perform and was not entitled to the full monthly invoice payments. It appears that appellant was asked by the government to resubmit its invoices, and appellant did so. Appellant did not file a claim with the CO related to the unpaid invoices at this time.

7. By e-mail to appellant dated 25 August 2010, SSgt Brad A. Nelson, USAF, the contract specialist on the contract, advised appellant as follows:

> We received the "new' invoices with the amounts I assume you believe to be owed. These amounts are not acceptable to us and they will not be accepted in WAWF for payment. We have provided the numbers we are willing to accept. These numbers have previously been supplied to you for input into WAWF to ensure smooth processing. For one reason or another, you have chosen to input other numbers.
>
> The Government is trying to be fair and we have supplied the reasoning behind our calculations.... If you have significant documentation you would like reviewed, please send it but the numbers you have entered will not be accepted.

(R4, tab 61)

8. By return e-mail dated 26 August 2010, appellant acknowledged receipt of the government's e-mail and stated that "[w]e will have a response to you next week" (compl., attach.). The record does not contain any written or e-mail response from appellant to the government the next week. Appellant did not file a claim with the CO related to the unpaid invoices at this time.

9. The government proposed significant reductions to appellant's monthly invoices for work allegedly not performed. For example, based upon a government spreadsheet prepared on or around 2 November 2010, the government sought to reduce appellant's full monthly price of $9,364.45 to $3,578.70 for April; $8,406.45 for May; $8,550.15 for June; $7,400.55 for July; and $8,190.90 for August (R4, tab 67).

10. After being made aware of the government's position, appellant initiated an e-mail chain with SSgt Nelson that appellant contends culminated in the filing of its claim with the CO on 3 November 2010 (SOF ¶ 17). The record reflects that the CO, Mr. Warren Hart, was a "cc" recipient on all the e-mails of 3 November 2010 except for the first e-mail initiated by appellant (SOF ¶ 11). Because of its significance to this motion, the e-mail chain of 3 November is set out in detail below.

11. By e-mail to SSgt Nelson on the morning of 3 November 2010, appellant inquired from the government as follows:

> Are these the correct and final amounts for Tiger to enter which the government will accept and process for payment.

SSgt Nelson e-mailed a reply to appellant the same morning as follows:

> Yes these are the amounts. They will not be accepted until I received [sic] the assignment mod. Please sign and get that back to me as soon as possible.

(R4, tab 68) It was the government's understanding that appellant had assigned the contract proceeds under Contract 0026 to CCB as it had under Contract 0001, and it insisted that appellant sign a contract modification (the "assignment mod") to reflect this matter.

12. Appellant promptly responded to SSgt Nelson by e-mail the same morning as follows: "Why will they [the invoices] not be accepted?" SSgt Nelson responded by e-mail that afternoon at 1:12 pm as follows:

> They will not be accepted because I have an outstanding mod that needs to be signed by your company. Once I received [sic] that mod, we will accept the mod.

(R4, tab 68)

13. Appellant then replied to SSgt Nelson by e-mail that afternoon as follows: "The contract documents are complete. Is this your final decision on payment?" SSgt Nelson then replied to appellant with the following e-mail that afternoon as follows:

> The modification for the assignment of claims has not been signed and returned. Is it your final decision you will not sign and return this? If this is the case, I will withdraw the modification to be bi-lateral and will release it as unilateral making it official anyway.
>
> By request of the bank, to ensure proper payment is being made to the correct party, this mod must be signed and returned before accepting invoices, or released unilaterally. Either way, payment will be made directly to the bank.

(R4, tab 69)

14. Appellant replied to SSgt Nelson that same afternoon with the following e-mail: "There is no assignment of claims for this contract. The correct party for payment is Tiger Enterprises, Inc." (Compl., attach.)

15. Having failed to receive a prompt reply from the government to this last e-mail, appellant e-mailed SSgt Nelson on 5 November 2010 as follows:

> Tiger Enterprises will consider your lack of response to our emails as your final decision in refusing to pay any of the invoices for this contract # FA3030-10-P-0026 [sic]. Tiger Enterprises did not execute or consent to an instrument of assignment for this contract.

(R4, tab 70)

16. SSgt Nelson responded to appellant by e-mail on 5 November, challenging appellant's position and threatening default termination if appellant did not sign the assignment modification. In a reply e-mail to SSgt Nelson on 8 November 2010, appellant challenged, *inter alia,* the government's ability to default the contract. (R4, tab 71)

17. Appellant's notice of appeal to this Board was dated 6 December 2010, requesting that "the Board deem its *November 3, 2010 claim* denied" (emphasis added).

DECISION

It is well settled that a contractor's submission of a written claim to the CO for decision in a sum certain and a contractor's timely appeal from that decision or its appeal from the CO's failure to issue such a decision are prerequisites to the Board's jurisdiction under the CDA. *See Madison Lawrence, Inc.*, ASBCA No. 56551, 09-2 BCA ¶ 34,235 at 169,206. "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. The contractor must submit a clear and unequivocal statement that gives the CO adequate notice of the basis and amount of the claim." *Id.* (citations omitted), *quoting Todd Pacific Shipyards Corp.*, ASBCA No. 55126, 06-2 BCA ¶ 33,421 at 165,687. No "magic" language is required for a claim and we consider the contractor's intentions. *See Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1578 (Fed. Cir. 1992). "A request for a CO's final decision need not be explicit, but can be implied." *Madison*, 09-2 BCA ¶ 34,235 at 169,206 (citations omitted). The contractor is required to establish the facts that support Board jurisdiction of the appeal. *Bruce E. Zoeller*, ASBCA No. 55654, 07-1 BCA ¶ 33,581 at 166,347.

The government contends that appellant has failed to show that it filed a claim to the CO for decision in a sum certain for the payment of its disputed invoices, and hence the Board is without jurisdiction over this appeal. Appellant contends otherwise. Appellant argues in its opposition papers that "I sought to have this payment issue resolved" (app. opp'n at 2); and "Tiger sought at every turn a resolution[,] either payment as stated in the contract or a final decision" (*id.*). However, appellant fails to point to any e-mail of 3 November 2010, or any other written communication of any other date that substantiates its contention that it sought, expressly or impliedly, a CO decision on the payment of its disputed invoices in a sum certain. Alternatively, appellant contends that its initial submission of its invoices for payment in or around 1 June 2010 was such a claim, but such a submission was a routine request for payment that was not in dispute when submitted and hence was not a claim at that time (SOF ¶ 6).

On the other hand, the record shows that the government disputed appellant's entitlement to recover its full monthly invoice amounts on a number of occasions. In early June 2010, the government rejected appellant's April and May invoices under this contract (SOF ¶ 6). Appellant could have a filed a written request with the CO for a decision for payment of these invoices at this time, but did not do so. By e-mail dated 25 August 2010, the government stated to appellant that the revised amounts invoiced by appellant were not acceptable (SOF ¶ 7). Appellant could have filed a written request with the CO for a decision for payment of these invoices at this time, but did not do so. By e-mail to appellant on 3 November 2010, the government presented another roadblock to payment, stating that it would not accept or process payment for any invoices until appellant signed the assignment modification (SOF ¶ 11). Appellant could have a filed a written request with the CO for a decision for payment of its invoices at this time, but did not do so.

We are mindful, as we stated above, that no magic language is required to perfect a claim under the CDA and that a contractor's intentions should be considered in making this assessment. However, the intention relevant here is not the subjective intention formed in appellant's minds-eye, but an objective intention manifested by appellant's written communications to the government. Appellant has failed to show any specific written communication or set of communications to the government which could be reasonably interpreted as seeking, expressly or impliedly, a CO decision on its disputed invoices in a sum certain. Accordingly we are without jurisdiction over this appeal.

CONCLUSION

The government's motion to dismiss for lack of jurisdiction is granted without prejudice. Appellant is free to submit a written claim to the CO for decision in a sum certain, at which time it will be entitled to a CO's decision and an appeal in accordance with law.

Dated: 5 August 2011

JACK DELMAN
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. 57447, Appeal of Tiger Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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