ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Ball Aerospace & Technologies Corp.	)	ASBCA No. 57558
	)	
Under Contract Nos. NAS5-00190	)	
NAS5-98040	)	
NAS1-99135	)	
NAS5-99089	)	
NAS5-30355	)	
DASG60-97-C-0007	)	
F33615-99-F-3700	)	
N00173-00-C-6027	)	
F29601-00-D-0010	)	
F09603-01-F-0097	)	
F33600-01-D-1017	)	
F33615-01-D-1844	)	
MDA972-01-C-0069	)	
DCA100-03-D-4000	)	
FA9453-03-C-0237	)	
F08635-03-C-143	)	
F33601-03-F-0057	)	
N00173-03-C-6018	)	

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APPEARANCE FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
DCMA Chief Trial Attorney

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

The Defense Contract Management Agency (DCMA) moves the Board to dismiss this appeal for lack of jurisdiction asserting that Ball Aerospace & Technology Corp.'s (BATC) claim failed to state a sum certain. The underlying dispute involves a final rate determination between the parties that subsequently was determined to have used erroneous (duplicate) costs in the final rate calculations resulting in erroneous indirect rates for fiscal year (FY) 2003. DCMA contends that BATC's articulation of its sum certain is defective because it includes a qualification relating to future costs, *i.e.*, "[t]his

claim is for the sum certain amount of $72,730.29 relating to fiscal year ('FY') 2003 costs that the government has failed to reimburse, *plus future costs to be incurred* using the FY 2003 indirect rates at issue and interest under the CDA" (R4, tab 30 at G-471,[1] emphasis added). Having concluded that the claim states a sum certain, we deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The National Aeronautics and Space Administration (NASA) awarded letter Contract No. NAS5-00190 on 15 August 2000 to BATC for a wide field camera 3 scientific instrument (R4, tab 1 at G-1-3). This contract is representative of the numerous contracts affected by this rate dispute.

2. The contract included FAR 52.233-1, DISPUTES (DEC 1998) that defines a claim, in part as:

> (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.

(R4, tab 1 at G-2)

3. BATC submitted its FY 2003 indirect incurred cost rate proposal on 30 June 2004 (R4, tab 3; compl. and answer ¶ 13). Among other costs claimed by BATC was $1.5 million in deferred incentive compensation (DIC) (compl. and answer ¶ 14).

4. The Defense Contract Audit Agency (DCAA) audit report of BATC's FY 2003 incurred costs was issued on 28 June 2005 (R4, tab 4). DCAA questioned $1,546,598 of the $402,011,269 indirect costs (*id.* at G-306, -312).

5. The parties entered into negotiations on BATC's 2003 indirect expense rates and on 17 April 2006 DCMA's Divisional Administrative Contracting Officer (DACO) documented the negotiated indirect rates for the year ending 31 December 2003 in a letter to BATC (R4, tab 9). The DACO asked BATC to confirm its acceptance of the rates by signing and returning the letter (*id.* at G-415). BATC's vice president for finance and accounting signed the confirmation on 18 April 2006 (*id.* at G-416). A second letter, dated 12 July 2006, setting out the "agreed upon final indirect expense rates for Ball

[1] The Rule 4 is stamped with Bates numbers beginning with G-000001, which we abbreviate, *e.g.*, as G-1. Rule 4, tab 1, G-1-105, includes excerpts from all of the various contracts affected by Ball's claim.

Systems Engineering Solutions" was confirmed by BATC's vice president for finance and accounting on 19 July 2006 (R4, tab 10).

6. On 18 February 2007, BATC sent the DACO a letter stating, in part:

> As you have been previously advised, BATC inadvertently included the Deferred Incentive Compensation (CAS 415) twice in the FY2003 rate calculation. The amounts involved were $1,528,000 for BATC and $-3,000 for BSES, netting to $1,525,000....
>
> This issue involves a year which is negotiated and final. While we regret this event, the year was closely reviewed by both sides and a final agreement was reached as to the rates that would apply for FY2003. We believe that a timely review of the corporate allocations would have uncovered the duplicate entry for FY2003 and will prevent this type of event in the future. The information provided here is for information only, per your request.

(R4, tab 11) This same language was included in a 1 October 2007 letter from BATC to the DACO (R4, tab 12).

7. In a letter to BATC dated 8 May 2008, the DACO, citing BATC's notice of duplicate costs in the rate calculations, stated that she "cannot authorize payment on invoices or final vouchers utilizing the established rates which contain costs which were not actually incurred" (R4, tab 13 at G-424). In the letter the DACO discussed four alternatives for recovering the costs associated with the error: (1) Unilaterally rescind and reissue the final rate letter; (2) Issue a Notice of Intent to Disallow Costs, FAR 42.801; (3) Disallowance of costs after incurrence, FAR 42.803; and (4) Voluntary adjustment of invoices by BATC. The DACO's "bottom line" was, "it is clear that I cannot pay for costs which were not actually incurred." (*Id.* at G-425)

8. BATC replied to the DACO's 8 May 2008 letter in a 9 June 2008 letter stating that, based on the advice of outside counsel, BATC would "resume invoicing 2003 costs using the final indirect cost rates agreed to in April, 2006" (R4, tab 14). Attached to BATC's letter was an analysis of the FY 2003 final indirect rates by BATC's outside counsel that concluded that the 2003 rates were "Final and Not Subject to Adjustment" (*id.* at G-430).

9. On 26 June 2008, the DACO issued a Notice of Intent to Disallow Costs relating to the disputed FY 2003 indirect rates (R4, tab 15). The DACO updated the

Notice on 15 August 2008 including recalculating rates that excluded the duplicate DIC costs (R4, tab 21).

10. Between July 2008 and March 2009 the parties continued to discuss this matter. BATC was allowed to continue to invoice using the disputed rates. (R4, tabs 17, 22) BATC continued to attempt to persuade the DACO that its position that the agreed upon rates could not be reduced was correct (R4, tab 24). The parties attempted alternate dispute resolution (ADR), but failed to resolve the matter (R4, tabs 25-27).

11. In a letter dated 17 March 2009, the DACO informed BATC that the recalculated (corrected) indirect rates would be used to remove costs associated with the duplication from final and interim vouchers with FY 2003 costs (R4, tab 27).

12. On 27 July 2010, BATC submitted a certified[2] claim to DACO/DCMA. The claim read in pertinent part, "[t]his claim is for the sum certain amount of $72,730.29 relating to fiscal year ('FY') 2003 costs that the government has failed to reimburse, plus future costs to be incurred using the FY 2003 indirect rates at issue and interest under the CDA (41 U.S.C. § 612)" (R4, tab 30 at G-471).

13. On 14 December 2010, the DACO issued her final decision denying BATC's 27 July 2010 certified claim (R4, tab 32). BATC filed a notice of appeal with the Board on 9 March 2011 and the appeal was docketed as ASBCA No. 57558 on 10 March 2011 (R4, tab 36).

DECISION

Contentions of the Parties

DCMA focuses on the language in the claim, "plus future costs to be incurred using the FY 2003 indirect rates at issue" and contends, "[b]y qualifying its claim to include 'future costs' of an uncertain amount, BATC rendered the claim invalid" because there was no sum certain (gov't mot. at 10). BATC contends, "The language in the claim is not an impermissible qualification of an otherwise sum certain under the decisional authority. At most, it identifies what BATC is otherwise entitled to do – increase the quantum amount on appeal where new facts are developed during litigation that impact BATC's damages (e.g., the DACO's disallowance of BATC's future costs that utilize the FY 2003 rates)."[3] (App. opp'n at 3) BATC is correct.

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[2] BATC apparently believes that the claim will exceed the $100,000 threshold that requires certification.

[3] BATC also argues that it asked the Board to interpret the contract, a claim that does not require a sum certain, however, although the final decision (R4, tab 32 at G-526)

Discussion

FAR 2.101 provides in pertinent part that "[c]laim 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." Here BATC's claim seeks "the sum certain amount of $72,730.29 relating to fiscal year ('FY') 2003 costs that the government has failed to reimburse, plus future costs to be incurred using the FY 2003 indirect rates at issue...." Since BATC presumably has already incurred any costs relating to FY 2003, we infer that "future costs" refers to FY 2003 costs which might be disallowed in the future (as of the date of the preparation of appellant's claim).

DCMA states, "[t]his Board has held that in order for a claim to be valid, the sum certain being demanded cannot be subject to *any* qualifications" (gov't mot. at 9) (emphasis added). This is an overstatement of the Board's precedent. Certainly there are qualifications that defeat a sum certain such as: "approximately" (*J. P. Donovan Construction, Inc.*, ASBCA No. 55335, 10-2 BCA ¶ 34,509 at 170,171, *appeal docketed*, No. 11-1162 (Fed. Cir. Jan 13, 2011); *Van Elk, Ltd.*, ASBCA No. 45311, 93-3 BCA ¶ 25,995 at 129,237); "at least" (*Precision Standard, Inc.*, ASBCA No. 55865, 11-1 BCA ¶ 34,669 at 170,788); "no less than" (*Sandoval Plumbing Repair, Inc.*, ASBCA No. 54640, 05-2 BCA ¶ 33,072 at 163,933); "well over" (*Eaton Contract Services, Inc.*, ASBCA No. 52888 *et al.*, 02-2 BCA ¶ 32,023 at 158,269); and "in excess of" (*id.* at 158,267). However, it is not "an improper qualification of the claim for appellant to notify the Government therein of a potential upward adjustment of the claimed amount." *Computer Sciences Corp.*, ASBCA No. 27275, 83-1 BCA ¶ 16,452 at 81,843.

In *Madison Lawrence, Inc.*, ASBCA No. 56551, 09-2 BCA ¶ 34,235, the contract involved food services at a Navy facility. Madison submitted an REA[4] in the amount of $196,982.62 and added, "Estimated Added costs to complete – To be Negotiated." *Id.* at 169,204. Madison explained this entry as follows:

> 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.

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and BATC's complaint refer to contract interpretation, no request for contract interpretation is evident in the claim (R4, tab 30 at G-471-77).

[4] The contracting officer treated the REA as if it were a claim and issued a final decision even though it was not certified. Madison subsequently converted the REA to a certified claim. The certified claim was appealed. *Madison*, 09-2 BCA ¶ 34,235 at 169,205.

> However, Madison will continue to incur these costs for the remaining option years due to the ongoing government actions and inactions.[5]

Id. In back-up data Madison estimated that the additional costs would be $18,088.24 per month. *Id.* at 169,205. The Board found, "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." *Id.* The Board concluded:

> 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 exceed 150,000. That the amount of a claim might change as additional information is developed does not invalidate it as a qualifying CDA claim.

Id. at 169,207. The government's motion to dismiss for lack of jurisdiction was denied.

South Carolina Public Service Authority, ASBCA No. 53701, 04-2 BCA ¶ 32,651, involved a claim by the Authority that its Cooper River rediversion project contract required the government to reimburse it for the cost of defending against a law suit by land owners along the river and any damages adjudged against it. In its claim the Authority reserved the right "to claim additional amounts arising from the *Sauders* litigation (whether incurred as fees and expenses to defend itself, damages and costs, or otherwise) in the future." *Id.* at 161,598. The government argued that the claim for future costs did not state a sum certain. The Board held, "Since the claim for past costs has been properly presented, appellant may revise it or present proof of a greater amount if based on information not reasonably available when the claim was submitted." *Id.* at 161,600.

BATC's claim reads, "[t]his claim is for the sum certain amount of $72,730.29 relating to fiscal year ('FY') 2003 costs that the government has failed to reimburse, plus future costs to be incurred using the FY 2003 indirect rates at issue and interest under the CDA" (SOF ¶ 12). The $72,730.29 is a sum certain. The language of BATC's qualification as we construe it, on its face unambiguously refers to costs which might be disallowed in the future. Just as in *Madison* and *South Carolina Public Service*

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[5] In its complaint, Madison qualified the sum certain with "at least," however since "at least" was not in the claim the sum certain requirement was satisfied. *Madison*, 09-2 BCA ¶ 34,235 at 169,207.

Authority, BATC's reservation of a right to adjust the $72,730.29 sum certain is based on future events not known at the time BATC's claim was submitted to the DACO. Therefore, BATC's qualification does not render the sum certain of $72,730.29 invalid.

Conclusion

DCMA's motion to dismiss for lack of jurisdiction is denied.

Dated: 20 July 2011

CRAIG S. CLARKE
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. 57558, Appeal of Ball Aerospace & Technologies Corp., rendered in conformance with the Board's Charter.

Dated:

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