ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Precision Standard, Inc.	)	ASBCA No. 55865
	)	
Under Contract No. SPO470-00-C-5470	)	

APPEARANCE FOR THE APPELLANT

Joseph A. Camardo, Jr., Esq.
Camardo Law Firm, P.C.
Auburn, NY

APPEARANCES FOR THE GOVERNMENT

Daniel K. Poling, Esq.
DLA Chief Trial Attorney
Edward R. Murray, Esq.
Trial Attorney
DLA Aviation
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE PAGE

Precision Standard, Inc. (PSI, the contractor or appellant) appeals a "deemed denial" of its 15 December 2005 "Claim for Equitable Adjustment" (CEA), alleging that the government wrongly refused to purchase C-5 Galaxy aircraft cowl doors following its erroneous rejection of PSI's first article (FA). PSI alleges that the government acted in bad faith by failing to give at least conditional approval to the FA, improperly finding that PSI was not an acceptable commercial source for the cowl doors, and then manufacturing the doors internally. The Board raised *sua sponte* the jurisdictional issue of whether the "claim" underlying the appeal was properly stated in a sum certain. The parties submitted briefs, and supplemented the appeal record to provide both correct and missing documents. We dismiss the appeal for want of jurisdiction; PSI's 15 December 2005 CEA was not submitted in a sum certain and is not a cognizable claim.

STATEMENT OF FACTS FOR THE PURPOSE OF DETERMINING JURISDICTION

The Defense Supply Center Richmond (DSCR)[1] on 24 October 1998 issued Solicitation No. SPO470-99-R-0043 (R4, tab 3 at 1[2]) that culminated in the instant contract for C-5 cowl doors (R4, tab 1). Both solicitation and contract categorized the cowl doors as a "CRITICAL APPLICATION ITEM" (R4, tab 1 at 4).

On 27 March 2000, the DSCR awarded Contract No. SPO470-00-C-5470 in the amount of $240,350 to PSI for the manufacture and delivery to Warner Robins Air Force Base, GA (Warner Robins AFB) of seven ACFT LT/HD Cowl Doors, Structural Panel for the C-5 Galaxy aircraft (R4, tab 1 at 3). The contract called for the government to order the cowl doors after PSI passed a First Article Test (FAT). The FA was to be tested for compliance with contract specifications by the Warner Robins AFB Engineering Support Activity (WR-ESA). (*Id*. at 3)

Requirements stated in the solicitation were incorporated into the contract between the government and PSI; some were incorporated by reference (R4, tab 1 at 7, tab 3 at 18). Among contract provisions are standard Federal Acquisition Regulation (FAR) clauses § I199, 52.233-1, DISPUTES (OCT 1995) and § I211A, 52.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT DFARS (MAR 1998) (R4, tab 3 at 15) as well as § I244, 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996) and § I246, 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) (*id*. at 17). The solicitation and contract stated in § L53, 52.216-1, TYPE OF CONTRACT (APR 1984) that the government contemplated award of a firm fixed-price contract (*id*. at 25).

Of particular relevance to this appeal is § I30 52.209-4, FIRST ARTICLE APPROVAL – GOVERNMENT TESTING (SEP 1989) ALTERNATE I (JAN 1997), which required the contractor to deliver a FA to the government within 180 calendar days for testing. If the FA was disapproved by the government, the contractor was responsible for submitting an additional FA at its expense. If the contractor failed to timely provide the FA, or if the contracting officer (CO) disapproved the article, then the contractor would be deemed to

---

[1] The DSCR, located in Richmond, VA, is part of the Defense Logistics Agency (DLA) (*see, e.g.*, R4, tab 13 at 2).

[2] Page references are to the printed, numbered solicitation pages, and do not include two cover sheets. Actual document page numbers are cited throughout Rule 4 file references except where the parties have Bates-stamped the pages of a particular document. The government submitted a revised Rule 4 file. All references herein are made to the revised Rule 4 file.

have failed to make delivery within the meaning of the Default clause of the contract. (R4, tab 3 at 11)

Contract Section B "ITEM DESCRIPTION" called for, among other requirements:

> PANEL STRUCTURAL, ACFT LT/HD COWL
> DOOR I/A/W LOCKHEED MARTIN CORP DWG 4P21017
> REV 'G' 14 NOV 88, P/N –701 C

(R4, tab 1 at 3) The referenced Lockheed Martin Drawing 4P21017 specified particulars for the C-5 cowl doors (R4, tab 2).

Contract Section E imposed a "higher-level" contract requirement in accordance with ESA 52.246-11, HIGHER-LEVEL CONTRACT QUALITY REQUIREMENT (FEB 1999); *see also* DSCR NOTE to 52.246-11 (R4, tab 1 at 7).

On 7 May 2003, PSI shipped its FA to Headquarters Warner Robins Air Logistics Center (WR-ALC) (R4, tab 15). The government's FA inspection found that the C-5 cowl door had imperfections rendering the item unsatisfactory (R4, tab 16). According to "Laboratory Test Request/Results" dated 30 May 2003, a "disbond/delamination [was] noted and marked on [the] part" and an "engineering evaluation [was] required" (*id*. at 3). The "First Article Test Plan" called for an ultrasonic inspection to check for both "honeycomb" and "disbonds" (*id*. at 4).

The DSCR notified PSI by letter dated 22 July 2003 that the contractor's FA had been tested but was disapproved due to the presence of disbonds and delaminations noted during the ultrasonic inspection, and the contractor's incorrect installation of a -153 pan instead of a -707A pan as called for by the specification. The contractor was instructed to "provide return authorization instructions" for "return of this failed FA," and advised that PSI was "authorized to re-submit" a new FA "within 30 days after [this] rejection notification." (R4, tab 17)

PSI wrote the DSCR CO on 29 July 2003 that it was "pleased that the part passed fit check and passed conformance to the drawings and specifications except solely for the rejection on the noted pan and untrasonic (sic) inspection matters." PSI advised that its "copy of the TDP was unclear as to the pan designation," but accepted that a "-707A pan...is required." The contractor requested return of its rejected FA, and agreed to contact the CO "further concerning the suggested resubmission and its timing." (R4, tab 18) PSI on 22 August 2003 requested from the DSCR CO "a copy of the particular specification that was followed in the ultrasonic inspection by the government inspectors," and "copies of all reports, data, graphs and print outs developed during the government's ultrasonic inspection of the submitted part evidencing disbonds and delaminations." (R4, tab 19)

The parties exchanged considerable correspondence regarding the government's rejection of PSI's FA. The contractor agreed to provide the pan sought by the government, but argued that the alleged disbonds and delaminations were minor defects and did not warrant the government's rejection of the FA. The government agreed to extend the delivery date to allow PSI additional time to submit an acceptable FA. (R4, tabs 20, 22, 27)

Although PSI was allowed to submit units for FA testing more than once, none successfully passed government testing (*see, e.g.*, R4, tabs 17, 28). Despite the contractor's repeated requests that the DSCR CO conditionally approve the article because any defects allegedly were minor or could readily be corrected (*see, e.g.*, R4, tabs 20-21, 26), the government declined to do so and did not order cowl doors from PSI (R4, tabs 24, 28, 36, 52-53).

The government on 27 October 2003 advised PSI that it had not prepared a report regarding the FA's flaws; "rather[,] the dis-bonds were marked on the actual first article." The government advised that the "two options available" for the contractor were to "perform[] a dis-bond check/test and return[] the test report to the government for evaluation/disposition," or to "return[] the article to the government so that a dis-bond check/test may be performed and recorded." The memorandum disagreed with giving PSI's FA conditional approval "until the dis-bond check/test is accomplished" by either the government or the contractor, and advised that the government no longer had "physical evidence" to support such a determination. (R4, tab 23; *see also* R4, tab 24)

When PSI did not timely reply to the 27 October 2003 letter, DSCR on 18 November 2003 again advised the contractor that "this contract is delinquent" and a "reply is requested within 4 days of the date of this letter." PSI was cautioned that "Failure to deliver on time or to obtain a delivery extension with appropriate consideration could result in cancellation or termination for default." The government also warned that an untimely delivery could affect the contractor's ratings, which "could affect future award decisions to your firm." (R4, tab 25)

PSI replied on 2 December 2003 to DSCR's 27 October letter (R4, tab 26). The contractor explained that it was "exploring the suggested alternative" of internally "performing a dis-bond check/test report." The contractor stated that the "problem is that our trained and certified ultrasonic inspection expert must have 'a copy of the particular specification that was followed in the ultrasonic inspection by the government inspectors'" as PSI previously had requested. PSI emphasized its need for the controlling contract specification to assess whether unacceptable dis-bonding had occurred, and opined that the "TDP is defectively silent on this point." The contractor again urged the DSCR CO to conditionally approve its FA "<u>if any such disbonding could be easily corrected by this vendor in production</u>." (*Id*. at 1) (Emphasis in original)

The DSCR CO on 19 March 2004 again "**Rejected**" the FA, "**declined**" to grant conditional approval, and advised the contractor once more of its options of either retesting the item internally or returning it to the government to do so. The CO stated that if PSI "determined that the above suggested resolutions are not acceptable to your company the Government is willing at this time to offer a **No Cost termination**," and instructed the contractor to reply within 5 days. (R4, tab 28) (Emphasis in original)

PSI'S 31 March 2004 inspection report (R4, tab 29) said that an ultrasound inspection had been performed on the "Part [which] had prior inspection marks on both inner and outer skins" (*id*. at 1). The report concluded that the "Inspection did not reveal any disbonds or delaminations that exceeded the allowable limits in accordance with Process Specification: STP-60-301." The report advised that the FA was "Destructively tested...to insure that marked locations on panel did not exceed allowable limits of the manufacturing specification." (*Id*.)

The parties continued to discuss and correspond regarding the government's rejection of PSI's FA, disagreement with the contractor's position that the flaws were minor, and refusal to grant the article conditional approval (*see, e.g.*, R4, tabs 30-38).

The CO's letter of 2 July 2004 told PSI "that as a matter of flight safety the contractor must re-submit a conforming First Article." The CO again offered the option of a no cost termination of the contract, and told PSI that "all costs related" to testing another FA "shall be borne by the contractor." PSI was requested to respond by 12 July 2004 regarding its intentions. (R4, tab 39)

PSI's response of 12 July 2004 to the DSCR CO (R4, tab 41) was "characterized as a Request for Equitable Adjustment on matters of principle, the monetary aspects being deferred" (*id*. at 1). The contractor took exception to the government's evaluation of PSI's FA and the "seemingly arbitrary dismissal of our testing effort." PSI again asked for more information about the government's FA testing and for "the identification of any commercial testing companies that have the same ultrasound testing equipment, to enable comparison of results." (*Id*. at 2)

Internal DLA emails of 10 November -16 December 2004 record the government's growing need for C-5 cowl doors and the frustration of DLA and DSCR in procuring these items (R4, tab 84). A DSCR employee observed that "Obviously WR wanted out of the business of making or refurb[ishing] these cowl panels which is why they" turned to commercial sources, lamented the failure of contractors to pass FAT, and questioned whether "to some extent it may come down to WR MAN capability in the short term" (*id*. at 7). The government's shortage of cowl doors was said to be reaching a critical point, and DSCR and the Warner Robins AFB organic manufacturing organization

(WR-MAN) explored the possibility of manufacturing the doors using internal ("organic") government resources (*id*. at 1-2, 5).

After rejecting each of PSI's FAs furnished for testing, DSCR determined there was an "urgent and compelling need" for the C-5 cowl doors and that these were not readily available commercially (R4, tab 141). Instead of purchasing the cowl doors from PSI, DSCR had WR-MAN make the units (R4, tabs 141-42). The cowl doors made by WR-MAN were also subjected to FA testing. An evaluation by the WR-ALC stated that a "problem occurred when the panel was heating in the oven" which was described as the "Z-channel bubbl[ing] up in a few areas along the aft closeout, because of expanding material" (R4, tab 133). WR-ALC conditionally approved the FA cowl door made by WR-MAN (R4, tab 81). WR-ALC allowed WR-MAN to stock this article for future use (R4, tab 134), provided the DCMA Quality Assurance Representative confirmed that the cause of the imperfection had been corrected. This latter precaution was required "to ensure that the discrepancy does not exist in production items" (R4, tab 133).

On 15 December 2005, PSI submitted its CEA to the CO (R4, tab 51). The CEA alleged that the contractor had to contend with "massive Government-caused delays, and unconscionable, negligent and bad faith behavior on the part of the Government personnel" (*id*. at 3). PSI asserted that the "intentional, improper, illegal and unconscionable behavior on the part of Warner Robins, with the negligent and/or collusive cooperation of DSCR has been employed as a device to ostensibly provide a basis for DSCR to convert (illegally) the procurement of the part into an 'organic manufacturing' project for Warner Robins, thereby excluding the private sector, including PSI" (*id*. at 24).

In addition to requesting a final decision of the contracting officer (COFD), PSI's 15 December 2005 CEA seeks "the following relief":

1. Compensation *at least* in the amount of $151,749.06;
2. The immediate issuance of a conditional/full approval of PSI's submitted First Article;
3. The immediate issuance of a release allowing PSI to begin production;
4. The immediate removal of Warner Robins as the testing authority for all acceptance testing for either First Article or production units for at least all C-5 parts;
5. The immediate designation of PSI as a qualified source for this item;
6. The immediate approval to allow PSI to submit bids/proposals for all solicitations for this item;
7. A determination that Warner Robins has improperly barred any approval of PSI's First Articles.

(*Id*. at 26) (Emphasis added)

In Attachment A "Overview of Pricing" of PSI's 15 December 2005 CEA, the contractor provided a "Summary of Pricing of Equitable Adjustment" (*id*. at 155). This table reads as follows:

Precision Standard, Inc.
Contract No. SPO470-00-C-5470
Summary of Pricing of Equitable Adjustment

Area of Pricing	Rate	Dollars	Suppor Ref
Price for the Wrongfully rejected First Article at the contractual stipulated price		$49,600.00	Tab 2
Additional Material and Testing costs		$10,344.90	Tab 3
Added labor costs associated with added testing of the First Article		$5,300.00	Tab 3
Labor costs for Building the Second FA		$37,500.00	Tab 3
Additional Administrative/Engineering Time and Effort due to Wrongful rejection to PSI's First Article		*To Be Determined*	Tab 4
Eichleay Calculation		$28,567.76	Tab 6
Subtotal		$131,312.66	
Profit	15.00%	$12,256.90	Tab 7
Proposal Fees		$8,179.00	Tab 8
Subtotal of Equitable Adjustment		$151,749.06	

(Emphasis added)

Also part of Attachment A is a narrative providing additional information about the "Additional Administrative/Engineering Effort" mentioned in PSI's "Summary of Pricing of Equitable Adjustment." PSI states that "All of the added time and effort by PSI is recoverable as a direct charge to the equitable adjustment." The contractor did not associate a dollar amount with this category, as "Currently PSI is in the process of compiling this information and PSI's Claim will be amended." (*Id*. at 164)

Although PSI's Notice of Appeal, received by the Board on 9 May 2007, refers to PSI's Claim for Equitable Adjustment dated 15 December 2005, the CEA initially furnished to the Board as part of the Rule 4 file was dated 20 December 2005. The Board on 19 August 2010 notified the parties of the discrepancy, called for an explanation, and ordered that the Rule 4 file be revised as necessary. According to the cover letter of the contractor's 20 December 2005 CEA, the contractor submitted the second document to furnish the CO with an originally-signed 15 December 2005 certification from PSI's president, because the 15 December 2005 CEA contained only a copy of the certification. The Board accepts the contractor's 15 December 2005 CEA as the basis for the instant appeal; this document is now found in the revised Rule 4 file at tab 51.

On 9 May 2007, the Board received PSI's 8 May 2007 Notice of Appeal. The contractor predicates its appeal upon the deemed denial of its 15 December 2005 CEA, as the CO did not issue a final decision in response to the CEA. According to appellant's First Amended Complaint dated 8 April 2008, the government improperly rejected PSI's FA; improperly assigned FA testing authority to Warner Robins, a competitor for contracts for the same parts; created a prejudicial conflict of interest; breached its duty to cooperate with PSI; and reneged on its representation that it would approve PSI's FA if certain conditions were met. (Amended compl. at 27-28)

Paragraph No. 69 of appellant's First Amended Complaint alleged the following "fact":

> On or about August 3, 2007, PSI submitted a revised certified Claim for Equitable Adjustment [amended CEA] reflecting an update of the costing and demanding compensation in the amount of $467,063.40.

The amended CEA is not the subject of an appeal to the Board, and it is not the basis for the captioned appeal.

According to the subject line of the transmittal letter accompanying the amended CEA, the purpose of the contractor's 3 August 2007 submission was to "Amend Claim (Quantum Only)" for the "Quantum portion" of the 15 December 2005 CEA underlying the subject appeal (R4, tab 157 at 2). The letter advised that "[t]his update does not affect the appeal since there is no change to PSI's entitlement basis and this package is merely an update to reflect the damages PSI has incurred due to the government actions and inactions" (*id*. at 2). An enclosure to the amended CEA labeled "Updated Claim Pricing" (*id*. at 3) furnished the government with PSI's Updated Quantum portion of its claim (*id*. at 5).

By order dated 13 July 2010, the Board raised *sua sponte* the question of whether the contractor had properly stated its CEA in a sum certain as required. The order

required the parties to brief whether PSI's 15 December 2005 CEA is stated in a sum certain. (*See also* Bd.'s 19 August 2010 order).

DECISION

PSI alleges that the government: wrongly rejected the contractor's FA C-5 Galaxy cowl doors due to minor defects that readily could have been corrected; used that rejection to determine there was no reliable commercial source for the doors; then inappropriately acted as a competitor by manufacturing the doors in-house. We do not consider the merits of the underlying dispute, only the jurisdictional issue of whether PSI's CEA of 15 December 2005 is a cognizable claim stated in a sum certain.

Where the gravamen of a claim is money, it must be stated in a sum certain before the Board asserts jurisdiction:

> The CDA [Contract Disputes Act of 1978] grants a limited waiver of sovereign immunity by allowing the federal government to be sued in its capacity as a contracting party, 41 U.S.C. §§ 601-13. A contractor's submission of a cognizable claim to the contracting officer is a prerequisite to the Board's jurisdiction over a subsequent appeal, as the Act and its implementing regulations require that a monetary claim be submitted in a sum certain. 41 U.S.C. § 605(a); FAR 33.201; *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1581-82 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992). A "sum certain" is a "determinable" amount, *Opto Mechanik, Inc.*, ASBCA No. 28190, 84-1 BCA ¶ 17,039 at 84,837 citing *Harnischfeger Corp.*, ASBCA No. 23918, 80-2 BCA ¶ 14,541 at 71,679.

Northrop Grumman Systems Corp., ASBCA No. 54774, 10-2 BCA ¶ 34,517 at 170,233.

The CDA's rationale for requiring a monetary claim to set forth a sum certain, as opposed to permitting a contractor to demand an open-ended amount, is to facilitate negotiations and the final and fair resolution of that claim by the CO; it is not a mere formality, and satisfies a legitimate statutory purpose. Efforts to resolve a dispute are deprived of finality where the claimed amount is missing, imprecisely defined, or indeterminate, as the "final decision by a contracting officer could not preclude a contractor from filing suit seeking the difference between the amount awarded and a greater amount that the contractor has not specifically stated." *Metric Construction Co. v. United States*, 14 Cl. Ct. 177, 179 (1988). If no sum certain is specified in the claim, then:

> [T]he CO cannot settle the claim by awarding a specific amount of money "because such a settlement would not preclude the contractor from filing suit seeking the difference between the amount awarded and some larger amount never specifically articulated to the contracting officer."

CPS Mechanical Contractors, Inc. v. United States, 59 Fed. Cl. 760, 765 (2004) *citing Executive Court Reporters, Inc. v. United States*, 29 Fed. Cl. 769, 775 (1993).

The Board examines the "totality of the circumstances" to ascertain whether the contractor has asserted a cognizable claim. *J.M.T. Machine Co.*, ASBCA No. 29739, 86-1 BCA ¶ 18,684 at 93,944. We evaluate each submission on a case-by-case basis, and employ a common sense analysis in assessing whether the contractor's submission is a valid claim. *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992); *Todd Pacific Shipyards Corp.*, ASBCA No. 55126, 06-2 BCA ¶ 33,421 at 165,687. In this regard, appellant also urges the Board to consider that, in addition to the remedy of "at least $151,749.06," the "claim included a detailed cost and pricing section that unequivocally states a sum certain of $151,749.06." PSI also relies upon other documents in the Board's correspondence file to buttress its position that its 15 December 2005 CEA is stated in a sum certain. We examine below the proof asserted by PSI to prove that it has a valid claim.

1. PSI's 15 December 2005 Claim for Equitable Adjustment Seeking "at least $151,749.06"

We focus first upon PSI's 15 December 2005 CEA which is the basis for this appeal. PSI seeks, among other demands, "Compensation *at least* in the amount of $151,749.06" (R4, tab 51 at 26) (emphasis added). According to PSI's 31 July 2010 response to the Board's inquiry into jurisdiction, it was not the contractor's intention to impose "any qualification on a sum certain. Rather, it was PSI's intention to state that PSI should be compensated in the amount of $151,749.06, in addition to other forms of relief":

> The claim submitted was extremely detailed, and at page 24, PSI requested 7 areas of relief (R4, tab 51). Item 1 requested monetary relief, and items 2 through 7 were claims for "the adjustment or interpretation of contract terms or other relief arising under or relating to the contract."[] It was not the intention at item 1 to say "Compensation at least in the amount of "$151,749.06," as any qualification on a sum certain. Rather, it was PSI's intention to state that PSI should be compensated in the amount of $151,749.06, in addition to the other various items of relief requested. In other words, "at

> least" has to be read in conjunction with the 6 other requests for relief, and not that PSI was attempting to go beyond the $151,749.06.

(App. resp. to the Bd.'s 13 July 2010 order at 1, 2)

A claim is set forth in a sum certain where "the contractor submit[ted] in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer 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). That boundary is absent and the claim for monetary relief was not stated in a sum certain where the contractor's use of qualifying language leaves the door open for the request of more money on the same basis.

A central flaw of the amount asserted in PSI's 15 December 2005 CEA is that the contractor precedes the dollar figure with the qualifying words "at least," thereby depriving that sum of the certainty required and raising the question of just exactly how much the contractor is demanding. There are numerous decisions holding that where a party describes its monetary demand with indefinite terms, it has not stated a sum certain and this is fatal to CDA jurisdiction. There is no jurisdiction where the contractor failed to seek a sum certain by demanding "approximately" a particular amount. *See, e.g.*, *Northrop Grumman*, 10-2 BCA ¶ 34,517 at 170,232-34 (the Board was without jurisdiction where the contractor sought "approximately $5.5 million"); and *Van Elk, Ltd.*, ASBCA No. 45311, 93-3 BCA ¶ 25,995 (the Board lacked jurisdiction where the contractor qualified the amount for a particular cost category as "approximate"). Similarly, use of the phrase "in excess of" before a monetary amount has rendered purported claims without limits and resulted in dismissal of subsequent appeals. *See, e.g.*, *Eaton Contract Services, Inc.*, ASBCA No. 52888 *et al.*, 02-2 BCA ¶ 32,023 at 158,266-67; *Godwin Equipment, Inc.*, ASBCA No. 53462, 02-1 BCA ¶ 31,674; *Corbett Technology Co.*, ASBCA No. 47742, 95-1 BCA ¶ 27,587 at 137,470-71; and *Rohr, Inc.*, ASBCA No. 44773, 93-2 BCA ¶ 25,787. We regard PSI's use of the phrase "at least" as depriving a named amount of certainty in the same manner as these modifiers that have been the subject of earlier rulings.

PSI further urges the Board to consider, in addition to its qualified request for "Compensation *at least* in the amount of $151,749.06," the CEA's "detailed cost and pricing section that unequivocally states a sum certain of $151,749.06" (app. resp. to the Bd.'s 13 July 2010 order at 2 citing R4, tab 51 at 155). We disagree. A submission requiring the Board to make an "either/or" choice between unclear or inconsistent assertions is not stated in a sum certain. This is particularly true where the total amount sought by PSI cannot be readily calculated by other information in the CEA, as the CEA's "Summary of Pricing of Equitable Adjustment" leaves open the dollar amount for the "Additional Administrative/Engineering Time and Effort," which is stated "To Be

Determined" (R4, tab 51 at 155). Further, the $151,749.06 stated on the table is described by the contractor as only the "Subtotal of Equitable Adjustment" and not the "total." Even though the sums listed on the table total $151,749.06, it is clear that PSI demands recovery for "Additional Administrative/Engineering Time and Effort" and we are not informed how much PSI seeks for this category. "No matter what certainty might be present in the calculation" of the subtotal of PSI's CEA (*Sandoval Plumbing Repair, Inc.*, ASBCA No. 54640, 05-2 BCA ¶ 33,072 at 163,933), the contractor did not provide an amount for an asserted "Area of Pricing" and thus does not meet the requirement for a sum certain.

2. Other Documents Relied upon by Appellant

PSI relies upon other documents in the appeal and correspondence file to buttress its position that the parties understood that the contractor's 15 December 2005 CEA is stated in the sum certain amount of $151,749.06. These include the contractor's Notice of Appeal, Notice of Appearance by its counsel and its Complaint, and the government's DCAA Audit Report. (App. resp. to the Bd.'s 13 July 2010 order at 2)

We are not persuaded that these documents remedy the deficiencies of PSI's 15 December 2005 CEA, as we look to the submission that purports to be a claim to determine jurisdiction. Our jurisdiction is predicated upon the sufficiency of the "claim" as submitted to the CO prior to appeal, and not by extrinsic correspondence or other documents. A contractor "cannot later furnish a sum certain to 'rehabilitate' an invalid" submission. *Northrop Grumman*, 10-2 BCA ¶ 34,517 at 170,233 *citing Eaton Contract Services*, 02-2 BCA ¶ 32,023 at 158,266. Either a claim is properly made, or it is not. We will not look to other documents emanating from appellant subsequent to appeal such as the pleadings, notices of appeal or entry of counsel, much less to comments by government auditors, to perfect the contractor's improperly or inadequately expressed true intent.

As the Board has held:

> Jurisdiction is a matter over which the Board lacks discretion, as "jurisdiction is an absolute concept; it either exists or it does not." *McDonnell Aircraft Co.*, ASBCA No. 37346, 96-1 BCA ¶ 28,164 at 140,573 citing *Universal Canvas, Inc. v. Stone,* 975 F.2d 847, 850 (Fed. Cir. 1992); *see also UNR Indus., Inc. v. United States,* 962 F.2d 1013, 1022 (Fed. Cir. 1992), *aff'd sub nom. Keene Corp. v. United States*, 508 U.S. 200 (1993). The burden of proving jurisdiction is on appellant as the party seeking the exercise of jurisdiction in its favor. *McNutt v. General Motors Acceptance Corp. of Indiana, Inc.*, 298 U.S. 178, 189 (1936); *United States v.*

Newport News Shipbuilding and Dry Dock Co., 933 F.2d 996, 999 (Fed. Cir. 1991); *Landmark Constr. Corp.*, ASBCA No. 53139, 01-1 BCA ¶ 31,372 at 154,908.

Eaton, 02-2 ¶ 32,023 at 158,266.

CONCLUSION

Having considered all of appellant's arguments, we find that PSI's 15 December 2005 CEA is not stated in a sum certain as required. The contractor's demands in that CEA for "at least $151,749.06" and incomplete listing of the dollar amount for each category of recovery sought do not describe a determinable amount.

The Board lacks jurisdiction over this appeal, which is based upon PSI's 15 December 2005 CEA as that document is not a cognizable claim. ASBCA No. 55865 is dismissed for want of jurisdiction.

Dated: 20 January 2011

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
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. 55865, Appeal of Precision Standard, Inc., rendered in conformance with the Board's Charter.

Dated:

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