ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Ironhorse Ltd.	)	ASBCA No. 56866
	)	
Under Contract No. N62467-00-D-8276	)	

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OPINION BY ADMINISTRATIVE JUDGE TING
ON MOTION TO DISMISS FOR LACK OF JURISDICTION

The Naval Facilities Engineering Command, Southern Division (NAVFAC or the government) awarded Ironhorse Ltd. (Ironhorse) an indefinite quantity contract for railroad repairs at the Naval Weapons Station in Charleston, South Carolina. The government moves to dismiss this appeal, relating to Ironhorse's Requests for Equitable Adjustments (REAs) submitted to the contracting officer (CO) in 2002, on two separate grounds: First, based on the Board's determination in connection with Ironhorse's Rule 1(e) petition that the claim was submitted on 31 January 2008[1], it is time barred by the 6-year statute of limitations. *Ironhorse Ltd.*, ASBCA No. 56455-920, 09-1 BCA ¶ 34,096; 41 U.S.C. § 7103(a)(4)(A). Second, the government contends that some of the REAs were based on a common or related set of operative facts and should have been combined when submitted, and if so combined should have been certified in accordance with 41 U.S.C. § 7103(b), and since Ironhorse did not properly sign or execute the necessary certifications, we have no jurisdiction.[2]

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[1] Ironhorse appeared *pro se* in connection with the Rule 1(e) petition and the filing of this appeal. On 22 November 2010, Ironhorse's counsel noticed his appearance on behalf of Ironhorse.

[2] We refer to the motion papers filed as indicated in the parenthesis following each motion: (1) The government's 20 January 2011 "Motion to Dismiss for Lack of Jurisdiction" (Motion Papers No. 1); (2) Ironhorse's 25 February 2011 "Appellant Ironhorse's Opposition to Appellee Government's Motion to Dismiss for Lack of

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 27 May 2000, the government awarded Contract No. N62467-00-D-8276 (Contract 8276) to Ironhorse. The contract was of the indefinite quantity type for railroad repairs at the Naval Weapons Station in Charleston, South Carolina. (R4, tab 1[3]) The contract included 129 contract line items (CLINs) of supplies and services that could be ordered separately. Each CLIN specified a unit price for the supplies/services designated. For example, CLIN No. 0011 was for "NEW GROUND STRAPS" to be provided in accordance with Specification 05650, ¶ 3.17 at a unit price of $126.82. (R4, tab 1)

2. Section 01450-9, paragraph 1.14.1 of the contract required the contractor to submit Contractor Production Reports (CPRs) for "each calendar day throughout the life of the Contract" (R4, tab 1 at 01450-9). The CPRs indicate the rough period of contract performance: The first CPR (No. 1) was dated 6 September 2000; the last CPR (No. 271) was dated 5 September 2001 (gov't supp. R4).

3. On 20 December 2000, the Navy issued Delivery Order No. 0004 for eight items (CLIN Nos. 0011, NEW GROUND STRAPS; 0021, NEW SWITCH POINT; 0023, REMOVING EXISTING ASPHALT PAVING; 0028, NEW ASPHALTIC CONCRETE; 0044, DEMO RAIL; 0045, EPOXY ANCHORS; 0046, 90 RELAY RAIL; 0047, REPLACE BASE PLATE (1")) for supplies and services in the total amount of $426,163.69. It specified 1 June 2001 as the completion date. (R4, tab 3)

4. On 1 June 2001, contracting officer Barbara A. Powell (CO Powell) notified Gaines S. Smith (Smith), Ironhorse's president, by e-mail that (1) the rail system for Wharf Alpha must be serviceable as soon as possible but by no later than 11 June 2001, (2) Ironhorse could continue asphalt demolition while rail was being installed but the effort to do so should not be at the expense of completing Wharf Alpha and, (3) no more

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Jurisdiction; and Renewed Motion to Amend Complaint and Supplement the Record" (Motion Papers No. 2); (3) the government's 25 March 2011 "Response to Appellant's Opposition to the Motion to Dismiss" (Motion Papers No. 3); and (4) Ironhorse's 19 April 2011 "Appellant Ironhorse's Surreply to Appellee Government's Response to Ironhorse's Opposition to Government's Motion to Dismiss for Lack of Jurisdiction and Renewed Motion to Amend Complaint and Supplement the Record" (Motion Papers No. 4). We grant Ironhorse's motion to supplement the record and amend its complaint as to the 19 June 2002 letter. So as not to burden the record unnecessarily at this juncture we defer ruling on all other supplementation issues.

[3] The Navy advised by letter dated 8 October 2009 that its binder previously submitted in connection with Ironhorse's Rule 1(e) petition would serve as its Rule 4 file. The Navy later supplemented the Rule 4 file with tabs 15-18 by letters dated 17 March 2010 and 8 November 2011 and with the daily reports by letter dated 2 April 2010.

rail was to be removed until "after the DOE shipment has been accomplished." (R4, tab 4)

5. On 11 June 2001, CO Powell issued a suspension notice. Ironhorse was told "due to waterfront operations scheduled to take place on Wharf Alpha...[s]uspension of work will be in effect 20 days from the date of this letter. During this suspension, you are not authorized to perform any work on Wharf Alpha." The notice advised Ironhorse "you will be entitled to time lost due to this action. Upon resumption of work, a time extension will be negotiated." On 13 June 2001, CO Powell unilaterally issued Modification No. 0004 01 correcting the Wharf Alpha completion date to 30 June 2001. By letter dated 28 June 2001, CO Powell told Ironhorse to proceed with performance. The letter said Ironhorse was "entitled to time lost due to this action," and "[a]ny request for time extension should...be submitted within 30 days after receipt of this letter." (R4, tab 4)

6. By letter dated 14 July 2001 (RFI-40), Smith requested a 60-day time extension for Delivery Order No. 0004 claiming that Ironhorse encountered a differing site condition in removing asphalt. CO Powell's 16 August 2001 reply stated that "[b]ased on our documentation, we calculate your new completion date to be 5 August 2001." The letter went on to say "the government is allowing you to continue work in liquidated damages" assessed at $200.00 per day until work was completed and accepted. The letter gave Ironhorse 10 days after receipt to present in writing any facts bearing on the question to the Resident Officer in Charge of Construction. (R4, tab 5)

7. CO Powell issued Modification No. 0005 02 on 17 August 2001. This modification (1) required removal of approximately 3000 TF of rails and (2) cancelled Delivery Order No. 0005. Ironhorse was told to review and complete blocks 15a, 15b and 15c and return the enclosed Standard Form 30 (SF 30) within 10 days of receipt. (R4, tab 5)

8. In his 28 August 2001 letter to CO Powell, Smith complained that Delivery Order No. 0005 was cancelled "AT THE WHIM OF THE GOVERNMENT." The letter said the change denied Ironhorse's right to recover costs for work performed, was unfair and arbitrary, and "PICKED THE POCKET OF IRONHORSE." Smith said he would be seeking an equitable adjustment though not within the next 10 days, and asked where the FAR allowed the CO to "MANDATE A RESPONSE" within 10 days. (R4, tab 7)

9. In her 29 August 2001 e-mail to Smith, CO Powell stated:

> You have disagreed with the Government's new Completion date of 5 August 2001 but have not provided a proposal supporting your request. You are hereby afforded the opportunity to present in writing a detailed proposal and supporting information. Your failure to present any mitigating circumstances within 10 days of this e-mail will be

> considered as an admission that none exist and we will process the modification unilaterally.

(R4, tab 5) On 14 September 2001, CO Powell issued Modification No. 0004 02. The modification unilaterally extended "the contract completion date 36 calendar days from 30 June 2001 to 5 August 2001 due to ported ship disruptions and suspension of work." (R4, tab 4)

10. On 20 September 2001, CO Powell unilaterally issued Modification No. 0004 03. This modification reduced the original Delivery Order No. 0004 $426,163.69 amount by $48,000.00 to $378,163.69. The deduction was based on what the Navy estimated it owed Ironhorse for "Adds" and what Ironhorse owed the Navy as credits. The modification explained that the deduction was taken because there was no time near the end of the fiscal year "to negotiate deductions for work not performed." (R4, tab 6)

11. CO Powell's 4 October 2011 e-mail to Smith asked him to provide a detailed proposal for expenses incurred for installation of plates (RFI-55), asphalt removal (RFI-57) and rail removal (RFI-58). The letter stated there was "definitely a misunderstanding about Delivery Order 0004" because Ironhorse had faxed in a statement of work by CLINs and Smith signed P0003 adding new CLINs. CO Powell stated "I don't understand how this could be mistaken for a LUMP SUM PRICE." (R4, tab 9)

12. In her 25 January 2002 letter to Ironhorse, CO Powell identified 14 changes which she said the government was considering. Some of the changes sought a credit for CLINs not used. Other changes were for what the government apparently perceived as additional work and materials:

> (1) Credit the government for line item 45, epoxy anchors, not used in the project. (2) Credit the government for line item 47, base plates, not used in the project. (3) Credit the government for line item 28, new asphalt, not used in the project. (4) Provide cost for cones and barricades that were lost during ship loading operations. (5) Provide cost for moored ships' use of the Ironhorse dumpster. (6) Provide cost for use of certified welders. (7) Provide cost for effort expended to remove water from wharf rail trenches on account of rain and fire main test. (8) Provide marginal cost for asphalt removal that was not adequately addressed by line item 23. (9) Provide cost for fabrication and installation of wharf expansion joint covers. (10) Provide cost for both new and used rail clips used in the installation of relay rail. (11) Provide cost of new base plate installed on north end of the wharf per line item 47. (12) Provide cost of cleaning existing base plates prior to installation of relay rail.

(13) Provide cost of chasing threads on bolt stems welded to existing base plates prior to securing rail clips with nuts.
(14) Provide cost of numerous mandatory cessations of work on account of MSC and DOE ship operations.

CO Powell's letter went on to say:

> In addition, pursuant to DFARS 252.236-7000 "Modification Proposal – Price Breakdown", you are requested to submit a detailed estimate of both credit and cost for the above described work by close of business on 1 February 2002. The estimate should be submitted with sufficiently detailed support to permit analysis and negotiations. Enclosure (1) is provided for your benefit in preparing proposal....
>
> After receipt and evaluation of your proposal, you will be advised as to the date of negotiations. Upon issuance of the modifications from this negotiation, this contract will be consider complete.

The letter enclosed a blank two-sided NAVFAC Form 4330/43 (10/95) (NAVFAC Form 4330) titled "CONTRACTOR'S PROPOSAL FOR CONTRACT MODIFICATION." (R4, tab 10) The letter also suggests that work under Contract 8276 was essentially complete by late January 2001.

13. In response to CO Powell's request for a proposal, Smith forwarded by e-mail on 15 February 2002, 23 Requests for Equitable Adjustments (REAs). The e-mail stated "there are several more REA's to be prepared and all the cover letters. Expect the cover letters early next week." (ASBCA No. 56455-920, Ironhorse's 2 January 2009 letter to the Board, attach. A[4])

14. On 21 February 2002, Smith sent an e-mail to Jeff Dimit (Dimit), NAVFAC's construction manager, and CO Powell. The e-mail forwarded 28 REAs as attachments and advised that 28 cover letters to the REAs would follow. The e-mail bore the typed name "GAINES" and the company name "IRONHORSE LTD." Each of the REAs (on NAVFAC Form 4330) attached set out a claimed amount. The signature block was left unsigned. (Motion Papers No. 2, tab 3)

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[4] Some of the documents submitted in connection with Ironhorse's Rule 1(e) petition, ASBCA No. 56455-920, were not resubmitted in this appeal. To the extent relevant in establishing a chronology of events leading to the submission of Ironhorse's claims, those documents are incorporated into this appeal.

15. The table below summarizes the 28 REAs as submitted to CO Powell on 21 February 2002:

REA	SUBJECT	AMOUNT	DAYS
01	Grout	$16,831	5
02	Epoxy anchors (CLIN 0045)	$30,715	
03	Replace base plates (CLIN 0047)	$52,420	
04	New asphalt concrete (CLIN 0028)	$ 7,373	
05	New ground straps (CLIN 0011)	$ 3,332	
06	Replace ground wire	$ 3,156	2
07	Install ground wire	$ 3,705	1
08	Angle bars, bolts, etc. (CLIN 0005)	$46,907	6
09	Cover plates on pier	$25,776	10
10	Clean out dumpster	$ 3,210	2
11	Clean base plates	$66,823	15
12	Supply certified welders	$12,458	33
13	Replace cones/barricades	$ 2,801	
14	Remove bond wires	$ 6,737	2
15	Clean/reshape threads	$55,943	12
16	New/used rail clips (CLIN 0046)	$10,625	
17	Clip Cleaning for Reuse (CLIN 0046)	$12,933	4
18	Withdrawn[5]		
19	Rail removal (DO #4) (CLIN 0021)	$ 7,213	2
20	Asphalt removal (DO #4) (CLIN 0023)	$ 3,342	1
21	Remove flood water	$15,226	3
22	Later withdrawn[6]	$30,260	
23	Travel costs	$ 4,060	
24	Differing site conditions	$ 54,628	22
25	Level the tracks (CLIN 0044)	$ 8,406	2
26	Removal/install more rail (CLIN 0046)	$14,342	3
27	Extended overhead for REA No. 24	$56,991	
28	Suspension of work	$30,260	47

[5] REA No. 18 was withdrawn by Ironhorse's 22 February 2002 e-mail (Motion Papers No. 2, tab 5).

[6] When the Board issued its decision on Ironhorse's Rule 1(e) petition in March 2009, REA No. 22 had not been withdrawn. It was not withdrawn until 22 November 2010 when Ironhorse filed an opposition to the government's answer in ASBCA No. 56866, raising the statute of limitations as an affirmative defense. Ironhorse's opposition said "REA No. 22 has been voluntarily withdrawn from consideration." (App. 22 November 2010 motion at 3, ¶ 12) As reflected on the face of the NAVFAC form for REA No. 22, the amount claimed was erroneously totaled at $30,260; it should add up to over $100,000 (Motion Papers No. 2, tab 3).

16. On 22 February 2002 at 1:29 p.m., Smith sent Dimit by e-mail his revised REA No. 16 (to $13,576) and told Dimit that REA No. 18 was withdrawn (Motion Papers No. 2, tab 5). On 22 February 2002 at 1:45 p.m., Smith sent Dimit an e-mail attaching a letter dated the previous day, 21 February 2002, confirming that Ironhorse had withdrawn all REAs sent "prior to 2-21-02" (ASBCA No. 56455-920, Ironhorse's 2 January 2009 letter, attach. D).

17. On 22 February 2002 at 3:11 p.m., Smith sent Dimit an e-mail which again bore the typed name "GAINES" and the company name "IRONHORSE LTD." Each of the attached cover letters, on IRONHORSE LTD letterhead, bore a typed signature block for "GAINES S SMITH" as "PRESIDENT." The signature block of each cover letter was left unsigned. (Motion Papers No. 2, tab 4) The cover letter for each REA requested an equitable adjustment and a "PROMPT DECISION OF THE CONTRACTING OFFICER," asserted a sum certain, and included a certification. For example, the cover letter for REA No. 3 contained this paragraph:[7]

> THE AMOUNT OF OUR REQUEST IS $52,420. WE CERTIFY THAT THIS REQUEST IS MADE IN GOOD FAITH AND THAT THE AMOUNT REQUESTED ACCURATELY REFLECTS THE CONTRACT ADJUSTMENT FOR WHICH WE BELIEVE THE GOVERNMENT IS LIABLE. ALL SUPPORTING DATA IS ACCURATE AND COMPLETE TO THE BEST OF OUR KNOWLEDGE AND BELIEF. WE ATTACH REA-03, WHICH DETAILS THE COST BREAKDOWN.

(Motion Papers No. 2, tab 4)

18. On 28 February 2002, Smith sent Dimit and CO Powell an e-mail stating:

> AFTER VISITING THE SITE, I HAVE REVISED TWO REA'S. I ENCLOSED THEM FOR REPLACEMENT OF THOSE SUBMITTED. I ATTACHED REA'S #'S 8 & 20, ALONG WITH REVISED COVER LETTERS.

REA No. 8 was revised to $42,830 and 6 days from $46,907 and 6 days. REA No. 20 was revised to $3,235 and 1 day from $3,342 and 1 day. (Motion Papers No. 2, tab 6)

19. CO Powell acknowledged receipt of the REAs by letter dated 28 February 2002. Her letter asked Ironhorse to provide (1) documentation to support its labor burden, and

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[7] Under the CDA, 41 U.S.C. § 605(c)(1) (re-codified in 2011 as 41 U.S.C. § 7103(b)), and its implementing regulation, FAR 33.207 (2000), a certification was required only "when submitting any claim exceeding $100,000."

(2) the most recent Defense Contract Audit Agency (DCAA) audit or documentation that NAVFAC could send to DCAA for an audit. (R4, tab 11) Smith provided the requested information on 12 March 2002 (Motion Papers No. 2, Smith aff. ¶ 14).

20. Opposing the government's motion to dismiss, Ironhorse referred to a letter dated 19 June 2002 which it did not provide when seeking a Rule 1(e) order.[8] In this letter to CO Powell, Smith said:

> I HAVE HEARD NOTHING FROM YOU SINCE I RESPONDED TO YOUR LETTER OF FEBRUARY 28, 2002. I HAVE PATIENTLY WAITED FOR YOUR RESPONSE. FOR YOUR CONVENIENCE PART OF THE FAR CLAUSE GOVERNING REQUESTS FOR EQUITABLE ADJUSTMENTS FOLLOWS: FAR 52.233-1 Disputes. (e) For Contractor claims of $100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.
>
> YOUR PROMPT RESPONSE, AS EARLIER REQUESTED IN THE COVER LETTER FOR EACH REA, WOULD BE APPRECIATED. PLEASE ADVISE AS TO WHEN I MIGHT RECEIVE YOUR RESPONSE.

The 19 June 2002 letter contained a typed signature block for "GAINES S SMITH" as "PRESIDENT," but it was not physically signed by Smith. (Motion Papers No. 2, tab 7) (Emphasis in original)

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[8] In response to the government's answer filed in this appeal, Ironhorse filed an opposition on 22 November 2010 in which it said that a 19 June 2002 letter requesting a CO decision "had not been entered into the Administrative Record, but will be provided as part of Ironhorse's supplementation of the record." By letter dated 13 December 2010, the Board instructed the government to file a separate motion to dismiss for lack of jurisdiction based on the statute of limitations as opposed to moving for dismissal as a part of its answer. The Board's letter asked Ironhorse to furnish the government and the Board a copy of the 19 June 2002 letter. Counsel for Ironhorse furnished the letter on 14 December 2010. We add this letter to the record of this appeal.

21. In his affidavit which accompanied Ironhorse's opposition to the government's motion to dismiss, Smith explained:

> 15. I waited for a CO response and decision until 19 June 2002, when I sent another letter to Barbara Powell attached to an email of the same date. See Exhibit "AFF-7".
>
> 16. In my 19 June 2002 letter, believing that Ms. Powell did not understand her duties as a Contracting Officer, I specifically identified FAR 52.233-1(e) to ensure that Barbara Powell understood that as a Contracting Officer she should have responded within 60 days, and that I was waiting on a response.

(Motion Papers No. 2, Smith aff. ¶¶ 15, 16)

22. CO Powell did not treat Smith's 21 February 2002 REAs nor his 19 June 2002 reminder as a request for a CO decision. With her 26 June 2002 letter to Smith, CO Powell enclosed a 7-page document entitled "ANSWER TO 28 REQUEST FOR EQUITABLE ADJUSTMENTS FROM IRONHORSE LTD" (answer to REAs). This document shows the government analyzed the REAs and found that Ironhorse was entitled to a partial equitable adjustment for 9 of the REAs (REA Nos. 9, 10, 13, 15, 19, 20, 21, 25 and 26). The answer to REAs noted that Ironhorse had withdrawn REA No. 18; that REA No. 27 should be a part of REA No. 24; and that REA No. 28 was a duplicate of REA No. 22. The government's answer to REAs shows that it evaluated each of the REAs separately. Seemingly unaware of Ironhorse's 19 June 2002 letter in which Ironhorse clarified its 21 and 22 February 2002 submissions were intended as its claims, CO Powell's letter forwarded Modification No. 0004 04 proposing the following adjustments:

> The total delivery order amount is therefore decreased by $98,231.82 from $378,163.69, to $279,931.87. The delivery order completion date is extended by 13 calendar days from 5 August 2001 to 18 August 2001.
>
> Acceptance of this modification by the Contractor constitutes an accord and satisfaction and represents payment in full (for both time and money) for any and all costs, impact effect and/or delays arising out of, or incidental to the work as herein revised and the extension of the contract completion time.

(R4, tab 12) CO Powell's 26 June 2002 cover letter directed Smith to sign and return the original SF 30 "within 10 days of receipt." It went on to say "If you take exception to the modification, please return the original with a letter stating your exception." (*Id.*)

23. E-mail exchanges between Smith and CO Powell show that Smith received the Navy's answer to REAs and took exception to it but did not provide the reasons for taking exception. CO Powell's 8 July 2002 e-mail acknowledged receipt of Smith's e-mail and pressed for more details: "The Government acknowledges your e-mail taking exception to Delivery 0004 Mod 4 but you didn't attach your reasoning. Please forward your reasoning within 10 days." Smith's e-mail reply on the same day stated:

> MS. POWELL
>
> I DID NOT SAY OR INDICATE THAT I WOULD HAVE A RESPONSE TO ALL THE REA'S WITHIN 10 DAYS. YOU ONLY ASK [SIC] THAT IF I TOOK EXCEPTION TO THE MODIFICATION, TO RETURN THE ORIGINAL (WHICH I HAVE NEVER RECEIVED) WITH A LETTER STATING MY EXCEPTION.
>
> ADDITIONALLY, YOU HAVE TAKEN 120 DAYS TO RESPOND TO ME, BUT ARE NOW MANDATING TO ME THAT I MUST DROP ALL THINGS I AM DOING AND RESPOND TO YOU WITHIN 10 DAYS. IF YOU WOULD BE SO KIND AS TO SEND ME THE LOCATION OF THE FAR CLAUSE THAT INDICATES THAT I MUST RESPOND WITHIN 10 DAYS, I WOULD BE MOST APPRECIATIVE. I CANNOT FIND ANY THING THAT SAYS I HAVE TO RESPOND WITHIN 10 DAYS, I ONLY FIND WHERE I MUST RESPOND WITHIN 6 YEARS. PLEASE CORRECT ME IF I AM WRONG.

(R4, tab 13)

24. On 10 August 2002, CO Powell unilaterally issued Modification No. 0004 04. It unilaterally decreased the delivery order amount by $98,231.82 from $378,163.69 to $279,931.87 and extended the contract completion date by 13 calendar days to 18 August 2001. The cover letter to the modification stated "Enclosed is a Standard Form 30 for a unilateral change to the subject delivery order. The form does not require your signature and is for your files only." (R4, tab 14)

25. By letter dated 31 January 2008, a few weeks shy of 6 years from 21 and 22 February 2002 when he first submitted the 28 REAs, Smith wrote that "WE DISAGREE WITH YOUR RESPONSES TO THE ABOVE REFERENCED 28 REQUESTS FOR EQUITABLE ADJUSTMENT AND RESPOND AS FOLLOWS." The letter listed the 28 REAs individually. With respect to REA No. 18, the letter indicated that the REA had been "WITHDRAWN." With respect to REA No. 22, the letter said "THIS REA HAD A MATH ERROR AND WE SUBMIT A CORRECT

REA 22.[9] THIS IS NOT A DUPLICATE OF REA-28, AND COVERS A DIFFERENT TIME PERIOD." With respect to REA No. 24, the letter said "WE REQUEST A CONTRACTING OFFICERS [sic] FINAL DECISION-THIS REA IS FOR LABOR FOR ASPHALT REMOVAL AND IS NOT A DUPLICATE OF REA-27." With respect to REA No. 27, the letter said "WE REQUEST A CONTRACTING OFFICERS [sic] FINAL DECISION-THIS REA IS FOR EQUIPMENT RENTAL FOR ASPHALT REMOVAL AND IS NOT A DUPLICATE OF REA-24." With respect to REA No. 28, the letter said "WE REQUEST A CONTRACTING OFFICERS [sic] FINAL DECISION-THIS IS NOT A DUPLICATE OF REA-22, AND COVERS A DIFFERENT TIME PERIOD." For each of the rest of the REAs, the letter said "WE REQUEST A CONTRACTING OFFICERS [sic] FINAL DECISION." The 31 January 2008 letter was physically signed by Smith. (R4, tab 17) According to Smith's affidavit provided in opposition to the government's motion to dismiss, he was not "filing 28 claims on 31 January 2008," nor was he "attempting to certify the claims." He said he was "merely demanding a final Contracting Officer's decision for the claims submitted in February of 2002, and the 2008 letter was a repeat of the 19 June 2002 letter for the same purpose." (Motion Papers No. 2, Smith aff. ¶ 20)

26. By letter dated 10 July 2008, Ironhorse petitioned the Board to direct the CO to issue a decision pursuant to 41 U.S.C. § 7103(f)(4) and Board Rule 1(e). The petition showed $694,774 as the amount of equitable adjustment requested. According to Ironhorse, it submitted 28 REAs each with a cover letter containing a certification to CO Powell in February 2002. The petition said that on 31 January 2008, it requested by letter a final decision on each REA. The letter went on to chronicle numerous unsuccessful attempts from January until June 2008 to initiate a dialogue through Dimit with NAVFAC representatives. The Board docketed the petition as ASBCA No. 56455-920.

27. On 22 July 2008, the Board directed the government to show cause why an order directing the CO to issue a decision should not be issued. The government responded by filing on 8 August 2008 a motion to dismiss for lack of jurisdiction contending that Ironhorse's petition should be dismissed for two reasons: (1) the 31 January 2008 letter was not a proper claim because "it has no sum certain or certification" and (2) "[e]ven if the claim were proper, it was submitted more than six years after contract performance ended–too late under the statute of limitation [sic]" (ASBCA No. 56455-920, gov't mot. at 3). The government contended that performance of the contract "was completed on or before September 30, 2001" (*id.* at 1, ¶ 1).

28. Ironhorse's 4 September 2008 response contended that it submitted "a proper claim for 28 REA's on 28 [sic] February 2002," and "[e]ach of the 28 certified claims had a cover letter that contained the certification as per the Contract Disputes Act." Ironhorse maintained that "[t]he 31 January 2008 submission was not the submittal of a certified claim, but a request for a contracting officer's final decision."

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[9] REA No. 22 was withdrawn (*see* n.5).

(ASBCA No. 56455-920, Petitioner's resp. at 1) The government's 18 September 2008 reply raised a new issue. The government pointed out that there was "no apparent signature anywhere" on the 21 February 2002 e-mail transmittal letter, the NAVFAC Form 4330s, and the 22 February 2002 cover letters. The government cited a number of Board cases for the proposition that the CDA "requires that signed claim certifications be submitted contemporaneously with the claim." (ASBCA No. 56455-920, gov't 18 Sept. 2008 reply at 2)

29. In our Rule 1(e) decision issued on 5 March 2009, we concluded that Ironhorse's 31 January 2008 letter constituted Ironhorse's claim on all of its REAs except REA No. 18 (withdrawn) and REA No. 22 (not properly certified and now withdrawn). Because there had been an undue delay since receipt of Ironhorse's 31 January 2008 letter in issuing a CO decision when the petition was filed, we directed the CO to issue a decision within 60 days from the date of the Rule 1(e) decision. *Ironhorse Ltd.*, ASBCA No. 56455-920, 09-1 BCA ¶ 34,096. With respect to the government's affirmative defense based on the statute of limitations, we said:

> The statute of limitations is typically raised as an affirmative defense after an appeal has been filed or commenced pursuant to 41 U.S.C. § 605(c)(5). We conclude that consideration of whether a 1(e) petition should be granted ought not be burdened with the statute of limitations defense at this juncture. If the CO believes she has a statute of limitations defense, she may raise the issue in her decision, and the Board will address that defense as a part of any appeal.

09-1 BCA ¶ 34,096 at 168,591.

30. A new CO, Renee M. Comfort, issued a decision by letter dated 1 May 2009. It denied Ironhorse's claim it its entirety. The decision explained that although Ironhorse was still performing punch list items up through 6 November 2001, "[a]ll work performed pursuant to Delivery Order No. 4 had been completed by August 18, 2001." The decision said that since the government did not exercise its option, "no further work could be ordered as of September 30, 2001." Asserting that "all of the events that would fix the alleged liability of either party were known or certainly should have been known by the time the contract ended on September 30, 2001," the CO found Ironhorse's claim, submitted by its 31 January 2008 letter was time barred by the 6-year statute of limitations. Referring to Smith's 8 July 2002 e-mail, the CO observed that Smith knew and understood that "in order for a claim to be valid it must be submitted to the contracting officer within 6 years after accrual of a claim," and "[a]ll of the REAs...in [the] claim accrued before September 30, 2001." (R4, tab 18) Ironhorse timely appealed the CO's decision by letter dated 26 June 2009.

DECISION

I.

Were Ironhorse's Claims Submitted to the CO Within the Six-Year Presentment Period?

In this case, on 27 May 2000, the government awarded Ironhorse an indefinite quantity contract for railroad repairs at the Naval Weapons Station in Charleston, South Carolina. On 21 and 22 February 2002, Ironhorse submitted 28 REAs to the CO. Although Ironhorse included certification language, it did not sign the REAs, which were submitted by email. On 31 January 2008 Ironhorse requested a CO's final decision on the REAs and subsequently petitioned the Board to direct the CO to issue a final decision. In our decision on the petition, we held that Ironhorse had submitted a claim as to each of the REAs under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109, by its 31 January 2008 letter, with the exception of REA No. 22, which exceeded the $100,000 threshold for certification, and directed the CO issue a decision on the claims. The government had argued that even if the 31 January 2008 letter otherwise qualified as a claim, it was barred by the 6-year statute of limitations in the CDA, 41 U.S.C. § 7103(a)(4)(A). We reserved decision on that issue pending the CO's final decision. *Ironhorse Ltd.*, ASBCA No. 56455-920, 09-1 BCA ¶ 34,096.

On 1 May 2009, the CO denied Ironhorse's claims in their entirety, and this timely appeal followed. The government filed a motion to dismiss the appeal for lack of jurisdiction based upon the 6-year statute of limitation (Motion Papers No. 1). Ironhorse opposed the motion and moved to supplement the record and amend the complaint to include a 19 June 2002 letter which, it argued, converted the REAs to claims at that time, meaning that Ironhorse had filed its claims within six years of accrual (Motion Papers No. 2). The record on the petition for a CO's final decision did not include the 19 June 2002 letter.

We granted Ironhorse's motion to supplement the record and amend its complaint to reflect the 19 June 2002 letter. We conclude that Ironhorse's 19 June 2002 reminder, sent just over 3 months after it submitted its 21 and 22 February 2002 REAs, had the effect of converting the REAs into claims. Accordingly, the claims are not barred by the 6-year statute of limitations.

II.

Has the Government Demonstrated that Ironhorse's Claims Should be Dismissed for Lack of Certification?

In reply to Ironhorse's opposition, the government, while continuing to argue its statute of limitations point, further argued that all or some of the REAs, which, with the

exception of REA No. 22 were less than $100,000, were based on a common or related set of operative facts and should have been combined when submitted, and if so combined should have been certified in accordance with 41 U.S.C. § 7103(b). The government argued that since Ironhorse did not properly sign or execute the necessary certifications, we have no jurisdiction for that reason (Motion Papers No. 3). In its surreply, Ironhorse in turn argued that the REAs were discrete claims which did not need to be certified (Motion Papers No. 4). Through the declaration of its construction manager, Dimit, the government provided several examples. We set out below three examples to illustrate the nature of the arguments raised. The government argues that REA No. 2 (epoxy anchors), REA No. 3 (base plates), REA No. 4 (new asphalt concrete) and REA No. 5 (new ground straps) "relate to the deletion of unused CLINS, the work associated with these CLINS...[and] should not be treated separately." (Motion Papers No. 3 at 2, Dimit decl. ¶ 6) It also contends that REA No. 8 (Angle bars, bolts, etc.), REA No. 11 (Clean base plates), REA No. 15 (Clean/reshape threads), REA No. 16 (New/used rail clips), and REA No. 17 (Clip cleaning for reuse) "all deal with the different pieces of hardware required for rail installation, there is no reason to treat them separately" (Motion Papers No. 3 at 2, Dimit decl. ¶¶ 8-11). The government contends that from Ironhorse's own reference in REA No. 27 (Extended overhead for REA No. 24) to REA No. 24 (Differing site conditions), Ironhorse itself "recognizes the factual connection between these two REAs" (Motion Papers No. 3 at 2).

Ironhorse's surreply notes that it withdrew REA Nos. 18 and 22 but maintains that "the remaining 26 REA's are separate claims properly submitted" in February 2002. Ironhorse contends that the claims submitted were not fragmented to "avoid the certification requirement...and to inflate the damages claimed." It points out the CO "considered and responded to" its individual claims separately in her 26 June 2002 answer to REAs. Ironhorse argues that the government's motion to dismiss should not be granted because "even the Government admits that at least some of the REAs [Nos. 6, 7, 9, 10, 12, 13, 14, 21, 23, and 28] are claims that are not fragmented, [and thus] do not require certification." (Motion Papers No. 4 at 2)

Disputing Dimit's declaration, Ironhorse provided an affidavit from Smith. Smith did not address whether REA Nos. 2, 3, 4, and 5 should be combined. Nor did he address REA Nos. 24 and 27. According to Smith, REA No. 11 (Clean Base plates), REA No. 15 (Clean/reshape threads), REA No. 16 (New/used rail clips) and REA No. 17 (Cleaning clips for reuse) should not be combined because "[t]he process for cleaning the bolts was not the same as the process for cleaning the base plates and the equipment required was also different." He also contends "[t]he process of obtaining new clips has nothing to do with the process of cleaning old clips.... I wrote them up separately because the skills, tools and actions were different." (Motion Papers No. 4, Smith aff. ¶¶ 7, 8)

The CDA requires certification of claims of more than $100,000. 41 U.S.C. § 7103(b).[10] Because certification, when applicable, is a prerequisite to our jurisdiction, "the issue of whether certification was required must always be considered." *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990). The Court stated:

> To determine whether two or more separate claims, or only a fragmented single claim, exists, the court must assess whether or not the claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists. If that claim seeks more than $50,000.00, then certification is required before there can be jurisdiction in the Claims Court. 41 U.S.C. § 605(c) (1988). On the other hand, if the claims as presented to the CO will necessitate a focus on a different or unrelated set of operative facts as to each claim, then separate claims exist that avoid the certification requirement, provided none of them exceeds $50,000.00.

Of the 26 remaining REAs, the government has not argued that 10 of the REAs (Nos. 6, 7, 9, 10, 12, 13, 14, 21, 23, and 28) were based on a common or related set of operative facts with the rest of the REAs other than that they pertained to the same project. Indeed, some of the REAs appear to be based on "a different or unrelated set of operative facts" to the underlying contract work. *Placeway*, 920 F.2d at 907. For example, in REA No. 10, Ironhorse claimed $3,210 and 2 days for cleaning out a dumpster, and in REA No. 21, Ironhorse claimed $15,226 and 3 days for removing flood water (SOF ¶ 15).

Moreover, even if we were to combine REA No. 2 ($30,715), REA No. 3 ($52,420), REA No. 4 ($7,373) and REA No. 5 ($3,332), as the government contends we should, the amount claimed—$93,840—would be less than the $100,000 certification threshold (*see* SOF ¶ 15). If we were to combine REA No. 24 ($54,628) and REA No. 27 ($56,991) as the government contends we should, the amount claimed for these REAs—$111,619—would exceed the certification threshold of $100,000 (*see* SOF ¶ 15). Similarly, if we were to combine REA No. 11 ($66,823), REA No. 15 ($55,943), REA No. 16 ($10,625) and REA No. 17 ($12,933), the total amount of the claims—$146,324—would exceed the certification threshold (*see* SOF ¶ 15).

The parties have presented a mixed bag and an incomplete picture. It could well be, as a result of combination based on the "common or related set of operative facts" test, a group or groups of REAs may exceed the certification threshold. Without further

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[10] The certification amount was increased from $50,000 to $100,000 by the 1994 amendment to the CDA. Pub. L. No. 103-355, § 2351(b), 108 Stat. 3322 (1994).

exposition, the present record does not allow us to decide what claims should or should not have been certified when submitted. We believe a hearing is necessary to flesh out whether any group of REAs should have been combined for certification purposes when submitted. Under Board Rule 5, we may defer our decision on the motion on jurisdiction "pending hearing on both the merits and the motion." For those claims which we ultimately decide to be less than the certification threshold, having Smith's signature is not a prerequisite for jurisdiction. For those REAs which we conclude should have been combined and, as a result of that combination, exceeded the certification threshold, those REAs will be dismissed for lack of jurisdiction because no properly signed or executed certification was provided in 2002.

CONCLUSION

Because Ironhorse's 19 June 2002 letter converted its 21 and 22 February 2002 REAs into claims, we hold that its claims were submitted within the 6-year statute of limitations presentment period. We deny the motion on this ground.

Because the present record does not allow us to decide whether any group of REAs should have been combined for certification purposes when submitted, we defer our decision on the government's motion on that ground.

Dated: 4 April 2012

PETER D. TING
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. 56866, Appeal of Ironhorse Ltd., rendered in conformance with the Board's Charter.

Dated:

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