ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Parsons Evergreene, L.L.C.	)	ASBCA No. 57794
	)	
Under Contract No. FA8903-04-D-8703	)	

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OPINION BY ADMINISTRATIVE JUDGE CLARKE ON
THE GOVERNMENT'S MOTION TO DISMISS

Appellant Parsons Evergreene, L.L.C. (appellant or Parsons) appeals from "the assessment of liquidated damages pursuant to a letter of the Contracting Officer of 27 December 2007" (notice of appeal dated 22 September 2011). The government moved to dismiss the appeal for lack of jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, contending that appellant never filed a claim, nor has the contracting officer issued a final decision on a claim. In the alternative, the government maintains that should the Board find that there is a final decision, the appeal must be dismissed as untimely filed under 41 U.S.C. § 7104(a). As we believe there has been no final decision on a claim, we grant the motion and dismiss the appeal for lack of jurisdiction.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. Parsons[1] was awarded master Contract No. FA8903-04-D-8703 by the Air Force Materiel Command on 12 December 2003 (R4, tab 1). Delivery Order (DO) 0013

[1] The contract was originally awarded to Parsons Infrastructure & Technology Group, Inc. (R4, tab 1 at 1); however, by novation of 9 September 2004, the contractor's name was changed to Parsons Evergreene, L.L.C. (R4, tab 2).

under the contract, dated 13 July 2005, was issued for design and construction of a temporary lodging facility (TLF) and visiting quarters (VQ) at McGuire AFB, NJ (R4, tab 7 at 1-4, tab 8 at 4).

2. The master contract includes, by reference, FAR 52.211-12, LIQUIDATED DAMAGES—CONSTRUCTION (SEP 2000) with the dollar amount to be specified in each individual order (R4, tab 1 at 9). The DO stated, in pertinent part, that "[i]f the Contractor fails to complete the work within the time specified, the Contractor shall pay liquidated damages to the Government in the amount of $1347.00 for each calendar day of delay until the work is completed or accepted" (R4, tab 7 at 10).

3. The master contract also contains, by reference, FAR 52.233-1, DISPUTES (JUL 2002) – ALTERNATE I (DEC 1991), which states in relevant part:

> (a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).
>
> (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.
>
> (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.... A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act....
>
> (d)(1) ...A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(R4, tab 1 at 24)

4. By letter dated 31 May 2007, the government issued a cure notice which included, among other deficiencies, delays in the performance schedule (R4, tab 22). Over the next several months, correspondence was exchanged between Parsons and the government which discussed the contractor's attempts to comply with the cure notice and the government's demand for on-time completion, as scheduled, for 27 December 2007 (R4, tabs 23-30).

5. By letter dated 27 December 2007, the scheduled completion date, the contracting officer notified Parsons that as of 28 December 2007, the contractor had failed to comply with the contract performance schedule stating that records indicated that the TLF was currently 82.1 percent complete, and the VQ was 73.4 percent complete (R4, tab 31). Critical to our decision is the second paragraph of the letter which stated:

> You are here by [sic] advised that based on your delinquent status and failure to meet the established completion date of 27 Dec 07, your company will be accessed [sic] liquidated damages in accordance with Section I Contract Clause 52.211-12 "Liquidated Damages—Construction (Sep 2000)" at the rate of $1,347.00 for each day of delay until Final Acceptance by the Government has been accomplished.

(*Id.*)

6. The government took beneficial use of the facilities as of 11 September 2008, prior to completion and acceptance of the work under the DO (R4, tab 42).

7. By letter dated 4 February 2011, Parsons requested the release of $2,100,000 contract retainage held by the government on the DO (R4, tab 33). The government's response of 10 March 2011 stated that the balance on the DO was $2,796,971.76 of which "[t]he calculations for the liquidated damages are $347,526.00" (R4, tab 35 at 3).

8. By letter dated 13 May 2011, Parsons made a second request for release of retainage. Starting with the same contract balance referenced in the government's 10 March letter, $2,796,971, Parsons subtracted several dollar amounts, including the $347,526.00 in liquidated damages calculated by the contracting officer, and then requested the remaining retainage amount of $363,611.67. (R4, tab 37)

9. The government's response, dated 26 May 2011, denied Parsons' request. The letter did not reference the liquidated damages. (R4, tab 39)

10. By email dated 18 July 2011, Parsons requested the government confirm the amount of liquidated damages as $347,526 (R4, tab 41). The record contains no evidence of a government response.

11. By letter of 22 September 2011, the contractor filed this appeal. The notice of appeal reads as follows:

> This is to appeal the assessment of liquidated damages pursuant to a letter of the Contracting Officer of 27 December 2007. The liquidated damages were assessed soon thereafter.

> Although the 27 December 2007 letter (attached) is not identified as a final decision, nor does it contain the required appeals right [sic] advice as required by FAR 33.211(a)(4), this assessment of damages against Parsons constitutes the assertion of a Government claim pursuant to applicable case law. Governing case law also establishes that because of the absence of the appeals rights advisement, this appeal is still timely.

12. Appellant's complaint demands $577,863 and seeks CDA interest. Following the filing of the complaint, the government moved to dismiss the appeal for lack of jurisdiction. Parsons has submitted its opposition to the government's motion and the government filed a reply to appellant's opposition.

DECISION

The Parties' Contentions

The government's motion to dismiss for lack of jurisdiction cites to the need for a valid claim under the Contract Disputes Act (CDA), 41 U.S.C. § 7103, prior to the filing of an appeal. Further, should the Board find there is an appealable claim, there remains the requirement that appellant file its notice of appeal within ninety days of receipt of the final decision, and thus far, the only evidence that appellant has alleged meets the criteria of a contracting officer's final decision is the government's letter of 27 December 2007, making the notice of appeal more than three years overdue. (Gov't mot. at 5-8)

Appellant's opposition submits that the government's assessment of liquidated damages is a government claim from which appellant may appeal (app. opp'n at 5-6), and that there is no need to go through the formality of submitting a contractor's claim as the purpose of submitting a claim is "to assure that the Government has full knowledge of and a fair opportunity to negotiate each contractor claim before facing an appeal" (app. opp'n at 1, 6-8). Further, as this is a government claim and there is no evidence that the government intends to reconsider its decision to assess liquidated damages, the matter has ripened into an appealable dispute (app. opp'n at 9-11). Lastly, appellant characterizes the government's argument that the appeal is untimely filed, as being unreasonable given that the contracting officer never informed Parsons of its final decision or appeal rights, "an essential due process requirement of the CDA" (app. opp'n at 11-12).

Discussion

With regard to our jurisdiction and the need for a CDA claim, we recently stated:

> The Board's jurisdiction under the Contract Disputes Act (CDA) is predicated upon a written claim by either the contractor or the government. 41 U.S.C. § 7103(a) (formerly codified at 41 U.S.C. § 605(a)); *Parsons Global Services, Inc,* ASBCA No. 56731, 11-1 BCA ¶ 34,632 at 170,653 ("Under the CDA, the submission of a claim to the contracting officer and a final decision on (or deemed denial of) the claim are prerequisites to jurisdiction over contractor claims."), *appeal docketed,* No. 11-1201 (Fed. Cir. Feb. 3, 2011); *Hanley Industries, Inc.,* ASBCA No. 56976, 10-1 BCA ¶ 34,425 (the CDA requires that government claims be the subject of a contracting officer's final decision).

Connectec Company, ASBCA No. 57546, 11-2 BCA ¶ 34,797 at 171,258.

In its opposition, Parsons states unequivocally that it has not submitted a certified claim to the contracting officer, but rather the appeal is taken from the government's assessment of liquidated damages which is "the quintessential government claim" citing *Sun Eagle Corp. v. United States,* 23 Cl. Ct. 465, 480 (1991) (app. opp'n at 4-5).

As stated in our introduction to the discussion, our jurisdiction rests upon a CDA claim, either by appellant or the government. Here, no one disputes that there is no contractor claim; therefore we limit our discussion to whether the government's letter of 27 December 2007 will suffice as a government claim and a final decision thereon for purposes of our jurisdiction.

Appellant rightly asserts that a claim for liquidated damages is the quintessential government claim, as stated in *Sun Eagle*. However, with regard to the Board's jurisdiction, our examination does not end with a finding that the government has or may have a claim for liquidated damages. There remains the necessity that the assessment of the liquidated damages be memorialized in a final decision by the contracting officer. *Sharman Co. v. United States,* 2 F.3d 1564, 1568-69 (Fed. Cir. 1993), *overruled on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc) (holding a final decision from the contracting officer on the government's monetary claim was a prerequisite to jurisdiction over the claim).

Under the fact scenario presented, the government's 27 December 2007 letter was not a final decision on a government claim for liquidated damages. The CDA does not define a claim; however, the contract includes the Disputes clause, FAR 52.233-1 (SOF

¶ 3). The clause defines a claim as, "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain...." The government's 27 December 2007 letter did not make a demand for payment, but rather stated its right and intention to assess liquidated damages at the contract rate of $1,347 per day in the future, stating: "[Y]our company will be accessed [sic] liquidated damages in accordance with [the contract]" (SOF ¶ 5). *See Hanley Industries, Inc.*, ASBCA No. 56976, 10-1 BCA ¶ 34,425 (government revocation of acceptance reserving right to demand damages was not a claim).

Parsons argues that the contracting officer can effectively make a final decision on a government claim once the contract is complete by declining to pay the contractor the balance due on the contract, citing *Placeway Construction Corp. v. United States,* 920 F.2d 903, 906 (Fed. Cir. 1990) (app. opp'n at 10). In *Placeway,* the trial court held that it lacked jurisdiction because the contracting officer's letter of 4 September 1986, wherein it declined to pay the balance due on the contract, was not a final decision as it lacked language stating it was a "final decision," there were no appeal rights as required by regulation, and the contracting officer had not yet ascertained the amount of the set off. *Placeway Constr. Corp. v. United States,* 18 Cl. Ct. 159, 164-165 (1989). However on appeal, the Federal Circuit held that "the set off asserted is a government claim" and "the CO effectively made a final decision on the government claim" as "[i]t was undisputed that Placeway had completed performance of the contract. Moreover, the contract price for the work completed was undisputed and was due upon completion of work." *Placeway Constr.,* 920 F.2d at 906. Unlike the facts presented in *Placeway,* in the current appeal, when the contracting officer issued its 27 December 2007 letter to Parsons, the contract was not complete (SOF ¶ 5) and the government had not declined to pay an undisputed balance due; therefore, the contracting officer's 27 December 2007 letter was not an "effective" final decision on a government claim as enumerated in *Placeway.*

CONCLUSION

For the reasons discussed above, we grant the government's motion to dismiss the appeal for lack of jurisdiction without prejudice.

Dated: 22 June 2012

Craig Clarke

CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 57794, Appeal of Parsons Evergreene, L.L.C., rendered in conformance with the Board's Charter.

Dated:

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