

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Tri-County Contractors, Inc. ) ASBCA No. 58167  
 )  
Under Contract No. N69450-10-C-3597 )

APPEARANCE FOR THE APPELLANT: Precious T. Martin, Sr., Esq.  
Precious Martin, Sr. & Associates, PLLC  
Jackson, MS

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.  
Navy Chief Trial Attorney  
Pamela J. Nestell, Esq.  
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES ON RESPONDENT'S  
MOTION TO DISMISS FOR LACK OF JURISDICTION

On 6 June 2012 Tri-County Contractors, Inc. (Tri-County) appealed from the contracting officer's (CO) 30 May 2012 letter denying all aspects of Tri-County's \$242,830 "claim" under the captioned contract. Respondent has moved to dismiss the appeal for lack of jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109, upon the grounds that Tri-County failed to request a CO's final decision in its claim and the CO did not render a decision. On 28 September 2012 Tri-County responded to the government's motion, and on 26 October 2012 respondent replied thereto.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 20 July 2010 NAVFAC (Naval Facilities Engineering Command) Southeast Naval Construction Battalion Center (NCBC), Gulfport, Mississippi, and Tri-County entered into Contract No. N69450-10-C-3597 (the contract) to replace NCBC Building 400's oil and lubricating system for the firm fixed-price of \$618,304.00. The original delivery date was 2 December 2010. (R4, tab 1 at 1, 4, 19<sup>1</sup>)

2. The contract incorporated by reference, *inter alia*, the FAR 52.233-1, DISPUTES (JUL 2002) and DFARS 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998) clauses (R4, tab 1 at 19-20).

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<sup>1</sup> All Rule 4 page number citations are to Bates numbers.

3. As modified, the contract price was increased by \$58,717.15 to \$677,021.15 and the delivery date was extended to 13 May 2011 (R4, tab 4 at 203, 205).

4. On or about 25 February 2011 Tri-County sent a letter to NCBC titled "Equitable Adjustment: Request for Contracting Officer's Final Decision" seeking \$156,150.80 and 49 days delay with respect to underground double wall piping, which included a DFARS 252.243-7002 certification that stated: "I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief," but included no CDA certification, and which NCBC received on 22 April 2011 (R4, tab 6 at 207, 209-10, 215; app. supp. R4, tab 1).

5. The undated letter of Renee M. Comfort, NAVFAC Southeast Chief of Contracts, advised Tri-County "that your claim has some merit" and that the claim was "remanded to PWD [Public Works Department] Gulfport to facilitate negotiations regarding the appropriate price adjustment associated with the specification ambiguity" (R4, tab 7). Ms. Comfort's 24 October 2011 letter to NCBC analyzed the contract specification and drawing ambiguities with respect to underground piping and remanded Tri-County's claim to PWD Gulfport for negotiations (R4, tab 8 at 230-31).

6. Tri-County's 8 November 2011 email to Mr. Bennie Boren, PWD Gulfport, submitted a \$242,830.00 "cost for negotiation" for its underground piping claim with a spreadsheet itemizing specialized labor, material, equipment and overhead rates and totals (R4, tab 9 at 233-34).

7. Respondent's 14 November 2011 email to Tri-County stated that the government considered the request for \$242,830 to be a new claim, provided the proper FAR 33.207(c) certification language and required further supporting documentation (R4, tab 10).

8. On or about 12 December 2011 Tri-County's president John Hunter submitted to PWD Gulfport a "FINAL" invoice for the \$9,676.85 contract balance (R4, tab 11 at 236-37).

9. Mr. Boren's 15 December 2011 email to Tri-County stated:

I have received your final invoice, however the Final Release was not attached.... If you complete the attached and return we can process the invoice. If, however, you elect not to sign the attached, please advise and we will reject the invoice back to you. You can then resubmit leaving \$100.00 on the contract until you are ready to submit a final release.

(R4, tab 12 at 238) On the same day Tri-County forwarded Mr. Hunter's 15 December 2011 release under the contract which reserved no claim against the government (R4, tab 13 at 240, 242). On 17 January 2012, the government made payment of the \$9,676.85 contract balance (R4, tab 14).

10. Ms. Comfort's 15 March 2012 letter to Tri-County stated that she had reviewed the submission seeking payment of \$242,830. She stated that the FAR 52.232-5(h)(3) "Payments under Fixed Construction Contracts" (sic) clause included in the contract does not allow payment of claims not specifically exempted from the operation of the contractor's final release; Tri-County had reserved no claim in, and respondent had made final payment to Tri-County based on, such release; and therefore "the Government no longer has a contractual relationship with Tri-County.... As a result of this, no further adjustments may be made to this contract." (R4, tab 14 at 244-45)

11. The 23 May 2012 letter of Precious T. Martin, Sr., Esq. to NCBC's Mr. Boren stated:

Pursuant to §41 U.S.C. 605(a) [sic] of the United States Code, this letter will serve as Tri-County Contractor's, Inc.'s (Tri-County) claim for payment of the NAVFAC Equitable Adjustment by the Navy.

In late 2011, Tri-County submitted the documents detailing a claim for an Equitable Adjustment in the amount of \$ 242,830.00. I am attaching the detailed Equitable Adjustment to this letter.

Please forward your written response to me.

Mr. Martin included a proper CDA certification signed by Mr. Hunter on 25 May 2012. (R4, tab 15 at 246-47)

12. The 30 May 2012 letter of Mr. Boren, over the title "Contracting Officer," to Mr. Martin attached Ms. Comfort's foregoing 15 March 2012 letter and stated that "no further adjustments may be made to this contract" (R4, tab 16 at 249-51).

## DECISION

Tri-County's complaint seeks judgment in the amount of \$242,830 for its unpaid claim. Respondent's answer asserts affirmative defenses of final release and payment and accord and satisfaction. It also includes a motion to dismiss for lack of jurisdiction, which states:

On 23 May 2012, Tri-County submitted a claim for payment of \$242,830.00 to the PWD Gulfport.... Tri-County's claim for \$242,830.00 did not request a contracting officer's final decision. (R4, tab 15) The Navy responded on May 30, 2012, informing Tri-County that because a final release had been submitted and final payment had been made[,] no further adjustments could be made to the contract.

Because Tri-County failed to seek a contracting officer's final decision on its additional claimed costs, no decision was rendered. In addition the claim was submitted after the final release was executed, without exception or reservation, and final payment has been made.

WHEREFORE, the Government requests this appeal be dismissed for lack of jurisdiction, and alternatively, if the motion is not granted, that its defenses be maintained and the appeal be denied.

(Gov't mot. at 4) (Citation omitted)

Movant's assertion that Tri-County's 23 May 2012 claim "did not request a contracting officer's final decision" disregards the totality of the parties' correspondence and discussions as well as the reference to 41 U.S.C. § 605(a), now codified as 41 U.S.C. § 7103(a). Tri-County's 25 February 2011 letter to NCBC was entitled "Equitable Adjustment: Request for Contracting Officer's Final Decision" (SOF ¶ 4). Tri-County submitted a \$242,830.00 "cost for negotiation" on 8 November 2011 (SOF ¶ 6). Respondent's 14 November 2011 email sent Tri-County the correct CDA certification language (SOF ¶ 7). Tri-County's 23 May 2012 claim set forth that same \$242,830.00, included a proper CDA certification and requested a "written response" (SOF ¶ 11). In the foregoing context, Tri-County's 23 May 2012 request for a "written response" plainly indicated its desire for a CO's final decision. *See Southern Automotive Wholesalers, Inc.*, ASBCA No. 53671, 03-1 BCA ¶ 32,158 at 158,998 (A request for a CO's decision need not be expressed in a particular form of words. The contractor's intention to obtain CO's

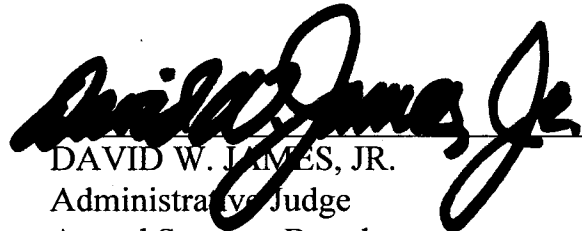
decision was manifested by its CDA claim certification, which signified that it intended that its REA serve as a claim and that the CO either grant or deny it in a written decision.). We hold that Tri-County's 23 May 2012 claim was a valid CDA claim. Furthermore, the contracting officer's letter of 30 May 2012 denied that claim.

Respondent requests that "if the motion [to dismiss] is not granted, that its defenses be maintained and the appeal be denied" (mot. at 4). Respondent has not filed a motion with respect to its affirmative defenses. Accordingly, these defenses are not before us for decision at this time.

CONCLUSION

We deny respondent's motion to dismiss this appeal.

Dated: 13 November 2012



DAVID W. JAMES, JR.  
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. 58167, Appeal of Tri-County Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

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