

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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MAC Electric Inc. ) ASBCA No. 62503  
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Under Contract No. W9124R-11-D-0214 )

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Washington, DC

APPEARANCES FOR THE GOVERNMENT: Scott N. Flesch, Esq.  
Army Chief Trial Attorney  
CPT Richard Hagner, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE D’ALESSANDRIS

Pending before the Board is the motion to dismiss the above-captioned appeal, filed by the United States Army (Army or government), for lack of subject matter jurisdiction. Appellant, MAC Electric, Inc. (MAC),\* has appealed four final decisions to the Board; however, the government’s motion applies only to ASBCA No. 62503, an appeal from the deemed denial of what MAC contends to be a non-monetary claim seeking a determination of the date of substantial completion for work on a task order. The government contends that MAC’s appeal is, in reality, a monetary claim for delay costs, and must be dismissed because the claim did not assert a sum certain. For the reasons stated below, we agree that MAC is asserting a monetary claim, and not a non-monetary claim related to the contract, and grant the government’s motion to dismiss.

STATEMENT OF FACTS FOR THE PURPOSES OF THE MOTION

The parties generally agree with regard to the relevant facts, but disagree with regard to the true “purpose” of MAC’s claim. On September 29, 2011, the Mission and Installation Contracting Command – Yuma Proving Ground awarded Contract No. W9124-R-11-D-0214, a multiple award task order contract (MATOC), to MAC Electric, Inc. (R4, tab 1). The MATOC required MAC to perform “a broad range of construction, repair, maintenance and bid-build on real property at the U.S. Army Yuma

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\* MAC changed its name to MAC GC-Electric, Inc. effective October 29, 2018 (compl. ¶ 1).

Proving Ground, Arizona” (R4, tab 1 at 7). On September 26, 2015, the government awarded Task Order No. W9124R-11-D-0214-0011 to MAC for \$6,508,324 (R4, tab 12 at 1). The task order required MAC to upgrade the heating, ventilation and cooling (HVAC) system for building No. 2105 at the Yuma Proving Ground (R4, tab 12 at 2). The task order had a period of performance of October 1, 2015-October 31, 2016 (R4, tab 12 at 3). MAC contends that the government “took possession, occupancy and beneficial use” of the contract work in December 2016, and that the “HVAC Upgrade to Building No. 2105 went into continuous operation” on December 30, 2016 (compl. ¶¶ 32-33). On October 31, 2019, MAC sent the contracting officer a letter regarding the HVAC project that “request[ed] a determination that it has achieved substantial completion of the project as of January 1, 2017” (R4, tab 46 at 2).

On December 23, 2019, MAC submitted what it characterized as a certified claim to the contracting officer “seeking final determination that it has achieved Substantial Completion of [the Task Order] as of January 1, 2017” (R4, tab 50 at 3). MAC asserted in the document that, “the Government took possession and occupancy of MAC’s Contract Work and began utilizing the space for its intended purpose,” on January 1, 2017 (*id.*). MAC further alleged it had “experienced significant, compensable delay in closing out the [task order]” and cited Federal Acquisition Regulation (FAR) 52.236.11, USE AND POSSESSION PRIOR TO COMPLETION (APR 1984) (*id.*). MAC stated that “[t]he compensable delays and additional work will be the subject of a forthcoming and separate claim” (*id.*).

The government did not respond to MAC’s purported claim document and MAC appealed to the Board on the basis of a deemed denial. On May 11, 2020, the Board docketed MAC’s appeal of its purported claim as ASBCA No. 62503. (Bd. corr. ltr. dtd. May 11, 2020) On June 4, 2020, the Board docketed MAC’s appeal relating to its Contractor Performance Assessment Rating (CPAR), ASBCA No. 62558, and its appeal asserting entitlement to \$28,308.02 and four days of delay, relating to requests for information 166 and 166A, ASBCA No. 62559 (Bd. corr. ltr. dtd. June 4, 2020). On July 6, 2020, MAC filed a consolidated complaint for ASBCA Nos. 62503, 62558, and 65559. The complaint’s statement of facts included similar allegations to those allegations in the December 23, 2019 purported claim. (Compl. ¶¶ 45-47)

With regard to ASBCA No. 62503, MAC’s complaint asserts that, “MAC Electric explained that it had experienced significant, compensable delay in closing out the Contract due to the Government’s unwillingness to provide the contractually-specified punch list and its directives to perform extra-contractual services for which it then refused to issue a modification to the Contract” (compl. ¶ 46). As with its claim, MAC asserted in its complaint that: “[t]hese compensable delays will be part of a separate claim and request for a Contracting’s [sic] final decision” (compl. at 9, n.2).

Subsequent to the events detailed above, MAC filed a fourth appeal with the Board, seeking \$332,767.50 pertaining to its payment application No. 22A and which was docketed as ASBCA No. 62611 (Bd. corr. ltr. dtd. July 22, 2020). Additionally, MAC states in its opposition to the pending motion, that it filed a fifth claim with the contracting officer on July 20, 2020, in the amount of \$486,943.81 for compensable delays and interference by the government relating to MAC's allegations regarding substantial completion at issue in ASBCA No. 62503 (app. resp. at 4). That claim is not currently before the Board.

## DECISION

### I. Standard of Review

MAC bears the burden of proving the Board's subject matter jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988); *United Healthcare Partners, Inc.*, ASBCA No. 58123, 13 BCA ¶ 35,277 at 173,156. Pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-09, a contractor may, "within 90 days from the date of receipt of a contracting officer's decision" under 41 U.S.C. § 7103 appeal the decision to an agency board. 41 U.S.C. § 7104(a). Our reviewing court, the Federal Circuit, has held that CDA jurisdiction requires "both a valid claim and a contracting officer's final decision on that claim." *M. Maropakos Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (citing *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996)).

### II. MAC's Claim For Determination Of The Date Of Substantial Completion Is, In Reality, A Monetary Claim Lacking A Sum Certain

A claim is 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 the contract" FAR 2.101. The government moves to dismiss MAC's appeal in ASBCA No. 62503 asserting that MAC's purported claim for determination of the date of substantial performance is, in reality, a monetary claim, and that the Board must dismiss the appeal because MAC has not asserted a sum certain (gov't mot. at 3). MAC opposes the government's motion, and alleges that it is asserting a claim for "other relief" relating to the contract (app. resp. at 5-6). We hold that MAC is asserting a monetary claim mischaracterized as a claim for contract interpretation when it requests a determination of the date of substantial performance.

MAC is correct that, under certain circumstances, the Board possesses jurisdiction to entertain non-monetary claims for contract interpretation (app. resp. at 5-6). However, MAC's brief does not address the Court of Appeals for the Federal

Circuit's holding in *Securiforce International America, LLC v. United States*, 879 F.3d 1354 (Fed. Cir. 2018). In *Securiforce* the Federal Circuit explained that “[i]f ‘the only significant consequence’ of the declaratory relief sought ‘would be that [the plaintiff] would obtain monetary damages from the federal government,’ the claim is in essence a monetary one.” *Securiforce*, 879 F.3d at 1360 (quoting *Brazos Elec. Power Coop., Inc. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998)). Here, the only “significant consequence” of the Board determining the date of substantial completion would be to permit MAC to use that determination in a delay claim seeking monetary damages. Thus, MAC’s claim is “in essence a monetary one.” *Securiforce*, 879 F.3d at 1360.

The Board does possess jurisdiction to entertain non-monetary claims; however, there must be a “significant consequence” other than the recovery of money. For example, in *Garrett v. General Elec. Co.*, 987 F.2d 747 (Fed. Cir. 1993), the Federal Circuit held that the CDA provides jurisdiction to entertain non-monetary claims for contract interpretation. In that case, the contract interpretation could relieve the contractor from its obligation to perform, and this would have been a “significant consequence” of the relief sought that was not monetary in nature. *Id.* at 749. In *Securiforce*, the government issued a partial termination for convenience and then terminated the contractor for default. The contractor filed its initial complaint in the Court of Federal Claims to challenge the termination for default and then filed a claim with the contracting officer challenging the termination for convenience. *Securiforce*, 879 F.3d at 1358-59. Thus, at the time *Securiforce* filed its claim, it had already been terminated for default and it could not obtain any relief other than money damages because it was no longer performing on the contract. *See also, Greenland Contractors I/S*, ASBCA Nos. 61113, 61248, 19-1 BCA ¶ 37,259 at 181,332; *Parsons Government Services, Inc.*, ASBCA No. 62113, 20-1 BCA ¶ 37,586 at 182,510-11. In a similar (though not binding on us) case, the Civilian Board of Contract Appeals held in *Duke University v. Dept. of Health and Human Services*, CBCA No. 5992, 18-1 BCA ¶ 37,023, that the contractor had “already incurred costs associated with its contract interpretation dispute, and it could have quantified those costs and stated them in a sum certain in a claim to the contracting officer.” *Duke*, 18-1 BCA ¶ 37,023 at 180,291. The Civilian Board explained that a “ruling in *Duke*’s favor would not result in *Duke* avoiding costs, but instead would be used only to entitle *Duke* to monetary relief in a separate proceeding. In such circumstances, it is clear that *Duke* has an uncertified and unquantified monetary claim.” *Id.*

In this appeal, MAC alleged in its claim that it had incurred compensable delay costs and performed additional work (R4, tab 50 at 3). MAC could have quantified those costs, and asserted them in a sum certain claim to the contracting officer. In fact, MAC subsequently quantified the costs and has asserted them in a claim that is now pending before the contracting officer. Moreover, determination of the date of substantial completion would not allow MAC to avoid costs, as in *Garrett v. General Electric*. Instead, it is clear that MAC has an unquantified monetary claim. In fact, MAC recognized in its claim that “[t]he compensable delays and additional work will

be the subject of a forthcoming and separate claim” (*id.*), and in its complaint that “[t]hese compensable delays will be part of a separate claim and request for a Contracting’s [sic] final decision” (compl. at 9, n.2). Thus, MAC itself clearly recognized the link between its request for determination of the date of substantial completion and a future monetary claim. MAC is actually asserting a monetary claim and has not asserted a sum certain, thus, the Board is without jurisdiction to entertain ASBCA No. 62503. *Maropakis*, 609 F.3d at 1327.

Having found that MAC’s claim is, in fact, a monetary claim without a sum certain, we address MAC’s other arguments. These arguments attempt to demonstrate jurisdiction by looking to MAC’s other claims. As jurisdiction must be established based on the claim submitted to the contracting officer, these arguments must fail. *Montage, Inc.*, ASBCA No. 56796, 09-2 BCA ¶ 34,293 at 169,414 (“whether the Board has jurisdiction is determined by the adequacy or sufficiency of the submission to the contracting officer, and not by the information in the notice of appeal or complaint submitted to the Board.”) (citation omitted). MAC asserts that the determination of the date of substantial completion is relevant to its appeal of its CPARS rating (ASBCA No. 62558) (app. resp. at 7), that the Board will need to determine the date of substantial completion in reviewing the CPARS claim even if the appeal is dismissed (app. resp. at 8-9), and that the lack of a sum certain is “moot” because MAC has submitted a claim to the contracting officer for its delay costs that asserts a sum certain (app. resp. at 9). Each of these arguments improperly seeks to base jurisdiction on other claims, including a claim that is not even before the Board. As noted above, the Board’s jurisdiction must be established in the claim submitted to the contracting officer. MAC’s final argument, that the government would not be prejudiced by denying the motion to dismiss because all of MAC’s claims will be consolidated before the Board, is simply irrelevant. There must be a valid claim and a contracting officer’s decision on that claim (or a deemed denial) for the Board to possess jurisdiction. *Maropakis*, 609 F.3d at 1327. Here, MAC’s failure to state a sum certain in its submission to the contracting officer means that there is not a valid claim. The Board cannot exercise jurisdiction simply because the government would not be prejudiced.

CONCLUSION

For the reasons stated above, the government's motion to dismiss appeal ASBCA No. 62503 for lack of jurisdiction is granted. The stay in appeals ASBCA Nos. 62558, 62559, and 62611 is lifted. MAC is directed to file a revised amended complaint within 30 days of the date of this decision. Further proceedings should follow the timing of the Board's rules.

Dated: December 18, 2020



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DAVID D'ALESSANDRIS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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RICHARD SHACKLEFORD  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



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OWEN C. WILSON  
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. 62503, Appeal of MAC Electric Inc., rendered in conformance with the Board's Charter.

Dated: December 18, 2020



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PAULLA K. GATES-LEWIS  
Recorder, Armed Services  
Board of Contract Appeals