



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: February 22, 2016

CBCA 4428

DEKATRON CORPORATION,

Appellant,

v.

DEPARTMENT OF LABOR,

Respondent.

Ralph C. Thomas, III of Baker, Cronogue, Tolle & Werfel, LLP, McLean, VA, counsel for Appellant.

David R. Koepfel and Colin W. O'Sullivan, Office of the Solicitor, Department of Labor, Washington, DC, counsel for Respondent.

Before Board Judges **POLLACK**, **KULLBERG**, and **WALTERS**.

KULLBERG, Board Judge.

Respondent, the Department of Labor (DOL), has moved to dismiss this appeal on the grounds that (1) appellant, DekaTron Corporation (DekaTron), failed to give the contracting officer (CO) adequate notice of its claim; (2) DekaTron has presented a new claim in its complaint; and (3) there was no contract between DOL and DekaTron during the period relevant to DekaTron's claim. DekaTron opposes the motion. For the reasons stated below, the Board denies the motion.

Facts

On September 22, 2010, DOL awarded to DekaTron contract DOLJ109630970 (contract), an indefinite delivery indefinite quantity contract (IDIQ), for “Departmental E-Budgeting System (DEBS) technical support services to the Office of the Assistant Secretary for Administration and Management (OASAM) Departmental Budget Center.” The contract provided for a base year and four option years. The first option year would begin on September 23, 2011, and end on September 22, 2012, and the succeeding option years would commence on the twenty-third of September and end on the twenty-second of September of each of the following years.

The contract set forth in full text Federal Acquisition Regulation (FAR) clause 48 CFR 52.217-9 (2009) (FAR 52.217-9), Option to Extend the Term of the Contract, which stated the following:

- (a) The Government may extend the term of this contract by written notice to the Contractor within 30 days; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.
- (b) If the Government exercises this option, the extended contract shall be considered to include this option clause.
- (c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 60 months.

Additionally, the contract incorporated in full text FAR 52.216-18, Ordering, which stated the following:

- (a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders will be issued anytime post award.
- (b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task order and this contract, the contract shall control.

(c) If mailed, a delivery order or task order is considered “issued” when the Government deposits the order in the mail. Orders may be issued orally, by facsimile, or by electronic commerce methods only if authorized in the Schedule.

On September 7, 2011, DOL issued modification 0001, which exercised the option for performance of the contract from September 23, 2011, through September 22, 2012. That modification stated in pertinent part, “The purpose of this modification is to Exercise Option Period 1 of the contract that runs from 09/23/2011-09/22/2012.” Both the CO and DekaTron executed the modification.

On September 18, 2012, DOL sent to DekaTron a letter that stated the following in pertinent part:

The purpose of this letter is to inform [DekaTron] Corporation of the Government’s intent to exercise Option Year 2 Period of Performance September 23, 2012 to September 22, 2013, in accordance with FAR clause 52.217-9 – Option to Extend the Term of the Contract (MAR 2000) and the Clauses Incorporated by Reference section of the contract. This notice does not commit the Government to exercise Option Year 2, nor does it obligate funds against the reference[d] contract.

....

If the Option is exercised by the Government, it will be accomplished via a bilateral modification. The modification will specifically identify the Option period of performance and contract amount.

DekaTron acknowledged receipt of the letter on that same date.

On September 24, 2012, DOL and DekaTron executed modification 0002, with an effective date of September 23, 2012. The modification stated, in pertinent part, “The purpose of this modification is to exercise the Government’s bilateral right to exercise an Option in accordance with (IAW) the contract’s clause FAR 52.217-9 – Option to Extend Term of the Contract.” DOL then issued on September 28, 2012, two task orders, DOLB129633991 and DOLB129634128, for DEBS services.

By letter dated September 19, 2013, DekaTron submitted to the CO its certified claim that demanded payment in the amount of \$602,000. DekaTron contended that its claim arose from improper withholdings from invoices during the period from April to July 2013.

Additionally, DekaTron alleged that DOL had impeded its work under the contract, and listed various causes of action that included bad faith, delay of work, breach of implied covenant of good faith and fair dealing, breach of duty to cooperate and not hinder performance, and constructive change.

The CO's decision dated February 27, 2014, asserted that DekaTron's claim did not "contain adequate notice of the basis and amount of the claim." The CO stated the following:

First, the invoice amounts stated in DekaTron's chart do not total the claimed amount of \$602,000 but total \$1,236,103.10—a discrepancy that is not explained by DekaTron's submission. Second, the selective e-mail correspondence from the Contracting Officer Representative ("COR") that DekaTron appended to its claim provides no further insight as to how DekaTron arrived at its \$602,000 figure. Rather, that correspondence details in part the COR's good faith efforts in helping DekaTron resolve various issues with its invoices, such as outstanding deliverables. It does not reveal the basis for DekaTron's \$602,000 disputed amount.

Third, DekaTron did not submit actual invoices to substantiate its claim, resulting in an overly burdensome, imprecise, and inefficient process. In other words, a meaningful review of DekaTron's submission would require that I attempt to cobble together DekaTron's own claim from cost, billing or other accounting information and various contemporaneous correspondence, including multiple iterations of DekaTron's invoices, to discern the basis of its \$602,000 amount.

....

Most importantly, by my calculation and based on a detailed review of DekaTron's underlying invoices, [DOL] in fact rejected less than \$260,000 from DekaTron's invoices for the period April, May, June, and July 2013—a far cry from \$602,000 that DekaTron asserts DOL withheld.

By letter dated May 29, 2014, DekaTron submitted its second certified claim in the amount of \$602,000. Also, DekaTron responded to the CO's February 27, 2014, decision and stated the following:

First of all, you state that the total invoice amounts stated in DekaTron's chart "do not equal the claimed amount of \$602,000, but total \$1,236,103.10." This

is not a “discrepancy” as you suggest. Our position is that DekaTron submitted the total sum of \$1,236,103.10 in invoices submitted to you. Since this was a firm fixed price contract, such invoiced amounts on the chart represent the 1/12 of the total contract value at the time of invoice. DekaTron alleges that of the total (\$1,236,103.10) amount of invoices submitted, a total amount of \$602,000 was not paid.

On October 10, 2014, the CO issued a second decision that again denied DekaTron’s claim. The CO contended that DekaTron had still failed to show how it computed its claim, and the concerns raised in the CO’s first decision had not been addressed in DekaTron’s second claim letter.

DekaTron filed a timely appeal of the CO’s decision with the Board. In paragraph fifteen of its complaint, DekaTron stated the following:

During the period of the contract, DekaTron submitted, or attempted to submit \$3,080,739.00 owed under the task orders for services performed, but only \$2,442,572.00 was paid to DekaTron by DOL, leaving a difference to be paid of \$638,000.00. DekaTron is claiming \$602,000 of that amount in violation of the Federal Acquisition Regulation (“FAR”).

DOL subsequently filed its request to dismiss this appeal.

Discussion

DOL requests that the Board dismiss this appeal without prejudice for lack of subject matter jurisdiction because “(1) DekaTron did not provide the [CO] with adequate notice of the basis for its claim; and (2) DekaTron is urging on appeal a ‘new’ claim to this Board that was not presented to the CO for decision.” Alternatively, DOL argues that dismissal with prejudice for failure to state a claim is warranted because “the underlying [IDIQ contract] expired on September 22, 2012, as a result of which there is no express or implied-in-fact contract underpinning DekaTron’s claims, merely an implied-in-law relationship at best.” Additionally, DOL argues the following:

Under the Competition in Contracting Act, 41 U.S.C. § 3304 et seq. (“CICA”), the Department as a whole lacked the authority to enter into a sole-source contractual relationship with DekaTron after its underlying IDIQ Contract lapsed on September 22, 2012, unless it can be said to have awarded the Task Orders as “sole source” or noncompetitive contracts, fully justified and approved by high-level officials. No such justification and approval exists in

this case. As a result, any alleged contract post-dating September 23, 2012, is “plainly illegal,” a “nullity and void ab initio.”

DekaTron opposes DOL’s request for dismissal and argues that it submitted a certified claim in the amount of \$602,000 to the CO, and it has not submitted a new claim in its complaint. Additionally, DekaTron argues that modification 0002 properly extended the performance period of its contract with DOL.

The Board addresses, first, the issue of subject matter jurisdiction as it relates to DekaTron’s claim. “Subject matter jurisdiction is a threshold matter involving a tribunal’s ‘power to hear a case,’ and a tribunal must dismiss a case over which it lacks jurisdiction.” *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,969 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)). The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), requires that a contractor submit a claim in writing to the CO for a decision. *Id.* § 7103(a). Claims in excess of \$100,000 shall be certified. *Id.* § 7103(b)(1). A CO’s decision “on a ‘claim’ is a prerequisite for Board jurisdiction.” *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc). No specific format is required for a claim under the CDA, and it is only necessary “that the contractor submit 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.” *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) (quoting *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)).

DOL contends that DekaTron did not give the CO adequate notice of its claim because “the claimed quantum was internally inconsistent and so lacking in specificity, supporting data, and/or rational explanation that there was effectively no ‘claim.’” This Board has recognized that “the jurisdictional validity of a claim is determined at the time of submission to the contracting officer and the accuracy of the sum certain amount claimed goes to the merits of the claim, not to its validity as a claim.” *ASP Denver, LLC v. General Services Administration*, CBCA 2618, 12-1 BCA ¶ 35,007, at 172,041 (citing *Computer Services Corp.*, ASBCA 56165, et al., 10-2 BCA ¶ 34,572; *MACH II*, ASBCA 56630, 10-1 BCA ¶ 34,357). “[T]he contractor need not include a detailed breakdown of costs” and “may supply adequate notice of the basis and amount of the claim without accounting for each cost component.” *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). DekaTron has met the requirement of submitting a certified claim for a sum certain in the amount of \$602,000. Additionally, DekaTron has alleged that its claim is for those amounts invoiced but not paid. In its motion, DOL argues that supporting documentation for DekaTron’s claim shows a total of \$1,236,103.10 instead of \$602,000, and the amount DOL actually withheld was only \$260,000. Neither contention is persuasive as a ground for dismissal. In deciding

DOL's motion to dismiss, the Board is not required to determine the merits of DekaTron's claim.

As a second ground for dismissal for lack of subject matter jurisdiction, DOL, citing DekaTron's complaint, contends that "DekaTron is 'claiming \$602,000 of [\$638,167.13],' related to the collective nature of all of the problems, changes and directives under the Task Orders over the entire period of performance—from September 2012 to September 2013." This Board has recognized the following:

"A new claim is one that does not arise from the same set of operative facts as the claim submitted to the contracting officer." *Hawkins & Powers Aviation, Inc. v. United States*, 46 Fed. Cl. 238, 243 (2000). "[S]o long as the essential nature and operative facts of the claim remain unchanged, the Board has jurisdiction to consider . . . increased/modified amounts of damages first raised in pleadings" *Whiting-Turner/A.L. Johnson Joint Venture v. General Services Administration*, GSBCA 15401, 02-1 BCA ¶ 31,708 at 156,622-23 (quoting *American Consulting Services, Inc.*, ASBCA 52923, 00-2 BCA ¶ 31,084, at 153,485). Updates to a claim which do not change the nature of the claim, its basic underlying facts, or the theory of recovery are allowed. *McDonnell Douglas Services, Inc.*, ASBCA 45556, 94-3 BCA ¶ 27,234, at 135,706-07.

New South Associates v. Department of Agriculture, CBCA 848, 08-1 BCA ¶ 33,785, at 167,211. "This Board's review of a challenge to a CO's final decision is *de novo* . . . [and] not a review limited to an administrative record developed before the CO." *McAllen Hospitals, LP*, 14-1 BCA at 174,976 n.10 (citation omitted).

DekaTron's complaint did not present a new claim to the Board. The complaint did not change the amount of the claim, and the complaint alleged that the claim was for amounts withheld from invoices. To the extent that the complaint differed from the claim, the complaint only alleged that such withholdings may have arisen over twelve months instead of four months, and such an allegation was not a new claim because it did not present a "materially different factual or legal theory." See *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015).

In the alternative, DOL argues that the Board must dismiss this appeal with prejudice because modification 0002 was executed after the contract expired on September 22, 2012, and no contract existed with DekaTron after that date. This Board has recognized that its "subject matter jurisdiction under the CDA 'applies to any express or implied contract . . . made by an executive agency for – (1) the procurement of property, other than real property

in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property.” *Omni Pinnacle, L.L.C. v. Department of Agriculture*, CBCA 2452, 12-2 BCA ¶ 35,118, at 172,440 (quoting 41 U.S.C. § 7102(a)). Generally, the FAR defines “a ‘contract’ [as] . . . ‘a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them.’” *Id.* at 172,441 (quoting FAR 2.101). It is well established that “a plaintiff need only allege the existence of a contract to establish the Board’s jurisdiction under the CDA ‘relative to’ an express or implied contract with an executive agency.” *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011). In applying that rule, this Board has recognized that when the Government moves to dismiss an appeal on the ground that a contract did not exist, the Board will deny such a motion when appellant has alleged the existence of a contract, and the question of whether a contract did exist will “be addressed on a fully developed record after [appellant] has had an opportunity to conduct discovery with respect to whether the alleged contract would qualify as a CDA procurement.” *Omni Pinnacle, L.L.C.*, 12-1 BCA at 172,442.

DekaTron has alleged the existence of a contract with DOL, and it is not necessary at this stage of the proceedings for the Board to determine whether a contract between DOL and DekaTron existed in light of that representation. The issue of whether modification 0002 extended the term of the contract is a matter to be determined on the merits, and DOL’s argument that the contract had expired is insufficient to show that modification 0002 did not extend the performance period of the contract. *See SecTek, Inc. v. Department of Homeland Security*, CBCA 1095, 09-1 BCA ¶ 34,137, at 168,771 (“suggestion that the bilateral agreements entered into by the parties have no effect because they are denominated as modifications to an expired contract asks us to elevate form over substance”).

In the alternative, DOL argues that any contract that resulted from the execution of modification 0002 was in violation of CICA and, therefore, void ab initio. The jurisdiction of this Board, however, is under the CDA, and the Board “lack[s] jurisdiction over allegations of irregularities in the selection process and misuse of IDIQ contracts.” *IMS Engineers-Architects, P.C.*, ASBCA 53471, 06-1 BCA ¶ 33,231, at 164,672. “These issues are reserved for other fora.” *Id.* Additionally, “[w]e do not have jurisdiction over bid protests because bid protests, by definition, involve disputes between the Government and disappointed bidders. *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685, at 166,765. DOL argues that a decision by the Comptroller General, *Washington National Arena Limited Partnership*, 65 Comp. Gen. 25 (1985), sustained a protest when a contract was extended by a modification after the option period expired. Such an argument is of no avail because this appeal concerns a CDA claim and not a protest, and it is not within the authority of this Board to decide whether DOL violated CICA. As discussed above, it is only necessary that DekaTron allege the existence

of a contract with DOL in order for this Board to have jurisdiction in this appeal under the CDA, and DekaTron has met that requirement.

Decision

The Government's motion to dismiss is **DENIED**.

H. CHUCK KULLBERG
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

RICHARD C. WALTERS
Board Judge