



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF
CAN BE GRANTED: September 10, 2009

CBCA 1369

DUFFY INCORPORATED,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Keith L. Baker of Barton, Baker, Thomas & Tolle, LLP, McLean, VA, counsel for Appellant.

Ronald Mulach, Office of the General Counsel, Department of Agriculture, Milwaukee, WI, counsel for Respondent.

Before Board Judges **VERGILIO**, **GOODMAN**, and **DRUMMOND**.

DRUMMOND, Board Judge.

The Department of Agriculture, Forest Service (FS or Government) requests that the Board dismiss the appeal filed by Duffy Incorporated (DI) for lack of jurisdiction. The FS argues that dismissal is warranted because DI failed to submit a legally sufficient and timely claim under the contract. Furthermore, the FS argues that DI's initial submission did not ripen into a claim after the contract closure period. DI opposes dismissal. For the reasons discussed below, we dismiss this appeal for failure to state a claim for which relief can be granted.

Findings of Fact¹

On January 31, 2005, the FS awarded to DI contract 03-152645 (contract) for the sale of timber. Appeal File, Exhibit 32. The contract, known as the Guffey Blowdown CE Re-Add Salvage timber sale, covered the eastern region of the Allegheny National Forest in Pennsylvania. *Id.* Under the terms of the contract, DI agreed to pay the FS \$881,396.11 to harvest an estimated 1938 hundred cubic feet (CCF) of timber. *Id.*, Exhibit 75. The contract divided DI's purchases into seven payment units. *Id.*

The contract included provision BT2.43, "Adjustment for Quantity Errors," which provides that:

An estimated quantity shown . . . shall be revised by correcting identified errors made in determining estimated quantity that resulted in a change in total timber sale quantity of at least 10 percent or \$1,000 in value, whichever is less, when an incorrect estimated quantity is caused by computer malfunction or an error in calculations, area determination, or computer input.

Appeal File, Exhibit 32.

Contract provision BT9.2, entitled "Disputes," provides a definition for the term "claim." A "claim" for purposes of this contract is defined as: "a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract." Appeal File, Exhibit 32. This provision further dictates that "[a] Claim by the Purchaser shall be made in writing and submitted to Contracting Officer [CO] for decision." *Id.*

The contract also contains provision BT9.21, entitled "Time Limits for Submission of Claim," which, *inter alia*, states:

Failure by Purchaser to submit a Claim within established time limit shall relinquish the United States from any and all obligations whatsoever arising under the contract or portions thereof. Purchaser shall file such claim within the following time limits:

. . . .

¹ The Board considers these facts to be undisputed.

(d) . . . Purchaser must file any Claim not later than 60 days after receipt of Contracting Officer written notification that timber sale is closed.

Appeal File, Exhibit 32.

The closure provision in the contract provides that the “contracting officer shall give appropriate written notice to Purchaser when Purchaser has complied with terms of this contract.” Appeal File, Exhibit 32, ¶ BT9.6.

DI began harvesting operations in July 2005. Appeal File, Exhibit 75, ¶ 31. By letter dated July 19, 2007, the FS advised DI that the contract would terminate on September 30, 2007. *Id.*, Exhibit 63. While all harvesting was timely completed by September 30, 2007, the contract termination date was extended thirty days to October 31, 2007, to allow DI time to finalize cleanup and complete certain restoration work. *Id.*, Exhibit 64.

On November 15, 2007, DI wrote to the CO, stating:

Duffy Inc. is requesting a change in the contract for Guffey Blowdown, Block 6 & 7, based on Part BT2.43 of the contract. Being that the quantity is different of more than \$1,000 and or 10%.

We will send the information regarding what we feel is the balance due.

Appeal File Exhibit, 65. The letter made no reference to a claim, nor did it request a CO’s decision. The letter also did not reference or include any attachments.

On December 18, 2007, the CO wrote to DI concerning its letter dated November 15, 2007. Appeal File, Exhibit 67. The CO’s letter stated:

This is in regard to your letter dated November 15, 2007 received by this office on November 19, 2007

The letter was submitted seeking a change in the contract Payment Units 6 and 7 based on standard provision BT2.43 You feel that the quantity is different by more than \$1,000 and or 10% and indicated that more information would be forthcoming. As of this date I have yet to receive any such documentation.

Once we have the documentation, we will promptly review it and determine whether there is sufficient information to support a change under BT2.43.

On February 19, 2008, the CO sent DI a certified letter, which stated:

All contractual requirements under Contract #03-152645 . . . have been successfully discharged and all required payments made. The contract has been closed.

Any claim relating to this contract, as defined under Standard Provision BT9.21(d) - Time Limits for Submission of Claim, must be filed by Purchaser no later than 60 days after receipt of this notice. Failure to submit a claim within this time limit shall relinquish the United States from any and all obligations whatsoever arising under said contract or portions thereof.

Appeal File, Exhibit 68. DI received this letter on February 21, 2008, thus establishing April 22, 2008, as the last date for filing a claim under the contract. *Id.* The CO's letter included a Timber Sale Closure Audit Check list signed by the CO on February 13, 2008, which certified that all contractual work had been completed and that there were no "outstanding cases on the sale and that all disputes are resolved, i.e. trespass, claims, appeals." *Id.* The record includes no claims submitted by DI to the CO between the period of February 19 to May 18, 2008.

On May 19, 2008, DI wrote to the CO requesting \$41,901.75 pursuant to provision BT2.43. Appeal File, Exhibit 70. The letter was described in the reference portion as a "Contract 03-152645 Part BT2.43 Claim." *Id.* In the letter DI asserted that it was entitled to the requested amount due to a volume shortfall for payment units 6 and 7. *Id.* DI identified the shortfall as:

The total quantity of black cherry saw timber stated in Schedule AT4c of the contract for Blocks 6 and 7 is 61.0 CCF. The total CCF of red cherry saw timber harvested from Blocks 6 & 7 was 25.2 CCF Consequently the volume shortfall of red cherry saw timber was 35.8 CCF. The price stated in the contract for black cherry saw timber is \$1170.44 per CCF. Thus the dollar value of the shortfall on Blocks 6 & 7, based on the total CCF of the logs is $35.8 \text{ CCF} \times \$1170.44/\text{CCF} = \$41,901.75$.

Id. Although DI's May 19, 2008, letter represented that the November 15, 2007, letter included an attachment addressing the amount of the claim, there is no evidence in the record to corroborate this representation as being true.

By letter dated September 11, 2008, the CO declined to consider DI's claim dated May 19, 2008. Appeal File, Exhibit 75. The CO stated:

While the Purchaser generally expressed a future desire or intent to seek relief under the contract in 2007 . . . [DI] never made good on . . . [its] intentions by filing a claim within the time period allowed under the contract. The record indicates that the Purchaser failed to file a viable claim in a timely manner according to the contract, despite having received the required and unequivocal written notification of contract closure and notice as to the timeline for submission. The November 15, 2007 letter was not a valid claim in that it failed to request a payment for a sum certain and provided no documentation or support for relief. The May 19, 2008 claim was not submitted within the required 60-day period following formal notification of contract closure to the Purchaser according to standard provision BT9.21 - Time Limits for Submission of Claim, paragraph (d), and thus is not a timely claim. The contract does not allow filing a bifurcated claim.

The claim submitted by Duffy Inc. is hereby rejected as being untimely.

Id. By letter dated September 30, 2008, DI appealed the CO's decision.

Discussion

The FS, in its answer, moves to dismiss this appeal for lack of jurisdiction based upon DI's alleged failure to submit a proper claim within the time period required by the contract. DI argues that its letter dated November 15, 2007, satisfies the requisites for a proper claim as it was submitted to the CO in writing and put the CO on notice that DI was requesting an adjustment for payment units 6 and 7 pursuant to provision BT9.21 of the contract. DI also maintains that its letter dated May 19, 2008, is not time-barred under the terms of the contract because it relates back to and supplements the November 15 letter. The FS considers DI's letter dated May 19, 2008, as the only claim under the contract; however, the submission was made after the period for such a claim had expired. The FS observes that, under the contract, DI has no basis for relief. The FS's motion is more akin to one for failure to state a claim upon which relief may be granted than a motion to dismiss for lack of jurisdiction.

Section 6(a) of the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613 (2006), provides that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." *Id.* § 605(a). The FS maintains that the November 15, 2007, letter was not a valid claim because it did not state a sum certain. The FS relies upon the Federal Acquisition Regulation (FAR) definition of claim. 48 CFR 2.101 (2007). However, the FS has not demonstrated that the FAR applies. "The FAR applies to all acquisitions as defined in part 2 of the FAR, except where expressly excluded." *Id.* 1.104. Part 2 defines "acquisition" as "the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use

of the Federal Government through purchase or lease” *Id.* 2.101. The record does not establish that the FAR applies to this contract, as the FS did not use appropriated funds to acquire supplies or services; rather, the FS sold timber to DI. *See Thomas Creek Lumber & Log Co.*, AGBCA 2005-132-1, 06-1 BCA ¶ 33,283, at 165,011; *Jeff Holland Logging*, AGBCA 93-211-1, 94-3 BCA ¶ 27,213, at 135,629 n.1.

The contract contains clauses which define and address the submission of a claim. The contract requires that “[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.” The contract further defines a claim as “a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.” Appeal File, Exhibit 32, ¶ BT9.2. The Board will utilize the terms and conditions agreed upon in the contract.

November 15, 2007, letter

In this case, DI’s concern about the shortfall on two units, expressed in its letter dated November 15, 2007, does not rise to the level of a claim. This submission itself does not indicate that it is a claim. It also provides no request for a decision from the CO. Moreover, the statement that “[w]e will send the information regarding what we feel is the balance due” demonstrates that DI did not view this submission as a claim; that is, this statement merely indicates DI’s intent to submit information and possibly a claim in the future. Furthermore, the subsequent correspondence by the CO to DI in December 2007 indicates that the CO did not consider the November 15 submission to be a claim. The CO makes no mention of the word claim when addressing DI’s submission. The December 2007 letter was followed by the CO’s letter dated February 21, 2008, which, in part, stated that “all required payments [had been] made . . . [and that] [a]ny claim relating to this contract . . . must be filed by Purchaser no later than 60 days after receipt of this notice.” The letter stated further that “[f]ailure to submit a claim within this time limit shall relinquish the United States from any and all obligations whatsoever arising under said contract or portions thereof.” DI did nothing to disabuse the CO of his position that a claim had not been submitted.

Moreover, the November 15 letter does not include a demand for payment. The statement that DI is seeking a change in the contract for payment units 6 and 7, based on provision BT2.43, because it considers the quantity is different by more than \$1,000 or 10% does not constitute a written demand for the payment of money or put the CO on notice as to the amount sought by DI. At best, the November 15 submission indicates DI’s intent to pursue negotiations concerning an alleged shortfall in the future. Furthermore, the subsequent actions and inactions by DI serve only to confirm that a claim was not provided for a CO’s decision until the letter dated May 19, 2008. It was not until the May 19 letter that DI stated that it was submitting a claim and made an express demand for the payment of money for the

alleged shortfall. Without the information DI provided in that letter, i.e., that it recovered only 25.2 CCF red cherry saw timber of the estimated 61.0 CCF on blocks 6 and 7, making the alleged shortfall 35.8 CCF and the total value of the shortfall \$41,901.75, there is no way the CO could have determined the nature of alleged error or rendered a final decision on whether DI was entitled to a price adjustment. Under these circumstances, we do not consider the November 15 submission to be a claim.

In its response to the Government's request for dismissal, DI asserts that "Appellant's November 15, 2007, letter requesting a contract price adjustment for Payment Units 5 and 6 was virtually identical to a previous letter that Appellant submitted on December 7, 2006." Appellant's Response to Government's Request for Dismissal (Appellant's Response) at 4. DI further asserts that "Respondent has conceded that the contracting officer referred to that letter as a claim." *Id.* DI concludes that there is no reason why the December 7 letter was a "claim," but the November 15 letter was not a "claim." *Id.* at 5. DI's conclusion lacks support in the record. A claim does not result from every contractor-Government dispute. The record includes no evidence that there existed an arrangement between the parties which would put the CO on notice that the November 15 letter constituted a written claim for relief or put the CO on notice that DI intended the November 15 letter to be a claim. Under the contract, the submission in December 2006 is not a factor in determining whether the submission on November 15, 2007, constituted a claim.

May 19, 2008, letter

The undisputed evidence in the record reveals that DI received notice of the contract closure on February 21, 2008, thus establishing April 22, 2008, as the last date for filing a claim under the contract. Appeal File, Exhibit 68.

The consequences of failing to comply with time limitation provisions are explicit in the contract language: "Failure by Purchaser to submit a Claim within established time limit shall relinquish the United States from any and all obligations whatsoever arising under the contract or portions thereof."

DI contends that any lateness in filing the May 19 claim is cured because it relates back to a claim requesting a change in payment units 6 and 7 in a letter to the CO dated November 15, 2007. Appellant's Response at 6. The contract made no provision for DI to bifurcate a claim in such a manner. Therefore, the Board finds DI's May 19 claim is time-barred.

Without a valid claim under the contract, an appeal from a decision characterized as a CO's decision confers no jurisdiction on the Board. The CO properly determined that the "claim" was time barred; there is no further relief or review available from this Board. *Thomas Creek*, 06-1 BCA at 165,013.

Decision

Respondent's motion is granted, and the claim is **DISMISSED FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.**

JEROME M. DRUMMOND
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

ALLAN H. GOODMAN
Board Judge

