



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 23, 2009

CBCA 1295

EBS/PPG CONTRACTING,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Stephen A. Hess of Sherman & Howard L.L.C., Colorado Springs, CO, counsel for Appellant.

William Robinson, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **DRUMMOND**, **STEEL**, and **SHERIDAN**.

SHERIDAN, Board Judge.

Respondent, the Department of Justice, on behalf of its Bureau of Prisons (BOP) requests that the Board dismiss the appeal filed by appellant, EBS/PPG Contracting (EBS), for lack of jurisdiction pursuant to Board Rule 8 (48 CFR 6101.8 (2008)). The BOP argues that dismissal is warranted because EBS did not submit a legally sufficient claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613 (2006). Furthermore, respondent avers that EBS's termination for convenience settlement proposals did not ripen into CDA claims because EBS did not allow sufficient time for negotiations to reach an impasse to rightfully demand a final decision from the contracting officer.

EBS asserts that the Board has jurisdiction under the letter and spirit of the law and that its termination for convenience settlement proposals constitute proper claims. Appellant

argues that the BOP's failure to properly act on any or all of the proposals constitutes a contracting officer's deemed denial of its claims.

The issues to be decided are whether appellant submitted a proper claim to the contracting officer and whether it was entitled to a final decision pursuant to the CDA. For the reasons stated below, the Board finds that the termination for convenience proposal EBS submitted on November 29, 2007, ripened into a CDA claim on January 16, 2008. However, due to appellant's submission of reformatted and recalculated settlement proposals, and its subsequent withdrawal of each of those proposals, the contracting officer was left without a claim on which to render a final decision. Without a proper claim pending before the contracting officer, the Board is without jurisdiction to decide this appeal. The Government's motion to dismiss is granted.

Background

On March 20, 2007, the BOP issued a request for proposals (RFP) for the installation of a sprinkler system in a special housing unit at the Englewood Federal Correctional Institution located in Englewood, Colorado. The RFP was set aside for appellant, EBS, a service-disabled veteran-owned small business. The BOP awarded EBS the \$86,900 contract on May 7, 2007, and a pre-construction meeting was held on May 9, 2007. During a meeting held on June 21, 2007, a disagreement arose between the parties regarding the scope of work under the contract. Throughout June and July 2007, the parties attempted to negotiate the disputed scope of work. After it became apparent that the parties would not be able to resolve the scope issue, on August 24, 2007, EBS requested a contracting officer's final decision addressing whether the BOP intended to terminate the contract for its convenience or suspend the work until the scope question was resolved and a notice to proceed was issued. On September 20, 2007, EBS received notice that the BOP had terminated the contract for its convenience.

On October 22, 2007, EBS forwarded to the BOP a termination for convenience settlement proposal in the amount of \$9900 from its subcontractor, Sedlak Electric Company (Sedlak), and informed the BOP that it would be submitting its own prime contractor settlement proposal shortly. EBS submitted its settlement proposal on November 29, 2007, in the amount of \$27,772.87. The settlement proposal contained the following language:

If a final settlement proposal is not accepted within 60 calendar days from [the] date of [this] submittal and/or goes into a formal dispute we reserve the right to withdraw this settlement proposal and submit a new settlement proposal to include other costs such as: administrative overhead, G&A, additional other [direct costs] (insurance, etc.), additional labor cost[s], interest, standby costs, etc. in accordance with Part 31 of the FAR [Federal

Acquisition Regulation]. These costs do not include preparation of the settlement proposal. The preparation of the settlement proposal costs will be submitted after settlement is reached since it may require legal representation, accounting, etc.

In early November, the contracting officer requested breakdowns and greater detail, and in response, EBS submitted additional documentation on December 5, 2007. Having received no response to its October 22, November 29, or December 5 submissions, EBS wrote to the BOP on January 16, 2008, implicitly requesting a final decision on its November 29 proposal and stating that “[i]f we have not received a final decision by February 1, 2008, we will consider your final decision as a denial which we intend to appeal.” EBS took the position that the BOP had “ample and reasonable time to respond to [it] with either a final decision and payment or other final decision.”

A contract specialist at the BOP responded to EBS on January 25, 2008, indicating that the previous contracting officer no longer worked for the BOP. EBS was informed that the contract specialist and the BOP Field Acquisitions Office were reviewing the proposals, and “[c]urrently the Government finds your costs to be very excessive.” The contract specialist informed EBS: “I will contact you soon and explain what is needed from you and your subcontractor.”

Four days later, on January 29, 2008, the BOP informed EBS that another contracting officer would be reviewing its settlement proposal. The third contracting officer told EBS to disregard previous correspondence from the BOP and informed EBS that the method it had used to submit its initial settlement proposal was not “suitable” for a termination settlement. EBS was told to resubmit its termination for convenience proposal in a new format. Using the BOP-prescribed format, through its attorney, EBS resubmitted the termination for convenience proposal on February 28, 2008, this time for \$38,239.37.¹

On May 21, 2008, EBS’s attorney wrote the contracting officer: “Nearly three months have passed since I submitted a settlement proposal on behalf of [EBS], and more than two weeks since I called to inquire as to the status. Please consider the settlement proposal withdrawn.” While purportedly withdrawing the settlement proposal, in a later paragraph

¹ The BOP format required that prime and subcontractor settlement proposals be submitted together. EBS’s resubmission proposed essentially the same settlement as earlier, except that Sedlak’s proposal was increased by \$586.50 to reflect travel and copying expenses. The cover letter for the submission indicated an ongoing desire for a final decision, closing with: “Please consider this proposal as our final offer, and we look forward to a response.”

the attorney went on to propose settlement for ten cents less than the February 28 settlement proposal, plus interest, claim preparation, and legal costs:

Although [EBS] is prepared to submit its total costs in a new offer, it would prefer to end this matter quickly, and to get paid sooner rather than later. Accordingly, [EBS] will accept \$38,239.27 plus interest and reasonable legal and accounting costs for its claim preparation so long as this offer is accepted in writing, delivered to me (e-mail is fine) no later than the close of business on May 31, 2008. If the offer is not accepted in writing by that date, it shall be considered withdrawn and no longer susceptible to acceptance by the Government.

Not having received any communication from the contracting officer since its letter of May 21, and believing “that the proposal has been rejected finally and that there [would] be no further settlement discussions with the Government,” on July 23, 2008, EBS appealed to the Civilian Board of Contract Appeals the BOP’s failure to issue a final decision on the termination for convenience settlement proposal. The matter was docketed by the Board as CBCA 1295.

Discussion

Interpreting the language of the CDA and the FAR implementing that Act, the Federal Circuit has established a step-by-step analysis for determining whether a CDA claim exists for jurisdictional purposes. *See Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc). The CDA provides that “[a]ll claims by a contracting officer against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 605(a). If the request for a contract adjustment is nonroutine, the requirements are that the claim “be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain.” 60 F.3d at 1575. There is no requirement that a dispute exists at the time of submission of a nonroutine request for it to be considered a claim. *Id.* at 1576-78.²

Finding that “it is difficult to conceive of a less routine demand for payment than one which is submitted when the government terminates a contract for its convenience,” the Federal Circuit in *James M. Ellett Construction Co. v. United States* concluded that “a

² The *Reflectone* decision overruled *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991), and other long-standing cases which stood for the proposition that there must be a preexisting dispute for a submission to be a claim. *Reflectone*, 60 F.3d at 1575-80.

written assertion seeking, as a matter of right under the termination for convenience clause, the payment of [a sum certain] plus interest, costs, and attorneys fees . . . met the FAR's requirements of a valid claim." 93 F.3d 1537, 1543 (Fed. Cir. 1996). Citing *Reflectone*, the Court noted, however, that not every nonroutine submission constitutes a claim, and that "the CDA also requires that all claims be submitted to the contracting officer for a decision." *Id.* at 1543 (citing *Reflectone*, 60 F.3d at 1577 n.7; 41 U.S.C. § 605(a); 48 CFR 33.206). The Court went on to clarify:

When a contractor submits a termination settlement proposal, it is for the purpose of a negotiation, not for a contracting officer's decision. A settlement proposal is just that: a proposal Consequently, while Ellett's termination settlement proposal met the FAR's definition of a claim, at the time of submission it was not a claim because it was not submitted to the contracting officer for a decision.

Id. at 1543-44.

While the CDA requires that a claim be submitted to the contracting officer for a decision, an explicit request for a final decision is not required "as long as what the contractor desires by its submissions is a final decision, that prong of the CDA claim test is met." *Ellett*, 93 F.3d at 1543 (citations omitted). Thus, a "request for a final decision can be implied from the text of the submission." *Id.* The Board must determine whether appellant explicitly or implicitly requested a contracting officer's final decision.

In its motion to dismiss for lack of jurisdiction, the BOP writes that "an implicit request for final decision must . . . be clear from its language and circumstances, and appellant cannot demand appeal of a decision it never affirmatively requested." Contrary to the Government's assessment, the request for a contracting officer's final decision need not be affirmative. "As long as the basic requirements of the CDA are met, and the contracting officer knows the bases of the claims and the final amounts sought, the 'request' for a final decision may be inferred from the circumstances of the case." *Mega Construction Co. v. United States*, 29 Fed. Cl. 396, 443 (1993). Thus, the request for a decision may be either explicit or implied. *See generally Transamerica Insurance Corp. v. United States*, 973 F.2d 1572 (Fed. Cir. 1992) (finding that although the contractor did not use the explicit words, "we request a final decision from the contracting officer," it was obvious that the contractor wanted a final decision on its equitable adjustment claim).

Language expressly requesting a contracting officer's final decision did not appear in EBS's initial or subsequently submitted termination for convenience settlement proposals. However, the Board also looks to whether EBS's submissions and the circumstances

surrounding them imply a desire for a contracting officer's final decision. As previously stated by this Board:

Whether a communication is deemed a claim sufficient to invoke the Board's jurisdiction depends on an evaluation of the relevant contract language, the facts of the case, and the regulations implementing the CDA. The intent of the communication governs, and we must use a common sense analysis to determine whether the contractor communicated its desire for a contracting officer's decision.

Guardian Environmental Services, Inc. v. Environmental Protection Agency, CBCA 994, 08-2 BCA ¶ 33,938, at 167,946 (citations omitted).

Respondent maintains that there is no claim ripe for review by the Board because EBS's submissions expressed an intent to negotiate and did not demand a contracting officer's final decision. While the October 22 and November 29 convenience settlement proposals were not claims when they were originally submitted, we find that a contracting officer's final decision was implicitly requested by EBS in its letter of January 16, 2008, where it wrote: "[i]f we have not received a final decision by February 1, 2008, we will consider your final decision . . . [to be] a denial which we intend to appeal." As of January 16, the contractor effectively put the Government on notice that as far as it was concerned, the Government's opportunity to negotiate a settlement would expire on February 1 and a final decision should be issued by that date, or the contractor would treat the matter as a deemed denial by the contracting officer. The Board finds that by the January 16 letter, EBS placed a claim before the contracting officer in the amount of \$27,772.87.³ As the claim was for less than \$100,000, the contracting officer was obligated to render a decision within sixty days. 41 U.S.C. § 605(c)(1).

That the claim submission may not have been fully supported, or that the Government may have desired additional documentation, did not relieve the contracting officer of her statutory duty to choose between issuing a timely decision, or, if over \$100,000, forecasting the date for a decision. *Westclox Military Products*, ASBCA 25592, 81-2 BCA ¶ 15,270.⁴

³ The January 16 letter only referenced EBS's prime contractor proposal dated November 29, so the Board limits its finding to the \$27,772.87 amount specified in that proposal.

⁴ If a contracting officer considers information submitted by a contractor to be insufficient, the contracting officer's proper course is to deny the claim for lack of proof, not to decline to issue a decision. *Scott Timber Co.*, IBCA 3771-97, 99-1 BCA ¶ 30,184 (1998);

EBS's willingness to negotiate here did not impair what had already ripened into a claim requiring a decision. *See generally Transamerica*. The BOP's repeated requests for more information in the face of EBS's clear desire to have a final decision on its claim did not negate the requirement for a final decision. The contractor here had the right to decide when it wished to move its termination for convenience settlement proposals into the claim phase. EBS effectively took the step from proposal to claim with its January 16 letter.

If that had been all that occurred here, we would find that we had jurisdiction over this matter. However, events followed which lead the Board to conclude that it lacks the jurisdiction to decide this matter. At the BOP's request, EBS submitted a newly formatted proposal on February 28, 2009, for \$38,239.37, essentially combining the October 22 and November 29 proposals.⁵ Then, on May 21, after the Government failed to respond to the proposal, EBS withdrew the February 28 proposal. Inexplicably, in that same letter, EBS proposed a settlement offer of \$38,239.27, adding a demand for interest, claim preparation, and legal costs. EBS placed a condition on its offer, that the BOP accept the offer by May 31, 2009, or it would be withdrawn. The Government did not accept the offer, ergo, the offer was withdrawn.

It is apparent that in its effort to get some sort of action from the BOP on any of its settlement proposals EBS became caught up in the nuances associated with CDA jurisdictional practice. Nevertheless, we find that by the time EBS was finished resubmitting and withdrawing its settlement proposals, it had neither a proposal nor a claim before the contracting officer.

The jurisdictional prerequisites for an appeal to this Board require that the contractor submit a proper claim requesting a decision by the contracting officer, and that the contracting officer either issue a decision on the claim or fail to issue a final decision within the required time period. *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 852 (Fed. Cir. 2004). To proceed in this matter, EBS should take steps to submit a proper claim to the contracting officer and wait the appropriate amount of time for a final decision on that claim. If it does not receive a timely decision, or is unwilling to accept the contracting officer's decision, the contractor is free to exercise its right of appeal.

John T. Jones Construction Co., ASBCA 48303, 96-1 BCA ¶ 27,997 (1995) (holding that if the claim is sufficient, the contracting officer's desire for more information does not change the "claim" status of the contractor's submission).

⁵ The newly formatted February 28 proposal sought an additional \$586.50 for subcontractor travel and copying settlement expenses.

Decision

Respondent's motion to dismiss for lack of jurisdiction is granted. The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

PATRICIA J. SHERIDAN
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

CANDIDA S. STEEL
Board Judge