



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: January 20, 2015

CBCA 3946

TRIAD MECHANICAL, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Steven Zwierzynski of Seifer, Yeats, Zwierzynski & Gragg, LLP, Portland, OR, counsel for Appellant.

Felipe Moncarz, Office of the Solicitor, Department of the Interior, Boise, ID, counsel for Respondent.

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

KULLBERG, Board Judge.

Appellant, Triad Mechanical, Inc. (Triad), brought this appeal after the contracting officer denied its certified claim in the amount of \$161,871. In its complaint, Triad gave notice that it would need to correct the amount of its claim. Respondent, Department of the Interior (DOI), then moved to dismiss the appeal for failure to state a claim that was a “sum certain.” Triad subsequently filed an amended complaint that reduced its claim. In a supplement to its motion, DOI reiterated that the appeal should be dismissed because Triad

now asserts a claim different from that previously certified. For the reasons stated below, the Board denies DOI's motion.

Facts

On July 24, 2012, the Bureau of Reclamation (BOR), an agency within DOI, awarded to Triad contract R12PC10023, Pinto Dam headworks modifications, Columbia basin project, Washington. Shortly after beginning work, Triad informed BOR that it had encountered a differing site condition related to work on the east concrete apron. On February 20, 2014, Triad submitted to the contracting officer (CO) its certified claim in the amount of \$161,871 for the cost of pouring an additional seventy-nine cubic yards of concrete. The CO denied Triad's claim in her decision dated May 29, 2014. Triad appealed the CO's decision to the Board on June 27, 2014. Triad's notice of appeal, which was also its complaint, stated the following:

Appellant claims \$161,871, which is based upon its unit price for concrete. Appellant acknowledges that its unit price for the slab on grade concrete includes certain costs that should not be included in the portion of concrete used for fill, and will reduce its claim accordingly in an amount to be proven at trial. Appellant also claims attorney fees and cost per [Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2012)].

DOI filed on September 24, 2014, its motion to dismiss Triad's appeal for failure to state a claim. The basis for DOI's motion was that Triad's notice of appeal and complaint asserted a claim for an amount that was not a "sum certain." Appellant filed, at the direction of the Board, its amended complaint that stated the following:

Appellant claims \$161,871, which is based upon its unit price for concrete. Appellant acknowledges that its unit price for the slab on grade concrete includes certain costs of \$22,917.90 that should not be included in the portion of concrete used for fill, and will reduce its claim to \$138,953.10. Appellant also claims attorney fees and cost per EAJA.

Appellant filed its response in opposition to DOI's motion to dismiss, which argued that the Board's jurisdiction in this appeal is not affected by the fact that appellant is asserting a claim for an amount less than the amount certified in its claim that was submitted to the CO. DOI then filed its reply that supplemented its motion to dismiss and argued that Triad's pleadings did not assert the same claim that was presented to the CO. Additionally, DOI argued that

“it would be unfair . . . to potentially award EAJA costs and fees based on a claim that was never submitted or certified to the Agency’s contracting officer.” Respondent’s Reply at 6.

Discussion

The issue presented by DOI’s motion to dismiss is whether this Board lacks jurisdiction to hear this appeal because Triad reduced the amount of its certified claim in its pleadings after filing its appeal. 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)). 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). Triad submitted a certified claim to the CO, and the denial of that claim has been appealed to the Board. The requirements for the Board’s jurisdiction in this appeal have been met.

DOI errs in its contention that the Board has no jurisdiction in this appeal because Triad reduced the amount of its claim in its pleadings. This Board has recognized that “[u]pdates to a claim which do not change the nature of the claim, its basic underlying facts, or the theory of recovery are allowed.” *New South Associates v. Department of Agriculture*, CBCA 848, 08-1 BCA ¶ 33,785, at 167,211 (citing *McDonnell Douglas Services, Inc.*, ASBCA 45556, 94-3 BCA ¶ 27,234, at 135,706-07). The “reduction in the sum certain amounts sought . . . does not render the [claim] invalid for jurisdictional purposes.” *Computer Sciences Corp.*, 10-2 BCA at 170,455. In its amended complaint, Triad reduced the amount of its claim to \$138,953, but it did so without altering the nature of its claim, which is the cost of an additional seventy-nine cubic yards of concrete due to a differing site condition. Triad has acknowledged that it has only removed from its claim an amount, \$22,917.90, that should not have been included. Triad’s reduction of the amount of its claim does not affect the Board’s jurisdiction.

DOI contends that it would be unfair for the Board to consider Triad's reduced claim because Triad also seeks to recover attorney fees under EAJA. With regard to an application for attorney fees under EAJA, Rule 30¹ of the Board's rules states the following:

A party seeking an award may submit an application no later than 30 calendar days after a final disposition in the underlying appeal. The Board's decision becomes final (for purposes of Rule 30) when it is not appealed to the United States Court of Appeals for the Federal Circuit within the time permitted for appeal or, if the decision is appealed, when the time for petitioning the Supreme Court for certiorari has expired. An application for fees or other expenses may not be filed before the Board's decision is final; a request for fees or other expenses made before the Board's decision is final does not constitute an application.

It is well established that an application for recovery of attorney fees under EAJA that is submitted to the Board before final adjudication of an appeal will be deemed premature. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 836-C(50), 07-2 BCA ¶ 33,705, at 166,885; *Travel Centre v. General Services Administration*, GSBCA 15132-C(14057), 00-1 BCA ¶ 30,631, at 151,221 (1999). There has been no final adjudication in this appeal, and, accordingly, Triad's request for legal expenses under EAJA is premature. Triad's inclusion of this request in its pleadings complaint does not affect, however, the Board's jurisdiction over the appeal.

Decision

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

H. CHUCK KULLBERG
Board Judge

¹ 48 CFR 6101.30 (2013).

We concur:

CANDIDA S. STEEL
Board Judge

RICHARD C. WALTERS
Board Judge