UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS GRANTED IN PART: May 12, 2015

CBCA 3835, 3836, 3837

VET TECH, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Brian H. Leinhauser of The MacMain Law Group LLC, Malvern, PA, counsel for Appellant.

Jennifer Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA, counsel for Respondent.

Before Board Judges **SOMERS**, **POLLACK**, and **SHERIDAN**.

SHERIDAN, Board Judge.

Respondent, the Department of Veterans Affairs (VA), has filed a motion to dismiss certain elements of the consolidated appeals for lack of subject matter jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). For the reasons below, we grant the motion in part.

Background

The VA awarded appellant, Vet Tech, LLC (Vet Tech), contract VA 244-C-1640 in late December 2010 for phase 2 of heating, ventilation, and air conditioning (HVAC)

upgrades at the Wilmington VA Medical Center in Wilmington, Delaware. Vet Tech submitted a series of change order proposals (COPs) for the performance of alleged constructive changes under the contract. An initial claim for several of these COPs (COPs 2, 7, 8, 9, 10, 11, and 12), in the total claim amount of $461,790.28, was submitted by Vet Tech to the VA contracting officer by letter dated July 31, 2013. That initial claim was rejected by an email message dated August 5, 2013, from the contracting officer, who advised that the claim lacked a certification, as required by the CDA for claims in excess of $100,000, and who requested that the claim be resubmitted. Subsequently, Vet Tech submitted COP-related claims on a more piecemeal basis.

COP s7 and 10, which related to alleged deficiencies in the Government's design of certain valves and valve configurations, were combined into a single claim totaling $55,429.97 that Vet Tech submitted to the contracting officer by letter dated December 10, 2013. The contracting officer, by letter of February 10, 2014, issued a final decision to Vet Tech, denying that claim in its entirety. That decision was appealed to the Board in April 2014 and the appeal was docketed as CBCA 3835.

Vet Tech, by letters dated December 6, 2013, also resubmitted claims for COPs 2, 11 and 12, all of which relate to alleged additional costs for integration of controls. The first of these letters (later denoted as Vet Tech claim no. 2) addressed COP 2 and COP 11 and sought a total claim amount of $74,727.31. The claim submission for COP 12 (later denoted as Vet Tech claim no. 3) sought $61,278.14. By letter dated February 6, 2014, the contracting officer addressed both of these December 6 claims and rejected them, noting that the two claims were based on "common or a related set of operative facts" and were considered by him to be the same claim. Since the total of the two claims exceeded $100,000, the letter stated, "proper certification" under the CDA was required. Subsequently, by letter dated March 12, 2014, Vet Tech resubmitted its claims for control integration in the total amount of $96,773.19. The letter indicates that, as a result of discussions between Vet Tech and its subcontractor, Modern Controls, Vet Tech decided to delete its claim for COP 2 and to reduce the dollar amount for COP 12:

> Vet Tech is officially revising and combining originally submitted claim no. 2 & 3 as totaling $96,773.19 - See attached.
>
> Vet Tech originally submitted claim no. 2 (COP 2 & COP 11) totaling $74,727.31 and Claim No. 3 (COP 12) totaling $61,278.14. After further discussions/correspondences with Modern Controls in reference to the COP's submitted as claims [it] was agreed to delete COP no. 2 and adjust/reduce the cost for COP 12.

This combined claim was denied in its entirety by the contracting officer, by final decision letter dated April 1, 2014. Vet Tech appealed the contracting officer's final decision and the appeal was docketed as CBCA 3836.

On December 10, 2013, Vet Tech resubmitted a claim for COP 9, relating to alleged costs incurred for having to work during off hours in the amount of $49,882.28. By final decision letter dated February 10, 2014, the contracting officer denied the claim in its entirety. Vet Tech appealed that decision in April 2014, and the appeal was docketed as CBCA 3837.

The Board consolidated CBCA 3835, 3836, and 3837, by Board order dated April 30, 2014. In accordance with that order, appellant filed a consolidated complaint for the appeals. The consolidated complaint identifies COPs 7 and 10 as elements of CBCA 3835. As part of its description of the claim, the consolidated complaint includes paragraph 16, which seems to allude to a claim for $44,743.34:

> In addition, the air handler/humidifier valves were also incorrect on the mechanical drawings and therefore, [thirty-one] air handler/humidifier valves had to be ordered and replaced costing of [sic] $44,743.34.

The derivation of the $44,743.34 figure is not provided. Nevertheless, a review of the documents in the appeal file indicates that the subtotals for COP 7s and 10 were $39,448.97 and $15,981, respectively; that the breakdown for COP 7 includes $27,748.72 as "subcontractor proposal" for "mechanical and HVAC"; and a letter dated January 15, 2013, to Vet Tech from Allstates Mechanical Ltd. provides a proposal totaling $27,748.72 for the replacement of thirty-one air handler/humidifier valves.

The consolidated complaint also identifies as elements of CBCA 3836 two COPs – COPs 9 and 14. The latter COP was never combined with COP 9, but was submitted to the contracting officer as a separate claim by letter dated October 16, 2014. That claim was in the amount of $79,803.46 and related to "additional cost for work [in] occupied rooms." The consolidated complaint, in connection with its description of CBCA 3836, seems to assert at paragraph 19 a claim for such work in a somewhat higher amount:

> Appellant was also required to perform work in occupied rooms, resulting in the employees being required to demobilize and remobilize office areas as directed by the VA due to scheduling changes resulting in a cost of $91,570.81.

The consolidated complaint identifies as elements of CBCA 3837 not only COPs 11 and 12, but also COP 2, notwithstanding its previous statement that it was deleting its claim for that COP.

Respondent's answer to the consolidated complaint contained affirmative defenses that raised jurisdictional concerns. The Board suggested that those concerns be presented in the form of a motion to dismiss for lack of jurisdiction. Respondent subsequently filed such a motion, and the parties both have submitted briefs in support of their respective positions regarding the extent of the Board's jurisdiction under the CDA here.

Discussion

Essential to this Board's jurisdiction under the CDA is the submission in writing of a "claim" to an agency contracting officer, one that, if monetary in nature, is stated in a "sum certain" (with the further requirement, under 41 U.S.C. § 7103(b)(1), that the claim be certified if it exceeds $100,000 in amount), and one that seeks a final decision on the claim, either expressly or implicitly. In this regard, our decision in *Red Gold, Inc. v. Department of Agriculture*, CBCA 2259, 12-1 BCA ¶ 34,921 (2011), is particularly instructive:

> The Contract Disputes Act . . . provides that "each claim by a contractor against the Federal Government relating to a contract [shall be in writing and] shall be submitted to the contracting officer for a decision." *Id*. § 7103(a)(l). The Federal Acquisition Regulation (FAR) defines "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract." 48 CFR 52.233-1(c) (2009). Interpreting the CDA and FAR, the Federal Circuit has established that for jurisdictional purposes, a CDA claim exists for a nonroutine contract adjustment if there is: (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc). To comply with the sum certain requirement of a valid claim, amounts must be stated with some specificity. *G & R Service Co. v. General Services Administration*, CBCA 1876, 10-2 BCA ¶ 34,506 (a "not to exceed" amount is undefined and does not qualify as a sum certain); *Sandoval Plumbing Repair, Inc.*, ASBCA 54640, 05-2 BCA ¶ 133,072 (modifying phrases like "no less than" do not qualify as a sum certain).
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> While no particular wording is required for a claim, it must contain "a clear and unequivocal statement that gives the contracting officer adequate

> notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States,* 811 F.2d 586, 592 (Fed. Cir. 1987). Additionally, the claim must indicate to the contracting officer that the contractor is requesting a final decision. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987); *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996). The request may be either explicit or implicit, so long as what the contractor desires by its submissions is a final decision. *Id*. To make this determination, the Board looks at the totality of the correspondence, including the submissions and the circumstances surrounding them. *See EBS/PPG Contracting v. Department of Justice*, CBCA 1295, 09-2 BCA ¶ 34,208; *Guardian Environmental Services, Inc. v. Environmental Protection Agency*, CBCA 994, 08-2 BCA ¶ 33,938. The intent of the communication governs, and a common sense analysis must be used to determine whether the contractor communicated his desire for a contracting officer's decision. *Guardian Environmental Services, Inc.*, 08-2 BCA at 167,946.

Red Gold, 12-1 BCA at 171,721.

In the present case, respondent raises jurisdictional questions relating to COP 2 , which, as noted above, the consolidated complaint identifies as an element of CBCA 3837 (in addition to COPs 11 and 12). Respondent also challenges the inclusion of COP 14 as an element of CBCA 3836 (in addition to COP 9). More specifically, respondent contends that, as of the time the instant appeals were initiated, Vet Tech had never presented COP 2 or COP 14 to the contracting officer for decision under the CDA.

As for COP 2, while at one time it may have been before the contracting officer for consideration as part of a CDA claim, by the time the appeals were filed, it no longer was a claim item requiring a contracting officer decision. Indeed, it is clear that Vet Tech expressly withdrew COP 2 as a claim element. In this regard, contrary to appellant's assertion that COP 2 was submitted "as part of COP 11 in March of 2014," a letter from Vet Tech to the contracting officer dated March 12, 2014, which Vet Tech submitted as an exhibit to its opposition to the instant motion and which is part of the consolidated appeal file (Exhibit 55), indicates precisely the opposite. COP 2 was never part of COP 11. Rather, as stated in that letter, COPs 2 and 11 were originally submitted together as Vet Tech claim no. 2, but Vet Tech subsequently elected to remove COP 2 from that claim. Understandably, because COP 2 had been deleted, the contracting officer's final decision of April 1, 2014, when addressing the letter and the $96,773.19 combined claim that was presented, deals solely with COP 11 (the only COP remaining under Vet Tech's claim no. 2) and COP 12 (the one COP that was

the subject of Vet Tech's claim no. 3). COP 2 is not part of the claim before the Board. The Board does not possess jurisdiction over COP 2.

As for COP 14, it is clear from the documents provided to the Board that, when the appeals were filed in April 2014, COP 14 had never been the subject of a CDA claim and was not decided by the contracting officer. Indeed, it was presented for the first time as a claim to the contracting officer not by Vet Tech itself, but by Vet Tech's attorney in a letter dated October 16, 2014, two weeks before he filed the consolidated complaint and months after the appeals were docketed by the Board. Thus, COP 14 was incorrectly identified as an element of CBCA 3836 and, though it appropriately might be the subject of a separate appeal at some time in the future,[1] the Board currently has no jurisdiction over COP 14.

In its motion, respondent also argues that COPs 2 and 14 ought be dismissed since appellant purportedly "failed to provide a sum certain" for the two COPs. Because we find that we do not possess jurisdiction to hear Vet Tech's claims related to COP 2 and COP 14, due to the failure of Vet Tech to present them to the contracting officer, we need not address the sum certain argument.

Finally, respondent, as part of its motion, requests the dismissal of paragraph 16 of the consolidated complaint, arguing that the language seems to present a new claim not previously submitted to the contracting officer. Appellant states that paragraph 16 "relates" to COP 7 and COP 10, being pursued under CBCA 3835. It is apparent based on documents contained in the appeal file that paragraph 16's reference to the need to order and replace thirty-one air handler/humidifier valves is not a new and separate claim. It is integral to COP 7 and something already considered by the contracting officer. As such, paragraph 16 poses no jurisdictional difficulty under the CDA.

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1 Appellant, in its response to the instant motion, states: "Appellant has requested a decision on COP 14 and therefore, the CBCA can either dismiss these claims, only to have them refiled once the contracting officer makes a decision, or stay these proceedings pending the decision of the contracting officer." This assertion reflects a misunderstanding of CDA case precedent and of the Board's rules. The Board may determine, with or without the concurrence of the parties, for the sake of judicial economy, to stay proceedings, so as to incorporate an appeal from this new claim as part of the consolidated appeals. Dismissal of the appeals without prejudice (what we take appellant's statement regarding "dismiss these claims" to mean), however, could well pose jurisdictional problems of a different and far more difficult nature for appellant should it choose to dismiss and later attempt to "refile" the claims/appeals. *See Bonneville Associates, Limited Partnership v. Barram*, 165 F.3d 1360 (Fed. Cir. 1999); CBCA Rule 12, 48 CFR 6101.12 (2013).

Decision

Respondent's motion to dismiss claims related to COPs 2 and 14, including the allegations set forth in paragraph 19 of the consolidated complaint, is **GRANTED**. We decline to dismiss or strike the language of complaint paragraph 16. All other aspects of the appeals remain on the Board's docket.

PATRICIA J. SHERIDAN
Board Judge

We concur:

JERI K. SOMERS
Board Judge

HOWARD A. POLLACK
Board Judge