



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: December 3, 2015

CBCA 4975

MAGWOOD SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Heyward R. Manigault, President of Magwood Services, Inc., Campbell Hall, NY, appearing for Appellant.

Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC; and Nancy E. O'Connell, Office of Regional Counsel, General Services Administration, Boston, MA, counsel for Respondent.

Before Board Judges **VERGILIO**, **SHERIDAN**, and **KULLBERG**.

SHERIDAN, Board Judge.

Appellant, Magwood Services, Inc. (Magwood), filed an appeal with the Civilian Board of Contract Appeals asking the Board to direct the respondent, the General Services Administration (GSA), to accept a tripartite escrow agreement (TEA) as payment protection for performance of its contract. In response to a show cause order issued by the Board on September 17, 2015, Magwood sought to amend its notice of appeal to include recovery of \$6000 for various alleged costs associated with the contract. Because the Board lacks jurisdiction to consider the appeal, we grant GSA's motion to dismiss.

Findings of Fact

On May 13, 2015, GSA published a solicitation for the replacement of flooring at the International Avenue Land Port of Entry in Calais, Maine. On May 19, 2015, GSA amended the solicitation, requiring an offeror, if awarded the contract, to provide performance or payment protection. On May 30, 2015, Magwood responded to the solicitation with a proposal to perform the work. GSA accepted Magwood's proposal on July 31, 2015.

The contracting officer notified Magwood on September 2, 2015, that he had received a package containing a TEA, which was submitted as payment protection for Magwood's contract. The contracting officer informed Magwood that a TEA "was not one of the acceptable forms of payment protection listed" in the solicitation, and requested that Magwood supply either a payment bond or irrevocable letter of credit. Magwood responded on September 3, 2015, stating that Magwood "followed the direction on page fifteen" of the solicitation when securing payment protection, and "Magwood choose [sic] (ii) An Irrevocable Letter of Credit, #(f) Tripartite [escrow agreement]."

On September 9, 2015, the contracting officer wrote to Magwood, explaining the solicitation's section on payment protection:

An irrevocable letter of credit and a tripartite agreement are two separate and distinct forms of payment protection. The solicitation package authorized an irrevocable letter of credit as one of the acceptable forms of payment protection. The tripartite agreement was not listed as one of the acceptable methods of payment protection. Had the solicitation specified that an escrow agreement or a tripartite agreement was acceptable, then the provisions cited in paragraphs d. and f. would have applied. Since the solicitation did not authorize an escrow or tripartite agreement, they do not. Please see FAR [Federal Acquisition Regulation] 28.102-1(b) [48 CFR 28.102-1(b)(2014)] for further reference.

The contracting officer attached the text from FAR 28.102-1(b) following the letter.

Magwood responded on September 10, 2015, writing:

Magwood Services have [sic] reviewed your letter dated September 9, 2015 about the inability to use Tripartite Escrow Agreement[.] [I]t now appear [sic] that the payment protection send [sic] in the enclosed letter on 9/9/15 is from a foreign origin. . . . [T]he document does not appear in the original bid

document. TEA was issued and has been paid for. . . . [T]he suppliers and subcontractor [h]as [sic] been put on hold at this time. Magwood Services need [sic] to know as soon as possible if this is your Final [sic] word that the TEA is not acceptable on this contract.¹

On September 10, 2015, the contracting officer wrote again to Magwood, further explaining:

The FAR quotation that was sent in my email . . . was for background info only. It was merely intended as additional clarification for the payment protection clause FAR 52.228-13 found on page 15 of the solicitation. That clause is as prescribed by FAR 28.102-3(b). The FAR quotation that was sent yesterday was from FAR 28.102-1, the section preceding FAR 28.102-3(b). Page 15 of the solicitation authorized two methods of payment protection: payment bond or irrevocable letter of credit. A tripartite agreement was not authorized by the solicitation. In order to issue a notice to proceed, we will need payment protection in one of the two forms authorized by the solicitation to be submitted to our office.

Magwood also sent an email message to the contracting officer on September 10, 2015: “We need your final word on TEA as not an acceptable payment protection that was submitted to you.” The contracting officer reiterated his explanation that Magwood was required to submit either a payment bond or an irrevocable letter of credit because “[t]he tripartite escrow agreement . . . is not an acceptable form of payment protection for this project.”

Magwood filed its appeal with this Board, where the matter was docketed as CBCA 4975. The Board noticed potential jurisdictional deficits (i.e., neither an underlying claim by the government nor the contractor) and issued an order to show cause. The Board noted that there did not appear to be a claim submitted to the contracting officer for a final decision per the Contract Disputes Act (CDA), 41 U.S.C. § 7103 (2012), and the contractor did not request an amount in a sum certain from the contracting officer. Magwood responded that its correspondence with the contracting officer amounted to a claim for interpretation of the contract terms related to payment protection, which the contracting officer responded with a “final decision.” Additionally, Magwood sought to add monetary relief to its claim in the amount of \$6000.

¹ This letter, which was very garbled and lacked punctuation, was edited to make its content understandable.

GSA opposed Magwood's response to the show cause order and filed a motion to dismiss for lack of jurisdiction.

Discussion

For the Board to have jurisdiction over a dispute not involving a government claim, the CDA requires a contractor to submit a written claim to the contracting officer for a final decision. 41 U.S.C. § 7103(a). The CDA does not define "claim," so the Board looks to the definition provided in the FAR. *See ePlus Technology, Inc. v. Federal Communications Commission*, CBCA 2573, 12-2 BCA ¶ 35,114, at 172,434 (citing *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc)). The FAR defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 CFR 52.233-1(c). "The 'claim need not be submitted in any particular form or use any particular wording,' but 'must contain a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.'" *Corrections Corp. of America v. Department of Homeland Security*, CBCA 2647, 15-1 BCA ¶ 35,971, at 175,741-42 (citing *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010)).

In *Kevin J. Lemay v. General Services Administration*, GSBCA 16093, 03-2 BCA ¶ 32,345, one of our predecessor boards of contract appeals, explained how a board reviews claims for compliance with the CDA's requirements:

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.

Id. at 160,041 (internal citations omitted); *see also ePlus Technology*, 12-2 BCA at 172,434.

The correspondence sent by Magwood to the contracting officer does not satisfy the required elements of a CDA claim because the writings do not contain a demand or assertion seeking, as a matter of right, relief in the form of adjustment or interpretation of the contract terms or the payment of money in a sum certain. *See* 48 CFR 52.233-1(c). The correspondence is better characterized as a discussion of the contract terms.

Magwood's September 3, 2015, letter informed the contracting officer that it believed a TEA was, according to FAR 52.228-13, an irrevocable letter of credit. The contracting officer responded by explaining the difference between a TEA and an irrevocable letter of credit and asking Magwood to furnish an irrevocable letter of credit or a payment bond. Magwood's September 9, 2015, letter asked the contracting officer if his explanation of FAR 52.228-13 was final. The contracting officer reiterated his explanation of the Payment Protection clause. Magwood's September 10, 2015, email message asked whether GSA's previous letters explaining its position on the TEA was its "final word."

Magwood never asserted in its correspondence that the contract entitled it to use a TEA or demanded that the contracting officer accept a TEA as payment protection. Again, while a contractor is not required to use any particular form or wording to assert a valid claim, *M. Maropakis Carpentry*, 609 F.3d at 1327, the contractor's writing must "assert entitlement to the relief sought." *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1265 (Fed. Cir. 1999) (explaining that "the claim must be a demand for something due or believed to be due"). A thorough review of Magwood's letters reveals no statement that would give the contracting officer "adequate notice of the basis or amount of the claim." *M. Maropakis Carpentry*, 609 F.3d at 1327. Our analysis leads us to conclude that Magwood failed to submit a proper claim for interpretation or adjustment of the contract terms to the contracting officer prior to filing its appeal before this Board.

In response to the Board's show cause order, Magwood attempted to amend its notice of appeal to include recovery of \$6000. The CDA requires that monetary claims be submitted to the contracting officer in writing; the writing must contain a sum certain of the amount sought. *See Northrop Grumman Computing Systems, Inc., v. United States*, 709 F.3d 1107, 1112 (Fed. Cir. 2013) (citing *Reflectone*, 60 F.3d at 1575-76) ("[T]he FAR sets forth only three requirements of a non-routine 'claim' for money: that it be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain.") The Board cannot exercise jurisdiction over a claim that was never presented to the contracting officer for a final decision. *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,971 (citing *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 14-1 BCA ¶ 35,630, at 174,492 ("[T]he Board does not have jurisdiction over new claims that were not presented to the contracting officer.")). As we explained in *Ketchikan Indian Community v. Department of Health and Human Services*, CBCA 1053-ISDA, 13 BCA ¶ 35,436, "when a new claim is asserted that was not directly addressed in the appellant's original claim submission, the tribunal must examine whether the newly posed claim derives from the same operative facts, seeks essentially the same relief, and, in essence, merely asserts a new legal theory for the recovery originally sought." *Id.* at 173,808-09. Magwood never submitted a claim for monetary relief in a sum certain

to the contracting officer for a final decision. The claim for \$6000 is a new claim; therefore, we cannot exercise jurisdiction over it.

Decision

The Board lacks jurisdiction to consider Magwood's claim. GSA's motion is granted, and the appeal is **DISMISSED FOR LACK OF JURISDICTION**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

H. CHUCK KULLBERG
Board Judge