



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: January 14, 2016

CBCA 5064

PACIFIC COAST COMMUNITY SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Daniel C. McAuliffe of Witcomb Law, P.C., Denver, CO, counsel for Appellant.

Denise A. McLane, Office of the General Counsel, Department of Homeland Security, Philadelphia, PA, counsel for Respondent.

Before Judges **DANIELS** (Chairman), **HYATT**, and **SHERIDAN**.

SHERIDAN, Board Judge.

Appellant, Pacific Coast Community Services, Inc. (PCCS), filed an appeal with the Civilian Board of Contract Appeals asking the Board to award it \$71,592.96 for additional services that it alleges were provided under Department of Homeland Security (DHS) contract HSHQW9-13-C-0001. In response to a show cause order issued by the Board on November 19, 2015, DHS has moved for dismissal for lack of jurisdiction, while PCCS asserts that the appeal should not be dismissed. We grant DHS' motion to dismiss.

Findings of Fact

On September 5, 2012, appellant entered into contract HSHQW9-13-C-0001 to provide administrative support services to DHS' Federal Protective Service (FPS) "in accordance with the attached Performance Work Statement [PWS]." The PWS set forth a schedule of services by contract line item numbers (CLINs), quantities, items, unit prices, and amounts. The contract was for a base year, to run from October 1, 2012, through September 30, 2013 (fiscal year (FY) 2013), and for as many as four option years (FYs 2014 through 2016).

On May 7, 2015, Christopher T. Flynn, the President and Chief Executive Officer of PCCS, presented to the contracting officer a "white paper" setting forth PCCS' position about two disputes which appeared to be developing. PCCS asserted that the contract only required its contract employees to work a total of 1888 productive hours per month. FPS had earlier taken the position that a higher number of hours was required. Also, there was a disagreement as to the receptionist provided by PCCS "being available at all times," and PCCS explained its position on that issue.

On July 31, 2015, PCCS submitted to the contracting officer what it characterized as its "NOTICE OF CONTRACT DISPUTE AND NOTICE OF WRITTEN DEMAND . . . for the payment of money in a sum certain in accordance with Federal Acquisition Regulation [FAR] Subpart 52.233-1, 'Disputes.'" The letter stated:

The total amount of the claim is [sic] ranges from \$5000 to \$25,000 per contract year or to \$200,000 if the disputed contract is terminated by the Government. This claim is based on the current best available estimate as described in the attached Basis of PCCS Claim for Adjustment and may be revised. The Pro-forma Impact on Price per Contract Interpretation is attached for illustrative purposes as the CO [contracting officer] has stated Example 3 is the preference of the Government. PCCS is requesting a final decision on its claim, or written notice of when a decision will be made, within 60-days.

PCCS attached "Enclosure 1: Basis of PCCS Claim for Adjustment" to its July 31, 2015, submission. Enclosure 1 set forth the applicable contract period by year, beginning with the base year, and then proceeded to list the "claims" PCCS associated with each period.

For option year one, in enclosure one, appellant states its claims as:

Claim 1: Health & Welfare increase of \$0.10 was applied to 9440 hours (5 positions at 1888 hrs each) in lieu of 10400 hours of PCCS employee paid hours. FOY [for option year] 1 \$96 cumulative contract not computed.

Claim 2: Extraordinary legal costs pertaining to Government's direction to take adverse action of PCCS employee while employee with a disability was on disability leave. \$3500

For option year two, in enclosure one, appellant states its claims as:

Claim 1: Health & Welfare increase of \$0.21 was applied to 9440 hours (5 positions at 1888 hrs each) in lieu of 10400 hours of PCCS employee paid hours. FOY 1 \$297.64 cumulative contract not computed.

Claim 2: Contract Year Amount was computed based on 1888 hours not 1896 hours as prescribed on Enclosure 4 Worksheet Employees Tab and then utilized in computation on the Pricing Worksheet tab. FOY 2 \$1811.

Claim 3: Extraordinary legal costs pertaining to Government's position of not recognizing Enclosure 4 (Pricing Work Sheet), the dispute. [Cost] Undetermined.

Claim 4: Reclaiming amounts deducted from Firm Fix priced Contract at direction of CO.

For option year three, in enclosure one, appellant states its claims as: "Claim 1: Claim of lost opportunity proceeds to non-profit agency, PCCS. Estimated rounded [amount]: \$100,000."

The contracting officer responded to appellant's notice of written demand:

1. It appears that the subject dispute is a pre-emptive claim as the above referenced contract has not been terminated. In addition, it is the government's intent to exercise the next option period, period of performance of 10/1/2015 - 9/31/2016.

2. The subject dispute does not contain a sum certain in accordance with FAR 52.233-1, rather it contains a range of potential dollars.

....

Based on the above, it is determined that this dispute is not a valid claim in accordance with FAR 52.233-1.

As she did not consider appellant's notice to be a claim, the contracting officer did not provide the appeal language set forth in the contract's Disputes clause and in the FAR.

On November 10, 2015, appellant's attorney filed a notice of appeal at the Board and the matter was docketed as CBCA 5064. The notice of appeal stated:

The agency has been unreasonable with regard to the following contract administration issues:

- (i) Improper direction on employee work hours;
- (ii) Denial of any makeup time for late commute arrivals;
- (iii) Degraded annual performance appraisal by the contracting officer resulting from contract dispute and agency adverse employment action;
- (iv) Placing Pacific at risk by discharging Pacific employees;
- (v) Denial of other contract or added contracting opportunities because of the contract dispute;
- (vi) Working Pacific employees at a higher rated non-contracted position for an extended period of time without compensation;
- (vii) Changing of work scope with [sic] credible negotiations of fairness;
- (viii) Interference with the contractor in training adequate back up staff;
- (ix) Interference with the contractor by denying routine site visits to Pacific employee desks; and
- (x) Intimidating Pacific in an attempt to have Pacific discharge an employee.

. . . The estimate of the amount of money in controversy is approximately \$71,592.96. This amount is based upon the schedule of services in the subject contract that was delineated by quantity, unit, unit price and total amount. The agency has insisted that Pacific provide additional services and Pacific has been performing at the agency's newly adjusted schedule without a contract modification.

On November 19, 2015, the Board ordered the parties to show cause why this appeal should not be dismissed for lack of jurisdiction.

In response to the Board's order to show cause, respondent moves to dismiss the appeal for lack of jurisdiction, arguing that "appellant failed to request a sum certain in connection with its dispute." Appellant disagrees, asserting:

The appellant has genuine issues of contract interpretation, administration, and value it has not been able to resolve with the Government. Its dispute and

claim are not “pre-emptive” as the contracting officer believes. The appellant is trying to get the Government to understand that the Proposal Pricing Worksheet is the basis of the dollar value of the contract. The Government disagrees and therefore there are genuine contractual issues to be resolved by the Civilian Board.

Discussion

The Board derives its jurisdiction to hear and decide contract disputes between government contractors and civilian executive agencies from the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012) (CDA). 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)). The intent of the communication governs, and the Board must use a common sense analysis to determine whether the contractor communicated its desire for a contracting officer’s decision. *Kevin J. LeMay v. General Services Administration*, GSBCA 16093, 03-2 BCA ¶ 32,345, at 160,041; *see also ePlus Technology*, 12-2 BCA at 172,434.

We look to the contractor’s submissions made pre-appeal to the contracting officer to determine whether PCCS has filed a CDA claim. In this matter, PCCS’ submissions to the contracting officer failed to state a sum certain, and its allegations were confusing. It is clear from the May 7 and July 31 letters that PCCS had raised some contract interpretation issues with the FPS, but had not yet clearly distilled those issues into a claim seeking a sum certain. For what appears to be the primary issue, the number of hours a PCCS employee was required to work per month, PCCS failed to seek a sum certain.

The notice of appeal statement that the “estimate of the amount of money in controversy is approximately \$71,592.96” failed to clarify the matter and in any event this amount was not submitted to the contracting officer, a pre-appeal jurisdictional requirement under the CDA. Further, it is impossible to ascertain from the notice to which of the ten allegations the \$71,592.96 pertains. Various other issues were mentioned in correspondence but it is unclear whether appellant was attempting to pursue those issues through this appeal. In particular, it is not apparent what matters of contract interpretation the contractor wanted the contracting officer to decide.

It is incumbent upon a contractor to submit to the contracting officer a claim that contains a clear and unequivocal statement that gives adequate notice of the basis and amount of the claim. PCCS’ claim wholly failed to provide the contracting officer a clear statement of basis and amount of the claim. Therefore, PCCS’ appeal must be dismissed for lack of jurisdiction.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

PATRICIA J. SHERIDAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge