UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: March 13, 2017

CBCA 5632

FOXY CONSTRUCTION, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Donna L. Gunther of Foxy Construction, LLC, Las Vegas, NV, appearing for Appellant.

Heather R. Hinton-Taylor, Office of the General Counsel, Department of Agriculture, Golden, CO, counsel for Respondent.

Before Board Judges **HYATT**, **ZISCHKAU**, and **LESTER**.

LESTER, Board Judge.

On February 7, 2017, the Board received and docketed an appeal filed by appellant, Foxy Construction, LLC (FCL), from a contracting officer's decision dated December 8, 2016. In reviewing the materials attached to the notice of appeal, the Board became concerned about its jurisdiction to entertain this appeal and issued a show cause notice to which both FCL and the United States Forest Service (USFS) (an entity within the Department of Agriculture, the respondent in this appeal) have responded. Based upon our

review of those responses and the materials attached to them, we must dismiss this appeal for lack of jurisdiction.

Background

On July 8, 2015, the USFS awarded contract no. AG-0261-C-15-0008 to FCL for the relocation of a USFS bunkhouse and visitor center near Las Vegas, Nevada, with a total fixed contract price of $358,591.50. The period of performance was originally set as ninety calendar days after issuance of the notice to proceed, but with a completion date no later than September 30, 2015 (a period less than ninety days from the contract award date). Subsequently, the contract was modified to incorporate additional foundational and other work, increasing the contract price to $392,438.90. The USFS also extended the contract performance period several times, and the USFS has represented that the work required by the contract was completed on April 22, 2016.

FCL's First Monetary Request. On January 7, 2016, FCL's owner sent an email message to the USFS contracting officer and the contracting officer's representative (COR), asking them to "see the attached documentation regarding the issues leading to a possible back charge" and indicating that "[i]f you have any questions please give me a call." Attached to the email message was a letter on FCL letterhead, addressed to the "United States Dept of Agriculture – Forest Service," in which FCL stated that it was "asking to be compensated for delays and for having to work in unusual conditions" and asserting that, by the time the contract was awarded, it was already short of the ninety days that were anticipated for contract performance. It represented that it had attempted to expedite performance to complete the project before the winter months, but then appears to suggest that design submittals were improperly rejected, which apparently delayed the project into the winter months when weather issues made work on the project more difficult. It then stated that it was attaching what it called a "claim" and asked that the contracting officer and the COR "review and comment" on it, as follows:

> Attached is a copy of the claim. Note the claim is because [the original Government inspector] was injured and another inspector took over the project who didn't trust [the first inspector's] decisions. Please review and comment.

In the letter, FCL then stated that, "with a 70%-30% shared responsibility (70% Forest Service & 30% Foxy), the backcharge should only be $51,051.47." The attachments to the letter included a "shut down" cost calculation and a "loss of efficiency and productivity" cost calculation, which, added together, totaled $170,171.57. Thirty percent of $170,171.57 is $51,051.47, which matches the amount of the backcharge request in the letter. Nevertheless, also included in the attachments to the January 7 letter was an unsigned "Application And

Certificate For Payment" apparently seeking payment (in the "Current Payment Due" column) of $95,207.71. There was no claim certification accompanying the letter.

The USFS contracting officer sent an email message to FCL's owner on January 19, 2016, informing her that, "the way [the claim] is written, my only option is to deny it in its entirety" based upon "lack of detail and the fact that it is very hard to understand." She also indicated that "[i]t is not clear how much you are asking for" or "how you came to these figures," but she interpreted the letter as seeking payment of more than $100,000, stated that "[c]urrently as written it is not a valid claim" because it was uncertified, and quoted from Federal Acquisition Regulation (FAR) 33.207 (48 CFR 33.207 (2016)) discussing claim certification requirements. She also requested that FCL provide additional information so that she could consider the monetary request.

On April 14, 2016, the USFS contracting officer and COR met with FCL's owner, at which time FCL apparently attempted to resubmit the January 7 letter directly to the contracting officer. The contracting officer, however, reiterated her concern that the claim was an uncertified request for payment of more than $100,000, which (as she wrote in another email message on April 18, 2016, summarizing the April 14 meeting) she "would have to reject again based on the same reasoning [she] sent in the email dated 19 Jan 2016." There is nothing in the record here indicating that, during or after the April 14 meeting, FCL challenged the contracting officer's belief that the claim value exceeded $100,000. In the April 18 email message, the contracting officer explained the claim submission and review process and indicated that a valid claim needed to contain a sum certain and, if the claim exceeded $100,000, the certification required by the FAR.

FCL's Second Monetary Request. On April 26, 2016, FCL sent another email message to the contracting officer, with the subject line "claim letter for Foxy Const.," to which was attached a letter with the subject line "Re: Relocation of Bunkhouse and Visitor Center." In that letter, FCL indicated that, "due to the extra days spent on job because of weather, the Forest Service owes Foxy an equitable adjustment to the contract" based upon the following: (1) "[t]he equipment that set [sic] for 39 days as listed for hours and amount"; (2) "[a] 45% increase for equipment used to complete job"; (3) "[a] 45% increase for all labor paid out"; and (4) "[a] Burden of 32% for overhead and profit." In the attachment to the cover page, FCL, after removing some costs for which it appears FCL assumed responsibility, indicated a "Grand Total" for payment by the USFS of $329,800. There was no claim certification accompanying the letter.

On June 21, 2016, the USFS contracting officer issued a decision on the April 26 "claim," denying it in its entirety. In the decision, the contracting officer indicated that FCL had not submitted a claim certification, as required by FAR 33.207 for claims in excess of

$100,000. The contracting officer then informed FCL that it could challenge the decision through an appeal to the Board or an action before the United States Court of Federal Claims.

FCL's Third Monetary Request. On September 8, 2016, the contracting officer, at FCL's request, agreed to participate in a conference call to provide additional comments upon the contractor's April 26 claim. According to the contracting officer, she agreed during that call to allow FCL to provide additional facts to support its claim and that she would consider a new submission.

On October 18, 2016, FCL submitted another letter by United States mail addressed to the USFS (which apparently did not receive it until November 1, 2016), directed to the attention of the USFS contracting officer. In the letter, FCL complained of a differing site condition at the administrative site, improper rejection of design submittals, and delays for which FCL was not responsible. In this letter, FCL represented that its "cost overrun on this project is approximately $225,000," which "is directly related to the change in onsite personnel and delays of the foundation plan approval." It indicated that it "look[ed] forward to a settlement that is palatable to your organization and mine." The letter did not contain a claim certification, and FCL did not attach any supporting materials to it.

The USFS contracting officer issued another decision on December 8, 2016. She indicated that FCL had not, as it had promised, provided any additional supporting rationale for its monetary request and again did not certify its claim. Accordingly, she indicated that her prior decision stood. Nevertheless, she again notified FCL of its right to appeal to the Board or to sue in the Court of Federal Claims.

The Current Monetary Request. On February 7, 2017, the Board received FCL's notice of appeal of the contracting officer's decision dated December 8, 2016. FCL attached to its notice of appeal both its letter to the contracting officer dated October 18, 2016, and the contracting officer's decision dated December 8, 2016 (which referenced both the April 26 and October 18 "claims" and the contracting officer's earlier June 21 decision).

On February 9, 2017, the Board issued a show cause order, asking the parties to address whether, to the extent that FCL's claim exceeded $100,000, it had been certified and whether, in the letter of October 18, 2016, FCL had requested monetary relief in a sum certain. FCL filed its response to the show cause order on February 28, 2017, indicating that it now seeks "exactly $153,430.12 as a Claim from [the USFS] in this matter." The USFS responded to the show cause order on March 2, 2017, requesting that the Board dismiss the appeal for lack of jurisdiction.

Discussion

I. Requirements for a Claim

The Board's jurisdiction to entertain contract disputes derives from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). As a prerequisite to review by the Board of a contractor's demand for money from the Federal Government, the contractor must have submitted a "claim" to an agency contracting officer. *Id.* §§ 7103, 7104(a). The CDA does not define the term "claim." *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1311 (Fed. Cir. 2011). In the absence of a such a definition in the CDA itself, we rely upon the FAR's definition of the term "claim" in applying the CDA's requirements. *Id.* 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 a sum certain." 48 CFR 2.101.

There is no requirement in the CDA or the FAR "that a 'claim' . . . be submitted in any particular form or use any particular wording." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). Nevertheless, "[f]or the Board to possess jurisdiction to entertain an appeal for monetary relief, the contractor must first have submitted a claim to the contracting officer identifying the basis of the request, seeking payment of a sum certain, and requesting, either expressly or implicitly, a decision of the contracting officer." *Bon Secour Management, LLC v. Department of Veterans Affairs*, CBCA 4703, slip op. at 2 (May 13, 2015). In addition, if the amount of a claim exceeds $100,000, the contractor must have certified the claim in the form required by 41 U.S.C. § 7103(b)(1), and any uncertified request for payment in excess of $100,000 "is not a claim under [the CDA] until certified as required by the statute." FAR 2.101 (48 CFR 2.101). Once a proper claim is submitted, the contractor cannot appeal until either the contracting officer has issued a decision on the claim or the statutory time for the contracting officer to issue such a decision, as set forth in 41 U.S.C. § 7103(f), has expired. *Primestar Construction v. Department of Homeland Security*, CBCA 5510, 17-1 BCA ¶ 36,612, at 178,330. These requirements are jurisdictional prerequisites to any appeal under the CDA. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1329 (Fed. Cir. 2010).

FCL submitted three different letters to the USFS contracting officer requesting additional money under its contract. The USFS argues in its response to the show cause order that none of those letters constitutes a "claim" that would allow us to entertain FCL's appeal. As an initial matter, the only contracting officer's decision that FCL attached to its notice of appeal was the one dated December 8, 2016, which purported to decide the FCL "claim" dated October 18, 2016 (which also was attached to the appeal notice). Under our rules of procedure, it is the claim and/or decision referenced in and/or attached to the notice of appeal that identifies what is being appealed. 48 CFR 6101.2(a)(1). Typically, we would

look to FCL's October 18, 2016, submission, rather than its earlier letters, to evaluate whether we possess jurisdiction to entertain this appeal. Nevertheless, in the interest of completeness, and because FCL's various submissions were apparently viewed as related (such that the contracting officer's December 2016 decision refers back to the earlier July 2016 decision and the April 2016 "claim"), we will evaluate all three submissions to determine whether any one of them could provide a jurisdictional basis for appeal.

II. The January 7, 2016, Letter

FCL first requested money under the contract in its letter dated January 7, 2016. The USFS argues that this letter was not a "claim" because FCL did not certify it in accordance with section 7103(b) of the CDA, 41 U.S.C. § 7103(b). Such a certification is required for any claim of more than $100,000 and is "a jurisdictional prerequisite for review of a contracting officer's decision before this Board." *B&M Cillessen Construction Co. v. Department of Health & Human Services*, CBCA 931, 08-1 BCA ¶ 33,753, at 167,084 (2007). "The submission of an uncertified claim [in excess of $100,000], for purposes of the CDA, is, in effect, a legal nullity." *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1384 (Fed. Cir. 1983). "Although a defective certification may be corrected, a failure to certify may not." *B&M Cillessen*, 08-1 BCA at 167,084 (quoting *K Satellite v. Department of Agriculture*, CBCA 14, 07-1 BCA ¶ 33,547, at 166,154).

There is no question that FCL did not attempt to certify its January 7 letter in accordance with the CDA. It is unclear, though, whether any certification was required. In its letter, the dollar figure that FCL identifies as the amount of the requested backcharge is $51,051.47, a figure below the statutory threshold for requiring certification.[1] Yet the attachments to the January 7 letter, which FCL represented constituted its "claim," include an unsigned "Application And Certificate For Payment" apparently seeking an additional payment of $95,207.71, which, coupled with the $51,051.47 backcharge request, exceeds the $100,000 certification threshold. The contracting officer expressed confusion over the amount of FCL's "claim," and it does not appear from the record that, in response to the contracting officer's statements in a January 19 email message and at a meeting on April 14 that the total claimed amount exceeded $100,000, FCL made any attempt to clarify whether it was only seeking to recover the $51,051.47 figure through the January 7 submission.

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[1] The USFS asserts that there are multiple dollar figures, some of which are more than $100,000, in the three pages of FCL's cost calculations that render it unclear exactly how much FCL was requesting. Our review of those pages indicates that all of the numbers were identified as part of the calculation for reaching the $51,051.47 backcharge figure that FCL said was the USFS's responsibility.

We need not resolve how much FCL was requesting in its January 7 letter because there is another reason – one that FCL candidly acknowledges – that precludes the January 7 submission from constituting a CDA "claim." Nowhere in the January 7 letter does FCL request a contracting officer's final decision, as required under the definition of a "claim" in FAR 2.101. Without such a request in the claim letter, we lack jurisdiction over an appeal based upon that "claim." *Bon Secour Management*, slip op. at 2. It is true that "[t]he law does not require an explicit demand or request for a contracting officer's decision; 'as long as what the contractor desires by its submissions is a final decision, that prong of the CDA claim test is met.'" *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1546 (Fed. Cir. 1996) (quoting *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1576 (Fed. Cir. 1992), *overruled in part on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 & n.10 (Fed. Cir. 1995) (en banc)). Further, "[t]hat the contractor intended to make such a request [can] be 'implied from the context of the submission.'" *Rex Systems, Inc. v. Cohen*, 224 F.3d 1367, 1372 (Fed. Cir. 2000) (quoting *Heyl & Patterson, Inc. v. O'Keefe*, 986 F.2d 480, 483 (Fed. Cir. 1993), *overruled in part on other grounds by Reflectone*, 60 F.3d at 1579 & n.10); *see Red Gold, Inc. v. Department of Agriculture*, CBCA 2259, 12-1 BCA ¶ 34,921, at 171,721 (2011) ("The request may be either explicit or implicit," but it must be clear from the submission that "what the contractor desires . . . is a final decision."). "To make this determination, the Board looks at the totality of the correspondence, including the submissions and the circumstances surrounding them," using "a common sense analysis . . . to determine whether the contractor communicated his desire for a contracting officer's decision." *Red Gold*, 12-1 BCA at 171,721.

There is no express request for a decision in the January 7 letter. Further, looking at the totality of FCL's communications, we cannot imply a request for a final decision into the language of that letter. Although FCL uses the word "claim" in its January 7 letter, FCL asks the contracting officer to "review and comment" on, rather than decide, its request. Further, in its email message accompanying the January 7 letter, FCL indicated that the January 7 letter and its accompanying materials related to "the issues leading to a *possible* back charge" and that, if the contracting officer had any questions, she should call FCL's owner. Exhibit C to Respondent's Show Cause Response (emphasis added). We recognize that a "cordial closing" to a letter or other written communication that invites further discussions does not, in and of itself, "compromise the letter's status as a claim." *James M. Ellett*, 93 F.3d at 1546; *see Contract Cleaning Maintenance*, 811 F.2d at 592 ("The fact that in those letters the appellant frequently expressed the hope that the dispute could be settled and suggested meeting to accomplish that result does not mean that those letters did not constitute 'claims.'"). Nevertheless, a "letter [that] expresses a willingness to reach an agreement as opposed to a demand that the contracting officer reach a final decision" is not a claim. *Hoffman Construction Co. v. United States*, 7 Cl. Ct. 518, 525 (1985). Here, considering as

a whole the letter, its attachments, and the email message through which the letter and attachments were delivered, there was no implied request for a final decision.

In its response to the Board's show cause order, FCL represented that its intent in submitting the January 7 letter (as well as its subsequent April 26, 2016, letter) was to begin a negotiating process with the USFS. The United States Court of Appeals for the Federal Circuit has distinguished between, on the one hand, a request for equitable adjustment that seeks materially to further the negotiation process through exchanges of information aimed at achieving a mutually agreeable settlement and, on the other, a formal claim intended to commence the litigation or prosecution process. *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1550 (Fed. Cir. 1995), *overruled in part on other grounds by Reflectone*, 60 F.3d at 1579 & n.10. Although a contractor (except in circumstances involving routine requests for payment and termination settlement proposals) may choose to initiate the claim prosecution process while or even before attempting to negotiate an amicable resolution, *Systems Development Corp. v. McHugh*, 658 F.3d 1341, 1347 (Fed. Cir. 2011) (impasse in negotiations is not necessary before claim can be submitted), the contractor is entitled to pursue negotiation before submitting a formal claim and to treat the costs that it incurs in that negotiation process as contract administration costs. *Tip Top Construction, Inc. v. Donahoe*, 695 F.3d 1276, 1284 (Fed. Cir. 2012). That is what FCL says it did through its January 7 submission, and the absence of a request for a contracting officer's final decision in the letter is consistent with FCL's representation that it did not intend for that submission to be a CDA claim. Until the contractor submits a formal claim meeting the requirements of the FAR, though, it cannot commence the appeal process. *Todd Construction*, 656 F.3d at 1311.

The January 7, 2016, letter does not constitute a "claim" that could provide us a basis for exercising jurisdiction.

III. The April 26, 2016, Letter

In its letter dated April 26, 2016, FCL requested an equitable adjustment of $329,800.[2] A claim in that amount requires certification. 41 U.S.C. § 7103(b). Because FCL did not certify its submission, it was not a claim, and we lack jurisdiction to entertain an appeal arising from it. *B&M Cillessen*, 08-1 BCA at 167,084. The fact that the contracting officer actually issued a decision in response to the April 26 submission, notifying the contractor of

[2] As with its January 7 submission, FCL has stated that it did not intend its April 26 letter to constitute a claim, but instead viewed it as a submission during a negotiation process: "[FCL] believed it was still trying to negotiate an equitable adjustment for [USFS] delays, not submitting a claim." FCL's Show Cause Response at 1.

its right either to appeal to the Board or to file an action in the Court of Federal Claims (using the language set forth in FAR 33.211(a)(4)(v) (48 CFR 33.211(a)(4)(v)), does not somehow eliminate the jurisdictional defect because "[a] contracting officer's decision rendered on an uncertified [claim] is a 'nullity.'" *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 16-1 BCA ¶ 36,468, at 177,705 (quoting *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3426, 13 BCA ¶ 35,371, at 173,572).

IV. The October 18, 2016, Letter

The letter that FCL attached to its notice of appeal, dated October 18, 2016, requested payment of "approximately $225,000." That letter cannot constitute a claim for two reasons.

First, like the April 26 letter, the October 18 letter seeks payment of more than $100,000, but without any CDA certification. The Board lacks jurisdiction to entertain an appeal arising from it. *B&M Cillessen*, 08-1 BCA at 167,084.

Second, the use of the word "approximately" in the October 18 letter is inconsistent with the FAR requirement that a claim be stated in a "sum certain." 48 CFR 2.101, 52.233-1(c). In *J.P. Donovan Construction, Inc. v. Mabus*, 469 F. App'x 903 (Fed. Cir. 2012), the Federal Circuit held that the use of the word "approximately" in describing the claimed amount meant that the claimed amount was not a "sum certain" unless the contracting officer, from other information or material in or accompanying the claim, could determine the exact amount that the contractor was claiming:

> Donovan's claim used qualifying language, "approximately $65,000," and did not include supporting documents that would allow the contracting officer to substantiate the claim. Donovan submitted the March Letter without supporting documents. In that form, the claimed amount was unascertainable. . . . [T]his court affirms the Board's dismissal of Donovan's appeal for lack of jurisdiction.

Id. at 908; *see JEM Transport, Inc. v. United States*, 120 Fed. Cl. 189, 198 (2015) (discussing the *J.P. Donovan* decision); *G&R Service Co. v. General Services Administration*, CBCA 1876, 10-2 BCA ¶ 34,506, at 170,166 (citing *Van Elk, Ltd.*, ASBCA 45311, 93-3 BCA ¶ 25,995, for proposition that approximate amount does not constitute a sum certain). Here, as in *J.P. Donovan*, no clarifying supporting material accompanied FCL's October 18 letter. Further, the dollar figure approximation in that letter differed from the dollar figures in earlier submissions. In such circumstances, the identification of "approximately $225,000" in cost overruns does not state a sum certain, as required for a claim under the FAR.

In response to the Board's show cause notice, FCL states that it is now seeking "exactly $153,430.12 as a Claim" from the USFS, a figure that differs from any of its prior submissions to the USFS. It is not too late for FCL to pursue this claim, *see* 48 CFR 33.206(a) (requiring contractor to submit claims to contracting officer within six years of accrual), but, before it files an appeal with the Board, FCL must first submit that claim to the contracting officer with the required information, identify the amount of its monetary request in a sum certain, certify the claim using the language required by the CDA (set forth at FAR 33.207(c) (48 CFR 33.207(c))), and allow the contracting officer to decide it. "If the contracting officer," after receipt of a proper claim, "does not render a timely decision, or [the contractor] is unwilling to accept the decision, [the contractor] is free to exercise its right of appeal to this Board." *Red Gold*, 12-1 BCA at 171,722.

Decision

For the foregoing reasons, this appeal is **DISMISSED FOR LACK OF JURISDICTION**.

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HAROLD D. LESTER, JR.
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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JONATHAN D. ZISCHKAU
Board Judge