



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK
OF JURISDICTION DENIED: July 5, 2017

CBCA 5760

SFM CONSTRUCTORS, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Colin K. McCarthy of Lanak & Hanna, PC, Orange, CA, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

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

SOMERS, Board Judge.

This appeal involves a claim by appellant, SFM Constructors, Inc. (SFM), seeking an equitable adjustment for extra work and cost overruns, which it asserts arose from the actions of contract administrators with the Department of Veterans Affairs (VA). SFM alleges that it suffered damages due to the VA's alleged failure to manage the sequencing of SFM's work. The VA has filed a motion to dismiss for lack of subject matter jurisdiction. For the reasons set forth below, we deny the motion.

Background

On December 30, 2013, the VA awarded SFM a construction contract at the VA Loma Linda Healthcare System, Loma Linda, California, to SFM. The VA issued a notice to proceed on May 15, 2014.

As a result of a dispute regarding the renovation and remodeling of certain public restroom facilities at the VA facility, SFM alleges that it suffered damages. On January 9, 2017, SFM submitted its certified claim to the VA contracting officer. The certified claim included a detailed thirty-nine page request for equitable adjustment for \$467,859, and sought the remaining contract balance of \$18,711. SFM's president certified the claim. The letter transmitting the claim to the contracting officer, signed by SFM's attorney, stated that the claim "seeks payment of at least \$486,570.00."

The contracting officer received SFM's request for a final decision on January 12, 2017. The contracting officer advised SFM that, due to the complexity of the claim, the VA anticipated issuing a decision no later than May 12, 2017.

When SFM did not receive the contracting officer's final decision by that date, it filed a notice of appeal, received and docketed by the Board on June 1, 2017. In the complaint accompanying the notice of appeal, SFM asked for "compensation from the Department of Veterans Affairs in the amount of at least \$473,319."

Discussion

The VA has filed a motion to dismiss this appeal for lack of subject matter jurisdiction on the ground that SFM's claim does not state a "sum certain." The Contract Disputes Act (CDA) grants a limited waiver of sovereign immunity by allowing the Federal Government to be sued in its capacity as a contracting party. As a waiver of sovereign immunity, this grant must be strictly construed. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,787 (citing *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982)). The CDA 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 decision." 41 U.S.C. § 7103(a)(1) (2012); *Systems Management & Research Technologies Corp.*, 15-1 BCA at 175,787. Since the Act does not define the term "claim," the definition that is set forth in Federal Acquisition Regulation (FAR) 2.201, 48 CFR 2.201 (2016), is relied upon by tribunals. *ASP Denver, LLC v. General Services Administration*, CBCA 2618, 12-1 BC ¶ 35,007, at 172,041 (citing *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc); *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1581-82 (Fed. Cir.

1992)). 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; *see ARI University Heights, LP. v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085, at 176,186 (citing *Construction Group LLC v. Department of Homeland Security*, CBCA 4459, 15-1 BCA ¶ 35,900, at 175,506).

A contractor must “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” to make a monetary claim in a sum certain. *See Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). A claim for monetary relief is not clear and unequivocal when a contractor’s “qualifying language leaves the door open for the request of more money on the same basis.” *See ARI University Heights*, 15-1 BCA at 176,186 (quoting *Precision Standard, Inc.*, ASBCA 55865, 11-1 BCA ¶ 34,669, at 170,788). In short, the sum certain requirement demands a fixed amount be stated in the claim. *ASP Denver*, 12-1 BCA at 172,041 (citing *Red Gold, Inc. v. Department of Agriculture*, CBCA 2259, 12-1 BCA ¶ 34,921 (2011)).

The sum certain requirement is satisfied, or not, at the time the contractor submits its claim to the contracting officer. *ARI University Heights*, 15-1 BCA at 176,186 (citing *Morgan & Son Earthmoving, Inc.*, ASBCA 53524, 02-2 BCA ¶ 31,874, at 157,482). Here, the Government asserts that SFM’s monetary claim is not stated as a sum certain because the dollar amount is preceded by the phrase “at least.” As SFM points out, this language is found in the SFM transmittal letter, not in the actual certified claim. The transmittal letter, standing alone, would not establish a claim pursuant to FAR section 52.233-1(c), as it does not seek, as a matter of law, the payment of a sum certain, it is not certified, and it does not seek a final decision from the contracting officer. By contrast, the actual certified claim contains no qualifying language. The certified claim here fulfills the sum certain requirement where the sum is “readily calculable by simple arithmetic” from a formula included in the claim. *See McAllen Hospitals, LP, v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758 at 174,975 n.9 (citations omitted). The formula here includes the claim for \$467,859, combined with an outstanding contract balance of \$18,711, for a total claim of \$486,570.

In support of its motion to dismiss, the VA asserts that the fact that SFM requested a different monetary amount in its complaint (\$473,319), which is less than the amount sought in the certified claim, proves that the claim cannot be construed as a sum certain. SFM explains in response:

The amount prayed for on the face of SFM’s complaint is less than the amount prayed for in its certified claim due to a payment by the VA to SFM in the

interim period from the submission of SFM's certified claim to the contracting officer[] and its filing of the complaint with this Board.

In short, the amount claimed by SFM for damages as a result of the VA's actions is unchanged. The variance in the total amount sought is caused by changes to the outstanding contract balance. The Government possesses all of the information necessary to calculate the precise figure it owes SFM for the outstanding contract balance. *See Metric Construction, Inc. v. United States*, 1 Cl. Ct. 383, 391 (1983) (sum certain requirement met with data which allows for reasonable determination of the recovery available at the time the claim is presented and/or decided by the contracting officer).

Decision

The VA's motion to dismiss for lack of jurisdiction is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

H. CHUCK KULLBERG
Board Judge