UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION
GRANTED IN PART: November 22, 2024

CBCA 8235

ELA GROUP, INC.,

Appellant,

v.

DEPARTMENT OF LABOR,

Respondent.

Edward L. Angel Jr., President of ELA Group, Inc., Shreveport, LA, appearing for Appellant.

José Otero and Joshua L. Caplan, Office of the Solicitor, Department of Labor, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **GOODMAN**, and **VOLK**.

LESTER, Board Judge.

Appellant, ELA Group, Inc. (ELA), represented in its notice of appeal that the appeal is based upon "the failure of the contracting officer to issue a final decision" on a payment demand that ELA submitted to the contracting officer in October 2023. Respondent, the Department of Labor (DOL), has filed a motion to dismiss this appeal for lack of jurisdiction, informing us that ELA submitted a more formal claim on September 12, 2024, and that this appeal is premature because ELA filed its appeal before the sixty-day time limit for the contracting officer to issue a final decision had expired. ELA's notice of appeal, however, does not mention the September 12, 2024, claim. As the basis for this appeal, it relies solely

on the "deemed denial" of its October 2023 submission. DOL argues that the October 2023 submission was a request for an equitable adjustment (REA), not a claim.

The United States Court of Appeals for the Federal Circuit's recent guidance in *Zafer Construction Co. v. United States*, 40 F.4th 1362 (Fed. Cir. 2022), directs us, when considering whether a payment request is a claim rather than an REA, to review the content of the payment request objectively and not to focus on subjective intent. Applying that guidance, we find that ELA's October 2023 submission constitutes a claim that required the contracting officer to issue a final decision within sixty days after its submission. We possess jurisdiction to entertain ELA's appeal of the "deemed denial" of its claim. Nevertheless, ELA has added allegations in its notice of appeal, complaining about liquidated damages that DOL assessed against it, that do not appear in its October 2023 claim. We dismiss ELA's challenge to the assessment of liquidated damages but otherwise deny DOL's motion to dismiss.

Background

ELA held a contract, no. DOL-ETA-15-C-0086, with the Office of the Senior Procurement Executive within DOL's Office of the Assistant Secretary for Management and Administration. Under that contract, ELA was to perform certain construction work at the Shreveport Job Corps Center in Louisiana.

On May 16, 2023, ELA submitted request for information no. 244 (RFI 244) to the DOL contracting officer suggesting a change to the contract plans to add a fire-rated seal to the building's plumbing chase. By letter dated June 13, 2023, the contracting officer requested that ELA provide a detailed cost proposal (inclusive of all material, labor, and equipment costs and impacts to the critical path of performance) in support of that change. ELA submitted its proposal on July 12, 2023, identifying a contract price increase of $24,470.36 and a seventy-five-day extension to the time for contract completion. After ELA submitted a revised quote on August 3, 2023, the DOL contracting officer requested clarification on August 7, 2023, asking for a further explanation of how the change in work would affect the critical path, a justification for the number of additional supervisory hours that ELA had proposed, and a more detailed description of the work that ELA's carpenters and laborers would perform. On August 31, 2023, DOL informed ELA that it had decided to rescind the June 13 request for a proposal, stating that "[i]t has been determined that the current conditions of the existing building make this request unnecessary."

On October 27, 2023, ELA submitted a letter to the DOL contracting officer making the following payment demand:[1]

> In accordance with Article G.14 Equitable Adjustment please find attached our proposal. [Request for Information] #244 dated 05-16-23 resulted in significant delays to the project critical path for the 2nd and 3rd floor bathrooms work had to cease awaiting a resolution impacting multiple trades.
>
> Although we appreciate the time that elapsed exchanging multiple possible solutions before a "final" decision was made the project was significantly delayed. Therefore, ELA is entitled to receiver [sic] the lost on-site supervision expense as well as extended overhead which we will waive.

In a "Change Order Form" attached to the letter, ELA sought payment of $26,424.09 for "RFI #244—Days expended working change order #72 to include supervision June 30, 2023 to August 31[,] 2023 [and a time extension of] 62 days."

The DOL contracting officer responded by letter dated November 13, 2023, informing ELA that "[t]he Government is in receipt of your Request for Equitable Adjustment" (REA). She interpreted ELA's request as "based on ELA's interpretation of a delay in processing the RFI 244" but found it "an inaccurate portrayal of the facts." She said that she found no evidence that work was stopped while ELA awaited a response to RFI 244, as other work in process was not yet complete during that period of time; that ELA had not, as required by the contract, told her within ten days of the beginning of the alleged delay that it believed the Government's RFI response time was creating a delay; and that ELA's request for an equitable adjustment "cannot be approved as it has no standing." The contracting officer did not include any notice of appeal rights in her letter or indicate that the letter was a "final decision" under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7019 (2018). She concluded the letter by stating that "[i]f you have any questions, please contact me."

ELA filed a notice of appeal on October 11, 2024, in which it represented, as indicated above, that this appeal is based upon "the failure of the contracting officer to issue a final decision." It stated that "[f]rom the date of November 13, 2023, where the contracting officer denied our claim[,] the contracting officer has failed to issue a contracting officer's final decision." It requested that the Board grant it "an additional time of 75 days and delay days of 69 for a total of 140 days and costs incurred in the amount of $45,784.57." It also

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[1] The letter was dated August 25, 2022, but the date is clearly a mistake, as evidenced from the discussion in the letter of events occurring between May and September 2023.

asserted that "[i]n addition, the architect of record granted substantial completion on 02/22/24, the government took beneficial occupancy, yet the contracting officer continued to assess liquidated damages improperly," which, according to ELA, was "punitive." As part of its notice of appeal, ELA's president provided a claim certification, dated September 12, 2024, containing the certification language for a claim identified in section 7103(b) of the CDA (41 U.S.C. § 7103(b)).

On October 30, 2024, DOL filed a motion to dismiss this appeal "as premature." It represented that, on September 12, 2024, ELA submitted a formal claim to the DOL contracting officer seeking payment of the monies at issue in this appeal. It asserted that this appeal is premature because, pursuant to Federal Acquisition Regulation (FAR) 33.211(c) (48 CFR 33.211(c) (2023)), "the agency has 60 days to issue its [final decision] on that claim" and that, when ELA filed its appeal on October 17, 2024, the sixty-day period had not expired. It represented that ELA's submission on October 27, 2023, was an REA, not a claim; that the contracting officer denied the REA on November 13, 2023; and that ELA did not submit a claim until September 12, 2024. The September 12, 2024, claim is not a part of the record in this appeal.

In response to DOL's motion, ELA originally agreed to DOL's request for dismissal of this matter to allow the parties to negotiate outside the context of litigation, but it subsequently decided to have the Board resolve the jurisdictional issue before deciding how to proceed with negotiations.

Discussion

In its motion to dismiss, DOL assumes that, prior to September 12, 2024, ELA had never submitted a claim seeking the money that it now requests. If DOL is correct that the September 12, 2024, claim is the first one that ELA submitted for the costs at issue here, it would be correct that ELA's appeal, filed before the sixty-day period that the contracting officer has for issuing a final decision, was premature and that we did not have jurisdiction to entertain the appeal when it was filed. *Fire Security Systems, Inc. v. General Services Administration*, GSBCA 12350, 93-3 BCA ¶ 26,047, at 129,487; *see Primestar Construction v. Department of Homeland Security*, CBCA 5510, 17-1 BCA ¶ 36,612, at 178,330 (2016) ("An appeal filed before there is a contracting officer's decision (either written or through a deemed denial after the statutory deadline has passed) is premature, . . . and we lack jurisdiction to entertain it.").

ELA does not mention or rely on the September 12, 2024, claim submission in its notice of appeal. Instead, ELA bases its appeal on its October 27, 2023, payment request and the contracting officer's "deemed denial" of that request. DOL ignores the possibility that ELA's October 2023 submission could constitute a "claim." The Federal Acquisition

Regulation (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, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract." 48 CFR 52.233-1(c) (2022). Mirroring what the DOL contracting officer said in her response to it, DOL tells us that the October 27, 2023, submission was only an REA, not a claim. Yet, "all that is required [for a submission to constitute a claim] is that the contractor 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." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). Beyond that, for its submission to constitute a claim, a contractor need only show that "what the contractor desires by its submissions is a final decision" from the contracting officer. *Zafer Construction Co. v. United States*, 40 F.4th 1365, 1367 (Fed. Cir. 2022) (quoting *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327-28 (Fed. Cir. 2010)).[2]

As the Federal Circuit instructed in *Zafer Construction*, we must carefully evaluate whether a submission, even if (as in that case) it is titled an REA, is actually a claim from which the contractor can begin the appeal process. Because, in appropriate circumstances, "a request for equitable adjustment can constitute a claim," 40 F.4th at 1367, we must look beyond the title of a document in making such a determination. Assuming that the contractor's submission demands the payment of money as a matter of right, "[t]he determination" of whether it should be considered a claim "focuses on whether, objectively, the document's content and the context surrounding the document's submission put the contracting officer on notice that the document is a claim requesting a final decision." *Id.* at 1368. The request requirement does not "focus[] on a contractor's subjective intent." *Id.* Further, "[t]o fulfill the request requirement, the contractor's request for a final decision can be . . . implicit"—there need not be an explicit request for a final decision, *id.* at 1367, and "magic words are not required." *Id.* at 1369 (quoting *Hejran Hejrat Co. v. United States Army Corps of Engineers*, 930 F.3d 1354, 1357 (Fed. Cir. 2019)).

The Federal Circuit recognized, however, that it can be a "difficult challenge [to] determin[e] whether a request for equitable adjustment is also a claim." *Zafer Construction*, 40 F.4th at 1370. There are reasons that a contractor might submit an REA, "which does not start the interest clock but gives the contractor more time to negotiate a settlement and possibly avoid hefty legal fees," rather than a claim, "which starts the interest clock but

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[2] Although a payment request in excess of $100,000 must also be accompanied by a certification to constitute a claim, *see Richter Developments, Ltd. v. General Services Administration*, CBCA 5119, 16-1 BCA ¶ 36,306, at 177,038, ELA's October 27, 2023, payment request falls well below the certification threshold, making the absence of certification irrelevant here.

requires the contracting officer to issue a final decision within 60 days." *Id.* at 1370-71. Further, a contractor can attempt to recover its REA preparation costs as a cost of contract administration, but, pursuant to the FAR, claim preparation costs are categorically unallowable, FAR 31.205-47(f)(5), providing contractors with a potential incentive initially to submit an REA rather than a claim. *See*, *e.g.*, *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1550-51 (Fed. Cir. 1995), *overruled in part on other grounds*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995) (en banc); *Southwest Marine, Inc.*, DOT CAB 1665, 96-1 BCA ¶ 28,168, at 140,601-02; *Advanced Engineering & Planning Corp.*, ASBCA 53366, et al., 03-1 BCA ¶ 32,157, at 158,992-95.

Here, applying the guidance of *Zafer Construction*, ELA's October 27, 2023, submission appears, on its face, to be a claim. Even though the DOL contracting officer labeled ELA's submission an REA in her response letter, ELA did not title its submission as such. ELA submitted its demand to the DOL contracting officer for payment of a specific sum of money and identified the basis of its payment demand, an action that, on its face, looks like a claim. It did not expressly request a final decision, but such a request is implicit in its statement that it is "entitled to receive[]" the requested money and its attachment of its change order form detailing the incurred costs that it wanted to be reimbursed.

Nevertheless, there are aspects of ELA's October 2023 submission that could be viewed as detracting from its position as a "claim," rather than merely an REA. In its payment request, ELA identified its submission as a "proposal," and it referenced Article G.14 of its contract, titled "Equitable Adjustments," as the contractual procedure that it was following for its submission. The "Equitable Adjustments" contract clause requires the contractor to "submit a proposal, in accordance with the requirements and limitations set forth in this 'Equitable Adjustments' clause, for the work involving contemplated changes covered by the request," along with "an itemized breakdown" of costs and detailed support for any time extension request. It then provides that, "[i]n considering a proposal, the Government shall . . . check estimates in detail, utilizing unit prices where specified or agreed upon, with a view to arriving at an equitable adjustment" and that, "when the necessity to proceed with a change does not allow time to properly check a proposal or in the event of a failure to reach an agreement on a proposal, the [contracting officer] may order the Contractor to proceed on the basis of a price to be determined at the earliest practical date."

Reviewing the "Equitable Adjustments" clause as a whole, it appears to focus on change proposals for work that has not yet been performed—for "contemplated changes"—and sets forth a process for the parties to come to an agreement on pricing *before* changed work is performed. The money that ELA sought in its October 27, 2023, submission was not for a "contemplated change" but for a change that allegedly had already occurred and for which ELA had allegedly incurred costs between June 30 and August 31,

2023. Even though ELA used the word "proposal" in its submission, ELA was not proposing a change that the Government could accept or reject. It was claiming entitlement to money for work already performed, with a demand that DOL pay for it. ELA's citation to the "Equitable Adjustments" clause in its contract and its use of the "proposal" did not change the nature of what it was demanding: payment for work allegedly already performed. ELA's reference to the clause does not change the nature of ELA's submission as a claim.[3]

We recognize that, on September 12, 2024, ELA formally submitted another claim seeking payment for the same monies at issue in this appeal. In other circumstances, that might be viewed as indicating that ELA did not view its October 2023 submission as a claim and knew that it needed to submit the September 2024 claim to allow it to pursue an appeal. Alternatively, we might discover, were we to develop a factual record on this issue, that ELA submitted the September 2024 claim out of frustration because DOL had refused to consider its October 2023 submission as a claim. Whatever the reason for the September 2024 claim submission, the *Zafer Construction* decision eliminates the need for us to develop that type of record. It tells us to review the content of the October 2023 submission "objectively" and not to "focus[] on [the] contractor's subjective intent" in deciding whether the submission was a "claim." *Zafer Construction*, 40 F.4th at 1368. Applying that direction, and looking objectively at the language of ELA's October 2023 submission, it constituted a claim.

That being said, ELA has included in its notice of appeal complaints about liquidated damages that DOL assessed against it. ELA's October 2023 claim does not address liquidated damages. We lack jurisdiction to entertain that issue in this appeal. *See Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,005 ("Although a contractor, when proceeding before this Board, may increase the amount of its claim, it 'may not raise any *new* claims not presented and certified to the contracting officer.'" (quoting *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). With regard to the increase in the length of the time extension and amount of damages that ELA requested in its notice of appeal from what it originally claimed, the record is not sufficiently developed to show whether those increases arise out of the same operative facts as ELA's October 27, 2023, claim. DOL may raise jurisdictional challenges in the future if, as the case develops, it determines that the increased claimed costs are based upon different operative facts than ELA's original claim. *See Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561, at 178,065 ("In determining whether a

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[3] In any event, the last sentence of the "Equitable Adjustments" clause in ELA's contract appears to contemplate that the contractor can submit an REA under the clause that is, in fact, a claim: "The Contractor shall submit all *claims* for equitable adjustments in accordance with, and subject to, the requirements and limitations set for[th] in this 'Equitable Adjustments' Clause." (Emphasis added).

contractor's increase to the amount claimed raises new claims, we look at whether the new issue is based on the same operative facts as the claim presented to the contracting officer.").

Decision

DOL's motion to dismiss this appeal for lack of jurisdiction is granted in part. The portion of ELA's appeal challenging DOL's imposition of liquidated damages is **DISMISSED FOR LACK OF JURISDICTION**. Otherwise, DOL's motion to dismiss is **DENIED**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Daniel B. Volk
DANIEL B. VOLK
Board Judge