UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: August 11, 2008

CBCA 994

GUARDIAN ENVIRONMENTAL SERVICES, INC.,

Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Robert W. Tate, Seattle, WA, counsel for Appellant.

Kenneth A. Redden and Kenneth R. Pakula, Office of General Counsel, Environmental Protection Agency, Washington, DC, counsel for Respondent.

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

SHERIDAN, Board Judge.

This appeal arose out of contract EP-R7-07-08, awarded to Guardian Environmental Services, Inc. (GES) on March 31, 2007, by the Environmental Protection Agency (EPA) to provide labor and materials at the Taylor Lumber and Treating (TLT) Superfund site in Sheridan, Oregon. CBCA 994 is an appeal from a contracting officer's decision that suspended and denied payment on a portion of a $1,664,490.36 certified claim that involved disputed invoices. Two other appeals, CBCA 1032 and 1033, were filed but dismissed by the Board following resolution during an alternative dispute resolution (ADR) proceeding.

Respondent has moved that CBCA 994 be dismissed for lack of jurisdiction, arguing that EPA has not issued a final decision assessing liquidated damages in a sum certain against

GES and that appellant's assertion that it has a proper claim before the Board is "without merit." Appellant responds that EPA, per its final decision, withheld negative incentives (by which it means, assessed penalties) against GES. Appellant equates the withholding of negative incentives to "the improper assessment of liquidated damages." GES argues that it filed a certified claim seeking full payment of the disputed invoices and that EPA has not made full payment on the invoices. GES maintains it is pursuing full payment of the disputed invoices, including the amounts withheld as negative incentives.

Regarding the disputed invoices, the Board has jurisdiction to decide entitlement, how much money is still being retained by EPA, and what amounts should be deducted from contract payments for unaccepted/incomplete work, negative incentives, and costs for work never accomplished.

The Board concludes that appellant has submitted a valid, certified claim for a sum certain, $1,664,490.36. By decision, the contracting officer did not grant payment of that entire amount, thereby explicitly or implicitly denying the claim. The claim is properly before the Board.

Background

On October 5, 2007, GES submitted a certified claim in the amount of $1,664,490.36 to contracting officer Mr. James Price. The claim was misdated December 12, 2007. The claim demanded a final decision and represented:

> This amount is in dispute based on your action in withholding funds in the amount of $1,603,490.36 under [invoice] 5[/A7002282922] presented under contract EP-R7-08, and your Notice of Contract Suspension, dated August 23, 2007, for GES invoice [4/]A7001424910 in the amount of $61,000, together with the fact that these withholdings are disputed by GES.

Prior to submitting its claim, GES had submitted invoices to the EPA for $61,000 (invoice 4/A7001424910) and for $1,603,490.36 (invoice 5/A7002282922). Also, on September 21, 2007, the contracting officer, via EPA Form 1900-68, "Notice of Contract Costs Suspended and/or Disallowed," notified GES of his intent to "suspend further progress payments and all other payments until GES takes corrective action to fix unacceptable work." The form noted "costs disallowing/suspending $1,603,490.36" associated with invoice 5/A7002282922 and stated, "Corrective action needed to fix unacceptable work."

On or about October 12, 2007, the contracting officer performed a calculation to determine how much of the amount remaining in the contract should be paid to GES. His summarization showed:

Total Contract Value	**$6,745,024.00**
10% Contract Total Value Retainage Amount	$674,502.40
Amount Suspended Invoice #4	$61,000.00
Negative Incentive (Maximum Amount Liquidated Damages Phase 1)	$300,000.00
Negative Incentive (Maximum Amount Liquidated Damages Phase II)	$30,000.00
Total Amount That Needs To Remain On Contact Until Final Project Acceptance	**$1,065,502.40**
Unpaid Amount	$2,392,904.58
Total Amount That Needs To Remain On Contact Until Final Project Acceptance	$1,065,502.40
Total Amount To Be Paid On Invoice #5	**$1,327,402.18**
GES Invoice #5 Amount	$1,603,490.36
Total Amount To Be Paid On Invoice #5	$1,327,402.18
Amount Suspended Invoice #5	**$276,088.18**

After making this calculation, the contracting officer requested that the suspension on payment of invoice 5/A7002282922 be lifted and authorized payment in the amount of $1,327,402.18. He asked that the payment be expedited and noted that EPA should continue to suspend payment of $276,088.18 on invoice 5/A7002282922.

Mr. Price issued a decision on GES' certified claim on November 29, 2007. He stated that EPA had paid $1,327,402.18 on invoice 5/A7002282922 and informed GES that he was continuing the suspensions on invoices 4/A7001424910 and 5/A7002282922 (totaling $337,088.18). Regarding invoice 4/A7001424910, he concluded, "Until I receive confirmation that all survey data is readable and usable, I will not remove the suspension, thereby allowing $5,500 to be paid to GES."[1] As to invoice 5/A7002282922, he stated:

> GES has caused considerable project delay by failing to submit all information required by the contract schedule, contract requirements, and contract specifications. These delays have adversely affected my ability to ascertain whether GES has completed work in accordance with the contract and project specifications. GES' invoices have contained significant errors and omissions and often lack supporting documentation. . . . On October 12, 2007, I removed the suspension and approved $1,327,402.18 for payment on Invoice

[1] It is not clear from the record whether and when payments were made on the $61,000 originally sought by invoice 4/A7001424910, but for purposes of deciding this motion we need not make any determination.

> No. 5, however, it is my determination that the remaining suspended costs in the amount of $276,088.18 shall remain suspended for covering costs of correcting unaccepted/incomplete work, negative incentives, and estimated costs for work never accomplished.

GES appealed the decision and the matter was docketed as CBCA 994. Two other appeals were subsequently filed on partial terminations for default, CBCA 1032 and 1033.

An ADR proceeding was held on February 5 and 6, 2008, at the TLT site. During that proceeding various matters were resolved and some of the payments that were suspended or withheld by the contracting officer were released to GES. On July 22, 2008, CBCA 1032 and 1033 were dismissed. Discussions on whether CBCA 994 should also be dismissed led to some disagreement between the parties, with appellant maintaining EPA was still withholding liquidated damages to which appellant was entitled. Respondent argued that it had never issued a final decision assessing liquidated damages and therefore the Board lacked the jurisdiction to consider the issue of liquidated damages.

EPA acknowledges that it "has retained $282,469.59 in negative incentives for GES' failure to timely complete the subject contract."

Discussion

Under the Contract Disputes Act of 1978 (CDA), "all claims by a contractor against the Government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a) (2000). The CDA does not define a claim. The Federal Acquisition Regulation, however, 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 or relating to the contract." 48 CFR 2.101 (2007).

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. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc). 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. *Kevin J. LeMay v. General Services Administration*, GSBCA 16093, 03-2 BCA ¶ 32,345.

On October 5, 2007, appellant submitted a written demand in the form of a certified claim seeking payment of $1,664,490.36 on two disputed invoices: invoice 4/A7001424910

in the amount of $61,000 and invoice 5/A7002282922 in the amount of $1,603,490.36. By issuance of the November 29 decision the contracting officer responded that EPA had paid $1,327,402.18 on invoice 5/A7002282922, but was continuing to suspend payment of $5500 on invoice 4/A7001424910 and $276,088.18 on invoice 5/A7002282922. As justifications for withholding payments the contracting officer cited costs associated with GES-caused project delays, correcting unaccepted/incomplete work, and negative incentives.

Appellant has sought a sum certain. The contracting officer has not fully paid that sum. Appellant may pursue its claim to resolution. At this stage, EPA has neither raised an affirmative defense nor issued a decision asserting a government claim for liquidated damages. So, too, it has no basis to unilaterally impede this appeal. The Board possesses the jurisdiction to decide entitlement and how much, if any, of the funds being withheld on invoices 4/A7001424910 and 5/A7002282922 still remain unpaid and should be released to appellant.

Decision

Respondent's motion to dismiss is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

JEROME M. DRUMMOND
Board Judge