UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: June 23, 2010

CBCA 1884, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908,
1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917

RON ANDERSON CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

William G. Beck and Michele A. Munson of Woods, Fuller, Shultz & Smith P.C., Sioux Falls, SD, counsel for Appellant.

Lindsay C. Roop, Office of Regional Counsel, Department of Veterans Affairs, Minneapolis, MN, counsel for Respondent.

Before Board Judges **SOMERS**, **BORWICK**, and **SHERIDAN**.

SOMERS, Board Judge.

The Department of Veterans Affairs (VA or the Government) entered into a contract with Ron Anderson Construction, Inc. (contractor or appellant) to remodel a wing at the VA Black Hills Health Care System in Hot Springs, South Dakota. During the course of contract performance, the contracting officer made changes to the contract, or the appellant determined that constructive changes had occurred. The parties would discuss these changes, and the contractor would proceed after receiving verbal approval from the contracting officer. After completing the work, the appellant would submit a change order indicating the additional charges for the changes. The VA would either pay the entire amount, dispute portions of the charges, or deny payment entirely.

The contract included the following VA Supplemental Changes clause:

> VAAR 852.236-88 Contract Changes - Supplement (JUL 2002)
>
> (b) Paragraphs (b)(1) through (b)(11) apply to proposed contract changes costing $500,000 or less:[1]
>
> (1) When requested by the contracting officer, the contractor shall submit proposals for changes in work to the resident engineer. Proposals, to be submitted as expeditiously as possible but within 30 calendar days after receipt of the request, shall be in legible form, original and two copies, with an itemized breakdown that will include materials, quantities, unit prices, labor costs (separated into trades), construction equipment, etc. (Labor costs are to be identified with specific material placed or operation performed.) The contractor must obtain and furnish with a proposal an itemized breakdown as described above, signed by each subcontractor participating in the change regardless of tier. When certified cost or pricing data or information other than cost or pricing data are required under FAR [Federal Acquisition Regulation] 15.403, the data shall be submitted in accordance with FAR 15.403-5. No itemized breakdown will be required for proposals amounting to less than $1,000.
>
> (2) When the necessity to proceed with a change does not allow sufficient time to negotiate a modification or because of failure to reach an agreement, the contracting officer may issue a change order instructing the contractor to proceed on the basis of a tentative price based on the best estimate available at the time, with the firm price to be determined later. Furthermore, when the change order is issued, the contractor shall submit within 30 calendar days, a proposal that includes the information required by paragraph (b)(1) for the cost of the changes of work.

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[1] None of these appeals involve proposed contract changes involving costs exceeding $500,000.

> (3) The contracting officer will consider issuing a settlement by determination to the contract if the contractor's proposal required by paragraphs (b)(1) or (b)(2) of this clause is not received within 30 calendar days, or if agreement has not been reached.

Respondent's Motion to Dismiss, Attachment 2.[2]

Thus, as noted by the VA, many of the appeals involve what are called "settlements by determination," which are contemplated by the above-cited clause. When the parties could not agree on the amount that the Government should pay for the proposed change within a reasonable period of time, the contracting officer would unilaterally change the contract through a contract modification. Most of the contract modifications included the following language:

> This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

See Attachments to the Notices of Appeal for CBCA 1884, 1901, 1902, 1903, 1904, 1905, 1907, 1908, 1911, 1912, 1913, 1914, 1915, 1916, and 1917. In some of the settlements by determination, the VA provided that the Government would take no further action regarding the contractor's change orders.

The remaining three appeals, CBCA 1906, 1909, and 1910, all involve circumstances in which the contractor submitted a cost proposal for changed work, the VA did not pay for the alleged changes, and the contracting officer did not issue a final decision. In these cases, the contractor demanded payment for the alleged changes. If the contracting officer did not pay upon request, the contractor submitted additional information and continued to demand payment. After months had passed without payment, the contractor requested final decisions. When the contracting officer failed to act, the appellant appealed the contracting officer's failure to act as a deemed denial of its claim.

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[2] The VA has provided limited excerpts of the contract in this case. No appeal files have yet been submitted.

The VA has moved to dismiss the appeals for lack of jurisdiction, alleging that the appellant never submitted a claim in any of the appeals. *See* Respondent's Motion to Dismiss at 2 (citing 48 CFR 2.101). The Government asserts that the cost proposals submitted by the contractor do not constitute claims sufficient to meet the requirements of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(a) (2006), because they are submitted pursuant to a provision in the contract which calls for the proposals to be resolved by "settlements by determination."

The appellant disagrees, and states in an affidavit that it submitted cost proposals demanding payment for unforeseen or unintended changes, in addition to being in response to change orders issued by the contracting officer. After submitting these cost proposals, the appellant provided additional information at the VA's request, while continuing to demand payment. Appellant's Brief in Response and Opposition to Respondent's Motion to Dismiss, Exhibit 1. The appellant contends that the fact that many of the unilateral contract modifications provided contract appeal rights served as a further indication that the Government considered the proposals to be claims and the unilateral modifications to be final decisions.

Discussion

Under the 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). 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 a sum certain, the adjustment or interpretation of contract terms, or other relief arising or relating to the contract." 48 CFR 2.101 (2009). The Court of Appeals for the Federal Circuit uses this definition in determining whether a communication is a claim. *M. Maropakis Carpentry, Inc. v. United States*, No. 2009-5024, 2010 WL 2403337, at *3 (Fed. Cir. June 17, 2010) (citing *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc)).

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. *See Reflectone*; *EBS/PPG Contracting v. Department of Justice*, CBCA 1295, 09-2 BCA ¶ 34,208; *Guardian Environmental Services, Inc. v. Environmental Protection Agency*, CBCA 994, 08-2 BCA ¶ 33,938. 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. *Id*. There is no requirement that a dispute exists at the time of submission of a non-routine request for it to

be considered a claim. *Reflectone*, 60 F.3d at 1576-78. Nor is there any "requirement in the Disputes Act that a 'claim' must 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).

Appellant bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988); *801 Market Street Holdings, L.P. v. General Services Administration*, CBCA 425, 08-1 BCA ¶ 33,853. In assessing whether the Board has subject matter jurisdiction, the allegations of the complaint should be construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *United Pacific Insurance Co. v. United States*, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006); *accord Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989); *CACI, INC.-FEDERAL v. General Services Administration*, GSBCA 15588, 02-1 BCA ¶ 31,712, at 156,635 (2001). When a motion to dismiss for lack of subject matter jurisdiction challenges the truth of alleged jurisdictional facts, the Board may consider relevant evidence beyond the pleadings to resolve disputed facts. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993); *B&M Cillessen Construction Co. v. Department of Health and Human Services*, CBCA 931, 08-1 BCA ¶ 33,753 (2007); *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685

The VA asserts that it has not received a specific demand seeking payment as a matter of right. It argues that the submission of proposals required under the contract cannot constitute claims as "[i]t is well settled that price proposals submitted by either party in the ordinary course of contract administration are not CDA claims," citing *Interstate Contractors, Inc.*, VABCA 3404, 92-1 BCA ¶ 24,480 (1991). Pointing to the change orders, the appellant notes that the proposals contain the statement "[w]e hereby propose to furnish the materials and perform the labor necessary for the completion of . . . ." Respondent's Motion to Dismiss at 3 (referencing change order 14 of CBCA 1906). The respondent contends that the appellant did not assert payment as a matter of right or demand a contracting officer's decision in any of the proposals. As to the unilateral change orders in the form of settlements by determinations, the fact that the contracting officer included final appeal language did not create a final decision.

Contrary to the Government's assessment, the request for a final decision need not be affirmative, but can be implied by the text of the submission. *See, e.g.*, *EBS/PPG Contracting*, 09-2 BCA at 169,111. "As long as the basic requirements of the CDA are met, and the contracting officer knows the bases for the claims and the final amounts sought, the

'request' for a final decision may be inferred from the circumstances of the case." *Id.* (quoting *Mega Construction Co. v. United States*, 29 Fed. Cl. 396, 443 (1993)).

Based on a review of the limited record before us, we note that language expressly requesting a contracting officer's final decision does not appear in any of the cost proposals or correspondence between the parties relating to the change orders and cost proposals. However, the Board also looks to whether the appellant's submissions and the circumstances surrounding them imply a desire for a contracting officer's final decision.[3] *EBS/PPG Contracting*, 09-2 BCA at 169,111; *Guardian Environmental Services, Inc.*, 08-2 BCA at 167,946. Here, looking at the actions of the parties and the totality of the circumstances before us, we find that in each appeal, the contractor submitted a cost proposal which contained "a written demand, seeking, as a matter of right, the payment of money in a sum certain," to the contracting officer, thus fulfilling the requirements for the submission of a claim. *See Reflectone*, 60 F.3d at 1575. The circumstances and correspondence surrounding the submission of each cost proposal support this conclusion.

Decision

VA's motion to dismiss these appeals for lack of jurisdiction is **DENIED**. The presiding judge will convene a telephonic conference with counsel to discuss further proceedings in these cases.

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JERI KAYLENE SOMERS
Board Judge

[3] The VA cites *Interstate Contractors, Inc.* and *Winding Specialists Co.*, ASBCA 37765, 89-2 BCA ¶ 21,737, in support of its contention that the cost proposals cannot be considered claims because they do not expressly seek a final decision or assert a payment as a matter of right. These cases, however, predate the guidance set forth in *Reflectone.* While it is true that the issuance of a "settlement by determination" does not serve to convey jurisdiction upon the Board in the absence of a valid claim or dispute, under *Reflectone*, the facts surrounding the issuance of a "settlement by determination" may give rise to a CDA claim, entitling the claimant to appeal rights.

We concur:

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ANTHONY S. BORWICK
Board Judge

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PATRICIA J. SHERIDAN
Board Judge