UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS OR FOR SUMMARY JUDGMENT DENIED;
MOTION FOR SANCTIONS DENIED: October 26, 2021

CBCA 7165

NUES INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Seun Oyewo, Chief Executive Officer of NUES Inc., Silver Spring, MD, appearing for Appellant.

Robert E. Nerthling, II and Elise Harris, Office of the General Counsel, Department of Health and Human Services, Atlanta, GA, counsel for Respondent.

BEARDSLEY, Board Judge (Chair).

Appellant, NUES Inc., has elected expedited, nonprecedential disposition of this appeal by a single Board judge under the small claims procedure in Board Rule 52 (48 CFR 6101.52 (2020)). Respondent, the Department of Health and Human Service (HHS), has moved to dismiss this appeal or, in the alternative, moved for summary judgment, asserting that (1) appellant never submitted a claim for $112,203.07 to the contracting officer for a final decision; (2) appellant failed to properly certify its claim; and (3) appellant has failed to state a claim for breach of contract. Appellant has filed its own motion, asking that we impose sanctions against HHS. We deny both respondent's and appellant's motions.

Background

On September 19, 2019, appellant entered into a firm fixed-price contract with the Centers for Disease Control and Prevention (CDC) to conduct on-site visits, monitoring, tracking, and reporting to support the Tuberculosis Trials Consortium (TBTC) in South Africa. Appellant performed the contract for the first year; however, in March 2020, CDC paused routine, on-site monitoring visits as a result of the COVID-19 pandemic. Appellant continued to perform other aspects of the contract that could be performed remotely. On October 16, 2020, appellant submitted final base-year invoice Q030 in the amount of $41,731.07 for costs incurred due to "services paused, work stopped, undeliverable item(s), change in contract schedule, [and] contract modification." Despite repeated meetings to discuss the invoice, CDC refused to pay the invoiced amount.

On January 22, 2021, appellant submitted a request for equitable adjustment (REA), seeking $31,030 for work performed and costs incurred as a result of the stop work order. The revised breakdown of costs provided was $20,000 for labor, $3500 for deliverables, $2030 for pro-rated profit, and $5500 for general and administrative (G&A) expenses. On February 18, 2021, by email, CDC agreed "to an equitable adjustment for $17,030.00 ($15,000 for Labor; $2,030 for Pro-Rated Profit)," and indicated that it would "issue a separate forthcoming decision within 7 days regarding the stop-work." Instead, on February 24, 2021, CDC notified appellant that it was terminating the contract for the convenience of the Government.

On April 14, 2021, appellant submitted a termination settlement proposal (TSP) on standard form (SF) 1436, requesting a contracting officer's final decision in the amount of $92,502. As part of its TSP, appellant claimed $20,000 for an "[e]quitable adjustment of base year labor costs," to include "labor hours for staffing for sites during Base Yr.-Stop Work Order." The contract incorporated by reference Federal Acquisition Regulation (FAR) 52.242-15 (Aug 1989), which states, in part, "If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement." 48 CFR 52.242-15(c) (FAR 52.242-15(c)).

On April 21, 2021, respondent again offered to pay appellant "$17,030 ($15,000 labor; $2,030 for profit)" in final settlement of the contract and requested further documentation from appellant in support of the "other invoiced expenses." CDC stated that "[t]he amount of $17,030 is for SF 1436 (out of the proposed $92,502)." On April 22, 2021, appellant offered its final settlement proposal in the amount of $54,730, which included $20,000 for "Equitable Adjustment – Base Year Labor Costs – Labor hours for staffing for sites during Base Yr-Stop Work Order," $25,200 for "Settlement Expenses (Items 12 and 5) – In-House & Outside Professional Fees/Expense," $7500 in attorney fees, and $2030 for

"Equitable Adjustment – Base Year Pro-rated Profit." CDC responded on April 30, 2021, extending the date to May 5, 2021, by which appellant could present additional information to support its TSP, exclusive of the $17,030 offered. Later that same day, appellant requested a final decision from CDC on the TSP submitted per SF 1436. CDC did not issue a final decision.

On July 12, 2021, more than sixty days after it had converted its TSP into a claim, appellant filed a notice of appeal based on the "deemed denial" of its TSP. In its notice of appeal and complaint, appellant asserted claims for "breach of firm fixed price contract, equitable adjustment, and termination for convenience" in the amount of $112,203.07. Appellant filed a supplement in which it provided a breakdown of the $112,203.07 claimed. Instead of the $20,000 and $2030 claimed for labor and profit in its TSP, appellant claimed $41,731.07, described as "Past Due for Base Year," and referenced the base year final invoice, Q030.

Discussion

Respondent's Motion to Dismiss for Lack of Jurisdiction

Appellant appealed the deemed denial of its TSP in the amount of $92,502. The TSP had converted into a claim once the parties reached an impasse in negotiations and appellant requested a contracting officer's final decision. *See James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543-44 (Fed. Cir. 1996). A contractor's request for a contracting officer's final decision on a TSP that is in dispute and the contractor's subsequent appeal of a deemed denial of the proposal is sufficient to confer jurisdiction on the Board. *Group Health Inc. v. Department of Health & Human Services*, CBCA 3407, 14-1 BCA ¶ 35,487. Thus, the Board has jurisdiction to decide the costs to which appellant is entitled for the termination for convenience.

In the TSP, appellant claims costs related to the termination for convenience as well as costs related to the base year labor costs and stop work order. These costs are properly claimed as part of the TSP. *See* FAR 52.242-15. The fact that the amount claimed for the base year labor costs and stop work order increased does not divest the Board of jurisdiction. A contractor may increase the amount of its claim on appeal after it has submitted a lesser amount to a contracting officer for decision, as long as the revised amount does not constitute a new claim. *Wheeler Logging, Inc. v. Department of Agriculture*, CBCA 97, 08-2 BCA ¶ 33,984, *reconsideration denied*, 09-1 BCA ¶ 34,025 (2008). If the increased amount is based on the same operative facts as the amount originally claimed, it is not a new claim. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). "If the fundamental character of the claim is changed, recertification and resubmission to the contracting officer

would be required." *Wheeler* (citing *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 591 (Fed. Cir. 1987)).

Here, the increase in the amount claimed is not based on a different set of operative facts and does not constitute a new claim. Instead, the increase represents the difference between the amount claimed in the TSP for the "[e]quitable adjustment of base year labor costs," to include "labor hours for staffing for sites during Base Yr.-Stop Work Order," and $2030 in profit and the amount of the base invoice amount of $41,731.07 for costs incurred due to "services paused, work stopped, undeliverable item(s), change in contract schedule, [and] contract modification." Appellant has asked CDC to reimburse it for these costs in four different ways – the base year invoice, the REA, the TSP, and this appeal. The fact that the amount invoiced differs from the amount requested in the REA and the amount requested in the TSP seems to stem from appellant's repeated efforts to reach a resolution of these costs. In response to each request for payment, CDC offered to pay only the labor costs and profit claimed, or $17,030.

Respondent argues that the Board lacks jurisdiction because appellant failed to certify its claim for $112,203.07. The Contract Disputes Act (CDA) mandates that contractors shall certify claims for over $100,000. 41 U.S.C. § 7103(b)(1) (2018). Failure to certify a claim deprives the Board of jurisdiction. *Whiteriver Construction, Inc. v. Department of the Interior*, CBCA 2045, 10-2 BCA ¶ 34,582. The proper time to examine whether a claim requires certification is when it is submitted to the contracting officer for a final decision. *Tecom, Inc. v. United States*, 732 F.2d 935, 937–38 (Fed. Cir. 1984). An uncertified claim submitted to a contracting officer requesting less than $100,000 need not be certified even if it increases to more than $100,000 during the disputes process. *Id.*

Appellant claimed $92,502 in its TSP and therefore did not have to certify its claim. Nonetheless, appellant adequately certified the TSP by submitting SF 1436. The certification in SF 1436 is sufficient for CDA jurisdiction. *James M. Ellett Construction Co.*, 93 F.3d at 1545 (finding the SF 1436 certification sufficient under the CDA, even though it is not identical to the contractor certification language of FAR 33.207(c)). Either way, appellant's failure to certify the amount claimed in this appeal – $112,203.07 – does not divest the Board of jurisdiction.

Respondent's Motion to Dismiss for Failure to State a Claim

Respondent moves to dismiss appellant's breach of contract claim for failure to state a claim on which relief can be granted. To survive such a motion, "[t]he contractor must point to factual allegations that, if true, would state a claim to relief that is plausible on its face, when the Board draws all reasonable inferences in favor of the contractor. The Board decides legal issues, and may treat any document that is incorporated in or attached to the

complaint as part of the pleadings." *B.L. Harbert International, LLC v. General Services Administration*, CBCA 6300, 19-1 BCA ¶ 37,335 (citing *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272).

In its complaint, appellant sets forth facts that state a claim for breach of contract. Specifically, appellant asserts that its base year invoice of $41,731.07 remains unpaid. Complaint ¶¶ 20–22. Moreover, appellant asserts entitlement to costs incurred as a result of the stop work order and the termination for convenience. *Id.* ¶¶ 25–29. Further, appellant sets forth facts that plausibly could support a claim for breach of the duty of good faith and fair dealing. *Id.* ¶ 25. Thus, respondent's motion to dismiss is denied.

Respondent's Motion for Summary Judgment

Respondent moves for summary judgment, arguing that it is entitled to judgment as a matter of law because appellant has failed to provide "a reasonable explanation, justification, and/or proof of expenses" for the costs claimed in the TSP as required by FAR 52.212-4(l). Respondent asserts further that appellant has not provided any substantiation for its proposed costs.

The contract incorporated by reference FAR 52.212-4, "Contract Terms and Conditions – Commercial Items (Oct 2018)." FAR 52.212-4(l) states:

> Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose.

"A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit." FAR 49.201(a); *Russell Sand & Gravel Co. v. International Boundary & Water Commission*, CBCA 2235, 13 BCA ¶ 35,455; *see SWR, Inc.*, ASBCA 56708, 15-1 BCA ¶ 35,832 (2014) (citing *Nicon, Inc. v. United States*, 331 F.3d 878, 885 (Fed. Cir. 2003)) ("[T]he overall purpose of a termination for convenience settlement is to fairly compensate the contractor and to make the contractor whole for the costs incurred in connection with the terminated work.").

Appellant has alleged a reasonable explanation and justification for its claimed costs. Accordingly, we deny respondent's motion for summary judgment as material facts remain in dispute.

Appellant's Motion for Sanctions

CBCA Rule 35(b) provides that sanctions may be imposed "[i]f a party or its representative, attorney, expert, or consultant . . . engages in misconduct affecting the Board, its process, or its proceedings." Appellant alleges that, in a telephone call between HHS's counsel and appellant's president, counsel for HHS engaged in the following misconduct that, according to appellant, warrants sanctions:

1. Misrepresented his interest and role in the appeal;
2. Offered unsolicited legal advice;
3. Suggested that appellant should commit acts of fraud against the Government by stating that appellant should be asking for more money;
4. Used deceptive methods in obtaining evidence from appellant to maliciously injure appellant's case;
5. Engaged in a bad faith effort to force appellant to mediate the dispute; and
6. Took advantage of appellant's self-represented status.

HHS's counsel denies all of these allegations and describes appellant's allegations as a "gross misinterpretation and mischaracterization of the 45-minute telephone call."

The actions of counsel, even as described by appellant, do not rise to the level of "misconduct affecting the Board, its process, or its proceedings." Moreover, appellant suffered no prejudice as a result of the telephone call with HHS's counsel. The motion for sanctions is denied.

Decision

For the foregoing reasons, we **DENY** respondent's motion to dismiss or for summary judgment, and we **DENY** appellant's motion for sanctions.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge