



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND  
IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON APRIL 5, 2021**

DISMISSED FOR LACK OF JURISDICTION: January 28, 2021

CBCA 6631

SAGE ACQUISITIONS LLC,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Michael R. Rizzo, Aaron S. Ralph, and Kevin J. Slattum of Pillsbury Winthrop Shaw Pittman LLP, Los Angeles, CA, counsel for Appellant.

Blythe I. Rodgers, Julie K. Cannatti, and William J. Selinger, Office of the General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **SHERIDAN**, and **O'ROURKE**.

**GOODMAN**, Board Judge.

Respondent, Department of Housing and Urban Development (HUD), has moved to dismiss this appeal (respondent's motion) filed by appellant, Sage Acquisitions LLC (Sage or appellant), or in the alternative for summary judgment. We dismiss the appeal for lack of jurisdiction.

### Background

On January 10, 2018, HUD terminated for convenience three asset manager (AM) contracts HUD had awarded to appellant on September 25, 2015: contract no. DU204SB-15-D-05 (Area 7A); contract no. DU204SB-15-D-07 (Area 5P); and contract no. DU204SB-15-D-12 (Area 1D).

On January 9, 2019, Sage submitted its termination for convenience settlement proposal (TSP), a sixty-nine page document, which included a standard form (SF) 1436. Appeal File, Exhibit 77 at 001991, et seq. Section II of the SF 1436, entitled “Proposed Settlement,” contained an itemized list of costs totaling \$3,149,926, as follows:

5.	Other Costs (from Schedule B)	\$2,666,496
8.	Profit (Explain in Schedule D)	\$266,650
12.	Settlement Expenses(from Schedule E)	\$216,780
15.	Gross Proposed Settlement	\$3,149,926
17.	Net Proposed Settlement	\$3,149,926
19.	Net Payment Requested	\$3,149,926

Pages 2 and 3 of the SF 1436 contained schedules B (Other Costs), D (Profit), and E (Settlement Expenses), all of which read, “See Attached Term. For Conv. Proposal Including REAs [requests for equitable adjustment].” The form was executed by appellant’s chief financial officer. Above the signature block appears a certificate with wording that varies from the certification required by the Contract Disputes Act (CDA), 41 U.S.C. § 7103(b) (2018).<sup>1</sup>

The TSP contains a narrative asserting legal principles and facts, including a chronology and explanation of appellant’s prior submission of REAs in 2017 and respondent’s rejection of the REAs in 2018. Appeal File, Exhibit 77 at 36-38. The TSP states that it is including the REAs “in this proposal as it is entitled to do under the applicable termination for convenience clause.” *Id.* at 38.

Section VII of the TSP, entitled “Sage Proposed Settlement Costs,” begins with a cost schedule. Appeal File, Exhibit 77 at 57. The cost schedule states: “The settlement costs identified by category are entered into and support Sage’s proposal calculation for ‘Other

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<sup>1</sup> Respondent has not challenged the sufficiency of the certification language for purposes of certification pursuant to the CDA.

Costs' on line 5 of SF 1436." The first section of the cost schedule is entitled "Termination for Convenience" and is an itemization of categories totaling \$3,149,926:

Unamortized Start-up Costs	\$955,004
Unabsorbed Depreciation for fixed assets	\$93,833
Cost of Terminated Work in Process	\$975,480
Continuing Office Lease	\$642,179
Closeout Costs continuing After Termination/Transition Out Costs	TBD [to be determined]
Subtotal	\$2,666,496
Proposal and REA Preparation Costs	\$216,780
Profit @ 10% (Excluding Settlement Costs)	\$266,650
 Total Termination for Convenience Settlement Proposal	 \$3,149,926

In this itemization, the subtotal of \$2,666,496 equals the amount on line 5 of SF 1436, "Other Costs," and the "Total Termination for Convenience Settlement Proposal" amount of \$3,149,926 equals the amounts on lines 15 ("Gross Proposed Settlement"), 17 ("Net Proposed Settlement"), and 19 ("Net Payment Requested") of SF 1436.

The second section of the cost schedule on page 57 of the TSP, entitled "REAs," contains the following:

<b>Legal Basis</b>	<b>Cost Impact</b>
Defective Specifications/Negligent Estimate	\$1,984,025 *
Violation of the Duty of Good Faith and Fair Dealing	\$1,984,025 *
Superior Government Knowledge	\$1,984,025 *
Mutual Mistake	\$1,984,025 *
Inventory Diversion	\$1,984,025 *
Excess Reimbursable Costs	\$950,572
Illegal Option Exercise	\$153,733
Beach [sic] of Bridge Requirements Contract	TBD
 Estimated REA Total Cumulative Impact	 \$2,934,597 **

\* Alternative Theories of Recovery

\*\* Certain Costs May be Duplicative of the Termination of Convenience Costs

Following the cost schedule is a twelve-page narrative in two parts, entitled “A. Termination for Convenience Costs” and “B. REA Costs.” The introduction to “REA Costs” states:

This section explains the calculation of the impact of the Government’s actions which respectively, either constructively changed the contract or breached the contracts. The majority of these calculations reflect alternative—not cumulative theories of recovery. Accordingly, Sage does not seek the cumulative amount of all the REA proposals. Sage further expressly reserves the right to supplement or revise these calculations as necessary.

Appeal File, Exhibit 77 at 66.

By final decision dated July 16, 2019, a HUD contracting officer denied the TSP in its entirety. On October 11, 2019, appellant appealed the denial of its TSP to this Board. In its complaint, appellant asserted, “The Termination Proposal claimed total entitlement of \$6,084,523.” Complaint ¶ 179. Appellant’s complaint contained nine counts. Counts I and III through IX total \$2,934,597, which correspond to the cost elements comprising the “Estimated REA Total Cumulative Impact in the TSP.” Appeal File, Exhibit 77 at 57. Count II, in the amount of \$3,149,926, corresponds to the total of the amounts designated as “Gross Proposed Settlement,” “Net Proposed Settlement,” and “Net Payment Requested” in the SF 1436 certification, and to the “Total Termination for Convenience Settlement Proposal” in the TSP. *Id.* Appellant also asserts in its opposition to respondent’s motion that “the termination settlement proposal seeks more than \$6 Million.” Appellant’s Opposition at 5.

Respondent has filed a motion to dismiss or in the alternative for summary judgment, on various grounds.

### Discussion

#### Respondent’s Motion

Respondent’s motion raises many issues which the parties have briefed. We dismiss the appeal for lack of jurisdiction because the TSP does not demand a sum certain, and the TSP is therefore not a claim pursuant to the CDA. We do not address the remaining issues in respondent’s motion.

### Respondent's Assertion of Lack of Jurisdiction

Respondent raises the issue of jurisdiction as follows:

As an initial matter, Appellant's Termination Settlement Proposal and REA should be dismissed, in whole or part, for lack of subject-matter jurisdiction because: (A) Appellant failed to certify its independent REA, depriving this Board of jurisdiction; (B) even if the Board finds that the Appellant did in fact certify the REA, neither the REA nor the Termination Settlement Proposal state a sum certain; and (C) neither Appellant's Termination Settlement Proposal nor REA contained the allegation that Contract DU204SB-15-D-07 (Area 1D), Contract DU204SB-15-D-12 (Area 5P), and Contract DU204SB-15-D-05 (Area 7A) . . . were breached Requirements contracts rather than IDIQ [indefinite delivery indefinite quantity] contracts.

Respondent's Motion at 1.

### The REAs

Appellant submitted several REAs to respondent that were denied prior to termination of the contracts. The REAs were not certified pursuant to the CDA when submitted. A description of the REAs and an itemization of their estimated costs were included in the TSP. Also included with the TSP was a SF 1436 which included certification language. In its motion, respondent raises the issue of whether the REAs required separate certification. Appellant counters that the REAs were included or "merged" into the TSP, noting their references on the SF 1436, and did not require independent separate certification. We do not address the issue of alleged lack of certification of the REAs, or the issue of whether the TSP or the REAs contained specific allegations. In resolving the motion to dismiss, we find that the TSP, the denial of which is the subject of this appeal, is not a claim pursuant to the CDA because it does not state a sum certain.

### The Requirement for a CDA Claim to State a Sum Certain

The CDA delineates the jurisdictional prerequisites to any appeal to this Board. Jurisdiction is a threshold matter. Where the Board lacks subject matter jurisdiction, we may not proceed to decide the merits of the case. Jurisdiction requires both a valid claim and a contracting officer's final decision on that claim. *ARI University Heights, LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085. Because the CDA does not define the term "claim," we apply the definition set forth in Federal Acquisition Regulation

(FAR) 2.101, 48 CFR 2.101 (2014).<sup>2</sup> See, e.g., *ARI University Heights LP; ASP Denver, LLC v. General Services Administration*, CBCA 2618, 12-1 BCA ¶ 35,007. The FAR defines “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 a contract.” 48 CFR 2.101; see *Construction Group LLC v. Department of Homeland Security*, CBCA 4459, 15-1 BCA ¶ 35,900 (citing *Northrop Grumman Computing Systems, Inc. v. United States*, 709 F.3d 1107, 1112 (Fed. Cir. 2013)).

In *ARI University LLP*, we set forth how and when a contractor must fulfill the requirement of submitting a monetary claim in a sum certain:

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 submit a monetary claim in a sum certain. . . . 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.” . . . In short, the sum certain requirement demands a fixed amount be stated in the claim. . . . *G & R Service Co. v. General Services Administration*, CBCA 1876, 10-2 BCA ¶ 34,506 . . . .

The sum certain requirement is satisfied, or not, at the time the contractor submits its claim to the contracting officer. See *Morgan & Son Earthmoving, Inc.*, ASBCA 53524, 02-2 BCA ¶ 31,874, at 157,482 (the contractor’s use of “no less than” and “in amounts to be proven at hearing” in its complaint did not render its claim uncertain because “the time for determining whether a contractor has submitted a valid CDA claim is when the claim is submitted to the contracting officer, not when the complaint is filed”). [citations omitted]

In *Pacific Coast Community Services, Inc. v. General Services Administration*, CBCA 5064, 16-1 BCA ¶ 36,213, this Board held that the use of estimated amounts does not result in a sum certain, and therefore cannot give a contracting officer a clear and unequivocal statement with adequate notice of the amount of the claim.

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<sup>2</sup> This definition appears in the Disputes clause of the contract, FAR 52.233-1(c) (MAY 2014), Appeal File, Exhibit 1 at 117.

### The TSP

We cannot determine a sum certain demanded by the TSP. The SF 1436 contains an amount, \$3,149,926, designated as “Gross Proposed Settlement,” “Net Proposed Settlement,” and “Gross Proposed Settlement.” This same amount is also designated as “Total Termination for Convenience Settlement Proposal” in the itemization on page 57 of the TSP’s section VII, entitled “Sage Proposed Settlement Costs.” However, the itemization and description in the TSP of the estimated REA costs, together with appellant’s attempts to explain how these costs relate to the termination for convenience costs, render the sum claimed in the TSP uncertain.

The TSP on page 57 itemizes the REAs with a total of \$2,934,597. This total amount is designated as the “Estimated REA Total Cumulative Impact.” Five alternate legal theories are offered for the component amount of \$1,984,025 contained in this total. Also, there is an explanatory note next to the total of \$2,934,597 which states, “Certain Costs May be Duplicative of the Termination for Convenience Costs.”

This raises two issues of uncertainty – that the total REA costs of \$2,934,597 is an estimate and that certain of these costs may be duplicative of termination of convenience costs – which suggests that possibly all or a portion of the REA costs may have been included in the termination for convenience costs of \$3,149,926, itemized separately. The SF 1436 suggests that the amount certified on that form, \$3,149,926, which is the amount of the termination for convenience costs, does include the REA costs, as schedules B (Other Costs), D (Profit), and E (Settlement Expenses) on the form all state, “See Attached Term. For Conv. Proposal Including REAs.” However, the narrative of the TSP further confuses the calculation of the REA costs. It states that “Sage does not seek the cumulative amount of all the REA proposals. Sage further expressly reserves the right to supplement or revise these calculations as necessary.”

As the question of a sum certain is to be determined by viewing the submission to the contracting officer, the estimated REA costs and the suggestion that certain of these costs may be duplicative of termination for convenience costs result in an unfixed variable in the calculation of the amount requested, which cannot result in a sum certain. *See, eg., ARI University Heights*. We cannot ascertain from the TSP whether the total amount sought was (1) \$3,149,926, the amount on the SF 1436 and designated as “Total Termination for Convenience Settlement Proposal” on page 57 of the TSP; (2) the sum of that plus the \$2,934,597 “Estimated REA Total Cumulative Impact” (for a total of \$6,084,523); (3) an amount greater than \$3,149,926 or less than \$6,084,523, depending on what portion of the REA costs is duplicative of termination for convenience costs; or (4) other amounts,

depending on a future calculation, if and when the REA estimates are revised or supplemented, which is suggested in the TSP.

Appellant states in its opposition to respondent's motion that the TSP seeks more than \$6 million and appellant asserts in its complaint that the TSP claimed total entitlement of \$6,084,523. This led the Board to issue an order of inquiry to appellant on November 12, 2020, asking where in the TSP the number \$6,084,523 appeared. Appellant responded as follows:

The number \$6,084,523 does not appear in the TSP. That fact, however, should have no legal import. The total amount of \$6,084,523, which derives from the addition of the two component numbers, appears repeatedly and consistently throughout the document. Specifically, the TSP carefully itemizes the total entitlement amounts requested for each of the two component numbers of the TSP. Also, the TSP made it very clear that these component numbers were to be combined.

The first paragraph of the TSP states as follows:

Pursuant to Federal Acquisition Regulation ("FAR") Sections 49.1, 49.2 and 52.249-2, Sage Acquisitions LLC ("Sage") hereby submits this final termination for convenience settlement proposal ("Proposal") seeking recovery of \$3,149,926 under Contracts No. DU204SB-15-D-05; No. DU204SB-15-D-07; and DU204SB-15-D-12; including legal and professional fees in the amount of \$216,780 pursuant to FAR 31.205-33. Sage includes with this proposal requests for equitable adjustments ("REA") to which it is entitled under these contracts. The majority of the REAs seek costs under alternative theories of adjustment so that Sage estimates that it seeks a total of \$2,934,597 in REA costs.

...

As shown above, the TSP unequivocally expressed a sum certain that sought recovery for the total amounts of two components: Sage's termination costs and related Request for Equitable Adjustment . . . costs.

Appellant's Response to Board's Order.

Appellant's response does not result in clarity. We find it difficult to understand how appellant can assert as a fact that a number does *not* appear in a document, declare that the



non-appearance of the number has no legal import, and then state that the number *appears repeatedly and consistently throughout the document*. Also, the assertion that two amounts should be “combined” does not lead to the conclusion that the resultant sum would be certain, as the REA amount was designated as an estimate with the additional qualification that there may be duplication of these costs within the termination for convenience amount.

Finally, appellant itself raises a question of material fact in its opposition to respondent’s motion with regard to the inclusion of the REA costs in the SF 1436 and the TSP. Appellant asserts:

The Government’s Motion further makes the bewildering statement that the certification applied only to “those charges allocable to the terminated portion of the contract” and that the REAs were not allocable because they “were not even listed on the signed [TSP] certification.” As explained above, the REA costs were, in fact, listed in the SF-1436 and throughout the attached TSP, which is covered by the certification as well. At a minimum, there is a material factual issue about which costs are covered by the TSP certification.

....

This Board possesses jurisdiction over the REAs. At the very least, this presents a disputed factual issue.

....

These facts create a genuine issue of material fact as to whether the TSP included the REA costs. As such it is not ready for judgment at the motion stage – especially before discovery has commenced in earnest.

Appellant’s Opposition at 10 & nn.11, 12.

Appellant’s assertion that discovery is needed to resolve the issue as to whether the TSP included the REA costs further supports the conclusion that the TSP did not demand a sum certain. The TSP did not meet the requirement that a claim must demand a sum certain, and therefore the TSP could not give the contracting officer a clear and unequivocal statement with adequate notice of the amount of the claim, and as such was not a claim as required by the CDA.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

*Allan H. Goodman*

ALLAN H. GOODMAN

Board Judge

We concur:

*Patricia J. Sheridan*

PATRICIA J. SHERIDAN

Board Judge

*Kathleen J. O'Rourke*

KATHLEEN J. O'ROURKE

Board Judge