



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: April 6, 2023

CBCA 7587

BES DESIGN/BUILD, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Jerome E. Speegle of Speegle, Hoffman, Holman & Holifield, LLC, Mobile, AL, counsel for Appellant.

Kelly Y. Burnell and David C. Charin, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DRUMMOND**, **KULLBERG**, and **ZISCHKAU**.

DRUMMOND, Board Judge.

Respondent filed a motion to dismiss for lack of jurisdiction, arguing that this claim is a resubmission of a previous claim that appellant did not timely appeal. For the reasons below, we grant respondent's motion and dismiss the appeal for lack of jurisdiction.

Findings of Fact

The General Services Administration (GSA) entered into a general construction, indefinite-delivery, indefinite-quantity contract (GS-04P-15-EZ-D-0011) with BES

Design/Build, LLC (BES). Appeal File, Exhibits 1–3.¹ Under that contract, GSA awarded BES a task order (GS-P-04-16-EX-7486) for \$348,227 to replace two exterior stairs at a courthouse in Statesville, North Carolina. Exhibit 6. During performance, disputes arose relating to issues of performance and non-payment.

On February 24, 2021, BES submitted a certified claim for \$37,816.15 to the contracting officer (CO). Exhibit 16 at 1. According to BES, the contract work had been completed, and GSA refused to pay the remaining balance. *Id.*

On April 23, 2021, the CO issued a contracting officer’s final decision (COFD) denying BES’s claim and including the statement, “This is the final decision of the contracting officer.” Exhibit 19 at 1. The COFD also provided notice to BES of its appeal rights. The COFD was sent electronically to BES’s owner and several other BES representatives on the day of issuance. Exhibit 18.

Over one year later, on June 8, 2022, BES submitted a claim to the CO that was nearly identical to the February 24, 2021, claim.² On August 22, 2022, the CO responded to the letter, informing BES that a COFD had already been issued on the matter on April 23, 2021. Exhibit 25. BES makes no contention that it did not receive the April 23, 2021, COFD.

Eighty-eight days later, on November 18, 2022, BES filed a notice of appeal with this Board, stating that BES was appealing a COFD issued on August 22, 2022, and referencing the CO’s email to BES of that date. In response, GSA filed a motion to dismiss for lack of jurisdiction.

Discussion

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), governs the jurisdiction of the Board and authorizes the Board to review a COFD on a contractor’s claim. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1573 (Fed. Cir. 1995). There are three components, or prerequisites, to our ability to hear a contractor’s claim for money under the CDA: the contractor’s submission of the claim to the CO, the issuance of a COFD or occurrence of a deemed denial, and a timely appeal. *Bass Transportation Services, LLC v. Department of*

¹ All exhibits are found in the appeal file, unless otherwise noted.

² The only difference between the claims was that BES lowered its sum certain because GSA made a payment between the submittals of the first and second claims. *Compare* Exhibit 16 (certified claim from February 24, 2021) *with* Exhibit 24 (certified claim from June 8, 2022); *see* Exhibit 21 at 4 (e-mails approving a payment of \$6189).

Veterans Affairs, CBCA 4995, 16-1 BCA ¶ 36,464, at 177,688; *see Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,603.

First, the contractor must have appropriately submitted a valid CDA claim to the CO. The CDA itself does not define “claim,” but it has been established that a non-routine “claim” for money be “(1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain.” *Reflectone*, 60 F.3d at 1575. Here, BES’s February 24, 2021, letter to the CO was a valid claim under the CDA. The claim consisted of a contractor’s written demand seeking payment as required under the contract with a sum certain of \$37,816.15. The claim also included an explicit request for a COFD and described the basis for the claim.

Second, an appeal must stem from a COFD or a deemed denial. *Bass Transportation*, 16-1 BCA at 177,688. A COFD should include a description of the claim, a reference to the pertinent contract terms, a statement of the CO’s decision with supporting rationale, the phrase, “this is the final decision of the contracting officer,” and the contractor’s notice of appeal rights. 48 CFR 33.211(a)(4) (2021) (Federal Acquisition Regulation (FAR) 33.211(a)(4)). Once a COFD is issued, the decision on the claim “is final and conclusive and is not subject to review . . . unless an appeal or action is timely commenced.” 41 U.S.C. § 7103(g). Here, the COFD is the CO’s April 23, 2021, letter to BES denying the claim. This letter described BES’s claim, the related facts, and the relevant contract provision, as well as the basis for the CO’s denial of the claim and the notice of appeal rights. It also prominently included the statement, “This is the final decision of the contracting officer.” Thus, the April 23, 2021, letter from the CO to BES is the COFD under the contract.

Third, the contractor must file a timely appeal for our jurisdiction to vest. “A contractor, within 90 days from the date of receipt of a contracting officer’s decision . . . may appeal the decision to an agency board as provided in section 7105 of this title.” 41 U.S.C. § 7104(a); *see Carl & Son’s Construction Co. v. Department of the Interior*, CBCA 5918, 18-1 BCA ¶ 36,920, at 179,873 (2017) (“Pursuant to section 7104(a) of the [CDA], if a contractor wants to appeal a contracting officer’s decision to the Board, it must file its appeal within ninety days from the date that it receives the decision.”).

It is well-established that a contractor’s failure to file an appeal with the appropriate board within ninety days of receiving the COFD precludes the board from hearing the appeal. *See, e.g., Wise Developments, LLC v. General Services Administration*, CBCA 6659, 21-1 BCA ¶ 37,774, at 183,347 (citing *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1391 (Fed. Cir. 1982)); *JAF Supply, Inc. v. Department of Veterans Affairs*, CBCA 6934, 20-1 BCA ¶ 37,729, at 183,126. BES asserts that the relevant claim for the ninety-day deadline is the claim submitted on June 8, 2022. However, the second claim was merely a resubmission of the February 24, 2021, claim. BES even states in the June 8, 2022, letter that

it was “resubmitt[ing]” the claim for payment. Exhibit 24 at 1. “The established test for what constitutes a ‘new’ claim is whether [the] claims are based on a common or related set of operative facts. If a court will have to review the same or related evidence to make its decision, then only one claim exists.” *JRS Management v. Department of Justice*, CBCA 3053, 13 BCA ¶ 35,235, at 172,996 (internal citations and quotations omitted). If the contractor’s allegations and the relief sought in each “claim” is substantially the same, the second claim is not a new claim. *Id.*; see *Battley v. Social Security Administration*, CBCA 1063, 08-2 BCA ¶ 33,896, at 167,768.

Here, both claims filed by BES arise from the same set of operative facts, the same contract, and the same work. In each claim, BES alleges that GSA refused to pay BES for the final payment application after completion of the project, thereby requiring us to examine the same facts to evaluate each claim.

As established above, the first COFD was issued on April 23, 2021, and BES received it the same day. Thus, the deadline for BES to file with this Board was July 22, 2021. Because BES filed its notice of appeal with this Board on November 18, 2022, the filing was untimely. The second claim is not a new claim, and the Board lacks jurisdiction to hear its appeal.

Decision

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

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge