



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART: March 21, 2024

CBCA 7451

QUALITY TRUST, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Lawrence M. Ruiz, President of Quality Trust, Inc., Junction City, KS, appearing for Appellant.

Amanda S. Wang and Rachel Grabenstein, Office of the Solicitor, Department of the Interior, Albuquerque, NM, counsel for Respondent.

Before Board Judges **RUSSELL, SULLIVAN, and CHADWICK.**

SULLIVAN, Board Judge.

Quality Trust, Inc. (QTI) appealed the decision of the contracting officer (CO) for the Department of the Interior (DOI or respondent) issued in June 2022. DOI filed two motions to dismiss—one seeking dismissal in part for lack of jurisdiction and the other seeking dismissal for failure to prosecute. We grant in part the motion to dismiss in part for lack of jurisdiction and deny the motion to dismiss for failure to prosecute.

Background

I. Claim to the Contracting Officer

In September 2020, the DOI entered into a contract with QTI for bridge and road repair. Appeal File, Exhibit 7 at 2-4.¹ In April 2021, the parties executed a bilateral modification, adding almost \$52,000 to the contract as the result of a mutual mistake. Exhibit 76 at 2 (modification 5). In January 2022, DOI issued a unilateral modification that partially terminated the work on the contract. Exhibit 121 (modification 9). By letter dated January 10, 2022, QTI submitted a “time and cost modification request,” seeking payment of \$2000 per day for the period March through November 2021, a period during which QTI alleged it was on standby due to “latent conditions and changes.” Exhibit 129.

In April 2022, QTI filed a claim pursuant to Federal Acquisition Regulation (FAR) Disputes clause 52.233-1 (July 2002) (48 CFR 52.233-1 (2021) (FAR 52.233-1)), seeking payment of \$481,109.75. Exhibit 146. QTI did not explain how it arrived at its \$481,109.75 figure nor what “Lost Adjustment expenses” remained to be incurred. *See id.* QTI certified that the supporting data it provided “are accurate and complete” and that the “amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.” *Id.*²

On May 23, 2022, the CO requested via email that QTI clarify the amount of its claim and provide documentation showing “how [QTI] arrived at the amount claimed and explain to the Government why [QTI was] entitled to the sum amount claimed.” Exhibit 148. In its email reply the same day, QTI described a series of purported problems on the contract:

[T]his contract is royally messed up in many specific areas. Let me reiterate,. [sic] When we had the problems on the bridge, a time and cost modification was sent to you, of which you never responded to over a year ago.. [sic] QTI had taken into account that we must be ready and willing to mob and demob two more times Which alone would easily add another \$100,000.00 Because

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

² QTI submitted four pages of what appears to be a proposal originally submitted in 2021 with two pages titled “Shipping Point Data.” One page is titled “Origin Offer Bids,” and one page is titled “Offer Conditions.” Exhibit 146 at 4-7. None of the proposal pages provide an explanation for the \$481,109.75 sought. *See id.* The final page, titled “FWS Application and Certificate for Payment,” requests payment in the amount of \$62,159.75. *Id.* at 8. Nothing on the application and certificate for payment explains how the document supports QTI’s claim. *See id.*

of all the changes, and a contract that never said, we were working on a Department of Natural Resources (DNR) project was very deceiving from the specifications and drawings. Please note: the project was out of scope and full of differing site conditions and latent conditions to mention a few. The more I think about this . . . , QTI could easily justify the \$481,109.75.

Exhibit 150 at 2. QTI also stated that “we estimated \$2,000.00 a day based on it being our only project.” *Id.* On the same day as the email quoted above, May 23, 2022, QTI sent another letter to the contracting officer, submitting a third payment request for \$75,840.25. Exhibit 149. QTI complained about a “unilateral Partial Termination . . . due to latent and differing site conditions” and that “Amendment P0005 was never honored in good faith in the Amount of \$51,921, plus interest and penalties.” *Id.* at 2.

On the following day, the contracting officer and QTI exchanged a series of emails seeking to clarify the basis of QTI’s claim and the payment request for \$75,840.25. *See* Exhibits 151, 152. In its replies, QTI appears to assert that a nearly \$52,000 modification to the contract value (modification 05) formed the basis of its claim but does not explain how. *See* Exhibit 152. On June 8, 2022, QTI sent the contracting officer three emails, the last of which offered to “justify the \$481,109.75.” Exhibit 153 at 4. QTI asserted that it could support its claim with the use of the *Eichleay* formula. *See id.* at 4 (“For the larger amount[,] QTI will claim under the EIKLAY [sic] formula”).

On June 14, 2022, the contracting officer denied the claim. Exhibit 154. He concluded that QTI had not provided support for the \$481,000 that it sought. *Id.* at 4.

II. Proceedings before the Board

In July 2022, QTI filed this appeal. Following QTI’s submission of its complaint, DOI moved to partially dismiss the appeal for lack of jurisdiction because several of the allegations raised in the complaint were not presented to the contracting officer. QTI responded to the motion and provided further explanation of some, but not all, of the paragraphs in its complaint.³

Following receipt of QTI’s response, the Board convened a teleconference and asked QTI to provide an explanation of its claim to the contracting officer and any supporting

³ In September 2022, the Board stayed proceedings to allow the parties to conduct mediation with another Board judge serving as a neutral. After the mediation proceedings were closed without resolving the case, the Board set a deadline for QTI’s response. Order (Jan. 24, 2023).

documentation. The Board set the deadline for this submission as March 15, 2023. QTI failed to meet this deadline or ask for an extension. The Board convened another conference call on April 17, 2023. During this conference, QTI's owner and representative explained that he had been unable to respond due to the press of other business. When asked when he could respond, the owner explained that medical issues would prevent him from responding for an extended period of time.

Following this conference, the Board issued an order denying the request to stay the case and setting a deadline of July 5, 2023, for a response to the Board's request for a further explanation of the claim. QTI did not file its response on this date but sent an email on July 6, 2023, asking that another teleconference be scheduled. On July 7, 2023, DOI filed its motion to dismiss for failure to prosecute.⁴

Discussion

I. DOI's Motion to Dismiss in Part is Granted in Part

DOI moved to dismiss for lack of jurisdiction those portions of QTI's complaint that were not raised in QTI's claim to the contracting officer. The Board's jurisdiction is bounded by what is presented in the claim to the contracting officer for decision. "A valid claim does not require 'magic words,' but rather it must meet each component of a claim as expressed in the regulation." *Crystal Clear Maintenance v. General Services Administration*, CBCA 7547, 23-1 BCA ¶ 38,324, at 186,109 (citing *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1578 (Fed. Cir. 1992)). A claim is defined in the FAR and the contract's Disputes clause 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." 48 CFR 2.101, 52.233-1(c). Each claim brought under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), "must be submitted in writing to the contracting officer, with adequate notice of the basis for the claim." 41 U.S.C. § 7103(a)(1); see *Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561, at 178,065 (citing *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). To determine the basis of the claim, the Board may consider the correspondence between the parties. *French*

⁴ On August 11, 2023, the Board issued a show cause order and notified the parties that DOI's motions and QTI's request for a teleconference were held in abeyance pending the decision on the show cause order. Following the Court of Appeals for the Federal Circuit's decision in *ECC International Constructors, LLC v. Secretary of the Army*, 79 F.4th 1364 (Fed. Cir. 2023) (holding that the sum certain requirement is not a jurisdictional requirement), the Board, under a separate order, withdrew the show cause order.

Construction LLC v. Department of Veterans Affairs, CBCA 6490, 22-1 BCA ¶ 38,164, at 185,340; *SRA International, Inc. v. Department of State*, CBCA 6563, et al., 20-1 BCA ¶ 37,543, at 182,312. An action brought under the CDA “must be ‘based on the same claim previously presented to and denied by the contracting officer.’” *Qwest Communications Co. v. General Services Administration*, CBCA 3423, 14-1 BCA ¶ 35,655, at 174,564 (citing *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)). “It must arise from the same operative facts and claim essentially the same relief.” *Id.*; see *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 14-1 BCA ¶ 35,630, at 174,492.

QTI, in its claim and complaint, seeks payment of over \$481,000. Although not stated in the claim itself, QTI explained in correspondence with the contracting officer that it seeks payment of this amount for the period that it was on standby. QTI’s complaint totals twelve paragraphs. Several of these paragraphs appear to be tied to the its constructive suspension claim (paragraphs 1, 5, 7, 8, and 10). Further proceedings before the Board will be limited to this claim.

QTI also raises in the complaint issues related to modification 5 (reforming the contract for mutual mistake), modification 9 (partial termination of the contract), and the final payment owed. While complaints about these items are found throughout QTI’s correspondence with the contracting officer, none of these issues are tied to the amount sought in the claim. Therefore, we find that we lack jurisdiction to consider these issues and grant DOI’s motion to dismiss the allegations in paragraphs 2–4, 6, 9, and 11–12.

II. The Board Denies DOI’s Motion to Dismiss for Failure to Prosecute

DOI also moved to dismiss for failure to prosecute, based upon QTI’s failure to meet the deadline set by the Board for a fuller explanation of the claim. The Board has the power to dismiss a case for failure to prosecute.⁵ *Medtek, Inc. v. Department of Veterans Affairs*,

⁵ Board Rule 35(b) provides, in pertinent part:

If a party or its representative, attorney, expert, or consultant fails to comply with any direction or order of the Board (including an order to provide or permit discovery) or engages in misconduct affecting the Board, its process, or its proceedings, the Board may make such orders as are just, including the imposition of appropriate sanctions. Sanctions may include, but are not limited to:

.....

CBCA 1544, 09-2 BCA ¶ 34,285, at 169,367. “This sanction has been described as ‘harsh’ and ‘severe,’ however, so we employ it sparingly.” *Id.* (citing *Kadin Corp. v. United States*, 782 F.2d 175, 176 (Fed. Cir. 1986)). The Board has used that power when an appellant has repeatedly failed to respond to the Board’s orders. *Brandon Staffing Solutions LLC v. Department of Veterans Affairs*, CBCA 7044, 22-1 BCA ¶ 38,050, at 184,765; *JDM, LLC v. Department of Veterans Affairs*, CBCA 5522, 17-1 BCA ¶ 36,729, at 178,893-94. The Board has declined to exercise the power when an appellant has not yet repeatedly failed to reply and the conduct complained of has not risen to the level of being egregious. *Geo-Imaging Consulting, Inc. v. Environmental Protection Agency*, CBCA 1852, 10-1 BCA ¶ 34,443, at 169,973.

We deny DOI’s motion. While QTI’s seeming refusal to provide the Board with the requested explanation or support for its claim will hinder the Board’s ability to resolve the claim, QTI has responded to communications and repeatedly requested that the Board schedule teleconferences. QTI’s actions do not meet the standard for abandonment that is usually found when a case is dismissed for failure to prosecute.

Our denial of the motion to dismiss should not be a signal to QTI that it may continue to fail to respond to the Board’s orders. If QTI fails to comply with the Board’s future orders for further proceedings in this case, the Board will consider whether such conduct warrants sanctions, up to and including dismissal for failure to prosecute.

Decision

DOI’s motion to dismiss in part is granted in part, and the appeal is **DISMISSED IN PART**. DOI’s motion to dismiss for failure to prosecute is denied. The presiding judge will issue a separate order for further proceedings in this appeal.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

(6) Dismissing the case or any part thereof;

48 CFR 6101.35(b).

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge