

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
J. P. Donovan Construction, Inc.) ASBCA No. 55335
)
Under Contract No. N62467-02-C-2747)

APPEARANCES FOR THE APPELLANT: Edward J. Kinberg, Esq.
Kinberg & Associates, LLC
Melbourne, FL

Frederick L. Wright, Esq.
Vaughn, Wright & Boyer LLP
Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Pamela J. Nestell, Esq.
Senior Trial Attorney
Naval Facilities Engineering
Command
Litigation Office
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE JAMES ON
GOVERNMENT'S MOTIONS TO DISMISS FOR LACK OF JURISDICTION
OR IN THE ALTERNATIVE TO STAY THE PROCEEDINGS

This appeal is brought by J. P. Donovan Construction, Inc. (Donovan) on behalf of its subcontractor, Costello Industries, Inc. (Costello). On 28 January 2010 the government submitted a Motion To Dismiss for Lack of Jurisdiction or in the Alternative Motion to Stay Proceedings, with 42 exhibits (hereinafter ex. G-). The motion asserts that Donovan's Contract Disputes Act (CDA) certification of Costello's claim, though conforming to the language of 41 U.S.C. § 605(c)(1) and the FAR 52.233-1, DISPUTES (DEC 1998) clause, was qualified and not made in good faith. Appellant replied to the motion on 5 March 2010. Respondent replied to appellant's response on 15 March 2010.

The Board's 23 March 2010 letter to the parties raised the issue *sua sponte* whether the phrase in Donovan's 7 March 2005 letter submitting the claim: "Donovan has or will have approximately \$65,000 of additional direct and administrative costs that should be added to this Costello requested amount" of \$559,764.00 (R4, tab 30 at 2), results in a claim which does not state a "sum certain," and negates the Board's

jurisdiction of the appeal, and requested further briefing on this issue. On 23 April 2010 appellant submitted a brief on the “sum certain” issue (“app. br.”). On 17 May 2010 respondent replied to appellant’s 23 April 2010 brief and submitted a “Motion to Dismiss for Failure to State a Sum Certain.” On 17 June 2010 appellant replied to the government’s 17 May 2010 motion.

STATEMENT OF FACTS (SOF)

1. The U.S. Navy awarded Contract No. N62467-02-C-2747 to Donovan on 18 September 2002 to repair Runway 13-31 at the Naval Air Station, Key West, Florida (R4, tab 2 at 1-7). The contract contained the FAR 52.233-1, DISPUTES (DEC 1998) –ALTERNATE I (DEC 1991) clause, whose ¶ (c) defined a “claim” as “a written demand or...assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain,” and the DFARS 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998) clause (R4, tab 1 at 53-54, 65 of 68).

2. On 15 October 2002 Donovan subcontracted with Costello for joint resealing, concrete spall repairs, herbicide application and incidental related work (ex. G-5).

3. Site work commenced on 13 November 2002 (ex. G-7). The work was complete on 9 May 2003 (ex. G-22).

4. On 14 January 2005 Costello submitted a request for equitable adjustment (REA) for \$559,764.00 to Donovan, requesting that Donovan certify it and submit it to the Navy (ex. G-41, Fraser dep. at 110).

5. On 7 March 2005 Donovan submitted Costello’s 14 January 2005 REA to contracting officer (CO) Jean C. Tarlton, attaching a CDA certification signed by its president, John P. Donovan, on 3 March 2005. This letter, with its 51 enclosures, is the claim which is the subject of this appeal. Donovan’s 7 March 2005 letter stated:

Reference: Contract N62747-02-C-2747....

Subject: Submittal of **Claim for Equitable Adjustment** J P
Donovan Construction, Inc. for and on behalf of their
Subcontractor, Costello Industries, Inc.

Gentlemen:

Enclosed find the 01/14/05 **Claim for Equitable Adjustment**
(hereinafter the “Claim”) regarding the above contract.

Please note that this document was previously referred to by
J P Donovan...as REA #2.... Please be aware that this Claim

document was presented from Costello...to Donovan in good faith and the document is now sponsored by Donovan for and on behalf of Costello. Also...Donovan has previously stated that certain aspects of the contents of this Claim may be considered meritorious and it is Donovan's contention that these aspects were and still remain worthy of monetary consideration by your office.

....

3. It should be understood that as the sponsor of this Costello Claim, Donovan is not required to believe that the Costello Claim to be certain, only that Donovan is stating herein that there are good grounds for portions of this Claim and a complete, detailed review by your office of this document is requested and is necessary. Also, please be aware that Donovan, as the sponsor and as the entity providing certification, had no access to Costello books and records and reviewed the Claim on only the face value of the documents which are identical and as submitted to you this date. Of the \$559,764.00 that Costello is claiming, Donovan is herein stating that Donovan has or will have approximately \$65,000.00 of additional direct and administrative costs that should be added to this Costello requested amount. These Donovan costs are for previous expenditures for Donovan's consultants whilst the Claim was entitled REA#2 as well as for previous costs expended by Donovan for necessary outside legal efforts.

....

We are most anxious to close this matter and your timely response to this Costello Claim for Equitable Adjustment will be appreciated.

(R4, tab 30, emphasis in original)

6. On 1 November 2005 CO Carol Lloyd issued a final decision to Donovan that denied "your claim of \$624,764.00" in its entirety. The amount of \$624,764.00 consisted of Costello's \$559,764.00 and "the balance of the claimed cost (\$65,000)...for additional direct and administrative cost you contend your company has incurred, or will incur, as a result of the claim." (R4, tab 31)

7. On 27 January “2005” (sic, 2006) Donovan appealed to the ASBCA from the foregoing decision, which was docketed as ASBCA No. 55335. Donovan’s notice of appeal stated: “The amount of the claim is \$624,764.00.” (Ex. G-38)

8. Appellant’s 1 March 2006 complaint prayed for monetary damages for Costello. Its 30 June 2009 amended complaint prayed for “3. Money damages for overhead costs [Donovan] incurred arising from or related to [Costello’s] claim under its subcontract with [Donovan].”

DECISION

On 18 September 2002, when Donovan’s contract was awarded, FAR 2.101 set forth the following definition of a CDA claim:

Claim means 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 the contract.

A valid CDA claim seeking the payment of money must set forth a sum certain. FAR §§ 2.101, 52.233-1(c); *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1542 (Fed. Cir. 1996).

Donovan’s 7 March 2005 claim included its subcontractor Costello’s \$559,764.00 claim which Donovan sponsored, and stated: “Donovan has or will have approximately \$65,000.00 of additional direct and administrative costs that should be added to this Costello amount” (SOF ¶ 5). The requirement that a claim be in a sum certain necessitates that the amount being demanded in the claim not be the subject of qualifying language, such as “approximately.” Thus, when a claim describes a cost as approximate and never states a sum certain that it is demanding, the sum certain requirement has not been met. *Van Elk, Ltd.*, ASBCA No. 45311, 93-3 BCA ¶ 25,995 at 129,237. Where, however, the qualifying language is used in the claim in relation to a cost but the sum certain being demanded is expressly stated (or ascertainable) elsewhere in the claim, the requirement is met. *United Technologies Corp., Pratt & Whitney Group, Government Engines and Space Propulsion*, ASBCA No. 46880 *et al.*, 96-1 BCA ¶ 28,226 at 140,946. It is not material that the costs elements may be estimates, for it is the final amount being demanded in the claim that must appear as a sum certain. *Manhattan Construction Co.*, ASBCA No. 52432, 00-2 BCA ¶ 31,091 at 153,521 (citing *Servidone Construction Corp. v. United States*, 931 F.2d 860 (Fed. Cir. 1991) (estimated costs are properly includable in a CDA claim)).

In the appeal before us, Donovan has stated the portion of its claim that is represented by its subcontractor's alleged costs (\$559,764) in a sum certain, but used qualifying language as to Donovan's own "add-ons." It never thereafter states a sum certain that it is demanding. The subcontractor's alleged costs and Donovan's are not separate claims. They arise out of the same set of operative facts, and indeed, Donovan's alleged costs flow solely from and assume entitlement to, its subcontractor's costs. The entire single claim must be in a sum certain. *Manhattan*, 00-2 BCA ¶ 31,091 at 153,521; *see, Placeway Construction Corp. v. United States*, 920 F.2d 903, 908 (Fed. Cir. 1990).¹

We hold that Donovan's 7 March 2005 statement, "Donovan has or will have approximately \$65,000.00 of additional direct and administrative costs that should be added to this Costello requested amount" failed to state a sum certain, and that such statement resulted in an entire claim that was not in a sum certain. We dismiss the appeal for lack of CDA jurisdiction. In light of our holding, we need not decide respondent's 28 January 2010 motions to dismiss due to alleged "qualification" of Donovan's claim certification and to stay ASBCA proceedings.

Dated: 16 July 2010

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

¹ There is no factual support for appellant's argument (app. br. at 3) that its claim is for \$559,764 and that the \$65,000 was only a potential claim.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55335, Appeal of J. P. Donovan Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals