UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: April 17, 2009

CBCA 1159

TARHEEL SPECIALTIES, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Richard D. Lieberman and Gabriel D. Soll of McCarthy, Sweeney & Harkaway, P.C., Washington, DC, counsel for Appellant.

Michael J. Davidson, Office of the Principal Legal Advisor, U.S. Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STERN**, and **WALTERS**.

WALTERS, Board Judge.

The Board presently has before it three consolidated appeals filed by the appellant, Tarheel Specialties, Inc. (Tarheel), CBCA 1041, 1159, and 1403. The respondent, the Department of Homeland Security (DHS), has filed a motion to dismiss the second of these appeals (CBCA 1159) for lack of subject matter jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601-613 (2006) (CDA). For the reasons explained below, we grant respondent's motion and dismiss that appeal.

Factual Background

The appeals all relate to task orders issued by DHS under a General Services Administration (GSA) schedule contract for the provision of guard services, contract no. GS-07F-0152N. By letter dated December 4, 2007, Tarheel submitted a claim to the DHS contracting officer in the total amount of $1,015,314.46 for "vacation/holiday/training pay," which it certified pursuant to the CDA. This total was broken down in the following chart contained within the claim letter, which Tarheel has provided as Attachment A to Appellant's Opposition to Respondent's Motion to Dismiss :

Company	**Training Amount**	**Vacation/Holiday Amount**	**Totals**
Tarheel Specialties, Inc.	$162,358.21		$ 162,358.21
Lone Wolf Investigation	$472,860.51		$ 472,860.51
Allied Protection Service	$146,989.37	$136,612.02	$ 283,601.39
Kelly's Professional	$ 39,144.48	$ 14,643.23	$ 53,787.71
Security Enforcement Authority	$ 26,111.13	$ 9,037.33	$ 35,148.46
Totals	**$847,463.70**	**$160,292.58**	**$1,007,756.28**
GSA Funding Fee (0.75%)			$ 7,558.18
Total Due			**$1,015,314.46**

Although amounts were included for vacation/holiday pay for three of Tarheel's subcontractors, Allied Protection Service, Kelly's Professional, and Security Enforcement Authority, no amount whatsoever for vacation/holiday pay was sought in that claim for either Tarheel (the prime contractor) or for another of its subcontractors, Lone Wolf Investigation. Tarheel asserts that it did not include anything for itself at that time because "the exact amounts were not available on the date of the initial claim." Appellant's Opposition to Respondent's Motion to Dismiss at 2.

The DHS contracting officer rendered a partial final decision on that certified claim by letter dated January 10, 2008, denying the amount sought for subcontractor

vacation/holiday pay, a total of $161,494.77, including the related GSA funding fee. The balance of the claim was to be handled separately. On January 18, 2008, Tarheel appealed that (partial) decision to this Board, and the appeal was docketed as CBCA 1041. Thereafter, at the parties' joint request, the Board issued an order suspending proceedings to permit them to engage in alternative dispute resolution (ADR).

In connection with the parties' ADR efforts and "at the Government's request," Tarheel sent DHS two email messages, dated March 5, 2008, and March 6, 2008, seeking a total of $546,849.18 (inclusive of the GSA funding fee) for its own vacation and holiday pay and requesting a contracting officer's decision. On March 19, 2008, Tarheel's president wrote a follow-up letter to the contracting officer regarding this "cost proposal" and requested the issuance of a contract "modification" for the $546,849.18. No separate CDA claim certification was submitted by Tarheel with respect to either the email messages or the March 19, 2008, letter. By letter to Tarheel dated March 20, 2008, the contracting officer denied in its entirety the request for $546,849.18, stating that such denial was "the final decision of the Contracting Officer." Thereafter, by letter dated April 24, 2008, Tarheel appealed that denial to the Board. The appeal was docketed as CBCA 1159 and was consolidated with CBCA 1041.[1]

Discussion

DHS now seeks to have CBCA 1159 dismissed by the Board for lack of subject matter jurisdiction under the CDA. It argues that the $546,849.18 claim involved, one that obviously exceeded $100,000 in amount, was not properly certified as a claim under the CDA and thus could not have been the subject of either a contracting officer's decision or a Board appeal. Citing to our decision in *Medtek, Inc. v. Department of Veterans Affairs*, CBCA 1153, 08-2 BCA ¶ 33,929, it maintains that the March 20, 2008, "final decision" is to be considered a "nullity." We agree.

In our recent decision in *Wheeler Logging, Inc. v. Department of Agriculture*, CBCA 97, 08-2 BCA ¶ 33,984, we grappled with the requirements for claim certification and noted that "the courts and boards of contract appeals have permitted amendments or changes to claims [including a change in legal theory for recovery] without recertification and resubmission to the contracting officer . . . as long as the claim continues to arise from the same operative facts and requests essentially the same relief." *Id.* at 168,089 (*citing Scott*

[1] A third appeal, CBCA 1403, likewise was consolidated with the other two Tarheel appeals and, until recently, all three consolidated appeals were the subject of ADR proceedings. The instant motion to dismiss raises no issue regarding CBCA 1403.

Timber Co. v. United States, 333 F.3d 1358, 1365 (Fed. Cir. 2003)). Here, Tarheel posits correctly that the amount being sought under CBCA 1159 for its own vacation and holiday pay arises from the same operative facts as had been put forth in its certified claim of December 4, 2007, that had given rise to the initial appeal, CBCA 1041. Indeed, it dubs that earlier claim the "underlying claim."

The question that needs to be resolved, however, is whether the additional relief sought in March 2008 is "essentially the same relief" Tarheel had been seeking in its December 2007 claim or whether the later request represented a new claim. On the one hand, the December 2007 claim characterized itself as a "claim . . . for vacation/holiday/training pay pursuant to task orders issued by the Department of Homeland Security – Federal Protective Service . . . ." Certainly, Tarheel's March 2008 claim for its own vacation and holiday pay would fit within that earlier claim characterization. Nevertheless, the claim and supporting documentation Tarheel presented to the contracting officer in December 2007 for analysis and decision sought no relief whatsoever for itself for either vacation or holiday pay, but only pursued relief on behalf of three subcontractors for those claim elements. Neither the amounts put forth in December 2007 for vacation and holiday pay nor the supporting data Tarheel certified at that time as accurate and complete contained anything related to the relief later sought for itself in March 2008.

Furthermore, Tarheel has not shown that information regarding its own vacation and holiday pay costs would not have been available to it in December 2007 or otherwise capable of reasonable estimation, *see Wheeler Logging*, 08-2 BCA at 168,089-90, but merely rationalizes now its unexplained omission of any claim for its own vacation and holiday pay based on alleged lack of "exact amounts." Appellant's Opposition to Respondent's Motion to Dismiss at 2. Although a contractor "may increase the amount of his claim . . . [it] may not raise any new claims not presented and certified to the contracting officer." *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987). Here, we view the March 2008 claim as a new claim and one that required a separate CDA certification. Absent such a certification, the Board has no jurisdiction to hear or resolve the claim under the CDA.

Since the March 20, 2008, decision is to be considered a "nullity," Tarheel is not precluded from resubmitting for a contracting officer's decision a properly certified claim for its own vacation and holiday pay and from appealing any denial of that claim to this Board.

Decision

For the above reasons, we grant respondent's motion to dismiss. Accordingly, CBCA 1159 hereby is **DISMISSED FOR LACK OF JURISDICTION**.

RICHARD C. WALTERS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JAMES L. STERN
Board Judge