UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 6, 2011

CBCA 2259

RED GOLD, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Anson Keller of Olsson Frank Weeda Terman Bode Matz, PC, Washington, DC, counsel for Appellant.

Michael Gurwitz, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **SHERIDAN**.

SHERIDAN, Board Judge.

This appeal arises out of a contract, awarded to Red Gold, Inc. (Red Gold) by the Department of Agriculture (USDA), to provide cans of salsa for use in child nutrition and other domestic food assistance programs.

The correspondence Red Gold submitted to the USDA about this matter does not rise to the level of a proper claim. Moreover, there was no certification language contained in the correspondence. Without a proper and certified claim submitted to the contracting officer for a final decision, the Board is without jurisdiction to decide this appeal. This appeal is therefore dismissed for lack of jurisdiction.

Background

On March 3, 2010, USDA issued an invitation for bid (IFB) for canned vegetables, including salsa, for use in child nutrition and other domestic food assistance programs. In response to that invitation, Red Gold bid on 97,584 cases of #10 size cans of salsa, packed six cans to a case. The bid included not only the cost of the product but also the cost of shipment to the various recipients. Red Gold won 92% of the total contracts in the IFB and was awarded contract 120205348 on April 14, 2010. The contract required Red Gold to begin delivery of the canned salsa to the various recipients by August 16, 2010, and continue through November 15, 2010. Red Gold began production in July and early August to meet the shipment commencement dates.

On September 24, 2010, Red Gold determined that it had made a mistake in its bid and notified the contracting officer at USDA, explaining that its finance/auditing department had determined that a clerical error was made when a Red Gold employee "used the F.O.B. [freight on board] price for the 6/#10 low sodium tomato sauce in error" instead of [the price] for salsa. Red Gold also requested that USDA engage in discussions of possible remedies. In a reply e-mail message sent the same day, the contracting officer asked for a formal letter with an explanation of the alleged mistakes and supporting documentation. Red Gold sent an explanation of the mistake, with supporting documents, to the contracting officer on September 28. The documents included, among other things, a breakdown of the bids Red Gold submitted with corrections in pencil, an explanation of the error, and a request for a remedy that would "at least" cover variable costs of "approximately $3.63 per case."

The contracting officer confirmed receipt of the documents on September 29, 2010, and asked for more information because she still could not "determine the mistake because the amount written on the invitation (in pencil) is the same amount that [Red Gold] submitted." Red Gold explained that as to the salsa, an employee mistakenly used the F.O.B. price of $10.80 per case (the correct price for low sodium tomato sauce), instead of the F.O.B. price of $16.90 (for salsa) -- a difference of $6.10. Red Gold clarified that it did not expect to recover the full amount, but hoped for a "remedy price" that would "at least" cover its variable costs of $3.63 per case, and indicated that it could provide further explanations over a conference call.

A few days later, the contracting officer requested additional information for each line item, to which Red Gold responded with an attachment that displayed an internal worksheet with the "intended prices" for its bid. On October 8, 2010, the contracting officer acknowledged to Red Gold that there were "alleged mistakes in bids submitted by Red Gold," but emphasized that USDA could not accept the higher intended prices, especially since Red Gold would not have been awarded the contract had it used those prices in its bids.

She further stated that USDA would cancel the remaining unshipped loads, but pay Red Gold for the shipped products at the stipulated contract prices. That same day, Red Gold responded by reiterating its "hope to settle at a price that at least covers . . . material costs, [if not] total variable costs." However, on October 13, the contracting officer communicated that USDA was not authorized by law to adjust the bid price upward, and that this constituted her "final decision" on the matter.

Consequently, Red Gold filed an appeal of the contracting officer's decision on January 7, 2011, seeking to "amend the bid prices on the shipped cases as to recover its costs," in the amount of $240,000.

Discussion

The Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109 (previously 41 U.S.C. §§ 601-613 (2006)), provides that "each claim by a contractor against the Federal Government relating to a contract [shall be in writing and] shall be submitted to the contracting officer for a decision." *Id.* § 7103(a)(1). The Federal Acquisition Regulation (FAR) defines "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract." 48 CFR 52.233-1(c) (2009). Interpreting the CDA and FAR, the Federal Circuit has established that for jurisdictional purposes, a CDA claim exists for a nonroutine contract adjustment if there is: (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc). To comply with the sum certain requirement of a valid claim, amounts must be stated with some specificity. *G & R Service Co. v. General Services Administration*, CBCA 1876, 10-2 BCA ¶ 34,506 (a "not to exceed" amount is undefined and does not qualify as a sum certain); *Sandoval Plumbing Repair, Inc.*, ASBCA 54640, 05-2 BCA ¶ 33,072 (modifying phrases like "no less than" do not qualify as a sum certain).

While no particular wording is required for a claim, it must contain "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). Additionally, the claim must indicate to the contracting officer that the contractor is requesting a final decision. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987); *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996). The request may be either explicit or implicit, so long as what the contractor desires by its submissions is a final decision. *Id.* To make this determination, the Board looks at the totality of the correspondence, including the submissions and the circumstances surrounding them. *See EBS/PPG Contracting v. Department of Justice*,

CBCA 1295, 09-2 BCA ¶ 34,208; *Guardian Environmental Services, Inc. v. Environmental Protection Agency*, CBCA 994, 08-2 BCA ¶ 33,938. The intent of the communication governs, and a common sense analysis must be used to determine whether the contractor communicated his desire for a contracting officer's decision. *Guardian Environmental Services, Inc.*, 08-2 BCA at 167,946.

The CDA also requires that:

> For claims of more than $100,000 made by a contractor, the contractor shall certify that –
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> (A) the claim is made in good faith;
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> (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief;
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> (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and
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> (D) the certifier is authorized to certify the claim on behalf of the contractor.

41 U.S.C. § 7103(b)(1) (previously 41 U.S.C. § 605(c)(1) (2006)); *see also* 48 CFR 33.207(c). Certification of a claim of more than $100,000 is not only a statutory requirement, but also a jurisdictional prerequisite for review of a contracting officer's decision before this Board. *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1384 (Fed. Cir. 1983); *see also W.M. Schlosser Co. v. United States*, 705 F.2d 1336 (Fed. Cir. 1983); *Essex Electro Engineers, Inc. v. United States*, 702 F.2d 998 (Fed. Cir. 1983). Thus, lack of proper certification deprives this Board of jurisdiction over this appeal. *See B & M Cillessen Construction Co. v. Department of Health and Human Services*, CBCA 931, 08-1 BCA ¶ 33,753 (2007); *V.I.C. Enterprises, Inc. v. Department of Veterans Affairs*, CBCA 1089, 09-2 BCA ¶ 34,205; *K Satellite v. Department of Agriculture*, CBCA 14, 07-1 BCA ¶ 33,547. Furthermore, certification after an appeal has been filed has no legal bearing on the Board's jurisdiction and cannot serve to cure a lack of jurisdiction. *B & M Cillessen Construction Co.*, 08-1 BCA at 167,083.

Upon receipt of a proper and certified claim over $100,000, the contracting officer must within sixty days issue a decision or notify the contractor of the time within which a decision will be issued. 41 U.S.C. § 7103(f)(2) (previously 41 U.S.C. § 605(c)(2) (2006)). Only after these jurisdictional prerequisites have been met can this Board review a

contractor's appeal. *See England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 852 (Fed. Cir. 2004).

Once sufficient facts are presented which bring into question the jurisdiction of the Board to hear the dispute, it is incumbent upon appellant to come forward with evidence establishing jurisdiction. Appellant bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988).

We reviewed the facts of this case in the context of the aforementioned statutory and regulatory framework and case law. We conclude that the Board is without subject matter jurisdiction to decide the appeal. Reviewed together, Red Gold's correspondence does not rise to the level of a claim. Red Gold's initial e-mail message to USDA on September 24, 2010, concerning the mistake in bid, only briefly explained the error and requested further discussions to explore possible remedies. The letter to the contracting officer, while including a breakdown of the bids, an explanation of the error, and a request for a remedy that would "at least" cover variable costs of "approximately $3.63 per case," contained no express request that the contracting officer make a final decision. The e-mail messages that followed between Red Gold and the contracting officer suggest no specific sum, and the repeated requests to further discuss the matter indicate to us that it was Red Gold's intent to continue to engage in negotiations, as opposed to submitting a claim. That Red Gold did not include a particular sum in any of its e-mail messages and simply requested a figure that would cover its "variable costs" reinforces our conclusion that Red Gold never requested payment of a "sum certain" from the contracting officer.

We also note that none of Red Gold's correspondence to the contracting officer contained the required certification language to claim over $100,000. Red Gold's notice of appeal to this Board requested relief in the sum of $240,000. This appears to be the first time Red Gold mentioned a definite sum in its correspondence concerning this matter. As noted above, claims over $100,000 require certification. The lack of certification deprives the Board of jurisdiction.

Without a valid claim, the contracting officer's "final decision" on October 13, 2010, cannot confer jurisdiction on the Board. *Whiteriver Construction, Inc. v. Department of the Interior*, CBCA 2045, 10-2 BCA ¶ 34,582. As the Court of Appeals for the Federal Circuit has stated: "Unless the contractor has submitted a properly certified claim to the contracting officer, there is no valid claim, the denial of which is an appealable decision of the contracting officer." *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989).

Red Gold's right to pursue its claim remains in force so long as it follows the prescribed rules for invoking our jurisdiction. To proceed in this matter, Red Gold should submit a proper claim to the contracting officer, and if that claim is over $100,000, provide certification. The contractor should await a final decision on that claim. If the contracting officer does not render a timely decision, or Red Gold is unwilling to accept the decision, it is free to exercise its right of appeal to this Board.

Decision

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

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PATRICIA J. SHERIDAN
Board Judge

We concur:

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STEPHEN M. DANIELS
Board Judge

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ALLAN H. GOODMAN
Board Judge