UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: August 1, 2012

CBCA 2573

ePLUS TECHNOLOGY, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

James E. McCollum, Jr. of McCollum & Associates, LLC, College Park, MD, counsel for Appellant.

Maureen Duignan, Frank Inserra, and Derek Yeo, Office of General Counsel, Federal Communications Commission, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **McCANN**, and **SHERIDAN**.

SHERIDAN, Board Judge.

Appellant, ePlus Technology, Inc. (ePlus), seeks $333,919 in costs associated with a termination for convenience on a $341,900 purchase order (PO) issued by respondent, the Federal Communications Commission (FCC). Among other things, respondent's answer raised lack of subject matter jurisdiction as an affirmative defense, arguing the appeal is not ripe for review because appellant had not filed a certified claim. Prior to proceeding with the case, the Board ordered the parties to brief the issue of whether the Board has proper jurisdiction to decide this matter. We treat the issue as if the FCC had filed a motion to dismiss the case for lack of jurisdiction. We have concluded that, based on the facts before us, the Board possesses jurisdiction to decide this appeal.

Background

On or about September 15, 2010,[1] the FCC issued a PO, PUR1000403, to ePlus in the total amount of $351,900 for commercially available, common-off-the-shelf thin clients,[2] associated software, and maintenance. Specifically, the PO called for: 50 units of Wyse P20s at $395 per unit for $19,775; 950 units of Wyse C50LEs at $247 per unit for $244,150; 2000 units of Wyse PC extender seat licenses at $34 per unit for $68,000; and 2000 units of one year of software maintenance at $10 per unit for $20,000.

The PO incorporated by reference Federal Acquisition Regulation (FAR) clauses pertinent to commercial item purchases, including the clause contained at FAR 52.212-4, Contract Terms and Conditions - Commercial Items (MAR 2009):

> (l) *Termination for the Government's convenience*. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

48 CFR 52.212-4(l) (2009).

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[1] The purchase order was misdated August 5, 2010.

[2] A "thin client" is a user machine that relies on the server to perform the data processing. Either a dedicated thin client terminal or a regular personal computer (PC) with thin client software is used to send keyboard and mouse input to the server and receive screen output in return. The thin client does not process any data; it processes only the user interface. The benefits are improved maintenance and security due to central administration of the hardware and software in the datacenter. *See* PC Magazine Encyclopedia, *available at* http://www.pcmag.com/encyclopedia (last visited July 25, 2012) ("thin client" defined).

The FCC issued amendment 0001 to the PO on September 29, 2010, terminating the purchase order for convenience.

On March 4, 2011, ePlus hand-delivered a letter to the FCC, addressed to the contracting officer who had terminated the PO. Under the letter's letterhead was written "**FOR SETTLEMENT PURPOSES ONLY**." The letter referenced the PO and began, "[P]ursuant to FAR 52.212-4 and FAR 52.249-2, ePlus . . . submits the following settlement proposal and claim regarding the above referenced order." The letter went on to describe ePlus' version of events, list its alleged costs associated with the termination for convenience, and request that the FCC pay ePlus $333,919 for its termination costs. The last page of the letter also stated, "pursuant to FAR 33.206, please also accept this letter as ePlus' claim, as a matter of right, for payment in the amount of $333,919.00, and request for a final decision." The certification contained the language required by the Contract Disputes Act, 41 U.S.C. § 7103(b) (Supp. IV 2011) (CDA), and was executed by ePlus' senior vice president (VP) for business operations.

When the contracting officer failed to respond to ePlus' letter of March 4, 2011, ePlus appealed that failure to the Civilian Board of Contract Appeals, where it was docketed on September 29, 2011, as CBCA 2573. *See* 41 U.S.C. § 7103(f)(5). Board Rule 2(b)(ii) provides that "[a]n appeal may be filed with the Board if the contracting officer fails or refuses to issue a timely decision on a claim submitted in writing, properly certified if required." 48 CFR 6101.2(b)(ii) (2011).

On December 1, 2011, the FCC's senior procurement executive, who is also a contracting officer, sent an email message to ePlus' VP attempting to start negotiations on ePlus' March 4 proposal and claim. In that same message, the FCC provided an extensive list of documentation it would need to receive from ePlus to "fully consider [ePlus'] termination settlement proposal." Additional correspondence ensued between the parties' counsel regarding the additional information that respondent felt was pertinent to the termination settlement proposal, but it does not appear from the record that ePlus ever submitted additional information or agreed to negotiate.

In its answer to ePlus' complaint, the FCC raised lack of subject matter jurisdiction as an affirmative defense, arguing that the claim was not "ripe," because appellant had not filed a certified claim and negotiations had not reached an impasse. The Board ordered the parties to brief the jurisdictional issue. The FCC asserts that the appeal should be dismissed because there is no impasse in negotiation of the termination settlement proposal and the proposal has not ripened into a claim. Alternatively, the FCC argues that the proposal and

claim are "insufficiently certain to afford a basis for relief." Appellant asserts that the claim is ripe and an impasse in negotiations is not required under the facts of this case.

Discussion

In the matter before us, the contractor submitted a termination for convenience settlement proposal characterizing it also as a claim, certified the claim, and requested a contracting officer's final decision. After six months of waiting for a response, and receiving none from the contracting officer, the contractor appealed that failure to issue a decision to this Board. The appeal was docketed. Once that occurred, the Government attempted to start negotiations, but appellant did not respond. The Government asserts that the Board lacks jurisdiction because the claim is not "ripe" because negotiations on the termination for convenience proposal had not reached an impasse. We disagree.

For the Board to have jurisdiction, the CDA requires that a contractor submit a written claim to the contracting officer for decision. 41 U.S.C. § 7103(a). Since the Act does not define the term "claim," the definition that is set forth in FAR 2.201, 48 CFR 2.201, is relied upon. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc); *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1581-82 (Fed. Cir. 1992). FAR 2.201, in pertinent part, defines a claim 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." No particular wording is required for a claim, but the demand 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 James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1395 (Fed. Cir. 1987). The request may be either explicit or implicit, so long as what the contractor desires by its submission is a final decision. *Ellett*, 93 F.3d at 1543.

To make a determination as to whether a submission is a proper claim, the Board looks at the totality of the circumstances, including the submissions and the communications 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 its desire for a contracting officer's decision. *Guardian Environmental Services, Inc.*, 08-2 BCA at 167,946.

Most of the termination for convenience clauses found in government contracts are found at FAR 52.249-1 through 52.249-10, and FAR 49.100 through 49.111 contain the prescription for the clauses, including the respective duties of the contracting officer and contractor. 48 CFR 49.100-.111, 52.249-1 to -10. FAR part 49 contemplates a process under which a contractor submits a settlement proposal and enters into negotiations on that proposal. The FAR part 49 convenience termination settlement process was reviewed by the Federal Circuit in *Ellett* [3]:

> When a contractor submits a termination settlement proposal, it is for the purpose of negotiation, not for a contracting officer's decision. A settlement proposal is just that: a proposal. Indeed, it is a proposal that [the contractor] contractually agreed to submit in the event of a convenience termination. The parties agreed that they would try to reach a mutually agreeable settlement. If they were unable to do so, however, it was agreed, consonant with the FAR's requirements, that a contracting officer would issue a final decision, which [the contractor] could appeal to the court or to the [appropriate] Board of Contract Appeals. Consequently, while [the contractor's] termination settlement proposal met the FAR's definition of a claim, at the time of submission it was not a claim because it was not submitted to the contracting officer for a decision.
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> Once negotiations reached an impasse, the proposal, by the terms of the FAR and the contract, was submitted; it became a claim. In other words, in accordance with the contract's prescribed method of compensating [the

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[3] The *Ellett* case involved the interpretation of the termination for convenience clause found at 48 CFR 52.249-2 (Alternate I), which is substantially different from the commercial items termination for convenience clause found in this contract as well as at 48 CFR 52.212-4(l). Among other things, the termination for convenience clause in the *Ellett* contract mandated that "the Contractor shall submit a final termination proposal to the Contracting Officer," "the Contractor and Contracting Officer may agree upon the whole or any part of the amount paid," and if they "fail to agree on the whole amount to be paid . . . the Contracting Officer shall pay the Contractor" the amounts the Contracting Officer determines are due under the FAR. 93 F.3d at 1540 (citing 48 CFR 52.249-2 (Alternate I)). In paragraph (j) the clause provides, "The Contractor shall have the right of appeal under the Disputes clause, from any determination made by the Contracting Officer . . . [except if] . . . the Contractor failed to submit the termination settlement proposal or request for equitable adjustment within the [appropriate time periods set by the clause]." *Id*.

> contractor] for a convenience termination, a request that the contracting officer issue a decision in the event the parties were unable to agree on a settlement was implicit in [the contractor's] proposal. After ten months of fruitless negotiations, [the contractor] explicitly requested that the contracting office settle its claim. This demand is tantamount to an express request for a contracting officer's decision.

Ellett, 93 F.3d at 1543-44 (citations omitted).

The *Ellett* Court concluded that as a termination for convenience proposal was a non-routine submission, there is no requirement that the settlement proposal be "in dispute" to trigger the requirement for a timely final decision. *Ellett*, 93 F.3d at 1546. In a subsequent decision, *Rex Systems, Inc. v. Cohen*, 224 F.3d 1367, 1372 (Fed. Cir. 2000), the Federal Circuit noted that "the *Ellett* court held that such a request [for a final decision] could be implied if the settlement proposal negotiations were at 'an impasse.'"

While *Rex Systems* did not involve a jurisdictional challenge, the Court discussed what constitutes an impasse. It reviewed the factors encountered in *Ellett*, including fruitless negotiations, a subsequent written request to the contracting officer that he "settle" the claims, and a "unilateral decision" by the contracting officer. *Rex Systems*, 224 F.3d at 1372-73 (citing *Ellett*, 93 F.3d at 1544). The Court noted that impasse had also been found where the contracting officer told the contractor that he would not consider the contractor's proposal and where the contractor explicitly requested a final decision in conjunction with the contracting officer's refusal to meet to negotiate. *Id*. at 1372. "In *Ellett* and [the aforementioned cases], there was objective evidence that the negotiations had reached an impasse and clear indication by the contractor that it desired a final decision." *Id*. The Federal Circuit in *Rex Systems* concluded that "in determining whether the instant negotiation had reached an impasse, we must look to the parties' actions and statements with regard to the negotiations initiated by the termination settlement proposal." *Id*. at 1373.

In looking at the circumstances presented here, we see a settlement proposal as well as certified claim being presented to the contracting officer. No attempt was made by the contracting officer to contact the appellant to discuss either the settlement proposal or the certified claim. After more than six months had passed, the contractor got fed up, filed the appeal, and refused to negotiate on the settlement proposal or certified claim. It is clear that in filing the appeal the contractor decided that an impasse had been reached.

Further, we find no applicable precedent prohibiting a contractor from presenting its termination for convenience settlement proposal and at the same time fashioning the proposal as a CDA claim. Granted, FAR part 49 envisions negotiations on the proposal

prior to the submission of a claim and, in a contract that includes a FAR part 49 clause, the contractor agrees to negotiate. However, the requirement to negotiate is not absolute. No consequences ensue if either party refuses to negotiate. When a contractor does not wish to negotiate it submits the proposal with a proper claim and requests a final decision; when the Government does not wish to negotiate it issues a determination as to what it agrees to pay or, as occurred here, simply ignores the proposal.

We do not view *Ellett* as requiring that both parties agree that an impasse has been reached before a termination for convenience proposal can be submitted as a claim. To hold otherwise would, as happened here, allow the Government to unduly delay the claims process until it decides to agree that an impasse has been reached.

We note that this commercial items contract did not contain a FAR part 49 termination for convenience clause. There was no contractual agreement by the parties to follow the FAR part 49 settlement process mandated in the termination for convenience clauses found at FAR 52.249-1 through 52.249-10 to negotiate and reach an impasse. Accordingly, the contractor did not contractually agree to submit a termination for convenience settlement proposal and negotiate that proposal until an impasse was reached.

While the Board might consider most attempts to limit the termination for convenience settlement process foolhardy, it believes that under the circumstances of this case the contractor submitted a proper claim for termination costs to the contracting officer for final decision, and the contracting officer was obligated to issue a final decision on that claim. The fact that the contracting officer provided no response at all to the settlement proposal or claim for over six months makes this situation all the more egregious.

The fact that the Government may desire more or better information in which to make a decision on a claim does not obviate the requirement for a timely final decision, particularly where it is clear that the contractor has no desire to provide further information regarding the claim. As we stated in *EBS/PPG Contracting*, 09-2 BCA at 169,112:

> [R]epeated requests for more information in the face of [the contractor's] clear desire to have a final decision on its claim did not negate the requirement for a final decision. The contractor here had the right to decide when it wished to move its termination for convenience settlement proposals into the claim phase.

Appellant has properly moved its termination for convenience settlement proposal into the claim phase and the Government can no longer delay resolution of this matter.

Decision

The Board has jurisdiction to consider this matter. The FCC's **MOTION TO DISMISS FOR LACK OF JURISDICTION IS DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

JAMES L. STERN
Board Judge

R. ANTHONY McCANN
Board Judge