

SOUTHEAST ENTERPRISE  
GROUP, INC.

VABCA-6002

CONTRACT NO. V573C-236

VA MEDICAL CENTER  
GAINESVILLE, FLORIDA

*Adam G. Adams, III, Esq.*, Adams & Grimm, P.A., Jacksonville, Florida, for the Appellant.

*Joan S. Ratliff, Esq.*, Trial Attorney, Jackson, Mississippi; *Charlma J. Quarles, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

#### OPINION BY ADMINISTRATIVE JUDGE PULLARA

By letter dated August 17, 1999, Appellant filed with the Board a Notice of Appeal in VABCA-6002. The appeal notice referenced a "decision of the Contracting Officer dated June 30, 1999 denying Southeast's claim for additional compensation submitted April 26, 1999 in the amount of \$7,552.21 on account of additional labor, services and materials provided for an extended fire watch as directed by the Contracting Officer."

The VA has filed a MOTION TO DISMISS for lack of jurisdiction. It is asserted that, although there exists a dispute between the parties as to the contract requirements, Appellant did not request a final decision nor assert in writing its right to a sum certain with sufficient specificity for the CO to make a reasoned judgment.

Appellant counters that it submitted a claim under the *Contract Disputes Act (CDA)*, 41 U.S.C. §605(a), that the VA Contracting Officer issued an appealable decision denying said claim and, therefore, the Board has jurisdiction

in this matter.

For purposes of deciding this motion, the undisputed findings of fact are as follows.

### FINDINGS OF FACT

On January 28, 1998, the VA awarded Contract No. V573C-236 to Appellant for replacement of the main hospital roof. In January and February 1999, fires occurred in roof areas in which Appellant had been working.

On or about February 19, 1999, the VA required Appellant to provide a fire watch 24 hours a day, 7 days a week. Sometime between February 24 and March 23, 1999, Appellant received a modification to that requirement. According to that modification, Appellant was to provide a fire watch for 24 hours after any day during which work was performed involving burning/heating of the roof surface, or any work involving open flame.

By letter dated March 4, 1999, addressed to the VA Contracting Officer and sent "Certified Mail Return Receipt Requested," Appellant notified the VA that its fire watch "costs were not anticipated in our bid price" and that this letter "should be considered written notice that we are claiming for recovery for these costs from the Government."

In a March 23, 1999 letter to the Contracting Officer, Appellant stated that the fire watch continued until March 19, 1999, when the torch work was completed, and that "[a]s you know, we have a claim pending for the recovery of the costs for the fire watch." Appellant stated it would send "a final total cost for the fire watch in the near future."

On April 26, 1999, Appellant wrote to the Contracting Officer, "[p]ursuant to the *claim* we filed for the cost of extended fire watch," and provided a detailed breakdown of its costs totaling \$7,552.21, with supporting documentation. (Emphasis added.) No specific request was made for a Contracting Officer's

final decision, or that such decision be issued within sixty days.

By letter to the Contractor dated June 30, 1999, the Contracting Officer stated:

This is in reference to your *claim* dated April 26, 1999, for additional compensation for the Government requiring Southeast to provide an extended fire watch. Your *claim* for additional compensation is *denied*. In light of two fires which occurred during this project, you were advised by the Contracting Officer, in accordance with FAR 52.236-13, "Accident Prevention" to provide a fire watch to minimize the possibility of any additional fires on the roof. (Emphasis added.)

The Government determined this requirement to be necessary considering the two previous fires, and made this decision under the terms of the contract.

The foregoing decision was not specifically stated to be a "final decision" and did not provide Appellant with information regarding its appeal rights.

By letter dated August 17, 1999, Appellant filed its Notice of Appeal with the Board, referring to the "decision of the Contracting Officer dated June 30, 1999 denying SOUTHEAST's claim for additional compensation submitted April 26, 1999 in the amount of \$7,552.21 on account of additional labor, services and materials provided for an extended fire watch as directed by the Contracting Officer."

## DISCUSSION

The VA asserts that Appellant merely expressed its request for an equitable adjustment and that such a request does not meet the prerequisites for the Board's jurisdiction as set forth in *Penn Environmental Control, Inc.*, VABCA

Nos. 3599, 3600, 93-3 BCA ¶26,021. The VA further asserts that, because the Contracting Officer has not yet issued a final decision regarding this issue, Appellant's claim is premature. In support of that position, the VA cites *Cox & Palmer Construction Corp.*, VABCA No. 3352, 91-3 BCA ¶24,055 and *Paragon Energy Corp. v. United States*, 227 Ct.Cl. 176, 645 F.2d 966 (1961) (CO's final decision is considered the linchpin for appeal); *see also, AB-Tech Construction, Inc.*, VABCA No. 1531, 82-2 BCA ¶15,897 (without presence of CO's final decision, or the failure of a CO to issue a final decision within a reasonable time, jurisdiction cannot vest in the Board). Finally, the VA asserts that the "CO requires sufficient time to analyze the information submitted by Appellant as well as to explore potential resolutions of a dispute in order to formulate a sound and reasoned final decision."

Appellant contends that the VA "had a period of 65 days, more than adequate opportunity to analyze the information submitted by Appellant in support of its claim and to explore potential resolution of the dispute in order to formulate a sound and reasoned final decision." Appellant asserts that its claim was for a specific sum, as a matter of right, and constitutes a "claim" under the CDA, citing *Davies Precision Machining, Inc. v. U.S.*, 35 Fed.Cl. 651, 662-64 (1996) and *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579-80 (Fed.Cir. 1995). Appellant asserts that the VA Contracting Officer issued an appealable decision, even though it was not specified as being his "final" decision and did not advise Appellant of its appeal rights. Finally, Appellant argues in the alternative that, even if the CO's decision was not "final," the CO is deemed to have denied Appellant's claim by his failure to render a final decision within sixty (60) days of submission of the claim, citing *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298 (Fed.Cir 1996) and *Mendenhall v. U.S.*, 20 Cl.Ct. 78 (Cl.Ct. 1990).

Section 605(a) of the CDA states that "[a]ll claims by a contractor against

the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.” FAR 33.201 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, . . .” Thus, the FAR sets forth the only three requirements of a non-routine “claim” for money: that it be (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). Here, Appellant’s April 26, 1999 letter met those requirements and constituted a claim under the CDA.

With respect to the Contracting Officer’s obligations upon receipt of a claim, the CDA states that the contracting officer shall issue his decision in writing, by mailing or otherwise furnishing a copy of the decision to the contractor, and that the decision shall state the reasons for the decision reached, and shall inform the contractor of his rights. The VA argues that the Contracting Officer’s decision here was not an appealable final decision because the letter contained neither the label “Final Decision” nor the notice of appeal rights that final decision letters normally contain. However, the Court of Appeals for the Federal Circuit has stated that a CO’s “decision is no less final because it failed to include boilerplate language usually present for the protection of the contractor” and, thus, the Contractor could properly appeal such decision. *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed.Cir. 1995). Here, the Contracting Officer’s June 30, 1999 letter clearly considered the Contractor’s claim and denied it for the reasons stated therein. Accordingly, such decision was properly appealable to this Board and we have jurisdiction herein.

## DECISION

Based on the foregoing, the Government's Motion to Dismiss is *Denied*.

DATE: **February 23, 2000**

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MORRIS PULLARA, JR.  
Administrative Judge  
Panel Chairman

We Concur:

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GUY H. MCMICHAEL III  
Chief Administrative Judge

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WILLIAM E. THOMAS, JR.  
Administrative Judge