

BOARD WILL NOT DISMISS A CLAIM FOR LACK OF ADEQUATE NOTICE AFTER DETAILED DECISION, 5 YEARS AFTER CLAIM WAS SUBMITTED

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The Boards of Contract Appeals and the Court of Federal Claims have jurisdiction to consider an appeal only if a valid claim was made. Recently, the Armed Services Board considered an appeal of a Contracting Officer's decision, where the agency asserted that the claim lacked sufficient information and detail that would have allowed the Contracting Officer ("CO") to meaningfully consider the claim. *Parsons Evergreene, LLC*, ASBCA No. 58634, Sept. 5, 2018. The issue is "what constitutes "adequate notice" of a claim.

The case involves an Air Force contract awarded to Evergreene to design and build a facility at an Air Force Base in New Jersey. The contractor submitted a certified claim on June 29, 2012 consisting of 127 pages and 7 discrete sections. The Air Force Center for Engineering and Environment issued a 31 page technical evaluation, and included 27 attachments. The Defense Contract Audit Agency ("DCAA") issued a report on the claim. On March 27, 2013, the Contracting Officer issued his 142-page final decision on each element of the claim, denying it completely. On April 24, 2013 this appeal was docketed, and more than four years later, after full litigation of the case and more than five years after the agency's receipt of the claim, the Air Force moved to dismiss the claim for lack of jurisdiction because it lacked sufficient detail and information.

The Board noted that there is no statutory requirement in the Contract Disputes Act ("CDA") that a claim be submitted in a particular form or use any particular wording. As the Board stated, in order to provide adequate notice of the basis of a claim "[a]ll that is required is that the contractor submit in writing to the contracting officer 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. Circ. 1987). Furthermore, in order "to be 'adequate, the contractor's statement must be sufficient to enable the contracting officer to undertake a meaningful review of the claim.'" And finally, "[w]hether a communication is a 'claim' within the meaning of the CDA as interpreted above is a question of judgment, which must be exercised on a case by case basis as the particular facts present themselves." *Citing Holk Dev., Inc.* ASBCA No. 40609, 90-3 BCA ¶ 23086.

The Board examined the facts, which included

- CO received the claim
- CO obtained detailed technical review
- CO obtained a DCAA audit
- CO issued a final decision that was challenged for lack of claim substantiation five years later after the case had been fully litigated at the Board
- The motion before the Board contained no testimony supporting the contention that the claim failed to provide adequate notice
- The CO had was apparently satisfied enough to issue a detailed lengthy (142 page) final decision on that claim

The Board stated that the Air Force now sought to have the Board second-guess the CO and to conclude that the CO never should have issued his decision. The Board concluded that the Air Force had incorrectly focused on what happened during the litigation, although it should have focused on what led up to the final CO decision. The Board held that the CO had adequate notice and sufficient substantiation “by exercising [its] discretion and applying common sense to the facts of the case.”

Takeaway. If an agency believes that notice of a claim is inadequate (i.e. lacks adequate substantiation), it should raise this point early in the claim analysis, or very early in the actual litigation. A CO always has discretion to ask for reasonable claim supporting analysis and documentation before that CO issues a final decision. Contractors should be wary of an agency which waits until 5 years after the contractor submits its claim to state that supporting data or analysis is inadequate—especially where the CO has obtained a technical analysis, an audit and issues a lengthy CO decision.

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