



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS TO DISMISS FOR LACK OF JURISDICTION AND
FOR SUMMARY JUDGMENT DENIED: March 3, 2023

CBCA 7597

ALARES CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Douglas L. Patin and Lee-Ann Brown of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA; and Kathleen Ramos, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Board Judges **RUSSELL**, **DRUMMOND**, and **ZISCHKAU**.

DRUMMOND, Board Judge.

Respondent, the Department of Veterans Affairs (VA), filed a motion to dismiss for lack of jurisdiction or, alternatively, a motion for summary judgment. The VA alleges the Board lacks jurisdiction to decide the claim because the claim lacks a sum certain and because appellant, Alares Construction, Inc. (Alares), released its claim when it signed its final release of claims. We find that there is a sum certain stated in the claim and that there remains an issue of material fact as to whether appellant released its claim when it signed its final release of claims.

Procedural Background

Alares was awarded contract VA241-16-C-0037 (the contract) by the VA in April 2016. The contract required Alares to relocate the Intensive Care Unit at the Providence VA Medical Center. Appeal File (CBCA 6149, et al.), Exhibit 1.¹ In CBCA 6149, et al., Alares filed a “claim supplement” or “claim addendum” in which “Alares added facts, allegations, and new legal theories.” Complaint (CBCA 7597) at 15-16. The Board refused to add the addendum to the claim in that consolidated appeal because it was a new claim, meaning it contained new legal theories which had not received a contracting officer’s final decision. *See Alares Construction, Inc. v. Department of Veterans Affairs*, CBCA 6149, et al., 22-1 BCA ¶ 38,225. Alares responded by voluntarily dismissing three claims—CBCA 6396, 7082, and 7083—and presenting a claim addendum to the contracting officer. *See Appellant’s Voluntary Motion to Dismiss* (CBCA 6149, et al.); Appeal File (CBCA 7597), Exhibit 27. The contracting officer subsequently denied the claim addendum. *See Appeal File* (CBCA 7597), Exhibit 28. Alares promptly appealed that denial to the Board, which was docketed as CBCA 7597.

Sum Certain

The VA argues that the Board does not have jurisdiction because (1) Alares failed to submit a claim that includes a valid sum certain, (2) the submission included two other amounts previously certified as a sum certain, and (3) the present claim duplicates many of the facts and issues presented in CBCA 6149, et al. Under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018), there must be both a valid claim and a contracting officer’s final decision on that claim in order for the Board to hear an appeal and to proceed to the merits of the case. *Sage Acquisitions, LLC v. Department of Housing & Urban Development*, CBCA 6631, 22-1 BCA ¶ 38,031, at 184,693 (2021).

A claim is not defined in the CDA, but the Board has adopted the definition located in the Federal Acquisition Regulation (FAR). *See Sage Acquisitions*, 22-1 BCA at 184,693 (citing 48 CFR 2.101 (2021) (FAR 2.101)). The FAR definition of a claim requires, among other things, “a sum certain.” FAR 2.101. “[T]he sum certain requirement demands a fixed amount be stated in the claim.” *Sage Acquisitions*, 22-1 BCA at 184,694 (quoting *ARI University Heights, LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085 at 176,186).

¹ Multiple appeals concerning this contract are pending before the Board. For clarity, all citations to the record reference the applicable CBCA docket number.

The VA cites to *Sage Acquisitions* as a similar case to the present but misconstrues the Board's holding. In *Sage Acquisitions*, the Board dismissed the case for lack of jurisdiction because the number held out to be a sum certain was not anywhere in the documentation. It was instead the sum of two separate numbers, one of which was an estimate, and thus the total was not a sum certain. *Sage Acquisitions*, 22-1 BCA at 184,695. Here, Alares stated in its claim a fixed number as its sum certain—\$1,679,495.60. Appeal File (CBCA 7597), Exhibit 27 at 1, 47.

The VA correctly asserts that Alares also included the claim addendum and Capital Project Management, Inc. report as attachments to its claim in CBCA 6149, et al. It is also accurate that those documents had calculations that listed a sum certain of \$1,657,353.24 and \$1,673,926.77. However, a plain reading of the claim shows that Alares included the claim addendum and rebuttal report for the facts and information enclosed within, not as a demonstration of the sum certain. Alares explicitly stated in its letter to the contracting officer that Alares “rel[ies] upon the information enclosed within the [claim] addendum” but that “Exhibit 2 to this letter revises slightly the amount claimed to \$1,679,495.60.” Appeal File (CBCA 7597), Exhibit 27 at 1.

The VA is also correct that this claim duplicates many of the facts and issues present in CBCA 6149, et al., as Alares itself states that the claim addendum “added facts, allegations, and new legal theories” to the extended general conditions claim (the basis of CBCA 6149). Complaint (CBCA 7597) at 15-16. This claim also acts, therefore, to cure the jurisdictional issues that were present in the claim addendum when it was filed as part of CBCA 6149, et al. We conclude that there is a claim with a sum certain stated in the amount of \$1,679,495.60, and that the VA's motion to dismiss for lack of jurisdiction is denied.

Final Release of Claims

The VA also moved for summary judgment. The VA alleges that by signing the final release of claims, Alares is precluded from bringing this claim. To succeed on a motion for summary judgment, there must be no material facts in dispute, and the moving party must prove it is entitled to judgment as a matter of law. *Grand Strategy, LLC v. Department of Veterans Affairs*, CBCA 6795, 21-1 BCA ¶ 37,895, at 184,039. “A material fact is one that will affect the outcome of the case. . . . [A]ll reasonable inferences and presumptions are resolved in favor of the non-moving party.” *Id.*

On October 29, 2019, Alares signed a final release of claims, discharging the Government from all liabilities under the contract, except for twenty-nine specified requests for equitable adjustment (REAs). Appeal File (CBCA 6149, et al.), Exhibit 81. Included within those twenty-nine REAs is REA 20, extended general conditions. REA 20 was converted to the claim that is at issue in CBCA 6149.

The first version of REA 20 was submitted on May 23, 2019, before the final release of claims. It requested an equitable adjustment due to alleged government delays and differing site conditions that led to increases in the cost of the project. *See* Appeal File (CBCA 6149, et al.), Respondent's Response to Appellant's Second Addendum, Exhibit A. In REA 20, Alares included broad language that preserved its rights to seek costs for other impacts on the schedule or time-related extended performance costs:

In accordance with VAAR [Veterans Affairs Acquisition Regulation] 852.228-70 and VAAR 852.236-88 Alares Construction, Inc. reserves its rights to receive a bond premium adjustment at the time of final settlement under this contract for Alares Construction, Inc. and its subcontractors['] increased Bond Premiums. Alares Construction, Inc. reserves it's [sic] rights to additional costs for impact of this change, *alone or in combination with other changes, on unchanged work; for additional time, due to impacts, if any, on the schedule; and for time-related extended time of performance costs*, all of which will be evaluated separately.

Id. at 5 (emphasis added). The broad nature of this language presents some doubt as to the material fact of whether appellant's claim addendum is barred by the final release of claims. Thus, summary judgment is not appropriate.

Decision

The VA's motion to dismiss for lack of jurisdiction and alternative motion for summary judgment are **DENIED**.

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge