

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Special Operative Group, LLC ) ASBCA No. 57678  
 )  
Under Contract No. W917BG-09-C-0044 )

APPEARANCE FOR THE APPELLANT: David Albino, Esq.  
Fayetteville, NC

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
Michael A. Rea, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District,  
Middle East  
Winchester, VA

OPINION BY ADMINISTRATIVE JUDGE GRANT  
ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This appeal concerns an invoice submitted to the government by Special Operative Group, LLC (SOG) for progress payments in the amount of \$292,086.43, and SOG's subsequent appeal to this Board on 28 June 2011 for the government's failure to make such progress payments, resulting in a "Government debt to SOG LLC of \$292,086.43." On 8 August 2011, the government filed a motion to dismiss for lack of jurisdiction under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101-7109, asserting that the invoice did not constitute a claim and was not certified as required by the CDA. For the reasons stated below, we grant the government's motion and dismiss the appeal without prejudice for lack of jurisdiction.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 30 September 2009, the U.S. Army Corps of Engineers awarded a fixed-price design-build contract to SOG for the design and construction of the Tal Eswad Iraqi Police Station in Al Anbar Province, Iraq. The total contract price at time of award was \$1,900,000 and the performance period was 240 days from the Notice to Proceed,

which was issued on 23 October 2009. (ASBCA No. 57484, R4, tab 3 at 1-3, 11, tab 12)<sup>1</sup> Modification No. 01 was issued on 19 May 2010, adding work in the amount of \$112,668.89 and extending the contract completion date to 29 August 2010 (R4, tab 4).

2. The contract contained FAR clause 52.233-1, DISPUTES (JUL 2002) (R4, tab 3 at 27-28). This clause requires, for contractor claims over \$100,000, that the claim be certified as specified:

“I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.”

FAR 52.233-1(d)(2)(iii). The Disputes clause also contained the FAR definition of “claim” that written demands over \$100,000 are not considered claims unless certified, and that routine requests for payment such as invoices that are not in dispute at the time they are submitted are also not claims. FAR 52.233-1(c).

3. The contract also contained FAR clause 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (SEP 2002) (R4, tab 1 at 22-23). This clause requires progress payments monthly as work proceeds; it also requires a contractor certification with each progress payment request:

I hereby certify, to the best of my knowledge and belief, that –

(1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

(2) All payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of chapter 39 of Title 31, United States Code;

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<sup>1</sup> The Rule 4 file citations in this decision are to SOG’s related appeal, docketed as ASBCA No. 57484.

(3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract; and

(4) This certification is not to be construed as final acceptance of a subcontractor's performance.

FAR 52.232-5(c). This certification is different from the certification required by the CDA (SOF ¶ 2).

4. At some point, SOG submitted an invoice dated 29 September 2010, Invoice No. AB-1007, for progress payments in the amount of \$94,250. The letter accompanying the invoice, also dated 29 September 2010, provided the progress payment certification required by FAR 52.232-5(c), specifically referenced to the 29 September 2010 invoice. (R4, tab 58 at 2-3)

5. On 13 October 2010, the contracting officer (CO) terminated the contract for default (R4, tab 2). Modification No. P00002 was issued on 5 December 2010, reflecting that termination and reducing the contract price to \$693,968.89 (R4, tab 5).

6. On 13 December 2010, SOG submitted a "demand for payment" for the \$94,250 outstanding invoice, requesting a "written final decision." SOG attached the 29 September 2010 invoice and the 29 September 2010 progress payment certification. Also attached to this 13 December 2010 demand is a copy of a later invoice, still numbered AB-1007, but dated 8 December 2010. This later invoice is for a total of \$292,086.43. In addition to reflecting a variety of charges, such as \$50,186.43 for a period of suspension from 22 September to 13 October 2010, it also carries forward the \$94,250 previously invoiced on 29 September 2010 as part of the new total invoiced charges. A note beside the \$94,250 entry indicates "Invoice Overdue", along with a similar comment at the bottom of the invoice referencing the previous invoice as overdue. This 8 December 2010 invoice did not contain either the progress payment certification required by FAR 52.232-5(c) or the CDA certification set forth in FAR 52.233-1(d)(2)(iii). (R4, tab 58) Apparently no final decision was ever issued on the 13 December 2010 demand concerning the \$94,250 invoice (gov't mot. at 5, ¶11).

7. SOG brought several appeals to this Board related to this contract default, three related to this motion. First, on 7 January 2011, SOG appealed the government's termination for default, which was docketed as ASBCA No. 57484. This Notice of

Appeal included the statement that the government breached the contract by failing to act in good faith and with fair dealing, and by failing to release progress payments. Next, on 18 May 2011, SOG appealed to the Board the CO's failure to issue a final decision as requested in SOG's 13 December 2010 demand for payment for the 29 September 2010 version of Invoice No. AB-1007, for \$94,250. This appeal was docketed as ASBCA No. 57631. Finally, on 28 June 2011, SOG appealed the government's "failure to make progress payments" as required by the contract, alleging that this failure "resulted in a Government debt to SOG LLC of \$292,086.43." This appeal was docketed as ASBCA No. 57678, and is the appeal that is the subject of the current motion.

### DECISION

The government argues that this appeal should be dismissed because the invoice underlying the appeal, for \$292,086.43, was not a claim and was not certified as required by the CDA. SOG argues that the 8 December 2010 invoice was not a routine request for payment and that it was certified because the preceding 29 September 2010 invoice had been certified. We conclude, as discussed below, that whether or not the invoice could otherwise be viewed as a claim, it was not certified as required by the CDA, and thus we dismiss without prejudice for lack of jurisdiction.

The CDA requires that all contractor monetary claims over \$100,000 be certified. 41 U.S.C. § 7103(b). The CDA's implementing regulation at FAR 2.101 provides that a "written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under the Contract Disputes Act of 1978 until certified as required by the Act." The Disputes clause echoes this requirement (SOF ¶ 2).

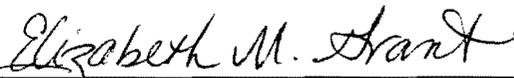
It is well settled that certification is a jurisdictional prerequisite for this Board for contractor claims over \$100,000. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 579 (Fed. Cir. 1991). Although a defective certification can be corrected without depriving this Board of jurisdiction, failure to certify at all does not constitute a defective certification, and cannot be corrected. *Tefirom Insaat Enerji Sanayi ve Ticaret A.S.*, ASBCA No. 56667, 11-1 BCA ¶ 34,628 at 170,630 (contractor's monetary claim dismissed without prejudice for lack of a CDA certification); FAR 33.201 ("Failure to certify shall not be deemed to be a defective certification").

This invoice is over \$100,000 and was not certified pursuant to the CDA.<sup>2</sup> The progress payment certification accompanying the 29 September 2010 invoice does not include any of the four required CDA certification elements; rather, the progress payment certification addresses only the specific certification requirements of the progress payments clause. Further, the progress payment certification is specific to the \$94,250 invoice amount, and does not purport to cover any other costs besides those identified in that invoice, such as the suspension costs of 22 September -13 October 2010 presented in the 8 December invoice. (SOF ¶¶ 2, 3, 4, 6) Consequently, we conclude that the 8 December 2010 invoice was not certified pursuant to the CDA and thus we do not have jurisdiction over SOG's appeal.

### CONCLUSION

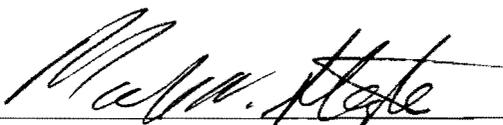
Because SOG's invoice of \$292,086.43 was not certified and thus does not constitute a claim, we have no jurisdiction. Consequently, we grant the government's motion and dismiss the appeal, without prejudice, for lack of jurisdiction.

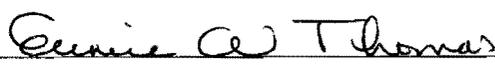
Dated: 19 October 2011

  
ELIZABETH M. GRANT  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

  
MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

  
EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

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<sup>2</sup> In its response to the government's motion, SOG provided an unsigned and undated CDA certification, promising a signed copy to follow (app. reply at 3 and ex. 2). However, filing a CDA certification after an appeal has been docketed cannot cure the jurisdictional deficiency of a previous failure to certify. *IMS P.C. Environmental Engineering*, ASBCA No. 53158, 01-2 BCA ¶ 31,422 at 155,163.

I certify that the foregoing is a true copy of the Order of Dismissal of the Armed Services Board of Contract Appeals in ASBCA No. 57678, Appeal of Special Operative Group, LLC, rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals