

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Moshman Associates, Inc. ) ASBCA No. 52320  
 )  
Under Contract No. 290-90-0031 )

APPEARANCE FOR THE APPELLANT: Mr. Jack Moshman, President

APPEARANCES FOR THE GOVERNMENT: Louis Mancuso, Esq.  
Acting Chief Trial Attorney  
Jeffrey P. Robbins, Esq.  
Martha C. Craig, Esq.  
Trial Attorneys  
Department of Health and Human  
Services  
Washington, DC

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

The Government moves to dismiss for lack of jurisdiction, alleging that the contractor has not submitted a "claim" as defined by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601, *et seq.*, and its implementing regulations.

FINDINGS OF FACT

1. On 28 September 1990, the Government awarded Contract No. 282-90-0031 (later changed to 290-90-0031) to appellant at an estimated cost-plus-fixed-fee of \$5,808,487. The contract incorporated FAR 52.233-1 DISPUTES (APR 1984) by reference (R4, tab B).
2. The contract was completed on or about 27 June 1996 (R4, tab B).
3. On 29 July 1998, the contracting officer requested appellant to submit a final invoice so that the Government could close-out the contract (R4, tab D).
4. On 24 August 1998, appellant submitted its final invoice and a Standard Form 1034, "PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL," in

the amount of \$280,559.67. The voucher contained the following certification, signed by Ms. Elaine M. Kokiko, Executive Vice President of appellant:

I certify that all payments requested are for appropriate purposes and in accordance with the agreements set forth in the contract.

(R4, tab E)

5. On 10 February 1999, appellant amended its final voucher, reducing the amount billed to \$186,084.99. The amended voucher contained the same certification quoted above. (R4, tabs A, F)

6. By letter dated 3 June 1999, the contracting officer returned the amended voucher to appellant because the amount billed exceeded the amount of funds remaining in the contract. Her letter stated, in part, as follows:

The Contracting Officer was never informed that a significant increase in your indirect costs would result in a cost overrun and was unaware of the increase until the invoice was received in August 1998. Had this office been aware of the situation at the time, corrective action could have been taken then (such as not issuing the final work assignment, or adding funds to the contract, etc.).

Therefore, since you knew or should have known of the impending cost overrun and did not notify the Contracting Officer of the situation, we must deny payment of your invoice for any costs above the total amount of the contract.

Therefore, it is requested that you submit a final invoice in the amount available (\$15,369.05), which we will promptly review and process for payment.

(R4, tab A)

7. By letter dated 2 July 1999, appellant offered a number of reasons why it should not be held responsible for the overrun. Appellant concluded that “[w]e desire to resolve this matter amicably and avoid the substantial legal fees that would result if we were forced to file a formal claim under the subject contract.” (R4, tab G)

8. On 18 August 1999, appellant appealed the contracting officer's 3 June 1999 letter to this Board (R4, tab I).

### DISCUSSION

Under the CDA, the contractor must submit a "claim" to the contracting officer before the Board has jurisdiction over the appeal. After carefully reviewing the documents in the Rule 4 file and the arguments of the parties, we conclude that appellant has not submitted a "claim" within the meaning of the CDA.

Neither the CDA nor its legislative history define a "claim." However, FAR 33.201, a regulation which implements the CDA, defines a "claim" as follows:

"Claim" . . . means 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, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract . . . . However, a written demand or 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. . . . *A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim.* The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time. [Emphasis added]

Appellant's final voucher was not a "claim" for two reasons: (1) it was a routine request for payment not in dispute at the time it was submitted; and (2) it was not certified. Appellant's final voucher was clearly not in dispute at the time it was submitted and is not a "claim" under *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc). Appellant's final voucher also was not a "claim" because it was not certified. The CDA requires the contractor to certify its "claim." We note that the CDA provides the contractor must certify that the claim "is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor." 41 U.S.C. § 605(c)(1).

Accordingly, the appeal is dismissed without prejudice to the submission of a proper claim to the contracting officer.

Dated: 27 April 2000

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ELIZABETH A. TUNKS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52320, Appeal of Moshman Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals