

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Doyon Properties-American, JV ) ASBCA No. 55842  
 )  
Under Contract No. DACA85-03-C-0028 )

APPEARANCE FOR THE APPELLANT: Joseph W. Sheehan, Esq.  
Fairbanks, AK

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
Toni B. London, Esq.  
Engineer Trial Attorney  
U. S. Army Engineer District,  
Alaska

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD  
ON MOTION TO DISMISS FOR LACK OF JURISDICTION

Doyon Properties-American, JV (appellant) filed this appeal on behalf of its subcontractor Great Northwest, Inc. The government filed a motion to dismiss alleging lack of jurisdiction by this Board based on “appellant’s failure to request and receive a Contracting Officer’s Decision and on its failure to certify its claim” (gov’t resp. at 1). Since appellant, as opposed to the subcontractor, failed to certify the claim, we dismiss the appeal on that basis.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 27 September 2003, the government awarded appellant a contract for the construction of a platoon battle course at Fort Wainwright, Alaska (R4, tab 18; compl. and answer ¶ 1).
2. Appellant subcontracted the earthwork portion of the contract to Great Northwest, Inc. (GNI) (R4, tab 17).
3. By letter dated 21 December 2005, GNI submitted a proposal to appellant for borrow overrun in the amount of \$578,744.00 contending that it constituted extra work (R4, tab 12). Appellant forwarded the proposal to the administrative contracting officer (ACO) by letter dated 14 January 2006 as a proposal requesting an equitable adjustment

(REA). Appellant added mark-ups increasing the total amount of the REA to \$690,825.00. (Supp. R4, tab 3)

4. By letter to appellant dated 16 May 2006, GNI requested a decision of the contracting officer on its proposal. The letter included a certification in the form required by the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(1), signed by GNI's project manager. (R4, tab 8)

5. On 17 May 2006, appellant emailed GNI's letter of 16 May 2006 to the ACO. Therein appellant requested that the ACO "review this correspondence from GNI requesting a contracting officer's decision on the borrow overrun." Appellant, as the prime contractor, did not include any CDA certification. (R4, tab 7)

6. The contracting officer issued a letter dated 25 January 2007 stating the REA was reviewed and found to be without merit. The letter informed appellant of the right to pursue the matter further under the "contract clause 52.233-1 Disputes." (R4, tab 6)

7. Appellant's appeal was filed with the Board on behalf of subcontractor GNI, and docketed on 11 April 2007.

8. On 27 June 2007, the government filed its motion to dismiss alleging lack of jurisdiction. Appellant's response opposed the government's motion and included an undated certification signed by appellant's president and general manager. Appellant's certification included language stating "[appellant] hereby adopts by reference the claim certification provided by [GNI] concerning the claim" and certified the claim on behalf of appellant by making all declarations required by section 6(c)(1) of the CDA, 41 U.S.C. § 605(c)(1). (App. resp., ex. D) The declaration of service certifies a copy of appellant's response and attached certification was forwarded to the government's counsel (app. resp. at 10).

## DECISION

The government asserts several arguments in support of its motion to dismiss. In that we find the government's contention regarding certification to be dispositive, we find it unnecessary to address the government's other arguments.

The government argues lack of jurisdiction by this Board due to appellant's failure to certify the claim. Under the CDA, contractors submitting monetary claims in excess of \$100,000 are required to 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)

It is well settled that when a prime contractor sponsors an appeal by a subcontractor, the prime contractor must itself have certified the claim. *St. Paul Fire and Marine Insurance Co.*, ASBCA No. 53228, 02-2 BCA ¶ 32,025; *Continental Maritime of San Diego, Inc.*, ASBCA No. 36733, 89-1 BCA ¶ 21,249; *Raymond Kaiser Engineers, Inc./Kaiser Steel Corp., JV*, ASBCA No. 34133, 87-3 BCA ¶ 20,140. Here, it was not until after the filing of the appeal, and in response to the government's motion to dismiss, that appellant, as the prime contractor, filed an undated certification.

Appellant asserts that “[b]y transmitting [the subcontractor’s] claim and certification to the Government, [appellant] adopted by reference [the subcontractor’s] claim and certification. . . . Under these circumstances, the entity/person who performed the work and documented the claim is an appropriate person to certify the claim.” (App. resp. at 7-8) Appellant also attempts to adopt “by reference the claim certification provided by [the subcontractor].” (App. resp., ex. D) These arguments are not tenable under the authorities cited above.

In the alternative, appellant argues that the certification is defective and can be cured. However, the opportunity to cure does not apply where no certification exists. *Eurostyle Incorporated*, ASBCA No. 45934, 94-1 BCA ¶ 26,458. Herein the certification was submitted by the subcontractor. This is tantamount to absence of certification. A claim exceeding \$100,000 which is not accompanied by any certification renders the claim invalid and precludes the Board from exercising jurisdiction. Nor does the submission of a certification by the prime contractor subsequent to the initiation of an appeal have any legal bearing on the Board’s jurisdiction over the subject appeal. *IMS P.C. Environmental Engineering*, ASBCA No. 53168, 01-2 BCA ¶ 31,422; *CDM International, Inc.*, ASBCA No. 52123, 99-2 BCA ¶ 30,467 at 150,514.

Accordingly the subject appeal is dismissed without prejudice for lack of jurisdiction.

Dated: 17 December 2007

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RICHARD SHACKLEFORD  
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  
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. 55842, Appeal of Doyon Properties-American, JV, rendered in conformance with the Board's Charter.

Dated:

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