

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Steven Allen Fiamengo, MD ) ASBCA No. 56668  
 )  
Under Contract No. W91YTV-08-P-0040 )

APPEARANCE FOR THE APPELLANT: Steven Allen Fiamengo, MD

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
CPT John J. Pritchard, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES  
ON RESPONDENT'S PARTIAL MOTION TO DISMISS  
FOR LACK OF JURISDICTION

On 9 March 2009 respondent moved to dismiss appellant's prayer for \$424,960.00 in his undated complaint, which the Board received on 5 December 2008, on the grounds that only the validity of the default termination is in dispute, appellant submitted no monetary claim to the contracting officer for decision and submitted no certification for such alleged claim as required by the Contract Disputes Act of 1978, 41 U.S.C. § 605.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 25 October 2007 the U.S. Army Signal Command entered into a personal services contract with Steven Allen Fiamengo, MD, to provide anesthesiology services to military personnel and beneficiaries at the Eisenhower Army Medical Center, Fort Gordon, GA, for a one-year period with two annual options (gov't mot. ¶ 1).

2. On 8 October 2008 respondent placed Dr. Fiamengo's clinical privileges in abeyance for 30 days due to his alleged violation of the Fort Gordon policy on possession of firearms, and unauthorized possession of government property and controlled substances (*id.* ¶¶ 2, 6).

3. On 13 November 2008 the contracting officer terminated the captioned contract for default (*id.* ¶ 8).

4. On 4 December 2008 the ASBCA received Dr. Fiamengo's complaint to the "General Accountability Office" and on 5 December 2008 received another complaint, readdressed to this Board, which was docketed as ASBCA No. 56668. Paragraph 42 of that complaint stated: "That the wrongful termination of this contract has damaged

petitioner [sic] in the amount of \$360,900.00 during a time that his professional ability is and was needed at the Eisenhower Army Medical Center.” Following the 45<sup>th</sup> allegation, the complaint concluded:

Wherefore, Steven Allen Fiamengo, M.D. demands the following relief:

1. Damages for breach of contract of \$ 360,900.00
2. Incidental damages relating to moving and travel expenses caused by the breach of contract of \$ 40,000.00
3. Legal fees in defense of the breach of contract in the amount to be assessed [by a designated lawyer].
4. Damages of 20 days of accrued leave of \$ 24,060.00 that contracting officer has refused to disburse.

5. Respondent asserts that the Board lacks jurisdiction to entertain appellant’s \$424,960.00 monetary claim because he submitted no such claim to the contracting officer for decision and no certification for such claim, and further that such claim is premature before the Board decides the propriety of the government’s default termination of the captioned contract (gov’t mot. at 3).

6. After the Board requested appellant to respond to the foregoing motion, on 4 May 2009 the Board received an undated letter from appellant which stated that “[t]he Board should adjudicate all issues requested by appellant,” which did not document any monetary claim submitted to the contracting officer, and whose ¶ 11 stated: “I requested payment for accrued leave and damages from Rosa Biles [health care administrator] and the contracting offices via e-mail in November 2008. My demands were denied. Copies of e-mails available on request.”

7. The Board reviewed e-mails sent to and from Rosa Biles and others in November 2008 which respondent sent to the Board on 20 May 2009. Though appellant was afforded opportunities to provide evidence of a CDA claim and certification to this Board by 1 June 2009, the Board has received no such evidence.

### DECISION

The Contract Disputes Act of 1978 (CDA) provides that a contractor must submit a written claim, certified, if required, to the CO, *see* 41 U.S.C. § 650(a), (c)(2), *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564 (Fed. Cir. 1995), and appeal from the contracting officer’s written decision on, or deemed denial of, that claim, *see* 41 U.S.C. § 605(c)(1), (3), (5), *Fru-Con Construction Corp.*, ASBCA No. 53544, 02-1 BCA ¶ 31,729 at 156,757. A claim cannot properly be raised for the first time in the pleadings before the Board. *See Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 at 158,668. It is well settled that the claim certification requirement is a

jurisdictional prerequisite that must be satisfied by the contractor before it may appeal the contracting officer's claim denial. *See United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 579 (Fed. Cir. 1991). The complete absence of a certification is not a defect that can be corrected under the CDA, 41 U.S. C. § 605(c)(6); *Eurostyle Inc.*, ASBCA No. 45934, 94-1 BCA ¶ 26,458 at 131,654. Since appellant has failed to establish that he submitted his alleged \$424,960.00 claim to the contracting officer for decision and submitted a CDA certification for such claim, this Board has no jurisdiction to adjudicate such claim. Accordingly, we dismiss such monetary claim, and need not address respondent's ground of prematurity.

Respondent's motion is granted, as set forth above.

Dated: 13 August 2009

---

DAVID W. JAMES, JR.  
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

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. 56668, Appeal of Steven Allen Fiamengo, MD, rendered in conformance with the Board's Charter.

Dated:

---

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