

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Baghdad Fallujah Company) ASBCA No. 58489
)
Under Contract No. W91GEU-07-P-0133)

APPEARANCES FOR THE APPELLANT: Mr. Haider Fahmy
President
Mr. Nasser Naaseh
Manager

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Anthony Lenze, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MELNICK
ON THE GOVERNMENT'S MOTION TO DISMISS

This appeal involves a contract for work in Iraq. The government has moved to dismiss the appeal. The motion is granted.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The Joint Contracting Command – Iraq/Afghanistan (government) decided to award a commercial items contract, No. W91GEU-07-P-0133, to Baghdad Fallujah Company in November 2006. The contract was for the delivery of 6,750 cubic meters of gravel to the Victory Base Complex, Baghdad, Iraq. At a unit price of \$28, the total award was in the amount of \$189,000. (R4, tab 1 at 1-3 of 16)

2. On 6 November 2006, appellant wrote to the government contracting officer (CO) seeking his “help to change the price” (R4, tab 3).

3. The CO responded on 7 November 2006 that he would not “award” the contract at the new price quoted by appellant. He concluded by telling the appellant to “[e]ither sign and return the agreement, or I will move on to the next offer.” (R4, tab 4)

4. On 9 November 2006, the CO sent an email to appellant giving it 24 hours to respond to his previous communication. He stated that appellant had to “accept this contract by signature...or I will withdraw this contract and award it to a different” offeror. (R4, tab 5) On the same day, the contracting officer’s representative (COR) gave

appellant instructions for delivery of gravel (R4, tab 6). In a later memorandum, the CO stated that the COR told him that appellant had not been responsive and had not delivered anything. He also noted that he told appellant it had until 1700 on 12 November 2006 “to sign the contract and begin work, or I would be withdrawing the offer.” (R4, tab 12) Appellant alleges that it delivered 6,750 cubic meters of gravel over three days—10 November 2006 through 12 November 2006 (app. resp. dtd. 16 May 2013, ¶ 3).

5. It appears that appellant emailed the CO on 12 November 2006 saying that it could not deliver at \$28 per unit and asking that the price be increased to \$33 per unit (R4, tab 7). The CO later stated that appellant “did not sign the contract” (R4, tab 12).

6. The CO says that government officials met on 15 November 2006, agreed that the government had not entered into a contract with appellant, and confirmed that the next company in line for award was 100 percent Iraqi-owned (R4, tab 12).

7. On 16 November 2006, the CO learned from the COR that nothing had changed (R4, tab 12) so he sent appellant an email stating that the government had “moved on to the next vendor’s bid” and that the government was “withdraw[ing] our offer” (R4, tab 10).

8. On 18 November 2006, the government issued Modification No. P00001 to the “award” to “change the company that will be performing the work to Tokio Company” and to increase the award amount by \$10,000 from \$189,000 to \$199,000 (R4, tabs 11, 12).

9. The record includes Modification No. P00002 to the contract dated 5 December 2006. The document lists appellant as the contractor. The modification terminated the contract for the convenience of the government under FAR 52.212-4(1). (R4, tab 13)

10. The record includes a Baghdad Fallujah Company invoice dated 13 November 2006 in the amount of \$189,000, and a corresponding DD250 for appellant also in the amount of \$189,000 and dated 13 November 2006. There is also what appears to be a government document entitled “ODS Document History.” The document indicates a payment under the contract for \$198,975 on 14 May 2007. (R4, tab 8)

11. Appellant sent the government an email on 21 January 2011 stating that the company had not been paid under the contract and asking for assistance (R4, tab 14). There is no indication of a certification as required by the Contract Disputes Act (CDA), 41 U.S.C. § 7103(b)(1). The government responded that the contract had been terminated for the convenience of the government on 2 December 2006 (R4, tab 15).

12. It appears that appellant inquired again in September 2012 and submitted a copy of the contract and an invoice for \$189,000. Again, there was no CDA certification. A CO issued what was denominated a 31 December 2012 final decision, with appeal

rights, noting that the government's "offer" to appellant had been withdrawn so there was no contract. The decision also stated that the contract had been terminated. She recommended that appellant not be paid. (R4, tab 16; app. resp. dtd. 16 May 2013, ¶¶ 4-13)

13. Appellant filed a notice of appeal from the 31 December 2012 final decision on 3 January 2013 and a copy of its \$189,000 invoice in March 2013. The government has moved to dismiss the appeal for lack of jurisdiction.¹

DECISION

The government asserts that because appellant sought more than \$100,000, its request had to be certified in accordance with the CDA, but was not. Appellant focuses on the merits of its appeal.

Appellant must demonstrate that it meets the requirements for Board jurisdiction. *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988); *United Healthcare Partners, Inc.*, ASBCA No. 58123, 13 BCA ¶ 35,277. Our jurisdiction to decide an appeal from a contractor claim depends on the prior submission of the claim to a CO for decision and a final decision on, or deemed denial of, the claim, 41 U.S.C. § 7103.² In addition, where the claim exceeds \$100,000, it must be certified in accordance with the CDA, 41 U.S.C. § 7103(b). *Special Operative Group, LLC*, ASBCA No. 57678, 11-2 BCA ¶ 34,860.

Appellant clearly seeks more than \$100,000 (SOF ¶¶ 12-13). Whether or not appellant's request could be considered a claim, it is clear that it was not certified as required by the CDA (SOF ¶¶ 11, 12). The certification requirement is jurisdictional. *Special Operative Group*, 11-2 BCA ¶ 34,860 at 171,480. The lack of certification here means that the Board lacks jurisdiction and the appeal must be dismissed. *Id.* at 171,480-81.

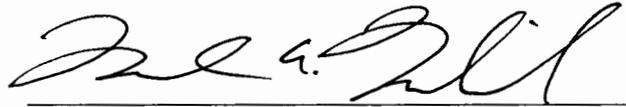
¹ A reading of our statement of facts makes it clear that the parties are uncertain as to whether a contract with Baghdad Fallujah Company was formed. We do not decide that issue in this Decision.

² The Federal Acquisition Regulation defines "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 as required by the Act." FAR 2.101 (italics in original).

CONCLUSION

For the reasons set out above, the government's motion is granted and the appeal is dismissed.

Dated: 14 August 2013



MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



ELIZABETH M. GRANT
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. 58489, Appeal of Baghdad Fallujah Company, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals