

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Metro Machine dba General Dynamics) ASBCA No. 62221
NASSCO-Norfolk)
)
Under Contract No. N00024-16-D-4408)

APPEARANCE FOR THE APPELLANT: Michael J. Gardner, Esq.
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McLean, VA

APPEARANCES FOR THE GOVERNMENT: Craig D. Jensen, Esq.
Navy Chief Trial Attorney
Philip S. Lazarus, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE CLARKE

The Navy challenges the Board’s jurisdiction because this pass-through claim is certified by the subcontractor’s president, not by an authorized officer of the prime contractor, Metro Machine dba General Dynamics NASSCO-Norfolk (NASSCO). NASSCO and the subcontractor contend that the subcontractor’s president had authority to bind NASSCO based on a sponsoring agreement and the terms and conditions of the subcontract. NASSCO further contends if there is a defect in the certification it is correctable. We agree with this latter argument. We have jurisdiction pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION*

1. The Navy awarded NASSCO Task Order No. N00024-16-D-4408-0006 under Contract No. N00024-16-D-4408 to perform repairs on the *USS Bulkeley* (DDG-84) (gov’t mot., att. A).

2. NASSCO awarded Purchase Order (PO) No. SL302379 to Advanced Integrated Technologies (subcontractor, AIT) to perform repair services including boat handling equipment repair onboard the *USS Bulkeley* (app. opp’n at 2).

* The parties both cite the same or similar facts that are undisputed. Relevant documents are attached to the parties’ motions and cited as such.

3. By letter dated March 22, 2017 the Navy informed NASSCO that boat handling repairs had not been timely completed, “Boat Handling equipment; repair: the equipment remains inoperable . . .” (gov’t mot., att. B at 1).

4. After completion of the work, NASSCO informed AIT that the Navy imposed liquidated damages against NASSCO in the sum of \$334,425.00 due to AIT’s performance on the PO (app. opp’n, at 2; gov’t mot., att. D).

5. On November 7, 2017, NASSCO and AIT entered into a Claim And Appeal Sponsorship Agreement (CAS Agreement) (app. opp’n, ex. 1). In particular, the preamble states:

WHEREAS the Purchase Order was subject to and included by reference NASSCO-Norfolk’s Military Ship Repair Programs General Terms and Conditions (“Ts & Cs”), which provide in paragraph 15(c) that NASSCO-Norfolk will permit AIT to make a pass-through claim against the Government under NASSCO-Norfolk’s sponsorship . . .

. . . .

WHEREAS AIT is not in privity with the Government and can assert its defense against the Government’s assessment of liquidated damages only through a sponsored claim, including, if necessary, an appeal, as permitted by paragraph 15(c) of the Purchase Order Ts & Cs; and

WHEREAS AIT and NASSCO-Norfolk have a mutual interest in having AIT’s claim resolved under the relevant clauses of the Prime Contract and the Purchase Order Ts & Cs.

(*Id.* at 2-3)

The CAS Agreement then states:

NOW, THEREFORE, the Parties hereto agree as follows:

1. In accordance with paragraph 15(c)(i) of the Purchase Order Ts & Cs, AIT shall submit a written and certified claim or request for equitable adjustment (“REA”) to NASSCO-Norfolk for submission by NASSCO-Norfolk to the Contracting Officer on the Prime Contract claiming entitlement to remission of the assessed liquidated damages and entitlement to a time

extension due to Government caused excusable delay (“Sponsored Claim”). AIT’s certification of the Sponsored Claim shall be in the form found in FAR 33.207(c). AIT shall submit the Sponsored Claim to NASSCO-Norfolk within thirty (30) days of the date of this Agreement.

2. NASSCO-Norfolk will review the Sponsored Claim and, upon determining in NASSCO-Norfolk’s sole discretion that it is made in good faith and has a reasonable basis, shall submit it as a pass-through claim to the Contracting Officer for a final decision pursuant to the Contract Disputes Act.

(Id. at 3)

6. NASSCO Military Ship Repair Programs General Ts & Cs Rev. D Effective July 15, 2016, Paragraph 15(c), referenced in the CAS Agreement reads:

15. Disputes

....

(c) Any Dispute solely in connection with or arising out of the Prime Contract with the Government or in connection with or arising out of both the Prime Contract with the Government and this Contract not resolved in accordance with paragraph (a) or (b), above, shall be resolved by means of the following procedure:

- (i) Seller may submit to Buyer a claim or request for equitable adjustment in accordance with the dispute resolution provisions of the Prime Contract, copies of which will be provided upon request. Buyer may, upon Seller’s request and in Buyer’s sole discretion, submit such claim or request for equitable adjustment to the Government through its Contracting Officer for resolution, including a Contracting Officer’s final decision in the case of a claim. Such submission, if not rejected for lack of jurisdiction, shall constitute Seller’s sole remedy and shall be a bar to Seller’s proceeding directly against Buyer in any forum. Seller’s compliance with the dispute resolution

provisions of the Prime Contract is a condition precedent to Buyer's submission of Seller's claim or request for equitable adjustment to the Government.

- (ii) The resolution of any claim or request for equitable adjustment by the Government through its Contracting Officer shall be conclusive and binding on Seller to the extent conclusive and binding on Buyer, subject to Seller's rights of appeal as set forth below.
- (iii) If Seller is dissatisfied with the final decision of the Contracting Officer with respect to any claim, Seller may appeal such final decision in accordance with the dispute resolution provisions of the Prime Contract, using Buyer's name, if such appeal does not affect Buyer's rights independent of Seller's claim. If the final decision affects Buyer's independent rights, Seller may appeal in Buyer's name only with Buyer's written consent.
- (iv) Requests for equitable adjustment or claims that are not submitted to the Government or which are dismissed by the Government for lack of jurisdiction may be resolved in accordance with paragraph (b) above.

(https://www.nassconorfolk.com/purchasing/docs/GDNN_MilitaryShipRepairPrograms.pdf)(Rev. D, effective July 15, 2016)

7. On November 2, 2017, NASSCO submitted AIT's Request for Equitable Adjustment (REA) to the Navy seeking remission of the liquidated damages in the amount of \$334,425.00 (a copy of this REA is attached as Exhibit A to the Complaint).

8. On February 6, 2018, the Navy requested clarifications of the REA (app. opp'n at 3).

9. NASSCO responded to the clarifications on June 22, 2018 (app. opp'n at 3).

10. The Navy denied the REA on August 19, 2018 (app. opp'n at 3).

11. On May 30, 2019, NASSCO certified the REA as a claim:

CLAIM CERTIFICATION

Request for Equitable Adjustment in the sum of \$334,425

USS BULKELEY (DDG 84)

Contract: N00024-16-D-4408

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.

Date: May 30, 2019


Signature

Name (printed)

(Gov't mot., att. E at 3) The Claim Certification was signed by Carlton Spraberry, President of AIT.

12. By letter dated June 4, 2019, NASSCO sent the certification to the Navy. The transmittal letter was signed by Ms. Connie Linden, NASSCO Director of Contracts (gov't mot., att. E at 1).

13. On August 2, 2019, the Navy Contracting Officer issued a final decision addressed to NASSCO denying the claim (gov't mot., att. F).

14. The final decision was appealed and the Board docketed the appeal as ASBCA No. 62221.

DECISION

Positions of the Parties

The Navy correctly recites the current law relating to claim certification and our jurisdiction. Defective certifications are correctable and do not divest the Board of jurisdiction. However, the complete absence of a certification/signature cannot be corrected and does divest the Board of jurisdiction (gov't mot. at 3-4). The Navy equates

AIT's certification, signed by its president Mr. Spraberry, to the complete absence of a signed certification:

NASSCO-Norfolk's 4 June 2019 letter to the Navy Contracting Officer does not carry this burden, as it lacks a signed certification (See attachment E), and thus the Board lacks jurisdiction over this appeal. *See Appeal of Al Rafideen Co.* at 175810. It is not enough to merely forward a claim certification by AIT's "Carlton Spraberry" and then state that it is "sponsoring" AIT's claim (See attachment E).

(Gov't mot. at 4)

For its part NASSCO admits that the claim certification was signed by AIT's "principal," Mr. Spraberry, but asserts he had the authority to bind NASSCO, "NASSCO included with its claim a certification executed by its subcontractor's principal, whom NASSCO duly authorized to bind NASSCO with respect to this claim" (app. opp'n at 1). As a fallback position, NASSCO contends if Mr. Spraberry's certification is defective, it is not equivalent to no signature, and is correctable:

If this Board finds that NASSCO's subcontractor's principal was not authorized to bind NASSCO with respect to this claim, the certification is not considered absent, as the Navy argues, but is simply a "defective certification" as that term is defined under 48 C.F.R. § 33.201. If the certification is defective, the Board is not without jurisdiction and therefore, the appropriate remedy is not dismissal, but correction of the defective certification as per 41 U.S.C. § 7103(b)(3).

(App. opp'n at 1)

Discussion

There is no dispute over the well-established law that the CDA requires the certification of claims "of more than \$100,000." 41 U.S.C. § 7103(b). This certification is required to be "executed by an individual authorized to bind the contractor with respect to the claim" and must state that:

(A) the claim is made in good faith; (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief; (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal

Government is liable; and (D) the certifier is authorized to certify the claim on behalf of the contractor.

41 U.S.C. § 7103(b). *See also* Federal Acquisition regulation (FAR) 33.207(e) (certification may be executed by “person duly authorized to bind the contractor with respect to the claim”).

For the appeal at hand, we start with the longstanding precedent that a subcontractor’s certification is not enough to confer jurisdiction on the Board:

Appellant’s subcontractor’s certifications will not suffice. Where no privity of contract exists between the Government and a subcontractor, the prime contractor must certify the claims of its subcontractor for Board jurisdiction over the appeal. *Raymond Kaiser Engineers, Inc. Kaiser Steel Corp., A Joint Venture*, ASBCA 34133, 87–3 BCA ¶ 20,140; *Turner Construction Company*, ASBCA 25447, 84–1 BCA ¶ 16,996. The fact that CMSD attached copies of its subcontractor’s claim certifications is not enough to meet the jurisdictional requirements of the Board.

Continental Maritime of San Diego, Inc., ASBCA No. 36733, 89-1 BCA ¶ 21,249 at 107,148

Next we consider the definition of defective certification. FAR 33.201, DEFINITIONS, defines defective certification:

Defective certification means a certificate which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person authorized to bind the contractor with respect to the claim. Failure to certify shall not be deemed to be a defective certification.

NASSCO argues that the Board takes a liberal view of who qualifies as a person authorized to bind the contractor with respect to the claim, “Since the passing of the FCAA [Federal Court Administration Act of 1992] and the subsequent FAR regulations, this Board has ruled that a multitude of individuals can be considered individuals ‘duly authorized to bind the contractor with respect to the claim’” (app. opp’n at 10). NASSCO cites three cases in support of its argument: *Horton Construction Co., Inc.*, ASBCA No. 61085, 18-1 BCA ¶ 36,979 at 180,130 (“While Horton has not provided evidence outside of its assertions in its filings that Ms. Washington is a vice president, Horton has demonstrated that Ms. Washington is the executrix to the estate and

permitted, or even required, to continue the litigation as part of her fiduciary duties Thus, we conclude that Ms. Washington has authority to bind Horton with respect to the claim.”); *Metric Constructors, Inc.*, ASBCA No. 50843, 98-2 BCA ¶ 30,088 at 148,940 (“The un rebutted evidence is that, at all pertinent times, Mr. Faber served as appellant’s Senior Project Manager, he had a physical presence at the project site, and he had responsibility for, among other things, the execution and performance of the contract and change orders, and had authority to bind appellant on its claim. Based upon that evidence, Mr. Faber was a proper certifying official.”); *Home Entertainment, Inc.*, ASBCA No. 50791, 98-1 BCA ¶ 29641 at 146,877 (“That attorney Whitice was not an officer of HEI is immaterial. Movant presented no proof that Mr. Whitice was not authorized to bind HEI.”). Each of these cases deals with an individual with a direct connection to appellant. We agree with NASSCO that the Board adopts a rather liberal view of who may certify the claim, but all of the cases cited by NASSCO show a close connection with appellant, and none of them involve either a subcontractor or a highly conditional delegation of authority to certify the claim.

Mr. Spraberry, AIT’s principal, signed the claim (REA) certification submitted by NASSCO to the Navy (SOF ¶ 11). NASSCO contends Mr. Spraberry is authorized to bind NASSCO with respect to the claim, the Navy disagrees. NASSCO supports its contention with the CAS Agreement and the Ts & Cs paragraph 15(c). (App. opp’n at 1; SOF ¶¶ 5-6) We look at these two documents to assess if NASSCO is correct that the CAS Agreement and the Ts & Cs paragraph 15(c) confer upon AIT and Mr. Spraberry authority to bind NASSCO with respect to the claim. It is possible that a carefully worded delegation of authority without caveats may work, but as discussed below these two documents fall short of creating such authority on the part of AIT and Mr. Spraberry.

The CAS Agreement between NASSCO and AIT incorporated NASSCO-Norfolk’s Military Ship Repair Programs General Ts & Cs (SOF ¶ 5). The CAS Agreement provides, in part:

NASSCO-Norfolk will review the Sponsored Claim and, upon determining in *NASSCO-Norfolk’s sole discretion* that it is made in good faith and has a reasonable basis, shall submit it as a pass-through claim to the Contracting Officer for a final decision pursuant to the Contract Disputes Act.

(*Id.*) (Emphasis added) The Ts & Cs paragraph 15(c)(i) provides:

Buyer may, upon Seller’s request and in *Buyer’s sole discretion*, submit such claim or request for equitable adjustment to the Government through its Contracting Officer for resolution, including a Contracting Officer’s final decision in the case of a claim. . . . If Seller is dissatisfied with the

final decision of the Contracting Officer with respect to any claim, Seller may appeal such final decision in accordance with the dispute resolution provisions of the Prime Contract, using Buyer's name, *if such appeal does not affect Buyer's rights* independent of Seller's claim. If the final decision affects Buyer's independent rights, Seller may appeal in Buyer's name *only with Buyer's written consent*.

(SOF ¶ 6) (Emphasis added) As can be seen from the language quoted above, NASSCO retained sole discretion over submitting AIT's claim and conditioned appeal on protection of NASSCO's rights or written consent from NASSCO. This language is inconsistent with an unequivocal delegation of authority to the subcontractor AIT and Mr. Spraberry to sign the required CDA certification and "bind the contractor [NASSCO] with respect to the claim." (41 U.S.C. § 7103(b)(A); FAR 33.207(d)). Therefore, the claim is not properly certified, but based on the FAR 33.201 definition of defective certification, we find AIT's certification is "defective," rather than completely lacking in certification. Thus, we disagree with the Navy that Mr. Spraberry's certification is equivalent to no certification at all. NASSCO may correct the defect by certifying the claim before we issue our merits decision. We have jurisdiction. The Navy's motion is denied.

CONCLUSION

For the reasons stated above the Navy's motion is denied.

Dated: June 9, 2020


CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur


J. REID PROUTY
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. 62221, Appeal of Metro Machine dba General Dynamics NASSCO-Norfolk, rendered in conformance with the Board's Charter.

Dated: June 10, 2020



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals