

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
)
Derian, Inc.) ASBCA No. 63283
)
Under Contract No. W912EF-20-C-0029)

APPEARANCE FOR THE APPELLANT: Mr. Mark Jensen
President

APPEARANCES FOR THE GOVERNMENT: Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
Theresa L. Hampson, Esq.
Deputy District Counsel
U.S. Army Engineer District, Walla Walla

OPINION BY ADMINISTRATIVE JUDGE YOUNG
ON THE GOVERNMENT’S MOTION TO DISMISS

Derian, Inc. (Derian or appellant) filed a notice of appeal alleging the contracting officer had not issued a timely decision. Appellant did not include a copy of a purported claim or any other documentation about the contract. The U.S. Army Corps of Engineers (USACE) Walla Walla District (government) filed a motion to dismiss for lack of jurisdiction alleging appellant did not submit a claim to the contracting officer. The Contract Disputes Act (CDA), 41 U.S.C. §§7101-7109, is applicable. For the reasons stated below, the appeal is dismissed.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On May 3, 2022, appellant submitted correspondence to the Board stating as follows:

USACE Walla Walla District refuses to issue timely responses or decisions; therefore, Derian considers these actions a deemed denial. USACE is unreasonably delaying final contract completion and payment.

Owner: USACE Walla Walla District
Contact: Jani Long Jani.C.Long@usace.army.mil
Contractor: Derian, Inc.
Contract: W912EF-20-C-0029
Title: McNary Unwatering Upstream Sump Repair

Project Substantial Completion: September 2021

Modifications:

Electrical/Fire: USACE issued January 2021

Derian response February 2021

USACE response March 2022

Negotiations fail March 2022

USACE refuses to issue unilateral modification or respond

P-10 Pump: Performance test completed August 2021

USACE informs Derian mod issuance/final acceptance
forthcoming in September 2021

USACE refuses to respond

Final closeout and payment pending issuance of modifications.

(Notice of appeal at 1)

2. On May 17, 2022, the Board docketed appellant's correspondence as ASBCA No. 63283.

3. On June 15, 2022, the government filed a motion to dismiss for lack of jurisdiction, arguing that appellant did not submit a claim to the contracting officer.

4. On June 22, 2022, the Board issued an Order directing appellant to respond to the motion within 30 days of the Order.

5. Appellant did not file a response as directed. On August 23, 2022, the government submitted correspondence to the Board noting that appellant had failed to respond within the timeframe directed by the Board. (Gov't. corr. dtd. August 23, 2022)

6. On August 24, 2022, the Board issued an Order directing appellant to file an opposition to the government's motion if appellant elected to do so, within 14 days of the date of the Order.

7. To date, appellant has not submitted a response to the government's motion to dismiss for lack of jurisdiction, or any other correspondence to the Board.

DECISION

“It is axiomatic that, in order for this Board to review an appeal under the CDA, there must be an underlying claim.” *Golden Build Co.*, ASBCA No. 62294, 20-1 BCA ¶ 37,649 at 182,774 (citing *Parsons Evergreene, L.L.C.*, ASBCA No. 57794, 12-2 BCA ¶ 35,092 at 122,346). The CDA requires that “each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 7103(a)(1). A valid claim from a contracting officer’s final decision is a prerequisite to jurisdiction by the Board. *See Parsons Glob. Servs., Inc. v. McHugh*, 677 F.3d 1166, 1170 (Fed. Cir. 2012).

Here, appellant’s submission of May 3, 2022 (SOF ¶ 1) contains no information as to whether a claim was submitted to the contracting officer. Appellant simply states that the government “refuses to issue timely responses or decisions” which Derian considers a deemed denial (app. corr. dtd. May 3, 2022). Nothing in the record supports that Derian submitted a claim to the contracting officer. Despite multiple Orders to respond, appellant has not provided any evidence that a claim was submitted to the contracting officer. Therefore, we must grant the government’s motion to dismiss for lack of jurisdiction.

CONCLUSION

The appeal is dismissed for lack of jurisdiction.

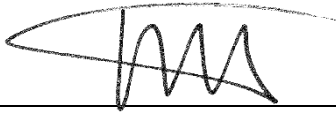
Dated: February 1, 2023



LIS B. YOUNG
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur



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

I concur



OWEN C. WILSON
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. 63283, Appeal of Derian, Inc., rendered in conformance with the Board's Charter.

Dated: February 1, 2023



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