ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Hawaii CyberSpace	)	ASBCA No. 54065
	)	
Under Contract No. F64605-96-M-7745	)	

APPEARANCE FOR THE APPELLANT: Mr. Philip Blackman
Director

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Mark H. Alexander, Esq.
Senior Trial Attorney
CAPT Andrea L. Muldoon, USAF
Trial Attorney

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

On 23 September 2003, the government submitted "Respondent's Motion to Dismiss for Lack of Jurisdiction" on the grounds that appellant's 17 May 2002 letter setting forth its claim certification was not signed, such omission is not a correctable defect under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c)(6), appellant's signature of the claim letter on 10 September 2003, in response to an inquiry by the Board, was not effective retroactively to certify its 17 May 2002 claim, and any 10 September 2003 claim would be barred by the CDA, 41 U.S.C. § 605(a), since more than six years have passed since the claim accrued.

Appellant's 3 October 2003 reply to the motion contends that its 18 July 1998, 10 April 2002 and 17 May 2002 letters, viewed in their totality, constituted a properly certified claim; the law and regulations require a CDA claim to be "executed," not "signed," appellant's letters to respondent under the captioned contract consistently lacked Mr. Philip Blackman's signature and nonetheless were regarded as "executed" documents; appellant relied on the contracting officer's (CO's) final decision denying its "certified claim"; and its claim accrued in June 1998, and is not time-barred (app. reply at 1-2, 6-7, 10-11).

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. In response to Solicitation No. F64605-96-Q-1043, Hawaii CyberSpace, a sole proprietorship owned by Philip Blackman (app. resp. at 1), submitted to the U.S. Air Force,

Hickam AFB, HI, a proposal dated 28 August 1996 bearing the handwritten signature of Mr. Blackman (R4, tab 1).

2. On 20 September 1996, the U.S. Air Force and Hawaii CyberSpace entered into Contract No. F64605-96-M-7745 for delivery of a "Video Display and Interactive Touch-Tone Telephone System" by 18 March 1997 (R4, tab 2).

3. On 30 June 1997, Mr. Blackman manually signed contract Modification No. P00001 (R4, tab 4), and a "Hi_AMC Training Checklist" (compl., ex. 4). Signatures of the CO and of Mr. Blackman appear on the CO's 25 July 1997 letter, "SUBJECT: FIDS Discrepancies" (R4, tab 8). The government alleges that final payment on Contract No. F64605-96-M-7745 was made on 13 August 1997 (R4, tab 21).

4. Appellant's 18 July 1998 letter claimed $675,220 for the following:

1.	Bad faith negotiation of changed condition modification	$ 63,840
2.	Breach of promise and extortion (June 1997)	$111,720
3.	Directed extra work (July 1998)	$ 77,330
4.	Directed delivery of equipment	$ 15,000
5.	Directed delivery of a second signal generating video system	$ 12,000
6.	Destruction of business opportunities and reputation (by COs)	$300,000
7.	Delay in payments, interest and invoice resubmit costs (August 1998)	$ 2,500
8.	Non-payment for services requested under IMPAC card procedures	$ 3,000
9.	Functional enhancements not paid for	$ 40,000
10.	Unannounced and undocumented changes to APACCS	$ 22,800
	Subtotal:	$648,190
	Tax	$ 27,030
	Total Claim	$675,220

The letter was not signed and did not include a CDA claim certification. It appears in the letter that claim items 1, 3-5, and 7-10, each in amounts less than $100,000, arose from different operative facts than items 2 and 6. (R4, tab 11)

5. Appellant's 10 April 2002 letter, entitled "Certified Claim Submittal follow-up," stated a claim total of $977,245.00, including the $648,190 claimed on 18 July 1998, $289,935 interest, and Hawaii GET tax of $39,120, set forth the typewritten name and handwritten signature of Mr. Blackman[1], and, notwithstanding its caption, included no CDA certification (R4, tab 14). The record contains no document from the appellant setting forth the CDA certification text prior to 17 May 2002.

[1] Rule 4, tab 14, contains an unsigned second page. The second page of that 10 April 2002 letter signed by Mr. Blackman is found in R4, tab 12.

6. Appellant's 17 May 2002 letter to the Commander, 15th Contracting Squadron, Hickam AFB, "SUBJECT: Certified Claim 17 May 2002," as included in the Rule 4 file, claimed $977,245, set forth the prescribed CDA certification text, but had no signature beneath that certification or anywhere in the letter (R4, tab 17).

7. The CO's 10 June 2002 memorandum to appellant stated: "On 30 May 2002 we received your certified claim . . ." (R4, tab 19). The CO explained that she received "Appellant's 'Certified Claim 17 May 2002' on 30 May 2002," in an envelope postmarked "May 29 '02"; this was "the only correspondence received from Appellant that contains the verbiage regarding claim certification." The CO states that the 17 May 2002 letter was "without a signature at the signature block on page 3 of the claim." (Coggin decl., ¶¶ 1, 3) Appellant has not controverted the CO's statement. We find that appellant's 17 May 2002 letter was not signed on 17 May 2002.

8. The 17 October 2002 final decision of the CO denied appellant's claim in its entirety. The first paragraph stated: "On 4 [sic] April 2002 you submitted a claim in the amount of $977,000.00 [sic] . . . . On 30 May 2002 [sic] you submitted a certification in accordance with FAR 33.207 . . . ." (R4, tab 24) No Hawaii CyberSpace document dated 4 April 2002 appears in the record; the CO probably meant 10 April 2002.

9. On 6 January 2003, appellant timely appealed the CO's final decision of 17 October 2002.

10. Early on 10 September 2003 in a conference call with the parties Judge James stated that appellant's 17 May 2002 letter in R4, tab 17, was not signed, and asked whether the original letter was signed or unsigned. The parties answered that they did not know, but would find out. Respondent's attorney said that the contract files were at Hickam AFB. At 6:10 p.m. on 10 September 2003, the Board received from appellant by facsimile a copy of its 17 May 2002 letter, on whose third page appeared Mr. Blackman's handwritten signature above his typewritten name. In a conference call to the parties at about 4:00 p.m. on 11 September 2003, the Board asked Mr. Blackman when he signed the 17 May 2002 letter. Mr. Blackman did not answer. We find that Mr. Blackman first signed the 17 May 2002 letter on 10 September 2003.

DECISION

Respondent's motion and appellant's response present two issues which we address. (1) Did appellant submit a validly certified CDA claim on or before 17 May 2002? (2) If appellant's certification was not valid, is it curable in accordance with 41 U.S.C. § 605(c)(6)?

I.

41 U.S.C. § 605(c)(1), as in effect in 1998-2002, provided in pertinent part:

> . . . For claims of more than $100,000, the contractor shall 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.

"The purposes of the certification requirement are to discourage the submission of unwarranted contractor claims and to encourage settlements," *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 354, 230 Ct. Cl. 11, 14 (1982); "to push contractors into being careful and reasonably precise in the submission of claims to the contracting officer," *Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984); and to enable the government "to hold a contractor personally liable for fraudulent claims," *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1580 (Fed. Cir. 1992).

Those purposes are frustrated by prospective claim certification. *See Oman-Fischbach International (Joint Venture)*, ASBCA No. 41474, 91-2 BCA ¶ 24,018 at 120,268-69, *aff'd*, 276 F.3d 1380 (Fed. Cir. 2002) (prospective certification in November 1988, before the parties reached an impasse on the dispute[2], was ineffective to certify the contractor's December 1989 claim). We stated our rationale for rejecting prospective certification in *Oman-Fischbach*, 91-2 BCA at 120,268-69:

> We cannot harmonize prospective application of appellant's certification with the purpose underlying 41 U.S.C. § 605(c)(1). . . . The three elements of the certification are all couched in the present tense, not the future or the subjunctive. *See* 41 U.S.C. § 605(c)(1). Plainly, a contracting officer can have little assurance that a claim submitted thirteen months after certifying continues to be "made in good faith," that the supporting data still "are accurate and complete," and that "the amount requested accurately reflects" what is believed to be due.

[2] Under *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 878 (Fed. Cir. 1991), *overruled in relevant part by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (*en banc*).

Appellant argues that its 18 July 1998, 10 April 2002 and 17 May 2002 letters, viewed in their totality, constituted a properly certified claim. Appellant's unsigned 18 July 1998 letter and its signed 10 April 2002 letter included no CDA certification. The record contains no document from the appellant setting forth the CDA certification text prior to 17 May 2002. (SOF, ¶¶ 4, 5, 6) Appellant's 17 May 2002 letter to the CO claimed $977,245.00, set forth the prescribed CDA certification, but was not signed on 17 May 2002 (SOF, ¶ 6).

We are not persuaded that appellant's foregoing "letters viewed in their totality" establish a valid CDA certification. Even if the 18 July 1998 or 10 April 2002 letter were considered to be a "certification," though neither letter set forth the CDA certification text, such "certification" would be prospective and hence ineffective. *See Oman-Fischbach, supra*.

Appellant argues that the law and regulations require that a CDA certification be "executed," not "signed." We disagree. The dictionary definition of "certificate" is: "A written assurance . . . that some act has or has not been done . . . or some legal formality has been complied with. . . . A statement of some fact in a writing signed by the party certifying." The definition of "execute" is: "To complete; to make; to sign; to perform; to do; to follow out; to carry out according to its terms; to fulfill the command or purpose of. To perform all necessary formalities, as to make and sign a contract, or sign and deliver a note." *Black's Law Dictionary*, 6th Ed. (1990) at 225, 567.

As recounted by the court in *Lehman, supra*, 673 F.2d at 355, the certification requirement was added to the CDA on 12 October 1978, the day the Senate passed the legislation, and the day before the House passed it, at the suggestion of Admiral H. G. Rickover, who said that the CDA bill should:

> Require as a matter of law that prior to evaluation of any claim, the contractor must submit to the Government a certificate signed by a senior responsible contractor official, which states that the claim and its supporting data are current, complete and accurate. In other words, you put the contractor in the same position as our working man, the income taxpayer who must certify his tax return . . . .

The court stated: "The provisions Congress adopted to include the certification requirement were based upon Admiral Rickover's written suggestions and fairly must be deemed to have incorporated his view concerning the effect of the certification requirement." *Lehman, supra.*

The DoD Appropriation Authorization Act for 1979, Pub. L. No. 95-485, enacted 20 October 1978, provided in § 813:

> . . . [N]one of the funds authorized to be appropriated for the Department of Defense by this or any other Act shall be used for the purpose of paying any contract claim, request for equitable adjustment to contract terms . . . which exceeds $100,000 unless a senior company official in charge at the plant or location involved has certified at the time of submission of such contract claim . . . that such claim or request is made in good faith and that the supporting data are accurate and complete to the best of such official's knowledge and belief.

The Department of Defense implemented the foregoing § 813 certification in Defense Acquisition Circular (DAC) No. 76-22, issued on 22 February 1980, adding ASPR 1-342, which provided in pertinent part:

> (a) Section 813 of the 1979 [DoD] Appropriation Authorization Act . . . requires the certification of contract claims . . . exceeding $100,000. This certification must be *signed* by a senior company official in charge at the plant or location involved. . . .
>
> . . . .
>
> (c) Section 6(c) of the Contract Disputes Act . . . also requires the certification of claims. . . . A single certification, using the language prescribed by the [CDA] but *signed* by a senior company official in charge at the plant or location involved, can be used to comply with both statutes . . . [emphasis added].

The Department of Defense implemented the CDA requirement for certification in DAC No. 76-24, issued on 28 August 1980, revising ASPR (DAR) 1-314 as follows:

> (a) *General*. The Contract Disputes Act of 1978 . . . establishes procedures and requirements for asserting and resolving claims by or against contractors . . . .
>
> . . . .
>
> (L) *Certification of Contractor Claims Over $50,000*.
>
> . . . .

> (2) The certification shall be *executed* by the contractor if an individual. When the contractor is not an individual, the certification shall be *executed* by a senior company official in charge at the contractor's plant or location involved, or by an officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs [emphasis added].

DoD's 1980 implementations of the two foregoing statutory certification requirements used the terms "signed" and "executed" interchangeably to require a contractor's certifier to *sign* the CDA and § 813 certification.

The Congress agreed with such interpretation. House Report No. 102-527 on the Defense Authorization Act for 1993, Pub. L. No. 102-484, § 813, which added 10 U.S.C. § 2410e, to require FAR regulations regarding certification of contract claims, stated:

> . . . Rickover recommended that the contractor submit with its claim a certificate *signed* by a "senior responsible contracting official, which states that the claim and its supporting data are current, complete, and accurate"—just like a taxpayer does when certifying a tax return.
>
> . . . .
>
> The [CDA] was implemented in . . . a Federal Acquisition Regulation (FAR 33.207(c)(2)) [derived from DAR 1-314], that was intended to allow one certification to meet both laws. However, the regulation, in authorizing a certification to be *signed* by: (1) a senior company official in charge at the contractor's plant or location involved; or (2) an officer or general partner having overall responsibility for the conduct of the contractor's affairs . . . [emphasis added].

The foregoing legislative interpretation of the CDA and its implementing regulations is reflected in *Youngdale & Sons Construction Co. v. United States*, 27 Fed. Cl. 516, 561, n.87 (1993), in which the court stated:

> In order to be effective, the certification statement must be signed by an authorizing official of the party to be charged. 48 C.F.R. § 33.207(c)(2). Inherent in the certification requirement as construed through the legislative history of [41

> U.S.C.] § 605(c)(1), and by the ordinary meaning of the term itself, the term "certify" clearly requires that one attesting to the truth of the certification must necessarily sign it in order to be held accountable for any falsities contained therein.

The Boards of Contract Appeals have held that the absence of a signature on a certification renders the certification ineffective. *AT&T Communications v. G.S.A.*, GSBCA No. 14932, 99-2 BCA ¶ 30,415 at 150,363; *R.W. Electronics Corp.*, ASBCA Nos. 46592, 46662, 95-1 BCA ¶ 27,327 at 136,211; *Land Movers, Inc. & O.S. Johnson, Dirt Contractor (JV)*, ENG BCA No. 5656, 92-1 BCA ¶ 24,473 at 122,102, n.4 ("The absence of a signature is fatal. An unsigned letter is not an effective instrument with which to certify a claim."). Therefore, to "execute" a CDA certification requires that the certifier sign the certification document.

Finally, appellant argues that he and the CO considered appellant's claim to be certified. This argument is unsound. The fact that a CO has rendered a decision on the merits of an uncertified claim is of no consequence, since the CO had no authority to waive a statutory requirement. *See W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1338 (Fed. Cir. 1983).

It appears in appellant's 18 July 1998 letter that claim items 1, 3-5, and 7-10, each in amounts less than $100,000, arose from different operative facts than items 2 and 6 (SOF, ¶ 4). We hold that appellant did not submit a validly certified CDA claim on or before 17 May 2002, with respect to those claim items that required CDA certification, *viz*., items 2 (for $111,720) and 6 (for $300,000).

II.

The Federal Courts Administration Act, Pub. L. No. 102-572, § 907(a)(1)(b), enacted 29 October 1992, amended 41 U.S.C. § 605(c) by adding subsection (6), which provides in pertinent part:

> . . . A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.

The implementing agency regulation, FAR 33.201, DEFINITIONS, in effect from 1998 to the present, provided:

> 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 duly authorized to bind the contractor with respect to the claim. Failure to certify shall not be deemed to be a defective certification.

The ASBCA has not previously decided whether a CDA claim certification without the certifier's signature is a "defective certification" curable under 41 U.S.C. § 605(c)(6), or is a "failure to certify" that is not curable. *See* FAR 33.201; *Eurostyle Inc.*, ASBCA No. 45934, 94-1 BCA ¶ 26,458 at 131,654. Considering the legislative purposes for certification recounted above, we conclude that the failure to sign is more akin to a "failure to certify."

We hold that appellant's attempted certification is not curable, and do not address respondent's contention that appellant's 10 September 2003 claim is time-barred. We grant the motion to dismiss with respect to appellant's claim items 2 and 6, but retain jurisdiction to adjudicate the balance of appellant's claim items.

Dated: 5 November 2003

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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. 54065, Appeal of Hawaii CyberSpace, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals