

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Sygnetics, Inc. ) ASBCA No. 56806  
 )  
Under Contract No. W74V8H-04-D-0066 )

APPEARANCES FOR THE APPELLANT: George W. Ash, Esq.  
Erin L. Toomey, Esq.  
Foley & Lardner, LLP  
Detroit, MI

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
Raymond M. Saunders, Esq.  
Deputy Chief Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS  
ON GOVERNMENT’S MOTION TO DISMISS FOR LACK OF JURISDICTION

Sygnetics, Inc. (Sygnetics) appeals the final decision of the contracting officer (CO) denying a request for payment of invoice 4095 in the amount of \$246,382.16. The government moves to dismiss, alleging that Sygnetics’ did not submit an executed CDA certification to the CO as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. In 2004, the government awarded the above-referenced multiple award indefinite delivery/indefinite quantity contract to Sygnetics and others (R4, tab 1). The contract required the awardees to provide recruiting services. On 23 November 2005, the government awarded Task Order (TO) No. 0006 to Sygnetics (R4, tab 2). TO No. 0006, also referred to as the “HRsolutions contract,” included a one-year base period and two 12-month option periods along with a 30-day transition period and had a total value of \$28,992,991.82 (R4, tab 36 at 2). The government authorized Sygnetics to begin work on 23 November 2005 (R4, tab 8A).

2. On 16 May 2008, Sygnetics submitted an uncertified request for payment of five previously disputed invoices relating to TO No. 0006 to LTC Gregory C. Franks, Contracting Officer, CCE, Department of the Army, Contracting Center for Excellence, Army Contracting Agency, 5200 Army Pentagon, Washington, DC 20310-5200 (app. supp. R4, tab BB).

3. On 12 June 2008, LTC Franks, the former CO, met with Mr. Tony Tarkowski, Sygnetics' president and chief executive officer (CEO), to discuss Sygnetics' request for an equitable adjustment (Tarkowski decl. ¶ 5). According to LTC Franks' declaration, he informed Mr. Tarkowski that the request had to be certified and showed him FAR 33.207 (Franks decl. ¶ 2(c.)).

4. On 12 June 2008, Mr. Tarkowski directed Mr. BJ Thornburg, Sygnetics' program manager for TO No. 0006, to prepare a draft CDA certification leaving blanks for the invoice numbers and claim total (Tarkowski decl. ¶ 7). On 13 June 2008, Mr. Tarkowski directed Ms. Janet Wagner, an accounting clerk employed by Sygnetics, to insert the invoice numbers and claim total in the certification (Tarkowski decl. ¶ 9). After reviewing the draft certification, Mr. Tarkowski directed Ms. Wagner to sign it using his signature stamp and send it by certified mail to LTC Franks, Defense Contracting Command – Washington, 5200 Army Pentagon, Washington, D.C. 20310-5200. Ms. Wagner also e-mailed “unexecuted” copies of the certification to LTC Franks, Ms. Kim Song, General Counsel, Contracting Center for Excellence (CCE), Ms. Dawn Larson, the contracting officer's representative for HRsolutions, COL Mary E. Westmoreland, the Program Manager for HRsolutions, and Mr. William Upham, HRsolutions Program Office (Wagner decl. ¶ 14).

5. Sygnetics produced a copy of the certified mail receipt which it found attached to the original certification in its files (Wagner decl. ¶¶ 7, 8, 11, 13). Although the receipt indicates that the postage for the item was \$5.32, it is not date stamped with an official U.S. Post Office stamp (mot., encl. 7). Sygnetics has not produced a copy indicating receipt by any government office. Ms. Norma Hudson, a government contract specialist, attempted to track the item through the Post Office. The Post Office was unable to find any record of the item. However, it advised Ms. Hudson that its tracking system did not store information for more than two years. (Hudson, decl. ¶ 4c.)

6. On 11 September 2008, Ms. Ruby Mixon, the then-current CO for TO No. 0006, issued her first final decision. The decision indicated that Sygnetics' uncertified request for payment of the invoices was received on 21 May 2008 and that the CDA certification was received via e-mail on 17 June 2008. At her deposition on 22 September 2010, Ms. Mixon testified as follows:

Q. Is this [referring to page 2 of app. supp. R4, tab HHH which includes the stamped signature] the claim certification that you received from Sygnetics via E-mail on June 17<sup>th</sup>, 2008?

....

A. I want to say it appears to be the letter, but there's a question because I included a copy of this with my KO [contracting officer] statement and it doesn't have a signature.

Q. Okay. But is this the document, a copy of the document that you received via E-Mail on June 17<sup>th</sup>, 2008?

A. I would say yes, but without signature.

....

Q. Did you ever see a claim certification from Sygnetics that had a signature on it?

A. I cannot recall.

....

Q. Would you have issued a final decision on a claim over \$100,000 if it did not include a claim certificate that was signed by the contractor?

A. That would not be something I would have done.

(Dep. at 4-6)

7. The copy of the certification in the Rule 4 file is not signed (R4, tab 33).

8. Based on additional documents provided by Sygnetics, Ms. Mixon rescinded her 11 September 2008 decision and issued a second final decision on 4 February 2009. She approved payment of invoice 3737 and denied payment of invoices 3351, 3738, 4095, and partially denied payment of invoice 4096. (R4, tab 38)

9. Sygnetics appealed the denial of its claims to this Board on 1 May 2009. The invoices were individually docketed as follows: ASBCA No. 56803 (invoice 3351), ASBCA No. 56804 (invoice 3737), ASBCA No. 56805 (invoice 3738), ASBCA No. 56806 (invoice 4095), and ASBCA No. 56807 (invoice 4096 – item #s 112-3, 112-4, 112-5, 112-6, 112-9, 112-11(a), 112-11(b), 112-12). Only two of the invoices or items exceeded \$100,000: invoice 4095, in the amount of \$246,382.16, and item 112-3 of invoice 4096, in the amount of \$119,351.91. The latter item is no longer in dispute.

10. On 17 August 2010, the government moved to stay the proceedings and dismiss the appeals for lack of jurisdiction, asserting that Sygnetics did not submit a signed CDA certification.

11. Sygnetics opposes the motion, asserting that its CDA certification was signed and sent to LTC Franks by certified mail.

12. On 22 September 2010, the Board ordered the parties to provide their positions as to the Board's jurisdiction over the claims which were \$100,000 or less, and on 23 September 2010 listed the claims which appeared to be in that category. In response, the government advised on 29 September 2010 that it would not challenge the Board's jurisdiction over those claims that are \$100,000 or less. It stated: "Accordingly, Respondent's jurisdictional challenge is now focused upon ASBCA 56806, which is Appellant's claim for payment of Invoice 4095 in the amount of \$246,382.16. We continue to assert the Board lacks jurisdiction to hear that appeal."

13. In view of the government's response dated 29 September 2010 to the Board's order, we deem the motion withdrawn as to ASBCA Nos. 56803, 56804, 56805, and 56807 and proceed to decide the motion as it relates to ASBCA No. 56806.

### DECISION

Section 605(a) of the CDA requires that all claims be in writing and submitted to the CO for a decision. Neither the CDA nor its legislative history defines a claim. However, FAR 2.101 defines a 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 [CDA] until certified as required by the Act. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the [CO] as provided in 33.206(a), if it is disputed either as to liability or amount....

FAR 33.207 further provides as follows:

(c) The certification shall state as follows:

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.

....

(e) The certification may be executed by any person duly authorized to bind the contractor with respect to the claim.

The purpose of the certification requirement is to discourage the submission of unwarranted claims and encourage settlements, to push contractors into being reasonably precise in the submission of their claims, and to enable the government to hold a contractor personally liable for fraudulent claims. *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 354-55 (Ct. Cl. 1982); *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1580 (Fed. Cir. 1992). Because the CDA is a statute that waives sovereign immunity, it must be strictly construed. *Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1370 (Fed. Cir. 2009).

Sygnetics alleges that it submitted an executed CDA certification to the CO by certified mail on 13 June 2008. According to Ms. Wagner, Sygnetics' accounting clerk, she sent the only executed copy of the CDA certification to LTC Franks. She also e-mailed unexecuted copies of the certification to government counsel, the contracting officer's representative, the program manager, and the program office. The certified mail receipt produced by Sygnetics as evidence that it submitted a certification to the CO, is not date stamped with an official U.S. Post Office stamp and LTC Franks does not recall ever receiving a certified claim. The government has searched its files and has been unable to find an executed copy of Sygnetics' CDA certification. In her deposition, Ms. Mixon testified that the CDA certification attached to her CO's statement was not executed and that she did not recall seeing an executed certification. Ms. Mixon also testified that she referred to Sygnetics' submission as a certified claim in the final decision and that she would not have done that if she did not have an executed

certification. Under the circumstances, we do not find this testimony persuasive. We conclude that Sygnetics did not submit a signed CDA certification to the CO.<sup>1</sup>

The absence of a signature on a CDA certification renders it ineffective for any purpose. *Teknocraft Inc.*, ASBCA No. 55438, 08-1 BCA ¶ 33,846 at 167,504-05; *Hawaii CyberSpace*, ASBCA No. 54065, 04-1 BCA ¶ 32,455 at 160,535; *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. Thus, ASBCA No. 56806 must be dismissed for lack of jurisdiction.

Dated: 12 October 2010

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ELIZABETH A. TUNKS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

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<sup>1</sup> In view of this conclusion we need not reach the question of whether a stamped signature is sufficient under the CDA.

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. 56806, Appeal of Sygnetics, Inc., rendered in conformance with the Board's Charter.

Dated:

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