

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Tefirom Insaat Enerji Sanayi ve Ticaret A.S.) ASBCA No. 56667
)
Under Contract No. SP0600-07-D-1001)

APPEARANCE FOR THE APPELLANT: Beril Pinar Tandogan, Esq.
Ankara, Turkey

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
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DLA Energy
Fort Belvoir, VA

OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

The Defense Energy Support Center (DESC) awarded Contract No. SP0600-07-D-1001 to Tefirom Insaat Enerji Sanayi ve Ticaret A.S. (Tefirom), a Turkish concern, for delivery of fuel to various locations in Iraq. The contract was terminated for cause. In appealing the termination, Tefirom asserted that it suffered \$1,540,398 in losses up through the termination. While conceding the Board has jurisdiction over the validity of the termination action, DESC moves to dismiss for lack of jurisdiction Tefirom's monetary claim on the ground it had not been submitted as a certified claim to the contracting officer for decision as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 23 January 2007, DESC awarded a requirements type contract (Contract No. SP0600-07-D-1001) to Tefirom to provide fuel supplies to various locations in Iraq via Turkey. The contract was in the estimated amount of \$65,380,947.00. (R4, tab 9 at 1-2)

2. The contract included Clause 11.03-12, CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (PC&S) (IRAQ) PORTS INTERNET APPLICATION

(DESC JUN 2006).¹ Paragraph (d) of this clause, “**DISPUTES**,” provides that “[t]his contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).” Paragraph (n), “**TERMINATION FOR CAUSE**,” provides that “[t]he Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance.... If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.” (R4, tab 9 at 7-8)

3. During the course of performance, DESC issued Contractual Non-Compliance Corrective Action Requests (CARs) seeking to have Tefirom correct its failure to adhere to procedures in its Quality Assurance Plan and other deficiencies (R4, tabs 19, 30) and issued Notices of Contractor Failure to Deliver for orders placed (R4, tabs 23, 42, 43).

4. On 31 August 2008, DESC’s contracting officer terminated Tefirom’s contract for cause by Modification No. P00007 due to “continued unsatisfactory performance,” and failure to cure the deficiencies specified in the cure notice issued on 1 July 2008. Other reasons stated for the termination included Tefirom’s failure to deliver in full on (1) Orders ER69, Q169 and 8066 placed between 30 June and 6 July 2008; (2) Orders ER71, Q171 and 8068 placed between 14 July and 20 July 2008; and (3) Orders ER73, Q173, and 8070 placed between 28 July and 3 August 2008. The modification told Tefirom that it had the right to appeal to the Board or to bring an action in the United States Court of Federal Claims. (R4, tabs 49, 53)

5. By letter dated 3 December 2008, DESC forwarded to the Board “a communication” it received from Tefirom. This communication—a fax bearing a date of 1 December 2008 written by Tefirom’s CFO and addressed to DESC - ARMED SERVICES BOARD OF CONTRACT APPEALS—stated in a cover letter to DESC that “we believe your termination is groundless and cannot be justified by any paragraph in the contract given the above facts.” The fax went on to say that Tefirom has suffered a loss of \$1,540,000 as detailed in an attached seven-page letter addressed to DESC. Tefirom’s 1 December 2008 cover letter to DESC contains no certification required by the CDA for a claim exceeding \$100,000.

6. Attached to the 1 December 2008 cover letter was a seven-page narrative, also dated 1 December 2008, objecting to the termination and asserting that the termination should be for the convenience of the government. The attached narrative then went on to list the damages Tefirom allegedly suffered up through the termination totaling

¹ This clause is a version of FAR 52.212-4 tailored pursuant to DESC 52.212-9F49 (R4, tab 9 at 9).

\$1,540,398. This seven-page narrative also did not contain the certification required by the CDA for a contractor claim exceeding \$100,000.

7. The Board docketed Tefirom's fax on 4 December 2008 as ASBCA No. 56667. Tefirom's 8 January 2009 e-mail notified the Board of its "assigned trial attorney." Thereafter, on 15 January 2009 Tefirom's counsel submitted by e-mail its "application documents and its annexes." This submission, consisting of seven pages, reiterated its earlier contentions and computed Tefirom's damages at \$1,542,560. The Board forwarded a copy of this submission to DESC as Tefirom's complaint by letter on 16 January 2009. On 2 January 2009, DESC entered an appearance of counsel and, on 25 February 2009, filed its answer to Tefirom's 15 January 2009 filing.

8. DESC counsel notified the Board by letter dated 30 July 2009 that while the parties had been conducting settlement negotiations, their negotiations had not been successful. DESC counsel proposed a 12-month discovery period ending on 31 August 2010.

9. By order dated 5 October 2009, the Board directed the parties to file a joint status report to include the parties' position on the Board's jurisdiction, if any, of Tefirom's assertion of a loss in excess of \$1.5 million. DESC counsel's 30 November 2009 reply took the position that the Board lacks jurisdiction over "appellant's assertion of monetary loss in excess of 1.5 million dollars." According to DESC, appellant "did not submit a claim, in writing or otherwise, to the contracting officer as required by FAR 33.206(a)," and "failed to comply with the certification requirement of FAR 33.207 for claims in excess of \$100,000."

10. Tefirom's 1 December 2009 report to the Board confirmed that settlement discussions by the parties up to that point had been unsuccessful. The letter asked the Board to "withdraw and cancel this arbitrary termination," and if the Board were to decline to do so, to have DESC pay \$1,542,560 plus attorney's fees pursuant to the Equal Access to Justice Act. DESC's 11 January 2010 report to the Board stated that "[t]he Government believes that appellant's offer of settlement does not reflect a realistic view of this dispute." DESC said that it believed that "due to appellant's failure to make a certified claim, the ASBCA lacks jurisdiction over all of appellant's assertions of monetary loss." DESC's letter also stated that it believed that "the Board resolving this question of jurisdiction would be a benefit to the parties' efforts to reconcile the disparate views of this case and arrive at a settlement that accurately reflects the facts of this situation."

11. By order dated 14 January 2010, the Board directed counsel for the parties to confer and to choose which of the following courses of action to follow:

1. If appellant does not agree the Board lacks jurisdiction, the government is to file a motion to dismiss by no later than 20 March 2010. Appellant will have until 30 April 2010 to oppose the motion. Pending resolution of the jurisdictional issue, all discovery will be suspended.
2. If appellant agrees with the government that the Board lacks jurisdiction, it can cure that impediment by promptly submitting to the contracting officer a certified claim, and thereafter the contracting officer shall promptly deny the claim by decision. The appellant can then appeal the adverse contracting officer decision to the Board. The Board will docket the new appeal, and consolidate the new appeal with ASBCA No. 56667 for further proceedings.

12. In his 19 February 2010 letter, DESC counsel reported that the parties were unable to reach agreement “as to the Government’s position that the Board lacks jurisdiction.” Counsel said that DESC would proceed to file a motion to dismiss and would suspend discovery pending resolution of the jurisdictional issue. Thereafter, on 19 March 2010, DESC filed its motion to dismiss. By letter dated 22 March 2010, the Board advised Tefirom that “there is a way to cure the jurisdictional defect the government has identified,” and “[i]f you choose to do so, follow the procedures outlined in Paragraph 2 [of the Board’s 14 January 2010 letter].” Inasmuch as Tefirom’s attorney did not seem to be totally familiar with the requirements of the CDA, the Board recommended that “If you choose to oppose the government’s motion to dismiss,” to “seek assistance from an attorney who is familiar with how the CDA works.” The letter gave Tefirom until 30 April 2010 to file its opposition.

13. Tefirom’s counsel notified the Board by e-mail on 14 April 2010 that his client “is in contact with some law firms which have experience on ASBCA process,” and would notify the Board “the name of the local law firm” as soon as an agreement was signed. By letter dated 12 July 2010 to Tefirom’s counsel, the Board asked for a status report on Tefirom’s efforts in securing a law firm and stated “If your client does not intend to file a response to the government’s motion, please advise by no later than 30 July 2010.” Tefirom’s 27 July 2010 response reported that it had delivered all documents and files to a law firm on 2 July 2010 and was “looking forward to receive [sic] their brief reports and answers at the latest by the next week.” Tefirom asked the deadline for reply to DESC’s motion be extended to no earlier than 15 August 2010. Based on this report, the Board by letter extended to 30 September 2010 the date for Tefirom to file its response to the DESC motion. As of the date of this decision, no response to DESC’s motion has been received.

DECISION

Tefirom's contract to provide fuel supplies to various locations in Iraq was terminated for cause. In its 1 December 2008 letter to DESC, Tefirom objected to the termination and sought damages in the amount of \$1,540,398. While acknowledging that the Board has jurisdiction to review whether it properly terminated the contract, DESC's motion contends that we lack jurisdiction over Tefirom's "monetary damages" because Tefirom failed to submit a certified claim to the contracting officer (mot. at 3).

We go directly to the certification issue because it is dispositive of the motion before us. The CDA under which Tefirom brought its appeal requires for contractor claims exceeding \$100,000 that the contractor provide a certification stating that:

[T]he 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.

41 U.S.C. § 605(c)(1). In this connection, the CDA's implementing regulation at FAR 2.101 provides that "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."

It is well settled that the certification requirement is a jurisdictional prerequisite that must be satisfied by the contractor before it may appeal the contracting officer's claim denial. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 579 (Fed. Cir. 1991); *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1338 ("Unless the claim was certified when it was submitted to the contracting officer, the Board should have neither heard nor ruled on the appeal.").

While a 1992 amendment to the CDA² made clear that "[a] defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction" of a claim over \$100,000, 41 U.S.C. § 605(c)(6), the complete absence of certification is not a jurisdictional defect that can be corrected after an appeal has been taken. *Dick Pacific/GHEMM, JV*, ASBCA No. 55829, 08-2 BCA ¶ 33,937 at 167,943. As we said in *Eurostyle Inc.*, ASBCA No. 45934, 94-1 BCA ¶ 26,458 at 131,654, "[t]o hold otherwise would ignore and circumvent the legislative purpose of the certification requirement." In this respect, we note that the CDA's implementing regulation provides

² See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907(a), 106 Stat. 4506, 4518 (29 October 1992).

that “[f]ailure to certify shall not be deemed to be a defective certification.” FAR 33.201. In this case, Tefirom’s 1 December 2008 letter to DESC and its seven-page narrative seeking to recover \$1,540,398 in losses contained no certification required by the CDA.

CONCLUSION

Because Tefirom’s monetary claim for \$1,540,398 was not certified in accordance with 41 U.S.C. § 605(c)(1), we have no jurisdiction over the claim. Accordingly, Tefirom’s appeal is dismissed as to the monetary claim without prejudice to its right to submit a properly certified claim to the contracting officer for decision. The Board retains jurisdiction in this appeal on the validity of the termination for cause.

Dated: 29 November 2010

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 56667, Appeal of Tefirom Insaat Enerji Sanayi ve Ticaret A.S., rendered in conformance with the Board's Charter.

Dated:

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