

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Green Dream Group) ASBCA No. 57413
)
Under Contract No. W91GDW-08-D-0005)

APPEARANCE FOR THE APPELLANT: Celeste R. Gamache, Esq.
Watson and Associates, LLC
Denver, CO

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Elisabeth L. Gilman, JA
CPT Elizabeth Kadlub, JA
Trial Attorneys

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

Green Dream Group (GDG) seeks \$554,400 in machinery rental costs that were disallowed in connection with a termination settlement proposal. The government moves to dismiss for lack of jurisdiction on the grounds that GDG's certification was not signed by an authorized individual and did not contain the certification language required by the Contract Disputes Act (CDA), 41 U.S.C. § 7103(b)(1) (formerly § 605(c)(1)). GDG opposes the motion, asserting that the individual who signed the certification was authorized to bind the company and that the defects in the certification are correctable.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 27 September 2008, the Joint Contracting Command-Iraq/Afghanistan (government) awarded Task Order (TO) No. 0260 under the above-referenced contract to GDG in the amount of \$6,405,917. The TO required GDG to teach Iraqis how to pave a road. (R4, tab 2) The government terminated TO No. 0260 for the convenience of the government on 24 May 2009 (R4, tab 6).

2. GDG submitted a termination settlement proposal in the amount of \$1,841,326 to the government on 9 July 2009 (R4, tab 7). The proposal was submitted on a Standard Form (SF) 1435 Settlement Proposal (Inventory Basis) and was signed by Mr. Mohammed Talib, GDG's Director of Finance (R4, tab 7 at 8). The SF 1435 contains the following pre-printed certification:

This is to certify that the undersigned, individually, and as an authorized representative of the Contractor, has examined this termination settlement proposal and that, to the best knowledge and belief of the undersigned:

(a) AS TO THE CONTRACTOR'S OWN CHARGES. The proposed settlement (exclusive of charges set forth in item 14)...have been prepared from the books of account and records of the Contractor in accordance with recognized commercial accounting practices; they include only those charges allocable to the terminated portion of this contract; they have been prepared with knowledge that they will, or may, be used directly or indirectly as the basis of settlement of a termination settlement proposal or claim against an agency of the United States; and the charges as stated are fair and reasonable.

(R4, tab 7 at 8)

3. The certification signed by Mr. Talib is identical to the certification included in the SF 1436 Settlement Proposal (Total Cost Basis) (FAR 53.301-1435, FAR 53.301-1436).

4. Settlement discussions were held on 20 May 2010. With the exception of machinery rental costs of \$554,400 and security costs of \$12,475, the parties reached agreement on all the items in GDG's proposal. (App. supp. R4, tab 14)

5. On 6 August 2010, Mr. Mark L. Harris, the contracting officer (CO), issued a final decision denying the claim for machinery rental costs on the ground that GDG had "not provided adequate proof that [the] equipment was used under this contract effort" (R4, tab 9 at 1). CO Harris also rejected the claim for security costs as unsubstantiated (R4, tab 9 at 2). In the final decision, CO Harris stated that he suspected the claims were fraudulent. By letter dated 18 March 2011, the government advised the Board "that there is currently no formal investigation pending" with respect to these assertions.

6. GDG timely appealed the final decision to this Board on 2 November 2010. The claim for machinery rental costs was docketed as ASBCA No. 57413 and the claim for security costs was docketed as ASBCA No. 57414.

DECISION

The government moves to dismiss ASBCA No. 57413, alleging (1) that GDG's Finance Director, Mr. Mohammed Talib, lacked authority to certify the claim; (2) that the certification on the SF 1435 does not contain the language required by the CDA. In support of the latter contention, the government proffered two e-mails that allegedly show GDG did not consider its claim to be properly certified. GDG argues that Mr. Talib was authorized to sign the certification and presented an affidavit setting forth his authority. Relying on *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1540, 1545-46 (Fed. Cir. 1996), GDG further argues that the certification language on the SF 1435 is correctable.

The certification requirement for claims over \$100,000 is a jurisdictional prerequisite that must be satisfied by the contractor before it may appeal from the CO's denial of its claim. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 579 (Fed. Cir. 1991); *W.M. Schlosser Co.*, 705 F.2d 1336, 1338 (Fed. Cir. 1983). Unless the certification requirement is met, "there is simply no claim that [the] court [or Board] may review under the Act." *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 355 (Ct. Cl. 1982).

FAR 33.207, which implements the CDA, provides, in part, as follows:

(a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any claim exceeding \$100,000.

....

(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.

(f) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected.

With respect to Mr. Talib's authority to certify, GDG submitted the following affidavit:

I, Ahmad Mansour, President of [GDG], state that Mr. Mohammad Talib is my Director of Finance, which is also known as the Chief, Financial Officer. It was my decision for Mr. Mohammad Talib to sign the Settlement Cost Proposal for contract W91GDW-08-D-0005 Task Order 0260 on behalf of [GDG]. He was authorized to sign and to bind [GDG] to this claim. He is familiar as I am with the costs incurred and payments made on this Task Order.

Accordingly, we find that Mr. Talib was authorized to certify the claim.

We also find that the certification is correctable. In *Ellett Constr.*, 93 F.3d at 1540, 1545-46, the Court held that the certification on the SF 1436 is correctable. Since the certification on the SF 1435 is identical to the one on the SF 1436, we conclude that GDG's certification is correctable. See *Western Plains Disposal*, ASBCA No. 56986, 11-1 BCA ¶ 34,617 at 170,613; *Tefirom Insaat Enerji Sanayi ve Ticaret, A.S.*, ASBCA No. 56667, 11-1 BCA ¶ 34,628 at 170,630.

As additional support for its motion, the government offers two e-mails from December 2010 from Ms. Celeste R. Gamache, GDG's counsel, to Capt Jake Alverson, USAF, who was apparently CO Harris's successor. The e-mails provide, in part, as follows:

[23 December 2010]
Since the machinery is over \$100,000, it has to be certified.
So, we are requesting a final decision for the machinery now that is properly certified.

....

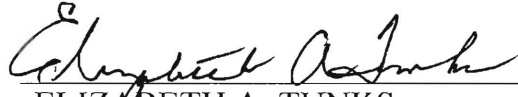
[28 December 2010]

Unless you're thinking about changing the decision, which I fully expect you're not, the only thing to do is reissue the final decision letter acknowledging the proper certification.

The certification which is the subject of this appeal is dated 9 July 2009 and the CO issued his final decision on 6 August 2010. The government did not submit an affidavit from Capt Alverson. Moreover, the record does not contain the corrected certification and/or re-issued final decision referenced in the e-mails. Under these circumstances, we accord these e-mails little or no weight.

We hold that Mr. Talib was authorized to certify the claim and that the defects in GDG's certification are correctable. The government's motion to dismiss is denied.

Dated: 4 April 2011



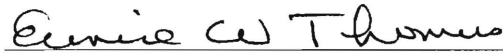
ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMLER
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. 57413, Appeal of Green Dream Group, rendered in conformance with the Board's Charter.

Dated:

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