

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Baghdadi Swords Company) ASBCA No. 58539
)
Under Contract No. M20133-06-M-6080)

APPEARANCES FOR THE APPELLANT: Theodore P. Watson, Esq.
Wojciech Z. Kornacki, Esq.
Watson & Associates, LLC
Denver, CO

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ David A. Dulaney, JA
Trial Attorney

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

This appeal involves a contract between the government and Baghdadi Swords Company. The government has moved to dismiss the appeal. The motion is granted.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The Joint Contracting Command Iraq (government) awarded Contract No. M20133-06-M-6080 to Baghdadi Swords Company on 27 February 2006. The commercial items contract required that appellant deliver a total of 15,000 cubic meters of gravel to three camps in Iraq within two weeks of the date of the contract. Appellant was to be paid \$64 per cubic meter for a total of \$960,000. (R4, tab 1 at 1-2)

2. The contract included subsection (d) of FAR 52.212-4, *Disputes*, which stated that the contract was subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, as amended (R4, tab 1 at 5).

3. It appears that the government, in November 2012, received inquiries apparently on behalf of Baghdadi Swords Company about payment under the contract. The person ostensibly representing appellant seems to have sent invoices and Form DD250s, Material Inspection and Receiving Reports, dated in March 2006, seeking a total of \$960,000. (R4, tab 2)

4. On 14 January 2013, the contracting officer (CO) issued a decision on appellant's "Claim for Payment of \$960,000" under the contract. Noting the government's request for documentation and the materials supplied by appellant, the CO concluded as follows: "The documents have been reviewed and can't be processed for payment due to questions on their validity." (R4, tab 3)

5. Appellant filed this appeal on 5 February 2013. Appellant seeks payment of \$960,000 under the contract (compl. dtd. 19 April 2013 ¶ 30). The government has filed a motion to dismiss. There is no indication in the record that, prior to filing the appeal, appellant submitted the certification required by the CDA for claims that exceed \$100,000. 41 U.S.C. § 7103(b).

DECISION

The government first argues that even if appellant's inquiry could be considered a claim, it is for more than \$100,000 and has not been certified as required (gov't mot. at 2-4). Alternatively, the government asserts that appellant failed to submit a claim within the six years required by the CDA, 41 U.S.C. § 7103(a)(4)(A) (gov't mot. at 4-5). In its response, appellant says that it submitted a proper certification on 4 April 2013 (app. resp. at 6-7), and that the claim is not barred by the statute of limitations due to equitable tolling (app. resp. at 7-16).

Where a claim exceeds \$100,000, it must be certified in accordance with the CDA, 41 U.S.C. § 7103(b). *Special Operative Group, LLC*, ASBCA No. 57678, 11-2 BCA ¶ 34,860. Appellant has the burden of establishing that the Board has jurisdiction. *United Healthcare Partners, Inc.*, ASBCA No. 58123, 13 BCA ¶ 35,277. The record does not contain a CDA certification that was submitted to the CO before this appeal was filed (SOF ¶ 5). See *IMS P.C. Environmental Engineering*, ASBCA No. 53168, 01-2 BCA ¶ 31,422. Appellant contends that its 4 April 2013 certification corrected that defect (app. resp. at 6-7 n.1). Although a defective certification does not deprive the Board of jurisdiction if it is corrected before final judgment, 41 U.S.C. § 7103(b)(3), "the complete absence of certification is not a jurisdictional defect that can be corrected after an appeal has been taken," and therefore dictates dismissal. *Tefirom Insaat Enerji Sanayi ve Ticaret A.S.*, ASBCA No. 56667, 11-1 BCA ¶ 34,628 at 170,630. The fact that a CO purported to issue a decision on the non-certified request has no legal bearing on the Board's jurisdiction over this appeal. See *IMS P.C.*, 01-2 BCA ¶ 31,422; *CDM International, Inc.*, ASBCA No. 52123, 99-2 BCA ¶ 30,467. Appellant's request was not certified before this appeal was filed and therefore we lack jurisdiction.

CONCLUSION

For the reasons set out above, the government's motion is granted and the appeal is dismissed for lack of jurisdiction.

Dated: 19 August 2013



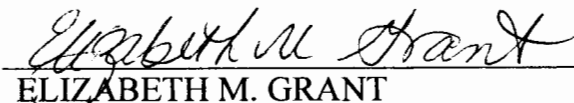
MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



ELIZABETH M. GRANT
Administrative Judge
Acting 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. 58539, Appeal of Baghdadi Swords Company, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals