

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Mawaraa AlBihar Company ) ASBCA No. 58585  
 )  
Under Contract No. W91GF5-07-M-6845 )

APPEARANCE FOR THE APPELLANT: Mr. Sisaban Obeidi  
Owner

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
LTC Peter H. Tran, JA  
Trial Attorney

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

This appeal involves a contract for generators in Iraq. The government has moved to dismiss the appeal for lack of jurisdiction. The motion is granted.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The government awarded Contract No. W91GF5-07-M-6845 to "Qusay H. Jabir[,] Torok Baghdad Company" on 28 August 2007. Under the contract, Torok Baghdad Company (Torok) was to provide an estimated quantity of 40 generators of various types. The award amount was \$632,200. (R4, tab 1 at 1-2)
2. On 4 September 2007, Mr. Jabir emailed the government stating that Torok could not supply the generators at the prices in the contract. Torok would require "at least \$925,000.00." (R4, tab 2)
3. In apparent response to Mr. Jabir's email, the government issued, on 5 September 2007, Modification No. P00001 which canceled the order for generators. The modification stated that cancellation had been agreed to by both parties, that the government would not be liable for any costs associated with the contract, and that contract funds would be "re-obligated to a new contract." (R4, tab 3)
4. Appellant's submissions in this appeal include a copy of what appears to be Contract No. W91GF5-07-M-6845 awarded to Mawaraa AlBihar Company on 9 September 2007. This contract was for the same generators in the same quantities as listed in the

contract with Torok, but the individual prices were somewhat different and the total price was \$667,200. The contract appears to be signed by a government contracting officer, but not by a representative for appellant. (R4, tab 4; notice of appeal dtd. 13 March 2013, attach.; app. reply to gov't mot. to dismiss dtd. 14 May 2013, attach.) The government says that it has no record that appellant even bid on the solicitation that led to the award of Contract No. W91GF5-07-M-6845 or that it contracted with appellant under Contract No. W91GF5-07-M-6845 (gov't proposed finding 2). The government could not find, in its files, any record of a contract with appellant, any background information about appellant, any pre-award correspondence from appellant, or any quote from appellant (R4, tab 25).

5. The government awarded Contract No. W91GF5-07-M-6857 to Machinery Group-KU on 13 September 2007. This contract was for the same generators in the same amounts as listed in the contract with Torok, but the individual prices were somewhat different. In addition, this contract added shipping prices. The total price was \$657,940. (R4, tab 5 at 1-2) Modification No. P00001 increased the contract price by \$29,720. (R4, tab 6). The government states that this contract was paid and closed out (R4, tab 25 at 2).

6. The original contract with Torok, the asserted contract with Mawaraa AlBihar, and the contract with Machinery Group-KU incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (FEB 2007) (R4, tab 1 at 3, tab 4 at 3, tab 5 at 3). Subsection (d) of FAR 52.212-4, Disputes, stated that the contract was subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

7. On 18 September 2012, Sisaban Obeidi<sup>1</sup> contacted the government saying that his company, Mawaraa AlBihar, won Contract No. W91GF5-07-M-6845 on 7 September 2007 and delivered the generators, but had not been paid. In a later email on 21 September 2012, he stated that the company had delivered the generators required under the contract over an eight-day period in October 2007; thereafter he left Iraq, returning in 2011 when he resumed attempting to obtain payment for the generators. There were three attachments to the email. (R4, tab 11) According to the contracting officer, the three attachments were: 1) a copy of the Mawaraa AlBihar contract on SF1449 which had Mr. Obeidi's name typed both in Box 17a for Contractor and in Box 30b as signer of the contract, although not signed; 2) an invoice for \$667,200; and 3) a DD250 dated 18 October 2007 (R4, tabs 4, 7, 9, 21). The record also includes a document entitled "SHIPPING INFORMATION" but which contains data purporting to be delivery information (R4, tab 8).

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<sup>1</sup> The record contains various spellings of Mr. Obeidi's name including different versions by Mr. Obeidi himself. In this opinion we use the spellings set out in the notice of docketing.

8. The government and Mr. Obeidi corresponded about the asserted contract through October 2012 (R4, tabs 12-16, 18-20).<sup>2</sup>

9. The record does not include a submission by appellant to the contracting officer containing the certification required by the CDA, 41 U.S.C. § 7103(b).

10. On 23 October 2012, the contracting officer issued a final decision, with appeal rights, stating her view that appellant's "invoice submitted for payment is not payable and should NOT be paid and the contract [should] remain closed" (R4, tab 21). The decision was sent to appellant by email on 30 October 2012 (R4, tab 23). Appellant received it on the same day (R4, tab 24).

11. Appellant filed a notice of appeal on 13 March 2013, 134 days after appellant's receipt of the emailed final decision. The government has moved to dismiss the appeal.

### DECISION

In its motion, the government argues that appellant failed to submit a valid claim to the contracting officer, and alternatively if the claim was otherwise valid, it was over \$100,000 and was not certified (gov't mot.). Appellant's response concentrates on the merits of the appeal and does not reply to the jurisdictional issues (app. resp.).


Under the CDA, the Board's jurisdiction is conditioned on submission of a claim comporting with the CDA to the contracting officer and a decision on, or deemed denial of, the claim. 41 U.S.C. § 7103; *see also Taj Al Safa Company*, ASBCA No. 58394, 13 BCA ¶ 35,278. Where the claim exceeds \$100,000, it must also be certified in accordance with the CDA to be considered a claim. 41 U.S.C. § 7103(b); FAR 2.101; *Special Operative Group, LLC*, ASBCA No. 57678, 11-2 BCA ¶ 34,860. While an appeal to the Board from a contracting officer's final decision must be filed within 90 days of the contractor's receipt of the decision, 41 U.S.C. § 7104(a), where there is no claim there can be no effective decision from which to appeal. *See D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997) (If a contractor's submission fails to meet the requirements of a claim, including certification if the request exceeds \$100,000, it is not a claim and the contracting officer has no authority to issue a final decision and any subsequent proceedings on the submission have no legal significance.).

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<sup>2</sup> At one point in the correspondence the government mistakenly told appellant that its contract had been terminated (R4, tab 12), when in fact it was the contract with Torok that was terminated (*see* R4, tab 25).

Appellant asserts the right to more than \$100,000. The record contains no evidence that appellant submitted a claim certified as required by the CDA (SOF ¶ 9). This jurisdictional problem may not be ignored or waived by the Board. *Western Pacific Enterprises*, ASBCA No. 25822, 81-2 BCA ¶ 15,217. We find that we lack jurisdiction to hear this appeal. Accordingly, the motion to dismiss is granted and the appeal is dismissed without prejudice to appellant submitting a certified claim to the contracting officer.

Dated: 27 September 2013



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RICHARD SHACKLEFORD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

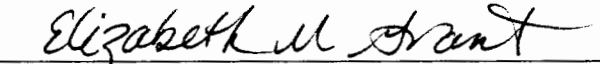
I concur

I concur



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



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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. 58585, Appeal of Mawaraa AlBihar Company, rendered in conformance with the Board's Charter.

Dated:

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