

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
New Iraq Ahd Company) ASBCA No. 58800
)
Under Contract No. W91GFB-10-C-5005)

APPEARANCE FOR THE APPELLANT: Mr. Abbas Abed Mohsin
Owner

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Vera A. Strebel, JA
Trial Attorney

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

Appellant, New Iraq Ahd Company (NIAC), seeks \$166,014 for purchased materials following a termination for default. The government has moved to dismiss this appeal for lack of jurisdiction on the basis that NIAC did not file a certified claim as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. For the reasons stated below, the government's motion to dismiss is granted.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 30 May 2010, the Regional Contracting Center (RCC) Mosul (the government) awarded Contract No. W91GFB-10-C-5005 to NIAC for the construction of two concrete pads on the storage yard in Iraq. The total contract award value was \$553,700. (R4, tab 1) The contract incorporated FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984), and FAR 52.233-1(c), DISPUTES (JUL 2002) by reference (R4, tab 1 at 42).

2. By letter dated 18 August 2010, the contracting officer (CO) terminated the contract for default effective 7 August 2010 due to NIAC's alleged poor performance (R4, tab 5, ¶ 2). This termination was also captured in Modification No. P00001, dated 21 August 2010, which also reduced the total contract value from \$553,700.00 to \$45,667.60, the amount the government asserted it owed NIAC for work performed (R4, tab 6 at 1-2).

3. NIAC submitted Invoice No. 01603, dated 18 August 2010, for \$45,667.50¹ which was approved for payment on 10 January 2011 (R4, tabs 8, 10). On 13 April 2011, NIAC executed a "Release of Claims" containing the following language:

The undersigned contractor acknowledges payment in full for all supplies, services, and/or construction provided under the subject contract in the amount of \$45,667.60 and hereby releases and discharges the United States Government of any further liabilities, demands, obligations, and claims arising under or by virtue of said contract.

(R4, tab 11)

4. Over two years later, NIAC contacted the current CO by email on 1 June 2013 requesting "please check this contract" (R4, tab 13). On 3 June 2013, the CO responded that the contract had been closed on 13 April 2011 (R4, tabs 13, 14). On 4 June 2013, the CO provided further information, in particular that the contract had been "terminated for cause" on 7 August 2010, that NIAC had been paid \$45,667.60 for work performed, and that NIAC had executed a release of claims on 13 April 2011 (R4, tab 14).

5. On 9 June 2013, NIAC sent the CO what it characterized as a "claim" for materials. Specifically, NIAC stated:

[Y]es I signed the notice for the amount of achieved work \$45,667.60. [T]his amount is for the work we did. [B]ut I bought the materials for this work. I have receipts prove that, I did not get a compensation for the losing, so please take my claim in your consideration and assist me as much as you can to get me paid my lost.... I just demand for my right.

¹ Invoice No. 01603 stated a total amount of \$45,667.50 but the "RCC Mosul Payment Ledger" indicated a payment of \$45,667.60 (R4, tab 10 at 3).

An attachment listed receipts totaling \$166,014 for purchased materials:

[R]eceipt#	TOTAL AMOUNT
1	\$70,000.00
2	\$2,000.00
3	\$8,630.00
4&5	\$28,400.00
6&7&8	\$34,104.00
9	\$17,000.00
10	\$2,420.00
11	\$1,460.00
12	\$2,000.00
TOTAL AMOUNT	\$166,014.00

(R4, tab 15)

6. The CO responded by email dated 10 June 2013, stating:

[A] release of claims means that you will not submit a claim against the government. Also, since this was a termination for cause, there are no grounds for any settlement agreement. There is no way the government is going to pay for your losses when you failed to perform the contract. I am sorry but in this case, there is nothing I can do to provide assistance.

(R4, tab 15) On 28 July 2013, NIAC emailed its notice of appeal to the Board, again asking for compensation for purchased materials. This notice of appeal was docketed by the Board on 29 July 2013.

DECISION

In order for the Board to have jurisdiction of a claim of more than \$100,000 under the CDA, the contractor must certify that:

- (A) the claim is made in good faith;
- (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief;
- (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and
- (D) the certifier is authorized to certify the claim on behalf of the contractor.

41 U.S.C. § 7103(b)(1). Certification is a jurisdictional prerequisite for contractor claims

exceeding \$100,000. *Special Operative Group, LLC*, ASBCA No. 57678, 11-2 BCA ¶ 34,860 at 171,480 (citing *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 579 (Fed. Cir. 1991)). A defective certification does not deprive the Board of jurisdiction; however, the complete absence of a certification is not a jurisdictional defect that can be corrected after an appeal has been filed. *Tefirom Insaat Enerji Sanayi ve Ticaret A.S.*, ASBCA No. 56667, 11-1 BCA ¶ 34,628 at 170,630.

The CDA does not define the term “claim.” However, the contract incorporated by reference the Disputes clause which defines a claim as:

[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.... However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified.

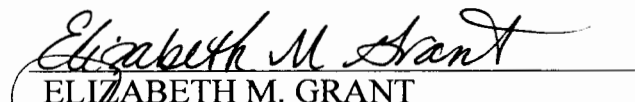
(SOF ¶ 1; FAR 52.233-1(c), DISPUTES (JUL 2002))

NIAC submitted a written demand for payment, as a matter of right, through its 9 June 2013 email to the government for \$166,014 in material costs incurred in performing the contract (SOF ¶ 5). However, there is no indication from the email that NIAC provided the required certification necessary for this to be considered a claim under the CDA. The absence of the certification is fatal and not a defect that can be corrected. As a result, no claim was submitted to the government on 9 June 2013, and the Board lacks jurisdiction over the appeal.

CONCLUSION

Because NIAC’s demand for payment of \$166,014 was not certified, it does not constitute a claim under the CDA. The government’s motion is granted and the appeal is dismissed, without prejudice, for lack of jurisdiction.

Dated: 17 December 2013


ELIZABETH M. GRANT
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur



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

I concur



ELIZABETH A. TUNKS
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. 58800, Appeal of New Iraq Ahd Company, rendered in conformance with the Board's Charter.

Dated:

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