



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: April 3, 2007

CBCA 14

K SATELLITE,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Reed R. Braithwaite of Ascione, Heideman & McKay, LLC, St. George, UT, counsel for Appellant.

Mark R. Simpson, Office of the General Counsel, Department of Agriculture, Atlanta, GA, counsel for Respondent.

Before Board Judges **HYATT**, **POLLACK**, and **SOMERS**.

POLLACK, Board Judge.

This appeal is from a final contracting officer's decision dated December 3, 2005, issued by the Department of Agriculture, Forest Service (FS), Southern Region, Atlanta, Georgia. The decision responded to a claim, dated November 16, 2005, from K Satellite (appellant) of Kanab, Utah, where K Satellite sought compensation of \$247,121.25 for emergency services provided during Hurricane Katrina. The Department of Agriculture Board of Contract Appeals (AGBCA) docketed the matter as AGBCA No. 2006-134-1 on February 15, 2006. As a result of board consolidation, the matter has been renumbered as CBCA 14.

In summary, the facts surrounding the dispute and appeal are as follows. K Satellite seeks compensation for work it performed during Hurricane Katrina. Many of the facts,

such as specific dates, what work was performed, which agencies and officials were involved, and what if any, contract instruments were used, are confusing, given the limited record before the board. What appears clear is that at some point K Satellite, acting on direction from either the FS or the Federal Emergency Management Agency (FEMA), reported to the National Guard Armory in Jackson, Mississippi. There it met first with a FS official and then was turned over to a FEMA representative. It further appears that K Satellite performed work, either for the FS, FEMA, or the General Services Administration (GSA), but no specific contract instrument or order has been identified, although several have been referenced. At least one resource number, given to K Satellite, appears to have also been assigned to another company.

It has been agreed that while in Mississippi, K Satellite did perform some work for the FS for which it was paid. That work is not in dispute. In that instance, the FS has reported that it had the paper work and back-up necessary to make payment appropriate. In contrast, this appeal seeks compensation for services for which no agency will take responsibility and for which K Satellite, at least for now, cannot produce a verifiable contract number or instrument. K Satellite has indicated that it thought it had a contract with the FS and as such submitted its claim to the FS. The FS contracting officer (CO), in issuing the decision from which appellant appeals, explains her decision in part, stating:

My rationale for this decision is that without a correct resource order number, pre-use inspection, shift tickets, invoice, post use inspection, or any government official willing to verify your dispatch, travel or period of performance, I have no basis which allows me to approve payment of this claim.

Soon after the matter was docketed, the AGBCA held a telephone conference with Ms. Karen Glazier, owner of K Satellite; the CO; and FS counsel. In that conference of March 17, 2006, it became clear that a number of agencies may have been involved in the claimed work. FS counsel agreed to contact those agencies to see if it could be determined which agency, if any, had a contract with K Satellite or had authorized specific work. Also during that board conference, counsel for the FS pointed out that appellant had not certified the claim. The board and parties discussed that and the Board pointed out that the appeal would have to be dismissed and a new claim certified and submitted to the appropriate government official. The board, however, opted to hold the matter open until a new claim was filed and a new decision issued, as it was expected that the claim would be filed with the FS and the new matter docketed at the board (or otherwise the board would be notified that appellant planned to file at the Court of Federal Claims).

In June 2006, K Satellite submitted a certified claim to the FS and also submitted the same claim to FEMA. In August 2006, appellant notified the board that FEMA and the FS each had declined to issue a final decision. At the time of the June letter, the sixty days needed for appealing a deemed denial had not yet passed. On August 18, the board received a letter from the FS that it did not intend to issue a decision. The board thereafter held the matter in abeyance, waiting for appellant to either file at the board or advise the board otherwise.

After not hearing from appellant, the Board issued a letter dated January 18, 2007, where it advised both parties of its intention to dismiss the appeal for lack of jurisdiction due to a failure to certify the initial claim. That letter sparked a letter dated February 21, 2007, from Reed R. Braithwaite, Esq., who indicated that he had been retained as counsel by appellant. He requested a conference. The Board thereafter held a conference on March 15, 2007, and at that time the Board reviewed what had transpired to that point. The Board then told the parties that it would be issuing the dismissal in short order and further advised the parties that since the dismissal was based on a lack of a certified claim, the dismissal would not impact the ability of appellant to proceed at the Board or the Court of Federal Claims with respect to the certified claims it has now filed.

Discussion

The appeal from the CO's decision of December 3, 2005, was in response to a claim for \$247,121.25, which had not been certified. Although a defective certification may be corrected, a failure to certify may not. There is no dispute that the contractor failed to certify its claim. Certification requirements concern the Board's subject matter jurisdiction and as such cannot be waived. That proposition is well settled. *See Hemmer-IRS Limited Partnership v. General Services Administration*, GSBCA 16134, 04-1 BCA ¶ 32,509.

Decision

The appeal is **DISMISSED** for **LACK OF JURISDICTION**.

HOWARD A. POLLACK
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

JERI K. SOMERS
Board Judge