



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION: February 14, 2008

CBCA 807

KENAN CONSTRUCTION CO.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Mustafa Senol Kirci, Project Manager of Kenan Construction Co., Samanpazari - Ankara, Turkey, appearing for Appellant.

Thomas D. Dinackus, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **GILMORE**, **GOODMAN**, and **KULLBERG**.

GOODMAN, Board Judge.

Appellant, Kenan Construction Company, entered into a contract with respondent, Department of State, to make certain improvements in the perimeter security of the United States Embassy in Geneva, Switzerland. This appeal was filed on July 7, 2007, by appellant, from a decision dated May 11, 2007 of respondent's contracting officer. Pursuant to CBCA Rule 8(c)(1), respondent has filed a motion to dismiss the appeal, in part, for lack of jurisdiction, alleging that appellant has failed to satisfy the jurisdictional prerequisites of the Contract Disputes Act, 41 U.S.C.A. §§ 601-613 (West Supp. 2007) (CDA), with regard to several aspects of its appeal.

Factual Background

Appellant's notice of appeal, subsequently designated by appellant as its complaint, contained the following itemization:

Request for Equitable Adjustment (REA) 002	1,493,009 CHF ^[1]
RFP 060 REV 001 SE Entry Extra Works	18,350 CHF
REA 004 for Extended Overhead November 15, 2006-December 15, 2006	52,500 CHF
Unpaid Portion of Contract since August 2006	340,080 CHF
Cost of Project Bonds since December 15, 2006	62,930 CHF
Total	1,966,869 CHF

Notice of Appeal and Complaint at 2.

Appellant submitted a certified claim for REA 002 (Appellant's Appendix 6 to Notice of Appeal) and a claim for REA 004 (Appellant's Appendix 10 to Notice of Appeal). Respondent acknowledges that the contracting officer issued an appealable final decision with regard to these two claims. Appeal File, Exhibits 40 and 61; Respondent's Motion to Dismiss at 12, n.7. However, with regard to the remaining issues in the notice of appeal, respondent asserts:

In this appeal, Kenan seeks to recover for numerous issues, and has organized its requests for relief into five categories. Kenan has failed to satisfy the CDA's jurisdictional prerequisites with regard to three of these requests for relief. With regard to these three requests, Kenan has never submitted a claim, and has never requested a final decision from the contracting officer (CO). Finally, Kenan has failed to certify one of these requests, which seeks more than \$100,000. As a result, the Board lacks jurisdiction to entertain the appeal with regard to these three requests, and they should be dismissed.

¹ The claim is submitted in Swiss Francs (CHF). As of the date of this opinion the exchange rate is 1CHF = .91USD.

Respondent's Motion to Dismiss at 6-7.

Respondent identifies the three requests for compensation for which it alleges that Kenan has not complied with the jurisdictional prerequisites of the CDA: 1) RFP 060 REV 001 SE Entry Extra Works; 2) unpaid portion of the contract since August 2006; and 3) cost of project bonds since December 15, 2006.

After receiving respondent's motion to dismiss, appellant sent to the contracting officer a written request for a contracting officer's final decision on the three claims for which respondent alleged appellant had not requested a final decision and included a CDA certification for the aggregate amount of these claims. Attachment 1 to Appellant's Response Regarding Respondent's Motion to Dismiss.

Discussion

In this appeal, appellant included in its notice of appeal and complaint three disputed issues that had not previously been submitted to the contracting officer with a request for a decision, one of which exceeded \$100,000 in value. When respondent moved to dismiss these portions of the appeal, appellant submitted these issues to the contracting officer as a claim which exceeded \$100,000 in value, requested a final decision, and provided the necessary certification.

The CDA requires that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a) (2000). The CDA also requires in relevant part that:

For claims of more than \$100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

Id. § 605(c)(1). Within sixty days of receipt of a submitted certified claim over \$100,000, a contracting officer must issue a decision, or notify the contractor of the time within which a decision will be issued. *Id.* § 605(c)(2).

Certification of a claim of more than \$100,000 is not only a statutory requirement, but also a jurisdictional prerequisite for review of a contracting officer's decision before this Board. *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1384 (Fed. Cir. 1983)

(citations omitted); *see also* *W. M. Schlosser Co. v. United States*, 705 F.2d 1336 (Fed. Cir. 1983); *Essex Electro Engineers, Inc. v. United States*, 702 F.2d 998 (Fed. Cir. 1983). As this Board recently stated in *K Satellite v. Department of Agriculture*, CBCA 14, 07-1 BCA ¶ 33,547:

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.

07-1 BCA at 166,154.

As appellant included in its notice of appeal issues that had not as yet been submitted to the contracting officer as a claim with proper certification, its subsequent filing of a claim and certification cannot serve to cure our lack of jurisdiction over these issues. *B&M Cillessen Construction Co., Inc. v. Department of Health and Human Services*, CBCA 931 (Dec. 7, 2007); *K Satellite v. Department of Agriculture*. We, therefore, dismiss the appeal, in part, as to the three issues that are the subject of the recently submitted certified claim. Once the contracting officer issues a decision as to this claim, appellant may pursue its appeal rights at that time.

Decision

Respondent's motion to dismiss the appeal in part for lack of jurisdiction is hereby **GRANTED**.

ALLAN H. GOODMAN
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

H. CHUCK KULLBERG
Board Judge