UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: February 21, 2012

CBCA 2279

SIDE BAR AND ASSOCIATES, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Philip M. Smith, Jr., Culver City, CA, counsel for Appellant.

Joseph Stein, Office of the General Counsel, Department of Health and Human Services, San Francisco, CA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DRUMMOND**.

HYATT, Board Judge.

Appellant, Side Bar and Associates, Inc. (Side Bar), appealed the deemed denial of a claim presented to the contracting officer in October 2010, seeking an equitable adjustment in the amount of $274,428.24 under its contract to provide guard services at the Food and Drug Administration's (FDA's) laboratory in Irvine, California. Since then, the contracting officer has issued a decision granting Side Bar's claim in part. Respondent has moved to dismiss the appeal as moot; appellant opposes the motion.

Background

Side Bar filed its appeal of the contracting officer's deemed denial of its claim on January 28, 2011. On March 1, 2011, respondent filed a motion to suspend proceedings for sixty days to permit the contracting officer to consider and decide the claim. Respondent explained that after conducting an extended search, the contracting officer determined that a claim had in fact been submitted to the FDA's Office of Acquisitions and Grants in an electronic mail message dated October 16, 2010. The claim had not been reviewed or processed, and the contracting officer was also concerned that the certification required by the Contract Disputes Act (CDA), 41 U.S.C.A. § 7103(b)(1) (West Supp. 2011), had not been properly executed in accordance with Federal Acquisition Regulation (FAR) 33.207. Declaration of Patricia Pemberton (Feb. 28, 2011) ¶¶ 4-5. Specifically, respondent averred that the certification had not been endorsed with either an electronic or actual signature.

Based on that information, the Board, sua sponte, in an order dated March 4, 2011, explained its concern that the certification had not been properly signed and ordered appellant to show cause why the appeal should not be dismissed for lack of jurisdiction.[1]

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[1] The Board stated in its order:

> "Lack of a proper certification deprives the Board of jurisdiction to proceed on the claim." *Wheeler Logging, Inc. v. Department of Agriculture*, CBCA 97, 08-2 BCA ¶ 33,984 (citing *Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984); *W. M. Schlosser Co. v. United States*, 705 F.2d 1336, 1338-39 (Fed. Cir. 1983)). Section 7103(b)(3) of the CDA permits a contractor to correct a defective certification, thus preserving the authority of the contracting officer to decide the claim and the board's jurisdiction to entertain it. The boards of contract appeals are in agreement, however, that the absence of a signature renders an attempted certification ineffective and thus not curable. *Teknocraft Inc.*, ASBCA 55438, 08-1 BCA ¶ 33,846, at 167,505; *Hawaii CyberSpace*, ASBCA 54065, 04-1 BCA ¶ 32,455, at 160,535 (2003); *AT&T Communications v. General Services Administration*, GSBCA 14932, 99-2 BCA ¶ 30,415, at 150,363; *R.W. Electronics Corp.*, ASBCA 46592, et al., 95-1 BCA ¶ 27,327, at 136,211(1994); *Land Movers, Inc. & O. S. Johnson - Dirt Contractor (JV)*, ENG BCA 5656, 92-1 BCA ¶ 24,473, at 122,102, n.4 (1991) ("The absence of a signature is fatal. An unsigned letter is not an effective instrument with which to certify a claim.").

On March 28, 2011, appellant responded to the Board's order, providing a hard copy of the October 16, 2010, claim that it had submitted electronically. The hard copy showed an electronic signature affixed to the certification. The individual who signed the claim filed a declaration attesting that this was his customary electronic signature and that he was duly authorized by Side Bar to certify the claim. Upon receipt of this information, which respondent did not challenge, the presiding judge, in an order dated April 4, 2011, found that appellant had met its burden to establish jurisdiction based on the October 16, 2010, email submission.

In its response to the show cause order, appellant had also asked the Board to lift the suspension and order the Government to submit the appeal file and answer to the complaint. The FDA then sought to extend the suspension of proceedings to permit the contracting officer to issue a decision. The Board responded that the CDA provides that claims that are not timely decided by a contracting officer may be presumed to be denied and ruled that Side Bar was entitled to proceed on that basis. In addressing the FDA's request to suspend proceedings to await the issuance of the contracting officer's decision, the Board merely observed that a final decision on the claim might be useful to include in the record; it did not order the issuance of a decision nor did it suspend proceedings for that purpose.[2]

On June 20, 2011, the FDA submitted a copy of a contracting officer's decision dated June 14, 2011. The contracting officer's decision, which addresses all correspondence received from appellant, including the October 16, 2010, request for a final decision, granted appellant's claim in the amount of $137,214.12, plus Prompt Payment Act interest, and denied all other costs and claims. Respondent contends that the issuance of this decision

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> FAR 2.101 defines what is meant by the terms "signature" and "signed." These terms, which include electronic symbols, require a "discrete, verifiable symbol of an individual which, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing." It appears from respondent's statements that the only certification provided was the one included with the email claim submission forwarded to the FDA contracting officer by appellant's counsel. No electronic signature was affixed to the certification. If this is the case, then, under the above-cited authorities, the certification is not eligible to be corrected, the Board would appear to lack jurisdiction over this appeal, and the contracting officer has no authority to consider the claim.

[2] The Board granted leave for the Government to submit such a decision for purposes of supplementing the record, providing it did so within sixty days of the date of the order.

moots the appeal and moves that the instant appeal be dismissed for lack of jurisdiction. It suggests that appellant may then appeal the decision issued by the contracting officer on June 14, 2011.

Appellant opposes the motion, pointing out that the decision did not fully grant the amount of its claimed equitable adjustment and thus the appeal is not moot. Appellant adds that had the same decision been issued before it filed an appeal of the deemed denial, it would have appealed that decision. Thus, Side Bar asserts, since the contracting officer denied half of its monetary claim, there is still a live controversy and the appeal should proceed.

Discussion

Appellant filed an appeal of the deemed denial of the claim it submitted to the contracting officer; it did not petition the Board to direct the contracting officer to issue a decision.[3] The Board has jurisdiction over that appeal. 41 U.S.C.A. § 7103(f)(5). Once jurisdiction is vested, the contracting officer cannot simply divest the tribunal of jurisdiction by either issuing or withdrawing a decision on a claim.[4] *Cf. Sharman Co. v. United States*, 2 F.3d 1564, 1571-72 (Fed. Cir. 1993), *overruled on other grounds*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (issuance of contracting officer decision six months after commencement of litigation involving same issue had no effect on existing proceedings); *see also Holmes & Narver, Inc.*, ASBCA 51430, 99-1 BCA ¶ 30,131, at 149,055 (1998) (withdrawal of final decision cannot divest board of jurisdiction); *Triad Microsystems, Inc.*, ASBCA 48763, 96-1 BCA ¶ 28,078, at 140,196 (1995) (unilateral action of contracting officer to rescind the decision that had been appealed does not deprive board of jurisdiction); *accord*, *Thomas J. Murray, Jr.*, GSBCA 6869, 84-1 BCA ¶ 17,081, at 85,055 (1983). In fact, it is not uncommon for contracting officer decisions to be issued following the appeal of a deemed denial. *See Senate Builders & Construction Managers, Inc.*, ASBCA 56236, 10-2 BCA ¶ 34,512; *ALKAI Consultants, LLC*, ASBCA 56792, et al., 10-2 BCA ¶ 34,493.

This is the case even though, presumably as a protective measure in the event the Board concluded that it lacked jurisdiction over the original claim, appellant presented the

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[3] Had appellant filed such a petition, the issuance of the contracting officer's decision would in fact have mooted the petition, giving rise to the dismissal of the case. *See Wilson v. General Services Administration*, GSBCA 13458 (Dec. 5, 1995).

[4] At the same time, if an appellant is satisfied with the decision, the parties may, of course, move jointly to dismiss.

identical claim, with another certification, to the contracting officer on March 16, 2011, following the issuance of the Board's show cause order. In response to the show cause order, appellant provided proof that the original claim had been electronically certified; respondent did not rebut appellant's proof; and the Board thus ruled that it possessed jurisdiction to proceed with the appeal of the deemed denial. In these circumstances the protective filing became irrelevant. It did not impose any obligation on appellant to withdraw, supplement, or amend its complaint in this appeal and file a new appeal, as respondent asserts.

Decision

The motion to dismiss the appeal as moot is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JEROME M. DRUMMOND
Board Judge