



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION TO DISMISS DENIED: August 9, 2016

CBCA 5180

AMX VETERANS SPECIALTY SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

William H. Torrico, Locust Grove, VA, counsel for Appellant.

Mary A. Mitchell and Donald Mobly, Office of General Counsel, Department of Veterans Affairs, Houston, TX, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SHERIDAN**, and **BEARDSLEY**.

**BEARDSLEY**, Board Judge.

Appellant, AMX Veterans Specialty Services, LLC<sup>1</sup> (AMX), appealed the deemed denial of its claim for costs and damages resulting from the termination for convenience of

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<sup>1</sup> Appellant has indicated that AMX VSS, L.L.C. and appellant, AMX Veterans Specialty Services, LLC, are the same entity. AMX VSS, L.L.C. AMX Veterans Specialty Services executed the contract. The two names, however, are used interchangeably by the Government and appellant in documents in the appeal file and in the briefs of this motion. For the purposes of this motion, we accept that AMX VSS, L.L.C. and AMX Veterans Specialty Services, LLC are the same entity and that all documents referring to AMX VSS, L.L.C. also relate to appellant, AMX Veterans Specialty Services, LLC, and vice versa.

its contract by the Department of Veterans Affairs (DVA). DVA moves to dismiss the appeal for lack of subject matter jurisdiction, asserting that AMX did not properly certify its claim or properly file its appeal. For the following reasons, we deny the motion.

### Background

DVA entered into a contract on September 30, 2011, with AMX to demolish an existing auditorium and construct the Learning Center of the North Texas Veterans Health Care Center in Dallas, Texas. On December 5, 2013, DVA terminated this contract for default. DVA converted the termination for default to a termination for convenience on April 10, 2015. AMX submitted an initial termination for convenience settlement proposal to DVA on June 29, 2015. On November 6, 2015, AMX submitted a certified claim in the amount of \$2,232,214 for costs and damages incurred prior to and as a result of the termination for convenience. DVA failed to issue a contracting officer's final decision within the required time period, and DVA's failure was deemed to be a decision denying the claim pursuant to 41 U.S.C. § 7103(f)(5) (2012). AMX filed its notice of appeal with this Board on January 29, 2016.

Mr. Anthony Edes signed AMX's claim certification as chief operations officer (COO) for AMX. The certification stated that Mr. Edes was "duly authorized to certify the claim on behalf of the contractor." DVA, however, challenges Mr. Edes's authority to certify the claim on behalf of AMX. DVA asserts that there are no documents in the record establishing that Mr. Edes was COO or manager of AMX or had the authority to bind AMX. DVA points to the fact that the contract was not signed by Mr. Edes and that the reports filed with the Texas Secretary of State do not reflect Mr. Edes as the COO or manager of AMX.

AMX contends that there is nothing that requires the person who executed a contract to certify the claim arising from that contract. AMX further argues that there is no requirement in the State of Texas for AMX to update its articles of organization and that these articles and other reports filed with the Texas Secretary of State do not have any effect on the authority of officers or managers to bind AMX. AMX chronologically outlines the progression of Mr. Edes to manager and COO and provides documentary evidence showing that Mr. Edes was elected as a manager and appointed as COO of AMX in 2009.

Article 3.3 of AMX's regulations gives managers authority to "do or cause to be done all such lawful acts and things, as are not by the TBCA [Texas Business Corporation Act<sup>2</sup>],

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<sup>2</sup> As of January 1, 2010, the Texas Business Organizations Code (BOC) replaced the TBCA. The BOC applies to all Texas limited liability companies registered to transact business in Texas regardless of an entity's formation date or whether the entity has taken affirmative steps to adopt the BOC.

the Articles of Organization or these Regulations directed or required to be exercised or done by the Members.” Further, article 3.17 gives the Chairman, CEO, and COO general supervision, direction, and control over the business and affairs of the company, including “general authority to execute bonds, deeds, and contracts in the name of the Company if deemed by him to be necessary.” The COO also has responsibility for the day-to-day operation of the company and such other duties and responsibilities as “(i) are customarily possessed by the chief operating officer of a corporation similar in size and line of business as the company, and (ii) may be delegated to him from time to time by the Managers of the Company.”

Most telling as to Mr. Edes’s position and authority in AMX is the fact that Mr. Edes, as COO, signed all of the contract’s bilateral modifications, modifications P00001 to P00009, the settlement agreement converting the termination for default to a termination for convenience, and the termination for convenience settlement proposal. Moreover, correspondence related to the project schedule, settlement negotiations, and the termination settlement proposal were exchanged during and after the project’s performance between the contracting officer and Mr. Edes. There is no indication that the contracting officer questioned Mr. Edes’s authority to bind AMX during or after contract performance.

### Discussion

In deciding a motion to dismiss for lack of subject matter jurisdiction, the Board accepts as true only uncontroverted factual allegations in the complaint. *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011) (citing *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993)). Disputed facts outside the pleadings are subject to the fact-finding of the Board. *Id.*; see also *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

The issue here is whether Mr. Edes had authority to certify AMX’s claim, and if not, whether that deprived the Board of subject matter jurisdiction. It is well-settled law that even if Mr. Edes did not have authority to certify AMX’s claim, and the certification would consequently be considered defective, the Board would not be deprived of jurisdiction.<sup>3</sup> However, the defective certification must be corrected prior to the entry of a final judgment

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<sup>3</sup> Respondent incorrectly relies on pre-1992 case law in support of its motion to dismiss for lack of subject matter jurisdiction. The Contract Disputes Act of 1978 was amended in 1992 to provide that a defect in the certification of a claim no longer deprived an agency board of contract appeals of jurisdiction over that claim. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907(a)(1)(B), 106 Stat. 4506, 4518; *Home Entertainment, Inc.*, ASBCA 50791, 98-1 BCA ¶ 29,641, at 146,877.

by the Board. 41 U.S.C. § 7103(b)(3); 48 CFR 33.207(f); *Bell Helicopter Textron Inc.*, ASBCA 59561, 15-1 BCA ¶ 36,111, at 176,293.

For claims greater than \$100,000, the contractor must certify that the claim is made in good faith, the supporting data are accurate and complete, the amount accurately reflects the contract adjustment, and the certifier is authorized to certify the claim on behalf of the contractor. 41 U.S.C. § 7103(b)(1)(A)-(D). An individual with authorization to bind the contractor with respect to the claim may execute the certification. 41 U.S.C. § 7103(b)(2); 48 CFR 33.207(e)(2015). A claim that is not executed by an individual authorized to bind the contractor with respect to the claim is a defective certification. 48 CFR 33.201; *Bell Helicopter*.

AMX has the burden of establishing the requisite authority of Mr. Edes. *Butte Timberlands, LLC v. Department of Agriculture*, CBCA 3232, 14-1 BCA ¶ 35,794, at 175,075 (citing *First Annapolis Bancorp, Inc. v. United States*, 72 Fed. Cl. 369, 376 (2006)). A contractor's agent may bind the contractor if the agent has either actual or apparent authority. *Id.* (citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947), and *Peter Bauwens Bauunternehmung GmbH & Co. KG*, ASBCA 44679, 98-1 BCA ¶ 29,551, at 146,497). Mr. Edes had both actual and apparent authority to bind AMX. Mr. Edes had actual authority because he had been elected manager and appointed COO of AMX, and by AMX's regulations, these positions carried with them the broad authority to bind AMX and, therefore, to certify the claim. *Id.* at 175,076 (citing *Leonardo v. United States*, 63 Fed. Cl. 552, 555-56 (2005)). Mr. Edes also had apparent authority because AMX created a reasonable belief that Mr. Edes was authorized by AMX to sign documents on its behalf. *Id.* (citing *Seven Seas Shipchangers, LLC*, ASBCA 57875, et al., 13 BCA ¶ 35,193, at 172,678 (2012)). Mr. Edes signed and DVA accepted as binding Mr. Edes's signature authorized by AMX on contractual documents throughout the project. DVA also failed to point to any provision that required AMX to file certain documents with the State of Texas to establish Mr. Edes's authority. Moreover, the BOC states that "each officer of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for purposes of carrying out the company's business." Texas Business Organization Code, Ann. § 101.254(a).

An act committed by an agent of a limited liability company . . . for the purpose of apparently carrying out the ordinary course of business of the company, including the execution of an instrument, document, mortgage or conveyance in the name of the company, binds the company unless: (1) the agent does not have actual authority to act for the company; and (2) the person with whom the agent is dealing has knowledge of the agent's lack of actual authority.

Id. § 101.254(b). We find that Mr. Edes had actual and apparent authority to bind AMX and that the certification was not defective.

DVA also suggests that the claim should be dismissed because the signator of the notice of appeal lacked the authority to sign it pursuant to Board Rules 2 and 5. DVA seems to believe that Mr. Edes had signed it. However, Mr. Torrico, AMX's attorney, signed the notice of appeal. When a party files an appeal, the CBCA requires a written notice "signed by the appellant or by the appellant's attorney or authorized representative." Rule 2 (48 CFR 6101.2 (2015)). The Rule further describes those individuals who may appear before the Board:

[a]ny appellant, petitioner, or applicant may appear before the Board by an attorney-at-law licensed to practice in a state, commonwealth, or territory of the United States, or in the District of Columbia.

Rule 5(a). Mr. Torrico represents that he is an attorney licensed to practice in the Commonwealth of Virginia, the District of Columbia, and the State of Georgia, and there has been no allegation that he is not so licensed. He, therefore, possessed the authority to sign the notice of appeal and appear on behalf of AMX before the Board. As such, AMX properly filed its appeal to the Board, and there is no basis to dismiss this appeal for lack of subject matter jurisdiction.

### Decision

For the foregoing reasons, respondent's motion to dismiss for lack of subject matter jurisdiction is **DENIED**.

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ERICA S. BEARDSLEY  
Board Judge

We concur:

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STEPHEN M. DANIELS  
Board Judge

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PATRICIA J. SHERIDAN  
Board Judge