



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: November 16, 2016

CBCA 5246-R

STOBIL ENTERPRISE,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Billie O. Stone, Chief Executive Officer of Stobil Enterprise, San Antonio, TX, appearing for Appellant.

Mary A. Mitchell, Office of Regional Counsel, Department of Veterans Affairs, Houston, TX, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **ZISCHKAU**, and **RUSSELL**.

RUSSELL, Board Judge.

Stobil Enterprise (Stobil) has moved for reconsideration of the Board's decision that dismissed this appeal for lack of jurisdiction. *Stobil Enterprise v. Department of Veterans Affairs*, CBCA 5246, 16-1 BCA ¶ 36,478. Citing 48 CFR 2.101 and 41 U.S.C. § 7103(b), the Board noted that, because Stobil's request to the contracting officer for payment in excess of \$100,000 was uncertified, it could not be considered a "claim" under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). The Board held that, in the absence of a valid claim upon which the contracting officer issued a final decision, the Board lacked jurisdiction over this appeal. The Board was unpersuaded by Stobil's argument relying on a document dated January 18, 2016, with the subject line, "Dispute of Claim," and

characterized by Stobil as its certified claim.¹ Such a document, following the contracting officer's decision dated December 18, 2015, could not cure the jurisdictional defect.

The Board's Rule 26 (48 CFR 6101.26 (2015)) provides that reconsideration may be granted "for any reasons stated in Rule 27(a) and the reasons established by the rules of common law or equity applicable to private parties in the courts of the United States." Rule 27(a) lists a number of bases upon which a party may seek relief from a Board decision or order, including newly discovered evidence which could not have been earlier discovered, even through due diligence; justifiable or excusable mistake, inadvertence, surprise, or neglect; fraud, misrepresentation, or other misconduct of an adverse party; the decision has been satisfied, released, or discharged, or a prior decision upon which it is based has been reversed or otherwise vacated, and it is no longer equitable that the decision should have prospective application; the decision is void, whether for lack of jurisdiction or otherwise; or any other ground justifying relief from the operation of the decision or order.

Stobil ultimately has the burden of proving the Board's jurisdiction. *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,969 ("The party invoking the Board's jurisdiction bears the burden of establishing it by a preponderance of the evidence."). Nevertheless, when there are questions of the Board's jurisdiction, the Board may weigh relevant evidence and make findings of fact pertinent to its jurisdiction. *See, e.g., Ferreiro v. United States*, 350 F.3d 1318, 1324 (Fed. Cir. 2003).

In support of its motion for reconsideration, Stobil contends that there are documents in the appeal file evidencing that the Board has jurisdiction over its claim. Specifically, it points to a contracting officer's decision dated February 16, 2016. Stobil argues that this decision, which postdates the January 18, 2016, "Dispute of Claim" document in which Stobil requests relief, proves that the Board has jurisdiction. Although unclear, Stobil appears to also argue that its claim actually accrued in 2013. Stobil seems to rely on email communication with respondent during December 2013 (and perhaps through January 2014) to support jurisdiction based on a deemed denial of its claim. Appeal File, Vol. 2, Exhibit 8.

¹ In this document, Stobil stated that it was formally seeking payment of funds exceeding \$100,000 and requested a decision from the contracting officer. Also in the document, Stobil certified that its claim was made in good faith, that data in support were accurate and complete to Stobil's knowledge and belief, that the amount requested accurately reflected what Stobil believed was the Government's liability and Stobil's losses, and that the signer of the document was authorized to certify the claim on behalf of Stobil.

We start with the premise that “the jurisdiction of the [Board] depends upon the state of things at the time of the action brought.” *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 570 (2004) (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L.Ed. 154 (1824)). Accordingly, as an initial matter, we look at what Stobil appealed to the Board. Stobil’s appeal challenged the contracting officer’s decision dated December 18, 2015. In the decision, the contracting officer noted that Stobil had failed to certify its claim in accordance with the Federal Acquisition Regulation (FAR) at 48 CFR 33.207(a) (2015). Appeal File, Vol. 1, Exhibit 2. Accordingly, before the Board was an appeal from a contracting officer’s determination based on an uncertified claim. As noted by the Board in its initial decision, a contracting officer’s final decision on an uncertified claim cannot confer jurisdiction.² Thus, the “state of things” at the time that Stobil filed its appeal shows that the Board lacks jurisdiction to consider Stobil’s claim.

² In *Case, Inc. v. United States*, 88 F.3d 1004 (Fed. Cir. 1996), the Federal Circuit summarized the CDA’s jurisdictional requirements:

A CDA action may be brought in the Court of Federal Claims or before a board of contract appeals only if (i) the contracting officer has issued a final decision on the contractor’s claim, 41 U.S.C. § [7103(f)], *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1573 (Fed. Cir.1995), or (ii) the contracting officer has failed to issue a final decision on the contractor’s claim or to notify the contractor of the time within which a decision will be issued, and at least 60 days have passed since the date the claim was submitted for a decision, 41 U.S.C. [§§ 7103(f)(5) and 7104(a), (b)]; *Do-Well Mach. Shop, Inc. v. U.S.*, 870 F.2d 637, 640 (Fed. Cir. 1989). In the latter case, the claim is “deemed denied.” *Pathman Const. Co. v. United States*, 817 F.2d 1573, 1575 (Fed. Cir. 1987). Closely related to this rule of jurisdiction is the principle that an invalid contracting officer’s decision may not serve as the basis for a CDA action. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 579 (Fed. Cir.), *cert. denied*, 502 U.S. 919, 112 S.Ct. 330, 116 L.Ed.2d 270 (1991). A contracting officer’s final decision is invalid when the contracting officer lacked authority to issue it. *See Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989) (where submitted claim was not properly certified, there was no valid claim for the contracting officer to decide).

Id. at 1008–09.

As for the contracting officer's decision of February 16, 2016, the Board notes that neither party discussed this decision in its initial briefing on the jurisdictional issue. Although the Board does not typically countenance motions for reconsideration based on evidence readily available to a party when an issue was originally briefed, in this instance, we do so here because the issue focuses on the threshold question of the Board's jurisdiction. If the Board previously erred in its determination regarding its jurisdiction, such error should serve as a "ground justifying relief from the operation of the [Board's initial] decision." Rule 27(a); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists."); *Fanning, Phillips & Molnar v. West*, 160 F.3d 717, 720 (Fed. Cir. 1998) (discussing court's "special obligation" to satisfy itself of its own jurisdiction).

Here, however, Stobil's reliance on a contracting officer's decision dated February 16, 2016, does not help cure the jurisdictional defect. As an initial and obvious point, Stobil did not appeal this decision. Further, for reasons not clear from the record, the February 16, 2016, decision addresses the same uncertified claim as the December 18, 2015, decision which was appealed. Both decisions have the same identical substantive language, starting with the opening paragraphs describing the claim at issue:

I am in receipt of the subject claim in the total amount of \$5,800.00 that was received by the Contracting Officer (CO) on 3 January 2015 (believed correct date should read 3 February 2015). . . .

Description of the claim/dispute

In the subject claim Stobil Enterprise (Stobil) is claiming equipment damages and losses due to VA employee actions. Stobil is also requesting compensation for loss of food on two separate occasions. The total requested amount for the losses/damages is \$5,800.00. Additionally, Stobil has requested compensation for back wages as no Cost of Living adjustments were requested by the contractor throughout the five years of the contract. Stobil provided Invoice # 2231, dated 8/20/2014, in the amount of \$111,560.00 for compensation.

Appeal File, Vol. 1, Exhibits 1, 2.

Additionally, both decisions have identical language regarding Stobil's failure "to certify its claim in accordance with FAR 33.207(a)." Accordingly, even if Stobil had

appealed the contracting officer's February 2016 decision, and it did not, the result would be the same. Specifically, the Board would lack jurisdiction over the appeal because the contracting officer's decision, on an uncertified claim, was invalid. *See D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir.1997) (when a contracting officer lacks authority to issue a final decision, subsequent proceedings "have no legal significance").

Further, the email communication between Stobil and respondent in December 2013 and January 2014 is insufficient to establish jurisdiction based on a deemed denial. The email messages generally reflect a discussion between Stobil and respondent on calculating the appropriate wage determination for the purpose of a price adjustment. For example, in one exchange, dated December 26, 2013, Stobil states to respondent, "Our office has completed and computed the applicable increase/s in accordance with the appropriate Wage Determination [revisions] . . . We will be applying these increases to our current pricing for submission to your attention." The email messages simply do not reflect submission of a written claim on which Stobil is requesting a contracting officer's final decision, and therefore, cannot serve as evidentiary support to establish jurisdiction based on a deemed denial of a claim.³

³ Indeed, the record is lacking any evidence that Stobil submitted a proper claim consistent with the requirements of the CDA prior to December 18, 2015, the date of the contracting officer's decision actually appealed by Stobil. From the record, it does appear that, on January 19, 2016, Stobil sent its "Dispute of Claim" document dated January 18, 2016, to respondent's procurement office via electronic mail. However, we do not have before us an appeal of a contracting officer's decision based on the January 18, 2016, document, or an appeal based on a deemed denial of the claim presented in that document. Regardless, even if Stobil had filed an appeal based on a deemed denial relying on its January 18, 2016, "Dispute of Claim" document which was purportedly received by the contracting officer on the following day, the appeal would have been premature on March 17, 2016 – the date on which Stobil filed its claim challenging the contracting officer's decision of December 18, 2015. *See* 41 U.S.C. § 7103(d), (f) (absent the passage of sixty days from the date that a claim is submitted to the contracting officer, a contractor cannot deem its claim as denied to establish the jurisdiction of the Board or the Court of Federal Claims). Further, in the January 18, 2016, "Dispute of Claim" document, Stobil stated that it was seeking payment of a claim "exceeding \$100,000." Stobil's characterization of the amount of the claim, by itself, would likely not satisfy the "sum certain" requirement for establishing jurisdiction under the CDA. *See* 48 CFR 52.233-1(c) ("claim" includes written request for "the payment of money in a sum certain"); *Pacific Coast Community Services, Inc. v. Department of Homeland Security*, CBCA 5064, 16-1 BCA ¶ 36,213, at 176,693 ("It (continued...)

Stobil makes two additional points that the Board will briefly address. First, Stobil reminds the Board of its claim based on respondent's failure to render a performance evaluation. We did not address this claim in our original decision but will do so here. The FAR defines "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, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 CFR 52.233-1(c). Assuming, without deciding, that Stobil's claim based on the respondent's alleged failure to render a performance evaluation is actionable, the Board cannot exercise jurisdiction over the allegation because Stobil has not presented evidence that (1) it submitted a claim to the contracting officer requesting a final decision on issuance of a performance evaluation and (2) the contracting officer issued a final decision or the claim can be deemed denied.

Second, Stobil notes that the Board, in its original decision, failed to address Stobil's various motions for summary relief filed in this appeal. In its original decision, the Board addressed Stobil's motion for summary relief based on respondent's alleged failure to produce a timely Rule 4 file. The Board noted that, because the Board lacks jurisdiction, Stobil's motion for summary relief could not be considered. Stobil's other grounds for summary relief suffer from this same defect.⁴ Specifically, the motions are moot due to the Board's lack of subject matter jurisdiction. *See Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993) (without subject matter jurisdiction, consideration of a party's motion for summary judgment is moot).

³(...continued)

is incumbent upon a contractor to submit to the contracting officer a claim that contains a clear and unequivocal statement that gives adequate notice of the basis and amount of the claim.").

⁴ Stobil's other grounds for seeking summary relief are based on respondent's alleged inclusion or exclusion of certain documents in the Rule 4 file, the purported inadmissibility of certain documents as evidence in this appeal, and the timeliness of certain of respondent's filings.

Decision

Stobil's motion for reconsideration is **DENIED**.⁵

BEVERLY M. RUSSELL
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JONATHAN D. ZISCHKAU
Board Judge

⁵ As noted in the Board's original decision, Stobil is not foreclosed from pursuing its claim. It may appeal a contracting officer's final decision on a proper (and, if necessary, certified) claim. 41 U.S.C. § 7103(a). Alternatively, it may appeal the deemed denial of a contracting officer's decision of a proper (and, if necessary, certified) claim. *Id.* § 7103(f)(5). However, this particular appeal, based on the contracting officer's decision of December 18, 2015, must be dismissed for lack of jurisdiction.