



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED FOR LACK OF JURISDICTION: June 7, 2018

CBCA 5897

GREENBRIER VALLEY ECONOMIC  
DEVELOPMENT CORPORATION,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Webster J. Arceneaux, III, James C. Stebbins, and Anna G. Casto, Esq. of Lewis, Glasser, Casey & Rollins, PLLC., Charleston, WV, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

Before Board Judges **GOODMAN**, **SHERIDAN**, and **ZISCHKAU**.

**SHERIDAN**, Board Judge.

Respondent, the Department of Veterans Affairs (VA), filed a motion to dismiss this appeal for lack of subject matter jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012) (CDA). The VA argues that the request for repair costs submitted to the contracting officer was over \$100,000 but lacked the certification language required by 41 U.S.C. § 7103(b)(1). For the reasons below, we grant the motion.

### Background

Appellant, the Greenbrier Valley Economic Development Corporation (GVEDC or lessor), and respondent, the VA (lessee), entered into lease VA-246-08-RP-0253-1 in October 2010. The purpose of the lease was to provide for the construction and lease of a community based out-patient clinic (CBOC) in the Nick J. Rahall Technology and Business Center in Maxwelton, West Virginia. The lease had a five year base term with an option to renew an additional five years at the expiration of the base five years. The lease also provided that the VA could terminate at any time by giving at least sixty days written notice to GVEDC.

The VA occupied the lease premises from January 2011 until September 30, 2015. During that period, there were continuous issues between the VA and GVEDC over the odor of formaldehyde and the air quality within the clinic. To address issues with the air quality, the heating, ventilation, and air conditioning (HVAC) system within the clinic was repaired. GVEDC hired Southern Air, Inc. for the repairs, which were made between mid-December 2014 and mid-February 2015.

On April 30, 2015, the VA chose not to renew the lease with GVEDC pursuant to its option clause under the contract. The VA vacated the premises on September 30, 2015.

On August 18, 2015, GVEDC sought \$129,458.57 from the VA for the cost of repairs to the HVAC system. The document submitted to the VA, while in the form of a claim, lacked the certification language required by the CDA, 41 U.S.C. § 7103(b)(1). The VA denied the request. GVEDC appealed that decision to the Board, where it was docketed as CBCA 5897. The VA now moves to dismiss the appeal for lack of subject matter jurisdiction, asserting that there was no certification of the claim request.

### Discussion

The Board's jurisdiction is derived from the CDA. The Court of Appeals for the Federal Circuit has made it clear that "the strict limits of the CDA" constitute "jurisdictional prerequisites to any appeal." *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004). If the Board does not have jurisdiction over a case, it must dismiss it. *Universal Canvas, Inc. v. Stone*, 975 F.2d 847, 850 (Fed. Cir. 1992). The party seeking to invoke the Board's jurisdiction "bears the burden of establishing [it] by a preponderance of the evidence." *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988).

The CDA requires that each claim be submitted in writing to the contracting officer for a final decision. 41 U.S.C. § 7103(a). The CDA also requires that:

For claims of more than \$100,000 made by a contractor, the contractor shall certify that – (A) the claim is made in good faith; (B) the supporting data are accurate and complete to the best of the contractor’s knowledge and belief; (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and (D) the certifier is authorized to certify the claim on behalf of the contractor.

*Id.* § 7103(b)(1).

Certification of a claim of more than \$100,000 is not only a statutory requirement, but a jurisdictional prerequisite for review of a contracting officer’s decision before this Board. The Court of Appeals for the Federal Circuit has stated that:

[C]ertification is not a mere technicality to be disregarded at the whim of the contractor, but is an unequivocal prerequisite for a post-CDA claim being considered under the statute. The CDA “requires that to be valid a claim must be properly certified.” . . . Unless the requirement is met, there is simply no claim on which a contracting officer can issue a decision. . . . The submission of an uncertified claim, for purposes of the CDA, is, in effect, a legal nullity.

*Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1383 (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).

In its opposition to respondent’s motion to dismiss, appellant argues that respondent waived the requirement of certification by issuing a final decision on the claim. Appellant argues that *ISC-Serco*, ASBCA 36397, 90-2 BCA ¶ 22,938, stands for the proposition that certification may be waived. Appellant is incorrect. In *ISC-Serco*, the argument focused on the fact that the claims involved “had not been certified *in accordance with GP 38 of the contract* which required that all claims, regardless of monetary amount, be properly certified.” *Id.* at 115,141 (emphasis added). It was a contract clause in that case, not the CDA, that required certification. Therefore, that case has no bearing on the matter at hand.

Furthermore, one of our predecessor boards, the Veterans Affairs Board of Contract Appeals (VABCA), held that “[t]he fact that the contracting officer issued a final decision is of no moment, for the contracting officer is without authority to waive the certification

requirement.” *Indiana Lumbermen’s Mutual Insurance Co.*, VABCA 2930, 89-2 BCA ¶ 21,831, at 109,832-33 (citing *Paul E. Lehman v. United States*, 673 F.2d 352 (Ct. Cl. 1982)).

Appellant also argues that the motion was filed after the deadline for all dispositive motions, and therefore should not be allowed. Appellant misunderstands the requirement of certification. Certification is a jurisdictional prerequisite that can not be waived. Therefore, the deadline for dispositive motions is irrelevant as the issue of subject matter jurisdiction may be raised at any time by either party, or by the Board itself.

### Decision

Respondent’s motion to dismiss for lack of jurisdiction is granted, and, accordingly, this appeal is **DISMISSED FOR LACK OF JURISDICTION**.

*Patricia J. Sheridan*  
PATRICIA J. SHERIDAN  
Board Judge

We concur:

*Allan H. Goodman*  
ALLAN H. GOODMAN  
Board Judge

*Jonathan D. Zischkau*  
JONATHAN D. ZISCHKAU  
Board Judge