



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: September 27, 2018

CBCA 5942, 5943, 5944, 5945, 5946

DEVELOPMENT ALTERNATIVES, INC. on behalf of ERSM
(AFGHANISTAN) LIMITED, d/b/a EDINBURGH INTERNATIONAL,

Appellant,

v.

AGENCY FOR INTERNATIONAL DEVELOPMENT,

Respondent.

Armani Vadiee, Todd M. Garland, and Sean K. Griffin of Smith Pachter McWhorter PLC, Tysons Corner, VA, counsel for Appellant.

John Alumbaugh, Office of General Counsel, Agency for International Development, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **HYATT**, and **ZISCHKAU**.

SOMERS, Board Judge.

Background

Respondent, Agency for International Development (USAID), awarded Development Alternatives, Inc. (DAI) five contracts to provide security services in Afghanistan. DAI executed subcontracts with ERSM (Afghanistan) Limited, d/b/a Edinburgh International (ESRM), a private security company (PCS). As DAI's subcontractor, ESRM provided armed security services under cost reimbursement type contracts.

The Government of the Islamic Republic of Afghanistan (GIRA) assessed fines on PCSs employing more than 500 guards. As a result, ERSM, with more than 500 guards, paid \$1,973,229.24 in fines.

ERSM submitted five claims for reimbursement of this payment to DAI, certified by its corporate secretary:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the subcontractor believes DAI and the Government to be liable; and that I am duly authorized to certify the claim on behalf of the subcontractor.

On May 10, 2017, DAI submitted ERSM's claims to the contracting officer. DAI's cover letter, also dated May 10, 2017, stated:

DAI Global, LLC hereby submits DAI sponsored claims submitted by ERSM Subcontractor (Afghanistan Limited d/b/a/ Edinburgh International) for the Contracting Officer's consideration and decision under DAI's five prime awards listed below. These sponsored claims are submitted in accordance with FAR [Federal Acquisition Regulation] 52.233-1 and the Contracts [sic] Disputes Act [(CDA), 41 U.S.C. §§ 7101-7109 (2012)]. As all the awards ended between 2011 and 2015, we are submitting this request to you as the cognizant Contracting Officer. . . .

As DAI believes there is a sound basis for these claims, we are sponsoring these ERSM's [sic] certified claims. ERSM, DAI's Security Service Provider, was not able to receive an exemption to the five-hundred-person [c]ap imposed by the changes in the local laws of the [GIRA]. Therefore, ERSM incurred the resulting fines during their performance under the above-referenced awards.

Given that ERSM is the real party in interest and is the only one who can logically and realistically certify these claims, DAI hereby submits this certification in satisfaction of the requirements of the Contract Disputes Act. As DAI is not the real party in interest, DAI must accept and rely on the ERSM certification at face value. In addition, DAI has no knowledge, which suggests that ERSM has knowingly or intentionally failed to comply with the requirements of the Contracts [sic] Disputes Act or has acted in bad faith.

In a July 19, 2017, letter, the contracting officer informed DAI that it needed to properly certify the claims and that the Government would not respond to the claims “until DAI Global submits a certified claim in accordance with FAR 33.207(a) and [the] CDA.”

On August 3, 2017, DAI submitted what it identified as a “supplement” to its May 10, 2017, certification:

As DAI believes there are good grounds for these claims, we are sponsoring ERSM’s certified claims, and DAI hereby submits this certification in satisfaction of the requirements of the Contract Disputes Act. These claims are being filed by our subcontractor and, inasmuch as ERSM does not have privity with USAID, DAI is acting as a conduit on behalf of ERSM in this matter. DAI does not have access to ERSM’s books and records and, therefore, cannot make any statement with respect to the amount of the claim. However, DAI has no knowledge which suggests that ERSM has knowingly or intentionally failed to comply with the requirements of the Contracts [sic] Disputes Act, or acted in bad faith.

Upon the advice of our legal counsel, we believe that the above certification is sufficient based on the decision of the United States Court of Appeals for the Federal Circuit in *Transamerica Insurance Corp. ex rel. Stroup Sheet Metal Works v. United States*, 973 F.2d 1572 (Fed. Cir. 1992).

In a letter dated August 24, 2017, the contracting officer informed DAI that “it is my opinion that your response of August 3, 2017, fails to provide the required certification [N]otwithstanding the lack of a complete certification, if I were to issue a final decision . . . I would deny the claim.”

On November 20, 2017, DAI, on behalf of ERSM, appealed the five claims on a deemed denial basis. The Board docketed the appeals as CBCA 5942, 5943, 5944, 5945, and 5946, and later consolidated the appeals on November 27, 2017.

Pending before us are USAID’s jurisdictional motions and DAI’s responses. USAID contended that the Board lacks jurisdiction because DAI failed to certify the claims.¹

¹ USAID’s first motion to dismiss for lack of jurisdiction asserted that the claims lacked a sum certain. It appears that USAID has abandoned that argument.

DAI submitted an updated certification with its April 5, 2018, sur-reply. After repeating the language included in the May 10, 2017, cover letter, DAI stated:

Taking into account the preceding paragraph, I, Baigal Darambaszar [Senior Director of Contracts, DAI Global, LLC], hereby certify that (A) the claims are made in good faith; (B) the supporting data are accurate and complete to the best of DAI's knowledge and belief; (C) the amount requested accurately reflects the contract adjustment for which DAI believes the Federal Government is liable given the information available to it; and (D) the certifier is authorized to certify claims on behalf of DAI.

In a third jurisdictional motion, filed on April 23, 2018, styled as the Government's response to appellant's opposition to the Government's request for a stay and motion to dismiss as premature, USAID now claims that DAI's appeals are premature because the contracting officer had not yet issued a final decision on the certified claims submitted on April 10, 2018.²

The Board held oral argument on the pending motions on July 16, 2018. In an order issued that day, the Board directed the parties to provide supplemental briefing. After considering the points presented during the oral argument and evaluating the supplemental briefing, we conclude that DAI did not properly certify its claims submitted on May 10, 2017. The certifications, lacking three of the four required prongs, are not correctable. We do not possess jurisdiction to entertain the claims.

Discussion

The CDA prescribes our jurisdiction to decide disputes arising under federal government contracts. The CDA provides that "each claim by a contractor against the Federal Government relating to a contract [shall be in writing and] shall be submitted to the contracting officer for decision." 41 U.S.C. § 7103(a)(1)-(2). For claims seeking more than \$100,000, the contractor must certify that

(A) the claim is made in good faith;

² On June 4, 2018, the contracting officer ultimately issued a final decision on DAI's claims after receiving DAI's April 5, 2018, certification. DAI appealed this final decision, which was docketed on September 4, 2018, as CBCA 6247. Whether we possess jurisdiction over that claim is a question for another day.

(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.

41 U.S.C. § 7103(b)(1). Section 7103(b)(3) clarifies that contractors have an opportunity to correct a certification that does not strictly adhere to the requirements of § 7103(b)(1), providing that:

A defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim. Prior to the entry of a final judgment by a court or a decision by an agency board, the court or agency board shall require a defective certification to be corrected.

41 U.S.C. § 7103(b)(3).

Although subcontractors may pursue claims against the Government, it must be under the proper sponsorship of, and in the name of, the prime contractor. *E.g., Aurora, LLC v. Department of State*, CBCA 2872, 16-1 BCA ¶ 36,198, at 176,648 (2015) (citing *Cooley Constructors, Inc. v. General Services Administration*, CBCA 3905, 15-1 BCA ¶ 36,001; *TAS Group, Inc. v. Department of Justice*, CBCA 52, 07-2 BCA ¶ 33,630). A subcontractor's certification of a claim, alone, is not sufficient to establish jurisdiction to entertain the appeal. *Thermodyn Contractors, Inc. v. General Services Administration*, GSBGA 11911, 93-1 BCA ¶ 25,408, at 126,598 (1992). DAI, as the prime contractor, must sponsor and certify its subcontractor's claims.

USAID asserts that DAI's attempted certification of the subcontractor's claim is deficient because it fails to include all of the elements required by the CDA. In particular, the certification does not state that the "supporting data is accurate and complete" or that "the certifier was authorized to certify the claim" on behalf of the contractor.

DAI asserts that its certification conforms with the one found adequate in *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1580 (Fed. Cir. 1992), *overruled in part on other grounds by Reflectone, Inc. v Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995). In that case, the prime contractor submitted the subcontractor's claim

for equitable adjustment to the contracting officer. The cover letter stated that “[t]his claim is being filed by our subcontractor and inasmuch as they do not have contract privity with you, we are acting as a conduit on their behalf in this matter. We do not have access to their books and records and, therefore, cannot make any statement with respect to the amount of their claim. However, we have no reason to believe that their cost figures and delay estimates are incorrect.”

However, in addition to providing that statement in the cover letter, the prime contractor in *Transamerica* separately included a certification executed by the prime contractor’s president. This is evident from the Federal Circuit’s discussion of the lower court’s statements during a July 12 preliminary hearing:

[Y]ou’ve got an adequate certification as such, the real issue is whether the cover letter diminishes it to the extent that the general contractor could not be held liable. . . .

The certification itself sounds like it does meet the requirements of 605c [now codified at 41 U.S.C. § 7103(b)] This certification is not qualified. It is accompanied by a cover letter that attempts to inch out of it. *However, the individual has put his John Henry to the certification and I think could be held liable.*

. . . .

The only purpose here that is served is to answer the question of *has the contractor put himself in a position where he could be prosecuted for making a fraudulent claim or statement to the contracting officer? . . . this kind of self-serving other language that the contractor included in his cover letter, sounded like an attempt to diminish the certification but nonetheless, the certification was made.*

973 F.2d at 1580 (emphasis added in bold). It is apparent from the Court’s statements that the prime contractor submitted a signed certification that met the CDA requirements. The issue before the *Transamerica* Court was whether the language used in the cover letter impermissibly qualified the certification submitted.

We have seen this “qualifying” language used before. The prime contractor in *Group Health Inc. v. Department of Health & Human Services*, CBCA 3407, 14-1 BCA ¶ 35,487, combined a CDA-compliant certification with the *Transamerica* caveat:

I certify that this claim is made in good faith by GHI [Group Health Incorporated]; that the supporting data are accurate and complete to the best of GHI's knowledge and belief; that the amount requested accurately reflects the contract adjustment for which GHI believes the Federal Government is liable; and that I am duly authorized to certify the claim on behalf of GHI.

This claim is being filed on behalf of GHI's subcontractor, DCCS [Douglas Consulting & Computer Services, Inc.], and inasmuch as DCCS does not have privity with the Government, GHI is acting as a conduit on DCCS's behalf in this matter. GHI does not have access to DCCS's books and records and, therefore, cannot make any statement with respect to the amount of DCCS's claim. However, GHI has no reason to believe that DCCS's cost figures and supporting data are inaccurate or incomplete.

Id. at 173,985-86.

By contrast, DAI never submitted its own CDA-compliant certification to the contracting officer. As to the first prong, "the claim is made in good faith," DAI merely says that it "believes there is sound basis for these claims." As to the second prong, "the supporting data are accurate and complete to the best of my knowledge and belief," DAI says nothing. The third prong, "that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable," is not present — DAI references ERSM's figures but did not certify any amount. As with the second prong, the fourth prong, "I am duly authorized to certify the claim on behalf of the contractor," is absent.

We conclude that neither the May 10, 2017, nor the August 3, 2017, submissions met the CDA's statutory requirements. DAI's purported certification bears no resemblance to a CDA certification, which is required to trigger "a contractor's potential liability for a fraudulent claim." *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 579 (Fed. Cir. 1991) (quoting *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1429 (Fed. Cir. 1989)).

DAI asserts, in light of the 1992 amendments and Congress's explanation of how those amendments are to be implemented, that if we find its certification is defective, it can be corrected. A defective certification is one "which alters or otherwise deviates from the language . . . or which is not executed by a person authorized to bind the contractor." 48 CFR 33.201 (2016). To qualify as a defective certification, however, the certification attempt must "at least resemble the statutory language." L-3

Communications Integrated Systems L.P. v. United States, 132 Fed. Cl. 325, 334 (2017) (quoting *CSX Transportation, Inc. v. United States*, 123 Fed. Cl. 244, 252 (2015)); *Scan-Tech Security, L.P. v. United States*, 46 Fed. Cl. 326, 337 (2000) (holding that “significant words” in the CDA certification beyond “certify” include “best knowledge” and “belief”).

To determine whether this certification is correctable, we look to see whether the defect is “technical” in nature, as in the following examples:

certification with each document submitted as part of the claim when all claim documentation is not submitted simultaneously, missing certifications when two or more claims not requiring certification are deemed by the court or board to be a larger claim requiring certification, and certification by the wrong or incorrect representative of the contractor.

H.R. Rep. No. 102-1006, at 28 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3921, 3937.³ If the defect is technical, it is correctable. On the other hand, if the certification is made with intentional, reckless, or negligent disregard for the applicable certification requirements, it is not correctable. *URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2589, 12-1 BCA ¶ 35,055, at 172,203-04 (certification fails to include two of the required prongs); *Keydata Systems, Inc. v. Department of the Treasury*, (GSBCA 14281-TD), 97-2 BCA ¶ 29,330, at 145,824 (certification that addressed only one prong and ignored the other three prongs of proper certification was negligent disregard of CDA requirement and not correctable). *See also Walashek Industrial & Marine, Inc.*, ASBCA 52166, 00-1 BCA ¶ 30,728, at 151,790 (citing *Production Corp.*, ASBCA 49122-812, 96-1 BCA ¶ 28,053, at 140,082 (1995), *reconsideration denied*, 96-1 BCA ¶ 28,181 (“intentional, deliberate failure to use CDA language which contained ‘little that would identify them as certifications’ was reckless and intentional disregard of the certification requirement and not correctable”)); *Sam Gray Enterprises, Inc. v. United States*, 32 Fed. Cl. 526, 530 (1995) (statement that included “I acted in good faith” did not remotely resemble required CDA certification so as to permit correction).

³ DAI questions the fact that we cite to the exhaustive list of technical defects identified in the House of Representative’s proposed version of the 1992 amendments to the CDA, when the enacted statute adopted the Senate version. As noted in a detailed analysis in *Engineered Demolition, Inc. v. United States*, 60 Fed. Cl. 822, 828-29 (2004), the differences between the House and Senate version are of no consequence.

In *Keydata Systems, Inc.*, one of our predecessor boards, the General Services Board of Contract Appeals (GSBCA), discussed the law surrounding defective certifications. Noting that “we will decline jurisdiction over a case involving a claim in excess of \$100,000 only if the claim was not certified at all, or if we find that the certification was made in bad faith, fraudulently, or with reckless or intentional disregard of the statutory certification requirements,” the GSBCA held that the certification at issue, which provided only one of the required prongs, to be “utterly bereft of even an allusion to any of the other prongs of the requirement.” 97-2 BCA at 145,824. The board noted that the contractor had been informed about the regulations governing government contract claim resolution:

Keydata showed by its correspondence that at least as early as April 1996, it had a close understanding of the regulations governing Government contract claim resolution. Those regulations contain the requirements for proper certification – as the contracting officer told the company in the following month. Keydata was thus on notice well before it filed its petition as to the actions it had to take to perfect the claim. In response, the contractor took no action whatsoever. We find that this refusal to cure the substantial defects, in the face of knowledge of what was required and the contracting officer’s pointed comment, and before litigation began, constitutes negligent disregard of the Contract Disputes Act requirement, not innocent mistake or inadvertence.

Id. (footnote omitted).

DAI points to *SAE/American—Mid-Atlantic, Inc. v. General Services Administration*, GSBCA 12294, 94-2 BCA ¶ 26,890, in which the GSBCA found the contractor’s request for equitable adjustment, which included a “Certificate of Current Cost or Pricing Data,” to be correctable. What distinguishes this case from *SAE/American* is the fact that the contracting officer put DAI on notice that its certification had substantial defects prior to filing the litigation. The contracting officer informed DAI on two separate occasions, July 19, 2017, and August 24, 2017, that DAI’s certifications did not comply with CDA requirements. DAI elected to roll the dice, and filed its appeal without correcting its certification. This made DAI’s submission “reckless” under the *Keydata* standard and therefore not salvageable.

We note that DAI submitted a properly certified claim on April 4, 2018, after initiating the current appeals. The submission of a certification after an appeal has been filed has no legal bearing on the Board’s jurisdiction over the case, nor can it cure a lack of jurisdiction. *Medtek, Inc. v. Department of Veterans Affairs*, CBCA 1153, 08-2 BCA

¶ 33,929, at 167,906; *B&M Cillessen Construction Co. v. Department of Health & Human Services*, CBCA 931, 08-1 BCA ¶ 33,753, at 167,085 (2007).

Decision

The appeals are **DISMISSED FOR LACK OF JURISDICTION.**

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge