UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: December 17, 2007

CBCA 931

B & M CILLESSEN CONSTRUCTION CO., INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Seth V. Bingham of Miller Stratvert P.A., Farmington, NM, counsel for Appellant.

Nigel F. Gant, Office of the General Counsel, Department of Health & Human Services, Dallas, TX, counsel for Respondent.

Before Board Judges **HYATT**, **DRUMMOND**, and **SHERIDAN**.

SHERIDAN, Board Judge.

The respondent, the Department of Health and Human Services (HHS), has moved to dismiss the subject appeal for lack of subject matter jurisdiction, arguing that the appellant, B & M Cillessen Construction Co., Inc. (Cillessen), failed to certify its claim of $131,481, as required by the Contract Disputes Act of 1978 (CDA or Act), 41 U.S.C. § 605(c)(1) (2000). Cillessen opposes the respondent's motion.

The record before the Board consists of the complaint, appeal file, respondent's motion to dismiss for lack of jurisdiction (motion), appellant's response opposing the motion (response), and the respondent's reply to the response. To its response, the appellant attaches

a "Certification Affidavit" dated November 8, 2007.

In considering the respondent's motion to dismiss for lack of jurisdiction, we may look beyond the pleadings to decide the facts, even if disputed, which are necessary for a determination of the jurisdictional merits. *Detroit Housing Corp. v. United States*, 55 Fed. Cl. 410, 412 (2003) (citing *Pride v. United States*, 40 Fed. Cl. 730, 732 (1998)); *see also Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993) (when jurisdiction is at issue, the tribunal is not limited to the pleadings).

Based on the findings and application of the law set forth below, we grant the respondent's motion to dismiss the subject appeal for lack of jurisdiction.

Background

The appeal before us involves a claim by Cillessen seeking an equitable adjustment of $131,481 from HHS, Indian Health Service (IHS). The claim arises out of contract HHSI 161200700014C, which was awarded to Cillessen for the construction of the expansion and renovation of the Chinle Comprehensive Health Care Center in Chinle, Arizona. Mr. William Obershaw, the chief of the contracting office at the IHS Division of Engineering Services, Dallas, Texas, was the senior contracting officer responsible for administering this $12,298,000 contract. Exhibit 19.

On July 27, 2003, Cillessen forwarded a request for an equitable adjustment (REA) to Mr. Obershaw seeking an increase of $131,481 to the contract amount for what it asserted was a one percent increase in the Navajo Business Activities Tax (NBAT). Exhibit 24. This tax is levied on companies receiving gross receipts from construction contracts on the Navajo Nation. Complaint ¶ 14. Cillessen informed the contracting officer that the one percent increase applied to all monies it received on the contract after July 1, 2007. Exhibit 24.

Mr. Obershaw responded on July 30, 2007, denying the REA. Exhibit 26. Further correspondence culminated in Mr. Obershaw writing Cillessen on July 31, 2007, suggesting that if Cillessen was still in disagreement with the contracting officer's decision to deny the REA, it should proceed under the disputes procedures set forth in Federal Acquisition Regulation (FAR) 52.233-1 (Alt. 1). Exhibit 29.

On August 3, 2007, Cillessen submitted a "Claim Notification" to the contracting officer "protesting [the contracting officer's] decision of July 30, 2007." This was docketed by the Government Accountability Office (GAO) as the *Matter of B & M Cillessen Construction Co.*, B-309965. Subsequently, on August 9, 2007, the GAO dismissed the matter because "it raises a matter of contract administration over which we do not exercise

jurisdiction." Exhibit 32.

Through its counsel, on August 29, 2007, Cillessen requested that Mr. Obershaw issue a contracting officer's final decision on the REA. Exhibit 33. Mr. Obershaw responded to the appellant's counsel on September 12, 2007:

> In your letter you have requested a contracting officer's final decision be issued. This will not be done at this time.
>
> When and if a formal, certified, sum-certain claim is file[d] with this agency and the Armed Forces Board of Contract Appeals [sic], or the U.S. Claims Court [sic][,] then such action [issuance of a final decision] will take place.

Exhibit 34.

Cillessen appealed to the Civilian Board of Contract Appeals (CBCA), where on October 4, 2007, the appeal was docketed as CBCA 931.

The only certification Cillessen made of its claim was in the form of a "Certification Affidavit" executed by Mr. William J. Cillessen and dated November 8, 2007, submitted as an attachment to the appellant's response to the motion. Response, Attachment A. Mr. Cillessen certified, *inter alia*, that as the president of Cillessen, he was authorized to certify the claim on behalf of Cillessen and that "the July 27, 2007 claim was made in good faith," "the supporting data and calculations are complete," and "this adjusted amount accurately reflects what is currently owed." *Id*. The certification affidavit also indicated that, due to a reduction in contract scope, the appellant had adjusted the amount sought from $131,481 to $125,210.43. *Id*.

Discussion

The CDA requires that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a) (2000). The CDA also requires in relevant part that:

> For claims of more than $100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

Id. § 605(c)(1). Within sixty days of receipt of a submitted certified claim over $100,000, a contracting officer must issue a decision, or notify the contractor of the time within which a decision will be issued. *Id*. § 605(c)(2) (2000).

This appeal presents an issue of lack of certification as opposed to a defective certification.[1] The respondent argues that the appeal should be dismissed for lack of jurisdiction because the appellant's purported claim is for an amount in excess of $100,000, but was not certified.

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

> [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 that 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, 1384 (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).

As this Board recently stated:

> Although a defective certification may be corrected, a failure to certify may not. There is no dispute that the contractor failed to certify its claim. Certification requirements concern the Board's subject matter jurisdiction and as such cannot be waived. That proposition is well settled.

K Satellite v. Department of Agriculture, CBCA 14, 07-1 BCA ¶ 33,547, at 166,154 (citing *Hemmer-IRS Limited Partnership v. General Services Administration*, GSBCA 16134, 04-1 BCA ¶ 32,509); *see also Hamza v. United States*, 31 Fed. Cl. 315, 323-24 (1994), *Thomas*

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[1] The CDA provides that a defective certification does not deprive a board of contract appeals of jurisdiction over a claim, but that the board must secure a correction prior to its decision on the contractor's appeal. 41 U.S.C. § 605(c)(6).

Creek Lumber & Log Co., IBCA 4020-1999, 00-2 BCA ¶ 31,077; *John E. Phillips*, ASBCA 49178, 96-1 BCA ¶ 28,160; *Eurostyle Inc.*, ASBCA 45934, 94-1 BCA ¶ 26,458 (1993); *Applied Science Associates, Inc.*, EBCA 9301146, 93-3 BCA ¶ 26,051. Moreover, the subsequent filing of a certification document has no legal bearing on the Board's jurisdiction over the subject appeal and cannot serve to cure our lack of jurisdiction. *Hemmer-IRS Limited Partnership*; *CDM International, Inc.*, ASBCA 52123, 99-2 BCA ¶ 30,467.

Decision

The respondent's motion to dismiss the appellant's appeal for lack of jurisdiction is hereby granted, and, accordingly, the subject appeal is **DISMISSED FOR LACK OF JURISDICTION**.

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PATRICIA J. SHERIDAN
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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JEROME M. DRUMMOND
Board Judge

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