UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: May 30, 2012

CBCA 2589

URS ENERGY & CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Daniel R. Frost, Claire Y. Dossier, and Shawn Rodda of Snell & Wilmer L.L.P., Denver, CO, counsel for Appellant.

Brady L. Jones, III, Sky M. Smith, and Kaniah Konkoly-Thege, Office of Legal Services, Environmental Management Consolidated Business Center, Department of Energy, Cincinnati, OH, counsel for Respondent.

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

SOMERS, Board Judge.

URS Energy & Construction, Inc. (URS) seeks full payment of an invoice in the amount of $1,093,750 for attorney fees. The Department of Energy (DOE) has moved to dismiss the appeal for lack of jurisdiction. For the reasons explained below, we grant the motion and dismiss the appeal.

Background

In February 1995, URS awarded a subcontract to Ground Improvement Techniques (GIT) to perform a task assignment under a contract issued by DOE to URS through DOE's Uranium Mill Tailings Remedial Action (UMTRA) Project Office. In September 1995, URS

terminated the subcontract with GIT for default.[1] DOE concurred with the termination and agreed to permit URS to subcontract for legal services for litigation arising from the termination. DOE initially agreed to the acquisition of legal services in an amount not to exceed $100,000. The parties entered into a litigation plan.

URS then filed a lawsuit for damages pursuant to the termination for default clause of URS's subcontract with GIT in the Colorado federal district court. GIT counter-claimed, alleging that URS had wrongfully terminated its subcontract and seeking compensation for contract work completed before the default termination date and for other costs. In 1996, a jury rendered its verdict in favor of GIT for wrongful termination, awarding GIT millions of dollars in damages.

URS appealed the decision to the United States Court of Appeals for the Tenth Circuit. The Court reversed and remanded the case on the issue of damages. A second jury returned a verdict of $15.6 million in favor of GIT.

Throughout the prior litigation, DOE paid invoices for legal fees resulting from the litigation. However, when URS requested approval under the litigation plan to appeal the second verdict to the Tenth Circuit, DOE denied approval. Nonetheless, URS filed an appeal and continued to incur attorney fees.

On May 27, 2011, URS submitted an invoice for attorney fees in the amount of $1,093,750 to the contracting officer. The cover letter submitted with the voucher included the following:

> I certify that this invoice is correct and in accordance with the terms of the contract and that the costs incurred herein have been incurred, represent the payments made by the Contractor except as otherwise authorized in the payments provision of the contract, and properly reflect the work performed.

The letter advised that payment for the voucher would be due in ten days.

---

[1] See *URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2260, 11-2 BCA ¶ 34,815, for details concerning the United States District Court litigation between URS and GIT, which resulted in the issuance of a surety bond (also known as a supersedeas bond).

When URS did not receive a response to the letter or payment of the voucher, URS filed an appeal with this Board on October 13, 2011.

DOE has moved to dismiss the appeal for lack of jurisdiction. Originally, DOE asserted that URS had failed to certify its claim. URS responded, pointing out that the voucher did include a certification. Nonetheless, as a protective measure, URS submitted a revised certification.

In DOE's reply in support of its motion to dismiss, DOE amended its argument, arguing that the voucher could not be construed as a claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (West Supp. 2011), because the "claim" was not in dispute when URS submitted it to the contracting officer. URS disagrees, asserting that URS's May 27, 2011, invoice qualified as a "claim" under *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995).

Discussion

Under the CDA, contractors submitting monetary claims in excess of $100,000 are required to 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 Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.

41 U.S.C. § 7103(b)(1). The statute also provides:

> A contracting officer is not obligated to render a final decision on a claim of more than $100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification is found to be defective. A defect in the certification of a claim does not deprive a court or an agency board [of contract appeals] of jurisdiction over the claim. Prior to the entry of 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).

Respondent has moved to dismiss for lack of jurisdiction, arguing that URS failed to certify its claim. In response URS asserts that, not only did it certify its claim, but, assuming for the sake of argument that the certification is defective, the defect can be corrected. Thus, we must decide whether the purported certification is correctable under CDA § 7103(b)(3).

URS's purported certification fails to include certification language specified under 41 U.S.C. § 7103(b)(1). Thus, according to Congress, 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.

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. H.R. Rep. No. 102-1006 at 28 (1992), *reprinted in* 1992 U.S. Code Cong. & Admin. News 3921, 3937; *see Walashek Industrial & Marine, Inc.*, ASBCA 52166, 00-1 BCA ¶ 30,728; *Keydata Systems, Inc. v. Department of Treasury*, GSBCA 14281-TD, 97-2 BCA ¶ 29,330.

Consistent with such Congressional guidance, tribunals have examined various certifications, and have held that certification language can be intentionally or negligently defective. *See Walashek*, 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); *Keydata*, 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 for CDA requirement and not correctable); *Sam Gray Enterprises, Inc. v. United States*, 32 Fed. Cl. 526, 529 (1995) (statement that included "I acted in good faith" did not remotely resemble required CDA certification so as to permit correction).

Here, URS's certification wholly omitted the first prong of the required certification, "the claim is made in good faith." As to the second prong, "the supporting data are accurate and complete to the best of my knowledge and belief," URS says only that "this invoice is correct and in accordance with the terms of the contract." The third prong, "that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable," is not present – instead, URS states that "the costs incurred herein have been incurred, represent payments made by the Contractor except as otherwise authorized in the payments provision of the contract, and properly reflect the work performed." As with the first prong, the fourth prong, "I am duly authorized to certify the claim on behalf of the contractor," is absent.

URS was well aware of the correct language to be used to certify a claim under the CDA. In an earlier-filed case currently pending before the Board, CBCA 2260, URS submitted an invoice to the contracting officer and the contracting officer declined payment. On January 22, 2010 (more than one year before URS submitted the invoice at issue here) URS resubmitted that invoice as a certified claim, using the language required by the CDA. We find that URS's failure to submit a certification that complies with the requirements of the CDA constitutes an intentional or negligent disregard of the CDA's requirement, not an innocent mistake or inadvertence. Because URS has not made the certification required by the Act, or even a certification with a curable technical defect, we must grant respondent's motion to dismiss for lack of jurisdiction.

Because we find that URS has failed to submit a curable or correctable certification, we need not decide, and, consequently do not opine, whether URS's submission of the invoice meets the requirements of a claim under *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1576 (1995) (en banc).

Decision

Respondent's motion to dismiss is granted. This matter is **DISMISSED FOR LACK OF JURISDICTION**.

_____

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

PATRICIA J. SHERIDAN
Board Judge