



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: November 3, 2010

CBCA 2045

WHITERIVER CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Karen A. Palecek and Sharon Shively of Palecek & Palecek, PLLC, Scottsdale, AZ, counsel for Appellant.

Sarah T. Zaffina and James L. Weiner, Office of the Solicitor, Department of the Interior, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DRUMMOND**.

HYATT, Board Judge.

Respondent, the Department of the Interior (DOI), has moved to dismiss this appeal for lack of subject matter jurisdiction. The basis for respondent's motion is that appellant's claim was not certified. Appellant, Whiteriver Construction, Inc. (Whiteriver), agrees that it did not certify its claim and does not contest the motion. Whiteriver further states that it intends to cure this jurisdictional defect and requests that the dismissal be without prejudice to its ability to reinstate within 180 days.

Background

DOI awarded contract number CMN00070001, for highway construction at the Navajo Indian Reservation in White Cone, Arizona. The contract was for construction services, specifically grading, draining, and paving 1.43 kilometers of roadway. DOI conducted a final inspection of the construction work on October 23, 2008. The work was deemed to have been satisfactorily completed and final acceptance of all work occurred on December 3, 2008.

The contract included the Disputes clause set forth in Federal Acquisition Regulation (FAR) clause 52.233-1, 48 CFR 52.233-1 (2007).

On January 19, 2009, Whiteriver submitted documents to support additional costs it believed the Government owed it under the contract. The agency performed an audit and concluded that an “as-built” modification should be issued. On December 7, 2009, the contracting officer informed Whiteriver that DOI would make a final payment of \$99,874.06 for the work performed on the contract. On December 11, 2009, Whiteriver wrote a letter to DOI seeking further explanation about the audit and expressing the hope that once the parties could agree on a methodology for calculating the final payment they could negotiate a mutually acceptable final payment amount. This letter did not state a sum certain that Whiteriver was seeking, nor did it include a certification of any claim.

The contracting officer responded to Whiteriver’s December 11, 2009, letter in a letter dated March 18, 2010, in which the audit findings were detailed and an explanation was provided for how the contracting officer determined the final payment amount. The contracting officer adjusted the amount to be paid, increasing it to \$107,478.62, and then advised that this was the “final Contracting Officer’s decision.”

On June 15, 2010, Whiteriver appealed the contracting officer’s decision to the Board, claiming entitlement to the amount of \$342,483.

Discussion

The Contract Disputes Act (CDA) requires that all 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) (2006). The CDA also provides in pertinent part:

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). For claims in excess of \$100,000, then, proper certification of the claim is a jurisdictional prerequisite to the tribunal's exercise of jurisdiction. *E.g.*, *Newport News Shipbuilding and Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1552-53 (Fed. Cir. 1993); *Kenan Construction Co. v. Department of State*, CBCA 807, 08-1 BCA ¶ 33,797; *Hemmer-IRS Limited Partnership v. General Services Administration*, GSBCA 16134, 04-1 BCA ¶ 32,509.

Both parties correctly recognize that the events leading to the filing of the appeal do not suffice to vest the Board with jurisdiction. The correspondence submitted by Whiteriver was more in the nature of an attempt to negotiate with respect to the amounts due than a request for a contracting officer's decision. It is far from clear that the contractor was asserting a specific claim or seeking a contracting officer's decision at that juncture. The contracting officer's attempt to issue a "final decision" cannot confer jurisdiction on the Board. As the Court of Appeals for the Federal Circuit has stated: "Unless the contractor has submitted a properly certified claim to the contracting officer, there is no valid claim, the denial of which is an appealable decision of the contracting officer." *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989).

Because we have no jurisdiction over this appeal, Whiteriver's right to pursue its claim remains in force so long as it follows the prescribed rules for invoking our jurisdiction. This case is similar to the appeal addressed in *Pixl, Inc. v. Department of the Treasury*, CBCA 1448 (Mar. 5, 2009), in which both parties recognized the Board had no jurisdiction over an uncertified claim and agreed to return to the drawing board with the submission of a certified claim. Since the contracting officer had no authority to waive the jurisdictional requirement for the submission of a certified claim, and the decision issued was in essence a nullity, Whiteriver is not precluded from submitting a properly certified claim for decision and appealing any denial of that claim. *Tarheel Specialties, Inc. v. Department of Homeland Security*, CBCA 1159, 09-1 BCA ¶ 34,120; *K Satellite v. Department of Agriculture*, CBCA 14, 07-1 BCA ¶ 33,547.

Decision

In the absence of a properly certified claim, the Board lacks jurisdiction to entertain this appeal. Respondent's motion is granted. The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

CATHERINE B. HYATT
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JEROME M. DRUMMOND
Board Judge