UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED:
January 9, 2014

CBCA 3407

GROUP HEALTH INCORPORATED ON BEHALF OF
DOUGLAS CONSULTING & COMPUTER SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Karen L. Manos of Gibson, Dunn & Crutcher, LLP, Washington, DC; and Daniel P. Graham of Wiley Rein LLP, Washington, DC, counsel for Appellant.

Jeffri Pierre and Anthony Marrone, Office of the General Counsel, Department of Health and Human Services, Baltimore, MD, counsel for Respondent.

Before Board Judges **SOMERS**, **GOODMAN**, and **STEEL**.

GOODMAN, Board Judge.

This appeal was filed by appellant, Group Health Incorporated (GHI), on behalf of its subcontractor, Douglas Consulting & Computer Services, Inc. (DCCS), from a denial by respondent's contracting officer of a claim arising from termination of GHI's contract with the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS or respondent) and resulting termination of the subcontract between GHI and DCCS.

Respondent has filed a motion to dismiss the appeal for lack of subject matter jurisdiction. As discussed herein, we deny the motion.

Background

In 1994, DCCS developed the paper Initial Enrollment Questionnaire (IEQ) system as a prime contractor to respondent's predecessor, the Health Care Financing Administration. In 1999, respondent bundled the IEQ services into a much larger coordination of benefits contract, contract no. HHSM-500-00-00001 (the prime contract). The prime contract, a cost reimbursement contract, was awarded to GHI as the prime contractor. On November 1, 1999, GHI entered into subcontract no. GHI-DCCS-500-00-0001/COB (the subcontract) with DCCS, under which DCCS performed the IEQ portion of the prime contract.

The subcontract incorporates the standard Federal Acquisition Regulation (FAR) clauses for a cost reimbursement contract, including FAR 52.2152, Audit and Records - Negotiation (AUG 1996); FAR 52.216-7, Allowable Cost and Payment (APR 1998); and FAR 52.249-6, Termination (Cost-Reimbursement) (SEP 1996).

On December 14, 2012, GHI submitted to respondent's contracting officer a claim pursuant to the Contract Disputes Act, 41 U.S.C. §§ 7101-7109, in the amount of $815,128 for costs incurred by DCCS related to GHI's termination of the subcontract for GHI's convenience, which termination followed respondent's partial termination of the prime contract for respondent's convenience.

GHI's certification read as follows:

> I certify that this claim is made in good faith by GHI; 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 GM.
>
> This claim is being filed on behalf of GHI's subcontractor, DCCS, and inasmuch as DCCS does not have privity with the Government, GUI 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.

> See *Transamerica Ins[urance] Corp. v. United States*, 973 F.2d 1572, 1575 (Fed. Cir. 1992) (holding that substantially similar language complies with the certification requirements of the Contract Disputes Act, 41 U.S.C. § 7103(b), formerly codified at 41 U.S.C. § 605(c)(1)).

Appeal File, Exhibit 160 at 2.

By letter dated March 12, 2013, the contracting issued a decision denying the certified claim in its entirety. In that decision, the contracting officer asserted that GHI's certification of the claim was defective, but also addressed the claim on the merits. On June 7, 2013, GHI timely filed a notice of appeal.

Discussion

A contractor's submission of a proposal for a termination for convenience settlement to the contracting officer as a claim pursuant to the Contract Disputes Act, and the contractor's subsequent appeal of the contracting officer's decision denying the claim, is sufficient to confer jurisdiction on this Board. *ePlus Technology, Inc. v. Federal Communications Commission*, CBCA 2573, 12-2 BCA ¶ 35,114. In the instant appeal, respondent has filed a motion to dismiss for lack of jurisdiction on various grounds.

Certification of the Claim

As the basis of its motion to dismiss for lack of jurisdiction, respondent states:

> Appellant is sponsoring a claim for a subcontractor without privity of contract with CMS. In order to proceed before the Board, the Appellant must submit a certification on behalf of the subcontractor and that certification must be made in good faith. For the reasons set forth [in this motion], the certification made by the Appellant on behalf of the subcontractor is defective and presents a jurisdictional bar.

Respondent does not dispute that GHI's certification complies with statutes and regulation. Rather, respondent raises issues as to the merits of the underlying claim, contending that factual assertions in the claim are "at odds" with the certification, that GHI failed to make "separate analysis" of DCCS's claim, and that there are apparent "disparities" between the positions taken by GHI and DCCS as to the allowability of various costs.

Appellant counters by asserting that certification language substantially similar to that which it used has been held to be compliant with the CDA certification requirements.

Appellant prevails on this issue. As appellant noted, it used certification language substantially similar to that used by the prime contractor to certify its subcontractor's claim in *Transamerica*. The Court upheld that language as CDA compliant. In so doing, the Court referred to its prior decision in *United States v. Turner Construction Co.*, 827 F.2d 1554, 1561-62 (Fed. Cir. 1987).

In *Turner*, the Court also held that the Government's allegations questioning the merits of the underlying claim cannot be used to invalidate a compliant certification. Rather, these allegations must be resolved during the appeal process. As the Court stated in *Turner*:

> [B]y allowing the contracting officer the discretion to look beyond certification language which complies with the statute would necessarily require an examination of the underlying basis and merits of the claim in order to determine the validity of the certification. Since a proper certification is a precursor to jurisdiction under the CDA, invalidating certifications as a result of such examinations would prevent the contracting officer, the board, or this court from employing the provisions of the CDA on any aspect of the claim. This is contrary to the overall goal of Congress that the CDA be used to resolve all disputes and claims arising from contracts with government agencies and would also render section 604 virtually useless as a means to prevent unwarranted claims. This is not what Congress intended. *See Colautti v. Franklin*, 439 U.S. 379, 392, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979) (a statute should be interpreted so as not to render one part inoperative); *Horner v. Merit Systems Protection Board*, 815 F.2d 668, 674 (Fed. Cir. 1987). While certification is indeed "one of the most significant provisions of the CDA," *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1384 (Fed. Cir.), *cert. denied*, 464 U.S. 826, 104 S. Ct. 97, 78 L. Ed. 2d 103 (1983), it is only one method of preventing unwarranted claims under the CDA; it was not designed to be nor is it the exclusive method.

Turner, 827 F.2d at 1561-62.

Thus, while respondent may have concerns about the merits of the underlying claim, GHI's certification is compliant with the CDA and its appeal of the certified claim confers jurisdiction on this Board. Concerns as to the merits of the claim do not divest the Board of jurisdiction and must be resolved during the appeal process.

The Severin Doctrine

While respondent prefaced its motion as based upon defective certification, it also asserts the *Severin* doctrine as another basis for its motion. *Severin v. United States*, 99 Ct. Cl. 435 (1943), held that a subcontractor's claim may only be recognized in the disputes process if the prime contractor is obligated to pay the subcontractor. Respondent asserts that here the Government is not liable because GHI is not contractually liable to DCCS for the costs claimed by DCCS. In asserting this defense as a bar to recovery, and referring to matters outside the pleadings, respondent's motion on this issue is treated as a motion for summary relief. *See, eg., Acquest Government Holdings v. General Services Administration*, CBCA 413, 08-1 BCA ¶ 33,720 (2007).

Respondent supports its contention that GHI is not liable to its subcontractor by examining the costs claimed by DSSC. Respondent asserts that many of the costs claimed were incurred after the subcontract was terminated, are therefore "dubious" and not reimbursable as termination costs. Thus respondent concludes that "GHI has no responsibility to pay DCCS for the majority of the costs incurred subsequent to termination.

Appellant responds first with a contractual defense, noting in its response to respondent's motion that in *Acquest*, this Board held:

> The post-*Severin* direction has been for the doctrine to be construed narrowly. *See United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1552 n.8 (Fed. Cir. 1983). In its present state, the doctrine applies only where there is an iron-clad release or contract provision immunizing the prime contractor completely from any liability to the subcontractor. *J.L. Simmons Co. v. United States*, 304 F.2d 886, (Ct. Cl. 1962); *Cross Construction Co.v. United States*, 225 Ct. Cl. 616 (1980); *George Hyman Construction Co. v. United States*, 30 Fed. Cl. 170 (1993), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994) (table). Also, the burden is on the Government to establish the existence of an iron-clad release, sufficient to trigger application of the Severin doctrine. *Metric Constructors, Inc. v. United States*, 314 F.3d 578 (Fed. Cir. 2002).

08-1 BCA at 166,969.

Appellant asserts that the subcontract does not contain contract language immunizing GHI from liability. Rather, the subcontract contains an incorporated termination for convenience clause that requires the prime contractor to reimburse certain termination costs. Additionally, appellant emphasizes that respondent admits that some of the costs claimed may be reimbursable, as respondent challenges the "majority" but not the totality of costs

claimed. Appellant also notes that the incurrence of costs after termination may not necessarily bar recovery of such costs as the termination for convenience clause provides for continuance of certain costs after termination. Finally, appellant argues that resolution of the termination for convenience claim cannot occur until respondent establishes final annual indirect cost rates for various years covered by the prime contract and subcontract.

The positions of the parties raise issues of material fact that preclude summary relief on the issue of the *Severin* Doctrine.

Decision

Respondent's motion to dismiss for lack of jurisdiction is **DENIED.**

ALLAN H. GOODMAN
Board Judge

We concur:

JERI K. SOMERS
Board Judge

CANDIDA S. STEEL
Board Judge