



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: August 12, 2022

CBCA 7447

GULF TECH CONSTRUCTION LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

James E. Krause of James E. Krause, P.A., Jacksonville, FL, counsel for Appellant.

Kathleen Ramos, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Board Judges **LESTER**, **RUSSELL**, and **SHERIDAN**.

LESTER, Board Judge.

Appellant, Gulf Tech Construction LLC (Gulf Tech), has filed a motion asking us to stay proceedings in this appeal to give it time to submit a certified claim seeking monetary relief to the contracting officer and to allow the contracting officer to issue a decision on it. Underlying the current appeal is an uncertified (and unsigned) request for equitable adjustment (REA) that Gulf Tech submitted for negotiation purposes. Gulf Tech filed this appeal after the contracting officer treated its REA as a claim and issued a final decision on it that notified Gulf Tech of its appeal rights. Gulf Tech alleges in its motion to stay that issuance of a final decision “was improper as Gulf Tech did not submit a Claim to the government.”

We agree with Gulf Tech that, because there is no contractor claim underlying this appeal that meets the requirements of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), the Board lacks jurisdiction to entertain the appeal. Rather than stay proceedings, we dismiss the appeal for lack of jurisdiction.

Background

The Department of Veterans Affairs (VA) awarded Gulf Tech a contract for construction work to expand a parking garage at the Durham VA Medical Center in Durham, North Carolina. Gulf Tech alleges that, during contract performance, several delays and disputes arose that were the subject of discussions between the parties.

On November 16, 2021, allegedly at the contracting officer's request, Gulf Tech submitted an REA with, according to Gulf Tech, "the intent and expectation to resolve matters with the [contracting officer] at the administrative level for solutions to several onsite delays and other problems." In the REA, Gulf Tech asked the contracting officer for "review and approval of the attached cost for REA #1" and represented that "the attached reflects re[asonable] costs that [Gulf Tech] has [incurred] based upon additional time onsite." Gulf Tech requested compensation of \$234,673.41¹ but indicated that some "shipping and material increases in prices are still coming in." Gulf Tech did not submit with its REA any written certification in accordance with the requirements of the CDA. In fact, the REA was not even signed. In it, Gulf Tech did not explicitly request a final decision from the contracting officer, which Gulf Tech tells us in a declaration from its corporate president was intentional. Gulf Tech states in its motion that it "did not submit the REA with the anticipation of having to resort to litigation or for the purpose of going, or with the intent to go, to the Board with an Appeal of a [contracting officer's final decision]."

On April 1, 2022, the VA contracting officer issued what he called "the final decision of the Contracting Officer" on Gulf Tech's submission. In it, he denied Gulf Tech's request for payment of \$234,673.41 but stated that "his review of the circumstances justifies a potential settlement in the amount of \$46,401.66." He then provided Gulf Tech with a notice

¹ Gulf Tech did not identify any dollar amount for which it was seeking compensation in the narrative portion of its REA. A chart accompanying the REA, however, identified a cost estimate of \$234,673.41 for which Gulf Tech wanted payment. It is not completely clear to the Board whether that \$234,673.41 figure encompassed or, instead, was supplemented by additional dollar figures identified in other attachments to the REA. In his decision on the REA, the contracting officer assumed that Gulf Tech's total request was for \$234,673.41. For purposes of this decision, we will similarly assume, without deciding, that Gulf Tech's payment request in the REA was stated in a sum certain.

of appeal rights pursuant to Federal Acquisition Regulation (FAR) 33.211(a)(4)(v) (48 CFR 33.211(a)(4)(v) (2021)) and indicated that, if Gulf Tech wanted to challenge the final decision, it needed to appeal to the Board within ninety days or file suit in the Court of Federal Claims within twelve months of receipt of the decision.

Gulf Tech timely filed a notice of appeal with the Board on June 30, 2022. On August 8, 2022, it filed its motion seeking an extended stay of proceedings (accompanied by its corporate president's declaration describing his intent when submitting the REA) and indicating that it intends to submit a certified claim to the VA contracting officer within the next ninety days. It represented that, before it has to pursue discovery, it would like the VA contracting officer to issue a final decision on that certified claim.

Discussion

The Board's jurisdiction to entertain contract disputes arises from, and is defined by, the CDA. *Rashid El Malik v. Department of Veterans Affairs*, CBCA 6600, 20-1 BCA ¶ 37,536, at 182,275. The CDA "requires all Government contractors seeking redress to submit and certify a written claim to the contracting officer and request a final decision." *J.S. Alberici Construction Co.*, GSBCA 10482, 91-3 BCA ¶ 24,203, at 121,062; see 41 U.S.C. § 7103(a)(1), (2). If the contractor is seeking monetary relief, the claim must identify the amount that the contractor seeks in a sum certain, *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,975 n.9; FAR 2.101, although it is sufficient if the total amount is unstated but "readily calculable by simple arithmetic from the attachments" to the claim. *PHI Applied Physical Sciences, Inc.*, ASBCA 56581, et al., 13 BCA ¶ 35,308, at 173,337. Neither the contracting officer nor the Board can waive these requirements. *J.S. Alberici*, 91-3 BCA at 121,062. The Board is able to exercise "jurisdiction over an appeal only after [the] 'claim' is submitted to a contracting officer and the contracting officer either renders a final decision on the claim or the failure to issue a decision is deemed to be a denial of the claim." *Atlas Elevator Co. v. General Services Administration*, GSBCA 11655, 93-1 BCA ¶ 25,216, at 125,617 (1992).

It is clear that Gulf Tech did not submit a CDA claim to the contracting officer for at least the following two reasons:²

First, Gulf Tech does not request in the REA that the contracting officer issue a final decision. We recognize that the Court of Appeals for the Federal Circuit has held that such a request may be implicit, rather than explicitly stated, *Transamerica Insurance Corp. v.*

² Because we find that the REA did not constitute a claim for the two reasons discussed below, we need not consider whether the REA requested payment in a sum certain.

United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992), and that the contractor’s subjective intent when submitting the monetary request is irrelevant to whether a final decision was requested. Instead, “[t]he determination focuses on whether, objectively, the document’s content and the context surrounding the document’s submission put the contracting officer on notice that the document is a claim requesting a final decision.” *Zafer Construction Co. v. United States*, No. 2021-1547, 2022 WL 2793596, at *3 (Fed. Cir. July 18, 2022). Because the contractor’s subjective intent is not relevant in evaluating whether a monetary request implicitly sought a contracting officer’s final decision, the declaration from Gulf Tech’s president indicating that he did not intend to seek a final decision when submitting the REA is not helpful to our analysis (except to the extent, perhaps, that it explains the factual circumstances surrounding the REA’s submission). To decide intent, we look to the language of the REA and the context surrounding the REA’s submission. *Id.*

Reviewing the language that Gulf Tech used in the REA and the circumstances surrounding its submission, we can find no request for a final decision in it, either explicit or implicit. The attachments to which the REA refers identify the dollar amount at issue as a “Construction Cost Estimate” for work not yet performed, and Gulf Tech stated in the text portion of the REA that some shipping and material price increases were “still coming in.” In his declaration, Gulf Tech’s president indicates that this REA was submitted at the contracting officer’s request as part of continuing discussions about construction cost increases that Gulf Tech had experienced. Reviewing the REA from an objective standpoint and considering the context within which it was submitted, we see no request for a final decision in the document.

Second, the REA is not certified. “If [a] claim involves a request for more than \$100,000, it must be certified.” *NEDA of Puerto Rico, Inc. v. General Services Administration*, CBCA 6793, 20-1 BCA ¶ 37,611, at 182,563 (citing *DAI Global, LLC v. Administrator of the United States Agency for International Development*, 945 F.3d 1196, 1198 (Fed. Cir. 2019)). Although “[a] defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim,” *DAI Global*, 945 F.3d at 1198 (quoting 41 U.S.C. § 7103(b)(3)), “[a] complete failure to provide a certification at all may not be deemed a defective certification’ and cannot be remedied for purposes of establishing jurisdiction.” *NEDA of Puerto Rico*, 20-1 BCA at 182,563 (quoting *Medina Construction, Ltd. v. United States*, 43 Fed. Cl. 537, 547 (1999)). Because Gulf Tech provided no certification with its REA and sought payment of more than \$100,000, the REA could not constitute a CDA claim.

The fact that the contracting officer issued what he called a “final decision” in response to Gulf Tech’s REA does not create jurisdiction. The Court of Claims in *Paragon Energy Corp. v. United States*, 645 F.2d 966 (Ct. Cl. 1981), recognized that the contracting officer’s final decision is “the linchpin for appealing claims under the [CDA].” *Id.* at 967.

Nevertheless, the CDA “denies the contracting officer the authority to issue a decision” on a contractor’s request for monetary compensation “until a contract ‘claim’ in writing has been properly submitted to him for a decision.” *Id.* at 971. Until the contractor submits a proper claim under the CDA, “no ‘decision’ is possible.” *Id.*; see *Straga v. United States*, 8 Cl. Ct. 61, 68 (1985) (Because “there was no claim upon which the contracting officer could have based his decision, the contracting officer was without authority to render his ‘final decision’ and this court is without jurisdiction to hear plaintiff’s claim.”); *Atlas Elevator*, 93-1 BCA at 125,617 (“If no claim was made, there exists no basis for jurisdiction at the Board, even if the contracting officer mistakenly issued a ‘final decision.’”); *Checker Moving*, ASBCA 32654, 87-1 BCA ¶ 19,357, at 97,905 (1986) (“If a contractor’s claim is [required], the contracting officer cannot generate a final decision on his own motion, i.e. without a submitted claim.”). As a result, a contracting officer’s mere labeling of a letter denying monetary relief to a contractor as a “final decision” does not create jurisdiction at the Board if that “decision” is not based upon a contractor “claim.” Here, because Gulf Tech has yet to submit a “claim” seeking the monetary relief in question, any “final decision” by the contracting officer is ineffective to provide us with jurisdiction to entertain this appeal.

“[W]hen jurisdiction is lacking, ‘the only function remaining to the [tribunal] is that of announcing the fact and dismissing the cause.’” *4K Global-ACC Joint Venture, LLC v. Department of Labor*, CBCA 7392, slip op. at 9 (July 29, 2022) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). We do not possess jurisdiction to entertain this appeal. Because jurisdiction is established at the time that a notice of appeal is filed, *id.* (citing *Pros Cleaners v. Department of Homeland Security*, CBCA 5871, 17-1 BCA ¶ 36,904, at 179,807), Gulf Tech’s future submission of a certified claim and the VA contracting officer’s future decision on that claim will not somehow retroactively remedy the existing jurisdictional defect. Instead, if Gulf Tech in the future submits a certified claim, Gulf Tech will have to file a new notice of appeal if it wants to challenge any subsequently-issued final decision. *Breiner Construction Co.*, VABCA 5461, 98-1 BCA ¶ 29,492, at 146,343 (1997). The existence of *this* appeal, were we to stay it, would not somehow eliminate Gulf Tech’s need to appeal the new decision, leaving no purpose to a stay here. In such circumstances, we decline Gulf Tech’s request that we stay proceedings in this appeal until it establishes a jurisdictional basis for a new appeal.

Decision

For the foregoing reasons, this appeal is **DISMISSED FOR LACK OF JURISDICTION**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge