



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED FOR LACK OF JURISDICTION: October 16, 2024

CBCA 8160

THE POVOLNY GROUP, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

John M. Manfredonia of Manfredonia Law Offices, LLC, Cresskill, NJ, counsel for Appellant.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA, counsel for Respondent.

Before Judges **LESTER**, **GOODMAN**, and **SHERIDAN**.

**SHERIDAN**, Board Judge.

The parties filed a motion to dismiss this appeal for lack of jurisdiction or, in the alternative, for failure to state a claim. Appellant, The Povolny Group, Inc. (Povolny), asserts that it did not submit an initial claim to the contracting officer under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), but rather submitted a request for information (RFI). The absence of a claim rendered the contracting officer’s final decision invalid, and, thus, the Board lacks the jurisdiction to further process this appeal. For the reasons outlined herein, we dismiss this appeal for lack of jurisdiction.

### Background

Respondent, Department of Veterans Affairs (VA), awarded Povolny a contract to renovate the atrium of the Minneapolis Veterans Administration Medical Center. The Government's specifications required 6" metal studs on the sides of duct chases so the chases could fit between the windows. Povolny submitted RFI 059 to request that the Government approve 3-5/8" studs for the project, stating that the Government's standards did not take into account the 4" angles for structural support or horizontal soffit profiles. The Government did not approve Povolny's request.

VA alleges that Povolny completed the relevant work by deviating from the specifications without prior approval. Upon completion, Povolny requested that the Government accept the 3-5/8" studs it used to complete the project. Povolny's second request to deviate was not approved, and the Government also determined that the structural steel for the duct chases was incorrectly fabricated. According to VA, this deficiency did not allow 6" studs to be used as designed on the sides of the duct chases or allow the duct chases to fit between the windows.

The contracting officer responded to the request for deviation by issuing what she considered a final decision on May 8, 2024. The final decision included the following "options for resolution" to rework the metal framing and achieve compliance: (1) remove the face of the drywall and provide 6" metal studs and install new drywall, or (2) attach 3-5/8" metal studs to the face of the finished drywall, which would reinforce the existing metal studs, and refinish with a layer of drywall.

Appellant timely appealed the decision to the Board on July 26, 2024, as a "protective appeal" and requested, in its notice of appeal, that "this appeal be dismissed for lack of jurisdiction" because the contracting officer's "final decision is invalid because it does not respond to a CDA claim." In its notice of appeal, Povolny explained:

By final decision, the contracting officer reiterated the VA's position regarding the steel framing for the duct chase and the two ways to fix it. [Povolny] has agreed to perform this rework with reservation of rights to file a CDA claim. [Povolny] has yet to file a claim.

Since [Povolny] has not submitted a CDA claim, the contracting officer's final decision is procedurally invalid. Although [Povolny] asked the Contracting Officer to retract her final decision for this reason, she has elected not to do so. Hence this protective appeal.

A review of the notice of appeal, which indicates that Povolny did not submit a claim to the contracting officer, prompted the Board to hold a teleconference with the parties to discuss whether a joint motion to dismiss for lack of jurisdiction and/or a joint motion to dismiss for failure to state a claim would be the appropriate path forward. During the call, the parties agreed that the contracting officer's final decision was invalid because it is not based on a claim, and they agreed to submit a motion to dismiss this appeal.

### Discussion

The Board derives its jurisdiction to decide contract disputes from the CDA. When a contractor is seeking the payment of money, the CDA requires both a claim from the contractor and a contracting officer's decision on the claim prior to an appeal to the Board. 41 U.S.C. §§ 7103(a)(1), 7104(a).

The issue before the Board is whether it has jurisdiction to hear this appeal, as it appears that Povolny did not submit a claim to the contracting officer. The CDA provides that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1). A contractor may appeal a contracting officer's decision or appeal the deemed denial of a claim when the contracting officer fails to issue a timely decision. *Id.* §§ 7103(f)(5), 7104(a). The Federal Acquisition Regulation defines a claim as follows:

Claim means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . . A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

48 CFR 2.101(b)(2) (2023).

As a contractor's claim submission is a prerequisite for a contracting officer's final decision, 41 U.S.C. § 7103(a), 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). 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.” *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981). Because “no claim was made, there exists no basis for jurisdiction at the Board, even [though] the contracting officer mistakenly issued a ‘final decision.’” *Atlas Elevator*, 93-1 BCA at 125,617.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

*Patricia J. Sheridan*

PATRICIA J. SHERIDAN

Board Judge

We concur:

*Harold D. Lester, Jr.*

HAROLD D. LESTER, JR.

Board Judge

*Allan H. Goodman*

ALLAN H. GOODMAN

Board Judge