



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

---

DISMISSED IN PART FOR LACK  
OF JURISDICTION: May 8, 2025

CBCA 8301

TOP LEVEL CONSTRUCTION COMPANY,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Khaybar Ziarmal, President of Top Level Construction Company, Kabul, Afghanistan,  
appearing for Appellant.

Alexandra N. Wilson, Office of the Legal Adviser, Buildings and Acquisitions,  
Department of State, Washington, DC, counsel for Respondent.

Before Judges **LESTER, O'ROURKE**, and **KANG**.

**KANG**, Board Judge.

Appellant, Top Level Construction Company (Top Level), seeks payment in connection with two purchase orders (POs) awarded by respondent, Department of State (DOS), for performance in Afghanistan. Respondent seeks dismissal for lack of jurisdiction of the portions of this appeal addressing costs under one of the POs at issue here, arguing that the appeal of the contracting officer's final decision related to that PO was not timely filed. Nevertheless, this appeal involves four separate claims (three under the first PO and one under the second) that appellant submitted to the contracting officer, only one of which was addressed in the contracting officer's decision. Because the appeal of that decision was not timely filed, the Board lacks jurisdiction to consider the claim that the contracting officer's

decision resolves and dismisses the portion of the appeal challenging the decision on that claim. Since this appeal concerns three additional distinct claims, none of which has been the subject of a contracting officer's decision and may be viewed as "deemed denied," the Board has jurisdiction over the appeal with regard to those three claims.

Respondent also asks us to dismiss one of the remaining three claims for lack of jurisdiction because appellant, through it, seeks payment of more than \$100,000 but effectively did not certify that claim, as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018). The claim at issue was accompanied by a defective certification, which appellant has now corrected. *See* 41 U.S.C. § 7103(b)(3). Respondent has identified no other basis for dismissal of that claim.

### Background

In 2021, respondent awarded appellant purchase order no. 19AF2021P0382 (PO 0382) for removal of an existing gate and installation of an automated gate at Camp Alvarado in Kabul, Afghanistan. Notice of Appeal at 23-24.<sup>1</sup> Also in 2021, respondent awarded appellant purchase order no. 19AF2021P0423 (PO 0423) for delivery and installation of concrete at Camp Alvarado. *Id.* at 25-26.

Appellant contends that the "changeable situation in Afghanistan" in August 2021 gave rise to claims under the contracts.<sup>2</sup> *See* Notice of Appeal at 1. Appellant requested payment, in a series of emails and invoices, of the following amounts: (1) the full value of PO 0382, that is, the \$53,837.75 difference between the award value of \$89,928.75 and the amount of \$36,091 approved by respondent for partial performance of the PO; (2) \$17,986 for performance bank guarantees for PO 0382 that appellant states were not returned by DOS, thereby precluding recovery by appellant; (3) \$63,330 for vehicles, equipment, and tools left at the work site for PO 0382; and (4) \$114,900 for vehicles, equipment, and tools left at the work site for PO 0423. *Id.* at 1-2, 7-18; *see* Appeal File, Exhibit 47 at 175-93.<sup>3</sup>

On August 15, 2024, the contracting officer issued a final decision which addressed appellant's request regarding payment of the full value under PO 0382, as follows:

---

<sup>1</sup> Citations are to the portable document format (PDF) pages in the notice of appeal.

<sup>2</sup> Although appellant does not explain the circumstances in detail, we presume they concern the withdrawal of United States forces from Afghanistan in 2021.

<sup>3</sup> Citations to documents other than the notice of appeal, including exhibits, are in the appeal file.

We have worked with our legal department on your invoice concerning PO # 19AF2021P0382. For this PO, your firm submitted a bill for \$89,928.75 but the U.S. government only approved a partial payment for \$36,091.08 based on the work your firm completed. Therefore, please send us an invoice for this amount (\$36,091.08).

If you disagree with this determination, you may appeal the decision following the procedures outlined below. However, payment will be made to your company, at this time, only in the amount of US\$36,091.08 for the work completed.

The Procurement Team previously communicated this decision to you in October 2022 . . . .

This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. . . . Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims . . . within 12 months of the date you receive this decision.

Exhibit 47 at 174.

On December 23, 2024, Top Level filed its notice of appeal with the Board. The Board granted respondent's request to file a motion to dismiss the appeal as untimely in lieu of its answer pursuant to Board Rule 6(d) (48 CFR 6101.6(d) (2024)). Although respondent originally sought to dismiss the appeal in its entirety, arguing that the claim relating to PO 0423 was addressed by the contracting officer's decision and was therefore not timely filed, respondent subsequently withdrew this argument. *See* Respondent's Response to Order to Show Cause at 4 (Apr. 3, 2025). Nevertheless, respondent argued that the monies sought for payment under PO 0382 are all related and should be viewed as a single claim. *Id.* at 2-3. In addition, in responding to a show cause order that the Board issued on March 11, 2025, respondent argued that the "certification" that Top Level provided to the contracting officer when it submitted PO 0423, a claim of more than \$100,000, was so deficient that it effectively amounts to no certification at all and that, as a result, the Board lacks jurisdiction to entertain Top Level's appeal relating to PO 0423.

## Discussion

### I. Jurisdiction to Entertain Claims Under PO 0382

#### A. Whether The Contracting Officer's Decision Covered All PO 0382 Claims

Respondent argues that all requests for payment under PO 0382 were resolved by the contracting officer's final decision dated August 15, 2024, and that the portion of the appeal relating to them should be dismissed for lack of jurisdiction because it was not timely filed. To resolve this motion, we must address three issues: (1) whether the different amounts sought in the appeal for payment under PO 0382 are one singular claim or three separate claims; (2) whether the contracting officer's final decision addressed all of the claims presented; and (3) whether the appeal was timely with regard to the claim addressed in the contracting officer's final decision.

The CDA provides the Board with jurisdiction to entertain appeals arising out of disputes involving contracts between contractors and Executive Branch agencies. Pursuant to the CDA, the Board may not exercise jurisdiction over an appeal unless the contractor submitted a claim to the contracting officer and the contracting officer issued a final decision denying that claim before the appeal was filed. 41 U.S.C. § 7103; *see Gulf Tech Construction LLC v. Department of Veterans Affairs*, CBCA 7447, 22-1 BCA ¶ 38,179, at 185,427-28. The CDA provides that a contractor has the right to appeal a contracting officer's final decision to a board of contract appeals "within 90 days from the date of receipt" of the decision. 41 U.S.C. § 7104(a). Our decisions, relying on binding precedent from the Court of Appeals for the Federal Circuit, have held that the ninety-day requirement may not be waived as it is strictly construed and failure to comply creates a "jurisdictional defect" which precludes the Board from considering the merits of the appeal. *Acabay Inc. v. General Services Administration*, CBCA 8185, 25-1 BCA ¶ 38,716, at 188,245-46 (2024) (citing *MINACT, Inc. v. Department of Labor*, CBCA 7575, 23-1 BCA ¶ 38,243, at 185,701 (2022); *West Coast General Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994); *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982)).

We first address whether the appeal concerning PO 0382 is a single claim or three separate claims. The test for whether a claim is independent of other claims is whether those claims are based on a common or related set of operative facts. *JRS Management v. Department of Justice*, CBCA 3053, 13 BCA ¶ 35,235, at 172,996; *see Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990).

The PO 0382 payment claim seeks the full amount of the PO, citing costs incurred that justify payment despite a lack of completion. The PO 0382 performance bank guarantees claim seeks payment in addition to the value of the PO based on respondent's alleged failure

to return the original guarantees. The claim for equipment under PO 0382 seeks funds in addition to the value of the PO based on the alleged loss of the equipment at a work site that was under the control of the Government. Each category of claims relies on a different legal theory and requires consideration of different facts. On this record, there are three different claims based on the operative facts that give rise to them. Each of those payment requests, although sometimes discussed between the contractor and the contracting officer in the same email chains, were submitted as separate “invoices” and were maintained as separate payment requests.

Next, we address which of these claims were addressed by the contracting officer’s final decision. The decision stated that it concerned PO 0382, specifically the “bill for \$89,928.75.” Exhibit 47 at 174. The decision did not reference the claim for the bank guarantees under PO 0382 or the claim for equipment under PO 0382—each of which seeks amounts above the PO value. Additionally, in his final decision, the contracting officer stated that “[t]he Procurement Team previously communicated this decision to you in October 2022.” *Id.* The October 2022 correspondence in the appeal file between appellant and respondent concerns payment of the full value of PO 0382 and does not address the other requests for payment. *See* Exhibits 17-18. On this record, the contracting officer’s final decision addresses only the claim for full payment of the award value of PO 0382.

#### B. Timeliness of the Appeal Seeking Payment of the Full Value of PO 0382

Having concluded that the contracting officer’s final decision addressed the claim for payment of the full value of PO 0382, we address the timeliness of the appeal of the denial of that claim. The contracting officer issued a final decision via email on August 15, 2024, and appellant does not dispute that it received the email on that date. The appeal was filed with the Board on December 23, 2024, which was more than ninety days after the date the contracting officer’s decision was received by appellant.

Appellant argues that the appeal was timely because it was filed within ninety days of a September 24, 2024, email from the contracting officer’s representative which referenced the contracting officer’s final decision and reiterated appellant’s right to file an appeal.<sup>4</sup> The time for filing an appeal of a contracting officer’s final decision runs from the contractor’s receipt of that decision. 41 U.S.C. § 7104(a). Subsequent communications about the contracting officer’s final decision do not extend or toll the time for filing an appeal, absent affirmative conduct by the contracting officer objectively indicating that the

---

<sup>4</sup> Although appellant cites these emails, they have not been entered into the record. As the emails could not support appellant’s argument, their absence from the record is not material.

decision is under reconsideration. *See Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,605-06. Here, neither appellant's arguments nor the record provides any basis to find that the time for filing an appeal was extended or tolled by the contracting officer. The appeal concerning this claim is therefore untimely, and we lack jurisdiction to consider it.

C. Timeliness of the Appeal of the Other Two PO 0382 Claims

Because the PO 0382 performance guarantees and equipment claims were not addressed in the contracting officer's final decision, these claims were not denied by the contracting officer, and there is no basis to dismiss them for lack of jurisdiction as untimely filed. Our finding that the contracting officer's final decision did not apply to the PO 0382 performance guarantees or equipment claims necessarily raises the related question of whether we have jurisdiction over an appeal regarding these claims. We find that, despite the lack of a contracting officer's final decision on these claims, we have jurisdiction to hear the appeal.

The CDA contains two time periods within which the contracting officer is required to issue a decision on a claim—for claims of \$100,000 or less and for claims of more than \$100,000:

(f) TIME FOR ISSUANCE OF DECISION.—

(1) CLAIM OF \$100,000 OR LESS.—A contracting officer shall issue a decision on any submitted claim of \$100,000 or less within 60 days from the contracting officer's receipt of a written request from the contractor that a decision be rendered within that period.

(2) CLAIM OF MORE THAN \$100,000.—A contracting officer shall, within 60 days of receipt of a submitted certified claim over \$100,000-

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

41 U.S.C. § 7103.

If the contracting officer does not act on the claim within sixty days, or extends the deadline but misses it, the contractor's effective options are to exercise its immediate right to appeal or to await a decision on its claim. *CTA I, LLC v. Department of Veterans Affairs*,

CBCA 5800, 17-1 BCA ¶ 36,829, at 179,489. Here, the claims were each for less than \$100,000, and the contracting officer did not issue a decision within sixty days. Appellant, therefore, timely appealed the deemed denials of the two remaining claims under PO 0382.<sup>5</sup>

## II. Jurisdiction to Entertain Top Level's Appeal Under PO 0428

Although respondent withdrew its argument that Top Level's appeal relating to the PO 0428 claim was untimely, it argues that the Board lacks jurisdiction to entertain the portion of the appeal relating to the PO 0428 claim because that claim, through which Top Level seeks payment of more than \$100,000, was, for all intents and purposes, not certified.

Under the CDA, a contractor submitting a claim seeking payment of more than \$100,000 must include, with that claim, a certification from an individual authorized to bind the contractor avowing that:

- (A) the claim is made in good faith;
- (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief;
- (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and
- (D) the certifier is authorized to certify the claim on behalf of the contractor.

41 U.S.C. § 7103(b)(1); *see DAI Global, LLC v. Administrator of the United States Agency for International Development*, 945 F.3d 1196, 1198 (Fed. Cir. 2019). A certification satisfying this requirement is set forth at Federal Acquisition Regulation (FAR) 33.207 (48 CFR 33.207 (2024)).

Top Level's PO 0428 claim did not include the required language. Instead, the invoices supporting the PO 0428 claim included a statement with the following language:

---

<sup>5</sup> As noted above, respondent withdrew its argument that the appeal relating to the claim under PO 0423 was untimely. For the same reasons that we have jurisdiction based on the deemed denial of the claims not addressed by the contracting officer in connection with PO 0382, we also have jurisdiction based on the deemed denial of the claim in connection with PO 0423. Although the claim under PO 0423 was for more than \$100,000, the contracting officer did not issue a decision or notify the contractor of the time within which a decision would be issued.

“I Khaybar Ziarmal an authorized official (Director) of Top Level Construction Company (TLCC) Confirm and certify that the amounts listed in this Proposed Cost . . . are true and accurate.” Notice of Appeal at 13.

A contractor’s “complete failure to provide a [CDA] certification” with a claim to a contracting officer seeking payment of more than \$100,000 precludes the contractor’s payment request as being viewed as a CDA claim and is a jurisdictional defect that bars the Board from entertaining an appeal. *GulfTech Construction LLC v. Department of Veterans Affairs*, CBCA 7447, 22-1 BCA ¶ 38,179, at 185,427 (quoting *NEDA of Puerto Rico, Inc. v. General Services Administration*, CBCA 6793, 20-1 BCA ¶ 37,611, at 182,563). Nevertheless, as the CDA expressly provides, “[a] *defect* in the certification of a claim does not deprive . . . an agency board of jurisdiction over the claim.” 41 U.S.C. § 7103(b)(3) (emphasis added). A “defective certification” is “a certificate which alters or otherwise deviates from the language in [FAR] 33.207(c) or which is not executed by a person authorized to bind the contractor with respect to the claim.” FAR 33.201. Although such a defect does not preclude the Board’s jurisdiction, “[p]rior to the entry of . . . a decision by an agency board, the . . . agency board shall require a defective certification to be corrected.” 41 U.S.C. § 7103(b)(3). At the Board’s direction, Top Level filed a corrected certification on April 14, 2025.

Respondent argues that the statement contained in the PO 0428 claim essentially constitutes a complete failure to provide a CDA certification because it strayed so far from the requirements of 41 U.S.C. § 7103(b)(1), particularly with regard to the statement of good faith, that it cannot be considered a “defective” CDA certification. Yet, the Federal Circuit has taken a broad view of what constitutes a “defective” certification, finding that “§ 7103(b)(3) does not limit defects [in a certification] to those that are technical in nature nor does it limit a contractor’s right to correct a defect [even] if the initial certification was made with intentional, reckless, or negligent disregard for the applicable certification requirements.” *DAI Global*, 945 F.3d at 1199 (internal quotation marks omitted). The statement included in appellant’s PO 0428 claim was a defective certification under 41 U.S.C. § 7103(b)(1), which Top Level has now cured. We have jurisdiction to hear Top Level’s appeal relating to PO 0428.



Decision

DOS's motion to dismiss is **GRANTED IN PART**. We dismiss for lack of jurisdiction appellant's claim for payment of the full amount of PO 0382 because it was not filed within ninety days of appellant's receipt of the contracting officer's final decision. DOS's motion is denied to the extent that it seeks dismissal of the remaining claims under PO 0382 for bank guarantees and equipment and of Top Level's claim under PO 0428. The Board will schedule further proceedings by separate order.

Jonathan L. Kang  
JONATHAN L. KANG  
Board Judge

We concur:

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

Kathleen J. O'Rourke  
KATHLEEN J. O'ROURKE  
Board Judge