



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED FOR LACK OF JURISDICTION: May 27, 2025

CBCA 8423

5 STONES INTELLIGENCE, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Brian J. Talay, Chief Executive Officer of 5 Stones intelligence, Inc., Cleveland, TN, appearing for Appellant; and Jason N. Workmaster and Elissa B. Harwood of Miller & Chevalier Chartered, Washington, D.C., counsel for Appellant.<sup>1</sup>

John J. Bowers and Laura D. Mayberry, Office of General Counsel, Justice Management Division, Department of Justice, Washington, DC, counsel for Respondent.

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

**LESTER**, Board Judge.

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<sup>1</sup> Until May 23, 2025, appellant's Chief Executive Officer, Brian J. Talay, served as appellant's sole representative in this appeal, and Mr. Talay filed the two motions to dismiss discussed in this decision. Mr. Workmaster and Ms. Harwood filed entries of appearance on appellant's behalf on May 23, along with a motion on behalf of both parties to stay all pending deadlines until the parties' motion to dismiss is resolved. Because Mr. Talay prepared the motions to dismiss, we have included him in the list of appellant's party representatives. The parties' May 23 motion to stay deadlines is denied as moot.

The parties filed a joint motion with the Board seeking dismissal of this appeal “for lack of jurisdiction without prejudice.”<sup>2</sup> Originally, the parties did not identify any basis for believing that the Board lacks jurisdiction. In response to the Board’s prompting, the parties filed a revised motion in which they indicated, contrary to representations in the notice of appeal, that appellant, 5 Stones intelligence, Inc. (5Si), has never submitted a certified claim for the money that it is seeking here and that the contracting officer never issued a final decision on such a claim. Having reviewed that stipulation and the materials in the record, we grant the parties’ joint request to dismiss this appeal for lack of jurisdiction.

### Background

On April 30, 2025, the Clerk of the Board docketed a notice of appeal in which 5Si alleged that it was appealing “the decision of [the Department of Justice (DOJ)] contracting officer” arising under contract no. DJJ16PSSV2670, a contract under which 5Si was allegedly providing services to support DOJ’s Organized Crime Drug Enforcement Task Force (OCDETF). In its notice of appeal, 5Si explained the basis of its claim as follows:

In the final months of the eight year [Asset Forfeiture Investigative Support Services (AFISS)] contract and Task Order with OCDETF, [5Si] was provided a final Mod[ification] of funding for the OCDETF Task Order in the amount of \$749,865.99. Given the length of the contract (8+ years), [5Si] requested a meeting with the OCDETF Unit Chief . . . for the specific purpose of determining the remaining funding on the Task Order, to include any unused funding from previous periods. During that zoom meeting we were told . . . of a specific amount of funding remaining (\$948,471.93). Immediately following this meeting [the Unit Chief] sent an email (attached) articulating the same amount of remaining funding (\$948,471.93). The DOJ Contracting Officer was copied on this and all programmatic email correspondence. [5Si] executed exactly to this agreed upon amount. The services were performed, received and accepted by the Government and invoiced, however our invoice was rejected stating we went over available funding.

During a subsequent call, it was stated by the [contracting officer] that [the Unit Chief’s] email misstated the amount of remaining funding. It was also discussed that, given this error by the Government, . . . either OCDETF or DOJ could pursue a “Ratification” process to pay the remaining invoice. A

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<sup>2</sup> “Any dismissal for lack of jurisdiction is, by necessity, without prejudice.” *SRA International, Inc. v. Department of State*, CBCA 6563, et al., 20-1 BCA ¶ 37,543, at 182,314 n.1.

subsequent email from the DOJ [contracting officer] . . . stated that OCDETF would not pursue a Ratification, but that DOJ [Asset Forfeiture Management Staff (AFMS)] will possibly submit for OCDETF. We have yet to hear of a status from OCDETF regarding the pursuit of a Ratification, however[,] the April 23, 2025 email from OCDETF is requesting to deobligate \$198,471.98 from 2023, which almost exactly matches the amount owed to [5Si] (\$198,605.94). The attached email states that [5Si] does not concur with the deobligation of the same amount that we are owed and from the same year.

The amount in dispute is \$198,605.94.

Notice of Appeal (Apr. 30, 2025) at 1-2.

5Si indicated that what it identified as the “Contracting Officer’s Final Decision” was attached to the notice of appeal. The majority of the attachments to the notice, however, were email chains between Brian Talay, 5Si’s Chief Executive Officer, and the OCDETF Unit Chief about contract funding amounts that did not involve the contracting officer. Those chains included an April 23, 2025, email from the OCDETF Unit Chief, notifying 5Si that OCDETF would be deobligating certain Fiscal Year (FY) 2023 monies from 5Si’s task order, leaving an available amount of only \$198,471.93. Notice of Appeal, Attachment 1 at 2. The contracting officer was not copied on or referenced in that email. Mr. Talay responded by email on April 24, 2025, asserting that 5Si “does not consent to the deobligation of funds \$198,471.83,” that “[y]our email of May 08, 2023 . . . authorized [5Si] to expend these funds,” and that, if 5Si could not resolve this issue soon and have OCDETF pay its outstanding invoice, 5Si “reserve[d] the right to appeal this with DOJ and the [Small Business Administration].” *Id.* at 1. Again, the contracting officer was not copied on or referenced in this email.

The only pieces of correspondence accompanying the notice of appeal that involved the DOJ contracting officer are from 2023. The first was a letter from 5Si dated August 21, 2023, in which 5Si provided a chronological listing of events involving 5Si’s OCDETF labor expenditures during the third quarter of FY2023, which 5Si said that it was submitting for the purpose of seeking “to achieve complete clarity with [OCDETF] regarding the remaining funding” on the task order and requesting that its “last invoice be approved.” Notice of Appeal, Attachment 5 at 1-2. The second is an email chain containing two emails to 5Si from the contracting officer on July 26 and December 4, 2023, the first representing that an invoice had been rejected “because it exceeds the order amount of \$749,865.99,” Notice of Appeal, Attachment 4 at 2, and the second “to provide [5Si] notice that OCDETF will not be submitting a request to ratify any unauthorized commitments related to its order.” *Id.* at 1. The third is a May 8, 2023, email from the OCDETF Unit Chief responding to an email from Mr. Talay identifying the amount of the funds remaining on the contract at that time, on

which the Unit Chief copied the contracting officer. Notice of Appeal, Attachment 7, at 1. The contracting officer is not included in any other correspondence accompanying 5Si's notice of appeal.

On May 8, 2025, Mr. Talay, on behalf of 5Si and respondent, filed a "joint motion to dismiss for lack of jurisdiction without prejudice," which reads in its entirety as follows:

[5Si] and [DOJ] (collectively, "the parties") come before the Board to jointly move to dismiss the above-captioned appeal for lack of jurisdiction, without prejudice to [5Si's] ability to file a new appeal from a future government final decision on a certified claim made by [5Si] regarding this issue.

Respondent has authorized Appellant to file on behalf of both parties.

Motion to Dismiss (May 8, 2025) at 1.

In an order dated May 9, 2025, the then-presiding judge<sup>3</sup> requested that the parties "supplement the motion to identify at least one agreed basis evident in the notice of appeal to dismiss for lack of jurisdiction." Order at 1. Mr. Talay, again on behalf of both 5Si and DOJ, filed a new motion to dismiss on May 12, 2025, repeating the representations from its May 8 motion and adding that "[i]n support of this motion, the parties stipulate that, to date: (1) [5Si] has not submitted to the DOJ contracting officer a certified claim regarding the issue presented by the appeal; and (2) the DOJ contracting officer has issued no final decision regarding the issue presented by the appeal." Motion to Dismiss (May 12, 2025) at 1.

### Discussion

In their original motion to dismiss, the parties asked that we dismiss this appeal for lack of jurisdiction, but they failed to identify any basis for that request. We cannot dismiss an appeal for lack of jurisdiction just because the parties tell us to do so. Although "both public and judicial policy look with favor on stipulations designed to simplify and shorten litigation to the benefit of all parties," we cannot "allow[] counsel to stipulate the law, a function which, in the context of a judicial proceeding, is the province of judges." *Hegeman-Harris & Co. v. United States*, 440 F.2d 1009, 1012 (Ct. Cl. 1971). "Jurisdiction is an issue of law." *Xerox Corp. v. United States*, 289 F.3d 792, 793 (Fed. Cir. 2002). Just as parties cannot create jurisdiction before a tribunal by mutual agreement, *see Riggle v. United States*,

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<sup>3</sup> This case was transferred to the current presiding judge on May 19, 2025.

131 F. App'x 273, 274-75 (Fed. Cir. May 5, 2005), they may not decide that the tribunal lacks jurisdiction by stipulation.

“[T]he Board is not bound by any agreement of the parties to the extent that such agreement affects the Board’s jurisdiction.” *Pope & Talbot*, AGBCA 85-591-1, 85-3 BCA ¶ 18,486, at 92,848; *see Swift & Co. v. Hocking Valley Railway Co.*, 243 U.S. 281, 289-90 (1917) (“If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative . . . since the court cannot be controlled by agreement of counsel on a subsidiary question of law.”); *Utica Mutual Insurance Co. v. Department of Agriculture*, CBCA 865, 2007 WL 3374991 (Nov. 8, 2007) (“[T]he parties have no authority to independently determine whether the Board has jurisdiction.”). It is the Board’s duty to determine, as a matter of law, whether it possesses jurisdiction to entertain an appeal, without deference to the parties’ agreement. *See McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,969 (“[T]ribunals ‘have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.’” (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006))). In seeking dismissal for lack of jurisdiction, rather than simply a dismissal without prejudice, the parties must provide the Board with more information than they originally did here.<sup>4</sup>

That being said, even though “the parties may not, by stipulation, confer jurisdiction where none exists” or eliminate it where it does, “they may, . . . by stipulation, agree to *facts* which in themselves constitute a basis for jurisdiction” or which establish a lack thereof. *Bar-Ray Products, Inc.*, ASBCA 3065, 58-1 BCA ¶ 1618, at 5928 (emphasis added); *see Johnson & Hayward*, GSBCA 10373-P, 1989 WL 138827 (Nov. 14, 1989) (finding lack of jurisdiction based on stipulated facts); *Benton Corp.*, ASBCA 28277, 83-2 BCA ¶ 16,757, at 83,322-23 (finding jurisdiction based on stipulated facts). In their follow-on motion to

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<sup>4</sup> We understand the reasons that 5Si, wisely, would want the Board in its dismissal order expressly to state that the Board lacks jurisdiction over this appeal rather than simply dismiss without prejudice, given difficulties associated with the so-called “Election Doctrine” that might result without the Board’s express resolution of the jurisdictional question. *See, e.g., Bonneville Associates v. United States*, 43 F.3d 649, 655 (Fed. Cir. 1994) (affirming dismissal based on the Election Doctrine of a contractor’s suit in the Court of Federal Claims, which the contractor had filed after withdrawing its previously filed appeal with a board of contract appeals upon an incorrect belief that the board lacked jurisdiction and without obtaining a jurisdictional determination from the board); *Palafox Street Associates, L.P. v. United States*, 114 Fed. Cl. 773, 788 (2014) (dismissing suit in similar procedural circumstances to *Bonneville Associates*). Nevertheless, they must provide a basis on which the Board can determine that jurisdiction is lacking.

dismiss, filed May 12, 2025, the parties stipulated that 5Si has not submitted a certified claim to the contracting officer. In its notice of appeal, 5Si indicates that it is seeking payment of \$198,605.94. The CDA requires that a claim in excess of \$100,000 be certified, 41 U.S.C. § 7103(b), and, although “[a] defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim,” *id.* § 7103(b)(3), “[a] complete failure to provide a certification at all may not be deemed a defective certification” and is a jurisdictional defect. *NEDA of Puerto Rico, Inc. v. General Services Administration*, CBCA 6793, 20-1 BCA ¶ 37,611, at 182,563 (quoting *Medina Construction, Ltd. v. United States*, 43 Fed. Cl. 537, 547 (1999)). In addition, reviewing the attachments to 5Si’s notice of appeal, it is clear that the communications upon which 5Si bases its current claim were with the OCDETF Unit Chief, not the DOJ contracting officer, and that it was the Unit Chief’s April 23, 2025, email that prompted 5Si to file the appeal. Even if 5Si’s communications with the Unit Chief could be viewed as involving some kind of request for payment, the Board cannot assume jurisdiction over an appeal where the contractor never submitted a claim “to the contracting officer,” *Atlas Elevator Co. v. General Services Administration*, GSBCA 11655, 93-1 BCA ¶ 25,216, at 125,617 (1992), and did not, in such a claim, expressly or implicitly request a final decision. *Foxy Construction, LLC v. Department of Agriculture*, CBCA 5632, 17-1 BCA ¶ 36,687, at 178,627.<sup>5</sup> Based on the parties’ factual stipulations and the Board’s separate review of the record, it is clear that we lack jurisdiction to entertain this appeal.

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<sup>5</sup> To the extent that 5Si’s letter to the contracting officer on August 21, 2023, might be viewed as a claim for payment of 5Si’s last invoice, the basis of this appeal appears to be the OCDETF Unit Chief’s appropriation deobligation announcement in April 2025, rather than the 2023 exchanges. Even if the August 2023 letter involves the same payment at issue here, an invoice “that is not in dispute when submitted” is not a claim, and it can become a claim only “by written notice to the contracting officer” once “it is disputed either as to liability or amount or is not acted upon in a reasonable time.” Federal Acquisition Regulation (FAR) 2.101 (48 CFR 2.101 (2023)); *see OST, Inc. v. Department of Homeland Security*, CBCA 7077, et al., 23-1 BCA ¶ 38,414, at 186,666. There is no evidence in the record that, when 5Si sent its letter to the contracting officer on August 21, 2023, the invoice was in dispute. Further, the August 21, 2023, letter was not certified.

Decision

The parties' joint motion to dismiss is granted. This appeal is **DISMISSED**, without prejudice, **FOR LACK OF JURISDICTION**.

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

We concur:

*Patricia J. Sheridan*  
PATRICIA J. SHERIDAN  
Board Judge

*H. Chuck Kullberg*  
H. CHUCK KULLBERG  
Board Judge