

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Kirlin Builders, LLC)
)
Under Contract No. W912DY-12-D-0012)

ASBCA No. 61901

APPEARANCES FOR THE APPELLANT:

Douglas L. Patin, Esq.
Lee-Ann C. Brown, Esq.
Bradley Arant Boult Cummings LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT:

Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
Michael L. Graves, Jr., Esq.
Engineer Trial Attorney
U.S. Army Engineering and Support Center
Huntsville, AL

OPINION BY ADMINISTRATIVE JUDGE MELNICK
DENYING MOTION TO DISMISS

The government seeks dismissal of this appeal for lack of jurisdiction. It contends that, after appealing here, Kirlin Builders LLC (Kirlin) could not correct its certification of a Request for Equitable Adjustment (REA) to the certification requirements of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-09. The motion is denied.

Kirlin submitted an REA to the government pursuing costs arising upon its contract to repair and renew a chiller plant (R4, tabs 5, 78). Kirlin later sent the government an REA certification as required by 10 U.S.C. § 2410(a) and Defense Federal Acquisition Regulation Supplement (DFARS) 252.243-7002 (R4, tab 80). Those provisions (with an inapplicable exception) require a contractor pursuing an REA to certify “that the request is made in good faith, and that the supporting data are accurate and complete to the best of [his or her] knowledge and belief.” DFARS 252.243-7002(b). These are two of the four elements also necessary to the certification of a claim submitted under the CDA, 41 U.S.C. § 7103(b)(1)(A)-(B). The others are that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and the certifier is authorized to certify the claim on behalf of the contractor. 41 U.S.C. § 7103(b)(1)(C)-(D). Eventually, Kirlin sought a contracting officer’s final decision upon its REA, which was denied (R4, tabs 3, 101). Kirlin then appealed to this Board. Thereafter, Kirlin

submitted a full CDA certification, signed by its vice president, containing all of the elements required by 41 U.S.C. § 7103(b)(1) (app. supp. R4, tab 15).

In seeking dismissal for lack of jurisdiction, the government contends that Kirlin's request for a final decision upon its REA failed to qualify as a CDA claim because it did not include a complete CDA certification.* The Board's jurisdiction under the CDA to entertain a contractor appeal is dependent upon the submission of a proper claim, which includes the § 7103(b) certification when, as here, the claim exceeds \$100,000. *Hejran Hejrat Co. v. U.S. Army Corps of Eng'rs*, 930 F.3d 1354, 1356, 1359 (Fed. Cir. 2019); *TTF, LLC*, ASBCA No. 59511, 15-1 BCA ¶ 35,883 at 175,433. Central to this inquiry is the language codified at § 7103(b)(3), which states that "[a] defect in the certification of a claim does not deprive . . . an agency board of jurisdiction over the claim." But, "[p]rior to the entry of . . . a decision," the Board "shall require a defective certification to be corrected." In contrast, the complete absence of a certification cannot be corrected and is fatal to the Board's jurisdiction. *Esood Al Blad Co.*, ASBCA No. 58425, 14-1 BCA ¶ 35,572 at 174,331 (citing *New Iraq Ahd Co.*, ASBCA 58800, 14-1 BCA ¶ 35,479).

Kirlin argues that the certification it provided after it appealed properly corrected its REA certification to comply with the CDA. The government seeks us to disregard our holding supporting Kirlin's position, *Air Services, Inc.*, ASBCA No. 59843, 15-1 BCA ¶ 36,146 at 176,425-27 (finding an REA does not reflect the complete absence of a CDA certification because it provides the government with two of the required CDA certification elements and is therefore correctable under § 7103(b)(3)). It prefers an earlier, non-binding decision by the United States Court of Federal Claims ruling the opposite. *Agility Def. & Gov't Servs., Inc. v. United States*, 103 Fed. Cl. 366, 369 (2012) (concluding an REA certification cannot be corrected to a CDA certification because it is not intended to be a CDA certification; a CDA certification must be separately submitted).

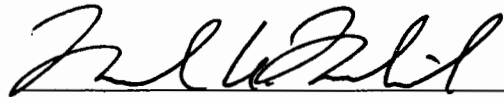
The government's request is pointless because the court of appeals has ruled against its position. In *Hejran Hejrat*, the contractor provided the government with a sworn affidavit stating its REA was true to the best of its knowledge. The Board dismissed the contractor's appeal from the REA's denial on the ground that the REA had not sought a final decision as required by the CDA. Incidentally, the Board recognized that, though facially inadequate to meet the CDA requirements, the sworn affidavit accompanying the REA tracked the REA certification elements sufficiently to be remediable under the CDA prior to a final resolution of the appeal. *Hejran Hejrat Co.*, ASBCA No. 61234, 18-1 BCA ¶ 37,039 at 180,322-23. After reversing the Board on the final decision matter, the court of appeals noted that the government had agreed

* Aside from its certification argument, the government does not otherwise dispute that the request for a final decision upon the REA qualifies as a CDA claim.

that the contractor's limited REA certification could be cured. Prompted by the government's concession, the court of appeals ordered that, on remand, the Board could require correction of the REA certification to comply with the CDA standards. *Hejran Hejrat*, 930 F.3d at 1359. *Hejran Hejrat* dictates rejection of the government's argument.

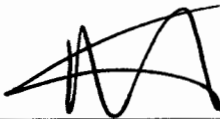
The motion to dismiss is denied.

Dated: December 4, 2019



MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 61901, Appeal of Kirlin Builders, LLC, rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals