

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of - )  
)  
Lessors of Abchakan Village, Logar ) ASBCA No. 61787  
Province, Afghanistan )  
)  
Under Contract No. DACA-AED-5-09-9650 *et al.* )

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OPINION BY ADMINISTRATIVE JUDGE SWEET

On December 13, 2019, the government moved to dismiss this appeal, on the grounds that Duane Morris LLP—appellants’ purported representative—is not a proper representative. On September 11, 2020, we issued an order to show cause, giving Duane Morris an opportunity to provide further evidence that it is a proper representative. We also ordered appellant, either to show that the individuals who signed the claim certification had the authority to bind the appellants with respect to the claim, or to correct any certification defect. Duane Morris submitted further evidence, and Duane Morris and the government have briefed the issues.

As discussed in greater detail below, Duane Morris has provided sufficient evidence that it is a proper representative. Moreover, appellants have corrected any certification defect. Therefore, we deny the government's motion to dismiss.<sup>1</sup>

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On April 23, 2009, the government entered into Leases No. DACA-AED-5-09-9650 through DACA-AED-5-09-9663 (Leases) with the heirs of [REDACTED]

[REDACTED] (Heirs)<sup>2</sup> respectively to lease real property in Afghanistan (R4, tabs 4-17).

2. The Leases required the Heirs to resolve any contractual dispute by submitting a certified claim to the Contracting Officer (CO) (R4, tabs 4-17 at 5). The Leases further provided that “[i]f the Lessor is an individual, the certification shall be executed by that individual” (*id.* at 6).

3. On April 13, 2018, Duane Morris—duly licensed attorneys—submitted a certified claim on behalf of the Heirs for \$27,965,792.63 in rent, interest, and deferred payment loss on the Leases (R4, tab 2 at 1). The claim contained a table that identified the amount of unpaid rent sought, the lessor (*e.g.*, the [REDACTED]), and the premises size for each Lease (*id.* at 4). The claim also attached the Leases, which identified the lessor and the property (*id.* at 23-106). Finally, the claim contained a certification executed by [REDACTED] and [REDACTED] (*id.* at 21).

4. The CO issued a final decision on September 4, 2018, denying the claim in its entirety (R4, tab 3 at 1).

5. On September 6, 2018, Duane Morris filed a notice of appeal on behalf of the Heirs (compl. ¶¶ 1-2).

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<sup>1</sup> Because we deny the motion to dismiss, we: (1) deny appellants' motion to stay this appeal so that they may develop more evidence to reply to the motion to dismiss; and (2) allow the government to file any motion regarding ripeness.

<sup>2</sup> Table 1 in the Addendum, identifies each of the Heirs, as alleged in the complaint (*e.g.*, [REDACTED])

(compl. ¶¶ 35-61). Because the government's motion does not dispute the complaint's allegations regarding the Heirs' identities, we assume that those allegations are true solely for purposes of this Opinion.

6. On December 13, 2019, the government moved to dismiss this appeal on the grounds that the Heirs lack a proper representative.

7. On September 11, 2020, we issued an order to show cause, stating that there was insufficient evidence that most of the Heirs have authorized: (1) Duane Morris to represent them in this appeal; or (2) Mr. [REDACTED] and Mr. [REDACTED] to bind the Heirs with respect to the claim. Therefore, we provided Duane Morris with the opportunity to correct those evidentiary deficiencies.

8. In response to the order to show cause, Duane Morris submitted declarations from each and every Heir<sup>3</sup> executed with a thumbprint (Declarations). The Declarations state that:

I certify that the claim was and is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which I believe the Government is liable; and that I am duly authorized to certify the claim on my behalf.

(App. br., exs. A-H3 ¶ 18, H4 ¶ 17, H5-N ¶ 18)<sup>4</sup>

9. With slight variation,<sup>5</sup> the Declarations also assert that:

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<sup>3</sup> As demonstrated in Table 2 in the addendum, there are slight variations between the complaint and the Declarations regarding some of the Heirs' names. However, those variations do not appear to be significant. Moreover, according to Duane Morris, [REDACTED] has died, and her son—[REDACTED]—is her Heir (app. br. 2, n.1).

<sup>4</sup> All citations to “app. br.” and “gov’t br.” are to the parties’ briefs in response to the order to show cause.

<sup>5</sup> The Declarations vary in the family member or third-party through whom each declarant authorized Mr. [REDACTED] and Mr. [REDACTED] to work with Duane Morris. Moreover, the Declarations from the family members through whom the other family members authorized Mr. [REDACTED] and Mr. [REDACTED] omit the “through” clause, or indicate that the other family member authorized the declarant to authorize Mr. [REDACTED] and Mr. [REDACTED] to work with Duane Morris. (App. br. exs. A-N ¶ 15) The Declarations from Mr. [REDACTED] and Mr. [REDACTED] indicate that they and Mr. [REDACTED] engaged Duane Morris; that, through a third-party, their families and others authorized and directed Mr. [REDACTED] and Mr. [REDACTED] to work with Duane Morris; and Duane Morris still represents Mr. [REDACTED] and Mr. [REDACTED] to this day (*id.* at H4 ¶ 14, K1 ¶ 15).

[W]e authorized [REDACTED] and [REDACTED] to engage Duane Morris LLP, through its attorneys Charles B. Lewis and Michael E. Barnicle, and others working with them (“Duane Morris”), to pursue our rent claims with the Army. Through [a family member or a third-party], we authorized and directed [REDACTED] and [REDACTED] to work directly with Duane Morris to obtain the payments owed to us. I am aware that [REDACTED] and [REDACTED] signed an engagement letter with Duane Morris on our behalf that was updated in 2018. These attorneys still represent us to this day, and are authorized to act on our behalf in their effort to compel the U.S. Government to pay the money it owes us.

(App. br. exs. A-N ¶ 15)

## DECISION

As discussed in greater detail below, the motion to dismiss is denied because Duane Morris is a proper representative of the Heirs, and the Heirs have corrected any certification defect.

### I. There is Sufficient Evidence That Duane Morris is a Proper Representative

First, there is sufficient evidence that Duane Morris is a proper representative of the appellant. Board Rule 15(a) states that “[a]n individual appellant may represent his or her interests before the Board; a corporation may be represented by one of its members; or any of these by an attorney at law duly licensed in any state[.]” Any purported representative—such as an attorney—must be a “duly authorized representative[.]” *Afghan Washington Constr. Co.*, ASBCA No. 60856, 18-1 BCA ¶ 37,009 at 180,242 (quoting *William Reisner Corp.*, ASBCA No. 39944, 90-3 BCA ¶ 23,144 at 116,194); *see also Diversified Moving & Storage, Inc.*, ASBCA No. 21171, 78-1 BCA ¶ 12,943 at 63,030-31.

Here, it is undisputed that duly licensed attorneys constitute Duane Morris (SOF ¶ 3). Moreover, the Declarations establish that each Heir has authorized Duane Morris to represent him by stating that each Heir “authorized [REDACTED] and [REDACTED] to engage Duane Morris LLP . . . . These attorneys still represent us to this day, and are authorized to act on our behalf in their effort to compel the U.S. Government to pay the money it owes us.” (SOF ¶ 9) Therefore, Duane Morris has established that it is a proper representative.

The government argues that Duane Morris is not a duly authorized representative of the Heirs because the Heirs hired Duane Morris through Mr. [REDACTED] and Mr. [REDACTED] (gov't br. 4-5). However, a principal may authorize a subagent to act on the principal's behalf through an agent if the principal authorizes the agent to hire a subagent. RESTATEMENT (THIRD) OF AGENCY § 3.15(2); *see also* RESTATEMENT (SECOND) OF AGENCY § 5(1). Here, the Declarations establish that the principals (the Heirs) authorized their agents (Mr. [REDACTED] and Mr. [REDACTED]) to appoint a subagent (Duane Morris) (SOF ¶ 9).<sup>6</sup> Therefore, Duane Morris is an authorized representative of the Heirs under the RESTATEMENT (THIRD) OF AGENCY § 3.15(2).

## II. The Heirs Have Submitted Proper Certifications

Second, the Heirs have submitted proper certifications. A claim of more than \$100,000 brought under the Contract Disputes Act (CDA) must be accompanied by a signed certification. *ABS Dev. Corp.*, ASBCA No. 60022 *et al.*, 16-1 BCA ¶ 36,564 at 178,098. The certification "may be executed by an individual authorized to bind the contractor with respect to the claim." 41 U.S.C. § 7103(b)(2); *see also* FAR 33.207(e). In particular, the Leases required that any certification be executed by an individual if the lessor was an individual (SOF ¶ 2).<sup>7</sup> While the complete absence of a certification deprives the Board of jurisdiction, any error in the certification is a correctable defect that does not deprive the Board of jurisdiction. *SkyQuest Aviation, LLC*, ASBCA No. 62586, 21-1 BCA ¶ 37,784 at 183,374; *ABS*, 16-1 BCA ¶ 36,564 at 178,098; *McDonnell Douglas Corp.*, ASBCA No. 46582, 96-2 BCA ¶ 28,377.

Here, the claim contained a certification, which arguably was defective because Mr. [REDACTED] and Mr. [REDACTED] signed that certificate on behalf of the Heirs (SOF ¶ 3). However, as part of the Declarations, each individual Heir signed a statement indicating that:

I certify that the claim was and is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which I

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<sup>6</sup> More accurately, there are two levels of subagents between each Heir and Duane Morris: (1) a family member or a third-party; and (2) Mr. [REDACTED] and Mr. [REDACTED] (SOF ¶ 9). However, the agency rule from the Restatement (Third) of Agency § 3.15(2) still applies because each Heir authorized the family member or third-party, who then authorized Mr. [REDACTED] and Mr. [REDACTED] (SOF ¶ 9).

<sup>7</sup> To be clear, we do not find that the original certification by the Heirs was necessarily defective and we do not address here the issue of whether a contract may impose stricter certification requirements than the CDA. Because the new certifications cure any alleged defect we need not make such determinations in the first place.

believe the Government is liable; and that I am duly authorized to certify the claim on my behalf.

(SOF ¶ 8) Thus, even assuming without deciding that the original certifications were defective, the Heirs corrected any defect by providing an executed<sup>8</sup> certification from each individual Heir.

The government argues that the certified claims are defective because it is entitled to know the amount it allegedly owes to each individual Heir (gov't br. 14). There is “no requirement in the [Contract Disputes Act, 41 U.S.C. §§ 7101-7109] that a ‘claim’ must be submitted in any particular form or use any particular wording. All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.” *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987); *see also Blake Constr. Co.*, ASBCA No. 34480 *et al.*, 88-2 BCA ¶ 20,552 at 103,891.

Here, the government has not shown that information regarding the amount it allegedly owed to each individual Heir was necessary to give the CO adequate notice of the basis and amount of the claim. On the contrary, each Lease is with a group of Heirs jointly (*e.g.*, the [REDACTED])—as opposed to with each Heir individually (*e.g.*, [REDACTED])—so any government liability on a particular Lease is to a group of Heirs instead of a particular specific Heir (SOF ¶ 1). Thus, information regarding the amount allegedly owed to each group of Heirs is more relevant<sup>9</sup> to the determination of any government liability than information regarding the amount

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<sup>8</sup> While the parties do not address the issue, we hold that the thumbprints used by the Heirs constitute valid signatures. In determining whether a mark constitutes a valid signature, we look to whether the mark is discrete (*i.e.*, separate and distinct) and verifiable (*i.e.* tieable to the signatory). *Kamaludin Slyman CSC*, ASBCA No. 62006 *et al.*, 20-1 BCA ¶ 37,694 at 182,999; *URS Fed. Serv., Inc.*, ASBCA No. 61443, 19-1 BCA ¶ 37,448 at 181,967-68. Moreover, other tribunals have recognized thumbprints in particular are valid signatures. *See Hassoun v. Reliastar Life Ins. Co.*, 288 F. Supp. 3d 1334, 1354 (S.D. Fla. 2018). Because the thumbprints used by the Heirs are distinct and tieable to the signatories, we find that authority persuasive, and hold that the thumbprints constitute valid signatures.

<sup>9</sup> We are not saying that information regarding the amount allegedly owed to each individual Heir is irrelevant. Rather, we merely hold that information regarding the amount allegedly owed to each group of Heirs is more relevant—and sufficient to state a claim—because each Lease was with each group of Heirs. The government more appropriately should obtain information regarding the amount allegedly owed to each individual Heir through discovery.

allegedly owed to each individual Heir. *Cf. Worleyparsons Int'l, Inc.*, ASBCA No. 57930, 14-1 BCA ¶ 35,482 (holding that a claim must be brought by a joint venture—and not a joint venture partner—because the joint venture is the contractor). And the claim expressly identified the amount allegedly owed to each group of Heirs under each Lease (SOF ¶ 3). Thus, the claim gave the CO adequate notice of its basis and amount.

CONCLUSION

Because Duane Morris has established that it is a proper representative of the Heirs, and has corrected any certification defect, we deny the motion to dismiss.

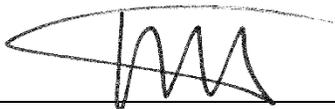
Dated: July 21, 2021



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JAMES R. SWEET  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



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J. REID PROUTY  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

**ADDENDUM**

**Table 1  
Leases and Alleged Heirs**

<b>Lease #<sup>10</sup></b>	<b>Lessor (Heirs of)</b>	<b>Heirs of Lessor (As Alleged in Complaint)</b>
9650	[REDACTED]	[REDACTED]
9651	[REDACTED]	[REDACTED]
9652	[REDACTED]	[REDACTED]
9653	[REDACTED]	[REDACTED]

<sup>10</sup> Last four digits.

9654	[REDACTED]	[REDACTED]
9655	[REDACTED]	[REDACTED]
9656	[REDACTED]	[REDACTED]
9657	[REDACTED]	[REDACTED]
9658	[REDACTED]	[REDACTED]
9659	[REDACTED]	[REDACTED]

		[REDACTED]
9660	[REDACTED]	[REDACTED]
9661	[REDACTED]	[REDACTED]
9662	[REDACTED]	[REDACTED]

9663	[REDACTED]	[REDACTED]
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(R4, tabs 4-17; compl. ¶¶ 35-61; app. br. exs. A-N)

**Table 2**  
**Name Variations Between Complaint and Declarations**

Name in Complaint	Name in Declaration (Exhibit #)
[REDACTED]	(A-6)
[REDACTED]	(C-2)
[REDACTED]	(D-1)
[REDACTED]	(K-4)
[REDACTED]	(K-5)
[REDACTED]	(K-7)
[REDACTED]	(L-1)
[REDACTED]	(L-3)
[REDACTED]	(L-13)

(Compl. ¶¶ 35-61; app. br. exs. A-N)

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. 61787, Appeal of Lessors of Abchakan Village, Logar Province, Afghanistan, rendered in conformance with the Board's Charter.

Dated: July 22, 2021

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