# Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

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DISMISSED FOR LACK OF JURISDICTION: August 3, 2001

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GSBCA 15387

GOLUB-WEGCO KANSAS CITY I, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Scott M. Heimberg and Andrea T. Vavonese of Akin, Gump, Strauss, Hauer & Feld, L.L.P., Washington, DC, counsel for Appellant.

Gerald L. Schrader and David M. Smith, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **GOODMAN**, and **DeGRAFF**.

**BORWICK,** Board Judge.

Background

Respondent moves to dismiss for lack of jurisdiction because under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613 (1994 & Supp. V 1999), an appeal may not be filed from a contracting officer's decision on an uncertified claim. We grant respondent's motion. Appellant submitted an uncertified claim to the contracting officer. The contracting officer's decision on the uncertified claim was a nullity from which an appeal meeting the CDA's jurisdictional requirements could not be filed. Appellant's submission of a certification after the issuance of a contracting officer's decision does not cure the jurisdictional defect.

The facts relevant to respondent's motion are as follows. On April 19, 1998, appellant leased 327,865 rentable square feet of office and related space in Kansas City, Missouri, to the Government for an initial ten-year term. Appeal File, Exhibit 1. The lease provided for a Government payment of overtime heating and cooling at a base rate of $80 per hour plus $40 per zone. Id. at 3 (¶ 13). The lease incorporated by reference the Federal Acquisition Regulation (FAR) Disputes clause at 52.233-1 (Oct. 1995). Id. at 255 (¶ 35).

On July 27, 2000, appellant submitted a purported claim to the contracting officer seeking an an equitable adjustment of $151,200 for overtime utilities due under the lease. The claim was not certified. Appeal File, Exhibit 14. On August 11, the contracting officer issued a decision denying the claim. Id., Exhibit 16. On August 17, 2000, appellant filed an appeal from that decision at the Board.

On October 26, 2000, appellant wrote the contracting officer that its equitable adjustment claim of July 27 on which the contracting officer issued her decision was "inadvertently not certified." Relying on 41 U.S.C. § 605(c)(6), appellant submitted its certification. Respondent's Motion to Dismiss, Exhibit 3.

## Discussion

The CDA requires certification of contractor claims in excess of $100,000. 41 U.S.C. § 605(c)(1). For claims above the certification threshold of the CDA, certification is a jurisdictional prerequisite for initiating an appeal. W.H. Mosely Co., Inc. v. United States, 677 F.2d 850, 852 (Ct. Cl. 1982), cert. denied, 459 U.S. 836 (1983); Paul E. Lehman v. United States, 673 F.2d 352, 355 (Ct. Cl. 1982). The contracting officer's decision on an uncertified claim is a nullity since the contracting officer has no authority to waive a requirement Congress has imposed. W.M. Schlosser Co. v. United States, 705 F.2d 1336, 1338 (Fed. Cir. 1983) (citing Skelly & Loy v. United States, 685 F.2d 414, 419 (Ct. Cl. 1982)). A retroactive certification after the contracting officer issued a decision does not cure the original failure to certify the claim at the proper time. Schlosser, 705 F.2d at 1338.

Appellant's reliance on the CDA's provision allowing the Board to retain jurisdiction pending correction of a defective certification does not assist appellant here. That provision does not apply to a failure to certify. 41 U.S.C. § 605(c)(6); 48 CFR 33.201 (1998); Lockheed Martin Tactical Defense Systems v. Department of Commerce, GSBCA 14450-COM, 98-1 BCA ¶ 29,717; Keydata Systems Inc. v. Department of the Treasury, GSBCA 14281-TD, 97-2 BCA ¶ 29,330. Consequently, we lack jurisdiction over this appeal.[1]

In opposition to respondent's motion, appellant now argues that the submission of a certification rendered the claim of July 27, 2000, cognizable by the contracting officer and the contracting officer's failure to render a decision can be considered a "deemed denial" as of December 25, 2000. Appellant's Reply at 1. There are several flaws in this argument. First, it ignores the FAR's implementation of 41 U.S.C. § 605(c)(1), that the contractor provide the required certification "when submitting any claim exceeding $100,000," 48 CFR 33.207(a), a requirement which is also repeated in the contract's Disputes clause. Appellant's submission of a certification on a stale claim after the issuance of the contracting officer's decision on that claim and after the filing of the appeal does not comply with the requirement that the contractor provide the certification "when submitting any claim exceeding $100,000."

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[1]Appellant has agreed to submit a certified claim to the contracting officer. Respondent has agreed to expedite a new contracting officer's decision on the certified claim. Upon the filing of a new appeal, the Board will make the prior prehearing proceedings, including the appeal file and discovery responses, applicable to the new appeal and will, as much as possible, adhere to the schedule of proceedings for this appeal.

Second, a "deemed denial" occurs when the contracting officer fails to issue a decision on a contractor claim within the required period for a decision. 41 U.S.C. § 605(c)(5). However, in this matter, the contracting officer had issued a decision denying the claim. If appellant had desired another decision, appellant does not explain how the contracting officer was supposed to infer that fact from her receipt of a retroactive certification on a claim she had already denied.

## Decision

The appeal is **DISMISSED** for lack of jurisdiction.

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ANTHONY S. BORWICK
Board Judge

We concur:

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ALLAN H. GOODMAN
Board Judge

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MARTHA H. DeGRAFF
Board Judge