UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: August 5, 2008

CBCA 1153

MEDTEK, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Shawn R. Farrell of Cohen, Seglias, Pallas, Greenhall & Furman PC, Philadelphia, PA, counsel for Appellant.

Kate Gorney, Office of Regional Counsel, Department of Veterans Affairs, Philadelphia, PA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GILMORE**, and **DRUMMOND**.

DANIELS, Board Judge.

The Department of Veterans Affairs (VA) moves the Board to dismiss for lack of jurisdiction an appeal filed by MedTek, Inc. For the reasons explained below, we grant the motion and dismiss the appeal.

Background

The VA and MedTek entered into a contract under which Medtek was to renovate an x-ray special procedure suite at the VA Medical Center in Philadelphia, Pennsylvania.

A dispute arose regarding the total amount of money the VA is obligated to pay MedTek for its work on this project. According to an unsworn "affidavit" submitted by MedTek's president, on January 24, 2008, the parties participated in a mediation session conducted by Judge Lowell A. Reed, Jr., of the United States District Court for the Eastern District of Pennsylvania. Appellant's Response to Motion to Dismiss for Lack of Jurisdiction (Appellant's Response), Exhibit 1, ¶ 3. At this session, "Judge Reed inquired as to whether or not any procedural requirements were not followed by MedTek, that would preclude [the VA's contracting officer] from issuing a final decision." *Id.* ¶ 5. "After consultation with counsel, [the contracting officer and VA counsel] all conceded that there were no more procedural requirements necessary before final decision could be rendered in this matter." *Id.* ¶ 6.

On January 26, 2008, MedTek's president sent a letter to the contracting officer. Appellant's Response, Exhibit 1, ¶ 7. The letter states:

> Previously, Medtek, Inc. had submitted a Final Application for Payment No. 12, that contained a request for payment of a pending change order, in the amount in excess of $350,000. At the mediation, Medtek, Inc. was informed that the payment application would not be processed with the inclusion of this change order. Furthermore, Medtek, Inc. was informed that a final determination on the pending change order was not rendered.
>
> The purpose of this letter is to inform the VA that Medtek, Inc. is enclosing a final application for payment. As instructed by the VA, this application does not include any amounts concerning the pending change order. . . .
>
> Furthermore, Medtek, Inc. requests that a final determination of its pending change order request be rendered. To facilitate that determination, enclosed please find an additional copy of all the documentation that supports Medtek, Inc.'s claim for additional consideration.

Motion to Dismiss for Lack of Jurisdiction (Motion), Exhibit 1 at 6.

Attached to the letter were a "contract progress report" appearing to assert that the total value of work under the contract was $734,079.17 and two additional documents. Motion, Exhibit 1 at 7-10. The first of these documents shows a figure of $692,729.17 for "total previous payment" and a figure of $41,350 for "amount of this estimate." *Id.* at 11. The second document includes the sentence, "Since the work has been completed in

accordance with plans and specifications and accepted, it is recommended that final settlement in the amount of $41,350.00 be authorized." *Id.* at 12.

At the bottom of the first of the two untitled documents referenced in the preceding paragraph is the following statement, which appears directly above the signature of MedTek's president:

> Claim made as indicated above, I hereby certify, to the best of my knowledge and belief, that --
>
> (1) The amounts requested are only for performance in accordance with the specifications, terms and conditions of the contract;
>
> (2) Payments to subcontractors and suppliers have been made from previous payments received under the contract and timely payments will be made from the proceeds of the payment covered by the certification, in accordance with subcontract agreements and the requirements of chapter 39 of title 31, United States Code; and
>
> (3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.

Motion, Exhibit 1 at 11.

By letter dated February 6, 2008, the contracting officer responded to MedTek's January 26 letter. Motion, Exhibit 1 at 4-5. The contracting officer understood that MedTek was "requesting payment in the amount of $350,000 under protest for delays, legal fees and losses incurred in connection with additional work performed related to the installation of the UPS (Uninterrupted Power Supply)." *Id.* at 4. She said that the VA was denying MedTek's claim and gave reasons for this determination. She then concluded, "Should you disagree with this decision, you may file an appeal with the Director/Acquisition Policy & Review Service . . . , Department of Veterans Affairs. . . . In the alternative, you may file an appeal with the General Counsel, General Accounting Office." *Id.* at 4-5.

On April 22, 2008, MedTek filed a notice of appeal from the contracting officer's February 6 letter, which MedTek considered a final decision. The notice of appeal seeks "[p]ayment of $350,000 in extra costs" which are "related to the failure of the VAMC [Veterans Affairs Medical Center] to timely close-out the Project and design issues related to the installation of an Uninterrupted Power Source ('UPS') system."

Discussion

The Contract Disputes Act of 1978 includes this requirement:

> For claims of more than $100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

41 U.S.C. § 605(c)(1) (2000).

As one of our predecessor boards of contract appeals explained:

> If the dollar value of a claim is above the certification threshold and the claim is not certified, we have no jurisdiction to consider an appeal from a contracting officer's decision on that claim. Even if the contracting officer issues a decision on the uncertified claim, that decision is considered a nullity and is therefore not a proper subject for appeal because the contracting officer has no authority to issue the decision.

Aylward Enterprises, Inc. v. General Services Administration, GSBCA 16649, 06-2 BCA ¶ 33,298, at 165,128 (citations omitted).

The VA contends that MedTek's claim was for more than $100,000 and was not certified, so the Board has no jurisdiction to consider the appeal. MedTek offers three reasons why we should find jurisdiction and deny the VA's motion:

(1) The claim was properly certified.

(2) Even if the claim was not properly certified, the defect in the certification was merely technical, and a technical defect does not pose an impediment to the Board's jurisdiction over the appeal.

(3) The actions and statements of the VA before Judge Reed indicated the agency's agreement that all conditions precedent to jurisdiction have been satisfied.

None of these assertions is convincing.

First, there is no evidence that the claim which is the subject of the notice of appeal was ever certified at all. MedTek's January 26, 2008, letter, which the parties seem to treat as a claim, when viewed in conjunction with its attachments, appears to address two separate matters. One is "payment of a pending change order, in the amount in excess of $350,000." The other is payment of the difference between a total contract amount and the total of previous payments, $41,350. To the extent that MedTek has made any certification, that certification is as to the second of these matters. We see no certification as to the matter which is the subject of the notice of appeal.

Second, although "[a] defect in the certification of a claim shall not deprive . . . an agency board of contract appeals of jurisdiction over that claim," 41 U.S.C. § 605(c)(6), the absence of certification of a claim for more than $100,000 is not a correctable deficiency. *K Satellite v. Department of* Agriculture, CBCA 14, 07-1 BCA ¶ 33,547, at 166,154; *Keydata Systems, Inc. v. Department of the Treasury*, GSBCA 14281-TD, 97-2 BCA ¶ 29,330, at 145,824.[1] It is true that in responding to the VA's motion to dismiss, MedTek included a properly phrased certification as to the matter which the company has attempted to place before the Board. *See* Appellant's Response, Exhibit 1 at 2. The submission of a certification *after* an appeal has been filed has no legal bearing on the Board's jurisdiction over the case, however; it cannot serve to cure a lack of jurisdiction. *B & M Cillessen Construction Co. v. Department of Health & Human Services*, CBCA 931, 08-1 BCA ¶ 33,753, at 167,083 (2007); *Aylward*, 06-2 BCA at 165,128.

Third, jurisdiction of the Board over Contract Disputes Act appeals is established by statute. Congress has not given agencies license to waive prerequisites for the Board to hear appeals. *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291, 1294 (Fed. Cir. 2002) (citing *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982)). Whether or not the VA lawyers and contracting officer told MedTek and a federal judge that all such prerequisites had been fulfilled, that advice has no legal significance. (We note that MedTek realizes that the VA's advice in another regard has been incorrect: The contracting

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[1] MedTek cites *Engineered Demolition, Inc. v. United States*, 60 Fed. Cl. 822 (2004) for the contrary proposition. Dicta in that decision indicate that in limited circumstances, missing certifications may be treated as defective. *Id.* at 829-30. The Board is not bound by decisions -- much less the dicta -- of the Court of Federal Claims, however, and the limited circumstances in which the court thought its dicta would apply are not present here. Furthermore, the court found jurisdiction in *Engineered Demolition* for a reason which had nothing to do with the presence or absence of certification: the contractor had submitted two claims, each in an amount of less than $100,000, and because the claims were "separate and independent in nature," no requirement for certification applied. *Id.* at 831.

officer told the company that it had alternative avenues of appeal of her decision -- to a higher-level VA official or to the General Accounting Office (whose name since July 7, 2004, has been the Government Accountability Office, *see* Pub. L. No. 108-271, § 8, 118 Stat. 811, 814 (2004)). As MedTek knows, a contracting officer's decision may by statute be appealed to the cognizant board of contract appeals or challenged by direct action in the Court of Federal Claims. *See* 41 U.S.C. §§ 606, 609(a)(1).

MedTek is of course free to resubmit its claim to the contracting officer, along with a proper certification. And if the company is not satisfied with the contracting officer's decision, it may appeal that decision to the Board. Because the Government's consent to such a suit is a waiver of sovereign immunity and such waivers must be construed strictly in favor of the sovereign, however, *Pacrim Pizza*, 304 F.2d at 1293 (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992)), we cannot consider MedTek's appeal now.

Decision

The VA's motion is granted. The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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BERYL S. GILMORE
Board Judge

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JEROME M. DRUMMOND
Board Judge