

“DEFECTIVE” CLAIM CERTIFICATION OR “NO CLAIM CERTIFICATION”

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In a recent Civilian Board of Contract Appeals case, *Development Alternatives, Inc. v. Agency for Int’l Dev.*, CBCA 5942 et. al, September 27, 2018, the Board considered an appeal of a claim for \$1.9 million for security services in Afghanistan. Holding that it had no jurisdiction of the claim because of lack of certification, the Board dismissed the case. The problem was a simple one, where the contractor never certified its initial claim to the contracting officer, even though it submitted a certification *after* the appeal was filed at the Board. Here’s the basis for this decision, and some recommendations on how to avoid the problem.

The Contract Disputes Act of 1978, codified at 41 U.S.C. § 7103 requires that all claims of more than \$100,000 be certified, and meet other requirements as set forth below in the statute:

...

(b) CERTIFICATION OF CLAIMS.—

(1) **REQUIREMENT GENERALLY.**—For claims of more than \$100,000 made by a contractor, the contractor shall certify that—

(A) the claim is made in good faith;

(B) the supporting data are accurate and complete to the best of the contractor’s knowledge and belief;

(C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and

(D) the certifier is authorized to certify the claim on behalf of the contractor.

(2) WHO MAY EXECUTE CERTIFICATION.—

The certification required by paragraph (1) may be executed by an individual authorized to bind the contractor with respect to the claim.

(3) FAILURE TO CERTIFY OR DEFECTIVE CERTIFICATION.—

A contracting officer is not obligated to render a final decision on a claim of more than \$100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective.

A defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim. Prior to the entry of a final judgment by a court or a decision by an agency board, the court or agency board shall require a defective certification to be corrected....

The Federal Acquisition Regulation (“FAR”) provides the specific language for contractors to use for their certification:

I certify that the claim 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 the contractor believes the Government is

liable; and that I am duly authorized to certify the claim on behalf of the contractor.
FAR 33.207(c).

The FAR also states that a “defective certification” means “a certificate which alters or otherwise deviates from the language in FAR 33.207(c) or which is not executed by a person authorized to bind the contractor with respect to the claim. *Failure to certify shall not be deemed to be a defective certification.*” FAR 33.201 (emphasis added).

There are a few simple recommendations for contractors when submitting claims over \$100,000:

- (1) Always provide a certification in (or attached to) any claim over \$100,000 submitted to the Contracting Officer (“CO”). Your failure to include the proper certification in your submission to the CO denies the Board of Contract Appeals or the Court of Federal Claims jurisdiction over the appeal of your denied claim.
- (2) You cannot assert that your failure to submit a certification to the CO was a “defective certification”—it is construed as no certification at all, and the claim will be dismissed.
- (3) The correct time to submit the certification is when the claim is submitted to the CO, and failure to submit some kind of certification to the CO cannot be corrected after you have taken an appeal to a Board or the Court of Federal Claims.
- (4) For your certification, use the exact language in FAR 33.207(c) (see above). This will eliminate any questions. If you attempt to submit a certification to a CO which does not include all of the required elements or is not properly worded, you may be advised that you have submitted a “defective certification” by either the CO or a Board or Court, and be permitted to revise it to the correct language. But if you submit no certification at all, that is not a “defective certification,” you cannot cure it, and your claim or appeal will be dismissed for lack of jurisdiction.
- (5) You must make some attempt to certify your claim over \$100,000 *before* you file suit in a court or Board. Correct a missing certification while the claim is pending before the CO, or resubmit your claim to the CO with the certification.

**For other helpful suggestions on government contracting, visit:
Richard D. Lieberman’s FAR Consulting at <https://www.richarddlieberman.com/>, and
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