

ALLEGED “FINAL CONTRACTING OFFICER DECISION” DOES NOT CURE ABSENCE OF REQUIRED CERTIFICATION

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The Armed Services Board of Contract Appeals recently considered a contractor’s claim for \$381,000 for the return of liquidated damages as well as a time extension. *Areyana Group of Const. Co.*, ASBCA No. 60648, May 11, 2018. The Board held that even though a project manager had sent Areyana a document which was described as “the final decision of the Contracting Officer” and notified the company of its appeal rights, there was no claim to appeal, and the appeal was dismissed.

Areyana was awarded a contract to design and construct barracks for the Afghan National Police. It did not complete the project in a timely manner. The government withheld \$381,000 for liquidated damages, and Areyana submitted two “requests for equitable adjustment” for time extensions and the return of the liquidated damages, as well as one request styled as a “claim” but lacking the necessary certification, since the amount exceeded \$100,000. The contracting officer advised in writing that the government could not consider the claim until it was certified. One week after that contracting officer’s letter, the government’s project manager notified Areyana in writing of its appeal rights under the Contract Disputes Act and described that document as “the final decision of the contracting officer.” The letter also contained the Board’s address and time limitations for filing claim. Shortly thereafter, Areyana appealed its claim to the Board.

The Board noted that the linchpin of the Board’s jurisdiction over a contractor claim is the contractor’s submission of a proper claim to the contracting officer for decision. Areyana’s absence of a certification was not a mere defect, rather, any “claim” over \$100,000 not accompanied by any certification is not a claim and the Board can’t exercise jurisdiction. The fact that the government purported to issue a “final decision” did not remedy the problem. Even if the purported “final decision” had been issued by a contracting officer (which it was not—it was issued by a project manager), the government had no authority to waive a requirement that the Congress had imposed. *W.M.Schlosser Co. v. United States*, 705 F.2d 1336 (Fed. Cir. 1983).

Takeaway: Always certify claims that are \$100,000 or more: no exceptions if you want to have a valid claim, and an ability to appeal the denial of that claim.

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