"The Most Important Cases of 2020"
Kamaludin Slyman CSC, ASBCA Nos. 62006, 62007, 62008, 20-1 BCA ¶ 37,694

by Judge Reba Page, Armed Services Board of Contract Appeals[1]

1. Introduction

In today's singular world in which the use of electronic devices and remote ways of doing business have assumed new importance, those involved in federal procurement are finding it necessary to reexamine some long-held positions. In *Kamaludin Slyman CSC*, ASBCA No. 62006, 62007, 62008, 20-1 BCA ¶ 37,694 (*Kamaludin*), the Armed Services Board of Contract Appeals (ASBCA or the Board) reversed prior decisions with respect to what constitutes a contractor's valid signature in certifying a claim that seeks more than $100,000. The Board held:

> "Today, we hold that, so long as a mark purporting to act as a signature may be traced back to the individual making it, it counts as a signature for purposes of the CDA, whether it be signed in ink, through a digital signature application, or be a typed name."[2]

There are several reasons why *Kamaludin* was it chosen as one of the most important decisions of 2020. From a substantive standpoint, it is a reminder of the basic tenets of a federal contractor's submission of a claim that can mature into an appeal over which an agency board of contract appeals (BCA) or appropriate court has jurisdiction. Foundationally, a contractor's claim exceeding the $100,000 must be properly certified in order to support an appeal under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 7100-7109. An effective certification must be properly signed by someone with requisite authority acting on behalf of the contractor. The importance of claim certification requirement is multifold: first, a claim in which the contractor seeks an excess of $100,000 must be properly certified for the Board to have jurisdiction under 41 U.S.C. §7103(b), which requires execution[3] a signature by a

---

[1] The views expressed herein are strictly those of the author, and not the United States Department of Defense or the Armed Services Board of Contract Appeals.

[2] *Kamaludin Slyman CSC*, ASBCA No. 62006, 62007, 62008, 20-1 BCA ¶ 37,694 at 182,998.

[3] For purposes of the CDA and this article, "execution" is generally regarded as being signed. The "'execution' of a CDA certification requires a 'certifier to sign the claim certification,' *Teknocraft*, 08-1 BCA ¶ 33,846 at 167,504 (citing *Hawaii CyberSpace*, 04-1 BCA ¶ 35,590 at 174,392." *Kamaludin*, 20-1 BCA at 182,999.

properly authorized person. Second, a contractor collects interest under 41 U.S.C. §7109 from the date the contracting officer (CO) receives a properly certified claim. Third, a valid signature acts as a deterrent to fraud, as a contractor can be held accountable. The decision in *Kamaludin* is also recognition that a hand-applied, pen and ink autograph no longer represents the sole acceptable instrument or means by which a signature may be affixed to a claim. Because *Kamaludin* overrules precedent, the procedural manner in which the decision was made gives an interesting view into the organizational structure of the ASBCA that some practitioners may not be aware of.

Kamaludin joins a lengthy history of decisions in which tribunals seek to determine just what a contractor must do to satisfy CDA requirements for a valid claim. Among these is the issue of what constitutes an appropriate certification has been addressed numerous times and with varying outcomes. Although its facts are not exactly on point, one consideration in the ASBCA's decision in *Kamaludin* was the effect of the United States Court of Appeals for the Federal Circuit's ruling in *Dai Global, LLC v. Adm'r of the United States Agency for Int'l Dev.*, 945 F.3d 1196 (Fed. Cir. 2019). The court there articulated an expansive perspective regarding curable defects in a claim, although the majority and some of the separate concurring opinions treated that ruling differently.

In *Dai Global*, the court held that 41 U.S.C. §7103(b)(3) did "not limit defects to those that are technical in nature nor does it limit a contractor's right to correct a defect if the initial certification was made with "intentional, reckless, or negligent disregard for the applicable certification requirements."[4] The majority view in *Kamaludin* was that *Dai Global* did not overrule ASBCA precedent which precluded a typed signature from effectively serving as a claim certification.[5] However, as discussed in § 6 *infra*, the separate concurring opinions of Judges Hartman, Melnick, and McIlmail reasoned that *Dai Global* supported their position that the typed signature in question was a defective but correctable certification.[6]

2. *The Genesis of the ASBCA's Decision in Kamaludin*

On September 25, 2020, the ASBCA in *Kamaludin Slyman CSC*, ASBCA Nos. 62006, 62007, 62008, 20-1 BCA ¶ 37,694,[7] reversed its prior stance that "a typed

[4] *Dai Global, LLC v. Adm'r of the United States Agency for Int'l Dev.*, 945 F.3d 1196, 1199 (2019).

[5] *Kamaludin*, 20-1 BCA at 183,005, n.6.

[6] *Kamaludin*, 20-1 BCA at 183,001-04.

[7] The portion of *Kamaludin* that is relevant here pertains only to ASBCA No. 62006. Because ASBCA Nos. 62007 and 62008, which were administratively consolidated with No. 62006, involve claims for less than $100,000, there is no

signature block does not meet the requirement for a signature necessary for claims certification pursuant to the [CDA]." The Board issued new precedent which focused on whether the proffered signature was discrete, verifiable, and evidenced an intent to authenticate the writing. It held that "so long as a mark purporting to act as a signature may be traced back to the individual making it, it counts as a signature for purposes of the CDA, whether it be signed in ink, through a digital signature application, or be a typed name."[8]

The appeal arose from a contract awarded on December 23, 2011 by the Combined Joint Special Operations Task Force-Afghanistan (the government) to Kamaludin Slyman, CSC (Kamaludin or the contractor) for the lease of heavy equipment in Afghanistan. On March 16, 2013, Kamaludin emailed the government a letter that demanded $155,500.00 for the government's alleged breach of contract. Under the subject line "Letter of Claim," Kamaludin alleged that the government had moved the leased machinery from the agreed upon place of performance to two different locations, and kept the equipment for five months after the lease expired. Although the March 16, 2013 letter did not contain any reference to the CDA's claim certification language, it included a handwritten signature from Kamaludin's president.[9]

Nearly six years later, on March 11, 2019, Kamaludin sent a second letter to the Air Force from the same email address used to transmit its 2013 letter. It read:

> Hey Sir,
>
> *For contract numbers -12-C-0089, -12-C-0131, -11-C-0322, and the claims submitted in respect to them on March 16, 2013, 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 belies the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.*
>
> *Sincerely,*
> *Kamaludin Slyman*[10]

Kamaludin's filed its notice of appeal with the Board on March 14, 2019, which docketed it as ASBCA No. 62006; Vice Chairman J. Reid Prouty was assigned as the presiding judge. According to the contractor, the appeal was made on the basis of a

---

issue with respect to certification there. This article does not address those appeals in any way.

[8] *Kamaludin*, 20-1 BCA at 182,998.

[9] *Kamaludin*, 20-1 BCA at 182,998.

[10] *Kamaludin*, 20-1 BCA at 182,998.

"deemed denial" of its claim dated March 16, 2013, as the CO had failed to issue a final decision. The government moved to dismiss the appeal, and alleged that the underlying claim did not contain a proper signature as required.[11]

3. The Decision by the ASBCA's Senior Deciding Group in Kamaludin

The majority opinion of the Board denied the government's motion to dismiss ASBCA No. 62006, and found that the claim certification's typewritten signature which had been conveyed from a known email address previously used by the contractor was a sufficient certification.[12] Because this ruling contravened the ASBCA's previous rejection of a typed signature as sufficient for claim certification purposes, it was necessary that the appeal be decided by the Board's Senior Deciding Group. This rarely-used procedure, which brings together the presiding judge, chairman, vice chairmen, and senior judges who head internal divisions as a panel to decide the appeal, is provided for in the ASBCA Rules;[13] its invocation here adds an interesting procedural aspect to the decision. The opinion was written by Judge Prouty, and was concurred in by Judges John J. Thrasher III, Richard Shackleford, Owen C. Wilson, Michael Paul, Reba Page, and Cheryl L. Scott. While Judges Terrence S. Hartman, Craig S. Clarke, Mark A. Melnick, and Timothy P. McIlmail concurred in the result, each wrote a separate opinion explaining his reasoning for doing so.[14]

4. A Summary of CDA Requirements for a Contractor's Claim

The CDA sets forth an orderly, stepwise progression for a contractor's claim to ripen into a justiciable appeal. The act makes an important exception in that it denies an agency head authority over a fraudulent claim.[15] A quick review of the contractor claim process, including certification requirements, furnishes a helpful background to understanding the decision in *Kamaludin*.

a. A CDA Claim in an Amount Greater than $100,000 Must Be Certified, Which Requires a Signature

---

[11] *Kamaludin*, 20-1 BCA at 182,998.

[12] *Kamaludin*, 20-1 BCA at 183,001.

[13] "Requests that an appeal be referred to the Board's Senior Deciding Group are addressed in the Board's Rules and Charter. ASBCA Rules, Preface, § II(c); ASBCA Charter, 84 Fed. Reg. 4360-01, 4361 ([] codified at 48 C.F.R., ch. 2, appx. A, pt. 1, ¶3)." *Kellogg Brown & Root Services, Inc*., ASBCA No. 57530, 19-1 BCA ¶ 37,321.

[14] *Kamaludin Slyman CSC*, ASBCA No. 62006, 62007, 62008, slip op. at 9-10 (September 25, 2020).

[15] 41 U.S.C. § 7103(c) FRAUDULENT CLAIMS.

All contractor claims against the government must be submitted in writing to the government's CO for a decision, and if that claim exceeds $100,000, then it must be properly certified by an authorized person.[16] If the claim certification is defective, the CO must notify the contractor of the deficiencies and a tribunal is not deprived of jurisdiction if corrections are made prior to final judgment.[17] For claims at or under the $100,000 threshold, the CO is to render a final decision (COFD) on a claim within 60 days; if more than that amount, the CO must either issue a COFD or notify the contractor of the anticipated date if additional time is necessary due to the amount and complexity of the claim.[18] If the CO denies all or part of the claim or fails to issue a decision, the contractor may then lodge an appeal[19] with an agency board of contract appeals or bring an action in the United States Court of Federal Claims; a CO's failure to act upon a claim is regarded as as a "deemed denial" of the claim.[20] In the alternative, the contractor may ask the tribunal to direct the CO to issue a COFD.[21] A critical part of this legislatively-mandated procedure is that a claim in excess of $100,000 be properly certified by the contractor; if it is not, then neither the BCAs nor the courts have jurisdiction over an appeal.[22] *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 355, 230 Ct. Cl. 11, 14 (1982); *see also* 41 U.S.C. §7103(b).

b. What Makes a Valid Signature?

Because the CDA does not define "signature," we look to Federal Acquisition Regulation (FAR) 2.101.[23] This regulation defines a "signature" as "the discrete, verifiable symbol of an individual that, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing.

---

[16] 41 U.S.C. § 7103, (a) CLAIMS GENERALLY & (b) CERTIFICATION OF CLAIMS.

[17] 41 U.S.C. § 7103(b)(3) FAILURE TO CERTIFY OR DEFECTIVE CERTIFICATION.

[18] 41 U.S.C. § 7103(f) TIME FOR ISSUANCE OF DECISION.

[19] 41 U.S.C. § 7102(d) MARITIME CONTRACTS provides that government contract claims arising under maritime contracts may be filed directly in federal district court.

[20] 41 U.S.C. § 7104 CONTRACTOR'S RIGHT OF APPEAL FROM DECISION BY CONTRACTING OFFICER. *See* ¶ (a) APPEAL TO AGENCY BOARD and ¶ (b) BRINGING AN ACTION DE NOVO IN FEDERAL COURT.

[21] 41 U.S.C. § 7103(f) TIME FOR ISSUANCE OF DECISION; *see also* ¶ 3 GENERAL REQUIREMENT OF REASONABLENESS, ¶ 4 REQUESTING TRIBUNAL TO DIRECT ISSUANCE WITHIN SPECIFIED TIME PERIOD, and ¶ 5 FAILURE TO ISSUE DECISION WITHIN REQUIRED TIME PERIOD.

[22] *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 355, 230 Ct. Cl. 11, 14 (1982); *see also* 41 U.S.C. §7103(b).

[23] 48 C.F.R. § 2.101 DEFINITIONS.

This includes electronic symbols" (emphasis supplied).[24] Although prior ASBCA opinions focused upon whether the purported signature was "discrete" and "verifiable," the Board in *Kamaludin* gave additional attention to the third characteristic (again, taken from the definition in FAR 2.101) of "whether the symbol indicates the present intention to authenticate the writing to which it is affixed."[25]

In defining a "discrete symbol," the Board in *Kamaludin* held to the "typical dictionary" meaning of "separate and distinct" that was used in *URS Federal Servs., Inc.*, ASBCA No. 61443, 19-1 BCA ¶ 37,448.[26] In *URS*, the ASBCA had held for the first time that a digital signature, *i.e*. a one that was computer-generated and shown to have been created through the use of the maker's password and unique user identification, met legal requirements for contractor claim certification. The certification signature in *URS* was deemed to be both discrete and verifiable.[27] Similarly, the Board in *Kamaludin* kept to the definition of "verifiable" as used in *URS*, which held that "if one can later establish that a mark is tied to an individual, it is verifiable."[28]

The decision in *Kamaludin* looked to rulings by the United States Court of Appeals for the Federal Circuit, the ASBCA's appellate court, in describing the importance of the CDA's certification requirement. The Board cited *Hawaii CyberSpace,* ASBCA No. 54065, 04-1 BCA ¶ 32,455, which summarized that "'[t]he purposes of the certification requirement are to discourage the submission of unwarranted contractor claims and to encourage settlements,' *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 354, 230 Ct. Cl. 11, 14 (1982)); 'to push contractors into being careful and reasonably precise in the submission of claims to the contracting officer' (*Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984)); and to enable the government 'to hold a contractor personally liable for fraudulent claims," (*Transamerica Insurance Corp.* v. *United States*, 973 F.2d 1572, 1580 (Fed. Cir. 1992)".[29] The Board acknowledged in these rulings the "long held" view "that the purpose of the CDA's certification requirement is to encourage accurate claims and to discourage (through the potential of civil and criminal penalties) the submission of unfounded claims."[30]

---

[24] *Kamaludin*, 20-1 BCA at 182,998.
[25] *Kamaludin*, 20-1 BCA at 182,999.
[26] *Kamaludin*, 20-1 BCA at 182,999 citing *URS*, 19-1 BCA at 181,968.
[27] *URS*, 19-1 BCA ⁋ 37,448 at 181,968.
[28] *Kamaludin*, 20-1 BCA at 182,999 citing *URS*, 19-1 BCA ⁋ 37,448 at 181,968.
[29] *Id*., citing *Hawaii CyberSpace*, ASBCA No. 54065, 04-1 BCA ¶ 32,455 at 160,533 and referencing *Teknocraft Inc*., ASBCA No. 55438, 08-1 BCA ¶ 33,846 at 167,505 for the proposition that "(signing [a] claim is necessary for holding the signer responsible for falsities contained within it)."
[30] *Kamaludin*, 20-1 BCA at 182,999.

The Court's decision in *Lehman* provides relatively early and valuable insight into the legislative history of claim certification requirement of the 1978 Act, and the prominent role played by Admiral Hyman G. Rickover in the passage of the CDA. Rickover, known as the "Father of the Nuclear Navy,"[31] expressed his concern to Congress over potentially fraudulent claims by government contractors. In hearings prior to its enactment and as cited by *Lehman,* Admiral Rickover urged that the proposed CDA:

> (r)equire as a matter of law that prior to evaluation of any claim, the contractor must submit to the Government a certificate signed by a senior responsible contractor official, which states that the claim and its supporting data are current, complete and accurate. In other words, you put the contractor in the same position as our working man, the income taxpayer who must certify his tax return.... Some contractors contend that they are not required to disclose any facts which would undermine their claims.[32]

The Board in *Kamaludin* acknowledged that the "policy goal of requiring signatures to deter fraud, though, is bottomed upon the notion of its use to identify the person making the false claim so that the claimant can be held accountable for it," and reflected on prior ASBCA rulings which had rejected various offerings as valid signatures to certify a claim. These included the insertion of a typed "//signed//" placed above a typewritten name (*Teknocraft*, 08-1 BCA ¶ 33,846 at 167,505) and the use of "a typewritten name, even one typewritten in Lucida Handwriting font [which] cannot be authenticated [because] [a]nyone can type a person's name; there is no way to tell who did so from the typewriting itself" (*ABS Development Corp.,* ASBCA No. 60022 *et al*., 16-1 BCA ¶ 36,564 at 178,099). In *NileCo General Contracting LLC*, ASBCA No. 60912, 17-1 BCA ¶ 36,862 at 179,606, the ASBCA followed the line of cases consonant with *Teknocraft*, albeit without elaborating on its reasons for doing so.[33]

Kamaludin reflected that the ASBCA's "conclusions in the prior cases requiring signatures to deter fraud were about identification and were not premised on the notion that the legal jeopardy attaching to an individual submitting a false claim is any

---

[31] Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627 (2001).

[32] *Lehman*, 673 F. 2d 352, 355 (1982) (citing Contract Disputes Act of 1978: Joint Hearings on S.2292, S.2787 & S.3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 21 (1978)).

[33] *Kamaludin*, 20-1 BCA at 182,999.

different if the signature is in notarized ink than if it is a typed "X" purporting to stand for the individual. Nor could they be." The decision made the important point that the certification signature itself is not a unique feature of a claim that can implicate a contractor for fraud, and that other claim content can expose it to liability. Because 41 U.S.C. § 7103(c)(2), the CDA's fraud provision, "requires only a misrepresentation of fact or fraud in the claim, and, in fact, makes no distinction between claims of a monetary value that must be certified and those which need not be," the certification "signature is immaterial to the applicability of this anti-fraud provision."[34]

The Board in *Kamaludin* decision noted that "The False Claims Act, 31 U.S.C. § 3729, prohibits and punishes presentment of false claims or false records or materials to the government, but does not hinge upon there being accompanying signatures of any form." Similarly, "the general federal false official statement criminal statute, 18 U.S.C. § 1001, makes no reference to signatures, whether they be ink, typewritten, or non-existent." It stated that "it is enough that the perpetrator use a materially false statement, representation, writing, or document" for liability to attach; *see* 18 U.S.C. § 1001(a).[35] Judge Prouty quoted Judge Posner, who had "noted almost 20 years ago in a Uniform Commercial Code case involving an exchange of emails [that] although a written signature may perhaps be better evidence of identity than a typed one, 'the sender's name on an e-mail satisfies the signature requirement of the statute of frauds.' *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 296 (7th Cir. 2002)."[36]

The ASBCA specifically overruled its prior decision in *Teknocraft* and those decisions that aligned with the rubric there. The Board held in *Kamaludin* that, regardless of the form it takes, a signature that is "verifiable in the sense that it permits a determination of which individual is responsible for the claim, satisfies the anti-fraud policy objectives which are the reason for the CDA's certification requirement."[37]

c. The Signator's "Present Intention to Authenticate" and The Effect of Electronic Communications

The last element of the definition in FAR 2.101 for a valid signature is that there be an indication of "a present intention to authenticate the writing. This includes electronic symbols." The Board looked to *Hamdi Halal Market LLC v. United States*, 947 F.Supp.2d 159 (D. Mass. 2013), in which the federal district court applied the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7006 (the "ESIGN Act"). The court in *Hamdi* noted that while electronic signatures were a relatively recent phenomenon, "similar questions have confronted the judiciary with

[34] *Kamaludin*, 20-1 BCA at 182,999-183,300.
[35] *Id*., 20-1 BCA at 182,999-183,000.
[36] *Id*., 20-1 BCA at 183,000.
[37] *Id*., 20-1 BCA at 183,000.

all communications technology advances, spanning from the telegraph to the internet."[38] The ASBCA did not address whether the ESIGN Act "strictly applies to CDA certifications" as it was "beside the point," because "the world in which the ESIGN Act applies to most commercial transactions is a world in which the use of a name at the end of an email conveys the intent to authenticate the writing therein."[39]

d. The Typed Name at the End of Kamaludin's Email Counted as a Signature for Purposes of Claim Certification

The final point addressed by the decision in *Kamaludin* was to state clearly that the typed signature at the conclusion of Kamaludin's emailed certification to the CO qualified as a signature for purposes of certifying a claim in excess of $100,000 under the CDA. The ASBCA emphasized the crucial point of being able to tie the typed name to "an email correspondence which demonstrates that the document came from the sender's email address." It stated that there are "numerous ways" in which an email address can be tied to a contractor, including its use of the same email address in previous communications with the government. Once the Board is satisfied "that the email address is linked to the certifier," such as the prior and consistent use of a particular email address, then the signature can be deemed verifiable and attributable to the contractor. Here, Kamaludin sent the certified claim using an established email account with which it previously had corresponded with the government.[40]

In rejecting the argument that email documents are more susceptible to forgery than signatures penned in ink, the Board quoted *United States v. Safavian*, 435 F. Supp. 2d 36 (D. D.C. 2006), which observed that paper documents are also vulnerable:

> While the defendant is correct that earlier e-mails that are included in a chain – either as ones that have been forwarded or to which another has replied – may be altered, this trait is not specific to e-mail evidence. It can be true of any piece of documentary evidence, such as a letter, a contract or an invoice. Indeed, fraud trials frequently center on altered paper documentation, which,

---

[38] *Hamdi,* 297 F.Supp. 2d 159,163-64 citing *Providence Granite Co., Inc. v. Joseph Rugo, Inc*., 362 Mass. 888, 888, 291 N.E.2d 159, 160 (1972) (a case in which a typed name at the end of a telegram qualified as a signature), and *Cloud Corp. v. Hasbro, Inc*., 314 F.3d 289. 295-96 (7th Cir. 2002) (holding a typed name at the end of an email qualifies as a signature). The Board in *Kamaludin* noted that the district court in *Hamdi* came to its conclusion by applying the ESIGN Act, whereas the court in *Cloud Corp*. reached the same result but did not consider that law.

[39] *Kamaludin*, 20-1 BCA at 183,000.

[40] *Kamaludin*, 20-1 BCA at 183,000.

> through the use of techniques such as photocopies, white-out, or wholesale forgery, easily can be altered. The *possibility* of alteration does not and cannot be the basis for excluding e-mails as unidentified or unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents (and copies of those documents). We live in an age of technology and computer use where e-mail communication now is a normal and frequent fact for the majority of this nation's population, and is of particular importance in the professional world.[41]

Kamaludin referenced decisions from across a variety of jurisdictions that "routinely found an email address, combined with other indicia within the email, to be sufficient to authenticate the email for admission as evidence." These included *United States v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000), which found that the lower court did not err in admitting emails where the email address and content of the emails provided sufficient circumstantial evidence that these were written by the defendant).[42] This reasoning was followed in *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007), in which the district court agreed that an email address can be circumstantial evidence of authorship[43] and even suggested that a business email could be self-authenticating.[44] Decisions from other courts with consistent rulings include *Am. Fed'n of Musicians of United States & Canada v. Paramount Pictures Corp.*, 903 F.3d 968, 976 (9th Cir. 2018) (circumstances of production as well as its contents would lead reasonable juror to ascertain authenticity of an email); *United States v. Fluker*, 698 F.3d 988, 999-1000 (7th Cir. 2012) (circumstantial evidence of authorship of email); and *Copeland Corp. v. Choice Fabricators Inc.*, 345 F. App'x 74, 77 (6th Cir. 2009) (email from known email address with typed name at end is considered "signed"); *cf. Cloud Corp.* 314 F.3d at 296.[45]

5. The Conclusion of the Board in Kamaludin

Acting through the Senior Deciding Group, the ASBCA concluded in *Kamaludin* that the typed name of appellant's president used to certify the contractor's claim in excess of $100,000 that was sent from an email address customarily used by the company to conduct business with the government was sufficient to find the certification valid. The contractor had relied upon "a discrete and verifiable mark made with the intent to authenticate the certification and we have no basis to suppose

---

[41] *Kamaludin*, 20-1 BCA at 183,000-01 citing *Safavian*, 435 F. Supp. 2d at 41.
[42] *Sidiqqui*, 235 F.3d at 1322-23.
[43] *Lorraine*, 241 F.R.D. at 546, 554.
[44] *Id*. at 554.
[45] *Kamaludin*, 20-1 BCA at 183,001.

that any other individual would have reason to falsify the signature."[46] For these reasons, the Board determined that it would treat the typed signature in the same manner as it would "a handwritten mark purporting to be a signature or a digital signature – no better, no worse." Although it left the door open for later-produced evidence that might show otherwise, the Board determined that the claim underlying ASBCA No. 62006 was certified in accordance with legal requirements.[47]

6. The Separate Opinions in Kamaludin That Concurred in the Result

Although six other judges in the Senior Deciding Group concurred in full with Judge Prouty's decision, separate opinions were filed by Judges Hartman, Clarke, Melnick, and McIlmail. Each of the latter three judges concurred in the result reached by the majority, but expressed a different basis for his opinion. Judge Clarke agreed with the "result and the reasoning of the majority which finds the typed signature block to be a signature in these circumstances," but "believe[d] that *Teknocraft* and the cases that followed it may be distinguished on the facts and need not be overruled to obtain this result."[48]

Neither Judge Hartman nor Judge Melnick nor Judge McIlmail agreed with the majority or with Judge Clarke that Kamaludin's emailed document, which relied upon the typed name of the company's president to certify the claim that is the basis for ASBCA No. 62006, contained an effective certification signature. Instead, they would have denied the motion to dismiss the appeal because they deemed the certification defective but curable. We examine their separate opinions in some detail, as the questions they raise about whether the claim was properly certified or subject to a correctable signature are likely to be the topic of further discussion and potential litigation.

a. *Judge Melnick's Separate Opinion Concurring in the Result*

Judge Melnick's separate opinion emphasized the importance of the certification as a jurisdictional requirement under the CDA, and his perspective that Kamaludin's email did not meet threshold requirements. After observing that in the near half-century since the CDA was passed, he said the Board correctly had "never found that a conventional email is a satisfactory certification," and had consistently decided cases to the contrary. He observed that Kamaludin had not cited (nor had Judge Melnick found) "any precedent holding that a certification mandated by a federal statute can be made in an email." Judge Melnick said that, "Considering the significance of the CDA certification to Congress," he was "confident that if squarely

[46] *Kamaludin*, 20-1 BCA at 183,301.
[47] *Kamaludin*, 20-1 BCA at 183,001.
[48] *Kamaludin*, 20-1 BCA at 183,001.

confronted with that question it would have expected something more solemn than an email." He cautioned that email accounts may be commonly used by more than one individual, can be cancelled or hacked, and urged there was "little basis to conclude an email is any more trustworthy than a typed name on company letterhead."[49]

Judge Melnick emphasized that, as a statutory waiver of sovereign immunity, the requirements of the CDA should be carefully construed. He explained:

> Congress ascribed great importance to the certification requirement so as to discourage unwarranted claims. *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 354 (Ct. Cl. 1982). It is also well established that the CDA, along with its certification requirement, is a waiver of sovereign immunity. *Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1370 (Fed. Cir. 2009). As such, its language must be strictly construed, or construed narrowly. *Id*. at 1370, 1373. Strictly applying the legal definition in use at the time of enactment, to certify means "to testify in writing." *Certify, Black's Law Dictionary* (rev. 4th ed. 1968). In turn, to "testify" is "to bear witness; to give evidence as a witness." *Testify, Black's Law Dictionary* (rev. 4th ed. 1968).[50]

20-1 BCA at 183,001-02.

An additional point made by Judge Melnick, which is particularly underscored by Judge McIlmail's separate opinion, is that under the legal doctrine of *stare decisis*, is his position that there was not an adequate basis in *Kamaludin* for overruling longstanding ASBCA precedent.[51]

b. *Judge McIlmail's Separate Opinion Concurring in the Result*

Like Judge Melnick, Judge McIlmail emphasized that, under *stare decisis* and absent any special circumstances that would dictate a different result, the Board should regard Kamaludin's emailed attempt to sign a CDA certification by inserting the typed name of its president as an invalid certification. Like Judges Melnick and Hartman, Judge McIlmail considered Kamaludin's certification to be unsigned in accordance with prior Board decisions, but he would treat that failure as a curable defect in accordance with *Dai Global, LLC v. Adm'r of the United States Agency for Int'l Dev.*, 945 F.3d 1196 (2019).

Judge McIlmail looked to the legislative history of the CDA in coming to his conclusion that the importance of deterring fraud warranted a contractor's "affix[ing] a

[49] *Kamaludin*, 20-1 BCA at 183,002.
[50] *Kamaludin*, 20-1 BCA at 183,001-02.
[51] *Kamaludin*, 20-1 BCA at 183,002-03.

hand-written signature or what we all understand to be a 'digital' signature to express ceremoniously his solemn vow" that:

> [t]he claim is made in good faith, the supporting data are accurate and complete to the best of the contractor's knowledge and belief, the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable, and the certifier is authorized to certify the claim on behalf of the contractor.[52]

The legislative history cited by Judge McIlmail recounts the importance placed on a signed certification as a deterrent to inflated claims, especially the influential Admiral Rickover. As described in *Fid. & Deposit Co. of Maryland v. United States*, 2 Cl. Ct. 137, 144 (1983) (emphasis added):

> Admiral Rickover was the prime mover of the certification provisions before the Congress. At hearings on the CDA on June 14, 1978, he advised that the new law should:
> "[r]equire as a matter of law that prior to evaluation of any claim, the contractor must submit to the Government a certificate signed by a senior responsible contractor official, which states that the claim and its supporting data are current, complete and accurate. *In other words, you put the contractor in the same position as our working man, the income tax payer who must certify his tax return*...."
> Contract Disputes Act of 1978: Joint Hearings on S.2292, S.2787 & S.3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 21 (1978).
> The Court of Claims cited this testimony in *Paul E. Lehman, Inc*. and commented notably on the legislative history of the CDA:
> "Admiral Rickover wanted to deter contractors from filing inflated claims which cost the Government substantial amounts to defeat. He sought to do so by subjecting contractors to financial risk if their claims were unreasonable.... [He] viewed the certification requirement as a necessary prerequisite to the consideration of any claim. The provisions Congress adopted to include the certification requirement were based upon Admiral Rickover's written suggestions and fairly must be deemed to have incorporated his view concerning the effect of the certification requirement. [citing *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31–32, 102 S. Ct. 821, 830–31, 70 L. Ed. 2d 792 (1982)] .... "The import of the language of the Act and its legislative history is that unless a claim has been properly certified, it cannot be considered under the statute..... Unless that requirement is met, there is simply no claim that this court may review under the Act." *Id*. at ——, 673 F.2d at 355.

[52] *Kamaludin*, 20-1 BCA at 183,003-04.

Kamaludin, 20-1 BCA at 183,003-04 citing *Fid. & Deposit Co. of Maryland v. United States*, 2 Cl. Ct. 137, 144 (1983) (emphasis added).

Judge McIlmail expressed concern that the majority opinion's acceptance in *Kamaludin* of an emailed, typed certification signature could lead to "litigation to sort out" the impact of this determination upon future appeals, especially those involving fraud.[53]

c. *Judge Hartman's Separate Opinion Concurring in the Result*

Judge Hartman's separate opinion agreed with Judges Melnick and McIlmail that the typed certification signature in *Kamaludin* was "not a valid CDA certification." As the basis for his opinion, Judge Hartman looked to the "Federal Circuit's recent decision in *Dai Global, LLC v. Adm'r of the U.S. Agency for Int'l Dev*., 945 F.3d 1196 (Fed. Cir. 2019)." He noted that this opinion "effectively has overruled our prior line of precedent that unexecuted documents, such as the email here, do not constitute a "defective certification" that later can be corrected."[54]

7. Summary

It is clear from the majority and separate opinions concurring in the result in *Kamaludin*, as well as numerous other decisions and legislative history on what comprises the effective certification of a claim exceeding $100,000, that there has long been considerable controversy regarding what is effective, what is defective but curable, and what is not considered to be a signature at all that would deprive tribunals of CDA jurisdiction over an appeal. While the ASBCA's decision in *Kamaludin* accepted a typed signature in an emailed document, it is in certain ways a recognition of evolving business practices that are grounded in electronic transactions and computer-generated text. However, it remains to be seen how the Federal Circuit will react in applying the 1978 CDA.[55]

---

[53] *Kamaludin*, 20-1 BCA at 183,004.

[54] *Kamaludin*, 20-1 BCA at 183,004.

[55] Various commentators have discussed the Federal Circuit's ruling in *Dai Global*, which some regard as leaving unanswered critical questions about the extent of "correctable" defects that could preserve BCA and court jurisdiction under the CDA. *See, e.g.*, Jeri Kaylene Somers, *The Modernization of Government Contract Appeals and the Federal Circuit*, 69 Am. U. L. Rev. 1055 (April 2020) and Armani Vadiee, Todd M. Garland, and Zachary D. Prince, "*Defective Certifications" Under the CDA: The Federal Circuit Provides Some Clarity*," 55-Sum Procurement Law. 26 (2020).

Although the reliance in the separate opinions by Judges Hartman, Melnick and McIlmail upon *Dai Global* for the proposition that the attempted certification signature in *Kamaludin* is a defective but correctable error, the problem is that the Federal Circuit did not clearly ruled upon this issue in that opinion or any another. Whether the decision in *Kamaludin* will generate a panoply of litigation before BCAs and courts remains to be seen, as does the ultimate outcome of the issue it the Federal Circuit decides to take up the issue. In the meantime, the ASBCA has provided clear guidance to contractors that it is willing to accept "a mark purporting to act as a signature [that] may be traced back to the individual making it" as "count[ing] as a signature for purposes of the CDA, whether it be signed in ink, through a digital signature application, or be a typed name."[56]

[56] *Kamaludin*, 20-1 BCA at 182,998.