

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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White Sands Construction, Inc. ) ASBCA No. 53056  
 )  
Under Contract No. DACA63-96-D-0022 )

APPEARANCE FOR THE APPELLANT: F. Randolph Burroughs, Esq.  
Burroughs & Rhodes  
Alamogordo, NM

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.  
Engineer Chief Trial Attorney  
Lloyd R. Crosswhite, Esq.  
Trial Attorney  
U.S. Army Engineer District,  
Fort Worth

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD  
ON GOVERNMENT MOTION TO DISMISS

Appellant, White Sands Construction, Inc. (White Sands), objects to the Government's exercise of option year four under its contract alleging breach of contract and bad faith. The Government has filed a Motion to Dismiss for Lack of Jurisdiction because of appellant's failure to submit its claim to the contracting officer. We dismiss the appeal.

FINDINGS OF FACT FOR PURPOSES OF THIS MOTION

By date of 6 June 1996, the United States Army Corps of Engineers awarded an indefinite delivery, indefinite quantity job order contract to White Sands for construction repair requirements at White Sands Missile Range, New Mexico. The contract, a Small Business Administration 8(a) set aside, was awarded for a base year and contained four one year options. As awarded, the contract contained a minimum guaranteed quantity of \$100,000 and a maximum value of \$3,000,000 for the base period and for each of the four option periods. (R4, tab 3) \*

White Sands performed under the base term of the contract and three option periods. Thereafter, White Sands sent several letters to the Government complaining of the small

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\* The Rule 4 file was submitted in conjunction with ASBCA No. 51875, a related appeal under the same contract number.

number of work orders placed with White Sands and other problems, requesting the Government to refrain from exercising the fourth option (app. supp. R4, tabs 1, 3, 4). These letters were written by Mr. F. Randolph Burroughs, counsel for White Sands, to Mr. Lloyd R. Crosswhite, Deputy District Counsel for the Government (*id.*). In reply, Mr. Crosswhite informed appellant that after reviewing the question of whether it was in the best interest of the Government to exercise the option, the contracting officer had determined that the Government would be exercising the fourth option year (app. supp. R4, tabs 2, 6).

Subsequently, the Government exercised the option to extend the contract for the fourth year on 3 June 2000. By letter dated 20 June 2000, Mr. Burroughs informed Mr. Crosswhite that White Sands objected to further performance under the contract. (App. supp. R4, tab 7; comp., ex. 2) In response, by letter dated 30 June 2000, Mr. Crosswhite notified Mr. Burroughs of his consultation with the contracting officer and their determination that performance under the contract should continue and, further, that if White Sands believed the Government had breached the contract that it could submit a claim under the Disputes clause of the contract to the contracting officer. (App. supp. R4, tab 8; comp., ex. 1)

By date of 19 September 2000, White Sands filed a notice of appeal referencing the 30 June 2000 “decision” of Mr. Crosswhite. White Sands seeks to have the contract terminated alleging financial hardship, material breach by the Government for failure to cooperate and bad faith. Appellant does not dispute the fact that its claim was not submitted to the contracting officer for final decision, but argues that the Government was well aware of the issues involved because of the many letters which were exchanged between the attorneys. To require appellant to submit a formal claim to the contracting officer, White Sands asserts, is putting “procedure over substance.” (App. resp. at 1-2)

### DECISION

This appeal is governed by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. Section 605(a) mandates that “[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.” Our jurisdiction over contractor appeals derives from claims which have been previously presented to the contracting officer for a final decision. *J & J Maintenance, Inc.*, ASBCA No. 50984, 00-1 BCA ¶ 30,784; *Trepte Construction Company, Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595.

It is undisputed that the appellant has not submitted its claim to the contracting officer requesting a final decision. Accordingly, we lack jurisdiction under the CDA over the appeal filed 19 September 2000. This appeal is dismissed without prejudice to the filing of a proper appeal under the CDA. We express no opinion on appellant’s statement in its response to the Motion to Dismiss that even if the Board dismisses this action, the issue will remain due to averments in appellant’s first Amended Complaint in ASBCA No. 51875.

Dated: 8 February 2001

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RICHARD SHACKLEFORD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53056, Appeal of White Sands Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals