

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Amina Enterprise Group, LTD) ASBCA Nos. 58547, 58548
)
Under Contract Nos. W91B4P-10-P-0309)
W91B4P-10-P-0329)

APPEARANCE FOR THE APPELLANT: Mr. Timothy J. McLaren
Vice President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Anthony V. Lenze, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES ON
RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

On 8 February 2013 Amina Enterprise Group (AEG) appealed to the Board the contracting officer's (CO's) 8 December 2012 terminations of the two captioned contracts for default. On 10 April 2013 the government moved to dismiss these appeals for lack of Contract Disputes Act (CDA) jurisdiction. AEG responded to the motion on 16 May 2013, and the government replied thereto on 2 July 2013.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. CENTCOM Contracting Command-East (CCCE) and AEG entered into Contract No. W91B4P-10-P-0309 (contract 309) and Contract No. W91B4P-10-P-0329 (contract 329) on 22 September 2010 for site preparation and construction of a 72' x 100' K-Span Building (contract 309) and a 72' x 100' K-Span Maintenance Facility (contract 329) at FOB Salerno¹ (gov't mot., ex. A at 2-6, ex. B at 2-6).

2. Contracts 309 and 329 each incorporated by reference the FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) and 52.233-1, DISPUTES (JUL 2002) clauses (gov't mot., ex. A at 16, ex. B at 16). The Default clause, ¶ (c), provided that if it were determined that the contractor was not in default or its delay was excusable, the termination would be treated as for the convenience of the government. The Disputes clause, ¶ (d)(2)(i), provided: "Contractors shall provide the [CDA] certification specified

¹ Movant asserts that "FOB SALERNO" means Forward Operating Base Salerno in Afghanistan (mot. at 1).

in subparagraph (d)(2)(iii) of this clause when submitting any claim exceeding \$100,000.”

3. On 8 December 2012 the CO, SSgt Berchan A. Torrejon, issued final decisions notifying AEG that contracts 309 and 329 each was “terminated completely for default” and that it had the right to appeal such decisions to the agency board of contract appeals “within 60 [sic] days from the date you receive this decision” (Bd. corr. ltrs. dtd. 8 December 2012).

4. On 8 February 2013 AEG filed at the ASBCA notices of appeal from the CO’s 8 December 2012 final decisions under contracts 309 and 329 (gov’t mot., ex. C). The ASBCA docketed AEG’s appeal under contract 309 as ASBCA No. 58547, and its appeal under contract 329 as ASBCA No. 58548.

5. AEG’s notice of appeal appended both CO decisions, an 8 February 2013 AEG letter to SSG Roy Jones, U.S. Army and SSgt Torrejon which stated in pertinent part:

Subject: Amina Response to Governments [sic] Official Termination Letters, dated 08DEC2012

....

[T]he Government is hereby notified that [AEG] intends to file appeal with the Armed Services Board of Contract Appeals, with the direct goal of reversing and/or making financially whole, all parties – including AEG....

....

A formal claim for cost over \$100,000 (approximately) is pending the US Government, pending outcome and/or decision of ASBCA...whether or not they decide to reverse US Governments [sic] decision to terminate.

and an 8 February 2013 AEG letter to the Recorder, ASBCA, stating in pertinent part:

Re: ASBCA No. [*Unknown at Time of Filing*]
Appeal of [**Anima Enterprise Group, LTD**]
Under Contract No(s) [**W91B4P-10-P-0309** and
W91B4P-10-P-0329 – (attached)]

**Wrongful Termination of Construction [K-SPAN]
Contracts...Located at FOB Salerno, Afghanistan**

A. Summary of Appellants Pleadings before the ASBCA
(1) Synopsis of Reasoning/Request for Financial Relief
– for Appealing Action;

[AEG] wishes to address the ASBCA to express what we believe to be a wrongful termination of two of our [CCCE] construction contracts [n.1 identified the notice of termination for default by the two contract numbers and the decisions dated 8 December 2012].

AEG seeks relief in the form of either contract reinstatement, or financial relief, as outlined in procedures exceeding the certified claims threshold of \$100,000 under the [CDA]; also under FAR clause 52.233-1 Disputes (2002).... Due to the possibility of the ASBCA’s decision to overturn the present termination decision, AEG has refrained from officially filing formal claim in lieu of the board’s decision following hearing and decision.

DECISION

The government’s grounds for its motion are that the “Board does not have the authority to grant specific performance and Amina’s monetary claim was not certified as required by the [CDA]” and thus the Board must dismiss both appeals for lack of CDA jurisdiction (gov’t mot. at 1). AEG contends that it strongly disagrees with the CO’s default termination and its aim is to obtain an impartial forum to reclassify or redesignate that default termination as a termination for convenience (app. resp. at 1-3).

AEG’s notice of appeal attached the CO’s 8 December 2012 final decisions and AEG’s 8 February 2013 letters to the CO and to the ASBCA. These documents indicated that appeals were being taken to the ASBCA, identified the two contracts by number and CCCE, the agency involved. (SOF ¶ 5)

AEG’s pro se notice of appeal also mentioned a “claim...over \$100,000,” which it had not formally filed pending the outcome of these ASBCA appeals, relief of “contract reinstatement” and making AEG “financially whole” (SOF ¶ 5). Whether AEG’s \$100,000 claim, which apparently has not been filed, will require CDA certification is immaterial to the Board’s jurisdiction to entertain these appeals of the CO’s default terminations.

A termination for default is considered to be a government claim and does not require a contractor to file a monetary claim for Board jurisdiction.

Connectec Co., ASBCA No. 57546, 11-2 BCA ¶ 34,797 at 171,258. Since AEG is appealing the CO's termination, and no monetary claim has or needs to be filed at this juncture, the government's motion is not well taken.

AEG's gratuitous statements about relief of contract reinstatement and making AEG whole do not nullify its notices of appeal:

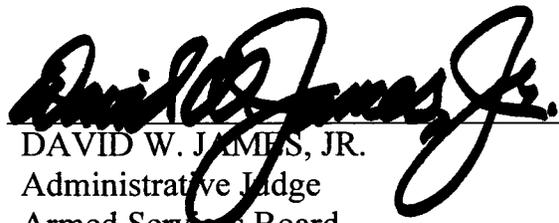
[A]ppellant's "request that you [the Armed Services Board of Contract Appeals] help me...", its "desire to have the contract reinstated as soon as possible" or that it "not be penalized monetarily or administratively", and its recitation of excuses for its non-performance constitute the requisite dissatisfaction with and intent to appeal the...default termination final decision. We are not dissuaded from this conclusion by this pro se appellant's mistaken assumption that this Board is empowered to grant relief in the form of specific performance.

See C. Kennedy Mfg. & Engineering, ASBCA No. 43341, 93-3 BCA ¶ 25,974 at 129,161. Such statements do not nullify its appeal notices or give us cause for dismissing these appeals. *See ESA*, 07-1 BCA ¶ 33,573 at 166,312 n.3 ("It cannot be denied that appellant's [notice of appeal] letter contains other confusing language. This language, however, does not overcome...appellant's dissatisfaction with the CO's final decision."). The terminations for default are properly before us.

CONCLUSION

Respondent's motion to dismiss is denied.

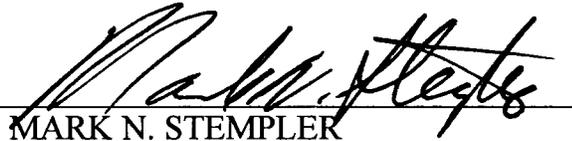
Dated: 24 July 2013



DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur



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

I concur



PETER D. TING
Administrative Judge
Acting 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 Nos. 58547, 58548, Appeals of Amina Enterprise Group, LTD rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals