

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Bescon Corporation and) ASBCA No. 51353
Seaboard Surety Company)
)
Under Contract No. DACA31-88-C-0045)

APPEARANCES FOR THE APPELLANTS: Douglas L. Patin, Esq.
Glenn S. Greene, Esq.
Spriggs & Hollingsworth
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Douglas P. Knowles, Sr., Esq.
District Trial Attorney
US Army Engineer District,
Baltimore

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON JURISDICTION

Appellants appeal the contracting officer's assessment of procurement costs expended to correct an allegedly latent defect in the contractor's performance under the above-referenced contract. The Board, *sua sponte*, raised the dual questions of timeliness and standing to pursue the appeal. After review of evidence proffered by the parties, we have resolved the timeliness issue in appellants' favor. However, we dismiss Seaboard Surety Company as an appellant for lack of standing.

FINDINGS OF FACT

1. The Army Corps of Engineers, Baltimore District (Government), awarded Contract No. DACA31-88-C-0045 (contract) to Bescon Corporation (Bescon) on 23 August 1988. Mr. Albert K. Leung signed the contract as the president of Bescon. Seaboard Surety Company (Seaboard) was surety on the payment and performance bonds tendered by Bescon under the contract. (R4, tabs 3, 17, 21; comp. ¶ 2; ans. ¶ 2)

2. The contract to construct buildings at Aberdeen Proving Ground, Maryland, included the installation of two 10,000-gallon underground fuel storage tanks. Paragraph 2.1 of specification § 11140 of the contract required that the tanks' installation conform to

the State of Maryland, Department of Natural Resources Regulation 08.05.04. The Government accepted Bescon's performance under the contract on 4 January 1991. (R4, tab 3-4; comp. ¶¶ 3-4; ans. ¶¶ 3-4)

3. By letter dated 30 November 1993, the Government confirmed its 11 November 1993 telephonic assertion that the storage tanks' installation did not comply with Regulation 08.05.04, asserted that the defect was latent and demanded that Bescon correct it (R4, tab 6). By letter dated 29 December 1993, Bescon denied that it was responsible for correction of the alleged defect and requested that Bescon not be given an unsatisfactory performance rating (R4, tab 18).

4. Bescon, Seaboard, and the Government continued to communicate through 11 March 1994 (comp. ¶7; ans.¶ 7). The appeal record does not indicate that Seaboard paid funds under the performance bond or that there was any takeover agreement.

5. On 3 August 1994, the Government modified an existing contract with J.J. Mundth Construction, Inc., Contract No. DACA 31-92-C-0084, to incorporate the removal and reinstallation of the storage tanks in accordance with Maryland regulations, for \$99,599.00 (R4, tab 7).

6. On 12 August 1997, the contracting officer issued a final decision which demanded \$129,599.00 as reimbursement for the costs incurred to correct the defective work under the contract (R4, tab 2).

7. The Government sent the final decision to Bescon on multiple occasions, to the address specified in the contract and to two other addresses, but it was returned to the Government unclaimed. One return envelope was marked "Forwarding Order Expired." (Corr. file, Gov't letters 15 December 1998 and 31 January 2000)

8. By letter dated 4 December 1997, the Government sent Seaboard a demand for reimbursement of the costs to correct the work, enclosing a copy of the final decision. The Government asserted that "[t]o the best of our knowledge, Bescon is no longer in business. As a result, we are contacting Seaboard Surety Company, as surety on the performance bond of the subject contract, to make demand for payment." The letter notified Seaboard that it had 90 days in which to file an appeal at the Board, or 12 months to file an action in the Court of Federal Claims. Seaboard received the letter on or about 4 December 1997. (Corr. file, app.'s letter dated 17 February 1999, attach. 1 and affidavit of Susan D. Weinstock)

9. Appellant has submitted an affidavit from Mr. Leung, in which he states his current Florida address. He further states that he was the sole owner and president of Bescon, which ceased operations in or about 1991, and that he received a copy of the final

decision from Seaboard in or about late December 1997, with a demand that he indemnify Seaboard with respect to any Government claims against Bescon. (Corr. file, app.'s letter dated 17 February 1999, affidavits of Ms. Weinstock and Mr. Leung, and statement of Mr. Patin)

10. Mr. Leung and Seaboard each retained Mr. Patin to defend Bescon and Seaboard, respectively, against the Government claim. Mr. Patin filed a notice of appeal at this Board on 19 February 1998, in his representative capacity for Bescon and Seaboard. The notice of appeal stated that it was an appeal from the 12 August 1997 decision, received by Seaboard on 4 December 1997, and that Bescon never received a copy (from the contracting officer). (*Id.*)

11. By order dated 10 December 1998, the Board, *sua sponte*, raised the issues of timeliness and Seaboard's standing. Both parties assert that the appeal was timely and Seaboard has standing.

DECISION

Timeliness

Under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, the Board lacks jurisdiction over an appeal filed more than 90 days after receipt of the final decision. 41 U.S.C. § 606. It is undisputed that Seaboard received the final decision dated 12 August 1997 on or about 4 December 1997 and that Bescon did not receive a copy of the final decision until it was furnished to its president, Mr. Leung, at his address in Florida, in late December 1997. In these circumstances, as agreed by the Government, the appeal was timely.

Standing

Our jurisdiction under the CDA depends upon the existence of an express or implied-in-fact contract between the Government and the appellant. Only a "contractor," defined in 41 U.S.C. § 601(4) as a "party to a Government contract other than the Government," may file an appeal. *See Michael C. Donohoo*, ASBCA No. 51936, 99-2 BCA ¶ 30,470 at 150,524. Under that definition, Seaboard, which has made no payment under its performance bond and has not signed a takeover agreement, is not a contractor. *See Admiralty Constr., Inc. by National American Ins. Co. v. Dalton*, 156 F.3d 1217, 1221-22 (Fed. Cir. 1998), *aff'g* ASBCA No. 48627, 96-2 BCA ¶ 28,280.

Appellants' only argument is that Seaboard has standing because the Government forwarded the final decision directly to Seaboard, demanded payment from Seaboard for the costs claimed in the final decision, and granted Seaboard 90 days in which to appeal.

(App. br. at 2) We do not agree with this argument. The Government's demand letter and statement that Seaboard could appeal do not serve to confer jurisdiction where there is none. We have considered and denied similar contentions. *See, e.g., David Grimaldi Co.*, ASBCA No. 36043, 88-3 BCA ¶ 21,045 (a final decision not relating to a proper claim does not confer appeal rights).

Seaboard's name is removed from the title of the appeal in accordance with this decision.

Dated: 13 September 2000

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 51353, Appeal of Bescon Corporation and Seaboard Surety Company, rendered in conformance with the Board's Charter.

Dated:

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