

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
LA Limited)
LA Hizmet Isletmeleri) ASBCA No. 52179
)
Under Contract No. F61354-97-H-0001)

APPEARANCE FOR THE APPELLANT: Mr. M. Levent Adali
Director

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
Richard L. Hanson, Esq.
Deputy Chief Trial Attorney
MAJ Timothy D. Matheny, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD
ON GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This dispute involves a concessionaire contract for food services. The appeal is taken from a contracting officer's final decision denying appellant's claim for compensation for losses suffered in performance of the contract and as a result of the termination of the contract. The Government has moved to dismiss portions of the appeal based upon a lack of Contract Disputes Act (CDA) subject matter jurisdiction. Appellant filed a response stating reasons for its claim for compensation.

STATEMENT OF FACTS

On 18 December 1996, appellant LA Limited, LA Hizmet Isletmeleri and a Non-Appropriated Fund Instrumentality (NAFI) that is not the Army and Air Force Exchange Service entered into Contract No. F61354-97-H-0001, a concessionaire contract for food services for the United States Air Force facility, Izmir Air Station, Turkey. The contract was to begin on 1 January 1997 and continue until 31 December 1997, for a base period of one calendar year with one year options that could extend the contract to a performance period not to exceed five years. (R4, tab 1)

The contract included a Disputes clause which provides for the decision of any claim or dispute "concerning" the contract by the contracting officer with a right of

appeal by the contractor to the Armed Services Board of Contract Appeals (R4, tab 1 at 11).

The Government exercised the first option extending the contract to 31 December 1998 (R4, tab 3). The Government did not terminate the contract. When the Government did not exercise the second option, the contract expired at the end of its term on 31 December 1998.

On 22 December 1998, appellant sent the contracting officer a claim for \$500,000 that requested an explanation for not exercising the option to extend the contract. Appellant alleged unreasonable, untimely, vindictive and criminal actions by the Government against its business. (R4, tab 33) In response to a Government request, appellant provided certification of the claim that was received by the Government on 3 February 1999 (R4, tab 35).

The contracting officer requested supporting documentation for the claim (R4, tabs 37, 39). By letter dated 25 March 1999, appellant itemized its alleged losses. This letter included the assertion that appellant's director, Mr. M. Levent Adali, had been "treated very badly" for which there was a demand for \$250,000 in compensatory emotional damages. (R4, tab 38) The letter also included a demand for \$7,000 for medical care necessitated by the "bad treatment." (*Id.*)

On 19 April 1999, the contracting officer issued a final decision denying appellant's claim in its entirety (R4, tab 42). Appellant filed this timely appeal.

In a letter of complaint filed with the Board on 21 June 1999, appellant alleged its losses, including *inter alia* in paragraph 8, compensatory emotional damages in the amount of \$250,000 caused by Mr. Adali's having been "treated very badly" by Government representatives and, in paragraph 9, medical care that was caused by the bad treatment and cost Mr. Adali \$7,000 (app. comp. at 2).

DECISION

The Government has moved to dismiss with prejudice the portions of appellant's complaint that relate to emotional damages and medical care expenses based on the Board's lack of subject matter jurisdiction over claims sounding in tort. The Government maintains that the requests for compensation are derived from alleged tortious conduct of Government personnel. Appellant responded with examples of why the request had been

made for compensatory emotional damages, including its demand for an explanation of why payment it considered due had been delayed. Mr. Adali stated in his response that his appeal is a “serious case” that warrants a full investigation before decision.

In deciding the Government’s motion to dismiss for lack of subject matter jurisdiction based upon the sufficiency of appellant’s allegations, we construe the pleadings in appellant’s favor. *E.M. Scott & Associates*, ASBCA No. 45869, 94-3 BCA ¶ 27,059 at 134,837; *HTC Industries, Inc.*, ASBCA No. 40562, 93-1 BCA ¶ 25,560 at 127,309, *aff’d on reconsider.*, 93-2 BCA ¶ 25,701, *aff’d*, 22 F.3d 1103 (1994) (Table). The CDA applies to all contracts for procurement of property and services entered into by executive agencies and by NAFIs that are affiliated with certain exchange systems. 41 U.S.C. § 602(a); *Leonard Clay Wrice*, ASBCA No. 51031, 99-2 BCA ¶ 30,557. Since the NAFI here was not such an exchange service, the appeal before us cannot be taken pursuant to the CDA. The Disputes clause in the contract, the terms of which provide a right of appeal to the Board from decisions of the contracting officer with respect to claims or disputes, is the basis of our jurisdiction herein. *Mid-America Officials Association*, ASBCA No. 38678, 89-3 BCA ¶ 22,231; *Rainbow Valley Corporation*, ASBCA No. 11691, 68-1 BCA ¶ 6840.

The Government submits that intentional infliction of emotional distress is a cause of action that sounds in tort. *Berdick v. United States*, 222 Ct. Cl. 94, 612 F.2d 533 (1979); *Land Movers, Inc. and O.S. Johnson –Dirt Contractor (JV)*, ENG BCA No. 5656, 91-1 BCA ¶ 23,317. We have held that the Board does not have jurisdiction under Disputes clauses over disputes that involve claims sounding in tort. *Cf. Edgar M. Williams*, ASBCA No. 16058, *et al.*, 72-2 BCA ¶ 9734 at 45,510-11. Furthermore, appellant has not alleged harm to the contractor. Instead appellant has alleged personal losses that were suffered by an individual director of the contractor company. Appellant has not alleged a relationship between the Government’s alleged wrongful conduct and its obligations under the contract that could provide a basis for our jurisdiction.

We conclude that the Disputes clause does not confer jurisdiction over appellant’s tort claim. Accordingly, we do not have jurisdiction over those portions of appellant’s complaint that allege that its director suffered losses in the nature of emotional damages and medical care expenses resulting from Mr. Adali’s being treated badly by Government personnel.

The Government's motion to dismiss paragraphs 8 and 9 of the complaint for lack of subject matter jurisdiction is granted.

Dated: 6 April 2000

LISA ANDERSON TODD
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
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 No. 52179, Appeal of LA Limited, LA Hizmet Isletmeleri, rendered in conformance with the Board's Charter.

Dated:

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