

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Bruce E. Zoeller ) ASBCA No. 55654  
 )  
Under Contract No. DACA41-1-99-532 )

APPEARANCE FOR THE APPELLANT: Mr. Bruce E. Zoeller  
Hiawatha, KS

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
William M. Edwards, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District,  
Kansas City

OPINION BY ADMINISTRATIVE JUDGE DELMAN

The government filed a motion to dismiss this appeal, contending that the Board lacks jurisdiction because Mr. Zoeller did not appeal from a contracting officer’s final decision. In the government’s reply to appellant’s opposition to the motion to dismiss, the government broadened its motion to assert that appellant’s request for payment was not a proper claim under the Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA). For the reasons discussed below, we grant the government’s motion.

STATEMENT OF FACTS FOR THE PURPOSES OF THE MOTION

On 22 June 1999, the U.S. Army Combined Arms Center and Fort Leavenworth, Fort Leavenworth, Kansas (government) entered into lease No. DACA41-1-99-532 with Mr. Bruce E. Zoeller (appellant) for the lease of three parcels of government-owned land, described as units AA, FW, and FE, for native plant seed production and harvesting and hay production. The parcels of land were located on the post at Fort Leavenworth, Kansas. The lease was for a period of five hay crop-years, beginning on 20 May 1999 and ending on 31 December 2003. Paragraph 31, OPTION TO RENEW, as amended per Supplemental Agreement No. 1, stated: “Lease Units AA, FE and FW may be renewed for an additional five (5) year term without competition . . . .” (R4, tab 3 at 1, 10; ex. A at 7; attach. 1 at 2) The lease also provided that the government could revoke the lease “at will by the Secretary” (R4, tab 3 at 1).

Appellant executed the lease on 14 June 1999. On 22 June 1999, the lease was executed on behalf of the government by Mr. Charles B. Barton, Chief, Real Estate Division, Department of Army, Corps of Engineers (COE). Mr. Barton also executed Supplemental Agreement No. 1 on behalf of the government.

Paragraph 5 of the lease, SUPERVISION BY THE DISTRICT ENGINEER, stated as follows (R4, tab 3):

The use and occupation of the premises shall be subject to the general supervision and approval of the District Engineer, Kansas City District, hereinafter referred to as said officer, and to such rules and regulations as may be prescribed from time to time by said officer.

Paragraph 4 of the lease, AUTHORIZED REPRESENTATIVES, stated in pertinent part as follows:

Except as otherwise specifically provided, any reference herein to "Secretary", "District Engineer", "Installation Commander", "Project Manager" or "said officer", include their duly authorized representatives.

Paragraph 3 of the lease, NOTICES, provided as follows:

All correspondence and notices to be given pursuant to this lease shall be addressed . . . if to the United States, to the District Engineer, Attention: Chief, Real Estate Division, Kansas City District, Corps of Engineers, 860 Federal Building, 601 East 12<sup>th</sup> Street, Kansas City, Missouri 64106-2896 or as may from time to time otherwise be directed by the parties. . . .

Paragraph 11 of the lease, RENTAL ADJUSTMENT, provided that:

In the event the United States revokes this lease or in any other manner materially reduces the leased area or materially affects its use by the Lessee prior to the expiration date, an equitable adjustment will be made in the rental paid or to be paid under this lease. Where the said premises are being used for farming purposes, the Lessee shall have the right to harvest, gather and remove such crops as may have been planted or grown on said premises, or the District Engineer

may require the Lessee to vacate immediately and, if funds are available, compensation will be made to the Lessee for the value of the remaining crops. . . .

Paragraph 21a of the lease, DISPUTES, stated as follows:

Except as provided in the Contract Disputes Act of 1978 (41 U.S.C. 601-613) (the Act), all disputes arising under or relating to this lease shall be resolved under this clause and the provisions of the Act.

Paragraph 21c stated that any claim by the lessee shall be made in writing and be submitted to the District Engineer for a written decision pursuant to the CDA, and included the CDA certification language for claims exceeding \$100,000.

Based upon the foregoing, we find that the lease contemplated that the District Engineer and/or the duly authorized representative of the District Engineer was to act as the contracting officer (CO) for purposes of claim submission and decision under the CDA.

Shortly after 11 September 2001, the government took over a portion of land from unit FE of appellant's lease to construct certain security facilities. On 4 October 2002, appellant submitted a claim to the government, seeking the value of the crops for the remaining years of the lease for this area. Appellant filed this claim with "Greg G. Wilson or acting District Engineer" (R4, tab 3, ASBCA No. 54160). Mr. Wilson was the Chief, Real Estate Division, COE. By letter to appellant dated 17 December 2002, Mr. Wilson denied the claim, identifying his decision as the "final decision of the contracting officer" and providing appellant with his appeal rights (*id.*, tab 2). Appellant filed an appeal to this Board, which was docketed as ASBCA No. 54160.

By letter dated 21 February 2003, the government provided appellant with official notice that it was cancelling the lease in part, that is, it removed units FE and FW from the lease (R4, tab 8). This notice was executed by Mr. Gary Dye, Chief Military Branch, Real Estate Division, COE. Appellant deemed this notification as tantamount to a CO decision and he appealed to this Board, which appeal was docketed as ASBCA No. 54205. Appellant disputed, *inter alia*, the government's right to partially cancel the lease in this manner.

The Board consolidated the appeals for hearing. At the hearing, appellant called Mr. Wilson as a witness. Mr. Wilson identified himself as the Chief of Real Estate, COE.

He testified and we find that the lease was delegated to his authority (R4, tab 20 at tr. 1/128). He also testified and we find as follows:

Q Were you responsible for portions of the lease that lists the district engineer as being responsible? Were you assuming his responsibility as far as the lease is concerned?

A Yes.

(*Id.*, at 129)

We find that Mr. Wilson was the CO for purposes of claim submission and decision under the Disputes clause of the lease and the CDA, and that appellant knew or had reason to know of this fact.

The Board sustained ASBCA No. 54160 under Board Rule 12.2, awarding appellant the value of the crops for the disputed area for the crop years of 2001, 2002 and 2003. *Bruce E. Zoeller*, ASBCA No. 54160 (Sept. 30, 2003) (unpublished) (R4, tabs 12, 20 at tr. 2/36-43). In a separate decision, the Board denied ASBCA No. 54205, ruling that the government had the authority to partially cancel the lease. The Board also noted that appellant's request for compensation resulting from the partial lease cancellation was not part of the appeal and was not properly before the Board. *Bruce E. Zoeller*, ASBCA No. 54205, 04-1 BCA ¶ 32,486, *aff'd on recons.*, 04-1 BCA ¶ 32,562, *aff'd*, 113 Fed. Appx. 390 (Fed. Cir. 2004).

On 27 September 2004, appellant filed suit in the U.S. Court of Federal Claims, seeking monetary relief for the partial lease cancellation based upon, *inter alia*, breach of contract and warranty and compensable taking under the Fifth Amendment to the U.S. Constitution. On 12 May 2005, the court dismissed the action for lack of jurisdiction. Insofar as pertinent, the court held that the government's partial lease termination was not a "compensable taking" since the government had not prevented appellant from seeking its contractual remedies. It also stated that in order for appellant to obtain its contractual remedy, it was required to submit a written claim to the contracting officer under the CDA, which it had not yet done. *Zoeller v. United States*, 65 Fed. Cl. 449, 461-62 (2005).

Appellant filed the subject certified claim, dated 30 May 2006. As far as this record shows, appellant did not address or mail this claim to the CO. He submitted the original claim letter and a CD-pdf to the Chief Council [sic], Kansas City District Engineer, USACE, DOD, and provided CD-pdf copies to various other government legal offices, including the chief counsel for the Installation Management Agency: TRADOC replacement, DOD; the Chief Engineer, COE; the Secretary of the Army; the Department

of Justice, DOJ; and the Department of Transportation, DOD. The claim was entitled as follows:

Subject: Damage claims and requests for determinations to rectify Army site demolition (errs, acts & omissions) impacts on claimant's tangible and intangible property, rights and interests.

(R4, tab 1)

Appellant's claim was lengthy and difficult to follow in many respects. In summary, appellant identified a number of government actions and inactions related to the lease which it claimed caused the appellant losses and damages in contract and in tort. Appellant sought damages in the amount of \$313,245.60 for "permanent or recurring damages to claimant's tangible and intangible property, rights and interests therein . . . ." (R4, tab 1 at 9).

Appellant's claim did not request a decision of the CO. Rather, the claim sought "a Chief Accountable Officer's decision." (*Id.*, at 10) Appellant concluded the claim as follows:

If mis-directed please redirect these damage claims and these requests for determinations to the proper U.S. Governmental Real Property Accountable Officer(s) and/or their chief council [sic].

(*Id.*, at 11)

By letter to appellant dated 25 July 2006, the Office of Counsel, per Alice J. Edwards, Assistant District Counsel, COE, stated in part, that she was "unable to discern the purpose of [Mr. Zoeller's] document or the relief [he was] requesting." The letter stated that the claim was "being reviewed by Ft. Leavenworth and the United States Army Claims Service because portions of [the] document resemble a tort claim." (R4, tab 6)

By letter to appellant dated 29 August 2006, Charles D. Hayes, Jr., Lieutenant Colonel, US Army, Acting Chief, Tort Claims Division denied the claim, informing appellant, among other things, that his opportunity to file a claim under the Federal Tort Claims Act had passed because the statute of limitations for tort actions had expired. LTC Hayes advised that his letter constituted the final administrative action on appellant's claim related to the unlawful termination of its lease, and advised appellant

that it could file suit in U.S. District Court no later than six months from the date of mailing of the letter. (R4, tab 5)

By letter dated 17 November 2006, appellant filed the subject appeal to this Board from the letter of LTC Hayes, which was docketed as ASBCA No. 55654 (R4, tab 2). As far as this record shows, appellant's claim was never directed to the CO by appellant or the government, nor did the CO have the opportunity to issue a decision on the claim.

### DECISION

The linchpin of our jurisdiction over a contractor claim under the CDA is the submission of the claim to the CO for decision. 41 U.S.C. § 605(a). *Neal & Co., Inc. v. United States*, 945 F.2d 385 (Fed. Cir. 1991). As claimant, appellant has the burden to show that it has filed such a claim, and that its claim is properly before this Board. We believe appellant has not met its burden.

Appellant's claim was not addressed to the CO or to appellant's primary contact under the lease, nor did the claim request a CO decision, nor did the claim request that it be delivered to the CO for a decision. Nor did the CO ever receive the claim or have the opportunity to issue a decision on the claim. Compare *Neal*, 945 F.2d at 388-89. Appellant was well aware of the identity of the CO -- Mr. Wilson -- under the lease. Previously, appellant had received a CO's decision from Mr. Wilson under the lease, which he had appealed to this Board. In fact, appellant called Mr. Wilson as a witness in the prior Board proceedings. Moreover, the Court of Federal Claims expressly instructed appellant that it was necessary for appellant to submit a claim for decision to the CO in order to seek its contract remedies under the lease.

Under these circumstances, we believe that appellant has failed to show that it submitted its claim to the CO for decision as required by the CDA. Accordingly, we lack jurisdiction over the claim.

### CONCLUSION

We grant the government's motion and dismiss this appeal, without prejudice to the appellant filing a written claim to the CO for decision as required by the CDA.

Dated: 30 May 2007

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JACK DELMAN  
Administrative Judge

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Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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 No. 55654, Appeal of Bruce E. Zoeller, rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals