

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
ACC Construction Company, Inc.) ASBCA No. 56451
)
Under Contract No. W9126G-05-C-0006)

APPEARANCES FOR THE APPELLANT: Karl Dix, Jr., Esq.
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Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE WILSON
ON THE GOVERNMENT’S MOTION TO STRIKE

This appeal arises from the contracting officer’s (CO) 16 June 2006 final decision that interpreted the construction schedule of a contract to build a Passenger Processing Facility (PPF) and perform other work. The contract provided for liquidated damages if the PPF was not completed on time (R4, tabs 12-13). Appellant initially filed a claim with the CO dated 27 October 2005 contending that the schedule allowed 450 days to complete the PPF and requested a CO’s decision on the interpretation of the construction schedule (R4, tab 27). The CO denied appellant’s claim contending that although the entire contract performance period was 450 days, the contract only allowed 360 days for construction of the PPF. The CO’s decision did not assert a claim for liquidated damages (R4, tab 2).

This matter was initially appealed to the U.S. Court of Federal Claims. However, upon appellant’s motion to consolidate this case with several appeals under the same contract currently before the Board, this appeal was transferred to the Board and docketed on 10 July 2008. The complaint previously filed in the U.S. Court of Federal Claims was allowed to serve as appellant’s complaint in this appeal.

In its complaint before the Board, appellant pleads the following:

23. The CO has authorized the withholding of earned funds in anticipation of assessing liquidated damages. Accordingly, ACC has been and continues to be prejudiced and damaged financially by the failure of the CO to publish a written decision sooner and by erroneously contradicting the CO making negotiation decisions at time of award.

....

WHEREFORE, ACC respectfully requests the following relief:

- a) That this Honorable Court correctly interpret the contract, as awarded, to allow 450 days to construct the PPF;
- b) that the Court render a judgment awarding to ACC any funds being withheld in anticipation of an assessment of [liquidated damages] on account of the Government's incorrect contract interpretation; and
- c) that the Court render in its judgment an award of interest, pursuant to the Contract Dispute [sic] Act, on money improperly withheld in anticipation of an assessment of [liquidated damages] on account of the Government's incorrect contract interpretation, amounts of which will be proven at trial.

(Compl. at 5-6)

On 17 September 2008, the government moved to strike paragraph 23 of the complaint, and paragraphs (b) and (c) of the prayer for relief for lack of jurisdiction. The government contends that these portions of the complaint pertain to monetary relief for an amount retained under the contract that was never submitted to the contracting officer for a final decision (gov't br. at 2-5). Appellant responded, by letter dated 24 October 2008, contending that the Board has jurisdiction over the monies withheld as a "*de facto*" government claim and requested oral argument on the motion (app. resp. at 1-2). Appellant contends that paragraph 23 is a factual statement and the prayer for relief should not be stricken because if the appeal is sustained, such a decision would result in

the release of withheld funds plus any accrued interest (app. resp. at 6-7).¹ Additionally, appellant contends that the 16 June 2006 final decision “claims the right to withhold liquidated damages” (app. resp. at 4).

The government replied, by letter dated 5 November 2008 indicating that: (1) no claim (from either the contractor or the government) for such monies was ever submitted to the CO for a decision; (2) no claim for such monies was ever decided; (3) no claim for such monies was ever certified as required by the CDA; (4) no claim for such monies was ever even raised until appellant’s counsel first asserted it in its complaint; and (5) appellant has recently filed a claim with the contracting officer (dated 16 September 2008) for these funds, at the same time it claims that the Board already has jurisdiction over them (gov’t reply br. at 1).

DECISION

The Board derives its jurisdiction to hear appeals from the Contract Disputes Act (CDA), 41 U.S.C. § 607(d) which states: “The Armed Services Board shall have jurisdiction to decide any appeal from a decision of a contracting officer... relative to a contract made by [the Department of Defense or component agency].” We lack jurisdiction over claims raised during our adjudication of an appeal, whether in a complaint, or otherwise, that were not first submitted to the CO for decision in the form of a qualifying CDA claim. *Kamp Systems, Inc.*, ASBCA No. 54253, 08-2 BCA ¶ 33,980 at 168,073, *citing Lockheed Martin Aircraft Center*, ASBCA No. 55164, 07-1 BCA ¶ 33,472 at 165,933; *Dawkins General Contractors & Supply, Inc.*, ASBCA No. 48535, 03-2 BCA ¶ 32,305 at 159,844.

Here, the appeal is from the denial of a claim for contract interpretation that did not include a separate monetary claim for consideration by the contracting officer. As such, we lack jurisdiction over any request for monetary relief found in the complaint for this appeal. *See Dick Pacific/GHEMM, JV*, ASBCA No. 55829, 08-2 BCA ¶ 33,937 (portions of complaint stricken as claim did not include a request for release of withholdings or liquidated damages). Accordingly, paragraphs (b) and (c) of appellant’s prayer for relief found on page six of the complaint are stricken.

With regard to paragraph 23 of the complaint, we agree with appellant that it is primarily a factual allegation that does not affect our jurisdiction. *ACEquip, Ltd.*, ASBCA No. 53479, 03-1 BCA ¶ 32,109, *citing Hibbitts Construction Company*, ASBCA

¹ By letter dated 16 September 2008, several months after the initiation of this appeal, appellant filed a claim with the contracting officer for retained amounts under the above-referenced contract (app. br. ex. A-2). To the Board’s knowledge, as of the date of this opinion, a final decision on this claim has not been rendered.

No. 35224, 88-1 BCA ¶ 20,505. Thus, the government's motion to strike this paragraph is denied.

CONCLUSION

The government's motion to strike is granted in part as set forth above. Additionally, appellant's request for oral argument is denied.

Dated: 11 December 2008

OWEN C. WILSON
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. 56451, Appeal of ACC Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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