

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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KBJ Architects, Inc. ) ASBCA No. 56434  
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Under Contract No. NAFBA1-02-C-0048 )

APPEARANCES FOR THE APPELLANT: Lilburn R. Railey, III, Esq.  
Howard M. Allen, Esq.  
Railey & Harding, P.A.  
Orlando, FL

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
CPT John J. Pritchard, JA  
CPT Pia Rogers, JA  
MAJ Charlotte Emery, JA  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE YOUNGER  
ON GOVERNMENT'S MOTION FOR DISMISSAL  
FOR LACK OF JURISDICTION

In this appeal under a contract awarded by a nonappropriated fund instrumentality for construction management services, the government has moved to dismiss, contending that the contracting officer's final decision was invalid due to a lack of both a dispute and a sum certain. The contractor, KBJ Architects, Inc., opposes, arguing principally that the motion is untimely and that, in any event, the final decision satisfies the requirements to confer jurisdiction. We grant the motion and dismiss the appeal.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

By date of 8 July 2002, the Shades of Green, an Armed Forces recreation center, awarded a contract to the Whiting-Turner Contracting Company (Whiting-Turner) to construct an expansion of the Shades of Green Hotel at the Walt Disney World Resort in Lake Buena Vista, FL. (Government's Motion for Dismissal for Lack of Jurisdiction (gov't mot.), ex. 1 at 1-2)

Thereafter, by date of 4 November 2002, the Hospitality Cash Management Fund (Fund), a nonappropriated fund instrumentality, awarded appellant KBJ Architects, Inc. (KBJ) Contract No. NAFBA1-02-C-0048 (the contract) to provide construction

administration and miscellaneous services for the Shades of Green expansion project for a firm, fixed price (R4, tab 4 at 1, 3 of 47).

The contract contained various standard clauses, including clause C-1, GENERAL, which provided in part that “[t]his is a Nonappropriated Fund (NAF) contract and is not funded by the appropriated funds of the United States. No Appropriated Funds of the United States shall become due or be paid the Contractor as a result of this contract.” Clause I-2 provided in part that “[t]he Non-appropriated Fund Instrumentality (NAFI) which is a party to this contract is a non-appropriated fund instrumentality of the Department of the Army.” The contract also contained Clause I-31, DISPUTES (FEB 1997). In pertinent part, it provided that:

(b) The contract is not subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

(c) All disputes arising under or relating to this contract shall be resolved under this clause.

(d) “Claims,” as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract forms, or other relief arising under or relating to this contract.... A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under this clause....

(e) ...A claim by the NAFI against the Contractor shall be subject to a written decision by the Contracting Officer.

(R4, tab 4 at 4, 16, 37 of 44)

Performance of Whiting-Turner’s contract gave rise to disputes regarding delays and contract administration, and, in August 2005, Whiting-Turner submitted a request for equitable adjustment to the contracting officer which it later converted into a claim (gov’t mot., ex. 2). Following the contracting officer’s denial of that claim, as well as a subsequent claim, Whiting-Turner filed two appeals with the Board, which have been docketed as ASBCA Nos. 53619 and 56452, respectively.

The contracting officer notified KBJ, by letter dated 24 August 2005, that she had received requests for equitable adjustment from Whiting-Turner and several subcontractors and that, “regardless of how these requests are settled between the [Fund] and Whiting-Turner, there is a possibility that...KBJ Architects [as the party] performing

the Construction Administration may still be potentially liable and subject to a direct claim(s) associated with these delays” (R4, tab 63 at 1615).

The contracting officer subsequently sent KBJ a 7 March 2008 letter that is the subject of the present motion. She styled the letter as a “Claim.” She cited her 24 August 2005 letter, stating that, in it, she had notified KBJ:

[O]f your potential liability for damages claimed by Whiting-Turner and its subcontractors for impacts.... As a direct result of these errors, omissions, untimeliness in the design and late responses to [requests for information] and submittals, the [Fund] has been adversely impacted, and a claim has been filed against the [Fund] by...Whiting-Turner...for delays of approximately \$12,000,000.00. Additionally, the [Fund] experienced increased construction costs of approximately, \$5,000,000.00, as well as losses due to lost revenue because of delayed construction completion and the inability to reopen for business in a timely manner resulting from...KBJ’s and its subcontractors’ response time to [requests for information] and submittals.

This letter is a final decision of the Contracting Officer, and is formal notice that to the extent that the [Fund] is liable to...Whiting-Turner...and its subcontractors for the claimed \$12,000,000.00, it hereby claims payment and indemnification under the contract.... Furthermore, [the Fund] seeks reimbursement against KBJ for increased construction costs (currently estimated as \$5,000,000.00) and lost revenue (currently estimated as \$4,500,000.00), to the extent that such losses were caused by KBJ’s and its subcontractors’ errors, omissions, and untimely performance of contract requirements.

This is a final decision of the Contracting Officer.

The letter concluded with an advice of rights regarding appeal. (Gov’t mot., ex. 4)

By notice of appeal dated 4 June 2008, KBJ brought this appeal “from the Contracting Officer’s final decision.” Thereafter, by letter to KBJ dated 30 January 2009, the contracting officer “rescind[ed] that contracting officer’s decision as it was issued prematurely and incorrectly.” (Gov’t mot., ex. 5)

## DECISION

In moving to dismiss, the Fund advances two arguments. First, it says, we lack jurisdiction because, when the contracting officer rendered her decision, the requisite dispute was lacking. Second, it contends that the contracting officer did not demand a sum certain on the government claim that she purported to be asserting. (Gov't mot. at 5-6) KBJ counters by urging first that the motion should be denied as untimely. KBJ also tells us that the contracting officer's decision was preceded by a dispute, and that the decision "specifically demands the sum of \$9,500,000.00 from KBJ," provides a legally sufficient sum certain, and that the subsequent withdrawal of the decision "in no way removes the jurisdiction...or otherwise eliminates the actual dispute." (Appellant KBJ Architects, Inc.'s Response to Government's Motion for Dismissal for Lack of Jurisdiction (app. opp'n) at 4-9)

In evaluating the parties' contentions, we recognize that "our jurisdiction derives from the Disputes clause of this NAFI contract," *PNL Commercial Corp.*, ASBCA No. 53816, 04-1 BCA ¶ 32,414 at 160,457, and not the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*; *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291, 1292-94 (Fed. Cir. 2002). Hence, we look to the Disputes clause of the contract to resolve the present motion. We also recognize that the Disputes clause before us parallels portions of 41 U.S.C. § 605(a), as well as FAR 2.101, and hence decisions construing those provisions may afford guidance.

We grant the motion and dismiss the appeal for lack of jurisdiction. We lack jurisdiction because the contracting officer's rescission of her decision in itself requires dismissal. *Chapman Law Firm Co. v. Greenleaf Construction Co.*, 490 F.3d 934, 939 (Fed. Cir. 2007) (noting that "[w]hen during the course of litigation, it develops that...questions in controversy between the parties are no longer at issue, the case should normally be dismissed"); *Lasmer Industries, Inc.*, ASBCA No. 56411, 09-1 BCA ¶ 34,115 (dismissing appeal where contracting officer unequivocally rescinded government claim), *appeal docketed*, No. 09-1316 (Fed. Cir. April 9, 2009); *cf. Aries Marine Corp.*, ASBCA No. 37826, 90-1 BCA ¶ 22,484 at 112,845 (granting contractor's motion "to dismiss its own appeal for lack of jurisdiction"). The contracting officer's rescission here is unequivocal and leaves no "claim...against the Contractor," as required by paragraph (e) of the Disputes clause, as well as no relief to be granted.

In reaching this conclusion, we express no opinion regarding whether the contracting officer's 7 March 2008 letter satisfies paragraph (d) of the Disputes clause.

CONCLUSION

The appeal is dismissed for lack of jurisdiction.

Dated: 26 October 2009

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ALEXANDER YOUNGER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 56434, Appeal of KBJ Architects, Inc., rendered in conformance with the Board's Charter.

Dated:

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