

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Basirat Construction Firm) ASBCA No. 56809
Under Contract No. W917PM-07-C-0056)

APPEARANCE FOR THE APPELLANT: Mr. Obaidur Rahman
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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Daniel B. McConnell, Esq.
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U.S. Army Engineer District,
Middle East
Winchester, VA

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON ORDER TO SHOW CAUSE

By date of 17 December 2010, the Board issued an order to show cause why this appeal asserting purported monetary claims under a construction contract should not be dismissed.

The premise of the order was that it appeared from the record that the purported monetary claims were requests for equitable adjustment only, and had not been presented to the contracting officer as claims for decision at the time that the complaint was filed. Hence, the Board would lack jurisdiction over this appeal. *E.g., Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981); *R.L. Bates General Contractor Paving & Associates, Inc.*, ASBCA No. 53641, 10-1 BCA ¶ 34,328 at 169,552 n.5, *appeal docketed*, No. 10-1313 (Fed. Cir. April 15, 2010) The order also recited that it further appeared that the monetary claims were all later included in another appeal – ASBCA No. 57085 – which was filed after the contracting officer had rendered her decision on those claims. The Board accordingly directed appellant Basirat Construction Firm (Basirat) to show cause why this appeal should not be dismissed, thereby allowing Basirat to pursue its claims in ASBCA No. 57085.

Basirat has now responded to the order to show cause. Basirat states that “[t]he reason that why all of the claims (ASBCA No. 56809) were also included in ASBCA No. 57085 is, that the Basirat...did not agree with the contracting officer’s final decision.”

Basirat also tells us that “if you want to dismiss ASBCA No. 56809,...you are strongly requested to consider our complete complaints...docketed under ASBCA No. 57085...” (Response to order to show cause at 1) For its part, the government has not taken a position regarding either the order to show cause or Basirat’s response to the order.

After considering Basirat’s response, as well as the record in both this appeal and ASBCA No. 57085, we conclude that this appeal should be dismissed, without prejudice to Basirat’s pursuit of its claims in ASBCA No. 57085.

In its 30 April 2009 notice of appeal, Basirat sought payment for four aspects of contract performance: 1) \$1,257,996 for a change of guard towers from wood to concrete; 2) \$15,266 for a suspension of work at a site located at Spera, in Khost Province, Afghanistan (the Spera site); 3) \$26,829, together with 123 additional days, for a suspension of work at a site located at Musakhil, also in Khost Province; and 4) \$417,647 (subsequently reduced to \$405,601 in the complaint), which was said to represent the unpaid balance on bilateral Modification No. P00005 (ASBCA No. 56809 notice of appeal ¶¶ 3-5, 7; complaint ¶ 7). The notice of appeal was styled as an “Appeal Against Termination,” and there is no indication in the record that the monetary amounts sought for the guard towers, and for the Spera and Musakhil sites, were based upon anything but requests for equitable adjustment that were submitted to the contracting officer in December 2008 and January 2009, and hence were pending at the time the appeal was filed.

Basirat’s appeal in ASBCA No. 57085 is undeniably brought from the contracting officer’s 28 December 2009 decision. It includes some claims that are identical to the requests for equitable adjustment at issue in this appeal, as well as other claims not relevant here. Thus, in its 9 January 2010 notice of appeal in ASBCA No. 57085, Basirat challenged the contracting officer’s denial of its \$1,257,996 claim with respect to the change of the wooden guard towers. Basirat also challenged the denial of its claim for \$15,266 regarding the suspension of work at the Spera site, as well as the denial of its claim for \$26,829, plus 123 days of delay, for the suspension at the Musakhil site. Basirat did not seek monetary relief with respect to Modification No. P00005, inasmuch as the contracting officer had conceded liability for \$405,601 in her decision, and Basirat tells us in its notice of appeal that “we agree with the contracting officer.” (ASBCA No. 57085 notice of appeal ¶¶ 3-5, 7)

Given the fact that this appeal is based upon requests for equitable adjustment that were later the subject of the contracting officer's decision that is at issue in ASBCA No. 57085, we dismiss this appeal for lack of jurisdiction, without prejudice to Basirat's right to pursue the purported monetary claims in ASBCA No. 57085.

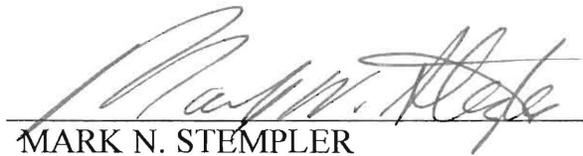
Dated: 8 March 2011



ALEXANDER YOUNGER
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. 56809, Appeal of Basirat Construction Firm, rendered in conformance with the Board's Charter.

Dated:

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