

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
)
Windamir Development, Inc.) ASBCA No. 63461
)
Under Contract No. N69450-19-D-0922)
Task Order No. N69450-19-F-0864)
APPEARANCE FOR THE APPELLANT: Jacob W. Scott, Esq.
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Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MCILMAIL ON THE
GOVERNMENT’S MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellant, Windamir Development, Inc., challenges the government’s termination of its contract for default, and requests more than \$1 million in alleged damages.¹ The government moves to dismiss the appeal in its entirety, for lack of jurisdiction. We grant the motion in part, and deny the motion in part.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

In 2019, the parties entered into an indefinite quantity, indefinite delivery contract for construction work to be performed at naval stations in Florida and Georgia.² Pursuant to that contract, the government issued to Windamir an order for the construction of a Naval Reserve Center at Fort Benning, Georgia.³ In July 2021, the government issued to Windamir a notice of non-compliance, alleging that there were “[e]xcessive amounts of organics in fill material used to construct the building pad.”⁴

In December 2021, Windamir presented to the contracting officer a claim requesting that:

¹ Compl. at 11 ¶ 36.

² R4, tab 1 at 1, 5.

³ R4, tab 5 at 47. The Department of the Army has renamed Fort Benning to Fort Moore as of May 11, 2023.

⁴ Compl. at 1 ¶ 2; answer at 1 ¶ 2.

[T]he Government should change its interpretation of applicable Section 31 00 00, such that the Government determines that the material supplied by Windamir is, indeed “satisfactory material”, and not “unsatisfactory material” as those terms are used in such specification.⁵

The contracting officer appears not to have issued a decision upon that claim.

In August 2022, the government terminated the contract for default, citing Windamir’s alleged failure (1) to “meet the requirements of Specification Section 31 00 00” concerning “Unsatisfactory Materials,” including material that “contains root and other organic matter”; and (2) to meet “the contract completion date of May 4, 2022.”⁶

In November 2022, Windamir noticed this appeal. Windamir claimed to be appealing from what it called the denial of its 2021 claim, as well as from the termination of the contract for default.⁷ Windamir filed a four-count complaint requesting what we understand to be (1) conversion of the termination to one for the convenience of the government, (2) termination for convenience costs, (3) declaratory relief, and (4) damages in the amount of \$1,154,216.75.⁸ Count I of the complaint states:

Windamir seeks, and is entitled to, a Declaration from this Tribunal that (1) the Government’s purported Termination for Default was unwarranted, (2) the Government’s Termination should be considered a Termination for Convenience, and (3) Windamir it entitled to recover its costs upon such a Termination for Convenience as allowed under FAR 52.249-2 and otherwise under the law, in an amount to be proven to this Tribunal.⁹

Count II states:

To the extent not covered by Count I above, Windamir seeks, and is entitled to, a declaration from this Tribunal

⁵ R4, tab 21 at 110.

⁶ R4, tab 23 at 115, 118.

⁷ Notice of appeal at 2.

⁸ Compl. at 8 ¶ 26, 11 ¶ 36.

⁹ *Id.* at 9 ¶ 28.

that (1) the Government’s interpretation of the specifications has been incorrect, to wit, the Government should have determined that the material supplied by Windamir is, indeed “satisfactory material”, and not “unsatisfactory material” as those terms are used in the applicable specifications.¹⁰

Count III states:

To the extent not covered by Count I above, and to the extent the Government correctly interprets Specification 31 00 00 when it finds that soils having only trace organics are unsatisfactory and/or that the specifications require soils 100% devoid of organic matter, such speculations are defective. To such extent, Windamir seeks, and is entitled to, a declaration from this Tribunal that (1) Specifications 31 00 00 (including any other specifications related thereto) are defective and that (2) Windamir is entitled to recovery its costs incurred as a result thereof.¹¹

And Count IV states:

The Government has breached its Contract with Windamir by, inter alia, (a) failing to properly compensate Windamir for its work on the project, (b) failing to properly interpret various Contract provisions, (c) providing defective specifications, (d) requiring Windamir perform work in an amount or to an extent not required by the terms of the Contract, (e) improperly rejecting work properly performed pursuant to the terms of the Contract, (f) improperly terminating Windamir without cause, (g) failing to cooperate in good faith with Windamir, and (h) in such other ways as may be shown in this matter. . . . Such breaches have proximately caused damages to Windamir in an amount to be proven. . . . As such, Windamir is entitled to recover from the Government on its Breach of Contract Count in an amount to be proven in this Tribunal.¹²

¹⁰ *Id.* ¶ 30.

¹¹ *Id.* at 10 ¶ 32.

¹² *Id.* at 10-11 ¶¶ 34-36.

DECISION

Termination

Windamir challenges the termination of the contract for default, requesting that it be converted to one for the convenience of the government.¹³ We possess jurisdiction to entertain that request. *Skyquest Aviation, LLC*, ASBCA No. 62586, 21-1 BCA ¶ 37,784 at 183,374. To that extent, the motion to dismiss is denied.

Windamir also presents allegations of government-caused project delay, presumably as an affirmative defense to the termination of the contract.¹⁴ A contractor contesting a default termination due to excusable delay must submit a claim for a time extension before appealing to the Board; otherwise the Board does not possess jurisdiction to entertain that challenge. *See ECC Centcom Constructors, LLC*, ASBCA No. 60647, 18-1 BCA ¶ 37,133 at 180,713. Windamir has not done so. Consequently, the allegations of government-caused project delay are dismissed from the appeal. We defer until the hearing of the appeal any issues regarding other, potentially pending affirmative defenses to the termination of the contract.

Declaratory Relief

Windamir requests declaratory relief; specifically, declarations that its interpretation of certain specifications is correct, and that certain contract specifications are defective.¹⁵ The contract having been terminated, there is no longer any live dispute between the parties regarding future performance of the contract; consequently, declaratory relief here would not be appropriate. *See Hensel Phelps Constr. Co.*, ASBCA No. 61517, 19-1 BCA ¶ 37,463 at 182,008. Accordingly, we dismiss those requests for declaratory relief.

Monetary relief

Windamir requests more than \$1 million in monetary relief, arising from several alleged causes that Windamir attributes to the government,¹⁶ as well as termination for convenience costs pursuant to Federal Acquisition Regulation 52.249-2.¹⁷ Windamir has not presented to the contracting officer *any* claim for monetary relief; consequently, we do not possess jurisdiction to entertain Windamir's requests for monetary relief, and those requests are dismissed, for lack of jurisdiction. *CDM*

¹³ Compl. at 9 ¶ 28.

¹⁴ *Id.* at 7 ¶ 24.

¹⁵ Compl. at 9-10 ¶¶ 30, 32.

¹⁶ *See* compl. at 8 ¶ 26, 11 ¶ 36(2).

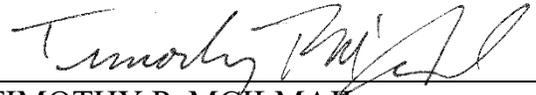
¹⁷ Compl. at 9 ¶ 28(3).

Constructors, Inc., ASBCA No. 59524, 15-1 BCA ¶ 36,097 at 176,238; *Armour of Am. v. United States*, 69 Fed. Cl. 587, 592 (2006) (no jurisdiction over claim for termination for convenience costs not presented to contracting officer); see 41 U.S.C. §§ 7103(a)(1), 7103(b)(1), 7104(a). In any event, any request for termination for convenience costs is premature, given that the underlying default termination has not yet been resolved. See *Env't Sys.*, ASBCA No. 53412, 02-2 BCA ¶ 32,027 at 158,295.

CONCLUSION

The motion to dismiss is granted in part, and denied in part, as set forth above.

Dated: December 21, 2023



TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



MICHAEL N. O'CONNELL
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. 63461, Appeal of Windamir Development, Inc., rendered in conformance with the Board's Charter.

Dated: December 22, 2023



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals