

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Weststar, Inc.) ASBCA Nos. 52837, 53171
)
Under Contract No. N68711-96-C-5048)

APPEARANCES FOR THE APPELLANT: Richard S. Busch, Esq.
Kenneth S. Humphrey, Esq.
Tanya S. Haney, Esq.
Busch & Berger
Calabasas, CA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
John S. McMunn, Esq.
Senior Trial Attorney
Engineering Field Activity West
Daly City, CA

OPINION BY ADMINISTRATIVE JUDGE DELMAN

The Board, *sua sponte*, issued an order canceling the hearing and to show cause why these appeals should not be dismissed for lack of jurisdiction. The Government contends that the Board does not have jurisdiction over the appeals. Appellant contends that the Board does have jurisdiction, and has filed an "Application to Substitute Amwest Surety Insurance Company as the Real Party in Interest."

FINDINGS OF FACT

1. On 27 September 1996, the Department of Navy (Government) awarded Contract No. N68711-96-C-5048 to Weststar, Inc. (appellant) for Joint and Spall Repair, Aircraft Parking and Taxiway C at the Marine Corps Air Station, Yuma, Arizona in the amount of \$2,633,446.75. Work was to be completed by 20 April 1997. (ASBCA No. 52837, R4, tab 1)

2. On or about 12 February 1997, Amwest Surety Insurance Company (Amwest) issued performance and payment bonds related to the contract (ex. A-1). In consideration for Amwest issuing bonds such as these, appellant had executed a general indemnity agreement. The Government was not a party to this agreement. (Ex. A-2)

3. Throughout contract performance, the Government issued a number of contract modifications to appellant which extended the contract completion date, through 31 December 1999 (ASBCA No. 53171, R4, tab 3, *see* Modification Nos. P00003, P00008, P00009, P00010, P00012, P00015, P00017, P00019).

4. It appears that in late 1998 appellant encountered certain performance and financial difficulties, and the Government ordered a suspension of work. By letter to the contracting officer dated 8 March 1999, Amwest, through its claims representative, Horizon Business Resources, Inc., advised, *inter alia*, that the surety had provided financial assistance to appellant to meet its payment obligations under the contract, and that appellant had assigned all remaining contract funds to the surety. Amwest also transmitted to the Government a draft “Tender Agreement for Performance and Completion of Contract and Release of Performance Bond.” (Ex. A-8)

5. The Government and Amwest did not sign the tender agreement, and Amwest did not take over contract performance. Appellant ultimately completed the work.

6. Appellant’s assignment of contract proceeds was memorialized in Modification No. P00016 dated 15 March 1999. The “Notice of Assignment” dated 8 March 1999 provided for assignment of contract funds to “The Pacific Bank, N. A., CDS,” which we find was an agent or representative of Amwest. (Ex. A-9)

7. Notwithstanding the change in contract payee, appellant continued to perform the contract work and to execute contract modifications issued by the Government after the assignment.

8. On or about 3 March 2000, appellant filed a certified claim in the amount of \$214,581 for “airstart units demolition; taxiway/parking apron slab replacement” (ASBCA No. 52837, R4, tab 7). By letter dated 28 August 2000, appellant filed a certified claim in the amount of \$397,937 related to delaminated slab replacement (ASBCA No. 53171, R4, tab 43).

9. The contracting officer did not timely issue decisions on these claims, and appellant appealed to this Board on a “deemed denial” basis. The delaminated slab replacement claim was docketed as ASBCA No. 53171, and the demolition claim was docketed as ASBCA No. 52837.

10. Sometime in 2000, appellant became insolvent and its assets were liquidated. The State of California revoked appellant’s corporate license effective 30 September 2000 (resp. br., ex. B). The parties do not dispute, and we find that appellant is no longer in

existence. Neither party contends that appellant currently has standing to prosecute these appeals.

11. On 7 June 2001, the District Court of Lancaster County, Nebraska issued an “Order of Liquidation, Declaration of Insolvency, and Injunction,” which *inter alia*, declared Amwest insolvent and authorized its liquidation. The court appointed a Liquidator to take possession and control of Amwest’s assets. The Liquidator was also vested with all rights of action of Amwest. The court appointed Mr. L. Tim Wagner, Director of Insurance for the State of Nebraska, as Liquidator pursuant to Nebraska law. Mr. Wagner appointed as his agent Mr. Michael J. FitzGibbons as Special Deputy Liquidator. (See Notice of Appearance of Busch & Berger by Tanya S. Haney, Esq. dated 11 September 2002, and enclosed documents)

12. During the pendency of these appeals, counsel for appellant moved to withdraw as attorney of record and to designate the Special Deputy Liquidator for Amwest as representative of appellant in these appeals.

13. The Board granted counsel’s motion to withdraw, and ordered the Special Deputy Liquidator to enter an appearance and to provide appropriate documentation regarding his authorization to pursue appellant’s claims before the Board. The Special Deputy Liquidator authorized the law firm of Busch & Berger to enter an appearance. Insofar as pertinent, counsel provided the Board with the order of liquidation referenced above, and documentation related to the appointment of the Liquidator and Special Deputy Liquidator.

14. During conference calls in early 2003, the Board, *sua sponte*, raised the issue of its jurisdiction to proceed with the appeals. By order dated 24 February 2003, the Board issued an order canceling the hearing and to show cause why the appeals should not be dismissed for lack of jurisdiction.

15. The parties replied in writing to the Board’s order to show cause. Counsel for the Special Deputy Liquidator/Amwest also filed an “Application to Substitute Amwest Surety Insurance Company as the Real Party in Interest,” contending *inter alia*, that Amwest was the duly authorized assignee of contract funds, and hence should be considered a proper substitute for appellant in these appeals.

DECISION

Under the Contract Disputes Act (CDA), we have jurisdiction to hear the appeal of a “contractor,” defined as the party to a Government contract other than the Government. 41 U.S.C. § 601. Appellant signed this contract with the Government and was the “contractor”

as defined by the Act. However, appellant is currently a defunct business entity and no longer exists. As such, it does not have standing to prosecute these appeals before the Board. *See Triad Microsystems, Inc.*, ASBCA Nos. 52726, 52839, 01-2 BCA ¶ 31,438.

It is contended that Amwest, as the duly authorized assignee of contract proceeds, is the real party in interest and can prosecute these appeals through the Special Deputy Liquidator. Appellant cites no authority for this proposition. Assuming, *arguendo*, that the Special Deputy Liquidator may lawfully act upon Amwest's behalf pursuant to the court's order, he has no greater rights than the entity on whose behalf he acts. It is well settled that an assignee of contract proceeds is not a contractor as defined by the CDA for purposes of our jurisdiction. *Ft. Carson National Bank*, ASBCA No. 38789, 89-3 BCA ¶ 22,192.

In view of the foregoing, we must deny the application to substitute Amwest as the real party in interest in these appeals, and we must dismiss the appeals for lack of jurisdiction.

Dated: 14 April 2003

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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 Nos. 52837, 53171, Appeals of Weststar, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals