ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Wimberly, Allison, Tong & Goo, Inc.	)	ASBCA No. 56432
	)	
Under Contract No. NAFBA4-01-C-0001	)	

APPEARANCES FOR THE APPELLANT: Brian W. Bennett, Esq.
Lee N. Bernbaum, Esq.
Nicholas A. Shannin, Esq.
Page, Eichenblatt, Bernbaum & Bennett, P.A.
Orlando, FL

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT John J. Pritchard, JA
Trial Attorney

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

In this appeal under an architect/engineering contract awarded by a nonappropriated fund instrumentality, 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 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 for lack of jurisdiction.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

By date of 22 December 2000, the Hospitality Cash Management Fund (Fund), a nonappropriated fund instrumentality, awarded appellant Wimberly, Allison, Tong & Goo, Inc. (Wimberly) Contract No. NAFBA4-01-C-0001 (the contract) to provide architect/engineering services to construct an expansion of the Shades of Green on Walt Disney World Resort (Shades of Green), an Armed Forces Recreation Center in Lake Buena Vista, FL, for a firm, fixed price (R4, tabs 4 at 1, 4, 5 at 1).

The contract contained various standard clauses, including clause C-3, DEFINITIONS, which provided in part that the Fund was "a Nonappropriated fund instrumentality of the United States Government.... The Fund includes all other Nonappropriated fund instrumentalities of the United States Government that may have an interest in this contract. NO APPROPRIATED FUNDS WILL BE USED IN SUPPORT OF THIS CONTRACT." The clause also provided that "NAFI refers to the Nonappropriated Fund Instrumentality...also referred to as the Fund." These provisions were repeated in words or substance in clause I-2, NONAPPROPRIATED FUND INSTRUMENTALITY (FEB 1997), which added that "[t]his contract is NOT subject to The Contract Disputes Act of 1978." 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 terms, 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 6, 24, 45-46)

By date of 8 July 2002, the Shades of Green awarded a contract to the Whiting-Turner Contracting Company (Whiting-Turner) to construct the expansion of the facility (Government's Motion for Dismissal for Lack of Jurisdiction (gov't mot.), ex. 1 at 1-2).

Performance of Whiting-Turner's contract gave rise to disputes, 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., exs. 2, 3). 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.

Thereafter, the Fund notified Wimberly, by letter dated 24 August 2005, that it intended to assert a claim against Wimberly for impacts as a result of alleged errors, omissions, and untimeliness of the design of the project (gov't mot., ex. 4 at 1).

The contracting officer subsequently sent Wimberly 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 Wimberly that the Fund had been adversely impacted by its alleged errors, omissions and untimeliness of design. She stated:

> As a direct result of these errors, omissions, and untimeliness in the design, 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 [Wimberly]'s and its subcontractors' errors, omissions, and untimely work on the design.
>
> 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 to the maximum amount allowed plus interest. Furthermore, [the Fund] seeks reimbursement against [Wimberly] 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 [Wimberly]'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 at 1)

By notice of appeal and complaint dated 2 June 2008, Wimberly brought this appeal from "[t]he March 7, 2008 final decision of the Contracting Officer" (notice of appeal and complaint ¶¶ 5, 8). After we docketed the appeal, by letter to Wimberly 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 5-7) Wimberly counters by urging first that the motion should be denied as untimely. Wimberly also tells us that the contracting officer's decision was preceded by a dispute, that the decision "specifically demands the sum of $9,500,000.00 from [Wimberly] in addition to the indemnification requested" and hence provides a legally sufficient sum certain. Wimberly says that the subsequent withdrawal of the decision "in no way removed the jurisdiction...or otherwise causes there not to be an actual dispute upon which this Board's jurisdiction was initially and providently invoked." (Appellant Wimberly Allison Tong & Goo's Response to Government's Motion for Dismissal for Lack of Jurisdiction (app. opp'n) at 8-11)

In evaluating the parties' positions, 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). 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 here.

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, *appeal docketed*, No. 09-1316 (Fed. Cir.

April 9, 2009) (dismissing appeal where contracting officer unequivocally rescinded government claim); *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: 29 October 2009

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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. 56432, Appeal of Wimberly, Allison, Tong & Goo, Inc., rendered in conformance with the Board's Charter.

Dated:

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