

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Starwin Industries, Inc.) ASBCA Nos. 56720, 56721, 56722,
) 56723, 56724, 56725
Under Contract No. SPM750-05-D-7707)

APPEARANCES FOR THE APPELLANT: Barbara A. Duncombe, Esq.
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APPEARANCE FOR THE GOVERNMENT: Daniel K. Poling, Esq.
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Columbus, OH

OPINION BY JUDGE DICKINSON
ON THE GOVERNMENT'S MOTION TO STRIKE QUANTUM

These appeals are from the government's termination for default of six delivery orders issued to appellant for the delivery of machine gun barrels under the referenced contract. In its complaint appellant included a demand for monetary relief:

V. RELIEF REQUESTED

59. Appellant prays that the Board find that the termination for default constitutes an abuse of discretion.

60. Appellant prays that the Board convert the termination for default to a termination for the convenience of the government and allow Starwin to recover its incurred expenses in excess of \$500,000 for the Contract and delivery order.

(Compl. at 11)

On 17 September 2009 the parties agreed that both entitlement and quantum were at issue in these appeals and would be heard at any scheduled hearing. On 24 March

2010 the Government filed a Motion to Strike Quantum, asserting that the Board was without jurisdiction to hear appellant's request for monetary relief in these appeals of contracting officer's decisions terminating the delivery orders for default. On 1 April 2010 appellant opposed the government's Motion to Strike, stating that the government's motion was untimely and unfair to appellant's preparation of its case for hearing. Appellant argued further that the government contracting officer was aware of a request for payment and that the request might be considered by the Board on a deemed denial basis (41 U.S.C. § 605(c)(5)). In support of that argument appellant attached an itemization of costs alleged to have been incurred totaling \$516,080 and prepared in connection with an ADR in which the parties engaged prior to the terminations for default. The itemization was neither signed nor certified by appellant. The government filed a reply on 2 April 2010 pointing out that the ADR itemization could not possibly be a claim because of the lack of a certification as required by 41 U.S.C. § 605(c).

Motions directed to jurisdiction are appropriate at any time. Board Rule 5(a). The government's failure to raise the issue of jurisdiction as to quantum earlier cannot operate as a waiver to create jurisdiction where none exists. In the absence of a valid monetary claim submitted to the contracting officer for final decision, appellant's argument that the monetary claim is properly before the Board on the basis of a deemed denial is both legally and factually incorrect. It is clear from the filings of the parties that the Board does not have jurisdiction as to that portion of appellant's complaint which seeks monetary relief. Accordingly, the government's Motion to Strike Quantum is granted.

Dated: 22 April 2010

DIANA S. DICKINSON
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 Nos. 56720, 56721, 56722, 56723, 56724, 56725, Appeals of Starwin Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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