

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Charles Mullens) ASBCA Nos. 56927, 57432
)
Under Contract No. NAFHA1-06-T-0226)

APPEARANCES FOR THE APPELLANT: Robert D. Stachel, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT’S MOTIONS TO DISMISS
AND MOTION FOR SUMMARY JUDGMENT

Charles Mullens appeals (i) the no-fault termination of his concession contract at a military installation (ASBCA No. 56927), and (ii) the contracting officer’s final decision denying a \$90,000 damages claim for government bad faith in terminating the contract (ASBCA No. 57432). In ASBCA No. 56927, the government has filed three motions to dismiss for lack of jurisdiction, and in the alternative, one motion for summary judgment. In ASBCA No. 57432, the government’s answer requests dismissal for lack of jurisdiction. The parties have briefed the jurisdictional issue raised by the answer as part of the briefing on the motions to dismiss in ASBCA No. 56927 and we deem it ripe for decision. We grant the first motion to dismiss ASBCA No. 56927 and deny the request to dismiss ASBCA No. 57432.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 27 January 2006, the NAF (non-appropriated fund)¹ Contracting Office, Fort Sam Houston, San Antonio, Texas awarded the captioned contract (hereinafter “Contract 0226”) to Mr. Mullens to operate a recreational vehicle (RV) and marine maintenance (mechanic) shop concession at Fort Huachuca, Arizona (R4, tab 1 at 1-3).

¹ The term “non-appropriated fund instrumentality” or “NAFI” is also used to describe these activities. For purposes of this decision the terms “NAFI” and “NAF” are interchangeable.

The contract provided for Mullens to charge his customers in accordance with a posted price list approved by the contracting officer and to pay a monthly concession fee of \$250 to the Fort Huachuca Installation Morale, Welfare and Recreation (MWR) Fund (*id.* at 3, 8).

2. The initial term of the contract was from 1 February 2006 through 31 January 2007. The contract included four successive 12-month option periods thereafter. The provisions for exercising the options were set forth in section 4.0 of the contract specifications in relevant part as follows:

4.0 OPTION TO EXTEND THE TERM OF THE CONTRACT – SERVICES. The NAFI may extend the term of this contract by written notice, not later than Thirty (30) Calendar Days prior to the date of expiration, provided that the NAFI shall give the Concessionaire a preliminary written notice of its intent to extend the contract at least Sixty (60) Days before the contract expires....

(*Id.* at 3)

3. Contract 0226 included among other provisions the following Special Provisions and Contract Clauses:

Special Provisions

- 1.0 *Authority.* The Contracting Officer is the only person who has the authority to alter or amend this contract or make determinations and findings with respect to this contract. Excluding changes made pursuant to the attached Contract Clauses, no change affecting the terms or conditions shall be made without written modification to this contract and issued by the Contracting Officer.
- 2.0 *Responsibility for Contract Administration.* The Contracting Officer, or their duly authorized successor, is responsible for the administration of this contract, and alone is authorized, to the extent indicated in this contract, to take action on behalf of the NAFI, which results in changes of the terms in the contract, including deviations from specifications, details and delivery schedule.

....

Contract Clauses

....

I-9 DISPUTES (NOV 2004) (BI-079)

(a) The contract is subject to the rules and regulations promulgated by the Secretary of Defense and Secretary of the Army for NAF contracting.

(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 forms [sic], or other relief arising under or relating to this contract... .

(e)(1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision...

....

(g) The Contracting Officer's decision shall be final unless the contractor appeals as provided in paragraph (h) of this clause.

(h) The Contracting Officer's decision on claims may be appealed by submitting a written appeal to the Armed Services Board of Contract Appeals within 90 days of receipt of the Contracting Officer's final decision. Decisions of the Armed Services Board of Contract Appeals are final and are not subject to further appeal.

....

I-13 NO-FAULT TERMINATION (NOV 2004) (BI-119)

This contract may be terminated in whole or in part by either party upon 10 days written notice to the other party.

(R4, tab 1 at 12, 14-15)

4. Fort Sam Houston, where the NAF contracting office and contracting officer were located, is approximately 850 miles east of Fort Huachuca (*id.* at 4). The contractor's performance was monitored at Fort Huachuca by MWR civilian employees one of whom was designated as the contracting officer's representative (COR). However, neither the COR nor any of the other MWR employees at Fort Huachuca had authority to contractually bind the government. (*Id.*; SOF ¶ 3, Special Provisions 1.0, 2.0)

5. The first two option periods in Contract 0226 were exercised by the contracting officer issuing respectively Modifications Nos. P00001 and P00002 to the contract (R4, tabs 2, 3). At the end of the second option period on 31 January 2009, the option for the third 12-month period was not exercised by the contracting officer (app. resp. dtd. 29 April 2011, ex. E, ¶¶ 2, 3). The government has acknowledged that the failure to exercise the third year option was an administrative oversight (gov't reply dtd. 24 May 2011 at 1).

6. Mullens continued to operate his RV and marine maintenance business at Fort Huachuca for another six months after 31 January 2009. During that period, Mullens continued to pay, and the Fort Huachuca MWR Rents office continued to accept, the monthly concession fee of \$250 specified in Contract 0226. The NAF contracting office and contracting officer at Fort Sam Houston were not aware that Mullens was continuing to operate his business until 8 July 2009. (App. resp. dtd. 29 Apr. 2011, ex. E ¶¶ 4-7)

7. On or about 19 May 2009, Mullens became involved in a billing altercation with a customer who was the daughter of a civilian government financial officer at Fort Huachuca. The customer allegedly removed her boat from Mullens' facility without paying the repair bill. Mullens called the military police. The MWR personnel investigated the customer's complaint. Mullens alleges that the MWR personnel interfered with the military police investigation and his bill collection procedures in order to protect a colleague's daughter. (ASBCA No. 57432, compl. ¶¶ 8-12)

8. On 8 and 9 July 2009, the following e-mail exchange occurred between the Fort Huachuca MWR Recreation Division Chief (Santiago) and the contract specialist (Large) assigned to Contract 0226 at the Fort Sam Houston NAF contracting office:

[Santiago to Large, 8 July 2009, 11:03AM]

We are really running into issues here [with] Chuck, the Boat contractor. Is there anything you need from me to help get his contract void via the no fault clause? We talked a little last week and thought you need to get the okay from your legal, again if you need me to do anything, I jump right on this.

[Large to Santiago, 9 July 2009, 4:55 AM]

Yes. I still need the email from you stating that you want to terminate the contract. I didn't receive anything last week...and I cannot modify the contract and send it to legal until I receive written notification from your end. You were going to mention that MWR is getting out [of] the business and no longer requires the services of Mr. Mullens.

[Santiago to Large, 9 July 2009, 10:16 AM]

Please terminate the Lost Canyon Contract with Mr. Chuck Mullens using the 10 day no fault clause. We will no longer need boat service support for the FMWR Rents facility and have had numerous bad experiences with this contract over the past two months....

(R4, tab 12 at 2-3)

9. On 20 July 2009, the NAF contracting officer signed and issued to Mullens Modification No. P00003 to Contract 0226. This modification cited the No-Fault Termination clause of the contract as its authority and stated in relevant part:

1. The NAFI is hereby terminating this contract for RV/Boat Repair services in its entirety at no cost to either party. The ten (10) day notice of termination shall become effective immediately upon notification to the Concessionaire by the Contracting Officer.

(R4, tab 12)

10. On 28 July 2009, Mullens by counsel submitted to the contracting officer a "Claim for Relief in Contract Termination and Non-Payment of Invoices." The claim

letter alleged among other things that the contract termination “was the result of bad faith,” and concluded with various requests for relief. These requests included, among others, rescission of the termination, payment of outstanding invoices, and a decision on the claim within 60 days. The requested relief, however, did not include damages in a sum certain for a bad faith breach of contract. (R4, tab 13 at 2, 4)

11. On 25 August 2009, Mullens appealed to this Board “the order issued on 21 July 2009 [sic] by Contracting Officer Todd J. Lennox terminating the concessionaire contract...and subsequent eviction of Charles Mullens’ business from Fort Huachuca.” The notice of appeal requested reinstatement of the contract pending decision of the appeal and included a “Motion for Injunctive Relief” to the same effect. This appeal was docketed as ASBCA No. 56927.

12. By letter dated 25 September 2009, the contracting officer denied Mullens’ 28 July 2009 claims for rescission of the termination and unpaid invoices. With respect to Mullens’ continued operation of the concession after the expiration of the second option period the contracting officer stated:

Mr. Mullens’ contract was not in the “third option period” as you stated in your correspondence because there is no current modification to his contract in place. The contract was not renewed due to an oversight of both parties for the third option period which was due to begin February 1, 2009. NAFI personnel allowed Mr. Mullens to continue operating his concession and collected his monthly fee of \$250.00 because we felt, at the time, we needed to offer this service. Our actions in terminating Mr. Mullens contract were in no way a means of retaliation against him as he has claimed. Per the terms of his contract, the NAFI has the right to terminate his contract and exercised that right by giving Mr. Mullens the 10 days notice which I felt he was owed.

(R4, tab 14)

13. On 2 November 2009, Mullens appealed the contracting officer’s 25 September 2009 decision “denying payment of invoices.” This appeal was docketed as ASBCA No. 56983. Mullens did not appeal that portion of the contracting officer’s decision denying his claim for rescission of the termination notice.

14. On 24 May 2010, Mullens moved to file a “First Amended Complaint” in ASBCA No. 56927. The first amended complaint asserted for the first time a claim against the government for breach of contract damages in an amount of “not less than \$90,000.00” for the alleged bad faith termination. (1st amended compl. at 8)

15. On 2 July 2010, Mullens submitted for decision by the contracting officer a claim for breach damages in the sum certain of \$90,000 for the alleged bad faith termination (ASBCA No. 57432, compl., ex. 1).

16. On 6 August 2010, ASBCA No. 56983 was dismissed on Mullens' notice that "the government has satisfied Appellant's claim regarding the outstanding invoices" (Bd. corr. ltr. dtd. 5 August 2010).

17. By final decision dated 16 August 2010, the contracting officer denied Mullens' 2 July 2010 breach damages claim entirely. The stated ground for the denial was:

The allegations in your claim pertain to events that occurred nearly six (6) months after the Contract expired. Therefore, these events did not arise or relate to the Contract. The second option period expired on January 31, 2009. The Contracting Officer did not exercise the third option. Therefore, the Contract was not in the third option period as you claim. Instead, after the expiration of the second option, you continued to work in the absence of a Contract. This occurred without the authorization of the Contracting Officer. Because no contractual relationship existed between the parties at the time of the alleged dispute, I find your claim without merit.

(ASBCA No. 57432, compl., ex. 2 at 1)

18. Mullens timely appealed the 16 August 2010 final decision and the appeal was docketed as ASBCA No. 57432. The Board has consolidated ASBCA Nos. 56927 and 57432 for further proceedings.

DECISION

A. ASBCA No. 56927

The government has filed three motions to dismiss for lack of jurisdiction and a motion in the alternative for summary judgment in this appeal. The motions to dismiss are respectively on the grounds of (i) premature appeal, (ii) no authority to grant the relief requested, and (iii) no contract in existence when the termination notice was issued. The cited ground for the third motion to dismiss is also the ground for the alternative motion for summary judgment. (Gov't mots. dtd. 10 Sept. 2009, 18 March 2010, 30 July 2010) As to the first ground, Mullens argues that when he was evicted from his business on Fort Huachuca pursuant to the termination notice, that notice "became a final, appealable

order.” He further argues that “the lack of jurisdiction issue has been cured by [the contracting officer’s] subsequent decision and denial of Appellant’s claim.” (App. resp. dtd. 6 Oct. 2009 at 2-3)

Our jurisdiction under the Disputes clause is limited to appeals on contracting officer decisions on “claims.” Claims are defined in the Disputes clause of the contract as “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 forms [sic], or other relief arising under or relating to this contract” (SOF ¶ 3).² Mullens’ 25 August 2009 notice of appeal in ASBCA No. 56927 expressly stated that it was an appeal from “the order issued on 21 July 2009 by [the contracting officer] terminating the concessionaire contract” (SOF ¶ 11). That order, however, was an exercise of the No Fault Termination right that both parties had under the contract. It was not a decision on a contractor claim, or the assertion of a government claim, for money, adjustment or interpretation of contract terms or other relief. *See CME Group, Inc.*, ASBCA No. 57446, 11-2 BCA ¶ 34,792; *Operational Service Corp.*, ASBCA No. 37059 *et al.*, 93-3 BCA ¶ 26,190 at 130,374; *Larry G. Pyle*, ASBCA No. 41155, 90-3 BCA ¶ 23,252 at 116,668.

The appeal in ASBCA No. 56927 is dismissed without prejudice for lack of jurisdiction.

B. ASBCA No. 57432

The government’s answer in ASBCA No. 57432 requests, among other things, that the Board dismiss this appeal for lack of jurisdiction “because Appellant has failed to show the existence of an authorized contract” (answer at 23). The government argues that the express contract for the concession expired on 31 January 2009 when the third option period was not exercised, and that Mullens’ continuing operation of the concession thereafter was not authorized by any government personnel having authority to contract (gov’t mot. dtd. 30 July 2010 at 9-14). The government also argues that there was no intent by the government to continue the concession after 31 January 2009 because it had determined in 2008 to discontinue RV and boat repair as an MWR service (gov’t reply dtd. 24 May 2011).


² Neither party has argued that the decision in *Slattery v. United States*, 635 F.3d 1238 (Fed. Cir. 2011) (*en banc*) establishes that this Board has Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, jurisdiction over this appeal, and we do not decide that issue here. Whether it does or not, the result on these motions would be the same as we determine here under the Disputes clause jurisdiction. *Compare* clause I-9(d) (SOF ¶ 3) with FAR 52.233-1(c), DISPUTES.

Mullens argues that the contracting officer ratified the extension of the contract performance period when he invoked the Contract 0226 No-Fault Termination clause to end Mullens' continuing operation of the concession after the second option period had expired. Mullens also argues that there was institutional ratification of the continuation of the contract because Fort Huachuca NAFI MWR personnel "with requisition approval authority" accepted the benefits of Mullens' continuing operation of the concession (app. resp. dtd. 29 April 2011 at 9-11).


For jurisdictional purposes under the Disputes clause of Contract 0226 or the CDA, it is sufficient in ASBCA No. 57432 that Mullens on 2 July 2010 submitted a claim in a sum certain for government breach of that contract, that the contracting officer on 16 August 2010 issued a final decision on that claim under the Disputes clause, and that Mullens timely appealed that decision to this Board. (SOF ¶¶ 15, 17, 18) Whether or not there was an inadvertent failure to exercise the third option period, and whether or not the government's conduct after the expiration of the second option period amounted to an institutional or other ratification of Mullens' continuing operation of the concession awarded by Contract 0226, go to the merits of the appeal and not to our jurisdiction under the Disputes clause to hear and decide those merits.


The request to dismiss the appeal in ASBCA No. 57432 for lack of jurisdiction is denied.

Dated: 13 October 2011


MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


MARK N. STEMPLER
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. 56927, 57432, Appeals of Charles Mullens, rendered in conformance with the Board's Charter.

Dated:

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