

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
EJB Facilities Services) ASBCA No. 57547
)
Under Contract No. N44255-05-D-5103)

APPEARANCES FOR THE APPELLANT: Kenneth B. Weckstein, Esq.
Pamela A. Reynolds, Esq.
Brown Rudnick LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Robert C. Ashpole, Esq.
Senior Trial Attorney
Tracey Rockenbach, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS ON THE
GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

The Navy moves to dismiss this appeal for lack of jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. It alleges that appellant's claim is a "legal nullity" because it was submitted in violation of 18 U.S.C. § 207(a)(1) of the Ethics in Government Act (Act) of 1978 (gov't mot. at 1). The Act of 1978 at 18 U.S.C. § 207(a)(1), prohibits a former government employee from knowingly, with the intent to influence, making any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter (e.g. a contract) involving a specific party or parties, in which he or she participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest. According to the Navy, Robert F. Parker, the former Commanding Officer of the Engineering Field Activity Northwest (EFANW), now appellant's the general manager, who submitted the claim, was personally and substantially involved in the solicitation and award of the contract prior to his retirement from the Navy. As a result, the government argues that the claim violated the policy underlying 18 U.S.C. § 207(a)(1) and "cannot be a basis for the Board to take jurisdiction over the underlying dispute" (gov't mot. at 10). Appellant denies that there has been a violation of 18 U.S.C. § 207(a)(1) and argues that its claim affirmatively met all of the requirements for a claim under the CDA.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. Mr. Robert F. Parker was the Commanding Officer of EFANW from August 2003 until August 2005 (app. opp'n, ex. 1, Parker decl. ¶ 2). As Commanding Officer, he was responsible for all Navy activities in the Pacific Northwest region, which covered the northwestern states and Alaska (Parker decl. ¶¶ 2-3). EFANW is now known as the Naval Facilities Engineering Command, Northwest (NAVFACNW).

2. Until the summer of 2005, the Acquisition Division was headed by Ms. Rita Brede, the Chief Contracting Officer (CCO). Ms. Brede and her staff were responsible for all aspects of acquisition planning for the contract, such as developing the solicitation and procurement schedule, coordinating and conducting site visits, conducting pre-proposal conferences, requesting proposals, establishing, directing, and overseeing the Technical Evaluation Board and the Price Evaluation Board, and making the final determination as to award. Her staff was also responsible for developing the scope of work and assessment standards for the contract. Ms. Mary Langfeldt replaced Ms. Brede as CCO in summer of 2005. (Parker decl. ¶ 6)

3. On 1 August 2005, the government awarded the contract to appellant to provide base operation services at various installations under the cognizance of EFANW in the western Puget Sound area of Washington State (Parker decl. ¶ 2).

4. Mr. Parker's 14 September 2012 declaration states that: "[a]lthough the WSBOSC [West Sound Base Operation Contract]...was under my authority as Commanding Officer, I had no personal and substantial involvement with the [actions leading to award of the contract]" (Parker decl. ¶ 7).

5. Mr. Parker relinquished his Command on 10 August 2005 and retired from the Navy in October 2005 (Parker decl. ¶ 12). After retiring, he worked for the Michael Baker Corporation, an architect/engineering firm, for two years and nine months (Parker decl. ¶ 13). On 1 June 2008, the Navy approved EJB's request to hire Mr. Parker as its general manager and he began work at EJB (Parker decl. ¶¶ 15-17).

6. Mr. Parker has worked on this contract as appellant's general manager since June 2008 and has dealings with Navy personnel on an almost daily basis (Parker decl. ¶ 18).

7. On 4 November 2010, appellant submitted the claim that is the subject of this appeal. Mr. Parker signed the claim. Mr. Larry R. Fuller, EJB's contracts manager, certified it in accordance with the CDA. (R4, tab 34 at GOV 2144, 2151, 2430)

8. Ms. Langfeldt denied appellant's claim on 7 December 2010 (gov't mot. at 2, ¶ 2). Appellant appealed the denial to this Board on 4 March 2011 where it was docketed as ASBCA No. 57547 on 7 March 2011.

DECISION

In the instant motion, the government alleges that the "claim" submitted by the contractor does not meet the requirements of the CDA (and presumably, the implementing regulation (FAR 52.233-1(c))) regarding what constitutes a claim because the claim's submitter, Mr. Parker, has allegedly violated 18 U.S.C. § 207 (a)(1).¹ The government is correct that this Board is without jurisdiction under the CDA if a claim meeting the requirements of the CDA and FAR has not been submitted to the contracting officer. We have not been presented with any reason, however, to hold that the claim submitted by appellant does not meet the requirements of the CDA and the FAR respecting what constitutes a claim. Assuming *arguendo* that 18 U.S.C. § 207(a)(1) has been violated, it is left unexplained how that translates into the submitted claim being rendered a "nullity". Whether a claim was submitted to the contracting officer is the only question presented in the motion before us.²

CONCLUSION

We conclude that we have jurisdiction to consider appellant's claim. The government's motion to dismiss for lack of jurisdiction is denied.

Dated: 12 October 2012



ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

¹ Neither the CDA nor the FAR speak to who may submit a claim (as opposed to who may certify a claim) on behalf of a contractor.

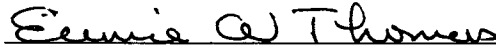
² The government has not alleged that the contract is void *ab initio*.

I concur



MARK N. STEMLER
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. 57547, Appeal of EJB Facilities Services, rendered in conformance with the Board's Charter.

Dated:

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