

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
)
ECC International Constructors, LLC) ASBCA No. 59586
)
Under Contract No. W912ER-10-C-0054)

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OPINION BY ADMINISTRATIVE JUDGE MCILMAIL


The parties each claim \$940,274 in liquidated damages ostensibly withheld by the government and arising from this contract for the design and construction of a military compound in Afghanistan (*see* gov't br. at 40; app. br. at 111, 117). We have issued opinions in this and related appeals, and we assume familiarity with those opinions. *ECC Int'l Constructors, LLC*, ASBCA No. 59643, 21-1 BCA ¶ 37,967 at 184,392; *ECC Int'l Constructors, LLC*, ASBCA No. 59586, 21-1 BCA ¶ 37,862, *reconsideration denied*, 21-1 BCA ¶ 37,897; *ECC Int'l Constructors, LLC*, ASBCA No. 59138 *et al.*, 19-1 BCA ¶ 37,252; *ECC Int'l Constructors, LLC*, ASBCA No. 59138 *et al.*, 19-1 BCA ¶ 37,281.

The government has the burden of proving that the Board possesses jurisdiction to entertain its claim for liquidated damages by demonstrating that the assessment of liquidated damages is memorialized in a timely final decision by a contracting officer. *See ASFA Int'l Constr. Indus. & Trade, Inc.*, ASBCA No. 57880, 14-1 BCA ¶ 35,736 at 174,909; *Parsons Evergreene, LLC*, ASBCA No. 57794, 12-2 BCA ¶ 35,092 at 172,347. The government does not demonstrate that a contracting officer has issued a final decision assessing liquidated damages (*see* gov't br. at 2-3; gov't reply at 1-3, 8, 29, 31). The government's post-hearing reply brief references a January 18, 2014 contracting officer's final decision (gov't reply at 1 (citing R4, tab 2)), but that decision addresses

appellant's request for a time extension and more than \$800,000; that decision does not assess liquidated damages against appellant (*see* R4, tab 2 at 1, 12; tab 67 at 1, 3; 70 at 1). Because the government does not satisfy its burden to establish our jurisdiction to entertain its claim to liquidated damages, that claim is dismissed for lack of jurisdiction. *See ASFA*, 14-1 BCA ¶ 35,736 at 174,910; *Parsons Evergreene*, 12-2 BCA ¶ 35,092 at 172,347. Consequently, what the government says is \$940,274 in liquidated damages is actually, at least at this point, a contract balance presumably owed to appellant.


Accordingly, we see no liquidated damages issue to adjudicate on its merits, and dismiss appellant's claim to liquidated damages, and its request for a 400-day extension of the contract completion date in support of that liquidated damages claim (*see* app. br. at 111-12), as moot, without prejudice. *See Combat Support Assoc.*, ASBCA Nos. 58945, 58946, 16-1 BCA ¶ 36,288 at 176,974. In view of this and our other opinions related to this appeal, we find it unnecessary to address any of the parties' remaining arguments. *See Kellogg Brown & Root Servs., Inc. v. Sec'y of the Army*, 973 F.3d 1366, 1370 (Fed. Cir. 2020); *Lowder v. Dep't of Homeland Security*, 504 F.3d 1378, 1383 (Fed. Cir. 2007).

Dated: January 6, 2022



TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
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. 59586, Appeal of ECC International Constructors, LLC, rendered in conformance with the Board's Charter.

Dated: January 10, 2022

for Jammye D. Alford

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals