



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: December 13, 2016

CBCA 5447

MUSTAFA KHAMOSH GROUP,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Mustafa Wali, Chief Executive Officer of Mustafa Khamosh Group, Dubai, UAE, appearing for Appellant.

Dennis J. Gallagher, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **GOODMAN, LESTER** and **RUSSELL**.

GOODMAN, Board Judge.

Respondent has filed a motion to dismiss this appeal for lack of jurisdiction and/or failure to state a claim upon which relief can be granted. We grant the motion and dismiss the appeal for lack of jurisdiction.

Background

On August 16, 2016, the Board received a submission from the contractor, consisting of email correspondence and documentation that appeared to be a contract modification arising from a termination for convenience of a contract. The Clerk of the Board inquired from the contractor if a claim had been submitted to the Government or if a contracting officer's appealable final decision had been issued. The contractor responded by referring to the documentation previously submitted.

On August 23, 2016, the Board issued an order on proceedings that read in relevant part:

While the Board has procedurally docketed this submission as an appeal, the Board raises the threshold issue of jurisdiction, as it does not appear that a claim has been submitted by the contractor that has been deemed denied or that an appealable contracting officer's decision has been issued, which would give rise to the Board's jurisdiction pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109 (as codified by Pub. L. No. 111-350, 124 Stat. 3677, 3816-3826 (2011)).

The order on proceedings directed appellant to submit a statement, supported by documentation, setting forth facts that would establish the Board's jurisdiction in this matter—whether the contractor has submitted a claim, and if so, the status of that claim, whether sufficient time has passed for the claim to have been deemed denied, or whether a contracting officer's appealable decision has been issued. Respondent was directed to submit a similar statement, or alternatively, if the Government did not believe there was a factual basis for jurisdiction, the Government was directed to file a motion to dismiss the appeal, explaining its position with supporting documentation.

Respondent filed a motion to dismiss the appeal for lack of jurisdiction and/or failure to state a claim upon which relief can be granted, pursuant to Board Rule 8(c)(1). Respondent's motion read in relevant part:

On April 30, 2016, the United States Embassy in Kabul, Afghanistan issued Order No. SAF20016M0944 to Mustafa Wali Mohammad/Mustafa Khamosh Group of Companies for various quantities of 23 items of kitchenware. Some items were delivered and some were not. After an extensive e-mail correspondence between the parties, Modification No. 2 to the Order was issued by the Embassy on August 9, 2016. This modification stated at section 14 "The purpose of this modification is to reduce quantities of items on the order to match with the actual delivered items and completely zero out Line items 17, 21, and 22 as they were partial [sic] terminated for the convenience of the government." An e-mail from Embassy Contracting Assistant Peya Chihubwe on August 10 advised Appellant that "No more orders are needed as this order has been terminated for convenience of the Government."

Respondent's motion stated further that the appellant's submission to the Board makes no showing that any written demand seeking payment of an amount certain has been made to the contracting officer, and to the extent appellant seeks relief, it appears that he is seeking

an order from the Board requiring the embassy to accept delivery of specific items. Accordingly, respondent maintained, as no claim has been submitted to the contracting officer, the Board lacks jurisdiction, and further lacks jurisdiction to order specific performance or to grant injunctive relief.

In response to respondent's motion, appellant submitted an email message dated October 3, 2016, summarizing delivery status of the kitchenware, confirming that the contracting officer had informed appellant that the kitchenware was not needed—an apparent description of the actions that led to the modification that terminated the items for convenience.

Discussion

The Board's jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), "is limited to hearing and deciding appeals by contractors of decisions issued by contracting officers on claims" by or against particular agencies of the Federal Government "under contracts for the procurement of property (other than real property in being); services; construction, alteration, repair, or maintenance of real property; or disposal of personal property." *AMEC Construction Management, Inc. v. General Services Administration*, CBCA 389, et al., 07-1 BCA ¶ 33,505, at 166,039.

The CDA provides that "each claim by a contractor against the Federal Government relating to a contract [shall be in writing and] shall be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1). The Federal Acquisition Regulation (FAR) defines "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract." 48 CFR 2.101(c) (2015).

In this case, appellant's submissions to this Board have not established that it has submitted a claim to the contracting officer. Rather, appellant's information evidences communication with the contracting officer concerning an order for delivery of certain goods. It appears that the contracting officer terminated for convenience part of the order representing goods that were ordered but not delivered, resulting in the acceptance of only goods that were delivered. Termination of a contract for convenience is not in and of itself an appealable contracting officer's decision. *The Writing Company v. Department of the Treasury*, GSBCA 15097-TD, 00-1 BCA ¶ 30,840, at 152, 221, *recon. denied*, 00-1 BCA ¶ 30,863.

There has been no claim submitted by appellant to the contracting officer, nor an appealable contracting officer's final decision. We therefore lack jurisdiction in this case. To the extent appellant's submission requests this Board to order respondent to accept specific goods not previously accepted, appellant requests relief for specific performance that this Board cannot grant. *Jose Gustave Zeno v. Department of State*, CBCA 4867, 16-1 BCA ¶ 36,363 at 177,254-55 (citing *Brent Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,901; *G2G, LLC v. Department of Commerce*, CBCA 4996, 16-1 BCA ¶ 36,266, at 176,917).

Decision

Respondent's motion is **GRANTED**. The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

ALLAN H. GOODMAN
Board Judge

We concur:

HAROLD D. LESTER, JR.
Board Judge

BEVERLY M. RUSSELL
Board Judge