

PSBCA 6235

APPEAL OF LUVIN CONSTRUCTION CORP

Under Contract No. 332495-07-B-0388

August 6, 2009

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OPINION OF THE BOARD ON MOTION TO DISMISS

Appellant, Luvin Construction Corp., appealed its removal from a list of prequalified construction contractors maintained by Respondent, United States Postal Service. Its removal was based upon its failure to complete a post office construction project on time. Appellant also appealed the contracting officer's failure to grant it an extension of the performance period under that contract.

Respondent filed a motion to dismiss, challenging the Board's jurisdiction to consider the matters appealed. Appellant opposes the motion. [FN1] The following findings of fact are made for purposes of deciding the motion to dismiss.

Findings of Fact

1. Respondent's New York Facilities Service Office issues prequalification solicitations to identify capable contractors to be considered for future construction projects. Interested contractors submit evidence of their qualifications and, if approved by Respondent, are added to the list of prequalified contractors eligible to submit offers on selected future Postal Service construction projects. (Appeal File, Tab ("AF") 1, Contractor Prequalification Guidelines).

2. Respondent keeps a record of each prequalified contractor's performance on postal projects. Contractors may forfeit their prequalification status if certain listed events occur. The listed disqualifying occurrence at issue in this appeal is "[e]xceeding contract performance time, on any project, regardless of implementation of liquidated damages." (Id.).

3. Appellant was a prequalified construction contractor.

4. On January 11, 2007, Respondent awarded Appellant a contract for the construction of the Wyandanch, New York Post Office. The original contract completion date of January 29, 2008, was extended by 56 days to March 25, 2008. (Complaint, ¶¶ 2, 4-8; AF 5 (p. 143)).

5. Appellant substantially completed the project no earlier than June 10, 2008 (Complaint, ¶ 38).

6. By letter dated June 20, 2008, the contracting officer advised Appellant that it had forfeited its prequalification status because it exceeded the contract performance time on the Wyandanch project and had been removed from the list of prequalified contractors. (AF 4).

7. On September 8, 2008, Appellant submitted a Request for Reinstatement of Prequalification Status to the contracting officer. Appellant included schedules and an extensive discussion of what it contended were project delays and changes that entitled it to an extension of the performance period on the Wyandanch project to June 10, 2008. (AF 5).

8. An October 8, 2008 letter to the contracting officer from Appellant's counsel referenced Appellant's September 8, 2008 explanation of the delays encountered on the project, and requested "that the contract completion time be extended as specified in its request for reinstatement, by 148 calendar days, and th[at] Luvin be reinstated to the pre-qualified status." The letter did not include a claim for monetary relief based on the alleged delays. (AF 6).

9. On January 16, 2009, Appellant filed a Notice of Appeal from the "presumed denial of its requests to reinstate it to the list of pre-qualified contractors and to extend its contract completion time on the above-referenced contract."

10. Respondent filed a motion to dismiss the appeal for lack of jurisdiction, and the parties have briefed the issues.

Decision

Reinstatement to Pre-Qualified Status

Respondent argues that the Board lacks jurisdiction over Appellant's request that it be reinstated to pre-qualified status because the request is in the nature of a procurement protest, a matter over which the Board lacks jurisdiction. Appellant argues that the disqualification of Appellant from the prequalified list resulted from its performance under the Wyandanch contract and that, therefore, the Board has jurisdiction to address it.

In order for this Board to have jurisdiction over a dispute under the Contract Disputes Act, the dispute must "relate" to a contract between the Postal Service and the contractor seeking relief.

Denise Baiamonte, PSBCA No. 5387, et al., 07-2 BCA ¶ 33,588 at 166,377 (citations omitted). Whether Appellant is listed among prequalified construction contractors has no bearing on the now completed performance of the Wyandanch Post Office contract or any claim arising from that performance. Because removal from the list affects only future contracts and does not affect the Wyandanch contract, this aspect of the appeal is beyond the Board's subject matter jurisdiction. See E. Huttenbauer & Son, Inc., ASBCA No. 45909, 93-3 BCA ¶ 26,178; Dreadnought Marine, Inc., ASBCA No. 45055, 95-2 BCA ¶ 27,650 at 137,826; Sundt Constr., Inc., ASBCA No. 56293, 09-1 BCA ¶ 34,084. [FN2]

The relief Appellant seeks is also beyond the jurisdiction of the Board. Directing Respondent to restore Appellant to the list of pre-qualified contractors involves equitable remedies such as granting injunctive relief, which this Board lacks authority to order. See Sarah M. Mitchell, PSBCA No. 6173, 09-1 BCA ¶ 34,107 at 168,655; Lee Ann Wyskiver, PSBCA No. 3621, 95-2 BCA ¶ 27,755. [FN3]

Request for Time Extension

Respondent argues that Appellant's request for a time extension is beyond the Board's jurisdiction because the request was never submitted to the contracting officer. However, as Appellant points out, it specifically requested a time extension of 148 days in its October 2008 letter (Finding 8). Arguably, Appellant's request for a time extension could fit the contract definition of a "claim" in that it is a written assertion seeking "the adjustment or interpretation of contract terms, or other relief arising under or relating to his contract." (AF 2, Clause B-1007, (p. 40)). In its Amended Complaint, however, Appellant alleges entitlement to monetary damages associated with the requested time extension, claiming damages resulting from Respondent's failure to extend the contract completion time, failure to issue change orders, and failure to pay Appellant for additional expenses, "in the amount to be determined at a trial of this matter, but presently estimated to be no less than \$500,000." (Amended Complaint, ¶ 42).

Appellant's October 8 letter identifies its claim for a 148-day time extension but does not mention the monetary claim that is a fundamental element of the relief Appellant seeks (Finding 8). The record does not reflect that Appellant has submitted the complete claim (i.e., the claim for monetary relief as well as the time extension) to the contracting officer. Absent its submission to the contracting officer for a decision, the Board lacks jurisdiction to consider the claim. [FN4] See 41 U.S.C. §605(a); Paragon Energy Corp. v. United States, 645 F.2d 966, 971 (Ct. Cl. 1981); Joseph J. Fanucchi, M.D., PSBCA No. 5356, 08-1 BCA ¶ 33,809; Linda Copman, PSBCA Nos. 4889, 4903, 03-2 BCA ¶ 32,342 at 160,030. [FN5]

Conclusion

Appellant's request that it be reinstated to the pre-qualified contractors' list is dismissed for lack of subject matter jurisdiction. Appellant's request for a time extension and damages is dismissed without prejudice to Appellant's right to submit such a claim, properly certified if in excess of \$100,000, to the contracting officer.

Norman D. Menegat

Administrative Judge

Board Member

I Concur:

William A. Campbell

Administrative Judge

Chairman

I Concur:

David I. Brochstein

Administrative Judge

Vice Chairman

FN1. After Appellant submitted its opposition to the motion, Respondent filed a reply, including new arguments supporting dismissal of the appeal and documents that were not previously in the record. As the arguments and documents do not address the basis for the Board's disposition of the appeal, they played no role in the Board's decision.

FN2. To the extent removal from the list could be seen as a de facto debarment, it is also beyond our jurisdiction. See *Lou's Industrial Supplies*, PSBCA No. 1355, 86-2 BCA ¶ 18,829 at 94,871 ("This Board has no jurisdiction to consider appeals which do not arise from a contract, but relate to bids or a de facto debarment."); *Ben M. White Co.*, ASBCA No. 39444, 90-3 BCA ¶ 23,115, recon. denied, 91-1 BCA ¶ 23,295.

FN3. In *Todd Constr., L.P. v. United States*, 85 Fed. Cl. 34 (2008), and *BLR Group of America, Inc. v. United States*, 84 Fed. Cl. 634 (2008), the Court of Federal Claims found in applicable FAR provisions a requirement that the government issue performance evaluations and, therefore, took jurisdiction over a claim challenging such evaluations. The FAR does not apply to Respondent's contracts and does not govern our decision in this appeal. See *Overflo Public Warehouse, Inc.*, PSBCA Nos. 4531, 4550, 4649, 04-1 BCA ¶ 32,488 at 160,713. Appellant has pointed to no contract provision or regulation that requires Respondent to issue performance evaluations under its contracts. See *TLT Constr. Corp.*, ASBCA No. 53769, 02-2 BCA ¶ 31,969.

FN4. The facts underlying Appellant's request for a time extension and the facts underlying the associated monetary consequences of the time extension are so intertwined that the contracting officer's consideration of the complete claim-time and money-before the Board addresses the claim furthers the efficient and economical presentation of the dispute to the Board. Furthermore, requiring Appellant to submit its complete claim to the contracting officer before consideration by the Board assures that the certification requirement of the Contract Disputes Act is not circumvented. See *Weststar Eng'g, Inc.*, ASBCA No. 52484, 02-1 BCA ¶ 31,759 at 156,851; *Franklin L. Hassell*, ASBCA No. 45242-697, 94-1 BCA ¶ 26,289. Accordingly, we decline to consider separately Appellant's request for a time extension. See *Rockhill Indus., Inc.*, ASBCA No. 51541, 00-1 BCA ¶ 30,693.

FN5. Asserting the monetary claim for the first time in the Amended Complaint does not suffice to give the Board jurisdiction. *Steven S. Freedman*, PSBCA No. 3867, 96-1 BCA ¶ 28,170. Also, quantifying its claim as "no less than \$500,000" fails to meet the requirement that a monetary claim be submitted in a sum certain. See *San-*

doval Plumbing Repair, Inc. d/b/a Sandoval Constr. Co., ASBCA No. 54640, 05-2 BCA ¶
33,072.