

C & J ASSOCIATES**SOLICITATION NO. 680-10-19****VABCA-3924****VA MEDICAL CENTER
TUSKEGEE, ALABAMA**

Curtis Duncan, President, C & J Associates, Montgomery, Alabama, for the Appellant.

Christopher Johnson, Esq., Trial Attorney; *Phillipa L. Anderson, Esq.*, Deputy Assistant General Counsel, and; *William E. Thomas, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE ROBINSON

C & J Associates (C&J or Contractor) has appealed a "Final Decision" by the Contracting Officer (CO), issued in response to the Contractor's letter protesting against the inclusion of bid guarantee and performance bond requirements in its Solicitation No. 680-10-19, for "Integrated Pest Management Services" at the Department of Veterans Affairs' (VA's) Tuskegee, Alabama Medical Center.

The CO's "Final Decision" justified the inclusion of the bonding requirements through reference to Part 28.103-2 of the Federal Acquisition Regulation (FAR), which makes such bonding optional at the discretion of the contracting agency. The CO concluded her letter by advising the Contractor to appeal either to this Board or to the Court of Federal Claims in accordance with provisions of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (the Act).

On December 7, 1993, the Board received and docketed the appeal, simultaneously ordering the parties to show cause why the appeal should not be dismissed for lack of jurisdiction, since the "Final Decision" appeared to deal exclusively with a pre-award issue rather than any contract between the parties.

The date for response to the Board's Show Cause Order has passed without response by either party. In the absence of any further information than that contained in the C&J letter of appeal, the Contractor's October 24, 1993 protest letter, and the CO's November 3, 1993 "Final Decision," the Board concludes that this appeal must be dismissed for lack of jurisdiction.

In her November 3 letter to C&J, the CO cited applicable FAR provisions to justify her action in requiring the protested bonds in the solicitation. She further cited the Contractor's failure to make its protest within the period of time specified by the FAR. While that advice (the correctness of which is an issue beyond our reach) was at least relevant to the issue presented by the Contractor, in accordance with the cited FAR provisions, the instructions pertaining to the availability of relief before this Board were erroneous.

In the appeal of *Commercial Sound and Safety, Inc.*, VABCA No. 3750, 93-1 BCA ¶ 25,498, a 1992 decision concerning another pre-award protest to the same VA contracting office, we thought we had clearly explained the Board's jurisdictional limitations in this regard. We stated, at 127,008, that:

It is well established that the Board does not have jurisdiction over bid protest actions. See 41 U.S.C. §§ 602, 605(a). Our jurisdiction "is limited to post-award and not to pre-award disputes." *H. T. Engineers and Contractors, Inc.*, VABCA No. 2456, 86-3 BCA ¶ 19,321 at 97,718; see also, *Emerson Electric Company, Industrial Controls Division*, VABCA No. 1843, 83-2 BCA ¶ 16,838. In *Coastal Corporation v. United States*, 713 F.2d 728, 730 (Fed.Cir.1983), the United States Court of Appeals for the Federal Circuit concluded: "[t]he scope of the Act thus is limited to express or implied contracts for the procurement of services and property or for the disposal of personal property." As the Federal Circuit previously noted, "the [Act] deals with contractors, not with disappointed bidders." *United States v. John Grimburg, Inc.*, 702 F.2d 1362, 1368 (Fed.Cir.1983). It is clear that the CO in her "Final Decision" has misdirected CSSI to this Board, which does not have jurisdiction to decide this matter.

DECISION

Accordingly, for reasons set forth above, VABCA No. 3924, the Appeal of C & J Associates, is Dismissed for Lack of Jurisdiction pursuant to Board Rule 5.

DATE: **December 28, 1993**

JAMES K. ROBINSON
Administrative Judge
Panel Chairman

We Concur:

DAN R. ANDERS
Administrative Judge

MORRIS PULLARA, JR.
Administrative Judge