

ARMED SERVICES BOARD OF CONTRACT APPEALS

Petition of -- )  
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Charitable Bingo Associates, Inc., d/b/a Mr. Bingo ) ASBCA No. 52999-883  
 )  
Under Contract No. NAFTH1-97-T-0001 )

APPEARANCE FOR THE PETITIONER: James A. Noone, Esq.  
Karalekas & Noone  
Washington, DC

APPEARANCES FOR THE NAF<sup>1</sup>: COL Michael R. Neds, JA  
Chief Trial Attorney  
LTC Scott E. Lind, JA  
CPT Elizabeth G. Eberhart, JA  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE STEMLER

Charitable Bingo Associates, Inc., d/b/a Mr. Bingo (Mr. Bingo), petitions the Board, under Board Rule 1(e), for an order directing the contracting officer (CO) to issue a final decision on Mr. Bingo's convenience termination claim. Asserting that the CO, in accordance with the contract, had previously stated a date by which the final decision would be issued, the NAF filed a motion to dismiss the petition. The Board, *sua sponte*, raised the issue of whether the Board has jurisdiction to order the relief sought under this NAF contract. The Board directed the parties to brief the jurisdictional issue.

FINDINGS OF FACT FOR PURPOSES OF THE PETITION

1. In 1996, the NAF procurement office at Fort Gordon, Georgia, awarded Mr. Bingo Contract No. NAFTH1-97-T-0001 to operate and manage bingo games (contract at 1-2).

2. The contract contains the following Disputes clause, in relevant part:

I-25. DISPUTES (SEP 1984).

(a) This contract is subject to the rules and regulations promulgated by the Secretary of Defense and Secretary of the Army for NAF Contracting.

(b) The contract is not subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

(c) All disputes arising under or relating to this contract shall be resolved under this clause.

....

(f) For Contract claims of \$50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$50,000, the Contracting Officer must within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(g) The Contracting Officer's decision shall be final unless the Contractor appeals as provided in paragraph (h) of this clause.

(h) The Contracting Officer's final decision may be appealed by submitting a written appeal to the Armed Service[s] Board of Contract Appeals with[in] 90 days of receipt of the Contracting Officer's final decision. Decisions of the Armed Services Board of Contract Appeals are final and are not subject to further appeal.

(Contract at 27-28)

3. The contract was terminated for the convenience of the NAF on 4 January 1999 (pet. br. at 1). Mr. Bingo submitted a termination settlement proposal (TSP) of \$107,330,672 to the CO on 26 April 1999. A lower supplemental TSP was submitted for \$14,134,101, minus a \$271,835 partial payment, on 3 March 2000. (Pet. attach. B)

4. Prompted by the results of an audit of the supplemental TSP, settlement negotiations were suspended by the CO on 15 May 2000 pending an investigation by the U.S. Army Criminal Investigation Division (USACID) (pet. attaches. C, J). Alleging an impasse, petitioner submitted a certified claim for a CO's final decision by letter dated 8 June 2000. The claim was made for \$14,134,101, less a prior payment of \$271,835. (Pet. attach. B)

5. By letter of 1 August 2000, in accordance with the contract's Disputes clause, the CO responded and stated:

In view of the ongoing investigation, the complexity of the issues you raised, and the high dollar value of your claims, I will require a reasonable amount of time to conduct a thorough analysis of the facts including the results of the investigation. This analysis is necessary in order to obtain the pertinent information needed for me to make a final decision.

The CO stated that a decision would be issued within two weeks after completion of the investigation but not later than 1 February 2001. (Pet. attach. A)

6. On 8 August 2000, Mr. Bingo petitioned the Board for an order directing the CO to issue a final decision within 14 days of the date of the Board's order (petition at 3).

7. *Sua sponte*, this Board requested the parties brief the issue of Board jurisdiction to order the relief sought by petitioner given that the contract was not subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended.

### CONTENTIONS OF THE PARTIES

In its response to the Board, the NAF argues that the contract's Disputes clause specifically states in paragraph I-25.(b) that the CDA does not apply. Further, while the wording of the subject contract's Disputes clause mirrors the CDA in most respects, there are exceptions. Here, the contract is notably devoid of a provision found in the CDA which gives the Board jurisdiction to order a CO's final decision in the event of undue delay on the part of the CO. *Cf.* 41 U.S.C. § 605(c)(4). Additionally, the Board has previously declined to order a CO to issue a final decision in a NAF contract not subject to the CDA. *See Reese Industries*, ASBCA No. 29594-91, 84-3 BCA ¶ 17,628 at 87,860 -61.

Petitioner contends that it has been over 18 months since the contract was terminated which is more than a reasonable amount of time for the NAF to review the facts. It further argues that the amount of time required by the NAF to issue a final decision, until 1 February 2001, constitutes an undue delay.

In support of Board jurisdiction, petitioner argues that the contract's Disputes clause gives this Board jurisdiction over any disputes arising out of the contract. Further, this Board's Rule 1(e) states that "[i]n lieu of filing a notice of appeal under (b) or (c) hereof, the contractor may request the Board to direct the contracting officer to issue a decision in the specified period of time, as determined by the Board, in the event of undue

delay on the part of the contracting officer.” Therefore, since the Board has jurisdiction to hear an appeal concerning this contract, Board Rule 1(e) allows petitioner to request, and be granted the relief it seeks.

### DECISION

We agree that the Board has jurisdiction over an appeal from the denial of a claim arising under this contract; this jurisdiction is granted in the Disputes clause of the contract. However, Mr. Bingo’s attempt to use Board Rule 1(e) to extend the Board’s jurisdiction to include directing a CO to issue a final decision is not well taken. Board Rule 1(e) implements 41 U.S.C. § 605(c)(4) and presupposes jurisdiction under the CDA.<sup>2</sup>

The CDA does not apply to the contract and therefore 41 U.S.C. § 605 does not apply to this matter. Further, the subject contract does not give the Board authority to order a CO’s final decision. Finally, in *Reese*, under facts similar to those of this petition, we held we were unable to direct the relief sought. *See Reese*, 84-3 BCA ¶ 17,628 at 87,860.

Nevertheless, prior to the CDA’s enactment, we have taken jurisdiction over disputes that have existed for lengthy periods without a final decision. *See Mite Corporation*, ASBCA No. 18534, 73-2 BCA ¶ 10,312. In *Mite* we held that the failure or refusal by the CO to issue a final decision is a final decision giving jurisdiction to the Board. *Id* at 48,687

Under *Mite*, we must determine if the CO’s actions amount to a refusal to issue an appealable final decision on Mr. Bingo’s claim. We conclude that they do not. The claim on which a final decision is requested was filed on 8 June 2000. The CO has promised to issue a decision no later than 1 February 2001, a period of less than nine months.<sup>3</sup> Given the size of the claim and the complicating addition of a criminal investigation, we do not deem this period unreasonable such that we can hold that the CO has refused to issue a decision.<sup>4</sup>

The petition is dismissed.

Dated: 17 November 2000

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur

I concur

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

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RONALD JAY LIPMAN  
Administrative Judge  
Armed Services Board  
of Contract Appeals

NOTES

<sup>1</sup> Non-Appropriated Fund.

<sup>2</sup> The cover page of our Rules advises the parties that the Rules are applicable to appeals processed under the CDA and other appeals to the extent consistent with law.

<sup>3</sup> We realize that the TSP was submitted on 26 April 1999. However, the TSP of \$107 million was supplemented on 3 March 2000 and the amount reduced to \$14 million. Moreover, it is Mr. Bingo's claim, not its TSP that the CO is required to address in her final decision.

<sup>4</sup> We also note that, while it is not before us, the filings reference the fact that Mr. Bingo also has before the CO a related \$27 million breach claim (petition at n.1).

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. 52999-883, Petition of Charitable Bingo Associates, Inc., d/b/a Mr. Bingo, rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals