

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Charitable Bingo Associates, Inc., d/b/a Mr. Bingo) ASBCA No. 53249
)
Under Contract No. NAFTH1-97-T-0001)

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

APPEARANCES FOR THE NAF¹: COL Michael R. Neds, JA
Chief Trial Attorney
LTC Scott E. Lind, JA
CPT Elizabeth G. Marotta, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE STEMLER
ON THE GOVERNMENT'S MOTION TO DISMISS

Charitable Bingo Associates, Inc., d/b/a Mr. Bingo (appellant or Mr. Bingo) appeals the deemed denial of its certified claim. The NAF has moved to dismiss the appeal for lack of jurisdiction on the ground that the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended, does not apply to this NAF contract, and no provision in the contract's Disputes clause provides for appeals from deemed denials. Appellant opposes the motion. We deny the motion.²

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

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 (Gov't mot. at 2).

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

¹ Non-Appropriated Fund.

² We previously denied appellant's petition for an order directing a contracting officer's decision pursuant to Rule 1(e). *Charitable Bingo Associates, Inc. d/b/a Mr. Bingo*, ASBCA No. 52999-883, 01-1 BCA ¶ 31,194.

I-25 DISPUTES (SEP 1984).

....

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

....

(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.

(Gov't mot. at 3; *Charitable Bingo Associates, Inc., d/b/a Mr. Bingo, supra* at 154,023)

3. The contract was terminated for the convenience of the NAF on 4 January 1999. Mr. Bingo submitted a termination settlement proposal (TSP) of \$107,330,672 to the contracting officer (CO) on 26 April 1999. A reduced TSP was submitted for \$14,134,101, minus \$271,835 partial payment, on 3 March 2000. (Compl. at 1, 2)

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). Alleging an impasse, appellant 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. (Compl. at 2)

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. (Compl. ex. A)

6. On 8 August 2000, Mr. Bingo petitioned the Board pursuant to Rule 1(e) for an order directing the CO to issue a final decision within 14 days of the date of the Board's order. (*Charitable Bingo Associates, Inc., d/b/a Mr. Bingo, supra.*)

7. By letter dated 3 October 2000, appellant requested that the CO resume settlement negotiations on the sole issue of equipment costs since the investigation did not appear to involve issues relating to equipment. By letter dated 10 October 2000, the CO responded by refusing to resume negotiations. Her letter concluded:

Let me reiterate that I am still not at liberty to discuss any aspects of the investigation with you at this time. I will notify you as soon as we are able to resume negotiations.

(App. reply br., exs. I, J)

8. By decision dated 17 November 2000, the Board dismissed Mr. Bingo's petition determining that while the subject contract does give the Board jurisdiction over an appeal from the denial of a claim arising under the contract, it does not give the Board authority to order a CO's final decision pursuant to Rule 1(e) or the Contract Disputes Act. (*Charitable Bingo Associates, Inc., d/b/a Mr. Bingo, supra.*)

9. By letter to the CO dated 4 January 2001, appellant proposed reconvening settlement negotiations on 23 January 2001. No response was received from the CO. (Compl. at 2, ex. B)

10. By letter dated 30 January 2001, the CO explained that she would be unable to meet the 1 February 2001 deadline, stating, in pertinent part:

Based on my review of preliminary documents provided by [USACID] . . . it is premature to either resume negotiations or to render my final decision as any further action may be directly dependant [sic] upon information being provided by CID.

For the reasons described below, I am unable to meet the February 1, 2001, date to render my final decision

(1) The CID is in the process of providing the necessary data which will be the basis of my decision.

(2) There have been changes in personnel at the Atlanta Fraud Resident Agency.

(3) During the course of the investigation, issues were raised which required coordination with and investigation by other Governmental agencies.

Based on the above, I will require a reasonable amount of time to analyze the facts presented and render my final decision. Accordingly, I will strive to re-open negotiations or render a final decision within 30-45 days after receipt of the data from CID. In the event CID has not provided me this data by April 16, 2001, I will provide you with a status report.

This letter should in no way be construed as a denial of your claim or a refusal to render a final decision; however, it should be apparent that without a complete understanding of what transpired it would be erroneous to render a decision.

(App. reply br., ex. B)

11. By letter dated 31 January 2001, appellant appealed to the Board on a deemed denial basis. The Board docketed the appeal on 1 February 2001 as ASBCA No. 53249.

12. By letter dated 9 February 2001, the CO informed appellant that she would either enter into negotiations or render a final decision not later than 18 June 2001 (Gov't mot., ex. 1).

13. On 6 March 2001, the NAF filed a motion to dismiss for lack of jurisdiction. Appellant responded on 23 March 2001. Each party submitted a further reply. In its reply brief, the NAF states that it "will not ask for another extension." (Gov't reply br. at 1)

14. In light of the CO's promise to issue a decision by 18 June 2001 and counsel's representation that no further extension would be requested, the Board, on 1 June 2001, suspended consideration of the NAF's motion and set a conference call for 19 June 2001.

15. By letter dated 11 June 2001, NAF counsel informed the Board that the CO could not issue a decision by 18 June 2001, requested an extension of 90 days, and stated that it was unsure whether at the time it would be in a position to issue a CO's decision.

16. By Order dated 13 June 2001, the Board resumed consideration of the NAF's motion.

CONTENTIONS OF THE PARTIES

The NAF argues that since section 605(c)(5) of the CDA, which specifically provides for appeals of deemed denials, is not incorporated or restated in the contract, there is no provision in the contract that provides for appeals from deemed denials. The NAF acknowledges that the Board, prior to the CDA's enactment, has taken jurisdiction over disputes that existed for lengthy periods without a final decision. Nevertheless, the NAF argues that the CO's actions related to this contract have not amounted to a refusal to issue a decision, particularly since the completion of the USACID investigation is vital to the CO's ability to issue a complete and accurate final decision.

Appellant argues that the NAF's recent notification that it will need over a year from submittal of the claim to issue a decision is unreasonable and represents the bad faith and abuse of discretion that has characterized the NAF's actions throughout the procurement. Moreover, appellant argues that the length of time the USACID investigation has continued, 12 months since the settlement negotiations were terminated by the NAF, is unreasonable, especially in light of appellant's cooperation with the investigation.

DECISION

We are asked to determine if the CO's refusal, to date, to issue a final decision regarding appellant's claim amounts to a refusal to issue an appealable final decision.

As we stated in our earlier decision regarding Mr. Bingo's petition to direct the CO to issue a final decision, the CDA does not apply to the contract; nevertheless, under the Disputes clause of the contract, the Board has jurisdiction over an appeal from the denial of a claim arising under the contract. *Charitable Bingo Associates, Inc., d/b/a Mr. Bingo*, ASBCA No. 52999-883, 01-1 BCA ¶ 31,194. It is well established that the purpose of the Disputes clause is to provide the parties with a rapid and inexpensive means of resolving disputes between the parties. *Mite Corporation*, ASBCA No. 18534, 73-2 BCA ¶ 10,312.

Prior to the CDA's enactment and under contracts where the CDA does not apply, we have taken jurisdiction over disputes that have existed for lengthy periods without a final decision. *See Mite Corp., supra; Atlantis Construction Corp.*, ASBCA No. 44044, 44860, 96-1 BCA ¶ 28,045. As the Board explained in *Mite Corp., supra*, at 48,687,

failure or refusal by the CO to issue a final decision within a reasonable time constitutes a final decision giving jurisdiction to the Board.

An unreasonable length of time has elapsed since the NAF suspended settlement negotiations and an unreasonable length of time has elapsed since appellant submitted its settlement proposal claim on which a final decision is requested. The NAF contends that it needs the information from the USACID investigation to make a proper final decision. The NAF has failed to meet its self-imposed deadlines in the past and the evidence does not give us confidence that the USACID will complete an investigation in the near future. While it may be true that the CO cannot grant appellant's claim because of the pending investigation, the CO's alternative under the circumstances is to deny the claim and allow appellant to proceed before us under the Disputes clause.

Accordingly, we conclude that the NAF's failure to issue a CO's decision is the equivalent of a refusal to issue a final decision. The appeal is properly before us.

The NAF's motion is denied.

Dated: 15 June 2001

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

(Signatures continued)

I concur

I concur

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

RONALD JAY LIPMAN
Administrative Judge
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. 53249, Appeal of Charitable Bingo Associates, Inc., d/b/a Mr. Bingo, rendered in conformance with the Board's Charter.

Dated:

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