

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Rodger L. Smith ) ASBCA No. 53298  
 )  
Under Contract No. F08651-97-C-0007 )

APPEARANCE FOR THE APPELLANT: Josephine L. Ursini, Esq.  
Virginia Beach, VA

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF  
Chief Trial Attorney  
Diana S. Dickinson, Esq.  
Michael J. Reuss, Esq.  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE DICUS  
ON RESPONDENT'S MOTION TO DISMISS AND STRIKE  
PORTIONS OF APPELLANT'S COMPLAINT

This appeal is taken from a contracting officer's decision terminating the above-captioned contract for default. Appellant has elected to proceed pursuant to Rule 12.3. The contract, between appellant and the nonappropriated fund instrumentality (NAFI) serving Eglin Air Force Base and Hurlburt Field in Florida, called for the provision of travel services. Our jurisdiction over such contracts arises from the Disputes clause and not from the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. *Computer Valley Int'l., Ltd.*, ASBCA Nos. 39658, 40496, 94-1 BCA ¶ 26,297. The contract contained Disputes and Termination for Default clauses and was terminated for default by NAFI on 28 February 2001 for appellant's failure to rebate 2.5 percent of total charges for contract services and its failure to permit examination and audit of its books (R4, tabs 4, 4e). Respondent has moved to strike paragraphs 54-61 and requests for relief (E) and (F) in appellant's complaint. We grant the motion with respect to the requests for relief. We also strike, *sua sponte*, certain other requests for relief.

The complaint provides as follows, in pertinent part:

54. The Notice of Termination of Default states, in paragraph 1, that "Quality Assurance Evaluators have been denied access to records on numerous occasions." This is incorrect. RTS provided access to all contract-related records. NAFI representatives were only denied access to records not related to the contract.

55. The Privacy Act, 5 U.S.C. § 552a(m), provides in pertinent part as follows:
- (m)[(1)] **Government contractors.**[--]When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.
56. The NAFI’s purpose in requiring that RTS provide leisure travel services and to maintain the records that are required to be maintained under the contract is “to accomplish an agency function.”
57. FAR 24.101 provides that a “system of records on individuals,” means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Passenger Name Records (PNRs), itineraries and invoices for leisure travelers meet this definition, requiring application of the Privacy Act, regardless of whether the Act is itself referenced in the Contract.
58. Under FAR 52.224-0002(b) criminal and civil penalties may be imposed for violations of the Privacy Act. The information contained in leisure travel records are, by definition, private information.
59. The Privacy Act does not even permit disclosure of personal information within the Government unless certain procedures have been followed including obtaining permission for release from the person(s) to whom the records relate – in this case, the travelers.

60. The US Government has the right to complete access to all official travel records, because it is the Government that is the purchaser of official travel, an audit request from the Government for official travel records is a waiver of any privacy rights under the Privacy Act.
61. The NAFI does not have a right to complete access to all leisure travel records, even for audit purposes. Although the Government may require access to leisure travel records for purposes of ensuring that all concession fees have been appropriately paid, there is no reason why auditors would require access to information that is personal to the leisure traveler, including name, address, social security number, method of payment information, frequent flyer numbers, and visa or passport information.

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#### **REQUEST FOR RELIEF**

Whereby, Appellant requests the following:

- (A) That the Termination for Default be voided and converted to a termination for the convenience of the Government;
- (B) A declaratory judgement from the Board regarding the scope of services and customers to be serviced under the contract;
- (C) A declaratory judgement from the Board regarding the basis for determination of the concession fees due under the contract;
- (D) A declaratory judgement from the Board regarding the amount of concession fees due to NAFI under the contract;
- (E) A declaratory judgement from the Board finding the NAFI in violation of the Privacy Act for its unauthorized after-hours search of non-contract

and contract records in July 2000, without notice to RTS.

- (F) Reimbursement of legal fees pursuant to the Equal Access to Justice Act.
- (G) Such other relief as may be appropriate.

(Complaint at 9-12)

Respondent argues that paragraphs 54-61 address Privacy Act issues which are beyond the Board's jurisdiction. The Privacy Act, 5 U.S.C.A. § 552(a) provides in subsection (g) that United States District Courts shall have jurisdiction over civil actions against Federal agencies. We do not, therefore, have subject matter jurisdiction. *Robert K. Adams*, ASBCA No. 34519, 87-3 BCA ¶ 20,205. Nonetheless, we decline to strike paragraphs 54-61 because we interpret those paragraphs as setting out part of appellant's rationale for not allowing examination of its books. We may not, however, issue a declaratory judgment on a matter over which we do not have subject matter jurisdiction. Accordingly, we grant respondent's motion as to request for relief (E).

Request for relief (F) seeks reimbursement of legal fees pursuant to the Equal Access to Justice Act, 5 U.S.C.A. § 504. We have held that we do not have jurisdiction to award attorneys' fees and costs under a NAFI contract. *Recreational Enterprises*, ASBCA No. 32176, 87-1 BCA ¶ 19,675. We grant respondent's motion and strike request for relief (F).

Appellant further seeks declaratory judgment relief from the Board in requests for relief (B)-(D). Our jurisdiction here is circumscribed by the contracting officer's decision and is thus limited to determining whether the termination for default was proper. Except as any future decision on the propriety of the default termination may provide insight into those matters, we decline appellant's requests. There is no contracting officer's decision or deemed denial of such a claim or claims from which appellant seeks relief. *Cf. Northrop Grumman Corp.*, ASBCA Nos. 52178, 52784, 52785, 5 April 2001. Accordingly, we decline to provide declaratory judgments as requested in paragraphs (B)-(D) and dismiss them from the appeal.

Respondent's motion is granted to the extent indicated and otherwise denied.

Dated: 8 May 2001

CARROLL C. DICUS, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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ALLAN F. ELMORE  
Administrative Judge  
Acting Vice Chairman  
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. 53298, Appeal of Rodger L. Smith, rendered in conformance with the Board's Charter.

Dated:

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