

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Interaction Research Institute, Inc. ) ASBCA No. 55198  
)  
Under Contract No. GS-22F-0085B )  
Delivery Order No. SP0600-95-F-8032 )

APPEARANCE FOR THE APPELLANT: Mr. Thomas D. Affourtit  
President

APPEARANCE FOR THE GOVERNMENT: Daniel K. Poling, Esq.  
Assistant General Counsel  
Defense Logistics Agency  
Ft. Belvoir, VA

OPINION BY ADMINISTRATIVE JUDGE JAMES  
ON RESPONDENT'S MOTION TO DISMISS  
FOR LACK OF JURISDICTION

This appeal arises from the Defense Logistics Agency contracting officer's (DLA CO) 3 February 2005 final decision denying appellant's 23 January 2003 claim for additional compensation in the amount of \$82,892.07 under delivery order No. SP0600-95-F-8032 (the DO) issued by DLA under the captioned General Services Administration (GSA) Federal Supply Schedule (FSS) contract. On 7 November 2005 respondent moved to dismiss the captioned appeal as untimely. Appellant replied to the motion on 26 December 2005. We grant the motion.

STATEMENT OF FACTS (SOF)

1. On 25 September 1995 the Defense Fuel Supply Center, a DLA activity, issued the DO to Interaction Research Institute, Inc. (appellant) for Item 1, a customer service excellence system, and Item 2, travel and miscellaneous expenditures, for a "Not to Exceed" price of \$800,000.00 for the two items under the captioned FSS contract (gov't mot., tab 1). The FSS contract is not in the record (see SOF, ¶ 7).

2. Appellant's 23 January 2003 letter to DLA CO Patrick J. Kennedy claimed \$82,892.07 plus interest for services rendered under FSS Contract GS-22F-0085B. Appellant alleged the services had been performed under Item 2 of the DO. (Gov't mot., tabs 9, 10)

3. DLA CO Kennedy's 3 February 2005 final decision denied appellant's January 2003 claim in its entirety on four grounds and included notice of appellant's appeal rights in substantial accordance with FAR 33.211(a)(4)(v). (Gov't mot., tab 14) Specifically, the DLA CO advised:

This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must do so, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. . . . Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims . . . within 12 months of the date you receive this decision. . . .

If you have any questions, please contact me [the DLA CO] at (703) 767-1166.

Respondent contends, and appellant concurs, that it received the final decision on 8 February 2005 (app. opp. at 1). The 90<sup>th</sup> day after 8 February 2005 was 9 May 2005, a Monday.

4. Appellant's 3 May 2005 letter to DLA CO Kennedy referenced DO No. SP0600-95-F-8032 and the CO's decision postmarked 7 February 2005, disagreed with each of the DLA CO's four grounds for denial of appellant's 23 January 2003 claim, and stated: "[Y]our decision to deny IRI's claim is unsubstantiated, based on dubious evidence and false conclusions. IRI looks forward to a rational review of its claim . . . ." (gov't mot., tab 15).

5. Appellant's 4 May 2005 letter, postmarked 5 May 2005, submitted an appeal to the GSA Board of Contract Appeals (GSBCA), identified the FSS contract and the DO by number, enclosed the DLA CO's 3 February 2005 final decision and appellant's 3 May 2005 letter to the DLA CO, and stated "I hereby render an appeal to the decision reached by the Defense Logistics Agency, Contracting Officer, enclosed. IRI's reply is also enclosed." Both the DLA CO and the GSBCA received appellant's 4 May 2005 notice of appeal on 9 May 2005, which the GSBCA docketed as No. 16638 on 10 May 2005. (Gov't mot. at 5, ¶ 11, tabs 16-17)

6. In a 14 June 2005 telephone conference with the parties on Appeal No. 16638, the GSBCA judge questioned why appellant had not appealed to the ASBCA. According to the conference memorandum:

It was also recognized, however, that, since the DLA decision was rendered in early February, the time for appeal to the ASBCA had already run and IRI's only remaining option would be to appeal to the Court of Federal Claims.

The GSBCA judge also raised the issue of whether the DLA ordering officer had authority to issue the final decision, and whether appellant should resubmit its claim to the GSA CO. (Gov't mot., tab 18) On 1 September 2005 the GSBCA issued an Order on Appeal No. 16638 stating:

In response to the Board's order of August 29, 2005, to show cause why this case should not be dismissed for lack of jurisdiction, appellant's president has advised the Board that he is withdrawing the underlying claim for this case until such time as a decision is rendered on the claim by a contracting officer of the [GSA] or until a decision is rendered by the [ASBCA] on a final decision already rendered by an ordering officer of the [DLA] regarding the same claim.

Counsel for GSA has advised the Board that he has no objection to the dismissal of this case based on appellant's reply to the Board's Order to Show Cause. Accordingly, this case is DISMISSED. Board Rule 128 (48 CFR 6106.28 (2004)). [Underlining in original.]

(Gov't mot., tab 21)

7. Appellant's "September 2005" letter, postmarked 4 October 2005 and received by the ASBCA on 5 October 2005, requested a ruling on the DLA CO's 3 February 2005 final decision and stated that "the actual 'disputes clause' included in the original [GSA FSS] contract is not available, since DLA and GSA did not retain a copy of the original contract . . . ." (gov't mot., tab 22 at 2).

### DECISION

The Contract Disputes Act of 1978 (CDA), 41 U.S.C § 606, provides: "Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract

appeals, as provided in section 607 of this title.” That 90-day period in which to appeal to an agency board of contract appeals is part of a statute waiving sovereign immunity which must be strictly construed and which cannot be waived by a board. *See Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982).

When the DLA CO issued the final decision giving rise to this appeal in 2005, FAR 8.406-6 provided in pertinent part:

(c) Appeals. Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims.

48 C.F.R. § 8.406-6 (2005).

Appellant did not appeal to the board of contract appeals “servicing the agency that issued the final decision,” *viz.*, the ASBCA; rather it appealed to the GSBCA which ultimately dismissed its appeal. Appellant’s “September 2005” letter to the ASBCA was postmarked 4 October 2005, which was 238 calendar days after the date appellant received the DLA CO’s 3 February 2005 final decision on appellant’s January 2003 claim (SOF, ¶¶ 3, 7). Hence that appeal to the ASBCA was not timely. Moreover, appellant’s 3 May 2005 letter to the DLA CO disputing the CO’s final decision did not clearly express its election to appeal to this Board, but merely that it “looks forward to a rational review of its claim” (SOF, ¶ 4). *See Stewart-Thomas Industries, Inc.*, ASBCA No. 38773, 90-1 BCA ¶ 22,481 at 112,836 (notice of appeal must express an election to appeal to this Board). Therefore, that letter does not come within the “misdirected appeal” rule in *Contraves-Goerz Corp.*, ASBCA No. 26317, 83-1 BCA ¶ 16,309 at 81,080 (valid timely appeal to the agency CO is tantamount to an appeal to the ASBCA). Any uncertainty about what appellant intended by the phrase “rational review of its claim” was dispelled the very next day by its notice of appeal to the GSBCA (SOF, ¶ 5).

Appellant argues that “IRI did respond to ‘an agency of contract appeals’ [sic] in a timely manner” (app. opp. at 2). The GSBCA dismissed the appeal pursuant to its Rule 128. Accordingly, this is an independent appeal which must stand or fall on its own jurisdictional facts. Appellant’s argument overlooks the fact that the above-quoted FAR regulation plainly directed contractors to appeal to the board of the agency whose CO issued the final decision, in this instance, the ASBCA. Therefore, the appeal to the GSBCA cannot provide a basis for a timely appeal to the ASBCA for jurisdictional purposes.

We have carefully considered appellant’s other arguments and find them without merit.

Accordingly, we grant respondent's motion and dismiss this untimely appeal for lack of jurisdiction.

Dated: 1 February 2006

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DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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EUNICE W. THOMAS  
Administrative Judge  
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. 55198, Appeal of Interaction Research Institute, Inc., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals