

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Factek, LLC) ASBCA No. 55345
)
Under Contract No. 0000-00-0000)

APPEARANCE FOR THE APPELLANT: Mr. Michael Dmytrasz
Technology Director

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Catherine E. Barnum, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Omaha

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON MOTION FOR RECONSIDERATION

Appellant Factek, LLC (Factek) has filed a letter dated 5 June 2007 that it characterizes as a “rebuttal” to our 23 April 2007 decision on the order to show cause and the motion of the Corps of Engineers (Corps) to dismiss for lack of jurisdiction. *See Factek, LLC*, ASBCA No. 55345, 07-1 BCA ¶ 33,568. By order dated 14 June 2007, we stated that we treated Factek’s letter as a motion for reconsideration but directed the Corps not to file a response unless, within ten days of the date of the order, it notified the Board that it wished to respond. The Corps did not do so. Thereafter, Factek submitted another letter dated 23 July 2007 taking issue with our decision and seeking a hearing. We refer to both letters collectively as the motion for reconsideration and address them below.

We grant the motion and, upon reconsideration, affirm our decision. In doing so, we first note that it is not evident from the record whether Factek has complied with our Rule 29, which provides that a motion for reconsideration “shall be filed within 30 days from the date of the receipt of a copy of the [challenged] decision.” While the record reflects that the Recorder followed our practice of sending the decision to both parties by certified mail, no return receipt came back from Factek. The Postal Service has no tracking information on the mailing. We thus cannot determine the date of receipt. In the absence of evidence that the motion was untimely, and a challenge thereto, we consider the merits.

We have said many times that we evaluate a motion for reconsideration to determine whether it is based either upon any newly discovered evidence, or upon legal theories that we failed to consider in our original decision. *E.g., Charitable Bingo Associates, Inc. d/b/a Mr. Bingo, Inc.*, ASBCA Nos. 53249, 53470, 05-2 BCA ¶ 33,088 at 164,014. Measured against this standard, Factek is not entitled to prevail on its motion. The main thrust of Factek’s motion appears to be that this case is “based on a research and development project.” (Letter from Michael Dmytrasz, Technology Director, Factek, LLC to Recorder (dtd. 5 June 2007) at 1). That may be, but it does not address or controvert the legal and factual bases of our decision, *viz.*, that the record fails to establish a triable issue regarding the existence of either an express contract as alleged, or an implied-in-fact contract. *Factek, supra*, 07-1 BCA at 166,284-85. Absent one or the other, we lack jurisdiction over the appeal.

In its 5 June 2007 letter, Factek’s representative expresses uncertainty regarding “the how and who I may appeal this to.” (Letter from Michael Dmytrasz, Technology Director, Factek, LLC to Recorder (dtd. 5 June 2007) at 2). Appeal lies with the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

Factek’s motion for reconsideration is granted and, upon reconsideration, our decision is affirmed.

Dated: 31 July 2007

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 55345, Appeal of Factek, LLC, rendered in conformance with the Board's Charter.

Dated:

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