ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
United Partition Systems, Inc.	)	ASBCA Nos. 53915, 53916
	)	
Under Delivery Order No. F02604-00-F-A033)		

APPEARANCES FOR THE APPELLANT: Paul F. Dauer, Esq.
Eric O. Jeppson, Esq.
Best Best & Krieger LLP
Sacramento, CA

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
MAJ Ronald J. Goodeyon, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE ROME
ON THE GOVERNMENT' S MOTION TO DISMISS FOR LACK OF JURISDICTION

The Government has moved to dismiss these appeals for lack of jurisdiction. For the reasons that follow, we grant the motion.

BACKGROUND

Appellant United Partition Systems, Inc. (UPSI) filed a monetary claim with the Air Force's Contracting Officer (CO) based upon the Air Force's alleged wrongful termination of a delivery order (DO) it had issued under appellant's General Services Administration (GSA) Federal Supply Schedule (FSS)/Multiple Award Schedule (MAS) contract. The Air Force CO issued a final decision denying appellant's claim and asserting a claim for excess reprocurement costs. Appellant appealed to the Board which, for administrative convenience, docketed the portions of the appeal that challenged the denial of appellant's claim, and the Air Force's payment demand, as ASBCA Nos. 53915 and 53916, respectively. The Air Force moved to dismiss for lack of jurisdiction, alleging that the appeals were not timely filed under the Contract Disputes Act (CDA), 41 U.S.C. § 606. The Board, *sua sponte*, raised the question of whether it lacked jurisdiction to entertain the appeals on the ground that the Air Force should have referred appellant's claim to GSA for a CO's decision. The Air Force now asserts that we also lack jurisdiction on that ground and that it will forward the dispute to GSA. Appellant alleges that it properly submitted its claim to the Air Force CO and timely appealed to this Board, but it does not oppose the Air Force's referral of its claim for a final decision by GSA's CO, without prejudice to its

efforts already pursued before this Board, or its right to proceed at the United States Court of Federal Claims.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Effective 29 July 1999 UPSI and GSA entered into FSS/MAS GSA contract No. GS-07F-0343J (hereafter "the contract") for the provision of prefabricated buildings, among other things, for a term extending through 30 June 2004. The contract stated that it was to be administered by GSA and GSA's CO executed it on behalf of the Government. (Ex. B-1 at 1, 1A)

The contract contains the Federal Acquisition Regulation (FAR) 52.212-4 CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS clause (Terms and Conditions clause) (ex. B-1 at Mod. No. MO02, Correc. 1 (MAY 2001)). The clause provides, at 52.212-4(d), that the contract is subject to the CDA and incorporates the Disputes clause contained at FAR 52.233-1. It also provides in part:

> (f) Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity . . . . The Contractor shall notify the [CO] in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith . . .
>
> . . . .
>
> (m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

The contract includes the FAR 52.216-18 ORDERING clause (ex. B-1 at Mod. No. MO02, Correc. 1 (OCT 1995)), which provides in part that supplies and services to be furnished under the contract are ordered through DOs by designated activities. The DOs are subject to the terms and conditions of the contract and, in the event of any conflict between a DO and the contract, the contract controls.

The contract also contains the I-FSS-249-B DEFAULT clause (ex. B-1 at Mod. No. MO02, Correc. 1 (MAY 2000)), which provides that:

> Any ordering office may, with respect to any one or more [DOs] placed by it under the contract, exercise the same right of termination, acceptance of inferior articles or services, and assessment of excess costs as might the [CO], except that when failure to deliver articles or services is alleged by the Contractor to be excusable, the determination of whether the failure is excusable shall be made only by the [CO] of [GSA], to whom such allegation shall be referred by the ordering office and from whose determination appeal may be taken as provided in the clause of this contract entitled "Disputes."

On 5 June 2000, the Air Force awarded DO No. F02604-00-FA033 (hereafter "the DO"), in the amount of $108,404, to UPSI under the contract. The DO, which incorporated the Terms and Conditions clause (R4, tab 3 at 1), called for the installation of a modular office building, destruction of existing modular offices, and related services, at Luke Air Force Base, Arizona, to be completed by 31 July 2000. (R4, tabs 1-3)

Commencing in about August 2000, the parties disputed whether UPSI's work satisfied the DO's requirements and was substantially complete (R4, tabs 4-18; AR4, tabs 3C, 3F, 3G, 3H). On 28 November 2000 the Air Force CO issued a cure notice to UPSI, stating that the DO might be terminated for default if UPSI did not comply with its Statement of Work (R4, tab 7). UPSI challenged the notice by letter to the Air Force CO dated 11 January 2001 and demanded payment for 95% DO completion (R4, tab 8).

On 25 June 2001 the Air Force CO issued a Show Cause Notice to UPSI, alleging that it had failed to cure conditions endangering DO performance and that the Government was considering terminating the DO for default, pending a determination of whether UPSI's failure to perform arose from causes beyond its control and without its fault or negligence (R4, tab 13).

In July and August 2001 letters to the Air Force and the Department of Defense, UPSI maintained that it had complied with the DO and that its incompletion was due to the

Air Force's suspension of work, lack of direction on unresolved questions, changes of contract administrators, delays, and nonpayment to UPSI, despite an alleged promise of a progress payment (R4, tabs 14, 15; AR4, tabs 3G, 3H).

By memorandum dated 20 August 2001, the Air Force CO notified UPSI that the DO was being terminated for default. He gave the contractor 30 days from termination to remove its supplies and equipment, stating that it could submit a claim under the FAR 52.233-1 Disputes clause. He did not describe the memorandum as a final decision and it did not contain appeal rights. (R4, tab 17) On 14 September 2001, the CO terminated the DO for default via Modification No. P00002, which was not identified as a final decision and did not contain appeal rights (R4, tab 18).

On 1 November 2001, Paul F. Dauer, Esq., of Best Best & Krieger LLP (BBK), wrote to the Air Force CO that he and his firm represented UPSI regarding the DO. He stated that any failure to complete full performance was solely due to the Air Force and demanded withdrawal of the termination for default or conversion to a termination for convenience. (AR4, tab 3I)

By memorandum to UPSI dated 12 December 2001, with a courtesy copy to BBK, the Air Force CO stated that UPSI had not removed its modular building within 30 days after termination and that, as part of the reprocurement process, the building had been disassembled and was being stored. He sought disposition instructions. (AR4, tab 3J) Mr. Dauer responded on 18 December 2001 that, as indicated, he and his firm represented UPSI regarding the DO. He denied that any removal request had been made and stated that UPSI would be filing a claim. (AR4, tab 3K at 1) On 20 December 2001 the Air Force faxed to UPSI and BBK a copy of the CO's 20 August 2001 memorandum, which appellant contends it had not received previously (AR4, tab 3L; Gov't reply at ex. 1, ¶ 3; app. opp. at 3, ¶¶ 1, 2).

By letter to the CO dated 25 January 2002, BBK enclosed UPSI's $108,000 claim, which was signed by BBK on behalf of UPSI and certified by UPSI's vice president of operations, and requested a CO's decision. BBK noted that the CO could contact it for additional information or materials. (R4, tab 19 at letter and at claim at 7-8) The claim alleged, *inter alia*, that the Air Force had changed the DO, suspended work, delayed performance, and failed to make a promised partial payment to UPSI, and that the termination was wrongful and should be treated as one for convenience (R4, tab 19 at claim). The claim stated that UPSI requested a CO's decision (*id*. at ¶ 21).

On 20 March 2002 the CO wrote to UPSI that a final decision was expected by 30 April 2002. On 23 April 2002 he wrote that it was expected by 30 May 2002. Neither letter indicates a courtesy copy to BBK. However, BBK received a copy of the

letters by fax on 25 March and 29 April 2002, respectively, apparently from UPSI. (App. opp. at exs. A, B, C) By letter to the CO dated 6 May 2002, Mr. Dauer stated:

> As indicated in our prior correspondence to [the former CO], my firm and I represent [UPSI] regarding [the DO]. We are in receipt of your letter, dated April 23, 2002, regarding another extension in the [CO's] decision of this matter which I received from my client.
>
> I would appreciate it if you would please direct *all* future correspondence to my attention in this matter. (Emphasis in original)

(App. opp. at ex. C)

On 20 May 2002, the CO issued a final decision denying UPSI's claim and asserting a Government claim for $10,987.50 in excess reprocurement costs (R4, tab 20). The CO concluded:

> 6. This is the final decision of the [CO]. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals (Armed Services Board of Contract Appeals, Skyline Six, 5109 Leesburg Pike, Falls Church, VA 22041-3208) . . . . Instead of appeal 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.

(*Id*. at 2). The decision indicated a courtesy copy to BBK. The Air Force sent the decision by certified mail to UPSI, at its address designated in the contract and in the DO, on 22 May 2002. The contractor acknowledged receipt on 24 May 2002 by certified return receipt. (R4, tab 3 at 1; ex. B-1 at 1; Gov' t mot. at ex. 2; Gov' t reply at ex. 1, ¶ 7) The Air Force also sent the courtesy copy of the decision by certified mail to BBK on 22 May 2002, which acknowledged receipt on 28 May 2002 by certified return receipt (Gov' t mot. at ex. 3; Gov' t reply at ex. 1, ¶ 7; Board corresp. file).

BBK filed a notice of appeal with the Board on behalf of UPSI on 23 August 2002 (Board corresp. file). This was 91 days after the contractor had received the CO's final decision and 87 days after BBK had received its courtesy copy.

DISCUSSION

The contract's I-FSS-249-B Default clause, quoted above, provides that, with respect to DOs, an ordering office can exercise the same right of termination and assessment of excess costs "as might the [CO]" (which, in context, refers to GSA's CO), but that, when the contractor alleges that a failure to deliver articles or services is excusable, that determination shall be made only by GSA's CO, to whom the ordering office is to refer the allegation and from whose determination the contractor can appeal.

Applicable regulations also require that an ordering office under an FSS contract refer a disputed default termination to GSA's CO for decision and that, if the CO does not excuse the failure to perform, the ordering office's CO may charge the contractor with excess reprocurement costs. FAR 8.405-5 TERMINATION FOR DEFAULT as amended effective 25 October 1994 provides in part:

> (a) (1) An ordering office may terminate any one or more orders for default in accordance with Part 49, Termination of Contracts. The schedule contracting office shall be notified of all cases where an ordering office has declared a Federal Supply Schedule contractor in default or fraud is suspected.
>
> (2) Should the contractor claim that the failure was excusable, the ordering office shall promptly refer the matter to the schedule contracting office. In the absence of a decision by the schedule contracting office (or by the head of the schedule contracting agency, on appeal) excusing the failure, the ordering office may charge the contractor with excess costs resulting from repurchase.

48 C.F.R. § 8.405-5 (1994). At all relevant times, FAR 8.405-7 DISPUTES provided:

> The ordering office shall refer all unresolved disputes under orders to the schedule contracting office for action under the Disputes clause of the contract. [*]

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[*] The CO's final decision issued on 20 May 2002. Effective 29 July 2002 FAR 8.405-7 was amended to provide in part:

> (a) *Disputes pertaining to the performance of orders under a schedule contract*. (1) Under the Disputes clause of the schedule contract, the ordering office [CO] may --

48 C.F.R. § 8.405-7 (1983). The "schedule contracting office" referred to in the regulations is that of GSA. *Grant Communications, Inc. v. Social Security Administration*, GSBCA No. 14862-SSA, 99-1 BCA ¶ 30,281 at 149,781.

In its claim, appellant denied that it was in default and contended that its failure to complete the DO was excusable due to the Air Force's actions in its contractual capacity, including its alleged change, suspension, delay and misadministration of the DO. Thus, pursuant to the contract and regulations, the Air Force CO should have referred the matter to GSA's CO for decision. Only a GSA CO responsible for the contract could issue a valid decision on the disputed default issues that is subject to appeal under the CDA. *Grant*

> (i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or
>
> (ii) Refer the dispute to the schedule [CO].
>
> (2) The ordering office [CO] shall notify the schedule [CO] promptly of any final decision.
>
> (b) *Disputes pertaining to the terms and conditions of schedule contracts*. The ordering office [CO] shall refer all disputes that relate to the contract terms and conditions to the schedule [CO] for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.
>
> (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.

To date, neither the FAR 8.405-5 Termination for Default regulation nor the I-FSS-249-B Default clause have been similarly amended. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have issued a proposed rule that would amend FAR 8.405-5 to provide, among other things, that an ordering agency CO may terminate individual orders for cause, with notice to the schedule contracting office. If the contractor claims that the failure was excusable, the ordering agency CO is to consider the question of failure to be a contract dispute under FAR 8.405-7. If the contractor does not so claim, the ordering office may charge the terminated contractor with excess costs resulting from repurchase. 68 Fed. Reg. 19298 (18 April 2003).

Communications, supra, 99-1 BCA at 149,782; *Centennial Leasing v. General Services Administration*, GSBCA No. 12321, 93-3 BCA ¶ 26,200 at 130,422. It remains to be seen whether a GSA CO will issue a decision excusing appellant's failure to complete the DO, as mentioned in FAR 8.405-5, above. Under the circumstances, the Air Force CO was not entitled to issue a decision assessing excess reprocurement costs against appellant.

The facts that the Air Force CO issued a decision on appellant's claim and asserted a Government claim; informed appellant that it could appeal to this Board; and appellant followed that erroneous advice, do not imbue this Board with jurisdiction when the contract and regulations provide otherwise. *Computer Equipment Co.*, ASBCA No. 20705, 77-1 BCA ¶ 12,246 at 58,963*; Centennial Leasing, supra*; *see also CACI, Inc.-Federal v. General Services Administration*, GSBCA No. 15588, 02-1 BCA ¶ 31,712 at 156,635.

Since there was no valid CO's final decision, we do not reach the question of whether appellant's appeals were timely filed with the Board. We decline appellant' s invitation to comment on what actions the Court of Federal Claims might take if appellant were to file an action there.

DECISION

ASBCA Nos. 53915 and 53916 are dismissed without prejudice for lack of jurisdiction.

Dated: 2 May 2003

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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 Nos. 53915, 53916, Appeals of United Partition Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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