

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Quimba Software, Inc.) ASBCA No. 57636
)
Under Contract No. F30602-03-C-0185)

APPEARANCE FOR THE APPELLANT: Christopher R. Shiplett, Esq.
Randolph Law, PLLC
Arlington, VA

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
DCMA Chief Trial Attorney
Srikanti Schaffner, Esq.
Trial Attorney
Defense Contract Management Agency
Carson, CA

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

The Defense Contract Management Agency (DCMA) moves to dismiss this appeal on the ground that Quimba Software, Inc. (Quimba or appellant) failed to file a timely appeal with this Board as required by the Contract Disputes Act (CDA), 41 U.S.C. § 7104(a). Appellant has filed an opposition to the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On or about 28 July 2003, the Air Force Research Laboratory, Rome, New York, awarded a cost-type contract to appellant to provide software in accordance with an attached Statement of Work (R4, tab 1). The contract was administered by DCMA.

Based upon a Defense Contract Audit Agency report, and in accordance with FAR 52.242-1, DCMA issued to appellant a Notice of Intent to Disallow Costs by letter dated 8 November 2010, stating that the government intended to disallow certain deferred compensation costs claimed by appellant in its FY 2004 incurred cost proposal (R4, tab 11). Appellant contested the government's position in an e-mail dated 6 January 2011 (R4, tab 14).

On 27 December 2010, appellant's co-founder, Robert Dourandish, sent an e-mail to the Administrative Contracting Officer (ACO) that stated, insofar as pertinent, "EMAIL IS THE BEST METHOD OF REACHING ME AND I ASK THAT YOUR

OFFICE ALWAYS EMAIL A COPY OF ANY CORRESPONDENCE TO BOB@QUIMBA.COM IN ADDITION TO MAILINGS” (gov’t mot., ex. 1).

By e-mail dated 4 March 2011, the ACO provided a copy of the final decision to Mr. Dourandish. The final decision demanded payment in the amount of \$91,992.77 for unallowable deferred compensation costs in Quimba’s FY 2004 incurred cost proposal (R4, tabs 15, 16). By e-mail to the ACO dated 4 March 2011, Mr. Dourandish acknowledged receipt of the final decision (R4, tab 17).

Insofar as pertinent, the ACO’s decision stated: “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 ASBCA...” (R4, tab 16). By letter dated 3 June 2011, hand-delivered to the Board on that date, Quimba filed its appeal of the ACO’s decision with this Board (corr. file). This was 91 days after its receipt of the ACO’s decision.

The Board docketed the appeal as ASBCA No. 57636. This government motion followed.

DECISION

Under the CDA, 41 U.S.C. § 7104(a), the 90-day period in which to appeal a contracting officer’s decision to the Board is jurisdictional and may not be waived. *See Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982); *Maria Lochbrunner*, ASBCA Nos. 57235, 57236, 11-2 BCA ¶ 34,783; *Graham International*, ASBCA No. 50481, 98-2 BCA ¶ 29,928. It is undisputed that appellant received the ACO’s decision on 4 March 2011 and filed its notice of appeal with this Board on 3 June 2011, which was 91 days after receipt of the decision. We have consistently dismissed such appeals for lack of jurisdiction under the CDA. *SMS Agoura Systems, Inc.*, ASBCA Nos. 50926, 50928, 97-2 BCA ¶ 29,325; *A.I.A. Costruzioni S.p.A.*, ASBCA No. 43584, 92-3 BCA ¶ 25,204; *Miller-Wills Aviation, Inc.*, ASBCA No. 40976, 91-1 BCA ¶ 23,290; *Booz, Allen & Hamilton, Inc.*, ASBCA No. 35286, 88-1 BCA ¶ 20,310.

Appellant does not challenge our case law, but contends that the result should be different here because appellant was furnished the ACO decision by e-mail, and we should be guided by Rule 6(d) of the Federal Rules of Civil Procedure (FRCP), adopted by the Rules of the U.S. Court of Federal Claims, that provides a party with three additional days to respond if served by e-mail or other means prescribed therein. We have no such rule at our Board. In any event, this rule has no application to the matter before us. Rule 6(d), FRCP, addresses the amount of time provided to a party litigating in the federal courts upon receipt of service by means such as e-mail. It does not address the statutory appeal period provided to a contractor upon receipt of a contracting officer’s decision under the CDA.

We have duly considered all of appellant's arguments but do not find them persuasive. We grant the government's motion to dismiss this appeal for lack of jurisdiction on the ground that appellant failed to file a timely appeal with this Board.

The appeal is dismissed.¹

Dated: 19 December 2011



JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEPLER
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

¹ Under the CDA, appellant may file suit in the U.S. Court of Federal Claims within 12 months from the date of its receipt of the ACO's decision. 41 U.S.C. § 7104(b)(3).

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. 57636, Appeal of Quimba Software, Inc., rendered in conformance with the Board's Charter.

Dated:

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