



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: October 2, 2007

CBCA 735

COMMODITY SOLUTIONS, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

George W. Ash and Erin L. Toomey of Foley & Lardner LLP, Detroit, MI, counsel for Appellant.

David W. Schaaf, Office of the General Counsel, Department of Agriculture, Kansas City, MO, counsel for Respondent.

Before Board Judges **PARKER, GILMORE, and KULLBERG.**

GILMORE, Board Judge.

We dismiss this case for lack of jurisdiction because it was filed more than ninety days after the contractor received the contracting officer's final decision.

Background

Respondent, the Department of Agriculture, awarded a contract to appellant, Commodity Solutions, LLC, on November 2, 2006, for the purchase of 1800 metric tons of

green peas and 900 metric tons of lentils, to be shipped to Jacintoport, Texas. The contract required shipment from December 27, 2006, through January 20, 2007.

By letter dated January 22, 2007, respondent notified appellant that it was terminating the lentil portion of the contract for default and that appellant had the right to appeal the partial termination under the Disputes clause of the contract.

The final decision was sent to appellant by facsimile transmission (FAX) on January 23, 2007, with the respondent receiving a “transmission report” that the transmission was “OK.” The final decision was also sent by certified mail, return receipt requested. The United States mail return receipt was stamped January 29, 2007.

Appellant filed a notice of appeal on April 30, 2007, and included a copy of the final decision partially terminating the contract that was faxed to it on January 23, 2007. Appellant also included in the notice of appeal a claim of a mistake in bid. A copy of the final decision pertaining to its claim of a mistake in bid was not submitted with its notice of appeal.

Respondent moves to dismiss the appeal of the partial termination (and also of the mistake in bid, to the extent that it was intended to be included in the notice of appeal), on the basis that the appeal was not timely filed, and thus, the Board lacks jurisdiction.

Appellant responded to the motion by agreeing that it had earlier conceded in a conference call with the Board on August 6, 2007, that the appeal relating to a mistake in bid was untimely. The final decision on that issue was dated January 17, 2007, and transmitted to appellant by FAX on January 18, 2007. Appellant received the decision by certified mail on January 22, 2007. Appellant also agreed with respondent that the appeal of the partial termination was also untimely, in that it admits that it received the contracting officer’s final decision by FAX on January 23, 2007, and did not file its appeal until April 30, 2007, more than ninety days after it received the final decision. Appellant also agrees with respondent’s statement of the law regarding receipt of the contracting officer’s decision by FAX.

Discussion

In a recent decision, we described the law regarding the timeliness of appeals of contracting officer decisions:

The Contract Disputes Act of 1978, which governs the Board’s review of contracting officer decisions, requires that an appeal of such a decision be filed “[w]ithin ninety days from the date of receipt of [the] decision.” 41 U.S.C.

§ 606 (2000). This deadline for filing has been strictly construed by the Court of Appeals for the Federal Circuit because the authorization to make the filing is a waiver of sovereign immunity. A late filing divests the Board of jurisdiction to consider the case on its merits. *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); *Tiger Natural Gas, Inc. v. General Services Administration*, GSBICA 16039, 03-2 BCA ¶ 32,321, at 159,910-11.

Robert T. Rafferty v. General Services Administration, CBCA 617, 07-1 BCA ¶ 33,577, at 166,340.

Based upon respondent's motion to dismiss and appellant's response, the parties agree that the appeal was not timely filed. The Board has reviewed the facts and the law and also agrees that the appeal was not timely filed. On the issue of transmission of the contracting officer's decision by FAX, the Federal Acquisition Regulation (FAR) provides that any method which provides evidence of receipt of the decision is acceptable. 48 CFR 33.211(b) (2006). The Department of Agriculture's supplementing regulations do not otherwise restrict the method of providing a copy of the contracting officer's decision. Thus, the FAR governs, and transmission by FAX is an acceptable method. *See Tyger Construction Co.*, ASBCA 36100, *et al.*, 88-3 BCA ¶ 21,149.

While successful transmission of a FAX, standing alone, is not proof of receipt of the FAX by the contractor, *see Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369 (Fed. Cir. 2005), here, appellant admits that it received the partial termination decision by FAX on January 23, 2007, and, thus, the ninety day period runs from that date. The ninetieth day after receipt of the FAX was April 23, 2007. The appeal was filed on April 30, 2007.

Decision

The appeal (which included two claims) was not timely filed under the requirements of the Contract Disputes Act and is **DISMISSED FOR LACK OF JURISDICTION**.

BERYL S. GILMORE
Board Judge

We concur:

ROBERT W. PARKER
Board Judge

H. CHUCK KULLBERG
Board Judge