



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED FOR LACK OF JURISDICTION: July 2, 2009

CBCA 1203

PIXL INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Ajay Sagar, Vice President of Pixl Inc., Fairfax, VA, appearing for Appellant.

Elin M. Dugan, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **VERGILIO**.

**HYATT**, Board Judge.

Respondent, the Department of Agriculture (USDA), has moved to dismiss the subject appeal, brought by appellant, Pixl Inc., as untimely under the Contract Disputes Act of 1978 (CDA). After reviewing the motion, appellant's response, and USDA's reply to Pixl's response, we conclude that the appeal is untimely filed and that the Board lacks jurisdiction to entertain it.

### Findings of Fact

In April 2004, Pixl was awarded a contract by the USDA's Forest Service to provide technical support services for the Forest Service's INFRA project.<sup>1</sup> By letter dated December 11, 2006, Pixl presented a certified claim to the contracting officer requesting a final decision on a miscellany of claims. The contracting officer's copy of this letter is stamped as received on January 15, 2007. Appeal File, Exhibit 14.

After requesting additional information, the contracting officer issued a decision on November 7, 2007,<sup>2</sup> generally denying Pixl's claim, except as to small amounts of interest owing on certain vouchers submitted by Pixl. The letter was transmitted to Pixl by overnight mail and a copy of the receipt is attached to the Government's motion as Exhibit A. This letter contains the following statement:

This is the final decision of the Contracting Officer. You may appeal this decision to the Civilian Board of Contract Appeals. If you decide to appeal, you must, within 90 days of the date you receive this decision, mail or otherwise furnish, written notice to the Board and provide a copy to the contracting officer from whose decision this appeal is taken.

Appeal File, Exhibit 14.

On April 7, 2008, Pixl sent another certified claim to the contracting officer, alleging that the certified claim submitted to the contracting officer on December 11, 2006, was for fiscal year 2007 "damages" and had not yet been addressed. Appellant also added a claim for fiscal year 2008, "damages." Appellant followed up this letter with an electronic mail communication demanding that the contracting officer respond to its claim. Appeal File, Exhibit 15. The contracting officer responded in a letter dated April 28, 2008, informing Pixl that the April 7, 2008 "claim" "does not introduce any new evidence that substantiates your allegations . . . and will not be processed as an additional claim." Appeal File, Exhibit 17.

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<sup>1</sup> The term INFRA refers to an integrated suite of Forest Service software applications and databases.

<sup>2</sup> The Forest Service points out in its motion that while appellant's notice of appeal actually refers to a contracting officer's decision dated October 6, 2007, the Forest Service did not issue such a decision on that date and believes that the November 7, 2007, decision is the one which appellant has appealed. This decision is set forth in the appeal file at exhibit 14.

Pixl submitted its appeal through the United States Postal Service, priority mail. It was date stamped on May 24, 2008, and received by the Board on May 29, 2008. The Board docketed the appeal on May 30, 2008.

### Discussion

USDA has moved to dismiss this appeal for lack of jurisdiction, on the ground that it was filed more than ninety days after the contractor received the contracting officer's decision in November 2007.

The Contract Disputes Act of 1978, under which the Board reviews contracting officer decisions, requires that an appeal of such a decision to a board of contract appeals be filed “[w]ithin ninety days from the date of receipt of [the] decision.” 41 U.S.C. § 606 (2006). 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. Failure to file an appeal within the ninety day deadline divests the Board of jurisdiction to consider the case on its merits. *Three Rivers Timber, Inc. v. Department of Agriculture*, CBCA 1044, 08-1 BCA ¶ 33,833 (citing *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1381 (Fed. Cir. 2007); *D. L. Braugher 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); *Robert T. Rafferty v. General Services Administration*, CBCA 617, 07-1 BCA ¶ 33,577, at 166,340). Because Pixl did not file its appeal within ninety days from the date of its receipt of the decision in question, we do not have jurisdiction to consider the appeal.

Pixl's belated attempt to resubmit its claims with an additional claim in the letter dated April 7, 2008, cannot serve to resuscitate jurisdiction at the Board. In this case, with respect to the underlying claim, once ninety days elapsed from appellant's receipt of the decision on November 8, 2007, appellant no longer had the option to pursue an appeal at the Board. To toll the ninety-day limitation period, any request that the contracting officer reconsider his decision must have been made before the expiration of that ninety-day period. *Schleicher Community Corrections Center, Inc.*, DOT BCA 3046, et al., 98-2 BCA ¶ 29,941; *Adventure Group, Inc.*, ASBCA 45511, 93-3 BCA ¶ 25,967. There is no evidence in the record that Pixl requested reconsideration of the November 7, 2007 decision prior to sending the April 7, 2008 letter. As a result, Pixl has not demonstrated that the Board has jurisdiction to consider this matter. *Hunn Corp. v. National Gallery of Art*, GSBCA 12888-NGA, 94-3 BCA ¶ 27,148; *accord Propulsion Controls Engineering*, ASBCA 53307, 01-2 BCA ¶ 31,494.

Decision

USDA's motion is granted. This appeal is **DISMISSED FOR LACK OF JURISDICTION**.

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CATHERINE B. HYATT  
Board Judge

We concur:

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JERI KAYLENE SOMERS  
Board Judge

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JOSEPH A. VERGILIO  
Board Judge