



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: June 27, 2018

CBCA 5993

B&F DISTRIBUTORS, LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Dessie Minor, President of B&F Distributors, LLC, Hattiesburg, MS, appearing for Appellant.

Samantha S. Ahrendt, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SULLIVAN**, **LESTER**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Appellant, B&F Distributors, LLC (B&F), appealed a contracting officer's final decision (COFD) more than seven years after it was issued. The agency filed a motion to dismiss the appeal for lack of jurisdiction. B&F opposed the motion, arguing that the COFD was legally defective because it was sent to B&F without a referenced attachment that identified which work orders were disapproved. We grant the motion.

Background

During the 2006-2007 time-frame, B&F performed work under a task order issued by the Federal Emergency Management Agency (FEMA or agency). Although the record is not

clear regarding the precise nature of the work, according to B&F's appeal, the company received work orders from FEMA for services related to "blocking, leveling and/or anchoring travel trailers in Mississippi." On June 29, 2009, two years after B&F completed performance under the contract, B&F received a notification of overpayment from FEMA in the amount of \$180,554, due to unsubstantiated invoices associated with 157 work orders.

On March 4, 2010, B&F disputed the overpayment in what it referred to as "a claim" to the contracting officer (CO), and on March 23, 2010, FEMA and B&F met to review the claim.¹ Based on their discussions, B&F analyzed thousands of documents and photographs to substantiate its work on the units/trailers in question and provided relevant supporting information to FEMA on April 7, 2010. After evaluating the information, the CO determined that, of the original 157 work orders in dispute, 132 were correctly approved for payment, and twenty-five were *incorrectly* approved for payment. The overpayment was reduced from \$180,554 to \$35,087, consistent with the CO's updated analysis.

On May 19, 2010, the CO issued a final decision on B&F's claim, informing B&F that it had been overpaid by \$35,087 based on twenty-five work orders that should not have been approved for payment.² The decision included the requisite language from the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613 (2006) (now codified at 41 U.S.C. §§ 7101-7109 (2012)), informing B&F of its right to challenge the COFD, including that it could appeal the decision to the Civilian Board of Contract Appeals within ninety days of the date of receipt. B&F received the final decision the same day it was issued and thanked FEMA in an email, stating, "This is still a lot but we will work with Tina to get it taken care of. An expensive lesson learned on my part."

The COFD twice referenced an "attached spreadsheet" that listed the twenty-five work orders that were disapproved and should not have been paid. However, the spreadsheet was not attached to the COFD. Repeated requests to the agency for a copy of the spreadsheet went unanswered and, in the meantime, the ninety-day appeal period lapsed. During that time, B&F did not file an appeal but did begin making payments on the debt. In October 2013, when \$14,600 had been paid back to FEMA, and B&F had still not received a copy of

¹ A copy of B&F's "claim" was not included with its appeal, so we cannot verify whether it satisfied the term "claim" as defined in the Federal Acquisition Regulation (FAR).

² Despite the CO's reference to the "Contractor's Claim" in the COFD, the record shows that the overpayment was actually a government claim against B&F. *See Dodd, Frazier & Co.*, IBCA 1591-6-82, et al., 83-1 BCA ¶ 16,231, at 80,644 (government claims subject to CDA procedures include the recovery of overpayments provisionally paid to a contractor).

the spreadsheet, B&F stopped making the payments. After numerous attempts to obtain the spreadsheet from the agency failed,³ B&F sought Congressional assistance, and on June 29, 2015, B&F received a copy of the spreadsheet from Senator Thad Cochran's office, reflecting an overpayment in the amount of \$33,016 related to invoices 14, 15, and 16—not the \$35,087 amount associated with invoices 14 and 15, as referenced in the COFD issued five years earlier.

According to B&F, it reviewed the spreadsheet and noted that all of the disapproved units had been on the original list of 157 work orders/units, which B&F received and reviewed with FEMA in 2010. B&F determined that approximately nineteen of the “disapproved” units had, in fact, been submitted to FEMA and approved by FEMA personnel as complete and ready for payment, as reflected in both the daily and cumulative reports.⁴ B&F noted that the other six units were decommissioned and properly denied payment. By B&F's calculations, the overpayment should have been further reduced to \$7442. Since B&F had repaid \$14,600, it asserted that its debt had not only been repaid in full, but that it had now overpaid FEMA by \$7158. Despite these observations in 2015, B&F did not request reconsideration from the CO or attempt to appeal the COFD.

On December 19, 2017, B&F received a letter from the Department of the Treasury informing B&F of a \$45,699.05 debt to the Government.⁵ On January 10, 2018—nearly eight years after the COFD was issued—B&F appealed the decision to the Board. B&F stated that FEMA miscalculated the overpayment, that B&F only owed \$7442 for six units, and that the \$14,600 it already repaid more than covered the debt.

FEMA promptly filed a motion to dismiss the appeal based on the contractor's failure to file its appeal within the ninety-day statutory period. In response, B&F argued that the

³ B&F contacted FEMA multiple times in October 2013 only to learn that previous personnel had moved on. When B&F contacted their replacements, B&F learned that no such spreadsheet was in the file.

⁴ According to B&F, the cumulative report was compiled from daily reports and included 4022 units.

⁵ This was the fourth letter B&F received from the Treasury Department on this matter. The three previous letters contained three different amounts: \$26,957 (November 2014), \$25,040 (May 2017), and \$36,215 (May 2017). All three debt notifications were returned to the “creditor agency” (FEMA). None of the letters reflected the \$14,600 that B&F allegedly repaid as indicated by the agency's Vendor Quick Report. The report shows payments but does not show the contractor name or contract number.

contracting officer's failure to provide the spreadsheet made the decision legally defective. The Board ordered FEMA to reply to B&F's argument that, without the attachment, the COFD was legally defective, and to comment on whether the appeal period did not start to run until the contractor had a complete copy of the decision, including its attachment. While FEMA admitted that the spreadsheet was never sent by mail or by email, and acknowledged that the spreadsheet provided additional information to support the government's claim, FEMA argued that the two-page COFD, as issued in 2010, was legally sufficient without it. In the alternative, FEMA reasoned that if the Board were to find that the COFD was defective without the attachment, and, consequently, that the appeal period did not begin to run until B&F received the spreadsheet from Senator Cochran's office in 2015, B&F's January 2018 appeal is still untimely, depriving the Board of jurisdiction.

Discussion

The CDA requires that once the contracting officer issues a final decision, an appeal to a board of contract appeals must be filed "[w]ithin ninety days from the receipt of [the] decision." 41 U.S.C. § 7104(a). "Failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits." *Bluegrass Contracting Corp. v. Department of Transportation*, CBCA 5240, 16-1 BCA ¶ 36,415, at 177,550. This filing deadline has been strictly construed since the authorization to make the filing is a waiver of sovereign immunity. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); see *Devi Plaza, LLC v. Department of Agriculture*, CBCA 1239, 09-1 BCA ¶ 34,033, at 168,338 (2008) ("A board of contract appeals cannot waive the statutory appeal period.").

In response to the motion, B&F argued that the COFD was legally defective due to the missing spreadsheet, effectively delaying the start of the statutory appeal period. The FAR provides that a final decision shall include (i) a description of the claim or dispute; (ii) a reference to the pertinent contract terms; (iii) a statement of the factual areas of agreement and disagreement; (iv) a statement of the contracting officer's decision, with supporting rationale; and (v) a statement informing the contractor of its appeal rights. 48 CFR 33.211(a)(4) (2006) (FAR 33.211(a)(4)). The COFD at issue stated, in part:

Meeting with B&F to review claim - 03/23/2010

B&F was provided an opportunity to provide any supporting documentation for Invoices 14 and 15, to include before and after pictures of work performed, approvals received by B&F from FEMA Contracting Officer Technical Representatives (COTR) or Contracting Officers (CO), affidavits, etc.

All documentation provided by B&F was reviewed and re-reviewed by FEMA COTR and CO and the findings are noted on the attached spreadsheet.

. . . There are 25 work orders identified on the attached spreadsheet identified as not approved due to invalid pictures, no COTR approval, etc.

When comparing the requirements of FAR 33.211(a)(4) with these statements, the CO's failure to include the spreadsheet did not render the COFD defective. The CDA requires a contracting officer to state the reasons for the decision reached and, in fact, expressly informs contracting officers and contractors alike that "specific findings of fact are not required." 41 U.S.C. § 7103(e). While most of the case law on defective COFDs focuses on the requirement to inform a contractor of its appeal rights, *see, e.g., Decker & Co. v. West*, 76 F.3d 1573, 1579 (Fed. Cir. 1996)), at least one of our predecessor boards has addressed paragraphs (iii) and (iv) of this FAR provision. In *Specialty Transportation, Inc.*, VABCA 6211, 00-2 BCA ¶ 30,978, the Board dismissed for lack of jurisdiction an appeal filed after the ninety-day appeal period, despite appellant's contention that the COFD failed to articulate the factual areas of agreement and disagreement. The Board reasoned that since appellant had prepared the invoices in question, as well as the driver's log book, "[appellant] cannot be said to be unaware of the 'factual areas of agreement and disagreement.'" *Id.* at 152,873. As made clear in *Specialty Transportation*, in reviewing whether a particular COFD is sufficiently "final" to start the appeal clock running, a tribunal must focus on whether, in light of the language of the COFD itself and the circumstances surrounding its issuance, the contractor subjectively understood, or objectively should have understood, what the dispute was about.

Although the precise provision of the FAR at issue in *Specialty Transportation* was different, the reasoning in this case is the same. Here, the COFD referenced B&F's claim and the invoice numbers at issue. It also acknowledged a meeting between B&F and FEMA where B&F's claim was reviewed and discussed. To explain the basis of the final overpayment amount, the CO reasoned, "Your original claim requested review of 157 work orders which B&F considered complete and ready for payment. The reviews by both parties found 132 work orders to actually be acceptable through before and after pictures, emails, affidavits, etc." The CO further explained that, based on the reviews and findings, the overpayment was reduced from \$180,554.00 to \$35,087.00, the final amount representing twenty-five work orders that were incorrectly approved.

B&F admitted that once it received the spreadsheet from Senator Cochran, it determined that the twenty-five disapproved units were among the original list of 157 work orders it received in 2010 and had an opportunity to respond to with pictures and other documentation. The final list contained no new information. While a more focused list of

work orders/units may have been helpful to B&F, the CO was not required to include specific findings with her decision. *See Sentry Insurance, A Mutual Co.*, VABCA 2617, 88-1 BCA ¶ 20,236, at 102,448 (1987) (CO's decision to deny the claim based on a simple statement that she lacked the authority to pay the claim pursuant to VAAR 833.009 was sufficient under the CDA, "particularly since the Act provides in 6(a) that specific findings of fact are not required"). Despite the agency's failure to attach the spreadsheet, we find that the COFD itself satisfied the requirements of 41 U.S.C. § 7103(e) and the FAR. Because the COFD was proper, and B&F was made aware of its right to appeal the decision upon receipt of the same, its failure to do so within the ninety-day statutory period deprives this Board of jurisdiction to consider the appeal.

Even if we were to find that the appeal period did not start to run until B&F had a complete copy of the COFD, B&F received the attachment on June 29, 2015, rendering delivery of the entire COFD complete by that date. Yet B&F did not appeal the COFD for another two-and-a-half years, which is well beyond the ninety-day limit. In the circumstances here, a finding that delivery of the COFD was incomplete until B&F had the attachment would not allow B&F to establish jurisdiction. Its appeal would still be untimely.

In its response to the motion, B&F seeks relief under Board Rules 26(b)(2) and 27(a)(2). 48 CFR 6101.26(b)(2), .27(a)(2) (2017). These rules provide reconsideration or relief from *the Board's* final decision or order. Here, B&F only has a final decision from a contracting officer, not the Board, so these rules are unavailing.

Finally, B&F's receipt of a notice of overpayment from the Department of the Treasury does not confer jurisdiction on the Board. While we are sympathetic to B&F's predicament in light of the agency's failure to provide the spreadsheet, the constant variation in the amount of the debt, and Treasury's apparent failure to factor in the repayment, the Board lacks jurisdiction to hear the case due to B&F's own failure to timely file its appeal. Although B&F cannot appeal the COFD here, there is evidence in the record that the amount identified in the COFD was incorrect/overstated. The spreadsheet that B&F finally received does not support the amount identified in the COFD, and it includes monies from an invoice that was not identified as being a part of the COFD's damages amount. We have no authority to demand that FEMA fix this discrepancy, but we would encourage FEMA to consider whether it has demanded repayment of monies which were not improperly paid after all, and whether, if it has, it can take any steps to resolve the situation.

Decision

For the foregoing reasons, respondent's motion to dismiss is granted, and the appeal is **DISMISSED FOR LACK OF JURISDICTION**.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge