

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS FOR LACK OF JURISDICTION
DENIED: October 17, 2001

GSBCA 15588

CACI, INC. - FEDERAL,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Judith B. Kassel, Deputy General Counsel of CACI International, Inc., Chantilly, VA,
counsel for Appellant.

Robert T. Hoff, Office of General Counsel, General Services Administration,
Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **HYATT**.

HYATT, Board Judge.

CACI, INC.- FEDERAL (CACI) has appealed the deemed denial of its claim for \$141,589.50 under Federal Supply Service (FSS) Information Technology contract number GS-35F-4483G. Respondent, the General Services Administration (GSA), has moved to dismiss the appeal for lack of jurisdiction, arguing that the claim was not filed with the GSA contracting officer, which is a prerequisite to filing an appeal. CACI opposes the motion. For the reasons stated, we deny the motion.

Background

Sometime prior to August 1998, GSA awarded CACI FSS contract number GS-35F-4483G. Subsequently, on August 11, 1998, the Government of the Virgin Islands of the United States issued purchase order number 2-1654-PP-98 under the contract to CACI. The

order, for the total amount of \$359,171, was for information technology services to be provided on a time and materials basis. The order was administered by the Office of the Commissioner of the Virgin Islands Department of Health. CACI was to provide information system implementation support services for the Virgin Islands Women, Infants, and Children (WIC) Program. CACI undertook preparatory work, but at some point was unable to continue with the task because the director of the Virgin Islands WIC program needed to obtain upgraded software from the developer. The upgrade was to be supplied to CACI to permit CACI to continue with implementation of the system. CACI invoiced the ordering agency for \$141,589.50, representing its expenditures on the work it had completed to that point. It appears that the ordering agency contends that CACI should not be paid because it did not implement the system.

When payment of its invoice was not forthcoming, on November 27, 2000, CACI sent a certified claim to Dr. Lucien Moolenaar, Acting Commissioner of Health, Department of Health, St. Thomas, Virgin Islands. CACI's letter, setting forth the basis for its claim, requested a final decision within sixty days. CACI also sent a copy of this letter to the GSA contracting officer, Mr. Dan Eberly.

Thereafter, CACI attempted to contact the GSA contracting officer at least four times in the hope of resolving the claim. After hearing that he wanted to discuss the claim with her, Denise W. Braden, CACI's director of contracts, in December 2000, left two separate telephone messages for Mr. Eberly, seeking resolution of CACI's claim. Declaration of Denise W. Braden (Braden Declaration) (June 26, 2001) ¶ 3. Ms. Braden states that she also attempted to call Mr. Eberly about the claim on at least two additional occasions in early 2001. *Id.* ¶ 4. Finally, Ms. Braden states that on March 20, 2001, she left a message for the GSA contracting officer apprising him of CACI's intent to file an appeal based on the contracting officer's deemed denial of CACI's claim. The GSA contracting officer did not return or otherwise respond to any of Ms. Braden's calls. CACI eventually filed this appeal in May 2001.

Discussion

Respondent has filed a motion to dismiss the appeal, contending that the claim was never properly submitted to the GSA contracting officer and that the Board therefore lacks jurisdiction to hear it. Under the Contract Disputes Act of 1978 (CDA), "[a]ll claims against the government relating to a contract shall be in writing and shall be submitted to the contracting officer." 41 U.S.C. § 605(a) (1994). Although GSA does not dispute that CACI's letter to Dr. Moolenaar generally meets the requirements for a claim that are set forth in the CDA, it does contend that under applicable regulations and case law, CACI was required to submit its claim to Mr. Eberly for decision in order to pursue its claim at the Board. 48 CFR 8.405-7 (1998). GSA maintains that CACI never obtained a decision from Mr. Eberly and that the Board thus lacks jurisdiction to entertain the appeal.

CACI filed a response, submitting Ms. Braden's sworn declaration, which details her efforts to raise this matter with the GSA contracting officer. In its response, CACI asserts that the GSA contracting officer had a copy of the claim and was well aware that CACI wanted the matter resolved. Under these circumstances, CACI says, the Board should conclude that the requirements for jurisdiction have been satisfied. GSA was afforded an

opportunity to file a reply to CACI's response but declined to do so. GSA has not denied that CACI sent a copy of its letter to the GSA contracting officer, Mr. Eberly, nor does it deny that Ms. Braden made several efforts to contact Mr. Eberly, leaving messages for him. We thus assume that the jurisdictional facts asserted by CACI are not disputed by GSA.

It is axiomatic that "[a] party seeking the exercise of jurisdiction in its favor bears the burden of establishing that such jurisdiction exists." Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1372 (Fed. Cir. 1994) (citing KVOS, Inc. v. Associated Press, 299 U.S. 269, 278 (1936)); accord Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991); Preston v. General Services Administration, GSBCA 14517, 99-2 BCA ¶ 30,515. In ruling on a motion to dismiss for lack of jurisdiction, the Board will accept as true the appellant's undisputed allegations with respect to jurisdictional facts and should construe them in the light most favorable to the appellant. See Hamlet v. United States, 873 F.2d 1414, 1415 (Fed. Cir. 1989); Reynolds v. Army & Air Force Exchange Service, 846 F.2d 746, 747 (Fed. Cir. 1988); Hardrives, Inc., IBCA 2319, et al., 93-2 BCA ¶ 25,779 (1992).

Federal supply schedule contracts are a common source of jurisdictional issues under the CDA. This is because the regulations contemplate that each ordering agency will administer the orders it has placed in the first instance, but the ordering agency cannot render an appealable decision on a dispute. The regulations provide that:

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

48 CFR 8.405-7. Frequently, contractors submit their claims to the ordering agency and then, when the claims are denied or not acted upon by the ordering agency, bring an appeal. Because the regulations require that these matters be presented to the GSA schedule contracting officer, however, the Board must frequently dismiss these cases for lack of jurisdiction because neither the ordering agency nor the contractor has realized that the matter must be submitted to the cognizant GSA schedule contracting officer for decision. Although the Board has remarked that these regulations can have the unfortunate effect of miring contractors in a "pit of bureaucratic quicksand," Centennial Leasing v. General Services Administration, GSBCA 12311, 93-3 BCA ¶ 26,120, at 129,822, it has nonetheless dismissed these cases when the claim had not been forwarded or otherwise provided to the GSA contracting officer for decision. Accord Grant Communications, Inc. v. Social Security Administration, GSBCA 14862-SSA, 99-1 BCA ¶ 30,281; Centennial Leasing v. General Services Administration, GSBCA 12321, 93-3 BCA ¶ 26,200; GF Office Furniture, Ltd., GSBCA 11058, BCA ¶ 24,157; Centennial Leasing Corp., GSBCA 10932, 91-2 BCA ¶ 23,678.

The rationale for dismissing these cases where the GSA contracting officer has not had an opportunity to consider and respond to the contractor's claim is that "[u]nder the CDA, a final decision by a [contracting officer] on a 'claim' is a prerequisite for Board jurisdiction." Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc)

(citing Sharman Co. v. United States, 2 F.3d 1564, 1568-69 (Fed. Cir. 1993)); accord William D. Euille & Associates v. General Services Administration, GSBCA 15261, 00-1 BCA ¶ 30,910, at 152,509-10; see also D. L. Braughler Co. v. West, 127 F.3d 1476, 1480 (Fed. Cir. 1997). Although a claim must be submitted to the contracting officer for decision, our appellate authority has recognized that this does not necessarily require that the claim be directly addressed and sent to the contracting officer.

The plain language of § 605 requires claims against the Government to be submitted to the contracting officer. It does not, however, require that the claims be sent only to the contracting officer, or necessarily directly to that officer. . . . If . . . the contractor sends a proper claim to its primary contact with a request for a final decision of the contracting officer and a reasonable expectation that such a request will be honored, and the primary contact in fact timely delivers the claim to the contracting officer, then we see no basis for finding that the claim was not submitted to the contracting officer as required under § 605(a).

Braughler, 127 F.3d at 1480 (quoting Neal & Co. v. United States, 945 F.2d 385, 388-89 (Fed. Cir. 1991)) (footnote omitted).

Decisions of the United States Court of Federal Claims, setting forth a detailed rationale for reaching this conclusion, were cited with approval by the Neal court. One of these decisions is particularly pertinent. In Robin Industries, Inc. v. United States, 22 Cl. Ct. 448 (1991), the contractor addressed a claim letter to the agency attorney rather than to the contracting officer. The letter detailed the events leading to the dispute and stated the contractor's position. It asked the attorney to consult with all appropriate individuals and to provide a decision within sixty days so that the matter could either be settled or further review pursued. The agency lawyer forwarded the matter to the cognizant contracting officer, who responded to the contractor. In ruling that these circumstances satisfied the CDA's jurisdiction requirements the court observed:

The CDA requires that all claims "be submitted to the contracting officer [CO] for a final decision." 41 U.S.C. § 605(a). The presentation of a claim to the CO is not a minor formality, but an integral part of the statutory disputes process which must be complied with before the court can assert jurisdiction over a contractor's direct access appeal. Plaintiff's letter was addressed to a[n agency] attorney, not the CO. However, the [agency] attorney forwarded the letter to the CO, who responded to plaintiff's communication on April 7, 1989. Defendant, therefore, asserts that plaintiff fell short of meeting the CDA submission requirement notwithstanding the fact that the . . . letter eventually reached the CO. In essence, defendant argues that a contractor must directly address all claims to the CO unless the contractor is instructed to do otherwise by the

contract or the CO. The court rejects this interpretation as inconsistent with the plain language of the CDA. Congress elected to use the broad term "submitted" instead of the words "directly sent" or "directly transmitted" in § 605(a) of the CDA. Congress, therefore, intended to provide other means of claim submission, i.e. through an intermediary, rather than imposing the rigid requirement that all claims be directly sent to the CO. . . . Moreover, it is the CO's receipt, not the contractor's submission, of a claim which obligates the government to render a decision on the claim and triggers the running of interest under the CDA. . . . By addressing the letter to the [agency] attorney, plaintiff bore the risk of non-transmission of the claim to the CO. However, it is undisputed that the claim was in fact received by the CO. Once the claim reached the CO, plaintiff satisfied the submission requirement set forth in § 605(a) of the Act. . . . The court, therefore, finds that plaintiff "submitted" its claim to the CO even though the claim was addressed to the [agency] attorney.

Id. at 455 (citations omitted).

The facts in the instant case are substantially similar to those in Robin Industries. Although CACI's letter was addressed to the Health Commissioner, Dr. Moolenaar, rather than directly to the GSA contracting officer, and requested that Dr. Moolenaar resolve the claim, this is consonant with the operational realities of FSS contracting, under which the ordering agencies and contractors are expected to make initial attempts to resolve disputes and then to resort to the GSA contracting officer when an impasse is reached. By the time CACI wrote to Dr. Moolenaar, an impasse had been reached. The regulations suggest that the contractor should present the claim to the ordering agency which in turn is, under the regulations, instructed to refer the matter to the GSA contracting officer. Since it nonetheless remains the responsibility of the contractor to seek a final decision from GSA prior to appealing to the Board, e.g., Centennial Leasing, GSBCA 10932, it was nonetheless entirely proper for CACI to, at the same time, undertake to send a copy of its claim to Mr. Eberly. Thereafter, CACI persistently attempted to engage the contracting officer in resolution of the issue. In the absence of any showing by GSA that the copy of the letter and CACI's messages were not received, CACI's actions are deemed to have given the GSA contracting officer adequate notice of the pending dispute and of CACI's desire to have it resolved or to obtain a final decision. The copy of CACI's letter, sent to the GSA contracting officer, and subsequent multiple telephone messages left for the GSA contracting officer, made clear that CACI wanted a resolution or the opportunity to file an appeal. We assume that the letter, which was dated November 27, 2000, was received within a week or so after that date. The GSA contracting officer was presumably aware of his role under the regulations and had ample opportunity to consider the claim and decide it. He did not do so within a reasonable time after receiving a copy of CACI's letter. Thus, the claim may properly be deemed denied and the Board has jurisdiction to consider CACI's appeal.

Decision

Respondent's motion to dismiss this appeal for lack of jurisdiction is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ANTHONY S. BORWICK
Board Judge