

AMERICAN AGRISURANCE, INC.,)	AGBCA No. 98-169-F
(Randy A. Schenk))	
)	
Representing the Appellant:)	
)	
Kim Gibson, President)	
American Agrisure, Inc.)	
P.O. Box 1574)	
Council Bluffs, Iowa 51502-1574)	
)	
Representing the Government:)	
)	
James H. Wood)	
Office of the General Counsel)	
U. S. Department of Agriculture)	
2550 University Avenue West)	
Suite 416N)	
St. Paul, Minnesota 55114-1052)	

RULING ON GOVERNMENT’S MOTION TO DISMISS

February 10, 1999

OPINION BY ADMINISTRATIVE JUDGE ANNE W. WESTBROOK

On May 15, 1998, the Board received this appeal from American Agrisure, Inc., of Council Bluffs, Iowa (Appellant), arising under a Standard Reinsurance Agreement (SRA), and involving Compliance Case No. SP-DC00-258 and the Federal Crop Insurance Corporation (FCIC) and the Risk Management Agency, U. S. Department of Agriculture (Government). Under the SRA Appellant sells and administers Multi-Peril Crop Insurance contracts in furtherance of the Government’s crop insurance program. The compliance case involves the insured’s, Randy A. Schenk’s, 1993 corn loss under a Multi- Peril Crop Insurance contract between the Appellant and the insured. There is no federal contract number.

At issue is a September 16, 1997, determination issued by the U. S. Department of Agriculture, Risk Management Agency, Office of Risk Compliance. The appeal to this Board was dated May 11, 1998. The Government has moved for dismissal on the basis that the contractor failed to file its appeal within 90 days of receipt of the determination. The contractor admits receipt of the determination on September 16, 1997. The contractor contends, despite notification in the denial that appeal should be made to the Agriculture Board of Contract Appeals, that it erroneously appealed to the USDA/Farm Services Agency (FSA) Compliance Division on October 24, 1997, within the 90-day appeal period and the Board should nonetheless hear its appeal. The Government

contends there is no evidence of an earlier appeal and in any event the earlier appeal is irrelevant to the issue of timeliness.

In resolving the Government's motion, the Board is here considering whether it has authority to hear this appeal under the regulatory jurisdiction granted to it at 7 C.F.R. §§ 24.4(b), 24.5 and 400.169. Based on the reasoning set out below, the Motion to Dismiss is granted.

FINDINGS OF FACT

1. This appeal arises under a SRA between the Appellant and the FCIC under the provisions of the Federal Crop Insurance Act, as amended, 7 U.S.C. § 1501 et seq., and 7 C.F.R., Part 400.

2. On August 18, 1995, the St. Paul Compliance Field Office (SPCFO) issued initial findings to Appellant regarding policy No. MP-126562, Randy A. Schenk. Appellant did not respond to the SPCFO initial determinations in spite of having the response date twice extended, first from September 29, 1995 to October 6, 1995, and then to November 3, 1995. On January 1, 1996, the SPCFO issued final determinations affirming its conclusions and concluding that Appellant should prepare corrected claims to recover indemnity overpayment of \$14,181. On February 5, 1996, in response to a telephone call from Appellant, the SPCFO reissued its final determinations which Appellant said it had not received. Appellant requested a determination by the Director of Insurance Services regarding the SPCFO final determination pursuant to 7 C.F.R. § 400.169(a), stating that it would be sending a complete report as to why it disagreed with the SPCFO findings. That request was received March 19, 1996. By letter dated April 5, 1996, the Director of the Risk Compliance Division acknowledged receipt of the request and asked Appellant to provide the basis and any supporting material within 3 weeks. Appellant failed to provide any analysis or documentation in support of its request.

3. The U. S. Department of Agriculture, Risk Management Agency, Office of Risk Compliance issued a denial of Appellant's March 19, 1996, claim on September 16, 1997. The decision advised Appellant of its appeal rights as follows:

If you disagree with this determination, you may appeal pursuant to 7 C.F.R. 400.169. The appeal must be filed with the United States Department of Agriculture Board of Contract Appeals, United States Department of Agriculture, Washington, D.C. 20250-0600. The Board's telephone number is 202-720-7023. The appeal must be filed within 90 days of receipt of this letter.

4. Appellant's first notice to the Board was a May 11, 1998, letter acknowledging that it received the denial on September 16, 1997. That letter also stated that "a further appeal requesting reduction of the overpayment from \$14,181 to \$4,580 was mailed to the Director of Compliance on October 24, 1997." Appellant further states that it received no response to the October 24, 1997 letter and inquired only after receiving a Referral for Administrative Collection Action on April 17,

1998. According to Appellant's May 11, 1998 letter it made a telephone inquiry on May 6, 1998, and then discovered that the October 27, 1997 appeal request had not been received. Appellant does not identify the person or office called. Enclosed with the May 11, 1998 letter is a letter addressed to the USDA Board of Contract Appeals with two dates. It is initially dated October 24, 1997. Next to that date in parenthesis and in bold type is the notation: "(Resent to Board of Contract Appeals - May 11, 1998)." The record contains no allegation by Appellant, nor any other indication, that Appellant ever sent any appeal notice, or any other communication, to the Board prior to May 1998.

5. On May 22, 1998, the Board sent its standard docketing letter to the parties, allowing Appellant 30 days in which to file a Complaint in accordance with Board Rule 6. Appellant submitted a letter dated June 19, 1998, presenting its substantive arguments. Seven exhibits were attached.

6. Upon receipt of Appellant's June 19, 1998 submission, the Board scheduled a conference call to discuss further proceedings, including modification of Appellant's complaint to more fully clarify the issues. During that call, the Government raised the issue of timeliness. For reasons of judicial efficiency, the Board directed that the timeliness issue be addressed before any further proceedings, including modification of the Complaint or the submission of an appeal file.

7. On November 10, 1998, the Government filed a Motion to Dismiss the appeal for lack of jurisdiction on the basis of untimeliness. The Government contended that the Appellant failed to file its appeal within 90 days of receipt of the final decision. The Government filed a brief in support of its Motion. Citing the Contract Disputes Act (CDA), 41 U.S.C. § 605, the Government argues that the appeal period is statutory and the Board may not waive it. The Government also contends that should this appeal proceed further, it will present evidence that the alleged earlier notice of appeal was not received by the Risk Management Agency.

8. On November 18, 1998, the Board allowed Appellant 30 days to file a response to the Motion. As a response, Appellant submitted a letter dated December 16, 1998. Appellant acknowledges that the September 16, 1997 decision advised it that any appeal should be made to Agriculture Board of Contract Appeals, and that it in error responded to the USDA/FSA Risk Compliance Division. Appellant appears to argue that the Risk Compliance Division has responsibility to remedy its error by notification or redirection.

DISCUSSION

The Government bases its motion on the CDA, 41 U.S.C. § 605 and 7 C.F.R. § 24.5. Reliance on the CDA is misplaced. The limitation for filing an appeal from a final administrative determination of the FCIC is contractual and is governed by regulation. The SRA provides that in the event of disputes, a contractor may appeal to FCIC in accordance with the provision of 7 C.F.R. § 400.169. Volume 7, C.F.R. § 400.169 allows appeals of final administrative decisions in accordance with 7 C.F.R., Part 24. Volume 7, C.F.R. § 24.5 provides that a notice of appeal of a final administrative determination of the FCIC "shall be filed within 90 days of receipt of the Corporation's final

determination.” The same paragraph also provides that the time for filing a notice of appeal shall not be extended by the Board.

It is undisputed that Appellant failed to file a notice of appeal with the Board within the 90-day appeal period. The record contains a letter addressed to the Board with the dates October 24, 1997, and May 11, 1998, typed on it (the latter in bold with the label “Resent to the Board of Contract Appeals”). However, Appellant has never argued that it filed a timely notice of appeal anywhere other than to the Risk Management Agency. Appellant’s suggestion that the Risk Management Agency bore a responsibility to remedy Appellant’s error is not well taken. The decision provided the contractor with both the name and address of the entity to which the appeal should be taken: the United States Department of Agriculture Board of Contract Appeals, United States Department of Agriculture, Washington, D.C. 20250-0600. Further, the Board’s regulations require that an appeal be made to the Board. The Board’s rules provide that it will not extend the time specified for appealing the determination.

RULING

Because the notice of appeal was not filed within the 90 days prescribed in 7 C.F.R. § 24.5, and the Board’s rules provide that it will not extend the time for filing a notice of appeal, it is concluded that the appeal must be dismissed as untimely. The Government’s Motion to Dismiss is granted.

ANNE W. WESTBROOK
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
February 10, 1999