

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Dawson Builders, Inc. ) ASBCA No. 53172  
)  
Under Contract No. F31601-96-C-0012 )

APPEARANCE FOR THE APPELLANT: Sue E. Anthony, Esq.  
Warren, Perry & Anthony, P.L.L.C.  
Wake Forest, NC

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF  
Chief Trial Attorney  
John A. Case, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS  
ON THE GOVERNMENT'S MOTION TO DISMISS

The Government moves to dismiss for lack of jurisdiction alleging that the appeal is untimely.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 29 April 1996, the Government awarded the subject contract to appellant for alterations and repairs to the Vehicle Maintenance Building, Pope Air Force Base (AFB), North Carolina (R4, tabs 1, 2, 3). Appellant began work in June 1996 and finished the project in June 1997 (R4, tabs 7, 135, 151 at 4th page).

2. On 21 August 1997, Mr. Michael D. Marguerat, appellant's president, advised the contracting officer that the Government owed it \$21,591.50: (1) \$329.41 for an error in Modification No. P00002; (2) \$4,606.03 for extra work performed under Modification No. P00003; (3) \$3,725.00 for unpaid progress payments; (4) \$5,713.46 for interest on late payments; and (5) \$7,217.60 for installation of a fire alarm system (R4, tab 96).

3. The parties attempted to settle the dispute through August 1998 (R4, tabs 97, 98, 99, 100, 101, 105, 113, 114). On 31 August 1998, Mr. Marguerat advised the contracting officer that he intended "to pursue any course available . . . to secure payment in full for the balance of the contract, in addition to any penalties and interest that may be due," and increased the amount of his claim to \$25,816.00 (R4, tab 114).

4. On 30 September 1998, Mr. Marguerat wrote the contract administrator, complaining about the Government's handling of his claim (R4, tab 127).

5. On 4 November 1998, the Defense Finance and Accounting Service paid appellant \$1,296.47 in interest on late payments. On 23 November 1998, the contracting officer forwarded Modification No. P00004 in the amount of \$12,153.04 to appellant for signature. The modification included \$329.41 for the error in Modification No. P00002, \$4,606.03 for extra work performed under Modification No. P00003, and \$7,217.60 for the fire alarm system. (R4, tabs 141, 157)

6. On 3 December 1998, appellant returned Modification No. P00004 unsigned and increased its claim by \$11,071.00 (R4, tab 142).

7. On 6 January 1999, COL Antonio Ferraro, Commander of the 43rd Logistics Group, Pope AFB, replied to Mr. Marguerat's 30 September 1998 letter, apologizing for the inconvenience caused by the delay in resolving his claim and informing him that the system was being changed (R4, tabs 144, 147, 149).

8. On 9 March 1999, the contracting officer issued a final decision denying all but \$12,153.04 of appellant's 31 August 1998 claim and all of its 3 December 1998 claim. (R4, tab 157). Appellant received the final decision on 12 March 1999 (decl. Mata, ex. 1). The decision stated, in part, as follows:

This is the final decision of the Contracting Officer. You may appeal this decision to the Agency Board of Contract Appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Agency Board of Contract Appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. Your appeal should be mailed to the following address:

Recorder  
Armed Services Board of Contract Appeals  
Skyline Six, Room 703  
5109 Leesburg Pike  
Falls Church, Virginia 22041-3208

. . . Instead of appealing to the Agency Board of Contract Appeals, you may bring an action directly in the United States Court of Federal Claims . . . as provided in the Contract

Disputes Act of 1978 . . . within 12 months of the date you receive this decision.

(R4, tab 157)

9. On the same day, the contracting officer issued Modification No. P00004 unilaterally, increasing the contract price by \$12,153.04 (R4, tab 158).

10. On 25 March 1999, Mr. Marguerat sent a letter to COL Ferraro stating that he did not accept the contracting officer's decision and that he intended to submit "a claim for the balance of our contract, plus authorized changes in the work." He concluded by requesting COL Ferraro to "accept this letter as our notice of claim dispute." The letter did not indicate that appellant wanted to have the dispute adjudicated by the Board. (R4, tab 160; app. ans. to mot. at 3)

11. Neither the contracting officer nor the Board received a copy of Mr. Marguerat's 25 March 1999 letter at the time (decls. of Crawley, Howard, Mata).

12. On 5 October 2000, appellant through an agent advised the contracting officer that it did not submit its 25 March 1999 letter to the Board because it was "under the impression [its] letter to Colonel Ferraro would suffice" and requested the contracting officer to review his 9 March 1999 decision (R4, tab 163).

13. On 16 November 2000, the contracting officer declined to review his 9 March 1999 decision, stating that since "no additional information has been brought forth for my review and re-consideration," his decision "still stands." He also stated that if "Dawson wishes to file a claim with the Agency Board of Contract Appeals they may do so in accordance with our letter dated 9 March 1999" (app. supp. br., ex. A).

14. On 4 December 2000, appellant sent a notice of appeal to the Board where it was docketed as ASBCA No. 53172.

### DECISION

The Government moves to dismiss for lack of jurisdiction alleging that the appeal is untimely. According to the Government, appellant's 25 March 1999 letter to COL Ferraro was not a valid notice of appeal for the following reasons: (1) it did not express an intent to appeal the final decision; (2) it was not sent to the contracting officer or the Board; (3) there is no evidence that it was mailed within 90-days of receipt of the final decision; and (4) it did not elect a forum. With respect to arguments (1) through (3), appellant asserts that its 25 March 1999 letter was adequate. With respect to argument (4), appellant concedes that it did not elect a forum in its letter, but argues that since "no intentional harm was done to the US Air Force, . . . under the theory of fairness, if nothing else, . . . the

ASBCA [should] allow the appeal to be heard . . .” (app. answer to mot. at 3-4). In the alternative, appellant argues that the contracting officer’s letter of 16 November 2000 extended the appeal period, making appellant’s 4 December 2000 notice of appeal timely.

In order to be effective, a notice of appeal must elect a forum in which the appeal is to be heard, *e.g.*, either an agency board of contract appeals or the Court of Federal Claims. In *Stewart-Thomas Industries, Inc.*, ASBCA No. 38773, 90-1 BCA ¶ 22,481 at 112,836, we explained this requirement as follows:

While the Board has historically interpreted contractors’ communications liberally in finding effective appeals, we find appellant’s 24 January 1989 notice to be ineffective inasmuch as appellant . . . fail[ed] to elect the forum in which it would seek relief. In order for our jurisdiction to attach, a notice of appeal must express an election to appeal to this Board.

*See also JWA Emadel Enterprises, Inc.*, ASBCA No. 51016, 98-2 BCA ¶ 29,765 at 147,503 (notice must reflect “an intent to appeal to the Board”); *William Howard Wilson d/b/a Wilson Maintenance*, ASBCA No. 47831, 97-1 BCA ¶ 28,911 (no statement the decision was being appealed to the Board); *SRM Manufacturing Co.*, ASBCA Nos. 44750, *et al.*, 96-2 BCA ¶ 28,487 at 142,267 (“no statement that SRM appeal[ed] . . . to the Board”); *Wach-und Werkschutz Kleve-Bocholt GmbH*, ASBCA No. 41651, 91-2 BCA ¶ 23,862 (contractor failed to elect a forum).

Appellant alternatively argues that the contracting officer’s letter of 16 November 2000 triggered a new 90-day appeal period, making its 4 December 2000 notice of appeal timely. In order to extend the appeal period, the contracting officer’s final decision must not be truly final; *e.g.*, he must lead the contractor to believe reasonably that the final decision is being reconsidered, and might be reversed or modified. *Mello Construction, Inc.*, ASBCA No. 49027, 96-1 BCA ¶ 28,008. The facts of this case do not meet that standard. On 5 October 2000, appellant through its agent requested the contracting officer to review his final decision, asserting that appellant thought its letter to COL Ferraro was sufficient to appeal the decision. The contracting officer rejected the request on 16 November 2000, stating that in the absence of any additional information, his decision “still stands.” In our opinion, these actions could not have been reasonably construed to mean that the contracting officer had reconsidered his final decision. Moreover, it is well-established that the 90-day filing period is jurisdictional and that neither the Board nor the contracting officer has the authority to enlarge the period. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982). Thus, the contracting officer’s suggestion that appellant could file a claim at the Board in his letter of 16 November 2000 is ineffectual to revive appellant’s long-expired right of appeal.

The Government's motion to dismiss is granted. The appeal is dismissed for lack of jurisdiction.

Dated: 19 September 2001

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ELIZABETH A. TUNKS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53172, Appeal of Dawson Builders, Inc., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals