

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
DK&R Company) ASBCA No. 53451
)
Under Contract No. N00189-98-M-AQ53)

APPEARANCE FOR THE APPELLANT: Mr. David Kissi
Owner

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Davis Young, Esq.
Trial Attorney
Fleet and Industrial Supply Center
Norfolk, VA

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

The Government has moved to dismiss this appeal for lack of jurisdiction on the ground that it was not timely filed under the Contract Disputes Act (CDA), 41 U.S.C. § 606. We deny the motion for the reasons stated below.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

On 16 December 1997 the Navy's Fleet and Industrial Supply Center issued purchase order (PO) No. N00189-98-M-AQ53 to DK&R Company (DK&R) for the lease and maintenance of washers and dryers at a billeting facility at Dam Neck, Virginia Beach, Virginia. David Kissi, appellant's representative in this appeal, signed and accepted the PO on behalf of DK&R. The contract's performance period ended on 30 September 1998. The Navy had the option to extend for three years. (R4, tab 1) The contract provided that "[t]he contractor shall remove all washing machines and clothes dryers within five calendar days after the end of the contract" (*id.* at attach. A, ¶ 3.27).

The Navy exercised the first two options, extending the contract period through 30 September 2000 (R4, tabs 3-6). On 1 August 2000 the contracting officer (CO) notified DK&R that the Navy would not exercise the third (R4, tab 12). On 2 August 2000 DK&R protested what it described as the "unilateral cancellation" of the contract and sought to continue it (R4, tab 13).

In the ensuing dispute, the Navy demanded that DK&R remove its washers and dryers. DK&R demanded the overdue payment of its invoice for the second option period and payment for the Navy's continued use of its machines. (*See, e.g.*, R4, tabs 14, 15, 17) The Navy eventually paid the invoice, with interest (R4, tabs 23, 24), and twice attempted, unsuccessfully, to settle the equipment usage and removal matters (R4, tabs 19, 26). DK&R ultimately claimed \$9,000 for the Navy's use of its washers and dryers prior to their removal and the Navy claimed \$1,840 in removal costs (R4, tabs 25-27). On 3 March 2001 DK&R suggested mediation (R4, tab 27).

On 7 March 2001 the CO issued a "final decision" denying DK&R's claim. She notified DK&R of the 90-day time limit for appeal to the Board and the 12-month limit for appeal to the U.S. Court of Federal Claims and ended: "If you wish to further discuss this issue, I can be reached at (757)443-1347." (R4, tab 28) DK&R received the decision on 8 March 2001. On 9 March, DK&R returned the decision to the Commanding Officer of the Fleet and Industrial Supply Center, with a note on the envelope inquiring about achieving a "fair deal" and asking why he had not responded to certain of the company's correspondence (R4, tabs 28, 29).

By letter dated 29 March 2001, sent to DK&R by Federal Express on 30 March 2001, the CO enclosed a duplicate of her decision and a proposed bilateral modification to settle the dispute. She concluded her letter by again stating "If you wish to further discuss this issue, I can be reached at (757)443-1347." (R4, tab 29) On 8 April 2001, Mr. Kissi wrote to the Commanding Officer, with a copy to the CO, rejecting the proposed settlement, stating: "We can informally resolve this through a personal meeting within the next 10 days or we will press our claim in the U.S. Court." (R4, tab 30)

On 16 April 2001 the CO wrote to Mr. Kissi that "I have arranged for a meeting between you and the Acquisition Executive (AE) with the sincerest hope that we may reach an agreement under this contract expeditiously" (R4, tab 31). A meeting occurred on 27 May 2001. On 28 May 2001 Mr. Kissi wrote to the CO, with a copy to Navy counsel, stating "This is a follow-up to our meeting yesterday." He enclosed requested documentation. (R4, tabs 32, 33) On 14 June 2001, the CO responded:

Thank you for providing the additional information requested by the Attorney. After careful consideration of the additional information, I have reached the conclusion that the additional information does not provide new facts or evidence warranting a reconsideration of the [CO's] final decision dated 07 March 2001. Thus, the [CO's] final decision dated 07 March 2001 still stands as the agency's final decision in response to your claim.

(R4, tab 33)

The Board received appellant's notice of appeal, which indicates that it was delivered by hand, on 12 July 2001. It is based upon an alleged "Final Order" by the CO in June 2001.

DISCUSSION

If a contractor elects to appeal from a CO's final decision to the Board, the CDA requires that it do so within 90 days from the date of its receipt of the decision. 41 U.S.C. § 606. The filing period is statutory, is strictly construed, and cannot be waived by the Board. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982). Nonetheless, it is well-settled that:

Where the facts indicate that a [CO's] initial decision was not truly final or that the decision is being reconsidered, the failure to appeal from the decision within the prescribed time period will not defeat the Board's jurisdiction and the contractor's opportunity to be heard on the merits.

Johnson Controls, Inc., ASBCA No. 28340, 83-2 BCA ¶16,915 at 84,170. If the Government elects to grant an audience to a disappointed claimant after a final decision, but does so only out of courtesy, with no intent to reconsider, it should make it clear that the appeal period continues to run (*id.*) The "issue to be resolved with respect to vitiation of 'finality' is whether the contractor presented evidence showing it reasonably or objectively could have concluded the CO's decision was being reconsidered." *Sach Sinha and Associates, Inc.*, ASBCA No. 46916, 95-1 BCA ¶ 27,499 at 137,042.

Here, the Government repeatedly attempted to settle its dispute with appellant, which contemplated a disposition by mediation. The CO's final decision of 7 March 2001 concluded with her offer to discuss the matter further. When appellant returned the decision, the CO resent it, but with a cover letter enclosing a proposed settlement modification, and she again offered to discuss the issues. Appellant then sought to resolve the dispute informally through a meeting. The CO not only was receptive but she expressed the "sincerest hope" for an expeditious agreement. The parties met and appellant thereafter provided requested documentation. If the CO had not intended to reconsider her decision, she should have made that clear, because her actions suggested otherwise. It was not until 14 June 2001, over 90 days after appellant first received the CO's decision on 8 March 2001, that she reaffirmed it.

The evidence shows that appellant reasonably and objectively could have concluded that the CO was reconsidering her decision and that it was not final until 14 June 2001. Thus, appellant's 12 July 2001 appeal was timely.

DECISION

The Government's motion to dismiss is denied.

Dated: 19 February 2002

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 53451, Appeal of DK&R Company, rendered in conformance with the Board's Charter.

Dated:

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