

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
John J. Kuqali General Contractor) ASBCA No. 53979
)
Under Contract No. F19650-01-P-0502)

APPEARANCE FOR THE APPELLANT: Mr. John J. Kuqali
Owner

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Leonard M. Cohen, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE COLDREN

The Government moves to dismiss the appeal for lack of jurisdiction as being untimely filed. It alleges that the appeal was not filed within the requisite 90-day time period. We grant the motion and dismiss the appeal for lack of jurisdiction.

The Government awarded Contract No. F19650-01-P-0502 to John J. Kuqali General Contractor (appellant). The contract required appellant to make minor repairs at Hanscom Air Force Base Officers' Club in Massachusetts.

After a dispute arose regarding performance, the contracting officer terminated the contract for default. On 17 July 2002, the Government sent by certified mail, return receipt requested, a notification of termination for default and a contract modification implementing that termination to appellant (Mod. P00001). It sent the mail package to the appellant's address but it was later returned stamped "unclaimed." (Gov' t mot., attach. 1-3; Gov' t resp., attach. B)

On both 17 July 2002 and 18 July 2002, the Government sent a copy of the notification of termination for default and Mod. P00001 to appellant by facsimile to the facsimile number provided by appellant to the Government as its business facsimile number. (Nowicki affidavit, Gov' t mot., attach. 3; Gov' t resp., attach. A) This facsimile number differs from the one which appears in the contract.

The facsimile number provided by appellant was actually the facsimile number of Town Paint & Supply, a business owned by Mr. Gary Sandler. According to Mr. Sandler, he had given Mr. Kuqali permission to use Mr. Sandler's fax machine to receive faxes at Town

Paint & Supply because he did not have a fax number in the local area. (Sandler affidavit, Gov' t resp., attach. C)

When the faxes came into Town Paint & Supply for appellant on 17 July 2002 and 18 July 2002, Mr. Sandler telephoned the Government's contract specialist Nowicki to ask what to do because the faxes "talk[ed] about default and termination" and appeared "serious." Mr. Nowicki asked Mr. Sandler to give the fax to Mr. Kuqali when Mr. Kuqali came in. (Sandler affidavit at 2, Gov' t resp., attach. C; Nowicki affidavit, Gov' t mot., attach. 3)

Mr. Kuqali came into Town Paint & Supply on 18 July 2002 and Mr. Sandler gave him the faxes that had been sent by the Government on 17 and 18 July 2002 (Sandler affidavit, Gov' t resp., attach. C). The faxed termination notice advised appellant of its appeal rights (Gov' t mot., attachs. 1-3).

The Government had scheduled a meeting for 19 July 2002 to hand-deliver the notification of termination for default and Mod. P00001 to Mr. Kuqali. On 19 July 2002, Mr. Kuqali called the Government contract specialist Nowicki to say that he was not coming to the meeting scheduled that day as he had already received the faxed copy of the notification of termination for default and Mod. P00001 on 18 July 2002. (Nowicki memo dated 19 July 2002, Gov' t, resp., attach. D)

Appellant sent a letter dated 17 October 2002 by Federal Express to the Board. The subject of the letter was the "NOTIFICATION OF TERMINATION FOR DEFAULT MODIFICATION P00001 DATED 17 JULY 02 AND RECEIVED 18 JULY 02." The letter expressed a desire to appeal the default termination because "[T]HE AMENDMENT WAS NOT RECEIVED VIA U.S. MAIL BUT RECEIVED BY FAX (NOT AT MY OFFICE) ON 18 JULY 02." The Board received and docketed appellant's notice of appeal on 18 October 2002.

By letter dated 15 November 2002, the Government filed a motion to dismiss for lack of jurisdiction on the ground that appellant had untimely filed its notice of appeal.

In response, by letter dated 13 January 2003 to this Board, appellant stated that "I was informed by Mr. Nowicki's office that my appeal was to be received at the ASBCA office not later that [sic] 18 October 02 and it was." This statement was not submitted by affidavit or supported by other evidence in the record. In another letter dated 10 February 2003 to the Government trial attorney with a copy to the Board, appellant declared:

I have already stated receiving [sic] a notice from the contracting officer representative via facsimile to a neighborhood hardware store in Natick, MA. Never at any time by the United States Postal Service (regular or certified mail)

was an official, original notice of any kind received by me at my physical home/office address which is stated in block # 09 of the contract award dated 15 June 2001 and signed by Ms. Louise Rollings.

DECISION

Under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, the Board lacks jurisdiction over an appeal filed more than 90 days after receipt of the final decision. 41 U.S.C. § 606. This 90 day filing period is statutory and cannot be waived by the Board. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982), *aff'g Cosmic Construction Co.*, ASBCA No. 26537, 82-1 BCA ¶ 15,541. We note that a contractor has 12 months from receipt of a final decision to file a direct action suit in the United States Court of Federal Claims. The burden of proof is on appellant to establish that its appeal was timely filed. That burden may be met by affidavit or other evidence. *Bearing and Drive Systems, Inc.*, ASBCA No. 31175, 86-1 BCA ¶ 18,577. However, it is the Government's burden to establish the date the final decision was received. *David Grimaldi Co.*, ASBCA No. 49795, 97-2 BCA ¶ 29,201.

In the instant appeal, appellant acknowledges receiving the termination notice on 18 July 2002. The 90th day thereafter was Wednesday, 16 October 2002. Appellant's notice of appeal, dated 17 October 2002, was not filed within 90 days of receipt of the contracting officer's decision. Moreover, since the notice was sent via a commercial carrier, rather than by the United States Postal Service, the date it is considered to have been filed is 18 October 2002, the date the Board received it. *ColeJon Corp.*, ASBCA No. 44209, 93-3 BCA ¶ 26,183.

Appellant appears to argue that the appeal is timely for two reasons: 1) it did not receive the contracting officer's decision by certified mail at its business or home address; and 2) an unnamed individual in Government contract specialist Nowicki's office told Mr. Kuzali that the appeal was due at the Board by 18 October 2002.

Neither of these arguments is tenable. The CDA requires the contracting officer to issue the final decision in writing and mail "or otherwise furnish a copy of the decision to the contractor" (41 U.S.C. § 605(a)). The Government attempted to send notification to appellant by certified mail but was unsuccessful. The Government's transmission of the notice by facsimile was successful as admitted by appellant. Where the appellant specifically acknowledges receipt of the facsimile, delivery by facsimile is sufficient to start the 90-day appeal period. *Tyger Construction Co., Inc.*, ASBCA Nos. 36100, 35101, 88-3 BCA ¶ 21,149.

Appellant also contends that someone in the CO's office represented that the deadline to file the notice of appeal was two days later than the 90 days specified in the

statement of appellant's appeal rights listed in the contracting officer's final decision. The CDA specifically states that a contractor has only 90 days from receipt of that decision to file an appeal. This statutory 90 day period cannot be waived. *Cosmic Construction Co. v United States*, 697 F.2d 1389 (Fed. Cir. 1982).

On the record before us, appellant's notice of appeal was filed more than 90 days after receipt and, therefore, was untimely. The appeal is dismissed for lack of jurisdiction.

Dated: 14 March 2003

JOHN I. COLDREN, III
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. 53979, Appeal of John J. Kuqali General Contractor, rendered in conformance with the Board's Charter.

Dated:

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