

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
ESA Environmental Specialists, Inc.) ASBCA No. 55620
)
Under Contract No. FA2823-04-C-0038)

APPEARANCE FOR THE APPELLANT: Mr. Charles Cole
CEO

APPEARANCES FOR THE GOVERNMENT: Diana S. Dickinson, Esq.
Acting Chief Trial Attorney
CAPT Tyler E. Merkel, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE STEMLER
ON GOVERNMENT'S MOTION TO DISMISS

Contending ESA Environmental Specialists, Inc. (appellant) failed to file its notice of appeal within the 90-day period following receipt of the contracting officer's final decision as required by 41 U.S.C. § 606, on 6 November 2006, the Air Force (government) filed a motion to dismiss for lack of jurisdiction. The Board did not receive a response to the government's motion from appellant. We deny the motion to dismiss.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. The government awarded Contract No. FA2823-04-C-0038 to appellant on 29 September 2004 for renovation of a building on Eglin Air Force Base, FL (R4, tab 1).

2. On 24 April 2006, the government received a certified claim from appellant in the amount of \$157,893.47 (gov't mot. at Statement of Facts (SOF) 2; R4, tab 5). The contracting officer issued a final decision dated 29 June 2006, denying appellant's claim. The final decision advised appellant regarding its right to appeal to this Board within 90 days or the U.S. Court of Federal Claims within 12 months of receipt of the decision. The final decision did not provide any address information for this Board or the Court (gov't mot., attach. 1).

3. The final decision was sent via certified mail, and was received by appellant on

5 July 2006 (gov't mot., attach. 2). Based upon the date of appellant's receipt of the final decision, the 90-day period for filing of a notice of appeal to this Board expired on 3 October 2006.

4. On 29 September 2006, the contracting officer (CO) received, via facsimile, a letter from appellant dated 28 September 2006. The letter, on appellant's letterhead, was addressed to the attention of the CO. The letter referenced the CO's final decision and included the claim number and contract number. The letter stated the following:

As specified in your letter dated June 29, 2006 [appellant] is formally reserving the right to remit this **Request of Appeal** to you since the address, phone number or e mail address for the agency board of contract appeals was not specified in said letter.

[Appellant] is awaiting information from our request to the Florida Freedom of Information Act. Upon receiving such information [appellant] intends to submit an appeal of your decision stated in the referenced letter.

*[Appellant] has contacted your office to obtain the address information and to date has not received it. Since your letter states that you must also be notified of our intention to appeal, [appellant] requests that your office forward this letter to the appropriate agency board of contract appeals. Once [appellant] receives the requested address information, we will also send this **Request for Appeal** to the agency board of contract appeals.*

(Gov't mot., attach. 3) (italics added, bold in original). The letter, though not signed, indicates its author to be Charles Cole, CEO, ESA Environmental Specialists, Inc. (Gov't mot., attach. 3).

5. On Monday, 2 October 2006, the CO sent a response to appellant "via electronic mail" providing appellant with the address for the Board and the U.S. Court of Federal Claims. The letter also referred appellant to the language in the CO's final decision regarding the filing of an appeal. The letter made no reference to appellant's request that the CO forward its 28 September 2006 letter to this Board. (Gov't mot. at SOF 4, and attach. 4) The CO did not forward appellant's 28 September 2006 letter to the Board.

6. On 10 October 2006, the Board received a letter from appellant via U.S. mail dated 28 September 2006 and with a postage meter stamp of 5 October 2006. The letter stated in relevant part:

As specified in the Final Contracting Officer Decision letter, [appellant] is formally reserving the right to remit this **Request of Appeal** of that decision. [Appellant] is awaiting information from our request to the Florida Freedom of Information Act. Upon receiving such information [appellant] intends to submit an appeal of your decision stated in the referenced letter.

The letter appears to be substantially the same letter sent to the CO referenced in finding 4 above with the final paragraph removed. As with the previous letter, it was on appellant's letterhead and referenced the CO's final decision, and included the claim number and contract number. The letter, though not signed, indicated its author to be Charles Cole, CEO, ESA Environmental Specialists, Inc. (Bd. corr. file)

7. Upon receipt of appellant's letter on 10 October 2006, the Board's Chief Counsel telephoned appellant and advised it that its letter was unsigned.¹ The Chief Counsel also advised appellant that there may be issues concerning whether appellant's letter had expressed a present intent to appeal and whether its appeal was timely. Appellant was advised that it would be given an opportunity to address these issues if necessary. Appellant was requested to fax a signed letter to the Board. (Gov't mot., attach. 6)

8. On 10 October 2006, the Board received, via facsimile, a signed letter from appellant dated 10 October 2006 stating that ". . . ESA is formally submitting a Request to Appeal that decision." The Recorder docketed this letter as ASBCA No. 55620.

DECISION

The question of whether appellant filed a timely notice of appeal can be answered by analyzing appellant's 28 September 2006 letter to the CO (Finding of Fact 4) since that is the only letter sent by appellant that could possibly serve as an appeal prior to the 3 October 2006 expiration of the 90-day appeal period.²

¹ Board Rule 2 states that a notice of appeal should be signed.

² The government argues that the Chief Counsel's 10 October 2006 telephone conversation with appellant and/or the Recorder's Office action in docketing the appeal from appellant's 10 October 2006 letter is material to this decision. The Board, of course,

To be considered timely, an appeal from a CO's final decision to an agency board must be made within 90 days of receipt of a CO's final decision. 41 U.S.C. § 606. The 90-day deadline is statutory, and the Board has no discretion to waive it. *Cosmic Constr. Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982); *Zolman Construction & Development, Inc.*, ASBCA No. 48135, 95-1 BCA ¶ 27,469.

In the matter before us, the 90-day period for filing of a notice of appeal expired on 3 October 2006. On 29 September 2006, within the 90-day filing period, appellant submitted to the CO, via facsimile, a letter which appropriately referenced the contracting officer's final decision, and included the claim number and contract number. Therein appellant stated that it was "formally reserving the right to remit this **Request of Appeal**" to the CO since no contact information was provided to appellant for the agency board of contract appeals in the final decision. Appellant also stated it had contacted the CO to obtain such information, but had not received a response. Appellant's letter also requested the following of the CO: "Since your letter states that you must also be notified of our intention to appeal, [appellant] requests that your office forward this letter to the appropriate agency board of contract appeals."³ Appellant's request that the letter be forwarded to the Board is sufficient to support its present intent to appeal.

The contents of the 28 September 2006 letter to the CO adequately fulfill well-established criteria for an effective notice of appeal. The letter reflects dissatisfaction with the CO's final decision and indicates an intention to appeal to a higher authority than the CO. *New Mexico Professional Standards Review Organization, Inc.*, ASBCA No. 25867, 82-1 BCA ¶ 15,499 at 76,878.

Citing Board Rule 2, the government also contends that the notice of appeal must be signed personally by the appellant. However, Board Rule 2 is advisory and not mandatory. *St. Paul Fire and Marine Insurance Co.*, ASBCA No. 53228, 02-2 BCA ¶ 32,025 at 158,289-90. *Cf.*, *Becker v. Montgomery*, 532 U.S. 757 (2001) (unsigned notice of appeal to district court does not void appeal if signature is timely supplied); *Ross v. United States*, 16 Cl. Ct. 378 (1989) (faxed complaint without signature was accepted when copy with signature was received outside of Contract Disputes Act statute of limitations); Fed. R. Civ. P. 11(a) (permitting prompt correction of missing signature).

had no knowledge of appellant's 28 September 2006 letter to the contracting officer at the time, since the contracting officer had failed to forward it to the Board. Neither the Chief Counsel nor the Recorder's Office is authorized to rule on the Board's jurisdiction.

³ It cannot be denied that appellant's letter contains other confusing language. This language, however, does not overcome appellant's clear request that the CO forward the letter to this Board nor appellant's dissatisfaction with the CO's final decision.

It is well settled that filing an appeal with the CO is tantamount to filing with the Board. Furthermore, a CO cannot extinguish a contractor's right to appeal by failing to forward an appeal to the Board. *Hellenic Express*, ASBCA No. 47129, 94-3 BCA ¶ 27,189 citing *Yankee Telecommunication Laboratories, Inc.*, ASBCA No. 25240, 82-1 BCA ¶ 15,515.

We conclude that appellant timely complied with the requirements for filing a notice of appeal by submitting its letter dated 28 September 2006 to the CO. Appellant is directed to file its complaint within 45 days from receipt of this decision. The stay granted at the request of the government for relief from filing a complete Rule 4 file is hereby lifted. The Rule 4 file will be filed within 45 days of receipt of this decision. The motion is denied.

Dated: 8 May 2007

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

I concur

I concur

PETER D. TING
Administrative Judge
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. 55620, Appeal of ESA Environmental Specialists, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals