

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
DLT Solutions, Inc.) ASBCA No. 55822
)
Under Contract No. FA8770-04-F-8019)

APPEARANCE FOR THE APPELLANT: Jonathan J. Frankel, Esq.
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Dorr LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Diana S. Dickinson, Esq.
Acting Chief Trial Attorney
Warnecke Miller, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON THE GOVERNMENT’S MOTION TO DISMISS

DLT Solutions, Inc. (DLT or appellant) appealed from a denial of its claim under a Blanket Purchase Agreement (BPA). The government has moved to dismiss the appeal arguing that the Board lacks jurisdiction because the notice of appeal was filed after the 90-day statutory limit for appealing a contracting officer’s final decision to this Board. For the reasons discussed below, we deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 25 November 2003, the government issued appellant Delivery Order No. FA8770-04-F-8019 (the contract) under Blanket Purchase Agreement (BPA) GS-35F-4543G to supply computer software on a leased basis (R4, tab 1).

2. DLT alleges the government violated several contract clauses and thus filed a certified claim dated 4 August 2006 in the amount of \$1,878,854.28 (R4, tab 2).

3. By final decision letter dated 5 December 2006, the contracting officer denied the claim. The letter informed the contractor of its right to appeal the contracting officer’s decision to this Board within 90 days of receipt of the decision. (R4, tab 3) The letter was sent to DLT via the United States Postal Service, certified mail, return receipt requested. According to the return receipt, the decision was received by DLT on 11 December 2006. (R4, tab 4)

4. Appellant filed a notice of appeal with the Board which was dated Monday 12 March 2007, and received by the Board on that date, 91 days after appellant's receipt of the contracting officer's final decision (COFD). The Board's notice of docketing was dated 13 March 2007 and forwarded to both parties. (See Board correspondence file)

5. Board Rule 33, Time Computation and Extensions, provides in part as follows:

(b) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.

DISCUSSION

The government contends that filing a notice of appeal on the 91st day is untimely, even though the 90th day was a Sunday.¹ The legal basis for that argument is stated as follows:

Section 7 of the Contract Disputes Act (CDA) of 1978 (as amended and codified at 41 U.S.C. § 606) sets forth the parameters of the statutory waiver of sovereign immunity that, in turn, grants the Armed Services Board of Contract Appeals jurisdiction over contractor claims against the Government. As this is a statutory waiver of sovereign immunity, congressional consent must be explicit and strictly construed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 399 (1976). Further, once a statutory period is established, only congress can lengthen this period. *Soriano v. United States*, 352 U.S. 270, 273-4 (1957); *O'Callahan v. United States*, 196 Ct.Cl. 556, 451 F.2d 1390, 1394 (1971). The Board has recognized these principles when considering jurisdictional issues under the CDA. *Interaction Research Institute, Inc.*, ASBCA No. 55198, 06-1 BCA ¶ 33,189 at 164,512.

¹ Initially, the government's motion to dismiss was premised on the belief that DLT had filed its notice of appeal 92 days following receipt of the COFD. This belief was based on the fact that appellant's notice of appeal was dated 12 March 2007 and the Board's notice of docketing was dated 13 March 2007, or 92 days after appellant's receipt of the COFD.

(Gov't reply to opp'n to mot. to dismiss at 5).

The government recognizes the existence of Board Rule 33(b) but contends that without a statutory basis, that rule cannot be used to enlarge the statutory waiver of sovereign immunity imposed by Congress under the CDA. At the same time, the government recognizes that in other fora, rules similar to our Rule 33(b) have been used to enlarge statutory waivers of sovereign immunity. However, the government asks that we revisit our Rule 33(b) wherein we have allowed as timely those notices of appeal made on the first business day after a 90th day that falls on a Saturday, a Sunday or a legal holiday. (Gov't mot. at 5-6)

Appellant's opposition to the motion rests on that Board precedent which holds that an appeal is timely filed on the 91st day following receipt of the COFD when the 90th day falls on a Sunday, together with similar decisions of the United States Court of Appeals for the Federal Circuit.

We have indeed consistently held that when the 90th day falls on a Saturday or Sunday or legal holiday the appeal is timely if made on the next business day. In some of those decisions we have relied on our Rule 33(b) to extend the filing period by the day or so required to get to the next business day. See *Balimoy Manufacturing Co. of Venice, Inc.*, ASBCA No. 49080, 96-1 BCA ¶ 28,072; *Lamb Enterprises*, ASBCA No. 48314, 95-1 BCA ¶ 27,559; *KIME Plus, Inc.*, ASBCA No. 46580, 94-3 BCA ¶ 27,128; *Interstate Construction, Inc.*, ASBCA No. 43261, 91-3 BCA ¶ 24,338. And, in some of those decisions we have not mentioned Rule 33(b) at all. See *Carothers Construction, Inc.*, ASBCA Nos. 44891 *et al*, 93-3 BCA ¶ 26,069; *Aviation Enterprises, Inc.*, ASBCA No. 34505, 87-2 BCA ¶ 19,793; *Orbas and Associates*, ASBCA No. 30201, 85-2 BCA ¶ 17,985; *Pacific Steel Building Systems, Inc.*, ASBCA No. 26346, 83-1 BCA ¶ 16,362.

Significantly, none of the decisions discussed a need for a statutory basis for Rule 33(b) in order to apply it to the 90-day statute of limitations for filing an appeal to the Board from a contracting officer's final decision. In the analogous case of *Wood-Ivey Sys. Corp. v. United States*, 4 F.3d 961 (Fed. Cir. 1993), the Court reviewed a United States Claims Court dismissal of a claim for failure to file a timely appeal. A contracting officer's final decision was received by the contractor on 8 December 1989; the 12 month period for appeal to the Claims Court ended on Saturday December 8, 1990, and the action was filed in the Court on Monday, December 10, 1990. The Claims Court had a Rule 6(a) which was the same as Federal Rule of Civil Procedure 6(a) which provided that a filing period set by rule, order or statute which expired on a Saturday, Sunday or legal holiday was timely when made on the first business day thereafter. The Claims Court declined to apply its Rule 6(a) stating that since the filing period was jurisdictional, it was not subject to Claims Court rulemaking and dismissed the action.

The Federal Circuit vacated the Claims Court decision holding that Rule 6(a) applies to the computation of time for filing an action when the statutory filing period ends on Saturday, Sunday or a holiday. In so finding the court rejected the government argument that the Claims Court Rules, which were authorized by Congress, are inapplicable because they were not required to be transmitted to Congress. The court stated:

Claims Court Rule 6(a) was enacted in accordance with the authorization of Congress to promulgate rules of procedure. It is an official rule on which the court and the public must rely. Congress did not require return of the Claims Court Rules to Congress for review and ratification. For the government to now argue that absent such ratification this Rule can not apply as it is written is an unwarranted disruption, after ten years of Claims Court existence, and indeed an improper intrusion into the constitutional balance.

4 F.3d at 964.

The Contract Disputes Act, 41 U.S.C. § 606, provides that a contractor may appeal a contracting officer's final decision to the agency board of contract appeals within 90 days of the date of its receipt of the contracting officer's decision. The Board is without discretion to waive this statutory 90-day deadline. *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.

Congress also mandated in the CDA, 41 U.S.C. § 607(h), that the Administrator of the Office of Federal Procurement Policy was “authorized and directed, as may be necessary or desirable to carry out the provisions of this act, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards.” Thus the Office of Federal Procurement Policy issued Uniform Rules of Procedure as guidelines for adoption by agency Boards of Contract Appeals. Paragraph III(b) of the Preface to the Rules, TIME, COMPUTATION, AND EXTENSIONS, is identical to ASBCA Rule 33(b). (Office of Federal Procurement Policy, *Rules for Procedures for Boards of Contract Appeals* (CCH Reports 1-2006, ¶ 101 at 1011-12; DFARS App. A, ¶ 33(b)).

The government’s motion argues that accepting an appeal on the first business day following a Saturday, Sunday or holiday impermissibly expands the statutory period for filing an appeal. Yet, the government ignores the reverse of that argument, which is

requiring the filing to be done on the last business day before a Saturday, Sunday or legal holiday, impermissibly reduces the statutory period for filing an appeal.²

Consistent with the holding in *Wood-Ivey, supra*, we find that in accordance with Board Rule 33(b), the appeal was timely filed on Monday when the statutory period ended on the previous Sunday.

DECISION

The government's motion to dismiss is denied.

Dated: 30 August 2007

RICHARD SHACKLEFORD
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

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

² In that regard, then Chief Judge Nies, in her concurring/dissenting opinion in *Wood-Ivey*, states: "When the choice is between *shortening* the statutory period because the Claims Court is not prepared to accept filings on nonbusiness days or lengthening it to the next business day, the equitable result dictated by *Irwin* [*v. Veterans Administration*, 498 U.S. 89, (1990),] is in favor of tolling to this extent." 4 F.3d at 967.

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. 55822, Appeal of DLT Solutions, Inc., rendered in conformance with the Board's Charter.

Dated:

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