

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
SET Dis Ticaret ve Sanayi Limited Sirketi ) ASBCA No. 56428  
)  
Under Contract No. FA5685-05-C-0008 )

APPEARANCE FOR THE APPELLANT: S. Onder Demir, Esq.  
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APPEARANCES FOR THE GOVERNMENT: Col Neil S. Whiteman, USAF  
Chief Trial Attorney  
Maj Sandra K. Whittington, USAF  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER

This appeal involves a contract for work in Turkey. The government has moved to dismiss the appeal for lack of jurisdiction, contending that the appeal was filed beyond the statutory deadline. We grant the motion.

FINDINGS OF FACT

1. By date of 19 August 2005, the government awarded Contract No. FA5685-05-C-0008 to SET Dis Ticaret ve Sanayi Limited Sirketi (SET), a Turkish-based firm. Under the contract, which was restricted to Turkish-based firms, SET was to furnish, install and test a duct system and copper cables for communication support at Incirlik Air Force Base, Turkey. (R4, tab 1 at 1-3 of 27)\*

2. On or about 5 June 2006, SET submitted a claim to the contracting officer, alleging that it encountered differing site conditions and various delays (Bd. corr. ltr. dtd. 4 August 2008; Respondent's Motion to Dismiss With Prejudice (gov't mot.), attach. 1 at 1).

3. By date of 22 February 2007, the contracting officer issued a final decision on the claim. An individual in SET's organization who gave his title as "PARTNER" acknowledged receipt by date of 26 February 2007. The final decision described SET's

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\* We treat the Rule 4 file in the related appeal, ASBCA No. 56429, as applicable to this appeal.

appeal rights and stated that if SET decided to appeal the decision to this Board, it would have to do so “within 90 days from the date you receive this decision.” (gov’t mot., attach. 1 at 4) In an uncontroverted declaration accompanying the government’s motion, the contracting officer asserts that “SET has asked for me to reconsider my decision; however I have not rescinded or stated that I would reconsider my decision” (gov’t mot., attach. 2, ¶ 4).

4. SET filed this appeal on 4 June 2008, which was 464 days after it acknowledged receipt of the contracting officer’s decision.

### DISCUSSION

Under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*, appeals to the Board from contracting officer decisions must be filed “[w]ithin ninety days from the date of receipt of [the] decision.” 41 U.S.C. § 606. As we explained in dismissing an appeal brought almost thirteen months after the contracting officer’s decision in *Graham International*, ASBCA No. 50481, 98-2 BCA ¶ 29,928 at 148,098, “[t]his time limitation is jurisdictional in nature and we may not waive it.” *See also, e.g., Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982) (upholding dismissal for lack of jurisdiction of appeal filed outside 90-day period); *John J. Kuqali General Contractor*, ASBCA No. 53979, 03-1 BCA ¶ 32,204 at 159,264 (dismissing appeal filed 92 days after receipt of decision).

These jurisdictional considerations are dispositive here. Having found that this appeal was filed 464 days after SET received the contracting officer’s decision (finding 4), we can only hold that this appeal is untimely and hence beyond our jurisdiction.

Regardless of how sympathetic we might be to the equitable considerations that SET marshals against dismissal, they are overcome by the statutory mandate governing our jurisdiction. Thus, SET’s main argument that the incorporation of some contract clauses by reference has the “possibility to create an unfair situation for the non-United States of America citizen part of the contract” (Appellant’s Brief (app. br.) at 2) does not abrogate 41 U.S.C. § 606. Similarly, SET’s contention that it “thought” it could make a “final appeal” after the contract was completed (app. br. at 2), cannot be reconciled with the statute, which contains no exception for subjective good faith. Finally, we have found that the contracting officer neither reconsidered nor rescinded the decision (finding 3).

CONCLUSION

The government's motion to dismiss is granted and the appeal is dismissed.

Dated: 7 August 2008

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ALEXANDER YOUNGER  
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. 56428, Appeal of SET Dis Ticaret ve Sanayi Limited Sirketi, rendered in conformance with the Board's Charter.

Dated:

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