

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Waterstone Environmental Hydrology)
and Engineering, Inc.) ASBCA No. 57557
)
Under Contract No. GS-10F-0291N)
Delivery Order No. FA8903-04-F-8889)

APPEARANCE FOR THE APPELLANT: Robert Gough, Esq.
Counsel

APPEARANCES FOR THE GOVERNMENT: Alan R. Caramella, Esq.
Acting Air Force Chief Trial Attorney
Col Mark S. Teskey, USAF
Lt Col Paul E. Cronin, USAF
Skye Mathieson, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON THE GOVERNMENT'S
MOTION TO DISMISS FOR LACK OF JURISDICTION

The Department of the Air Force (AF or government) has filed a motion to dismiss this appeal for lack of jurisdiction on the ground that Waterstone Environmental Hydrology and Engineering, Inc. (Waterstone or appellant) failed to file an appeal to this Board within 90 days of its receipt of the contracting officer's decision in accordance with the Contract Disputes Act (CDA), 41 U.S.C. § 7104(a).¹ Appellant has filed in opposition to the motion. At appellant's request, we held a hearing and heard oral argument on the motion.² For reasons stated, we grant the government's motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 23 September 2004, the AF issued a firm fixed-price task order to Waterstone, FA8903-04-F-8889, in the amount of \$2,041,774, under GSA Contract No. GS-10F-0291N, Multiple Award, Federal Supply Schedule. The purpose of the task

¹ The CDA was recodified in January, 2011. When Waterstone filed the notice of appeal in this case, the CDA section prescribing the 90-day appeal period was 41 U.S.C. § 606. All references to the CDA herein are to the current, recodified version of the Act.

² Prior to the hearing, appellant acted *pro se* in these proceedings. It did employ counsel, Mr. Gough, as its representative at the hearing, and as far as we are aware Mr. Gough remains counsel of record for appellant.

order was, among other things, to establish a "Decision Support Tool" to support programs at various bases under the Air Education and Training Command in accordance with an attached Statement of Work. The original period of performance for the task order was 23 September 2004 through 31 December 2005, but it was later extended to 31 March 2006 under Modification No. P00001. (R4, tab 1)

2. By letter dated 14 July 2010, appellant submitted a certified claim to the AF, received on 22 July 2010, seeking \$767,842.14 for additional services rendered under the task order (R4, tab 6 at 2, 3, 6). On 5 October 2010, the AF contracting officer (AFCO) issued a final decision denying the claim in its entirety. The AFCO furnished appellant a copy of the decision by email. Appellant has stipulated that it received the final decision on or about 5 October 2010 (joint ex. 1, ¶ 10). The decision concluded as follows:

This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken....

(R4, tab 2 at 44, 46; ex. G-2)

3. Subpart 8.4, Federal Supply Schedules, FAR 8.405-7, effective on the date of award of the GSA contract, provided as follows with respect to disputes:

8.405-7 Disputes.

....

(c) *Appeals.* Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims.

This provision now appears at FAR 8.406-6.

4. The AF was the agency that issued the final decision. Appellant did not file an appeal with the board servicing the AF, the Armed Services Board of Contract Appeals (ASBCA). Rather by fax transmission dated 29 December 2010 appellant, proceeding without the assistance of counsel, submitted a notice of appeal with the board servicing

the GSA, the Civilian Board of Contract Appeals (CBCA) (Bd. corr. file).³ The CBCA stamped the notice of appeal as received on 30 December 2010, which was 86 days after appellant received the decision of the AFCO. The appeal was docketed as CBCA No. 2262.

5. On 8 March 2011, the CBCA convened a telephone conference call. Appellant, *pro se*, participated in the call with counsel for GSA and the Air Force. During the call the CBCA Judge explained that “she had talked to the Chief Counsel of her board who had spoken to the Chief Counsel of the ASBCA Board and that they had agreed to transfer our case from CBCA to ASBCA” (tr. 21)⁴. Air Force counsel objected to the transfer (tr. 22).

6. By undated letter to the ASBCA received on 9 March 2011, the Clerk of the CBCA stated that pursuant to a conversation between the chief counsels of the ASBCA and CBCA, the CBCA is transferring appellant’s case to the ASBCA for processing. The letter also stated that “This case involves an Air Force contract and therefore should be handled by the Armed Services Board of Contract Appeals (ASBCA).” (Ex. A-1)

7. Our Board docketed the case as ASBCA No. 57557. The government’s motion to dismiss followed.

8. By letter to the Board dated 28 September 2011, appellant stated that Air Force counsel “kindly pointed out on two or three occasions that Waterstone still has the option of filing a claim in the US Court of Federal Claims as long as it was done by October 5, 2011” (ex. G-1). By letter to the Board dated 21 October 2011, captioned “RE: Waterstone Decision to not File in Court of Federal Claims,” appellant stated that “Waterstone decided to not file in the Court of Federal Claims because it appeared to us that we could not have two claims in two separate courts at the same time. Since we have already filed an action in your court we have chosen to remain in your jurisdiction” (Bd. corr. file). Appellant recognized that this decision was akin to putting all its “eggs in the Board’s basket” (tr. 29).

³ Appellant, through its chief operating officer (COO), sought counsel to pursue an appeal but was unable to obtain an attorney that appellant could afford. The COO also had various health problems at this time, which delayed the filing of the appeal to the CBCA to 29 December 2010. (Tr. 12-15)

⁴ The conversation between the boards’ chief counsels is not of record, and the general reference to their “agreement” is at best hearsay. In any event, under the rules of the ASBCA, the chief counsel cannot bind the Board on disputed issues of jurisdiction, or on any substantive matters that require a Board decision.

DECISION

It is undisputed that appellant submitted its claim relating to the performance of the task order to the AFCO for decision and that the AFCO issued the decision denying the claim. Based upon the regulations (SOF ¶ 3), if appellant wanted to appeal the AFCO decision to a board, it was required to file its appeal with the board servicing the AF, the ASBCA. 41 U.S.C. § 7105(e)(1)(A). Appellant did not file an appeal with the ASBCA, but with the CBCA, the forum that services the GSA. 41 U.S.C. § 7105(e)(1)(B). Appellant filed its appeal with the wrong forum under the CDA.

The government contends that we should dismiss this appeal because the statutory appeal period under the CDA is jurisdictional and absolute and appellant failed to file an appeal with the ASBCA within 90 days of its receipt of the CO's decision as required by the CDA. 41 U.S.C. § 7104(a). Appellant contends that we should find jurisdiction at the ASBCA even though the appeal was not timely filed here because the 90-day appeal period may be waived by the Board and is subject to equitable tolling.

We have a long line of Board precedent—extending over 30 years—holding that the 90-day appeal period under the CDA is jurisdictional, absolute and may not be waived. *E.g.*, *Maria Lochbrunner*, ASBCA Nos. 57235, 57236, 11-2 BCA ¶ 34,783; *John J. Kugali General Contractor*, ASBCA No. 53979, 03-1 BCA ¶ 32,204; *Graham International*, ASBCA No. 50481, 98-2 BCA ¶ 29,928; *All-State Co.*, ASBCA No. 30670, 85-2 BCA ¶ 18,157; *Western Pacific Enterprises*, ASBCA No. 25822, 81-2 BCA ¶ 15,217; *Sofarelli Associates, Inc.*, ASBCA No. 24580, 80-2 BCA ¶ 14,472.

The Federal Circuit confirmed our Board precedent in *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982). *Cosmic Construction* affirmed our dismissal of an untimely appeal to this Board under the CDA. The Court ruled that the Board had no discretion to entertain “equitable considerations as warranting waiver of the ninety day period,” and stated that the CDA statutory appeal period was part of a statute that waived sovereign immunity and “defines the jurisdiction” of the Board. The Court also expressly rejected a cited GSBCA decision that held that the 90-day appeal period was not jurisdictional and was subject to waiver. *Cosmic Construction*, 697 F.2d at 1390-91. As far as we are aware, the Court has not overturned *Cosmic Construction*.⁵ Absent appellant's showing of some compelling reason otherwise, we believe we are bound to follow *Cosmic Construction* and the many Board cases—both prior to and after that case—that have similarly held.

⁵ In *Bonneville Associates, Ltd. Partnership v. Barram*, 165 F.3d 1360, 1365 (Fed. Cir. 1999), the Court, without citing *Cosmic Construction* and without deciding the legal issue, discussed whether equitable tolling of the 90-day period could be applied to the facts of that case. We share the view of Judge Gajarsa, concurring at 1367, that the majority's discussion of the issue in *Bonneville* was *dicta*.

Appellant nevertheless asks us to depart from *Cosmic Construction* and our 30-year precedent on the strength of a recent U.S. Supreme Court decision, *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011). In *Henderson*, the Court held that that the 120-day appeal period from the Board of Veterans' Appeals to the U.S. Court of Appeals for Veterans Claims under the Veterans' Judicial Review Act (VJRA) is a "claims-processing rule" and not jurisdictional. Appellant urges us to reverse our precedent and hold that the 90-day appeal period under the CDA is a claims processing rule without jurisdictional significance and subject to equitable tolling. Appellant concedes that the CDA was not before the Court in *Henderson*, but urges us to consider the rationale of *Henderson* to support its position.

We believe that the rationale of *Henderson* is grounded in facts and law materially distinguishable from our own. In our view, the *Henderson* holding was driven primarily by the unique statutory and administrative scheme under the VJRA that favors veteran claimants. See *Henderson*, 131 S. Ct. at 1205, referencing the VJRA and related laws that "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions" (citation omitted). These special circumstances do not pertain under the CDA. There is no reasonable basis in fact or law to reverse 30 years of Board precedent based upon *Henderson*.

The Board's precedent is also well grounded in the text of the CDA. Under 41 U.S.C. § 7103(g), Congress emphasized that a contracting officer's decision on a claim is final and conclusive absent *timely appeal*:

(g) FINALITY OF DECISION UNLESS APPEALED.—
The contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, *unless an appeal or action is timely commenced* as authorized by this chapter.
[Emphasis added]

We believe the use of this unequivocal language manifested the intent of Congress to preclude a board from extending, waiving or tolling the 90-day period based upon equitable considerations.

We are mindful of *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009), wherein the Court held that the 6-year claim presentment period under the CDA, 41 U.S.C. § 7103(a)(4)(A), is subject to equitable tolling. However, the Court noted that this statutory provision "is in the nature of a statute of limitations, not a statute that governs the timing of review," 583 F.3d at 800 n.6. It is the latter type of statutory provision that is at issue here. Also, federal statutes of limitation come clothed with the presumption that they are subject to equitable tolling. *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990). This presumption has no application here. Nor did the Court in *Arctic Slope* have for application the wealth of precedent and the statutory textual support

in favor of jurisdictional absoluteness that guide this decision. We believe *Arctic Slope* does not affect the decision we reach today.

We have in the past, under narrow circumstances, taken jurisdiction of appeals under the CDA where notices of appeal were timely filed with certain Defense Department components other than the ASBCA. *E.g.*, *Contraves-Goerz Corp.*, ASBCA No. 26317, 83-1 BCA ¶ 16,309 (timely notice of appeal addressed to Secretary of Air Force through the CO); *Brunner Bau GmbH*, ASBCA No. 35678, 89-1 BCA ¶ 21,315 (timely notice of appeal to government counsel); *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (timely notice of appeal to CO). However, we have not taken jurisdiction over appeals misfiled with different tribunals. *See Interaction Research Institute, Inc.*, ASBCA No. 55198, 06-1 BCA ¶ 33,189 (late appeal to ASBCA dismissed after wrongful appeal to CBCA).

We are also mindful of statutes, such as 28 U.S.C. § 1631, that authorize a court to transfer a case under which it has no jurisdiction to a court that does have jurisdiction, rendering the filing date at the new tribunal effective from the date of filing at the transferring tribunal. Such a statutory provision would have been of assistance to appellant here. Unfortunately for appellant, there is no statutory or regulatory provision or rule that authorizes such a transfer between the boards of contract appeals under the CDA. Indeed, we have expressly held that the CDA does not provide any authority for board transfers. *Bill Griffiths*, ASBCA No. 47437, 94-3 BCA ¶ 27,225 at 135,680 (dismissing for lack of jurisdiction a CDA appeal directed to the wrong Board):

[W]e have no statutory or regulatory authority to transfer appeals that should have been filed with other boards.... We also have no “inherent authority” to transfer appeals to other boards. [Citations omitted]

Accord, Business Management Research Associates, Inc., ASBCA Nos. 55309, 55862, 07-2 BCA ¶ 33,599 at 166,418 n.1.

CONCLUSION

We are not unsympathetic to appellant who proceeded without the benefit of counsel and filed its appeal with the wrong tribunal. However, consistent with *Cosmic Construction* and Board precedent we must conclude that the 90-day appeal period under the CDA, 41 U.S.C. § 7104(a), is jurisdictional, absolute and not subject to waiver or tolling due to equitable considerations.

The government's motion to dismiss for lack of jurisdiction is granted. ASBCA No. 57557 is dismissed.⁶

Dated: 26 April 2012



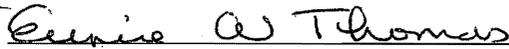
JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

⁶ By letter to the Board dated 29 March 2012, appellant contends that the government's motion should also be denied because it failed to show proof of appellant's receipt of the final decision by certified mail, return receipt requested. Under FAR 33.211(b), the CO must furnish the final decision to the contractor by "certified mail, return receipt requested, or by any other method that provides evidence of receipt." The final decision was furnished to appellant by email on 5 October 2010 (SOF ¶ 2), and the email "read receipt" acknowledges receipt of the CO's email transmission on that date (gov't ltr., 9 April 2012, enclosure 2). Appellant also stipulated that it received the decision on or about 5 October 2010 (SOF ¶ 2). Appellant's contention is without merit.

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. 57557, Appeal of Waterstone Environmental Hydrology and Engineering, Inc., rendered in conformance with the Board's Charter.

Dated:

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