

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Ft. McCoy Shipping & Services) ASBCA No. 58673
)
Under Contract No. MCC 08-205)

APPEARANCE FOR THE APPELLANT: Ms. Jane Barnas
Owner

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
LTC Peter H. Tran, JA
Trial Attorney

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

Contending Ft. McCoy Shipping & Services (appellant) failed to file a notice of appeal within the 90-day period following receipt of the contracting officer's final decision as required by 41 U.S.C. § 7104(a), the Army (government) filed a motion to dismiss for lack of jurisdiction. We deny the motion for the reasons stated below.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The Army & Air Force Exchange Service (AAFES) awarded Contract No. MCC 08-205 to appellant on 30 April 2008. The contract was "a negotiated contract for concession operation of a business center located at Ft. McCoy, WI" for a period of five years, unless terminated earlier according to the contract's general provisions. (R4, tab 1)

2. General Provision 8(b) stated: "This contract may be terminated in whole or in part by either party upon thirty (30) days notice (ninety (90) days for vending contracts) in writing to the other party" (R4, tab 2 at 3).

3. The DISPUTES (FEB 95) clause is found at General Provision 11 of the contract, and states the contract is subject to the Contract Disputes Act, and except as provided in that Act, "all disputes arising under or relating to this contract shall be resolved under this clause." The clause sets forth the 90-day appeal period for appeals to this Board, and the one-year appeal period for appeals to the Court of Federal Claims. (R4, tab 1 at 3, 4)

4. On 20 September 2012, appellant, through its owner, Ms. Jane Barnas, informed the government it was terminating the contract and would close its shipping store no later than 28 September 2012 (R4, tabs 9, 10).

5. The contracting officer acknowledged receipt of appellant's notice of termination by letter dated 25 September 2012 (R4, tab 10).

6. By letter dated 29 November 2012, appellant through Ms. Barnas, submitted a claim to the contracting officer for \$17,000 for what it described as "undue costs incurred" (R4, tab 13).¹

7. In a letter dated 11 January 2013, the contracting officer denied the claim in its entirety. After enumerating her reasons for the denial, the contracting officer stated:

This is the final decision of the contracting officer. You may appeal this decision to the Armed Services Board of Contract Appeals (ASBCA) within 30 days from the date you receive this decision, by mailing or otherwise furnishing written notice **to the ASBCA** and providing a copy of the notice to me at the following address:

Army and Air Force Exchange Service
Attn: Tanisha Davis (SDV/C/E)
3911 S. Walton Walker
Dallas, Texas 75236

The notice must state that an appeal is intended, reference this decision, and identify the contract by number.

(R4, tab 14) (Emphasis in original)

¹ For unexplained reasons, the letterhead on the claim letter reads "La Crosse Talent Services Inc."

8. Appellant sent the contracting officer a letter dated 16 January 2013, acknowledging receipt of the contracting officer's decision on 15 January 2013.² Appellant's letter was captioned: "Subject: Appeal to Monetary Claim dated 11 January 2013 contract number MCC08-205." Appellant stated that its letter was in response to the 11 January 2013 final decision and referenced the contract number. Appellant also asked for the address of the ASBCA since it was not provided in the final decision. Appellant went on:

This letter serves as my notice of intent to appeal. I request all required information, forms, and contact numbers, addresses, etc. to adequately file and prepare for my appeal.

(Gov't mot., ex. 1) The record does not contain a response from the contracting officer to the appellant. The contracting officer did not forward this letter to the Board.

9. By letter dated 22 January 2013, appellant complained to the AAFES Inspector General (IG) that the contracting officer had not provided assistance with the contract or the monetary claim (R4, tab 15 at 1). In the attached chronology, appellant noted: "20. Jan 16 – Appeal notice – as of Jan 23 still no complete information" (*id.* at 2).

10. Mr. Ray McGhee, AAFES Associate Director of Personal Services, in a letter to appellant dated 6 March 2013, acknowledged appellant's letter to the IG. He addressed the issues raised in the 22 January 2013 letter, item by item. In response to appellant's complaint of inadequate assistance regarding an appeal, Mr. McGhee stated, "For any appeal, the complainant is responsible for pursuing the appeals process with [the] ASBCA." He stated he had reviewed the documentation sent appellant and found "no improprieties" by the government. (R4, tab 16 at 2) He did not provide an address for the Board (ASBCA) or correct other mistakes in the contracting officer's final decision, nor did he forward appellant's correspondence to the Board.

11. Appellant responded to Mr. McGhee by letter dated 18 March 2013 and again by email on 12 May 2013 asking about its claim (R4, tabs 17, 18). Mr. McGhee, by email on 17 May 2013, informed appellant the claim for \$17,000 had been denied in its entirety by the contracting officer on 11 January 2013 and the Exchange considered the matter closed (R4, tabs 17, 18).

12. Appellant appealed to the Board by letter dated 23 May 2013. Appellant's correspondence included a copy of its 29 November 2012 claim, Mr. McGhee's 6 March 2013 letter, and the contracting officer's final decision. The Board docketed the appeal as ASBCA No. 58673.

² Establishing 16 April 2013 as the end of the 90-day appeal period.

DECISION

The government has moved for dismissal of the appeal on the basis the Board lacks jurisdiction due to appellant's 23 May 2013 notice of appeal being filed 128 days after receipt of the contracting officer's final decision by appellant (gov't mot. at 1, 4, 5). The government argues that even though the 11 January 2013 contracting officer's final decision was mistaken in stating appellant had only 30 days to file with the Board, appellant had not shown detrimental reliance on the contracting officer's erroneous and incomplete explanation of the appeal rights sufficient "to excuse the tardiness" of the appeal (gov't mot. at 5, 6). In regard to appellant's post-final decision communications with the contracting officer and AAFES management, the government states none of the communications "amounted to a reconsideration" of the final decision by the contracting officer (gov't mot. at 6).

We need not address the question of detrimental reliance by appellant on the erroneous appeal information supplied by the contracting officer in her final decision. *See Decker & Co. v. West*, 76 F.3d 1573 (Fed. Cir. 1996). We also do not need to address the issue of whether the contracting officer's decision of 11 January 2013 was under reconsideration at any point. *See, e.g., Johnson Controls, Inc.*, ASBCA No. 28340, 83-2 BCA ¶ 16,915. Instead, we view as relevant an examination of our body of case law concerning misdirected notices of appeal with regard to appellant's 16 January 2013 letter to the contracting officer.

To be considered timely, an appeal from a contracting officer's final decision to an agency board must be made within 90 days of receipt of a contracting officer's final decision. 41 U.S.C. § 7104(a). The 90-day period is statutory, and the Board has no discretion to waive it. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982); *Compania de Asesoría y Comercio, S.A.*, ASBCA No. 52047, 99-2 BCA ¶ 30,400; *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 16 April 2013. The question of whether appellant filed a timely notice of appeal is answered by analyzing appellant's 16 January 2013 letter to the contracting officer, captioned "Appeal to Monetary Claim...." This letter, submitted within the 90-day filing period, referenced the contracting officer's final decision, included the contract number, expressed dissatisfaction with the decision, made clear appellant was seeking resolution by higher authority and stated, "This letter serves as my notice of intent to appeal." (SOF ¶ 8) The "fundamental purpose of [a notice of appeal] is to provide the Board and the Government with notice of an impending appeal." *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 at 149,570. The Board has historically liberally read contractors' communications in finding effective appeal notices and has repeatedly held a notice of appeal requires only a writing filed within the requisite time period that

expresses dissatisfaction with the contracting officer's decision and indicates an intention to appeal the decision to a higher authority. *ESA Environmental Specialists, Inc.*, ASBCA No. 55620, 07-1 BCA ¶ 33,573 at 166,312; *Thompson Aerospace*, 99-1 BCA ¶ 30,232 at 149,570; *New Mexico Professional Standards Review Organization, Inc.*, ASBCA No. 25867, 82-1 BCA ¶ 15,499 at 76,878. A notice of appeal, meeting the above criteria, has been found effective "notwithstanding some degree of futurity." *All Seasons Construction & Roofing, Inc.*, ASBCA Nos. 43941, 45085, 93-1 BCA ¶ 25,435 at 126,675 (quoting *Kos Kam, Inc.*, ASBCA No. 34633, 88-1 BCA ¶ 20,311 and cases cited therein); *Massachusetts Microwave Tube & Device Corp.*, ASBCA No. 52020, 99-1 BCA ¶ 30,350 at 150,100 (holding a letter to the contracting officer within 90 days of receipt of a notice of a termination for default stating the contractor intends to "protest the action taken by your office" and requesting "information necessary to start the protest and appeal process," constituted an effective notice of appeal).

The content of appellant's 16 January 2013 letter to the contracting officer adequately fulfills well established criteria for an effective notice of appeal. The letter reflects dissatisfaction with the contracting officer's final decision and indicates an intention to appeal to a higher authority. Moreover, it is well settled that filing an appeal with the contracting officer is tantamount to filing with the Board. *ESA Environmental Specialists*, 07-1 BCA ¶ 33,573 at 166,312; *Thompson Aerospace*, 99-1 BCA ¶ 30,232 at 149,569; *Massachusetts Microwave*, 99-1 BCA ¶ 30,350 at 150,100.

We conclude that appellant timely complied with the requirements for filing a notice of appeal by submitting its letter dated 16 January 2013 to the contracting officer. The motion is denied.

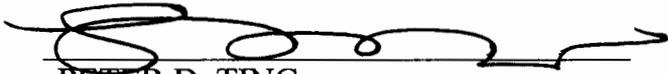
Dated: 9 October 2013



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

(Signatures continued)

I concur



PETER D. TING
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
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. 58673, Appeal of Ft. McCoy Shipping & Services, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals