

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Public Service Cellular, Inc.) ASBCA No. 52489
)
Under Contract Nos. DABT10-94-D-0036)
DABT10-98-P-0310)

APPEARANCES FOR THE APPELLANT: Virgil Ted Theus, Esq.
James A. Balli, Esq.
Page, Scrantom, Sprouse, Tucker &
Ford, P.C.
Columbus, GA

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
LTC Richard O'Keefe, JA
Trial Attorney

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

This appeal is taken from a contracting officer's final decision asserting a Government claim for overpayment and denying appellant's claim for the balance due under the above-referenced contracts. Appellant elected to proceed pursuant to Board Rule 12.3. The Government moves to dismiss the appeal contending the Board lacks jurisdiction due to the appellant's untimely filing of its Notice of Appeal¹. We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. By letter dated 30 June 1999, Public Service Cellular, Inc. (PSC or appellant), filed a claim for \$33,481.36, the balance remaining under the above cited contracts. The

¹ Appellant in its 9 February 2000 letter requested a hearing on the Government's motion. Appellant in its 18 February 2000 letter stated the purpose of the hearing was for oral argument on the motion. Appellant's request for oral argument was denied. (*See*, Bd. correspondence file)

claim was signed by Mr. B. Todd Smith, appellant's Credit Recovery Manager. (Gov't br. at encl. 2)²

2. The contracting officer (CO) on 7 September 1999 issued a final decision denying the claim and asserting a Government claim for the return of overpayments of \$4,163.75. The decision was addressed to "Public Service Cellular/ATTN: Todd Smith" and instructed appellant that "[i]f 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" Across the top of the decision are the words "CERTIFIED MAIL". (Gov't br. at encl. 3)

3. Late on 7 September 1999, the Government's contract administrator, by facsimile (fax), transmitted a copy of the final decision to appellant via a fax telephone number used during the course of contract performance. Except for the fax transmission report indicating "Transmission OK" the Government is unable to verify appellant's receipt of the final decision. (Gov't br. at 2; declaration of contract administrator and attachments at encl. 3)

4. Mr. Todd Smith on 9 September 1999 received, certified mail return receipt requested, the CO's 7 September 1999 final decision (app. br. at 2; affidavit of Mr. Todd Smith).

5. On 8 December 1999, 90 calendar days after receiving the 7 September 1999 final decision sent via certified mail, appellant filed its notice of appeal at the Board. (*Id.*; Board's correspondence file)

6. On 15 December 1999 the Government filed a motion, and brief in support of the motion, to dismiss the appeal arguing the 7 September 1999 final decision was delivered to the appellant by fax on 7 September 1999, and, accordingly, its 8 December 1999 notice of appeal was untimely (Bd. correspondence file).

7. On 20 December 1999 appellant filed its response in opposition to the Government's motion. (*Id.*) Attached to its brief was an sworn affidavit from Mr. Smith wherein he stated that he had not been contacted, by telephone or otherwise, on 7 September 1999, or at any time thereafter, to confirm receipt of the fax.³ He further asserted:

² References will be as follows: Government's motion and brief (Gov't br.); appellant's response and brief (app. br.); Government's response and brief to appellant's response (Gov't reply br.).

³ Appellant's counsel on 24 February 2000 submitted a second affidavit from Mr. Smith wherein he avers that he relied upon the date "9 September 1999,"

I did not request that the government send a copy of the contracting officer's decision via facsimile, and I have no recollection of receiving notice of such decision prior to my receipt of the original, certified letter which our records show was received on September 9, 1999.

8. On 13 January 2000 the Government filed a reply to appellant's response in opposition the Government's motion. (*Id.*)

DECISION

Under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, the Board lacks jurisdiction over an appeal filed more than 90 days after receipt of the final decision. 41 U.S.C. § 606. This 90 day filing period is statutory and cannot be waived. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982).

The Federal Acquisition Regulation (FAR) section 33.211(b) provides that “[t]he contracting officer shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, *or by any other method that provides evidence of receipt*” (emphasis added). The Board has accepted fax transmissions of the final decision as adequate evidence of “receipt” in certain circumstances where there is independent supporting evidence the fax was received. *See, Mid-Eastern Industries, Inc.*, ASBCA No. 51287, 98-2 BCA ¶ 29,907 (appellant requested that the document be faxed and did not deny that the fax had been received); *Tyger Construction Co.*, ASBCA Nos. 36100, 36101, 88-3 BCA ¶ 21,149 (fax transmission of the final decision was adequate to prove receipt where the contracting officer's agent confirmed receipt by telephone immediately upon completion of the transmission); *Leixab, S.A.*, ASBCA No. 51581, 98-2 BCA ¶ 29,962 (appellant requested that the final decision be faxed, receipt was confirmed by telephone, and a faxed copy with appellant's representative's signature was returned to the Government).

The Government has the burden to establish the date that appellant received the faxed copy of the final decision. *Mid-Eastern Industries, Inc., supra; David Grimaldi Company*, ASBCA No. 49795, 97-2 BCA ¶ 29,201 at 145,296.

We have held that a “successful” transmission report for a fax transmission was not reliable evidence of receipt of the final decision where the Government did not

the date PSC received the certified mail hard copy of the final decision as the date from which to calculate the running of the 90 day period for filing the appeal. The Government has filed a response to this second affidavit.

otherwise confirm receipt. *Grimaldi, supra.* at 145,296. The Government attempts to distinguish *Grimaldi*, arguing that in the instant appeal the transmission report is much more detailed, giving the precise date and time of the transmission, and showing successful transmission of seven pages to the previously-used fax telephone number. Although the parties may have successfully conducted business by fax using a particular number on prior occasions, such prior use does not rise to the level of proving that the faxed final decision was received on 7 September 1999. This Board is unwilling to make the quantum leap and infer from the Government's transmission report's statement "Transmission OK" that the final decision was received by PSC on 7 September 1999. *See, cf. W&W Logistics*, Comp. Gen. Dec. B-283998, 2000 CPD ¶ 123 (transmission report insufficient to prove submission of quote).

The Government has not met its burden of proving the appellant received the faxed final decision on 7 September 1999. Accordingly, the Board finds the appellant's 8 December 1999 notice of appeal from the final decision was timely.

The motion is denied.

Dated: 2 March 2000

ALLAN F. ELMORE
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

RICHARD SHACKLEFORD

Administrative Judge
Acting 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. 52489, Appeal of Public Service Cellular, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals