

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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TLT Construction Corp. ) ASBCA No. 52532  
 )  
Under Contract No. DACA21-96-D-0158 )

APPEARANCE FOR THE APPELLANT: Mr. Kenneth D. Tarbell  
Executive Vice President

APPEARANCE FOR THE GOVERNMENT: Frank Carr, Esq.  
Engineer Chief Trial Attorney  
E.J. Colbert, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District,  
Savannah

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL

The Board, *sua sponte*, questioned its jurisdiction over this appeal based on the apparent untimeliness of appellant's notice of appeal. Because we determine that the appeal was not filed within the requisite 90-day time period, we dismiss the appeal for lack of jurisdiction.

FINDINGS OF FACT

1. On 30 September 1996, the U.S. Army Corps of Engineers (Government) awarded Contract No. DACA21-96-D-0158 (contract) to TLT Construction Corporation (TLT). The contract called for TLT to repair various housing units located at Fort Bragg, North Carolina.

2. After completing the project, TLT submitted to the Government a claim for additional costs in the amount of \$117,786.78. The contracting officer denied TLT's claim in its entirety by final decision of 26 March 1999. The decision advised TLT of its right to contest the decision by appealing to this Board "within 90 days from the date you receive this decision," or by filing suit at the U.S. Court of Federal Claims "within 12 months of the date you receive this decision." (Final decision at 12)

3. The contracting officer's decision was sent to TLT via certified mail. The return receipt indicates that TLT received the final decision on 2 April 1999. Accordingly, TLT's 90-day deadline to appeal the decision to this Board was 1 July 1999.

4. TLT mailed its notice of appeal to the Board on 22 December 1999.

5. By letter of 29 December 1999, the Board alerted the parties to the possibility that the appeal might not have been timely filed, and provided them with an opportunity to state their positions. Both parties responded. TLT acknowledges that its appeal was tardy, but asks us to excuse its untimeliness on grounds that TLT had delayed filing an appeal because it hoped to negotiate a settlement with the Government. (TLT letter of 14 February 2000)

6. According to TLT, the parties met on several occasions following the issuance of the final decision to discuss “the merits of our claim as well as the possible submission of an appeal.” (TLT letter of 14 February 2000) TLT offers no details or documentation concerning the date(s) of, parties to, or substance of these alleged discussions. Nor does TLT contend that the Government agreed to reconsider its final decision as a result of the discussions. The Government admits that a Government representative inquired as to whether TLT planned to pursue an appeal, but insists that it never entered into any negotiations whatsoever with TLT. (Gov’t letter of 17 February 2000)

### DECISION

Pursuant to the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613, the Board lacks jurisdiction over an appeal filed more than 90 days after the contractor’s receipt of the contracting officer’s final decision. 41 U.S.C. §§ 605(b) and 606. The 90-day filing period is strictly enforced and cannot be waived by the Board. *Cosmic Constr. Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982).

In the instant case, there is no dispute that TLT failed to submit an appeal to the Board within 90 days of receipt of the final decision (findings 3-5). Thus, unless TLT demonstrates that the deadline for filing an appeal somehow was tolled, the appeal is untimely and beyond our jurisdiction.

The Board has recognized that the 90-day deadline for filing an appeal may be tolled if the contracting officer is shown to have been “reconsidering” the final decision. *See, e.g., Ra-Nav Laboratories, Inc.*, ASBCA No. 49211, 96-2 BCA ¶ 28,514. In that situation, the contracting officer’s decision is not truly final, so failure to appeal from the decision within the prescribed time period will not prevent the contractor from being heard on the merits. It is the contractor’s responsibility to come forward with “evidence showing it reasonably or objectively could have concluded the [contracting officer’s] decision was being reconsidered.” *Sach Sinha and Associates, Inc.*, ASBCA No. 46916, 95-1 BCA ¶ 27,499 at 137,042.

TLT has made no such showing in this appeal. Aside from merely stating that it would have preferred to negotiate a settlement with the Government, TLT has offered no evidence that any settlement discussions ever actually occurred (finding 6). Moreover, TLT does not identify any actions or statements by Government personnel that might plausibly have suggested that reconsideration was in progress (*id.*) Thus, on the present record, TLT has not shown any basis for tolling the 90-day deadline.

CONCLUSION

The appeal is untimely and must therefore be dismissed for lack of jurisdiction.

Dated: 29 February 2000

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J. STUART GRUGGEL, JR.  
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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RONALD JAY LIPMAN  
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. 52532, Appeal of TLT Construction Corp., rendered in conformance with the Board's Charter.

Dated:

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