

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Syntak Industries, Inc.) ASBCA No. 52630
)
Under Contract No. DAAE07-98-C-T075)

APPEARANCE FOR THE APPELLANT: Mr. Lawrence Bruckner
President

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
Raymond M. Saunders, Esq.
Deputy Chief Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE WILLIAMS

The Government moved to dismiss 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 FOR PURPOSES OF THE MOTION

1. Contract No. DAAE07-98-C-T075 (the "contract,") a firm fixed-price contract, was awarded to Syntak Industries, Inc. ("Syntak"), on 13 January 1998, to provide Brake Bands and Lining, NSN 2530-00-679-4495.

2. The contracting officer terminated the contract in its entirety for default on 10 November 1999, informing appellant it was terminated for "failure to make delivery of the supplies within the time specified in the contract or any reasonable extension thereof." The termination notice stated it was the final decision of the contracting officer and advised appellant 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." (Gov't mot., ex. 1)

3. Further, the termination notice included the required data of contract number and date. It informed Syntak its right to proceed was terminated and that it would be liable for any excess costs if the Government exercised its right to reprocure. Appellant was also informed the termination notice was a decision pursuant to the DISPUTES clause, and that the failures enumerated were not beyond Syntak's control. (*Id.*)

4. The final decision was sent to appellant by certified mail, article number 4083, PS Form 3811, return receipt requested. The return receipt indicates that Syntak received the final decision on 15 November 1999. (Gov't mot., ex. 2) Accordingly, the 90-day period expired on 13 February 2000. As this day was a Sunday, the next business day, 14 February 2000, was the deadline for Syntak to appeal to this Board.

5. Appellant's undated notice of appeal was sent to the Board by private courier service. It was received at the Board 17 February 2000, three days after the expiration of the 90-day deadline.

6. The Government filed its Motion to Dismiss for Lack of Jurisdiction on 9 March 2000, and appellant was given until 14 April 2000 to respond.

7. On 7 April 2000, the Board received an undated response from appellant which read:

Syntak Industries, Inc. believes the Government's motion to dismiss the appeal is unwarranted. SI had verbal communications with the PCO whereas the PCO would provide pertinent information that would have been a major issue in our appeal. The PCO to this day has not responded accordingly. The basis for SI appeal is based on facts as well as the Federal Acquisition Regulations. The Termination for Default was not issued in compliance with the F.A.R. SI has the right to get a response from the PCO in a timely manner in order to properly submit our appeal to the board. Syntak Industries respectfully requests that the board admit our appeal based on pertinent facts.

8. By letter dated 11 April 2000, the Board informed appellant it had not addressed the issue of timeliness and needed to do so. Appellant was also informed it could submit evidence regarding its assertion that the termination had not been issued in accordance with the FAR. Furthermore, the Board advised appellant it had not complied with Board Rule 26 regarding its representation. Shortly thereafter, a proper representative was designated and a conference call was scheduled.

9. During the conference call with all parties on 4 May 2000, appellant announced it had been informed by a representative from the Small Business Administration that the 90-day deadline for filing at the Board is "tolled" when the SBA is involved. Appellant stated that it would immediately submit a filing with the name of the individual and citation to the regulation regarding the "tolling." No such filing has been received at the Board.

DECISION

Pursuant to the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (CDA), 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 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 Syntak failed to submit an appeal to the Board within 90 days of receipt of the final decision (findings 4, 5). Thus, unless Syntak can demonstrate that the appeal period somehow was vitiated, the appeal is untimely and beyond our jurisdiction.

The Board has recognized that the 90-day deadline for filing an appeal may be vitiated 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 proceeding 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.

Syntak has made no such showing in this appeal. Quite the opposite, Syntak has admitted the PCO was to provide information "that would have been a major issue in our appeal" (finding 7). Syntak was not under the impression the contracting officer was reconsidering the termination, it was waiting for information to use on the merits of its appeal. There is no evidence of actions or statements by any Government personnel, at the SBA or the contracting agency, suggesting that reconsideration was in progress or even contemplated.

Nor has appellant established that in some way the final decision was defective. Both the CDA and the FAR specify certain types of information that should be included in a contracting officer's final decision. The CDA provides that "[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision of the contracting officer" and "shall state the reasons for the decision reached" but that "[s]pecific findings of fact are not required." 41 U.S.C. § 605(a). FAR Subpart 49.4 covers terminations for default and enumerates procedures to be used in 49.402-39(g). The requirements listed therein appear, on their face, to have been met. The contract number and date are listed on the termination notice, the omissions constituting the default, *i.e.*, "failure to make delivery of the supplies within the time specified in the Contract or any reasonable extension thereof," are articulated, that the contractor's right

to proceed is terminated is clear, the contractor is informed the Government has the right to reprocur and the contractor will be held liable for any excess costs, that the notice is a decision pursuant to the DISPUTES clause and the failures enumerated are not beyond the control of the contractor is stated, and the contractor is advised of its appeal rights. (Findings 2, 3) Syntak has made no showing that the appeal rights themselves were somehow inadequate or flawed or that it relied on any misstatements to its detriment in bringing this appeal. *See Decker & Co v. West*, 76 F.3d 1573 (Fed. Cir. 1996).

On the present record, Syntak has not established any basis for vitiating the 90-day appeal period.

CONCLUSION

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

Dated: 14 July 2000

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

I concur

I concur

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

ALLAN F. ELMORE
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. 52630, Appeal of Syntak Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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