

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Propulsion Controls Engineering) ASBCA No. 53307
)
Under Contract No. N00024-96-H-8710)

APPEARANCE FOR THE APPELLANT: Mr. David Clapp
Vice-President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
James D. Beback, Esq.
Trial Attorney
Supervisor of Shipbuilding
Conversion & Repair, USN
Everett, WA

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL

The Government moves to dismiss this appeal asserting that appellant failed to file a timely notice of appeal from the contracting officer's decision.

FINDINGS OF FACT FOR PURPOSES OF THIS MOTION

1. On 30 August 2000, the Supervisor of Shipbuilding, Conversion and Repair (SUPSHIP), Puget Sound, Everett, Washington, awarded Job Order 007M34 under the subject contract to Propulsion Controls Engineering, Everett, Washington, for repairs on the USS DAVID R. RAY (DD-971). The period of performance was 31 August to 29 September 2000. (R4, tab 1)

2. During performance, a dispute arose over the requirements of the subject contract. By letter dated 15 September 2000, the contractor submitted a claim in the amount of \$2,000 to the contracting officer. (R4, tab 5)

3. The contracting officer issued a final decision, dated 11 October 2000, denying the claim. The final decision properly informed the contractor of its appeal rights and the time requirements associated with those rights including, *inter alia*, that appellant was afforded 90 days from receipt of said decision to file its notice of appeal therefrom with the agency board or one year to file its appeal with the U.S. Court of Federal Claims. (R4, tab 6)

4. The record does not indicate the actual date appellant received the final decision. We note that both appellant and SUPSHIP, Puget Sound, are co-located in Everett, Washington. Other correspondence contained in the Rule 4 file was sent and received between the parties within one to two days. *See* R4, tabs 4 and 5. The Rule 4 file herein also reflects the parties' mutual understanding that said final decision was, in fact, received by appellant (findings 5-7, 9 *infra*). We note that appellant does not argue that its appeal was timely other than arguing that the contracting officer's decision was being reconsidered until 30 January 2001 (*see* findings 5, 6, *infra*). Appellant does not contend and we cannot reasonably find that appellant's receipt of the contracting officer's 11 October 2000 final decision was somehow delayed until 25 November 2000.¹

5. By letter dated 8 December 2000, an individual "retained . . . as their [appellant's] representative on the . . . disputed item" involved herein, wrote the Government to request rescission of the contracting officer's 11 October 2000 final decision to allow for "further discussions to resolve this local issue." Included with this request was a list of "issues" which, according to the representative, the contractor had not had the opportunity to present to the Government as "objective evidence." While expressly acknowledging the contractor's right to appeal to the Board, the representative recommended that the contracting officer initiate action necessary to allow for a fact-finding conference and closed the letter by "respectfully [requesting] that you consider the above as presented and rescind the decision to allow for a fair and forthright method of settlement." (R4, tab 7)

6. By letter dated 30 January 2001, the contracting officer responded to the "representative's" 8 December 2000 letter. The response stated that "the Contracting Officers Final Decision was issued 11 Oct 00 and remains unchanged." (R4, tab 8)

7. The contractor filed a notice of appeal dated 23 February 2001 which referenced its 8 December 2000 request to the Government to rescind the contracting officer's decision and the Government's denial of that request. The notice of appeal indicated that "[a]s provided by the Rules of the Armed Services Board of Contract Appeal, an appeal of that final decision is being taken." The Board received this notice on 13 March 2001. We note the envelope indicates that, on or about 5 March 2001, it had been returned for insufficient postage.

8. In its motion to dismiss for lack of jurisdiction, the Government maintains that the appeal is untimely in that over 90 days elapsed between the receipt of the contracting officer's final decision and the notice of appeal. Included with the Government's motion is the sworn declaration of Ms. Tracy Mandell, the contracting officer. Ms. Mandell states that "[a]t no time did I indicate to [the contractor], verbally or in writing, that discussions

¹ The 25 November 2000 date is 90-days before 23 February 2001, the earliest possible date that appellant indicated an intent to appeal the contracting officer's 11 October 2000 final decision (finding 7, *infra*).

would be reopened or that the Navy was reconsidering their claim.” (Mandell affidavit)
There is no evidence in the record that the contracting officer was reconsidering her final decision.

9. In response to the Government’s motion to dismiss, the contractor maintains that until it received an answer to its 8 December 2000 request, “there was no final decision to appeal.” According to appellant:

Due to the lack of response for 53 days to the contractors [sic] 08 December 2000 letter, it was reasonably concluded, objectively, that the CO was reconsidering the decision and a local resolution (jointly) could prevail. All the contractor requested was an opportunity to present its evidence of entitlement personally in a scoping conference

. . . .

Appellant does not deny that the Contracting Officer issued the initial decision on 11 October, but does believe that the lack of initiating a response, for 53 days, to the contractors request for reconsideration . . . does constitute that the letter of 30 January 2001 was the finality of this issue. Until the 30 January 2001 letter was issued, the request to settle locally was not final and was being considered.

It was only known to be the final answer with issuance of the 30 January 2001 letter by the Contracting Officer.

(App. resp. to Gov’t Mot. to Dismiss)

DECISION

The Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended, requires a contractor to file a notice of appeal within 90 days from the receipt of the contracting officer’s decision. This 90-day filing period is statutory and may not be waived by the Board. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982), *aff’g Cosmic Construction Co.*, ASBCA No. 26537, 82-1 BCA ¶ 15,541.

A letter properly mailed is presumed to have reached its destination and been received by the party to whom it is addressed. *Sancolmar Industries, Inc.*, ASBCA No. 16879, 73-1 BCA ¶ 9812. Appellant has not rebutted this presumption and indeed does not allege it did not receive prompt delivery of the contracting officer’s 11 October 2000

decision.² Under the circumstances involved herein, we are satisfied that appellant received the contracting officer's 11 October 2000 final decision in a timely fashion at a time substantially prior to 25 November 2000 (findings 3-7).

Nonetheless, it is well-settled that if a contracting officer's decision is not truly "final," but is being reconsidered, a "failure to appeal from the decision within the prescribed time period will not defeat . . . [a] contractor's opportunity to be heard on the merits." *Johnson Controls, Inc.*, ASBCA No. 28340, 83-2 BCA ¶ 16,915 at 84,170. The issue to be resolved with respect to finality is "whether the contractor presented 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 (finality of final decision vitiated where the Government, after issuing termination for default, met with contractor, discussed termination and requested written settlement alternatives).

In the present appeal, the contractor sent a written request for rescission or reconsideration of the final decision to the contracting officer within the 90-day appeal period but did not receive a negative reply until after the 90-day appeal period had passed. It is undisputed that the contracting officer did not meet or communicate with the contractor in the 90-day period following receipt of the final decision. There is no evidence of any action or statement by other Government personnel suggesting that reconsideration was contemplated. The contractor did nothing and let the 90-day time period run out. As the Board observed in *D'Tel Communications*, ASBCA No. 50093, 97-2 BCA ¶ 29,251 at 145,205 where the contractor delayed appealing a default termination, but had corresponded with the contracting officer after the decision was issued:

One may speculate why [the contractor] did nothing in the face of the contracting officer's silence and a running appeals clock. Whether it be inadvertence, a conscious decision to await any excess cost assessment, or some other reason, the responsibility for acting, as well as the consequences of inaction, remained with the appellant.

The contractor would have us accept that the request for reconsideration alone is objective evidence from which it reasonably concluded that the contracting officer was reconsidering the final decision. We cannot agree. We find it is unreasonable to conclude that a contracting officer is reconsidering a final decision simply as a result of a request to do so. *See Rainbow Construction Co., Inc.*, ASBCA No. 48196, 95-1 BCA ¶ 27,580.

² We note that this is not a case where it is a close question as to whether the notice of appeal was mailed timely, requiring us to demand preciseness of the Government in establishing date of receipt of the contracting officer's decision. *Sancolmar*, *supra* at 45,858.

Appellant received the contracting officer's decision substantially before 25 November 2000. Since appellant did not file its appeal until 5 March 2001 or thereafter, the appeal is untimely. Accordingly, the Government's motion to dismiss is granted and the appeal is dismissed.

Dated: 29 June 2001

J. STUART GRUGGEL, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
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. 53307, Appeal of Propulsion Controls Engineering, rendered in conformance with the Board's Charter.

Dated:

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