

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Medina Contracting Company) ASBCA No. 53783
)
Under Contract No. DACW68-01-C-0003)

APPEARANCE FOR THE APPELLANT: Mr. Timothy O. Maher
General Manager¹

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Linda Kirts, Esq.
District Counsel
D. Anthony Weeks, Esq.
Engineer Trial Attorney
U.S. Army Engineer District
Walla Walla, WA

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

Appellant, Medina Contracting Company (Medina), contracted to provide certain services at a United States Army Corps of Engineers facility in the State of Washington. The Government has moved to dismiss the appeal, asserting that it was untimely. The motion is granted.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. The Government awarded Contract No. DACW68-01-C-0003 to Medina on 27 February 2001. Under the contract, appellant was to provide grounds maintenance, janitorial services, and pest plant control at the Mill Creek Project in Walla Walla, Washington. (Gov't motion, exs. 1, 2)

2. The contract contained the clause DISPUTES, FAR 52.233-1 (DEC 1998). In subsection (f), the clause stated that a contracting officer's decision would be final unless the contractor appealed or filed suit "as provided in the Act" referring to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, *as amended*. The clause did not list the

¹ Mr. Maher signed appellant's notice of appeal. That is the only communication the Board has had from appellant. Its telephone has been disconnected. No notice of appearance from a proper Rule 26 representative has been filed.

appellate forums available to the contractor or the deadlines for filing an appeal. (Gov't motion, ex. 8)

3. Following the issuance of a show cause notice, the contracting officer terminated the contract for default in a decision dated 2 May 2001. At two points, the decision stated that Medina had the right to appeal the termination under the Disputes clause. The decision did not list the appellate forums available to the contractor or the deadlines for filing an appeal. (Gov't motion, ex. 6) The termination was received by appellant on 8 May 2001 (Gov't motion, ex. 7).

4. On 2 August 2001, Medina wrote the contracting officer confirming a 25 July 2001 meeting, seeking to have the termination for default converted into a termination for the convenience of the Government. In this letter, appellant also stated that it had discussed the matter with a Government contracts attorney and that it intended to appeal if the contracting officer did not convert the termination for default into a termination for convenience. Medina offered to accept a no cost termination for convenience if the contracting officer converted the termination prior to the filing of an appeal. (Gov't motion, ex. 9) On 4 September 2001, the contracting officer responded that appellant's request could not be considered (Gov't motion, ex. 10).²

5. The notice of appeal (dated 29 April) was received via Federal Express on 2 May 2002. By motion dated 31 May 2002, the Government requested dismissal of the appeal. It argues that the appeal was not filed within 90 days of appellant's receipt of the contracting officer's decision terminating the contract and that the Board does not have jurisdiction. Appellant has not responded to the motion. All attempts by the Board to contact appellant have been unsuccessful.

DECISION

Under the CDA, the Board lacks jurisdiction over an appeal filed more than 90 days after receipt of the contracting officer's final decision. 41 U.S.C. §§ 605(b), 606. Medina's appeal was filed almost one year after it received the Government's termination for default.

FAR 33.211(a)(4)(v) and 41 U.S.C. § 605(a) require that contracting officers' decisions advise contractors of the specifics of their appeal rights. The contracting officer's decision in this instance did not do so. In these circumstances, if an appellant can demonstrate that it was actually prejudiced by the missing or erroneous information, the 90-day appeal period to this Board does not begin to run. *Decker & Company v. West*, 76 F.3d 1573, 1579-80 (Fed. Cir. 1996); *Ra-Nav Laboratories, Inc.*, ASBCA No. 49211, 96-2 BCA ¶ 28,514 at 142,396, *recons. denied*, 97-1 BCA ¶ 28,650, *aff'd*, 137 F.3d 1344 (Fed.

² The contracting officer made clear that his response was not a reconsideration of the original decision. *Id.*

Cir. 1998). In this appeal, appellant has not alleged, much less demonstrated, that the defect in the contracting officer's decision prejudiced it. We note in particular that prior to the expiration of the 90-day period on 6 August 2001, appellant had advised the contracting officer that it would appeal if the contracting officer did not withdraw the termination for default. (*See*, FOF 4)

CONCLUSION

The appeal is untimely and is dismissed for lack of jurisdiction.

Dated: 4 September 2002

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

I concur

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

ALEXANDER YOUNGER
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. 53783, Appeal of Medina Contracting Company, rendered in conformance with the Board's Charter.

Dated:

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