

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
KQ Services, Inc.) ASBCA No. 53841
)
Under Contract No. DAKF40-01-D-0037)

APPEARANCE FOR THE APPELLANT: Mr. Jerome Millender
President

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Timothy J. Ryan, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE STEMLER
ON THE GOVERNMENT’S MOTION TO DISMISS FOR LACK OF JURISDICTION

The Government moves to dismiss for lack of jurisdiction alleging that appellant failed to timely appeal the termination for cause of the captioned contract. We grant the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 18 July 2001, KQ Services, Inc. (appellant or KQ Services) was awarded a contract for custodial services at Fort Bragg, North Carolina (Gov’t mot., ex. 1 at ¶ 1).

2. On 15 March 2002, the Government rendered a final decision terminating the contract for cause. Appellant was read the Termination for Cause Notice over the telephone, and was sent a copy via facsimile transmission. (*Id.* at ¶ 6) The transmission report shows it was successful (Gov’t mot., ex. 2). The notice advised appellant of its right to appeal the decision to this Board within 90 days of receipt or to the Court of Federal Claims within one year of receipt in accordance with Federal Acquisition Regulation (FAR) 52.233-1, which was incorporated into the contract by reference (*Id.*; R4, at 29).

3. Appellant’s notice of appeal (dated 17 June 2002) was post-marked 20 June 2002 (Board corres. file).

4. The Government filed a motion to dismiss for lack of jurisdiction on 11 July 2002. By order dated 12 July 2002, appellant was given until 12 August 2002 to respond to the motion. (*Id.*) No response was received.

5. By order dated 23 August 2002, appellant was directed by certified mail to respond to the motion by 6 September 2002 (Board corres. file). Appellant received the order on 28 August 2002. To date, no response has been received.

6. After being contacted telephonically, appellant stated that it would file a response to the motion not later than 17 September 2002. To date, nothing has been received.

DISCUSSION

Our jurisdiction derives from the Contract Disputes Act of 1978 (CDA), as amended, 41 U.S.C. §§ 601-613. For purposes of CDA jurisdiction, an appeal sent by mail is considered filed on the date it is postmarked. *See, e.g., Page Constr. Co., ASBCA No. 41206, 91-1 BCA ¶ 23,434.* Appellant’s notice of appeal was filed 20 June 2002. Thus, the appeal was filed 97 days after notice of appellant’s receipt, on 15 March 2002, of the contracting officer’s decision. The requirement that an appeal be filed within 90 days of receipt of the contracting officer’s decision is jurisdictional and cannot be waived. *Cosmic Constr. Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982), aff’g Cosmic Constr. Co., ASBCA No. 26537, 82-1 BCA ¶ 15,541.*

DECISION

The appeal was not timely filed. The appeal is dismissed for lack of jurisdiction.

Dated: 30 September 2002

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

(Signatures continued)

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. 53841, Appeal of KQ Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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