

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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AST Anlagen-und Sanierungstechnik GmbH) ASBCA No. 51854
)
Under Contract No. DAJA76-87-C-0866)

APPEARANCE FOR THE APPELLANT: Reed L. von Maur, Esq.
Attorney at Law
Glashuetten, Germany

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
CPT John T. Harryman, JA
Trial Attorney
Headquarters, U.S. Army Europe
& Seventh Army

OPINION BY ADMINISTRATIVE JUDGE PAUL
ON THE GOVERNMENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION

Approximately a decade after the work on the underlying contract was completed, the contracting officer issued a final decision denying in part and granting in part appellant Anlagen-und Sanierungstechnik GmbH (AST's) claim for delay and acceleration costs. More than a year after the Board held an oral hearing in this appeal, the parties finished briefing the Army's motion to dismiss for lack of jurisdiction. We deny the motion.

FACTUAL BACKGROUND¹

1. On 30 June 1996, AST submitted a certified claim to the contracting officer in which it sought damages in the amount of DM1,185,000 for delay and acceleration costs. At this time, and at all times relevant to this motion, AST was represented by Mr. Reed L. von Maur who was then a partner in the firm of Parker, Poe, Adams & Bernstein (Parker, Poe) (R4, tab 55).

2. The contracting officer completed his final decision denying AST's claim on 31 July 1998 (R4, tab 59). On 5 August 1998, the contracting officer hand delivered a copy of the final decision to Mr. Swen Riethmuller, a colleague of Mr. von Maur's, at Parker, Poe's offices in Sulzbach, Germany (attach. 5 to gov't mot.). In order to verify the date of

¹ We cite these facts only for purposes of resolving the instant motion.

receipt, the contracting officer had Mr. Reithmuller stamp the final decision with the following imprint: “Received 5 AUG 1998 Parker, Poe, Adams & Bernstein LL” (attach. 2, 5 to gov’t mot.).

3. On 5 August 1998, the contracting officer also mailed a copy of the final decision directly to AST. This copy was received on 8 August 1998 (R4, tab 59; attach. 4 to gov’t mot.). The final decision was addressed to Herr Tomo Matasic, AST’s general manager. It stated, *inter alia*: “If you decide to make . . . an appeal, you must mail or otherwise furnish written notice thereof to the Board of Contract Appeals within 90 days from the date you receive this decision” (R4, tab 59).

4. In an affidavit attached to AST’s sur-reply brief on the motion, Herr Matasic stated that he was unaware of the hand delivery of the final decision to Mr. Riethmuller on 5 August 1998, and that he forwarded the copy of the final decision which he received through the German postal system to Mr. von Maur as that he could take appropriate action (aff. at 3-4).

5. On 4 November 1998, Mr. von Maur filed a notice of appeal on AST’s behalf. He stated, in pertinent part:

This Notice of Appeal is an Appeal from the Contracting Officer’s Final Decision which was submitted for mailing to the German Post Office by the Contracting Officer on 5 August 1998 and was received by the Contractor’s [sic] authorized representative on 8 August 1998. The appeal of the Contracting Officer’s Final Decision with this letter is accordingly timely.

(Attach. 3 to gov’t mot.)

6. Several months after the oral hearing in this appeal was completed, the Army filed a motion to dismiss. Relying on the hand delivered final decision, it contended that the appeal was untimely. The parties filed five briefs on this issue.

DECISION

It is well-settled that a contractor must file a notice of appeal within 90 days of receipt of a final decision to order to vest this Board with jurisdiction under the Contract Disputes Act, (CDA), 41 U.S.C. §§ 601 *et seq.* *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982). If the hand delivery of the decision to AST’s attorney was legally effective, then the appeal is untimely by one day; however, if the date of receipt of the mailed copy is efficacious, then the appeal was timely filed.

The Board reviewed a similar situation in *Eastern Computers, Inc.*, ASBCA No. 49185, 96-2 BCA ¶ 28,343. There, the contracting officer forwarded multiple copies of a final decision to the contractor but did not indicate which copy was intended to begin the running of the appeal period. Under these circumstances, the Board held that computation of the appeal period ran from the date of receipt of the last copy. *Id.* at 141,550. *Accord Kime Plus, Inc.*, ASBCA No. 46580, 94-3 BCA ¶ 27,128.

In this appeal, the contracting officer similarly did not inform either AST or its attorney which copy of the final decision was legally effective. Accordingly, AST was entitled to rely on the appeal language contained in the mailed copy. In fact, as stated in the notice of appeal, it did rely upon receipt of this copy and, therefore, the appeal was timely filed.

The Army's reliance on our decisions in *Mid-Eastern Industries, Inc.*, ASBCA No. 51287, 98-2 BCA ¶ 29,907, and *Leixab, S.A.*, ASBCA No. 51581, 98-2 BCA ¶ 29,962, is misplaced. In both of those appeals, the contracting officer forwarded copies of the final decision first via facsimile and then by regular mail. In each instance, we held that the facsimile copy triggered the appeal period and that the appeals were untimely. But we also noted that both contractors had specifically requested facsimile copies. Therefore, the contractors themselves had previously determined the efficacious mode of delivery and receipt. These decisions are, thus, inapposite.

CONCLUSION

The motion to dismiss is denied.

Dated: 11 August 2004

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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. 51854, Appeal of AST Anlagen-und Sanierungstechnik GmbH, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals