

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
KAMP Systems Inc.) ASBCA No. 55317
)
Under Contract No. F41608-97-D-0862)

APPEARANCE FOR THE APPELLANT: Mr. Mel McCullough
Secretary/Treasurer

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiapas, Esq.
Chief Trial Attorney
Arthur M. Taylor, Esq.
Stacy R. Procter, Esq.
Trial Attorneys
Defense Contract Management Agency
Carson, CA

OPINION BY ADMINISTRATIVE JUDGE SCOTT

The government moves to dismiss this appeal on the ground that it was not timely filed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. Appellant asserts that it filed its appeal within 90 days of its receipt of the contracting officer’s (CO’s) final decision, in compliance with the CDA’s time limit for appealing to the Board, 41 U.S.C. § 606.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

On 18 November 1997 the Department of the Air Force awarded requirements Contract No. F41608-97-D-0862 to KAMP Systems Inc., a small business, to supply munitions trailers. The face page of the contract listed KAMP’s address as 8348 Kimball Ave., Hangar #1, Chino, CA 91710. Patricia A. Coleman, KAMP’s president, signed appellant’s offer on behalf of KAMP and signed one bilateral modification. Mel McCullough, as “CFO,” signed the last bilateral modification of record, No. P00004, effective 26 October 1998. (R4, tab 1) This evidences that Mr. McCullough was an authorized representative of KAMP and that the government acknowledged his authority to act on behalf of KAMP.

On 9 August 2002 the CO issued a notice of termination for convenience of the contract to appellant at the address named in the contract (R4, tab 3). By letter dated 13 January 2003 to the CO, Mr. McCullough, as “Controller,” submitted a request for equitable adjustment on behalf of KAMP. He notified the CO that he should be

contacted if the CO required further information. (R4, tab 6) By letter dated 7 August 2003 to Mr. Mel Moe, the termination contracting officer (TCO), Mr. McCullough, as controller, submitted KAMP's termination settlement proposal, stating that he looked forward to working with the TCO (R4, tab 9).

Meanwhile, on 10 July 2003, the CO issued a final decision asserting the government had overpaid appellant on the contract. Appellant timely appealed the final decision and the appeal was docketed as ASBCA No. 54253. By letter received by the Board on 4 April 2005, Ms. Coleman, who was representing appellant *pro se*, notified the Board and government counsel as follows:

The purpose of this letter is to provide you with a current mailing address and telephone number to reach me regarding any matter related to ASBCA No. 54253. This will be my address and telephone number until further notice:

Ms. Patricia A. Coleman, President
KAMP Systems Inc.
C/o Process Fab Inc.
15644 Clanton Circle
Santa Fe Springs, CA 90670
Phone: 951-255-6626
Fax (562) 921-3145

(R4, tab 12; *see also* Bd. corr. file in ASBCA No. 54253). There is no evidence that Ms. Coleman notified the CO of the Process Fab Inc. address for contract administration purposes or otherwise. Process Fab Inc. has not been identified in the record. There is no evidence that it is an authorized representative of KAMP.

On 2 August 2005, the TCO sent to Ms. Coleman, at the Process Fab, Inc. address, provided to him by government counsel, what the parties refer to as the "15-day notice." The TCO advised that, in accordance with FAR 49.109-7(b), KAMP was to submit any additional evidence by 19 August 2005 substantiating the amount requested in its termination settlement proposal of 7 August 2003. (R4, tab 13; gov't mot., ¶ 5) In his 8 March 2006 declaration in support of the government's motion to dismiss this appeal, the TCO states that, at the time he sent the 15-day notice, he "knew KAMP was no longer occupying their previous place of business" and "KAMP had not provided me with a new business address" (gov't mot., ex. 1, ¶ 3). There is no evidence that the TCO inquired of Mr. McCullough, or of Ms. Coleman, concerning the appropriate mailing address before he sent the 15-day notice.

By e-mail to the TCO dated 15 August 2005, Mr. McCullough referred to a letter to the Board from government counsel in ASBCA No. 54253. Mr. McCullough inquired:

“WHAT 15 DAY NOTICE IS HE TALKING ABOUT??” The TCO responded on 15 August 2005 to Mr. McCullough:

That 15 day notice is the one I sent to Pat at Process Fab, Inc, Since the ASBCA letter was coordinated with Pat, it was assumed that she had received the 15-day notice. But when your e-mail dated today said that Pat has been up north with her husband since May and you would have “an answer in the next 2 to 3 weeks”, that is why I asked if Pat had received the notice.

As you have requested that all correspondence on this termination go through you, please provide me your mailing address. [Emphasis added]

(App. opp’n, ex. 2) We find that the TCO thereby implicitly agreed to send all termination correspondence to Mr. McCullough.

Mr. McCullough replied as follows by e-mail to the TCO dated 17 August 2005:

HI MEL,

I DID NOT RECEIVE YOUR LETTER DATED AUGUST 8, 2005 [sic] AS PER FAR 49.107(b). SINCE THE GOVERNMENT HAS TAKEN 3 YEARS TO GET THE TERMINATION TO THIS POINT, AND KAMP HAS IN GOOD FAITH WAITED AND HAS BEEN PATIENT, WOULD YOU PLEASE GRANT KAMP UNTIL SEPTEMBER 16, 2005 TO FURNISH THE INFORMATION REQUESTED.
YOU CAN REACH ME AT:
951-316-7181 (YOU ALREADY HAVE THIS NUMBER)

MEL MCCULLOUGH
1853 COUPLES RD.
CORONA, CA 92883

(R4, tab 14; app. opp’n, ex. 3) We find that Mr. McCullough, an authorized representative of KAMP, thereby notified the CO of the mailing address to which the CO was to send correspondence to KAMP. Even if Ms. Coleman’s notice to government counsel and to the Board of a different address for her, in a different appeal, “until further notice,” were relevant, Mr. McCullough provided that “further notice.”

The TCO replied on 18 August 2005, by e-mail to Mr. McCullough, that the extension KAMP had sought was granted (R4, tab 15; app. opp'n, ex. 3). By e-mail to Mr. McCullough dated 6 October 2005, the TCO stated that, due to the wide variance in the parties' positions, he intended to issue a unilateral determination and that it should be issued by 7 October (app. opp'n, ex. 4). On 7 October 2005, the TCO issued a "Final Decision/Unilateral Determination and Demand for Payment," which notified KAMP that, if it appealed to the Board, it must do so within 90 days from the date it received the decision. The TCO sent the notice by Federal Express to Ms. Coleman at Process Fab Inc.'s address, rather than to the address designated by Mr. McCullough. (R4, tabs 17, 18) The Federal Express receipt shows that the decision was delivered to Process Fab Inc.'s address on 10 October 2005 and signed for by a "D.RAZ," who is not identified in the record. There is no evidence that "D.RAZ" was an authorized representative of KAMP or even of Process Fab Inc. (R4, tab 19)

The TCO declares that he sent his final decision to Process Fab Inc.'s address because "KAMP still had not provided me with an official mailing address. KAMP also had not objected to my use of the Process Fab, Inc. address on the 15-day notice letter." (Gov't mot., ex. 1, ¶ 4) However, as we have found, in August, 2005, nearly two months prior to his final decision, the TCO became aware that Mr. McCullough was unfamiliar with the 15-day notice and that, at the time, Ms. Coleman had not been at the Process Fab Inc. address since May 2005. Mr. McCullough had requested of the TCO that all correspondence concerning the termination go through him, and the TCO had implicitly agreed to send it to the address Mr. McCullough gave him.

The government has not disputed Mr. McCullough's representation that he received the TCO's final decision on 14 October 2005 and documentary evidence reflects that receipt date (app. opp'n at 3, ex. 1). Accordingly, we find that Mr. McCullough received the decision on 14 October 2005. By letter to the Board and to the TCO dated 12 January 2006, on KAMP letterhead, showing the address that Mr. McCullough had supplied to the TCO on 17 August 2005, KAMP appealed, *pro se*, from the TCO's final decision. Mr. McCullough signed the notice of appeal on behalf of KAMP as its Secretary/Treasurer. (Bd. corr. file) The record does not indicate the method of delivery to the TCO, who, like KAMP, was located in California. The TCO declares that he received a copy of the notice of appeal either on 12 January 2006 or 13 January 2006 (gov't mot., ex. 1, ¶ 5). Because the TCO acknowledges a potential 12 January 2006 receipt date, we accept that acknowledgement and find that he received a copy of the notice of appeal on that date. This was 90 days after Mr. McCullough's receipt of the TCO's final decision on behalf of KAMP on 14 October 2005, and 94 days after it was delivered to the Process Fab Inc. address on 10 October 2005. Appellant sent the Board's copy of its notice of appeal by Federal Express on 12 January 2006. The Board received it on 13 January 2006, 91 days after Mr. McCullough's receipt of the TCO's final decision and 95 days after it was delivered to the Process Fab Inc. address.

DISCUSSION

Under the CDA, the CO must issue a decision in writing and mail or otherwise furnish a copy to the contractor. 41 U.S.C. § 605(a). The implementing regulations require that the decision be provided to the contractor by “certified mail, return receipt requested, or by any other method that provides evidence of receipt.” FAR 33.211(b). When a contractor appeals to the Board from a CO’s final decision, the CDA requires that it do so within 90 days from the date of receipt of the decision. 41 U.S.C. § 606. The filing period is statutory and the Board cannot waive it. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982).

Receipt of a CO’s decision means the “actual physical receipt of that decision by the contractor.” *Borough of Alpine v. United States*, 923 F.2d 170, 172 (Fed. Cir. 1991), quoting *Pathman Construction Co. v. United States*, 817 F.2d 1573, 1577 (Fed. Cir. 1987). “Actual receipt” includes receipt by an authorized representative of the contractor acting within the scope of the representative’s authority. *Borough of Alpine*, 923 F.2d at 172-173. The burden is upon the government to prove the date of receipt by objective indicia. *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1372 (Fed. Cir. 2005). The appeal period does not commence until the final decision is received at the location designated by a contractor for receipt of project-related correspondence. *Brinderson Corp.*, ASBCA No. 31831, 86-1 BCA ¶ 18,616, *aff’d on recons.*, 86-2 BCA ¶ 18,905. If the contractor wishes that a CO’s decision be sent to an address other than its address of record, it must show that a request was made to and agreed to by the CO. *L.C. Craft*, ASBCA No. 47351, 94-2 BCA ¶ 26,929.

In computing the 90-day timeframe, the Board has held that the date of filing is the date of transfer to the U.S. Postal Service, *i.e.*, the postmarked date of mailing. *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232. Appeals that are not transmitted by U.S. mail, such as the instant appeal, are deemed filed when received by the Board. *Innovative Refrigeration Concepts*, ASBCA No. 48869, 96-1 BCA ¶ 28,231. However, the Board has long held that filing an appeal with the CO is tantamount to filing with the Board. This is true regardless of whether the contractor also attempted to file at the Board and the CO received only a copy. *Thompson Aerospace, Inc.*, *supra*.

The government urges that appellant should be deemed to have received the CO’s final decision on 10 October 2005, when it was delivered to Process Fab Inc.’s address and “D.RAZ” signed the delivery receipt. However, in August 2005, the TCO had been notified by Mr. McCullough, whom we have found to be an authorized representative of KAMP, of the proper address to which to send termination correspondence to KAMP, and the CO had agreed to do so. In any event, the government has not established that “D.RAZ”, who is not identified in the record, was an authorized representative of KAMP.

Thus, the government has not met its burden to prove that KAMP received the TCO's final decision on 10 October 2005.

We have found that Mr. McCullough received the TCO's final decision on 14 October 2005. He sent KAMP's notice of appeal, by Federal Express, to the Board on 12 January 2006, which received it on 13 January 2006, 91 days after KAMP's receipt of the final decision -- one day after the time limit for appealing to the Board had expired. However, we have also found that the TCO received a copy of the notice of appeal on 12 January 2006, within the CDA's 90 day appeal time limit. Accordingly, KAMP's appeal is timely.

DECISION

The government's motion to dismiss on grounds of timeliness is denied.

Dated: 19 December 2006

CHERYL L. SCOTT
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. 55317, Appeal of KAMP Systems Inc., rendered in conformance with the Board's Charter.

Dated:

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