

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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The Swanson Group, Inc. ) ASBCA No. 54863  
 )  
Under Contract No. N68711-91-C-9509 )

APPEARANCE FOR THE APPELLANT: Mr. Johnny Swanson, III  
President

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.  
Navy Chief Trial Attorney  
John S. McMunn, Esq.  
Senior Trial Attorney  
Naval Facilities Engineering  
Command  
Alameda, CA

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD  
ON GOVERNMENT'S MOTION TO DISMISS AND APPELLANT'S MOTION  
FOR SUMMARY JUDGMENT

The subject contract was awarded to appellant in 1991 to provide security guard services at the Long Beach Naval Shipyard. The contract was terminated for default and on appeal to this Board we sustained the appeal, converting the default termination into a termination for the convenience of the government. *The Swanson Group, Inc.*, ASBCA No. 44664, 98-2 BCA ¶ 29,896 (*Swanson I*). *Swanson I* was followed by six other decisions<sup>1</sup> at the Board and at the Court of Appeals for the Federal Circuit and this will be the eighth. We will refer to those other decisions only as necessary to resolve the issues raised in these motions.

The current appeal is from the contracting officer's rejection of appellant's termination settlement proposal as untimely, since it was alleged to have been filed more than a year after receipt of notice of the termination for convenience. The government moved to dismiss for lack of jurisdiction on several grounds, most of which we rejected

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<sup>1</sup> *The Swanson Group, Inc.*, ASBCA No. 52109, 01-1 BCA ¶ 31,164 (*Swanson II*); *The Swanson Group, Inc.*, ASBCA No. 52109, 02-1 BCA ¶ 31,836 (*Swanson III*); *The Swanson Group, Inc.*, ASBCA No. 52109, 02-2 BCA ¶ 31,906 (*Swanson IV*); *England v. The Swanson Group, Inc.*, 353 F.3d 1375 (Fed. Cir. 2004) (*Swanson V*) vacating *Swanson IV* and directing that ASBCA No. 52109 be dismissed; *The Swanson Group, Inc.*, ASBCA No. 52109, 04-1 BCA ¶ 32,603 (*Swanson VI*) dismissing ASBCA No. 52109; *The Swanson Group, Inc.*, ASBCA No. 54863, 05 -2 BCA ¶ 33,108 (*Swanson VII*).

in *Swanson VII*. In that decision we examined the government argument that the appeal should be dismissed on the grounds that appellant failed to timely file a claim or settlement proposal as a motion for summary judgment since it was in the nature of an affirmative defense. While we found that appellant failed to timely file a settlement proposal within one year of the termination for convenience, we stated:

The contractor has a right to appeal a settlement termination determination if it submitted a timely termination settlement proposal or request for equitable adjustment or request for a time extension. FAR 52.249-2(j). Accordingly, appellant's right of appeal is not barred as a matter of law by its failure to submit a timely termination settlement proposal. The genuine issues of material fact as to the timelines of appellant's request for an extension of time preclude a grant of summary judgment for the government.

The government's motion is denied. The government shall within 30 days of its receipt of this decision supplement the Rule 4 file to provide documents relevant to the issue of fact regarding the timeliness of appellant's request for an extension of time and present any further argument in support of this part of its motion to dismiss. Appellant will then be permitted to file documents in its supplemental Rule 4 file and submit argument in opposition to the motion.

*Swanson VII*, 05-2 BCA at 164,090.

Those additional submittals have been made and we make the following findings as to which there is no genuine issue:

1. The Board issued its decision in ASBCA No. 44664 on 7 November 1997. On 12 November 1997 the Board mailed the decision to the parties – to the attention of Richard D. Lieberman, Esq. of Washington, DC, attorney of record for Swanson and to the attention of John S. McMunn, Esq., of San Bruno, California, attorney of record for the government. Each was sent certified mail, return receipt requested. (Board corr. file, ASBCA No. 44664)

2. Based upon the executed return receipts, the decision was delivered to Mr. McMunn's address on 17 November 1997 and to Mr. Lieberman's address on 13 November 1997.<sup>2</sup>

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<sup>2</sup> Previous *Swanson* decisions have stated that appellant received the decision on 17 November 1997 (see *Swanson II and V*); however, that statement was based

3. On 10 November 1998, Anthony A. Joseph, a Montgomery, Alabama attorney sent the following letter to Mr. McMunn at his San Bruno address.<sup>3</sup> The letter referenced ASBCA No. 44664, Appeal of The Swanson Group, Inc. Under Contract No. N68711-91-C-9509 and stated as follows:

As you may or may not be aware, Johnny Swanson, the principal of The Swanson Group, Inc., is currently incarcerated in the federal medical prison facility in Rochester, Minnesota.

It is my understanding that The Swanson Group has one year to fifteen months in which to initiate a claim based on the contract dispute. It is also my understanding that the parties can stipulate to an extension beyond the initial one year to fifteen month period. Accordingly, on behalf of The Swanson Group, I hereby request a one year extension in order to initiate the claim.

Because time is of the essence, I would appreciate a written response regarding your position in this matter within five days. Thank you for your immediate attention and cooperation in this matter.

(Board corr. file, ASBCA No. 44664)

4. Mr. Joseph's letter was received in the San Bruno Navy mailroom on Friday, 13 November 1998 and by Mr. McMunn on Monday, 16 November 1998 (supp. R4 (ASBCA No. 54863), tab 2; McMunn Declaration, ¶¶13-14, 16).

5. Mr. McMunn assumed that the letter referred to a termination settlement proposal under the Swanson contract with which he was familiar and since he (McMunn) had no contracting officer authority, he attempted to contact the contracting officer in San Diego, California who was not immediately available (*id.*, ¶¶ 30-33).

6. Thus, on 23 November 1998, Mr. McMunn wrote to Mr. Joseph, as follows:

I am in receipt of your letter dated November 10, 1998 seeking agreement to an extension for your client to file a

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upon an allegation in Swanson's complaint and not upon review of the return receipt.

<sup>3</sup> In addition to Mr. McMunn, the letter was also directed to Arthur H. Hildebrandt, Esq. who at the time was Chief Trial Attorney for the Navy.

Termination for Convenience settlement proposal on the above [contract]. As you know, the one year period in which such a proposal could have been filed has expired.

The Contracting Officer with authority to consider your request is currently unavailable due to a family emergency. He is expected back in the office during the first week in December, at which time I hope to consult with him and get back to you on your client's request.

(Supp. R4 (54863), tab 3)

7. Mr. McMunn wrote to Mr. Joseph again on 9 December 1998, as follows:

In further reply to your letter of November 10, 1998 on the above, I have spoken to the Contracting Officer who has declined to grant your client an extension.

The Contracting Officer plans to move forward and issue a settlement determination on Mr. Swanson's contract. Any information which Mr. Swanson wishes to submit for consideration in the determination may be provided the Contracting Officer through me.

Absent your instruction to the contrary, the settlement determination will be sent to Mr. Swanson in care of your office. We do not have a current mailing address for Mr. Swanson.

(*Id.*, tab 4)

### DECISION

Because we have already determined that appellant did not file a timely termination for convenience settlement proposal within one year of receipt of notice of termination, in order to contest the contracting officer's determination of settlement costs, the appellant had to file a request for a time extension to file a termination settlement proposal within one year of receipt of the notice of termination for convenience (*Swanson VII*). Said notice was the Board's decision which was received by counsel of record for appellant on 13 November 1997. *Ryste & Ricas, Inc. v. Harvey*, 477 F.3d 1337, 1341 (Fed. Cir. 2007). Thus a request for a time extension had to be made by 13 November 1998. Mr. Joseph's letter was dated 10 November 1998 and was received in the Navy mailroom on 13 November 1998. The contracting officer actually received the request some time later than 16 November 1998.

Assuming that addressing the letter to Mr. McMunn was sufficient, the request for a time extension was timely submitted. It was received by the Navy on 13 November 1998, the last day in the one year period. In any event the request was submitted on 10 November 1998, well within the one-year period. *Jo-Bar Mfg. Corporation*, ASBCA No. 39572, 93-2 BCA ¶ 25,756 (mailing of settlement proposal within one year after receipt of notice of termination is timely filing); *Space Dynamics Corporation*, ASBCA No. 21883, 77-2 BCA ¶ 12,645 (“Submit” in termination for convenience clause means date of mailing, not date of receipt).

The government also contends that sending the request to government counsel is not sufficient to constitute a proper request for a time extension and in support of that position cites *J & E Salvage Co. v. United States*, 37 Fed. Cl. 256, 262 (1997), *aff’d*, 152 F.3d 945 (Fed. Cir. 1998) (table), *cert. denied*, 525 U.S. 827 (1998). That case held that a letter to an Assistant United States Attorney did not constitute submission of a claim under the Contract Disputes Act even though the letter eventually found its way to the appropriate contracting officer, because the letter did not express a desire for a final decision and the Court reasoned that by sending the letter to Justice counsel without a request for a final decision “plaintiffs demonstrated no intent to seek a final decision within the meaning of the CDA.”

The instant case is clearly distinguishable from *J & E Salvage*. Swanson was not filing a claim, but was seeking an extension for filing a settlement proposal. In fact, we have distinguished *J & E Salvage*. In *National Gypsum Company*, ASBCA No. 53259, 01-2 BCA ¶ 31,532, we found that a claim submitted to counsel which eventually arrived on the contracting officer’s desk and which included an express request for a contracting officer’s decision distinguished that case from *J & E Salvage*. We find that submission to Mr. McMunn who correctly reasoned that the letter was a request for a time extension for submission of a termination settlement proposal and who promptly contacted the contracting officer who denied the request and communicated that denial through Mr. McMunn, was an acceptable request under the termination clause.

Therefore, we hold as a matter of law that appellant submitted a timely request for a time extension within which to file a termination settlement proposal and therefore has a right to contest the contracting officer’s unilateral determination of the termination settlement costs. The government’s motion to dismiss which we evaluated by summary judgment standards is denied.

On 28 January 2006, Swanson submitted what it termed a Motion for Summary Judgment. In fact this document was a request that the Board adopt the record in ASBCA No. 52109 and resolve the quantum issues in this appeal (ASBCA No. 54863) based on the decisions in that appeal. Our decisions in that case were vacated and remanded by the Court of Appeals for the Federal Circuit with instructions to dismiss

(*Swanson V*) and we did (*Swanson VI*). The motion is denied as an inappropriate vehicle for accomplishing what Swanson requests.

Within 30 days of receipt of this decision, the parties are directed to advise the Board if they desire a hearing or a Rule 11 record submission and should consider the extent to which the previous record may or may not be used.

Dated: 24 September 2007

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RICHARD SHACKLEFORD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 54863, Appeal of The Swanson Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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