

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Corners and Edges, Inc.) ASBCA Nos. 55767, 56277
)
Under Contract No. 263-99-C-7278)
(NO2-A0-97278)

APPEARANCE FOR THE APPELLANT: Mr. John E. Larson
Secretary

APPEARANCE FOR THE GOVERNMENT: Mogbeyi Omatete, Esq.
Trial Attorney
Department of Health and
Human Services
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DELMAN

The Board, *sua sponte*, has raised a number of questions with respect to the filing of these appeals that may affect the Board’s jurisdiction. For reasons stated below, we retain jurisdiction of ASBCA No. 55767 and we dismiss ASBCA No. 56277 for lack of jurisdiction.

FINDINGS OF FACT

1. On 1 October 1998, the National Institutes of Health, National Institute of Allergy and Infectious Diseases (NIH or government) awarded this contract to Corners and Edges, Inc. (appellant). The contract was a firm-fixed priced contract for janitorial services at the Rocky Mountain Laboratories in Hamilton, MT. The contract was for one year, with option to extend performance on a yearly basis for up to four additional years. It is undisputed and we find that the government extended contract performance under all options, through 30 September 2003. (R4, Binder 5, tab 2 at 20-21)

2. By letter to the contracting officer (CO) dated 27 March 2002, appellant submitted a claim for price adjustment in the amount of \$13,244.56, seeking additional costs arising out of changed conditions and constructive change orders (R4, Binder 1 & 2, tab 1). The CO received the claim on 1 April 2002. The CO did not issue a final decision on this claim.

3. Over a number of years appellant submitted amended claims to the CO to reflect its additional costs for these claimed changed conditions and constructive change

orders throughout the performance period (*see* finding 8 below). Insofar as pertinent here, appellant's revised claim to the CO dated 4 October 2006 sought \$194,076, requested a CO decision and included a claim certification as required by the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(1) (R4, Binder 1 & 2, tab 1).

4. Appellant mailed the revised, certified claim of 4 October 2006 through the U. S. Postal Service (USPS), certified mail, return receipt ("green card") requested. The claim was postmarked 4 October 2006. It is undisputed and we find that the envelope was properly addressed to the CO with the correct street address, city, state and zip code, "Bethesda, MD 20817-4813." (R4, Binder 1 & 2, tab 1, postal receipt attach. to claim)

5. The USPS did not deliver the claim letter to the address and zip code of the CO. Rather, the delivery record of the USPS shows that the claim letter was delivered on 13 October 2006 at 10:45 a.m. to the NIH central mailroom in Bethesda, MD 20892 and was signed for by Ms. Sandra C. Bell (Bd. corr. ASBCA No. 55767(55767), app. resp. to Bd. order dtd. 3/17/08 at 9).

6. The NIH mailroom did not route the claim letter to the correct mail stop for the CO (55767, gov't resp. to Bd. order dtd. 3/17/08 at 2). Nor was the green card returned to appellant. Accordingly, the CO did not receive appellant's revised claim dated 4 October 2006 at or around the time appellant mailed it to the CO. We find that the NIH mailroom mishandled appellant's claim.

7. By letter dated and postmarked 4 January 2007, which was 83 days after the claim was received in the NIH mailroom, appellant filed a notice of appeal (NOA) with this Board from the CO's failure to issue a decision on appellant's revised claim of 4 October 2006, 41 U.S.C. § 605(c)(5). The Board received the NOA on 8 January 2007. Appellant enclosed with the NOA the 4 October 2006 revised claim along with a number of its earlier claim letters, including the original claim dated 27 March 2002. Appellant sent the CO a courtesy copy of the NOA, but it is unclear whether appellant sent the CO all the claim letters that were attached to the NOA. The NOA was docketed as ASBCA No. 55767.

8. On 16 January 2007, appellant filed its complaint in this appeal. Appellant averred (compl. ¶ 3) that it had submitted a number of demands for equitable adjustment to the CO for "constructive change and changed condition"[sic], beginning with its claim letter dated 27 March 2002, and followed by claim letters dated 16 August 2002, 25 November 2002, 5 December 2005, 12 September 2006, 15 September 2006 and 4 October 2006. These claim letters basically modified the quantum of the original claim filed on 27 March 2002. (R4, Binder 1 & 2, tab 1) The Government's amended answer, dated 13 April 2007, admitted that appellant submitted claims to the CO by letters dated

27 March 2002, 5 December 2005, 12 September 2006 and 4 October 2006.¹ The amended answer also stated that the government was without sufficient information to admit or deny whether appellant submitted to the CO the claim letters dated 16 August 2002, 25 November 2002 and 15 September 2006. The CO did not issue a timely decision on any of appellant's claim letters, 41 U.S.C. § 605(c)(2).

9. The CO ultimately issued a final decision on the revised claim of 4 October 2006 by letter dated 8 November 2007, denying the claim in its entirety. After addressing the claim on the merits, the CO stated in the decision that "It should also be mentioned that the Contracting Officer never received CEI's 4 October 2006 [sic] as can be shown on the Track and Confirm Search Results from the United States Postal Service." (R4, Binder 1 & 2, tab 1). This sentence was unclear. By Order dated 17 March 2008, the Board sought clarification from the parties.

10. The CO's final decision references appellant's 4 October 2006 revised claim and addresses it on the merits. Clearly the CO received this claim, contrary to what the decision suggests. Absent persuasive evidence to the contrary, we find that the CO meant to convey that he did not receive the 4 October 2006 claim on or about 4 October 2006, which is consistent with the evidence of record.

11. The CO's final decision advised appellant of its right to file an NOA with the ASBCA or to bring an action directly in the U.S. Court of Federal Claims. On 18 December 2007, appellant filed an NOA from the CO's decision with this Board, and the NOA was docketed under ASBCA No. 56277.²

12. Effective 6 January 2007, the Civilian Board of Contract Appeals, not the ASBCA, had jurisdiction over appeals from final decisions of NIH contracting officers, 41 U.S.C § 607(d) (see below).

¹ In response to a Board Order dated 17 March 2008 (finding 9), Government counsel argued that the CO did not "physically" receive the 4 October 2006 claim revision until 31 October 2007, when counsel faxed a copy to the CO along with other documents (55767, gov't resp. to Bd. order dtd 3/17/08 at 4). Counsel failed to provide the date on which he obtained possession of the claim and whether he promptly delivered the claim to the CO. In any event, since we conclude, *infra*, that the CO received the claim on the date it was received by the NIH mailroom, we need not make any findings as to the exact date that the CO personally received the claim.

² Appellant's NOA recalculated and increased its quantum beyond that contained in its certified revised claim dated 4 October 2006. Since we conclude, *infra*, that we do not have jurisdiction over this appeal, we do not address the propriety of this revision.

13. On 6 February 2008, the Board issued an order to show cause why ASBCA No. 56277 should not be dismissed. The parties provided their positions in writing. In brief, the government seeks dismissal of ASBCA No. 56277 for lack of jurisdiction based upon 41 U.S.C. § 607(d). Appellant requests that we retain jurisdiction of this appeal. Because of recent statutory changes that have affected the jurisdiction of the boards of contract appeals, we address our jurisdiction under both appeals.

DECISION

ASBCA No. 55767

The CDA, as amended effective 6 January 2007, 41 U.S.C. §§ 601-613, gave effect to the establishment of a new agency board of contract appeals, the Civilian Board of Contract Appeals (CBCA), 41 U.S.C. § 438. The CBCA was granted jurisdiction to decide any appeal from a CO decision from any executive agency relative to any contract subject to the Act other than the Department of Defense and its military services, the National Aeronautics and Space Administration, the U. S. Postal Service, the Postal Regulatory Commission and the Tennessee Valley Authority, 41 U.S.C. § 607(d). Accordingly, effective 6 January 2007, CBCA jurisdiction extended to appeals from CO decisions of NIH and its contracting components.

Appellant's NOA from the CO's failure to issue a decision on its claim was dated and postmarked on 4 January 2007. As of 4 January 2007, the ASBCA, per interagency agreement, had jurisdiction to decide NIH appeals. However, the Board received the NOA on 8 January 2007. As of 8 January 2007, the CBCA had jurisdiction to decide NIH appeals.

The CDA does not define the date on which a notice of appeal from a CO decision is taken to a board, *i.e.*, the date of mailing of the notice of appeal by the contractor, its receipt by the board or otherwise. Given this silence, we seek guidance from the pertinent regulations and the case law.

FAR 33.211(a)(4)(v), CONTRACTING OFFICER'S DECISION, provides that a recipient of a CO's decision who wishes to appeal "must, within 90 days from the date you receive this decision, *mail* or otherwise furnish written notice to the agency board of contract appeals..." (emphasis added). We have defined "mailing" to include proper address, postage and transfer into the custody of the USPS. *Micrographic Technology, Inc.*, ASBCA No. 25577, 81-2 BCA ¶ 15,357 at 76,070. Proof of mailing may be shown by the date of the postmark, and the date of the postmark is tantamount to the date of filing with the Board. *California Ranch Fresh, Inc.*, ASBCA No. 46815, 94-2 BCA ¶ 26,740.

It is undisputed that appellant's NOA was postmarked on 4 January 2007. Accordingly, the NOA was filed with this Board on 4 January 2007, on which date the ASBCA had jurisdiction to decide appeals under NIH contracts.

Having concluded that we are the proper agency board to decide this appeal, we must next determine whether we have jurisdiction over the appeal under the unique facts of this case. Appellant's revised claim was dated and postmarked on 4 October 2006. The claim letter was directed to the CO, was properly certified, sought a sum certain and requested a CO decision. The claim was properly mailed and addressed to the CO with the CO's correct address. In short, appellant complied with all the statutory requirements for the submission of a claim to the CO under the CDA, 41 U.S.C. § 605. Appellant also took the additional precaution of sending the claim through the USPS as certified mail, return receipt requested.

Unbeknownst to appellant, the NIH mailroom mishandled the claim and failed to forward the claim to the mail stop of the CO. Appellant filed a notice of appeal with this Board on 4 January 2007 based upon the CO's failure to issue a decision on its claim, which was 92 days from the mailing of the claim and 83 days after it was received in the NIH mailroom. Title 41 U.S.C. § 605(c)(2) requires a contracting officer to issue a decision (or notify the contractor of the time within which a decision will be issued) on a certified claim over \$100,000 within 60 days after receipt of the claim. In this appeal, the CO did neither within this statutory period.

The CDA, 41 U.S.C. § 605(c)(5), provides that "[a]ny failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter." Under the unique facts presented here, we hold that appellant was authorized to commence its appeal to this Board based upon a deemed denial of its claim, which was properly submitted to the CO for decision in accordance with the CDA, received by the agency but subsequently mishandled by the agency and not timely delivered to the CO. To hold otherwise would allow the agency to benefit from its own negligence, or might encourage the less scrupulous to lose or misplace properly submitted contractor claims and frustrate a contractor's statutory right under the CDA to have its claim considered administratively with prompt recourse to board or court review. Absent evidence to the contrary, we conclude that the NIH mailroom was authorized to receive and in fact received appellant's claim on behalf of the CO. *See Ship Analytics International, Inc.*, ASBCA No. 50914, 01-1 BCA ¶ 31,394 (Naval postal office deemed to receive Board decision on behalf of Navy).

Our conclusion is consistent with that reached in *Wallace O'Connor International, Ltd.*, 23 Cl. Ct. 754 (1991) on almost identical facts (court retained jurisdiction on deemed denial basis when properly submitted claim to CO was received by agency

mailroom employee but not delivered to CO). It is also factually distinguishable from the Circuit's holding in *Dawco Construction Inc., v. United States*, 930 F.2d 872, 879-80 (Fed. Cir. 1991), *overruled on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995) (contractor claim properly submitted under CDA when addressed and mailed to Navy contracts manager and later forwarded to CO).

Based upon the foregoing, we conclude we have jurisdiction over this appeal.

ASBCA No. 56277

On 18 December 2007, appellant filed an NOA with this Board from the CO's decision dated 8 November 2007. This CO decision addressed appellant's claim as revised on 4 October 2006 that is before us under ASBCA No. 55767. However, this appeal was filed with our Board almost one year after the CBCA had become the exclusive board forum to receive appeals from CO decisions of NIH. Effective January 6, 2007, ASBCA jurisdiction under the CDA extended to "any appeal from a decision of a contracting officer of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or the National Aeronautics and Space Administration relative to a contract made by that department or agency," 41 U.S.C. § 607(d). Appellant's NOA dated 18 December 2007 was not such an appeal. Hence, we have no jurisdiction over this appeal under the Act.³ *See Business Management Research Associates, Inc.*, ASBCA Nos. 55309, 55682, 07-2 BCA ¶ 33,599 (appeal dismissed that was filed after the date ASBCA no longer had jurisdiction over HHS appeals).

CONCLUSION

For reasons stated, we retain jurisdiction under ASBCA No. 55767. We dismiss ASBCA No. 56277 for lack of jurisdiction.

Dated: 14 August 2008

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

³ We express no opinion concerning the proper course of action of the U.S. Court of Federal Claims or the CBCA should a notice of appeal be filed there.

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 Nos. 55767 and 56277, Appeals of Corners and Edges, Inc., rendered in conformance with the Board's Charter.

Dated:

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