

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Free & Ben, Inc.) ASBCA No. 56129
)
Under Contract No. W91GY0-07-C-0056)

APPEARANCE FOR THE APPELLANT: Mr. Ben Emosivbe
President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
Robert T. Wu, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT'S MOTION TO DISMISS

Free & Ben, Inc. (F&B) moved for reconsideration of the Board's decision in *Free & Ben, Inc.*, ASBCA No. 56129, 11-1 BCA ¶ 34,719. It electronically transmitted its motion from Copenhagen, Denmark, on the 31st day after receipt of a copy of the decision. The motion was received at the Board on the 30th day after receipt of a copy of the decision, before midnight, local time, after the Board's normal business hours. The government moved to dismiss the motion as untimely under Board Rule 29. F&B opposed the motion.

BACKGROUND

On 22 March 2011, we issued our decision in this appeal. The decision was sent to F&B's place of business in Brussels, Belgium, by registered mail. The United States Postal Service (USPS) Return Receipt for International Mail shows Mr. Ben Emosivbe (Emosivbe) received the decision on 29 March 2011.

At 10:23 p.m., local time, Falls Church, VA, on 28 April 2011, F&B sent an e-mail addressed to the Board's Recorder. Attached to this e-mail were a cover letter dated 27 April 2010 [sic] submitting F&B's motion for reconsideration and 15 pages of an unnumbered pdf document titled "APPELLANT'S MOTION FOR RECONSIDERATION AND BRIEF IN SUPPORT" also dated 27 April 2011. The cover letter said government counsel had been sent "a hard copy of the enclosure." Even though unnumbered, judging from its content and Emosivbe's electronic signature on the last page of the 15-page motion papers, it appears F&B successfully transmitted, and the Board received, the entire document.

By letter dated 2 May 2011, the Board directed the government to respond to F&B's motion for reconsideration by 3 June 2011. The government's 5 May 2011 letter requested a copy of the USPS Registered Mail Return Receipt and other information so that it could determine whether to challenge the timeliness of F&B's motion for reconsideration.

Based on the Recorder's findings, the Board forwarded to both parties by letter of 11 May 2011 documents showing:

1. The [registered] mail return receipt indicating that Mr. Ben Emosivbe received the Board's decision in ASBCA No. 56129 on 29 March 2011.
2. An e-mail from Mr. Ben Emosivbe attaching his 27 April 2010 letter and "APPELLANT'S MOTION FOR RECONSIDERATION AND BRIEF IN SUPPORT." Mr. Emosivbe transmitted the e-mail at 02:23:07 UTC (Greenwich Mean Time) on 29 April 2011 and the Board received it at 10:23 p.m. local time on 28 April 2011. The printed version of the e-mail and attachment were stamped in at the Board the next morning, 29 April 2011 at 6:51 a.m.

On 16 May 2011, the Board received from the government its "MOTION TO DISMISS FOR LACK OF JURISDICTION." The government asked us to stay its response to the reconsideration motion since the government's motion, if granted, would be dispositive of the case. We granted the government's motion to stay. We received F&B's response to the government's motion to dismiss on 22 May 2011.

DECISION

Board Rule 29, Motion for Reconsideration, states:

A motion for reconsideration may be filed by either party. It shall set forth specifically the grounds relied upon to sustain the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

In moving to dismiss for lack of jurisdiction,¹ the government urges us to adopt a bright-line rule that "a filing does not occur until there is some meaningful receipt by an agent authorized to receive filings on behalf of the Board, such as an employee of the

¹ Although the time limits are strictly enforced, Rule 29 is not jurisdictional.

Office of the Board[’s] Recorder” (gov’t mot. at 5). If we were to adopt this “bright-line” rule, the government says, “no custody was taken over Appellant’s Motion nor any meaningful receipt of it until the Board’s agent in the Recorder’s office received the document and stamped it at 6:51 A.M. on 29 April 2011” (*id.* at 8-9), and F&B’s motion would be untimely (*id.* at 10).

Rule 29 does not restrict the method of filing. As a matter of practice, we have permitted filing by facsimile and by e-mail in addition to filing by mail and by courier delivery service. *Al-Dhiyaa Bureau for General Contracting, Al-Ghadeer Bureau for General Contracting, Al-Sa’Doon Bureau for General Contracting*, ASBCA No. 55788 *et al.*, 10-2 BCA ¶ 34,488 (e-mail complaining about fairness of the Board’s decision deemed to be a timely motion for reconsideration); *Zolman Construction & Development, Inc.*, ASBCA No. 48135, 95-1 BCA ¶ 27,469.

While receipt of delivery by mail or by courier service depends upon office hours at the point of receipt, receipt of facsimile or e-mail does not. The Board’s facsimile machines and computers are able to receive transmissions any time of the day or night. For this reason, we believe an electronic filer should have until midnight, local time, on the 30th day, to file its motion for reconsideration under Rule 29.

In the case before us, F&B’s e-mail with its attached motion for reconsideration addressed to the e-mail address of the ASBCA Recorder, was sent on 29 April 2011, from Copenhagen, Denmark. The e-mail with its attached motion for reconsideration was received by the Board at 10:23:42 p.m.², 28 April 2011, before midnight on the due date. But for the fact the ASBCA was closed for business at night, F&B’s e-mail with its attached motion for reconsideration could have been accessed as soon as they were received. As it was, ASBCA personnel did not open, print, and time stamp F&B’s e-mail submission until 6:51 a.m., the next morning, 29 April 2011. We conclude, under the circumstances, F&B’s motion for reconsideration, complete on its face, is timely filed. In our view, Rule 29 is sufficiently broad to accommodate this result. To adopt the bright-line rule suggested by the government, requiring electronically-transmitted documents to be filed during business hours when Board personnel are present, would be a step backwards when commerce and filings are increasingly accomplished by electronic transmission.

² Converting from UTC to Eastern Daylight Time (EDT) placed the e-mail receipt time at 10:23:42 p.m.

CONCLUSION

The government's motion to dismiss for lack of jurisdiction is denied. The government's response to F&B's motion for reconsideration is to be filed within 30 days from receipt of a copy of this decision.

Dated: 18 July 2011



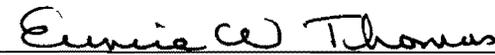
PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

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. 56129, Appeal of Free & Ben, Inc., rendered in conformance with the Board's Charter.

Dated:

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