

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Bruce E. Zoeller) ASBCA No. 56578
)
Under Contract No. DACA41-1-99-532)

APPEARANCE FOR THE APPELLANT: Mr. Bruce E. Zoeller
Hiawatha, KS

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
William M. Edwards, Esq.
Alice J. Edwards, Esq.
Engineer Trial Attorneys
U.S. Army Engineer District, Kansas City

OPINION BY ADMINISTRATIVE JUDGE DELMAN

By decision dated 27 June 2013, the Board addressed the parties' cross-motions for summary judgment, denying appellant's motion, and denying in part and granting in part the government's motion. *Bruce E. Zoeller*, ASBCA No. 56578, 13-1 BCA ¶ 35,353.

Appellant received the Board's decision on 5 July 2013. Pursuant to Board Rule 29 (48 C.F.R., ch. 2, app. A, pt. 2), a party has 30 days from receipt of a Board decision to file a motion for reconsideration. In this case, the 30th day—4 August 2013—was a Sunday, and hence appellant had through Monday, 5 August 2013 to file the motion.

On Friday, 2 August 2013, appellant emailed to the Board a motion "for an enlargement of time in which to file its motion to reconsider and response to the Board ruling dated 27 JUN 12."¹ Appellant's motion was unsigned, and appellant emailed a signed motion on Sunday, 4 August 2013. On Monday, 5 August 2013 at 12:40 p.m., the Board responded to appellant by email, advising that it was unaware of any Board case law that allowed for an extension to the 30-day filing requirement for the filing of a motion for reconsideration; that a timely motion for reconsideration needed to be filed by 5 August 2013; and that upon such a filing, the Board would consider the contractor's request for additional time to file a brief in support of the motion. (Bd. corr. file)

¹ The Board's decision was actually dated 27 June 2013.

On the afternoon of 5 August 2013 (the last day of the reconsideration period), appellant telephoned the Board to inquire about “whether an emailed motion for recon had to be submitted by 4:00 or whenever the Board closed for the day.” He was advised that “emailed documents are considered filed on the day received by the Board’s email server, any time up to 11:59 p.m.” (Bd. corr. file)

On Tuesday, 6 August 2013 at 12:32 a.m., the Board received the following email document from appellant:

APPELLANT’S MOTION FOR RECONSIDERATION AS
WELL AS MOTION FOR STAY TO AFFORD THE
GOVERNMENT SUFFICIENT TIME NEEDED TO
CONSTRUCT THE DOCUMENTS WHICH THE BOARD
HAS ORDERED THE GOVERNMENT TO PRODUCE

On 6 September 2013, the government filed a motion to dismiss appellant’s motion for reconsideration as untimely, or if the motion is deemed timely to dismiss it for lack of new evidence or a failure to show errors in fact findings or legal theories that were not previously considered. Appellant filed a reply in opposition to the government on 7 October 2013.

DECISION

We have strictly construed Board Rule 29, requiring that motions for reconsideration be timely filed no later than 30 days from the receipt of a Board decision, although additional time may be granted to file a brief in support of a timely motion. A request for additional time to file a motion for reconsideration does not extend or waive the 30-day time limit. *Environmental Safety Consultants, Inc.*, ASBCA No. 54615, 07-2 BCA ¶ 33,613. An email filing is considered timely if it is received by the Board up to midnight of the last day of the reconsideration period. *Free & Ben, Inc.*, ASBCA No. 56129, 11-2 BCA ¶ 34,802.

It is undisputed that appellant’s motion for reconsideration was received by the Board on 6 August 2013 at 12:32 a.m. Appellant argues that its motion was only 32 minutes late and should be considered timely. However, appellant had 30 days (actually 31 days since the 30th day was a Sunday) to file this motion, and by email it had the additional flexibility of filing the motion after the Board’s business office was closed so long as it was received by the Board by 11:59 p.m. on 5 August 2013. Notwithstanding this flexibility and through no fault of the Board, appellant failed to timely file its motion. Accordingly, appellant’s motion for reconsideration is denied as untimely. Appellant is not without recourse however. After the Board issues its final decision on quantum, appellant may seek judicial review as provided in the Contract Disputes Act, 41 U.S.C. § 7107.

CONCLUSION

For reasons stated herein, appellant's motion is denied. The parties shall have 30 days from receipt of this opinion to supplement the record on the two disputed data points in the quantum formula addressed in the Board's decision dated 27 June 2013.

Dated: 17 December 2013



JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



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



DIANA S. DICKINSON
Administrative Judge
Acting 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. 56578, Appeal of Bruce E. Zoeller, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals