

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of--)
)
Alnawars Company) ASBCA No. 58678
)
Under Contract No. W91GEU-07-P-2502)

APPEARANCE FOR THE APPELLANT: Mr. Buraier Yassen
Owner

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Samuel E. Gregory, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE STEMLER ON GOVERNMENT'S
MOTION TO DISMISS FOR LACK OF JURISDICTION

The government has moved to dismiss this appeal for lack of jurisdiction on the basis of an untimely-filed notice of appeal. We grant the government's motion and dismiss the appeal for lack of jurisdiction.¹

¹ After reviewing the facts summarized in Statement of Facts nos. 1, 3, 4, 6, the Board, by Orders dated 20 September and 9 October 2013, stated that it understands that Mr. Yassen is the owner of Alnawars Company for the purpose of determining whether appellant has complied with Board Rule 26. Because the government had asserted some intent to object, the Board directed the government, if it wished to present evidence that Mr. Yassen does not meet the requirements of Rule 26, to do so by 23 October 2013. On 22 October 2013, the government objected to the Board's decision concerning Rule 26, arguing that there is no evidence supporting the Board's decision aside from the emailed communications and urging that appellant should provide some other evidence that Mr. Yassen meets the requirements of Rule 26. However, the government did not present any evidence that Mr. Yassen does not meet the requirements of Rule 26. For purposes of this motion, the Board is satisfied that the requirements of Board Rule 26 are met. It is unexplained how the government reconciles its position in its motion to dismiss with its opposition to Mr. Yassen being appellant's Rule 26 Representative since we could not rule on the government's motion if Mr. Yassen was not authorized to act on appellant's behalf.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 31 August 2007, the Joint Contracting Command-Iraq/Afghanistan (the government) awarded Contract No. W91GEU-07-P-2502 (the contract) to “ALNAWARS COMPANY...BURAIER YASSEN” (appellant) for the delivery of gravel to Camp Liberty, Baghdad, Iraq. The total award amount of the contract was \$54,000. (Gov’t mot., ex. A)

2. By document dated 14 September 2007, appellant submitted Invoice No. 750 to the government in the amount of \$54,000 (gov’t mot., ex. B at 3). On 25 November 2007, the government’s finance office disbursed a cash payment of \$54,000. The payment record, issued in response to Invoice No. 750, identifies the payee as “AL NAWARS COMPANY, BAGHDAD, IRAQ.” The name “HASSAN” is handwritten above the “PAYEE” block. (*Id.* at 1)

3. By email to a contracting officer, from “Buraier Yassen [alnawarscompany@yahoo.com],” dated 29 November 2007, appellant stated,

I’d like to inform you I was sent my Reps. to pick up the payment for contract ((07_P_2502)), the finance office told him the payment already paid on 15th [sic] of NOV, This incorrect thing because I haven’t sent any person before yesterday, please advice. Note: I already told finance office do not pay any payment without authorization letter signed by my self, waiting reply ASAP.

(Gov’t corr. dtd. 22 October 2013, attach. 1)

4. The government’s currently-assigned contracting officer issued a contracting officer’s final decision (COFD), dated 14 January 2013, in response to appellant’s 29 November 2007 email.² In the COFD, the contracting officer stated, in relevant part,

Documentation in contract file shows invoice as paid. There is no evidence to suggest that funds were improperly disbursed. My decision is that invoice No 750 has been paid and the contract will remain closed.

² Neither party questions whether appellant’s 29 November email constituted a claim. For purposes of this motion, we find that appellant’s email constituted a claim, and that the COFD was in response thereto.

The COFD also informed appellant,

You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals....

...Instead of appealing to the agency board of appeals, you may bring an action directly in the United States Court of Federal Claims...within 12 months of the date you receive this decision.

(Gov't mot., ex. C)

5. The government's contract specialist sent the COFD to appellant via an email dated 14 January 2013, addressed to "Buraier Yassen" (gov't mot., ex. C). Since appellant has not asserted, in response to the government's motion, that it received the COFD on a different date, we find that appellant received the COFD on 14 January 2013.

6. On 3 June 2013, 140 days after it received the 14 January 2013 COFD, appellant (Mr. Yassen) appealed the COFD to this Board via email.

DECISION

The government moves to dismiss the appeal for lack of jurisdiction on the ground that appellant's notice of appeal was untimely because it was not filed within 90 days from appellant's receipt of the COFD. Appellant responds that it has not received payment and the payment is still due appellant even if it did not appeal the COFD within 90 days from receipt.

The Contract Disputes Act (CDA) provides that "[a] contractor, within 90 days from the date of receipt of a contracting officer's decision under section 7103 of this title, may appeal the decision to an agency board." 41 U.S.C. § 7104(a). This 90-day appeal period is statutory, strictly construed and cannot be waived. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982).

Appellant's appeal, submitted to this Board by email 140 days after it received the COFD, was filed well outside the statutory 90-day appeal period set forth in the CDA for appeals to this Board. The appeal is untimely and is dismissed for lack of jurisdiction.

Dated: 19 November 2013



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

I concur



MARK A. MELNICK
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I concur



JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Order of Dismissal of the Armed Services Board of Contract Appeals in ASBCA No. 58678, Appeal of Alnawars Company, rendered in conformance with the Board's Charter.

Dated:

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