ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Maintenance Engineers	)	ASBCA No. 53060
	)	
Under Contract No. N62467-97-D-0929	)	

APPEARANCE FOR THE APPELLANT: Mr. Bradley G. Herman
Vice President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Chuck Kullberg, Esq.
Senior Trial Attorney
Engineering Field Activity Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE JAMES

The Government requested the Board to order appellant to show cause why this appeal should not be dismissed for lack of jurisdiction, arguing that the notice of appeal was filed more than 90 days after appellant had received the contracting officer's final decision (COFD). The Board issued such an order. Appellant responded, asserting that the COFD did not address two of its three claims and, therefore, the Contract Disputes Act's 90-day filing limit does not preclude Board jurisdiction of this appeal. We find that the appeal is untimely and dismiss the appeal for lack of jurisdiction.

STATEMENT OF FACTS

1. The Navy awarded Contract No. N62467-97-D-0929 (the contract) to Maintenance Engineers (appellant) on 7 January 1998 for grounds maintenance services at the Coastal Systems Station, Panama City, FL, for the price of $363,608. The contract incorporated by reference the FAR 52.233-1 DISPUTES (OCT 1995) clause. (R4, tab 1)

2. Appellant's 30 June 1999 letter to the Government stated:

> This is a claim under the disputes clause of the contract, requested is a Contracting Officer's Final Decision within sixty (60) days.
>
> Reference is made to pre-contract start meeting of 29 January 1998, all minutes of meetings and correspondence relating to

Mr. Gerald McCallister, and all inspections performed by Mr. . . . . McCallister.

Claim 1: All deductions taken for Family Housing based upon the inspections of . . . . McCallister should not have been taken.

During the meeting of 29 January 1998 the Government stated that Shirley Shoemaker would be the QAE for Family Housing. Ms. Shoemaker was the assigned QAE for Family Housing for the entire term of the contract she did not issue any negative inspections relating to our work. All deductions, for work performed in Family Housing, were based upon the inspections of Mr. . . . McCallister, who was not assigned to the Family Housing areas. The total amounts deducted from our invoices, should be returned due to fact that the person assigned to inspect Family Housing found our work was performed to an acceptable quality level.

Claim 2: Inspections were not properly performed for Base and Family Housing areas.

The inspections reports failed to clearly identify the deficiency. The Performance Requirements Summary divides each work requirement into various sub task [sic]. Each sub task is assigned a specific weighting. Virtually each of the negative reports received by us do [sic] not break the items into the various sub tasks. The majority of the inspections were identified with a checkmark in a box "sat" or "unsat" or "rework" and did not clearly indicate the deficiency per the Standards of Performance. Without proper inspection reports the amount of deduction could not be determined . . . .

Claim 3: The inspections performed by Mr. . . . McCallister were bias [sic] against Maintenance Engineers and should not be utilized.

The inspections performed by Mr. . . . McCallister were prejudice [sic] against our firm. Our complaints centered on his directing our employees, his vindictive inspections and his personal negative bias towards our firm. Anytime we disagree with him on his inspection reports, the interpretation of the contract, or methodology of our operation; the inspections that followed were more stringent until he calmed down . . . . [T]he

> governments [sic] letter of 15 October 1998, ... recognized that Mr. McCallister's impartiality was not possible, and thus removed him from his duties associated with our contract.
>
> These claims were detailed in our letter to the Contracting Officer dated 17 February 1999, which we have not received a response.
>
> Our claim is in the amount of $22,449.31 plus interest, due to the Government's improper inspections, bias on the part of Mr. McCallister, and inspections made by persons not assigned to the Family Housing areas.

Appellant's 30 June 1999 letter did not contain a sum certain for each of the three numbered "Claims." (R4, tab 2)

3. The 17 November 1999 COFD denied appellant's 30 June 1999, $22,449.31 claim, stating, in pertinent part:

> Inspection is a Government right and the selection of a qualified inspector is up to the Government. There is no evidence that Mr. McCallister was not qualified, improperly interfered with the work force or was otherwise unreasonable as to his method of inspection. The Quality Assurance Evaluation reports clearly state the reasons where unsatisfactory performance was noted. If you did not understand these reports it was your duty to seek clarification.

(R4, tab 3) We find that the COFD denied appellant's $22,449.31 claim in its entirety.

4. Appellant's 22 December 1999 letter to the Government stated that "your Final Decision of 17 November 1999" did not contain a COFD on appellant's "Claim 1" or "Claim 2," and inquired when it might receive a COFD thereon. Such letter did not request reconsideration of the 17 November 1999 COFD, nor did it state that appellant wished to appeal therefrom. (R4, tab 4)

5. Appellant's 20 September 2000 notice of appeal to this Board stated that it—

> does hereby appeal . . . . the Contracting Officer's failure to issue decisions on claims 1 and 2 dated 30 June, 1999 . . . . On 17 November, 1999 a Contracting Officer's Final Decision was issued on claim 3 . . . . we hereby appeal the Contracting Officer's Final Decision on Claim 3.

Appellant's appeal was docketed as ASBCA No. 53060.

6. Respondent's 16 October 2000 letter: (a) requested the Board to order appellant to show cause why the appeal should not be dismissed for lack of jurisdiction based on the filing of the appeal more than 90 days after receipt of the final decision, and (b) enclosed its 17 November 1999 COFD and a copy of the certified mail receipt showing that appellant received that COFD on 29 November 1999.

7. The Board's 24 October 2000 letter informed appellant that it appeared that the appeal may be untimely and ordered it to show cause why the appeal should not be dismissed for lack of jurisdiction. Appellant's 20 November 2000 letter in response thereto stated in pertinent part:

> By our letter dated June 30, 1999, we filled [sic] three (3) claims. The claims were numbered 1, 2, and 3. Each and everyone [sic] of the claims was for the Contracting Officer to return $22,449.31 deducted from our payments. The amount of $22,449.31 was the total amount deducted from our payments. Therefore, we utilized the singular term "claim" as we did not want to imply that we were due a multiple of the $22,449.31.
>
> The Contracting Officer's Final Decision dated November 23 [sic], 1999 only addressed . . . . Claim No. 3 . . . .
>
> . . . .
>
> The Contracting Officer has never issued a Final Decision on Claims numbered 1 or 2. Therefore, the ninety (90) day limitation from the date of receipt of the final decision is not applicable.

DECISION

The Contract Disputes Act of 1978, 41 U.S.C. § 606, provides that a contractor may appeal from a contracting officer's final decision to an agency board of contract appeals within 90 days from the date of receipt of the decision. The Boards cannot waive that statutory appeal period. *See Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982). Appellant received the 17 November 1999 COFD on 29 November 1999 (SOF, ¶ 6). Appellant's 20 September 2000 notice of appeal (SOF, ¶ 5) was more than six months beyond the 90-day period allowed by the CDA.

Appellant argues that the contracting officer never issued a final decision on its "Claim 1" or "Claim 2" and, thus, such limit does not apply. We do not agree. We hold that the 17 November 1999 COFD denied appellant's $22,449.31 claim for improper deductions in its entirety, including those theories designated "Claim 1," alleging an improper QAE, "Claim 2," alleging inadequate inspection reports, and "Claim 3," alleging a biased QAE (SOF, ¶¶ 2-3).

This appeal was untimely. We dismiss the appeal for lack of jurisdiction.

Dated: 12 December 2000

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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. 53060, Appeal of Maintenance Engineers, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services

Board of Contract Appeals