

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Ledyard Mechanical Corp. ) ASBCA No. 53440  
 )  
Under Contract No. NAS3-27604 )

APPEARANCE FOR THE APPELLANT: Mr. Edward Ledyard  
President

APPEARANCE FOR THE GOVERNMENT: Jerald J. Kennemuth, Esq.  
Trial Attorney  
National Aeronautics and  
Space Administration  
John H. Glenn Research Center  
Cleveland, OH

OPINION BY ADMINISTRATIVE JUDGE STEMLER

In the course of the captioned proceedings, the Board questioned whether the appeal was timely filed. We conclude that it was not and dismiss for lack of jurisdiction.

FINDINGS OF FACT

1. On 19 June 2000, the contracting officer issued a final decision denying appellant's 17 December 1999 certified claim. The decision provided appellant with all the necessary appeal rights information, including its right to appeal to this Board within 90 days from receipt of the decision or to the Court of Federal Claims within one year of receipt of the decision. (R4, tab 36)

2. On 25 June 2001, appellant called the Board's Recorder's office and inquired concerning the status of an appeal said to have been filed in October 2000. Appellant was informed the Board had no such appeal docketed.

3. Also on 25 June 2001, via facsimile transmission, appellant sent this Board, a copy of a notice of appeal. The notice of appeal is dated 18 October 2000. (R4, tab 37) The 25 June 2001 transmission is the only record the Board has of the 18 October 2000 notice of appeal.

4. By Order dated 6 September 2001, appellant was directed to, by 27 September 2001, show by suitable evidence, whether affidavit or otherwise, that it filed a timely appeal in accordance with the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 606. Appellant's

response date was extended to 14 November 2001 by order dated 24 October 2001, and again to 14 December on 6 December 2001.

5. By facsimile transmission dated 17 December 2001, appellant submitted a letter and a copy of a Bankruptcy Court order dated 3 July 2001 regarding Mr. Ledyard's personal bankruptcy. Neither document addresses the apparent untimeliness of appellant's filing of its notice of appeal.

6. By letter dated 11 February 2002, the Government submitted the declaration of the cognizant contracting officer stating that he had transmitted his 19 June 2000 final decision to appellant on 19 June 2000, either by mail or facsimile. The contracting officer further stated that, approximately 55 days after issuing the decision, Mr. Ledyard called him and asked "for more information on submission of an appeal." During that same conversation, according to the declaration, the contracting officer referred appellant "back to the final decision and explained to [appellant] that his appeal rights were set forth in that document."

7. On 22 February 2002, the Board issued an Order to Show Cause why the appeal should not be dismissed since it appeared that appellant had not timely appealed. Appellant was given until 22 March 2002 (later extended to 29 March and 12 April 2002) to respond.

8. On 12 April 2002, appellant filed a letter and several exhibits with the Board. The filing deals with the facts and circumstances surrounding its claim. Nothing in the filing demonstrates or attempts to demonstrate that appellant's appeal was filed timely.

9. On 20 May 2002, the Government filed its reply to appellant's response to the Board's Order to Show Cause. In essence, the Government argues that appellant has failed to show that it timely appealed the contracting officer's decision, and asks that we dismiss the appeal.

### DECISION

Our jurisdiction in this appeal derives from the CDA, 41 U.S.C. §§ 601-613, as amended. Under the CDA, an appeal from a contracting officer's decision must be taken within 90 days of a contractor's receipt of that decision. 41 U.S.C. §§ 605(b), 606. The appeal period is statutory and cannot be waived by the Board. *Cosmic Constr. Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982), *aff'g Cosmic Constr. Co.*, ASBCA No. 26537, 82-1 BCA ¶ 15,541. While it is the Government's burden to establish the date the final decision was received, it is the appellant's burden to establish that its appeal was timely filed. *Mid-Eastern Industries, Inc.*, ASBCA No. 51287, 98-2 BCA ¶ 29,907.

Appellant has not alleged that it received the contracting officer's decision in an untimely manner. Appellant has not filed an affidavit pertaining to the circumstances under

which appellant allegedly mailed the notice of appeal dated 18 October 2000 which the Board received by facsimile on 25 June 2001. Under the circumstances here present, we are convinced that appellant received the final decision substantially more than 90 days before the filing of its notice of appeal. *Propulsion Controls Engineering*, ASBCA No. 53307, 01-2 BCA ¶ 31,494; *Sancolmar Industries, Inc.*, ASBCA No. 16879, 73-1 BCA ¶ 9812. Appellant has not carried its burden to persuade us that the notice of appeal was timely filed. Accordingly, the appeal is dismissed for lack of jurisdiction.

Dated: 3 June 2002

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

I concur

I concur

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

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CARROLL C. DICUS, JR  
Administrative Judge  
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. 53440, Appeal of Ledyard Mechanical Corp., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals