

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Wilco Construction, Inc.) ASBCA No. 53851
)
Under Contract No. DACA56-00-C-2021)

APPEARANCE FOR THE APPELLANT: Larry Lewis, Esq.
Monte J. White & Associates, P.C.
Wichita Falls, TX

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
John W. Sturges, Esq.
John Roselle, Jr., Esq.
Engineer Trial Attorneys
U.S. Army Engineer District,
Tulsa

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
PURSUANT TO BOARD RULES 11 and 12.3

Appellant appealed a contracting officer's final decision denying its claim in the amount of \$3,385.00 for additional costs to install carpet in three rooms in Snow Hall, Fort Sill, Oklahoma. Appellant elected to proceed under Board Rule 12.2, subsequently changed to Rule 12.3. The Government submitted supplements to the record and a brief in response to the Board's Order regarding the processing of the appeal following a conference call between the parties. Appellant did not submit supplemental materials to the record and did not submit a brief. Neither party addressed the possible untimeliness of the appeal in their respective pleadings or other documents filed with the Board. Therefore, the Board, *sua sponte* raised the issue of our jurisdiction and directed the parties to provide evidence regarding the timely filing of the appeal.

FINDINGS OF FACT

1. The contracting officer issued a final decision denying appellant's 21 January 2002 claim. This decision was issued on 14 March 2002, and mailed certified mail, return receipt requested, and contained all the necessary appeal rights information, including the contractor's right to appeal to this Board within 90 days from the receipt of the decision, or to the Court of Federal Claims within one year of the receipt of the decision. The Government has filed with the Board a copy of a certified mail receipt, signed by

appellant's representative on 20 March 2002, indicating appellant's receipt of the contracting officer's final decision on that date (Official Board File; R4, tab R2).

2. By letter dated 25 June 2002, meter-stamped 28 June 2002, and received by the Board on 1 July 2002, appellant filed its notice of appeal. Appellant also elected to proceed under Board Rule 12.2, subsequently changed on 2 July 2002 to Rule 12.3.

3. By order dated 11 December 2002, issued by facsimile transmission dated 11 December 2002 and by mail on that date, the Board, raised the issue of the Board's possible lack of jurisdiction due to possible untimely appeal, and directed appellant to file with the Board within five (5) days of the order, suitable evidence that it had filed a timely appeal in accordance with the Contract Disputes Act of 1978 (CDA), as amended, 41 U.S.C. § 606. The Order further stated that appellant may submit evidence by affidavits or otherwise, of when it received the contracting officer's final decision and when the notice of appeal was mailed, by proof of mailing, or any other evidence to indicate that appellant's notice of appeal was timely filed. Appellant has failed to respond to this Order or communicate in any other way to the Board concerning its appeal.

DECISION

Our jurisdiction in this appeal, if any, derives from the CDA, 41 U.S.C. §§ 601-613, as amended. Under the CDA, an appeal from the 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 Construction Company, v. United States*, 697 F.2d 1389 (Fed. Cir. 1982). While it is the Government's burden to establish the date that the contracting officer's final decision was received by the appellant, it is the appellant's burden to establish that its appeal was timely filed. *Mid-Eastern Industries, Inc.*, ASBCA No. 51257, 98-2 BCA ¶ 29,907. It may do so by affidavit or other evidence. It has not done so here.

Appellant has not alleged, nor has it provided any evidence, that it did not receive the contracting officer's decision in a timely matter, and that it filed its notice of appeal within the statutory ninety (90) day period required for timely filing. Indeed, the Government's submission of the return receipt from its certified mailing of the contracting officer's final decision established that appellant received the contracting officer's final decision more than ninety (90) days before the date of its 25 June 2002 notice of appeal, which notice was meter-stamped 28 June 2002 and received by the Board on 1 July 2002. We, therefore, hold, under the circumstances and appellant's lack of attempt to establish the timeliness of its appeal, that the appeal was untimely and that we have no jurisdiction to consider the merits of the appeal. *Propulsion Controls Engineering*, ASBCA No. 53307, 01-2 BCA ¶ 31,494.

Accordingly, the appeal is dismissed.

Dated: 30 December 2002

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
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. 53851, Appeal of Wilco Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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