ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Centurion Electronics Service	)	ASBCA No. 51956
	)	
Under Contract No. DABT19-94-C-0026	)	

APPEARANCE FOR THE APPELLANT: Mr. Anthony Drew
Owner

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Richard L. Hatfield, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING
ON APPELLANT'S MOTION FOR RECONSIDERATION

Centurion Electronics Service (Centurion) has filed a motion for reconsideration of the Board's decision issued on 5 December 2002. *Centurion Electronics Service*, ASBCA No. 51956, 03-1 BCA ¶ 32,097.

The Board's record shows that an authenticated copy of the Board's decision, issued on 5 December 2002, was sent to Centurion by certified mail return receipt requested (PS Form 3811) dated 6 December 2002. No receipt of this mailing was ever returned to the Board. As a result of an inquiry from Mr. Anthony Drew (Drew), Centurion's owner, the Board sent a second authenticated copy of the decision to Centurion by letter dated 3 January 2003. This letter was also sent by certified mail return receipt requested. No return receipt was ever received by the Board on this second mailing.

On 29 January 2003, Drew called the Board and advised that he intended to file a motion for reconsideration. When asked when he received the Board's decision, he indicated it was on either 7 or 8 January 2003. Drew was instructed to return the return receipt for the purpose of establishing timeliness of the motion he was about to file.

On 19 February 2003, the Board received from Centurion an unsigned and undated motion for reconsideration. The motion came in an envelope which was postmarked 13 February 2003. By letter dated 19 February 2003, the Board advised Drew that his appeal had been provisionally reinstated to the Board's docket, and that he should provide the Board and Government counsel a signed copy of the motion. He was also asked to provide the Board and the Government evidence of the date he received the Board's decision mailed to him on 3 January 2003.

On 10 March 2003, Drew sent the Board by FAX a signed copy of the motion, and a copy of the PS Form 3811 showing that he signed for the decision on 19 January 2003. As evidenced by his ability to FAX a copy of the return receipt to the Board, Drew had obviously retained it and had not returned it.

By letter dated 10 March 2003, the Board asked the Government to respond to the motion by 15 April 2003. On 10 April 2003, Government counsel advised that he had elected not to file a response.

Although we have questions as to when Drew received a copy of the Board's decision mailed to him on 3 January 2003, there is no way to establish that he received the decision earlier than 19 January 2003. We therefore consider Centurion's motion, postmarked 13 February 2003, to have been timely filed pursuant to Rule 29.

DECISION

Centurion's motion raises four points. As its first point, Centurion contends that our findings relating to Modification No. P00002 were based on a document – Rule 4, tab 4 – which was removed from the Rule 4 file. Centurion argues that, as a consequence, our findings in ¶¶ 21-25 of the decision relating to Drew's signing of the modification and thus agreeing to the service call and parts reductions should be withdrawn. The record shows that Rule 4, tab 4 – Modification No. P00002 – was removed from the Rule 4 file pursuant to Rule 4(e) at the beginning of the hearing on 18 June 2001, as a result of Drew's objection (tr. 18-19). However, during the hearing on 19 June 2001, Government counsel moved that document into evidence, and it was admitted over Drew's objection (tr. 284). Consequently, we see no reason to disturb findings ¶¶ 21-25.

As point 2 of its motion, Centurion asks us to decide the Breach of Protest Settlement issue because of "the significant amount of time, testimony, and evidence amassed in this case concerning this issue" (mot. at 1). Our jurisdiction does not depend upon the amount of evidence in the record. As we said in our original opinion, citing *Stencel Aero Engineering Corp.*, ASBCA No. 28654, 84-1 BCA ¶ 16,951 at 84,315, the proper scope of an appeal processed under the Contract Disputes Act is "circumscribed by the parameters of the claim, the contracting officer's decision thereon, and the contractor's appeal therefrom" (03-1 BCA at 158,657). In moving for reconsideration, Centurion continues to rely on "the initial complaint letter, pre-trial discussions, interrogatories, a significant amount of trial testimony, as well as the post-trial brief" (mot. at 1). None of these activities, however, give us jurisdiction. Without a claim, and without a contracting officer's decision on that claim, we did not, and still do not, have jurisdiction to decide the Breach of Protest Settlement issue.

As point 3 of its motion, Centurion wants us to allow the adjustments the contracting officer (CO) erroneously granted. It cites FAR 50.302-1(b) as our authority to do so. Part 50 of the FAR pertains to "EXTRAORDINARY CONTRACTUAL ACTIONS." It prescribes policies, and procedures for entering into, amending, or modifying contracts in order to facilitate the national defense under the extraordinary emergency authority granted by Pub. L. No. 85-804, as amended. As we have said before, we are not empowered to grant relief under that law and its implementing regulations. *See Paragon Energy Corp. v. United States,* 645 F.2d 966, 974-75 (Ct. Cl. 1981).

As point 4 of its motion, Centurion takes exception to the Board's finding that although Centurion used the proposal format sheets furnished by the Government to develop its hourly rates, it was free to use other methods as well (finding 15). Centurion contends that, contrary to the Board's findings, "this was the only pricing formula presented to the contractor for the purposes of deriving a fair hourly rate for the services rendered under the contract" (mot. at 2). At the hearing, CO Ms. Elizabeth Bornman testified that since Centurion was a new business starting up, the proposal format sheet was provided to it for guidance. She also testified that "[t]here are other ways of deriving at the hourly rate. That's the method he chose" (tr. 164). In any event, the predicament in which Centurion found itself had nothing to do with the hourly rates it negotiated which were in the "same ball park" as those paid under its blanket purchase agreements (finding 15). Rather, Centurion's predicament stemmed from the requirements contract it entered into with the Government. Under that contract, although the volumes of service calls ordered fell far short of the estimates given, the Government ordered all of its Automated Data Processing Equipment (ADPE) repair needs from Centurion (finding 17). We have found that to the extent Centurion relied on the Government furnished proposal format sheets in concluding that 3,500 service call hours a year would be ordered, Drew was told, at a 9 August 1994 meeting, there were no guarantees in the contract to be awarded (finding 16). Moreover, we have found no evidence that the service call estimates were not realistic or not current, or were negligently prepared, or that the estimates were not prepared in good faith (finding 11) to warrant an adjustment in the contract price.

For the foregoing reasons, Centurion's motion for reconsideration is denied.

Dated: 21 May 2003

PETER D. TING
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. 51956, Appeal of Centurion Electronics Service, rendered in conformance with the Board's Charter.

Dated:

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