

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Costruzioni & Impianti s.r.l.) ASBCA No. 53853
)
Under Contract No. NAFVC2-98-C-0015)

APPEARANCE FOR THE APPELLANT: Mr. Ron Massimo
Amministratore Unico

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT John T. Harryman, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE COLDREN

The Government has filed a motion to dismiss the appeal as having been filed in an untimely fashion. We grant the motion and dismiss the appeal.

FINDINGS OF FACT
FOR PURPOSES OF
THE MOTION

1. In 1998, the United States Army Morale, Welfare and Recreation Fund, a non-appropriated fund instrumentality of the United States Army, awarded the subject construction contract to the Costruzioni & Impianti s.r.l. (appellant).

2. The construction contract contains a "DISPUTES" clause which provides in pertinent part:

I-25 DISPUTES (APRIL 1987)

(a) This contract is subject to the rules and regulations promulgated by the Secretary of Defense and Secretary of the Army for NAF contracting.

(b) The contract is not subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

(c) All disputes arising under or relating to this contract shall be resolved under this clause.

....

(g) The Contractor [sic] Officer's decision shall be final unless the Contractor appeals as provided in paragraph (h) of this clause.

(h) The Contracting Officer's final decision may be appealed by submitting a written appeal to the Armed Services Board of Contract Appeals within 90 days of receipt of the Contracting Officer's final decision. Decisions of the Armed Services Board of Contract Appeals are final and are not subject to further appeal.

(R4, tab 1 at 21)

3. A dispute arose between the parties concerning the responsibility for certain needed repairs (R4, tabs 4, 8). The Government directed the contractor to make these repairs (R4, tabs 10, 37) under the "WARRANTY OF CONSTRUCTION" clause which provides in pertinent part:

I-30 WARRANTY OF CONSTRUCTION (APRIL 1987)

(a) In addition to any other warranties in this contract, the Contractor warrants, except as provided in paragraph (j) of this clause, that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work. If the NAFI takes possession of any part of the work before final acceptance, this warranty shall continue for a period of 1 year from the date the NAFI takes possession.

(R4, tab 1 at 23).

4. The contractor refused to make the directed repairs and demanded the payment of the monies remaining to be paid under the contract (R4, tab 38). A final decision dated 7 March 2002 was issued by the contracting officer terminating the contract for default and

withholding final payment (R4, tab 39). The final decision specifically notified appellant of its right to appeal to this Board within 90 days from receipt of the decision (*id.*).

5. Two provisions within the contract defined applicability of law, and in pertinent part, are as follows:

6. NON-APPLICABILITY OF ITALIAN CIVIL CODE

The undersigned contractor, having seen and being completely knowledgeable of the contents of the solicitation and eventual contract, in all of its parts, hereby renounces to any and all rights afforded to him by article 1341 of the Italian Civil Code with respect to the provisions and clauses listed below of this contract and Italian Civil Code articles 1664, 1467, and 1673. This renouncement is made on his own free will without having received influence of any kind, from any third parties, including the Contracting Officer. The contractual price includes adequate monetary compensation for this renouncement.

....

7. CHOICE OF LAW

This contract will be construed and the rights and obligations thereunder will be governed by the Laws of the District of Columbia, United States of America, as interpreted by the United States Federal Courts, regardless of the place of execution or performance.

(R4, tab 1 at 49, 38)

6. The contractor received the final decision on 15 March 2002, as confirmed by a notice of receipt from the Italian postal authorities (R4, tab 41).

7. On 2 July 2002, appellant mailed a letter to this Board generally taking exception to the 7 March 2002 decision and declaring that “the claim to [the contracting officer’s] decision has been lodged at the Leghorn court that having the jurisdiction.” We treated this letter as a notice of appeal. It was mailed 109 days after appellant’s receipt of the final decision.

8. On 29 August 2002, the Government filed a Motion to Dismiss alleging appellant’s appeal was untimely. By letter dated 12 September 2002, the Board afforded appellant 30 days in which to respond to the Government’s Motion to Dismiss.

9. Appellant did not respond; nor did appellant file its complaint. Subsequently, the Board sent a Show Cause Notice dated 7 November 2002 to appellant by registered mail. When no confirmation receipt was returned to the Board, the Show Cause Notice was faxed to the appellant on 28 January 2003. By letter dated 30 January 2003, and received by this Board on 3 March 2003, appellant responded to the Show Cause Notice. Appellant's response addressed the merits of the dispute between the parties and again referenced the "Leghorn COURT"; it did not, however, address the timeliness issue, which is the threshold issue which must be decided by the Board.

DECISION

The issue before the Board is whether, under the Disputes clause of the contract, appellant filed its notice of appeal in a timely manner. The Government bases its Motion to Dismiss on the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. However, the CDA does not apply. The subject contract was awarded by a non-appropriated fund instrumentality (NAFI) of the United States Army which is not an activity described in 28 U.S.C. §§ 1346, 1491. Therefore, the Board's jurisdiction in this matter stems from its Charter and the Disputes clause contained within the contract, not from the CDA. 41 U.S.C. § 602(a); *Computer Valley International, Ltd.*, ASBCA Nos. 39658, 40496, 94-1 BCA ¶ 26,297.

The contract entered into by the parties stated in the "DISPUTES" clause, "[t]he contract is not subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613)." The clause went on to provide, "[t]he Contracting Officer's final decision may be appealed by submitting a written appeal to the Armed Services Board of Contract Appeals within 90 days of receipt of the Contracting Officer's final decision."

Appellant received the contracting officer's final decision on 15 March 2002. The contracting officer's final decision contained appeal rights consistent with the contract's clause governing disputes.

Timely appeal to the Board would have required that the notice of appeal be filed on or before 13 June 2002. Appellant's notice of appeal was filed 2 July 2002. Accordingly, we grant the Government's motion and dismiss this appeal for lack of jurisdiction as being untimely filed.

Dated: 12 March 2003

JOHN I. COLDREN, III
Administrative Judge

Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 53853, Appeal of Costruzioni & Impianti s.r.l., rendered in conformance with the Board's Charter.

Dated:

EDWARD ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals