ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
American Renovation & Construction Company	)	ASBCA No. 54039
	)	
	)	
Under Contract No. F41622-98-C-0011	)	

APPEARANCES FOR THE APPELLANT: Robert G. Watt, Esq.
Frank S. Murray, Esq.
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
McLean, VA

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Richard L. Hanson, Esq.
Deputy Chief Trial Attorney
MAJ Stacie A. Remy Vest, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES ON
RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Respondent moves to dismiss this appeal for lack of jurisdiction on the ground that the appellant did not appeal timely from the contracting officer's (CO) partial termination decision under the Contract Disputes Act (CDA) of 1978. Appellant opposes the motion.

STATEMENT OF FACTS (SOF)

1. On 27 March 1998 the Air Force awarded Contract No. F41622-98-C-0011 (contract 11) to American Renovation & Construction Company (ARC) to construct 72 military family housing units at Malmstrom Air Force Base (AFB), Montana (R4, tab 1 at 1-2).

2. Contract 11 incorporated by reference the FAR: (a) 52.233-1 DISPUTES (OCT 1995) clause, which provided that "[t]he Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the [Contract Disputes] Act" and did not expressly state to which tribunals and within what time periods such appeal could be taken, and (b) 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause, which stated that if the contractor refused or failed to prosecute the work or any separable part with the diligence that would insure its completion within the time specified in the contract,

or failed to complete such work by such time, the Government might terminate the contractor's right to proceed with such work (R4, tab 1 at 19, 21 of 30).

3. After ARC had performed 98% of contract 11 and the Government had accepted the houses, a dispute arose about ARC's grading and landscaping around the units. On 1 October 2001 the CO decided on "a partial termination for default [of contract 11] . . . for uncompleted work, i.e. grading and landscaping." (R4, tab 3 at 3)

4. The CO's 2 October 2001 letter to ARC, designated a "Partial Termination for Default," did not advise ARC of its choices of appeal fora and their filing deadlines prescribed by the CDA and FAR 33.211(a)(4)(v), and stated:

> 2. Pursuant to FAR Clause 52.249-10 Default . . . Contract [11] . . . is hereby terminated. This termination applies to the uncompleted work, i.e., grading and landscaping.
>
> . . . .
>
> 6. This Notice constitutes the [CO's] determination that ARC's failure to perform is not excusable. ARC has the right to appeal this decision under the Disputes clause of the contract (FAR 52.333-1 [sic] Oct 1995).
>
> . . . .
>
> 8. This Notice constitutes a decision that ARC is in default as specified in paragraph 2, and ARC has the right to appeal under the contract's Disputes clause.

(R4, tab 4 at 2) ARC received that letter on 10 October 2001 (R4, tab 4 at 3). The 90th day thereafter was 8 January 2002.

5. On or about 19 December 2001 ARC received a default termination notice on its Malmstrom AFB "Phase I and II" military housing Contract No. F41622-97-C-0022, which correctly advised ARC of its right to appeal to the board of contract appeals within 90 days, or to the Court of Federal Claims within 12 months, after receipt of the CO's decision, which decision ARC timely appealed (app. resp., ¶ 5, ex. 1).

6. In February 2002, respondent's attorney, then CAPT Stacie Vest, and ARC's attorney, Robert Watt, discussed the 2 October 2001 default termination and respondent's investigation of problems with houses accepted under contract 11 (Gov't mot., tab 5 at ¶ 5; app. resp. at ex. 2, ¶ 2).

7. In the summer of 2002 CAPT Vest told Mr. Watt that the Air Force might revoke acceptance of work and terminate contract 11 for default. The attorneys discussed whether such revocation and termination would supersede the 2 October 2001 partial default termination, but CAPT Vest did not state a position on that issue. (Gov't mot., tab 5 at ¶ 6; app. resp., ex. 2 at 1)

8. The CO's 17 September 2002 letter to ARC did not mention or reference her 2 October 2001 partial default termination letter, and stated:

> 1. Pursuant to FAR Clauses 52.249-10 Default . . . and 52.246-12 Inspection of Construction, I am revoking acceptance of the project/site and terminating contract [11] in its entirety [for ARC's failure to complete the work in accordance with contract requirements, breaches of implied warranties of suitability and habitability, and latent defects].
>
> . . . .
>
> 8. This Notice constitutes a decision that the contractor is in default as specified, and that the contractor has the right to appeal under the Disputes clause (FAR 52.233-1).
>
> 9. This is the final decision of the [CO]. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you received this decision, mail or otherwise furnish written notice to the agency board of contract appeals . . . . The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number . . . . Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims . . . within 12 months of the date you receive this decision.

(Gov't mot., tab 3).

9. CAPT Vest's 18 September 2002 facsimile cover sheet forwarded that 17 September 2002 letter to Mr. Watt and stated:

> I wanted to get a copy to you so you can decide how you wish to proceed. We are viewing the partial T4D and the Revocation as two separate and independent actions. We anticipate discussing all issues related to all Terminations on both contracts at our settlement negotiations.

(R4, tab 6 at 4) CAPT Vest says that she sent that facsimile to assure that Mr. Watt was aware of the Air Force's position in time to appeal to the Court of Federal Claims if he so chose and she did not represent to Mr. Watt that the 2002 default termination would supersede the 2001 partial default termination (Gov't mot., tab 5 at ¶ 8).

10. Mr. Watt says that he interpreted CAPT Vest's 18 September 2002 statement "as a willingness to discuss the propriety of the partial termination for default and whether any appeal of that partial termination was necessary. In fact, the propriety of the partial termination for default . . . was a subject of discussion at our settlement negotiations . . . on October 17, 2002." He did not state that the CO participated in such "negotiations." (App. resp., ex. 2 at ¶ 6)

11. On 11 December 2002 ARC filed a notice of appeal to the ASBCA, 427 days after it received the CO's 2 October 2001 partial termination letter. That notice of appeal enclosed the CO's 17 September 2002 and 2 October 2001 decisions (R4, tab 7). The Board docketed those appeals, respectively, as ASBCA Nos. 54038 and 54039. The timeliness of ARC's appeal from the 17 September 2002 decision (in ASBCA No. 54038) is not challenged, nor is it encompassed by respondent's motion to dismiss.

PARTIES' CONTENTIONS

Movant argues that: (1) the CO's 2 October 2001 letter constituted a decision that ARC was in default and advised ARC of its right to appeal under the contract's Disputes clause, (2) if such notice were deemed deficient, ARC did not show detrimental reliance on the deficiency in accordance with *Decker & Co. v. West*, 76 F.3d 1573 (Fed. Cir. 1996), because ARC had full knowledge of its appeal rights since it received a default termination notice on 19 December 2001 on Contract No. F41622-97-C-0022 that advised ARC of its rights to appeal to the board of contract appeals or to the Court of Federal Claims, and their filing deadlines, which decision ARC timely appealed, and CAPT Vest told ARC that respondent considered the 2001 and 2002 terminations as "separate and independent" in time for ARC to file an action in the Court of Federal Claims, had it so chosen (mot. at 3-7).

ARC argues that: (1) the CO's 2 October 2001 letter did not start the 90-day appeal period running because it was not identified as a "final decision" and did not advise ARC of its appeal rights as required by FAR 33.211(a)(4)(v); (2) *Decker*'s requirement for proof of the contractor's detrimental reliance on incorrect advice of appeal rights is inapplicable to the October 2001 notice that "completely failed to inform [ARC] that it had *any* right of appeal to the Board or the Court of Federal Claims"; and (3) ARC detrimentally relied on the procedural deficiencies indicating "lack of finality" in the October 2001 notice and respondent's vacillation for several months over whether the future termination might moot or supersede such notice (app. resp. at 5-7, 9-11).

DECISION

Under the CDA, 41 U.S.C. § 606, the Board lacks jurisdiction of an appeal filed more than 90 days after the contractor's receipt of a valid CO's final decision. That 90-day period is statutory and cannot be waived. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982). The appeal in ASBCA No. 54039 was filed 427 days after ARC received notice of the 2 October 2001 termination for default (SOF, ¶ 11).

ARC argues that the 2 October 2001 partial default termination letter was not a valid CO's decision because it was identified as a "determination," not a "final decision." That letter stated that "[t]his Notice constitutes a decision that ARC is in default" (SOF, ¶ 4). The CDA requires that Government claims "shall be the subject of a *decision* by the contracting officer." 41 U.S.C. § 605(a) (emphasis added). Identification of the CO's October 2001 partial default termination letter as a "decision" satisfied the CDA.

ARC argues that the October 2001 decision was defective because it cited "FAR 52.333-1," which did not exist and did not advise ARC of its appeal rights with respect to choice of tribunals and their filing deadlines, as required by the CDA and FAR 33.211, but only stated: "ARC has the right to appeal under the contract's Disputes clause" (SOF, ¶ 4). ARC knew that contract 11 included the FAR 52.233-1 Disputes clause (SOF, ¶ 2). Thus, that "FAR 52.333-1" reference was harmless. *See Rowe, Inc.*, GSBCA No. 14136, 00-1 BCA ¶ 30,668 at 151,466 (reference to non-existent "default" clause was harmless). Moreover, ARC's brief and supporting affidavit did not allege confusion about the FAR 52.333-1 typographical error.

The CDA requires a CO's decision to advise contractors of their appeal rights provided "in this chapter," *viz*. Chapter 9 of Title 41. Chapter 9 provides for appeals to the boards of contract appeals, filed within 90 days after receipt of the CO's decision, or direct actions in the Court of Federal Claims, filed within 12 months after receipt of the CO's decision. 41 U.S.C. §§ 605(a), 606, 609(a)(1). FAR 33.211(a)(4)(v) requires a CO's decision to include a paragraph substantially stating–

> This is the final decision of the [CO]. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals . . . . The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number . . . . Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims . . . within 12 months of the date you receive this decision . . . .

48 C.F.R. § 33.211(a)(4)(v) (2001).

In *Decker* the CO's default termination decision erroneously stated that the contractor could appeal to the U. S. Claims Court, which at the time lacked jurisdiction of default terminations absent a monetary claim. On appeal, the Federal Circuit affirmed our decision in *Decker & Co., GmbH,* ASBCA No. 41089, 94-2 BCA ¶ 26,759, upholding the default termination. 76 F.3d at 1582. In *dicta*, *Decker* disapproved seven ASBCA cases holding that defective advice of appeal rights in a CO's decision prevented the appeal limitation period from starting without proof of detrimental reliance on the defect, on the rationale that:

> . . . [H]arm should accompany a defect in an otherwise proper termination notice in order for the contractor to seek relief based on that defect.
>
> . . . .
>
> [41 U.S.C. §] 605(a) requires that the Government provide the contractor sufficient information concerning his rights to make an informed choice as to whether, and in what forum, he will pursue an appeal. The focus of this requirement is the protection of the contractor. When the contractor's determination regarding appeal is unaffected by the defect, the notice does not fail in its protective purpose. The notice thus continues to be an effective [CO's] decision under § 605 with respect to triggering the limitation period.
>
> . . . .
>
> . . . A contractor in Decker's position must demonstrate that the fact that it was informed of non-existent appeal rights, in addition to being told of its true appeal rights, actually prejudiced its ability to prosecute its timely appeal before the limitation period will be held not to have begun.

76 F.3d at 1579-80.

Post-*Decker* decisions addressing appeals of "defective" CO's decisions have required proof of detrimental reliance in the instance of a termination notice that omitted advice of the contractor's appeal rights. *See State of Florida, Dept. of Ins. v. United States*, 81 F.3d 1093, 1098 (Fed. Cir. 1996) (default termination notice omitting "any

reference in the termination notice to the contractor's appeal rights"[*] was a "harmless" CDA violation without detrimental reliance, because the surety had actual notice of its appeal rights at the time it received the defective termination notice, since such rights had been stated in the termination notice to the original defaulted contractor and in the bonded contract that the surety had undertaken to perform, and the surety litigated the default termination in a later progress payment action in the Court of Federal Claims).

In *Medina Contracting Co.*, ASBCA No. 53783, 02-2 BCA ¶ 31,979, the default termination decision notified the contractor of its right to appeal the termination under the Disputes clause, but did not identify the fora or their respective filing deadlines (as here). Before the appeal period to the ASBCA expired, the contractor advised the CO that it would appeal if the CO did not withdraw the default termination. We held that the contractor had not shown it was prejudiced by the appeal advice omitted from the CO's decision, and dismissed the appeal for lack of jurisdiction. 02-2 BCA at 158,020-21.

ARC argues that *Medina* wrongly extended *Decker*, which distinguished its holding from the holding in *Pathman Construction Co. v. United States*, 817 F.2d 1573 (Fed. Cir. 1987), that a deemed denial did not inform the contractor "of its appeal rights to even the most limited extent" and thus did not trigger the running of the appeal period. (App. resp. at 7) This appeal involves not a deemed denial, as in *Pathman*, but a defectively written CO's decision. *State of Florida* has already extended the *Decker dicta* from inaccurate to omitted appeal advice. We disagree that the *Decker dicta* are inapplicable to this motion. We perceive no basis to distinguish our *Medina* holding.

ARC had actual knowledge of its appeal rights as stated in the CO's 19 December 2001 default termination notice under the Phase I and II Contract No. F41622-97-C-0022 (SOF, ¶ 5), during the 90-day appeal period to the ASBCA of the CO's 2 October 2001 termination notice (SOF, ¶ 4). We hold that ARC has not shown detrimental reliance or harm due to the defective October 2001 decision. *See Decker, State of Florida, and Medina, supra*. ARC's argument about supersession of the 2 October 2001 decision by respondent's alleged vacillation in 2002 is irrelevant to the timeliness of its appeal to this Board from that October 2001 decision.

CONCLUSION

We grant respondent's motion and dismiss the appeal for lack of jurisdiction.

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[*] The COFC described the omission as: "The [USPS] Manual states that all final decisions issued by [COs] regarding contract disputes must contain a paragraph that sets forth the contractor's appeal rights. . . . The notice of default termination issued by the Postal Service . . . did not contain this clause." *State of Florida v. United States*, 33 Fed. Cl. 188, 193 (1995).

Dated: 24 June 2003

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. 54039, Appeal of American Renovation & Construction Company, rendered in conformance with the Board's Charter.

Dated:

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