

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Bay Gulf Trading Co., Ltd.) ASBCA No. 54122
)
Under Contract No. SP0600-03-S-4000)

APPEARANCE FOR THE APPELLANT: Mr. Joseph A. Bondi
Vice President

APPEARANCES FOR THE GOVERNMENT: Bernard Duval, Esq.
Chief Trial Attorney
Danica Irvine, Esq.
Assistant Counsel
Defense Energy Support Center
Fort Belvoir, VA

OPINION BY ADMINISTRATIVE JUDGE STEMLER

The Government has filed a motion to dismiss for lack of jurisdiction alleging appellant's notice of appeal was not timely filed. Appellant opposes the motion.

FINDINGS OF FACT

1. In October of 2002, the Defense Energy Support Center, a field activity of Defense Logistics Agency, awarded Contract No. SP0600-03-S-4000 to Bay Gulf Trading Co., Ltd. (appellant) for sale of gasoline (R4, tab 3).

2. By letter dated 31 October 2002, appellant submitted a claim to the contracting officer requesting compensation for removal of excess water from the gasoline (R4, tab 4).

3. The contracting officer issued a final decision denying the claim. The final decision was dated 4 December 2002, and was sent by facsimile to appellant. (R4, tabs 5, 6)

4. The facsimile transmission record indicates transmission to appellant on 4 December 2002. Appellant's vice-president confirms receipt by him on 5 December 2002. (App. resp.; R4, tabs 5 and 6)

5. Appellant's notice of appeal, dated 5 March 2003, was delivered to the Board by commercial courier. The date of delivery to the Board was 6 March 2003. (See Board Corres. file)

DECISION

Under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, the Board lacks jurisdiction over an appeal filed more than 90 days after receipt of the final decision. This 90-day period is statutory and cannot be waived. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982).

Based upon the date of receipt of the final decision (whether it be 4 or 5 December 2002), appellant's notice of appeal was not timely filed. Calculating from 4 December 2002, the last day for timely filing a notice of appeal was 4 March 2003 and calculating from 5 December 2002, the last day was 5 March 2003. Appellant delivered the notice of appeal to a private courier. The date of delivery and filing of the notice of appeal with the Board was 6 March 2003. *Tyger Construction Company, Inc.*, ASBCA Nos. 36100, 36101, 88-3 BCA ¶ 21,149 at 106,781. (Notice carried by a commercial courier is deemed filed on the date it is delivered to the Board.) Appellant filed its notice beyond the 90-day period allowed by the CDA. Accordingly, the motion to dismiss is granted, and the appeal is dismissed for lack of jurisdiction.

Dated: 23 June 2003

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

I concur

I concur

CARROLL C. DICUS, JR.
Administrative Judge
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. 54122, Appeal of Bay Gulf Trading Co., Ltd., rendered in conformance with the Board's Charter.

Dated:

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