ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
J.E. McAmis, Inc.	)	ASBCA Nos. 54455, 54456, 54457
	)	
Under Contract No. DACW05-00-C-0020	)	

APPEARANCE FOR THE APPELLANT: Joseph A. Yazbeck, Jr., Esq.
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Portland, OR

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
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U.S. Army Engineer District
Sacramento

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
ON GOVERNMENT MOTION TO DISMISS

Appellant appealed a contracting officer's final decision denying three claims. The appeals have been docketed as ASBCA Nos. 54455, 54456, and 54457. The government filed a motion to dismiss the appeals on the basis that they were untimely under the Contract Disputes Act of 1978, specifically, 41 U.S.C. § 606.

STATEMENTS OF FACT FOR PURPOSES OF THE MOTION

1. The U.S. Army Corps of Engineers, Sacramento District (government) awarded Contract DACW05-00-C-0020 to appellant on 24 February 2000 for the firm fixed price of $9,794,798. (R4, tab 3) The contract called for the construction of a Riverbed Gradient Facility and associated bank protection for the Sacramento River at the Glenn-Colusa Irrigation District Intake at Sacramento River Mile 208 in Butte and Tehama Counties, California. The contract contained the standard clauses for construction contracts, including the FAR 52.233-1 DISPUTES (DEC 1998) clause. This clause provided, in pertinent part, that "This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613)." (R4, tab 1)

2. Appellant entered into a subcontract with Nordic Industries, Inc. on 27 March 2000, for the supply and placement of riprap under the contract (app. ex. 1). The subcontract provided in Section 13. DISPUTES RESOLUTION that:

> Any disputes resolution procedure in the prime contract shall be deemed incorporated in this Agreement, and shall apply to any disputes arising hereunder, except disputes not involving the acts, omissions or otherwise the responsibility of the Owner under the prime contract, those which have been waived by the making or acceptance of final payment, and questions regarding the licensure of the subcontractor. Subject to compliance with all applicable laws, . . . Contractor's sole obligation is to present any timely-filed claims by Subcontractor to the Owner under such procedure and, subject to the other provisions of this Agreement, to pay to Subcontractor the proportionate part of any sums paid by the Owner to which Subcontractor is entitled. . . .

3. Nordic Industries submitted a proposal for an equitable adjustment in the total amount of $266,009 to appellant on 2 December 2000 (app. ex. 2). Appellant forwarded this proposal to the government's Army Engineer District, Sacramento resident engineer on 8 December 2000 (app. ex. 2). By letter dated 3 October 2001, appellant referenced the earlier proposal for an equitable adjustment on behalf of Nordic Industries, noting that the government had not responded to the request, and requested the government to review the proposal so that the parties could negotiate a settlement resolving this matter (app. ex. 3). The contracting officer denied Nordic's request by letter dated 18 January 2002 (app. ex. 4). Following a further exchange of correspondence between appellant and its subcontractor, Nordic Industries, appellant, by letter dated 28 February 2002, requested a meeting with the Corps of Engineers to discuss the outstanding issues pertaining to Nordic Industries' request for an equitable adjustment (app. ex. 6). As of 27 February 2002, Nordic Industries had submitted three proposals for equitable adjustments on 9 June 2000, 26 June 2000, and 2 December 2000 respectively, and requested a meeting with the Corps of Engineers to discuss these proposals in detail (app. ex. 6). Nordic further asserted that it did not understand the basis for the government's rejection of its third proposal dated 2 December 2000.

4. By letter, dated 6 August 2002, appellant's subcontractor, Nordic Industries, submitted a properly certified claim in the amount of $266,009.00, and claims for previously unresolved claims in the amounts of $13,813.75, and $1,720.00 (R4, tab 6). As stated above, Nordic Industries had previously submitted proposals on 2 December 2000, 26 June 2000, and 9 June 2000 for equitable adjustments for increased costs for producing riprap for the project, hauling riprap, and for reimbursement of costs for testing rock from the Paynes Creek Quarry for quality compliance. Appellant forwarded Nordic Industries' certified claim of 6 August 2002 to the contracting officer on 9 August 2002 (app. ex. 7). However, on 15 August 2002, the contracting officer returned appellant's 9 August 2002 letter without action "due to the claim not being certified by the Prime Contractor under the Disputes Clause, FAR 52.233-1" (app. ex. 8). Appellant certified Nordic Industries'

claims, in the total amount of $281,542.75, and forwarded the certified claim to the contracting officer on 20 August 2002 (app. ex. 9).

5. The contracting officer issued a final decision denying Nordic Industries' three claims on 28 August 2003 (R4, tab 2). The return receipt for the certified, return receipt mailing of the contracting officer's final decision reflected its receipt by appellant on 2 September 2003. Therefore, the final date for filing an appeal to this Board was 1 December 2003.

6. On 18 November 2003, Nordic Industries sent a letter to appellant (app. ex. 13 at 3). The subject of the letter was: "FAR 52.233-1; Disputes, Appeal of Contracting Officer's Final Decision, Certified Claim." Nordic Industries stated therein:

> Therefore, please consider this as Notice that Nordic is appealing the Contracting Officer's Final Decision dated August 28, 2003 for Contract No. DACW05-00-C-0020.
>
> Nordic requests that you appeal, on its behalf, to the Armed Services Board of Contract Appeals as detailed in Section V. Appeal Procedure of the Contracting Officer's Final Decision (copy enclosed).
>
> Nordic further requests that the appeal be expedited so it is received by the Board within the 90 day period from when you received the Contracting Officer's Final Decision.

7. By letter dated 21 November 2003, appellant forwarded to the contracting officer a copy of Nordic Industries' letter of 18 November 2003, in which Nordic requested appellant to appeal the contracting officer's final decision (app. ex. 13). Appellant's letter did not specifically state that appellant was appealing the contracting officer's decision. However, it clearly stated that it was forwarding Nordic Industries' letter of 18 November 2003, which as quoted above, did contain the notice of appeal, and requested the contracting officer to forward a complete Rule 4 file to appellant. Appellant had previously forwarded letters from Nordic Industries requesting documents from the "Rule 4 file" referred to in a contracting officer's letter of 2 October 2003 to appellant and identified in the contracting officer's final decision of 28 August 2003 (app. ex. 13 at 6). According to the certified mail receipt, appellant delivered its 21 November 2003 letter to the Sacramento, California Metro Post Office on 21 November 2003. The certified mail receipt was stamped received by the Corps of Engineers Sacramento District (app. ex. 13 at 2). The government alleges that it has no record of this letter with its 18 November 2003 enclosure.

8. Although appellant had previously submitted its appeal to the contracting officer by letter dated 21 November 2003, appellant submitted a "Written Notice – Appeal of

Contracting Officer's Final Decision" to the Board on 24 December 2003. This Notice contained a copy of the contracting officer's final decision of 28 August 2003 denying appellant's claim, and the government's draft index to the Rule 4 file. The Board received the appellant's notice of appeal on 29 December 2003; the envelope containing the notice of appeal was postmarked 24 December 2003. The Board docketed appellant's appeal as three appeals (ASBCA Nos. 54455, 54456, 54457) representing each of the three claims submitted by appellant's subcontractor.

DECISION

The government, in its motion to dismiss, first contends that appellant's notice of appeal dated 24 December 2003 was untimely, and secondly, in response to appellant's opposition thereto, contends that there was nothing in appellant's letter of 21 November 2003 to the contracting officer that "remotely suggest[ed] that McAmis is attempting to appeal" the contracting officer's final decision on behalf of its subcontractor (gov't mot. at 2; gov't resp. at 2). According to the government, in order to gain access to the disputes appeal process under the Contract Disputes Act, the subcontractor's appeal must be sponsored by the prime contractor, and under the facts of this attempted appeal, there is no basis for an argument that appellant sponsored the appeal.

Appellant contends that its 21 November 2003 letter to the contracting officer, forwarding Nordic Industries' letter, which was clearly identified as an "Appeal of Contracting Officer's Final Decision, Certified Claim," provided sufficient notice that appellant was appealing the contracting officer's decision. Appellant then contends that the Board has held that service of a notice of appeal on the contracting officer within the time required by the Contract Disputes Act is valid. Appellant further contends that the Board looks to the facts and circumstances of an appeal to determine if sponsorship has been established, such as: prime contractor consistently cooperated in the presentation of the claim, including certifying the original claim to the contracting officer, and lack of evidence that the prime contractor intended to discontinue its sponsorship of the claim following the issuance of the contracting officer's final decision.

We first address the issue of the timeliness of the appeal since under the Contract Disputes Act of 1978, the Board has no jurisdiction over an appeal unless the appeal is taken within 90 days of the date of contractor's receipt of the contracting officer's final decision. *Cosmic Construction Co.*, ASBCA No. 26537, 82-1 BCA ¶ 15,541, *aff'd*, 697 F.2d 1389 (Fed. Cir. 1982). The issue, therefore, here is whether appellant's letter to the contracting office on 21 November 2003 was a notice of appeal, and if so, did it constitute a timely appeal since it was mailed within the prescribed 90-day period.

For over two decades, we and other boards have consistently held that misdirection of a notice of appeal is not fatal to jurisdiction so long as the writing in question has been transmitted within the time allowed by the Act, or Disputes clause, and expresses

dissatisfaction with the contracting officer's decision and an intention to appeal to an authority higher than the contracting officer. *See Manistique Tool and Manufacturing Company*, ASBCA No. 29164, 84-3 BCA ¶ 17,599, *aff'd, United States v. Manistique Tool and Manufacturing Company*, 790 F.2d 95 (Fed. Cir. 1986) (table), and decisions cited therein; *but see Stewart-Thomas Industries, Inc.*, ASBCA No. 38773, 90-1 BCA ¶ 22,481 at 112,836, noting requirement to elect the Board as a forum and declining to follow *Manistique* and like cases to the extent they may have found notices valid which failed to elect an appeal to the Board within the 90-day period.

In the instant appeal, Nordic Industries specifically stated unequivocally that its letter was a notice of appeal, and requested that appellant submit an appeal on behalf of Nordic Industries, to the Armed Services Board of Contract Appeals in accordance with the appeal procedures outlined in the contracting officer's final decision. This was a timely and reasonably clear election of forum. We hold that appellant's letter of 21 November 2003 to the contracting officer forwarding Nordic Industries' letter of 18 November 2003 constituted a timely notice of appeal. Moreover, we have not had our attention directed to any decision of this Board, or of the Court of Appeals for the Federal Circuit, nor have we found any, that would hold that the prime contractor's timely forwarding of a subcontractor's notice of appeal, without specifically stating that the prime contractor was appealing the contracting officer's final decision was fatal to the effectiveness of the subcontractor's notice of appeal forwarded by the prime contractor. As in *Manistique Tool and Manufacturing Company*, appellant's subsequent filing of an appeal with the Board here on 24 December 2003 merely perfected the appeal action attempted earlier by appellant.

Except as we held in *FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA ¶ 32,571, and as the Court held in *D & H Distributing Company v. United States*, 102 F.3d 542 (Fed. Cir. 1996), and subject to certain possible exceptions discussed in *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1548-51 (Fed. Cir. 1983), a subcontractor's appeal must be sponsored by the prime contractor as a prerequisite to Board jurisdiction to decide the subcontractor's claims. *United States v. Johnson Controls, Inc.*, 713 F.2d at 1550. It is well settled that the Board has jurisdiction over appeals from contracting officer's decisions on claims in which the subcontractor is the real party in interest only if pursued under the authority and sponsorship of the prime contractor. *Cf. Holmes & Narver Services, Inc.*, ASBCA No. 51155, 00-2 BCA ¶ 30,972.

As we said in *Holmes & Narver Services, Inc., supra* at 152,851, "sponsorship and authority can be inferred when the prime contractor subsequently ratifies the filing of the appeal and 'consistently cooperates' in the presentation of the claim even if the prime contractor did not specifically authorize the subcontractor to file the appeal prior to the expiration of the appeal period." We also said in *Batteast Construction Company, Inc.*, ASBCA Nos. 30452, 33357, 89-3 BCA ¶ 21,933, at 110,341, and elsewhere, that we have looked to the circumstances of the claim to determine if the appeal was made with the

authorization and sponsorship of the prime contractor, setting forth some of the evidence upon which the determination of sponsorship can be made. Here, as there, there is abundant evidence that J.E. McAmis, Inc. sponsored the claim of Nordic Industries. The subcontract DISPUTES RESOLUTION clause specifically provided that any disputes resolution procedure in the prime contract would be deemed incorporated in the subcontract, and that the "Contractor's sole obligation is to present any timely-filed claims by Subcontractor to the" government. On 2 December 2000, Nordic Industries submitted a request for an equitable adjustment to appellant, which appellant then forwarded to the government on 8 December 2000. Then by letter dated 3 October 2001, appellant referenced the earlier request for an equitable adjustment on behalf of Nordic Industries, noting that the government had not responded to it and requested the government to review the proposal so that the parties could negotiate a settlement resolving the matter. The contracting officer denied this request. Following further exchange of correspondence between appellant and Nordic Industries, appellant on 28 February 2002, requested a meeting with the Corps of Engineers to discuss the outstanding issues pertaining to Nordic Industries' requests for equitable adjustments. As of 27 February 2002, Nordic Industries had submitted three proposals for equitable adjustments and requested a meeting with the Corps of Engineers. However, as in *Batteast Construction Company, Inc.*, and *Foster Company of Greenville, Inc.*, ASBCA No. 28955, 84-2 BCA ¶ 17,481, the most convincing evidence demonstrating the sponsorship of the claim was appellant's certification of Nordic Industries' claim. Nordic Industries' letter of 18 November 2003 forwarded through appellant to the contracting officer was an unequivocal notice of appeal, appealing the contracting officer's final decision denying Nordic's three claims. Although appellant did not specifically state in its letter of 21 November 2003 forwarding Nordic Industries' notice of appeal to the contracting officer that appellant, itself, was appealing the contracting officer's decision, the clear language of that letter was that it was forwarding Nordic's notice of appeal, and that appellant was requesting the complete Rule 4 file to be sent to appellant.

There is no evidence in the record that J.E. McAmis, Inc. did not intend to continue its sponsorship of the claims following the issuance of the contracting officer's decision denying the claims. Indeed, as appellant's letter of 24 December 2003 to the Board reflects, appellant continued its sponsorship of the appeal.

Accordingly, we hold that appellant's appeal is timely, and that we have jurisdiction.

Dated: 26 August 2004

ROLLIN A. VAN BROEKHOVEN
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 Nos. 54455, 54456, 54457, Appeals of J.E. McAmis, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals