ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Tyrone Shanks	)	ASBCA No. 54538
	)	
Under Contract No. F04666-03-P-0005	)	

APPEARANCE FOR THE APPELLANT: Mr. Tyrone Shanks
Sole Proprietor

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
MAJ Ronald J. Goodeyon, USAF
Trial Attorney

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

This appeal arises out of the contracting officer's (CO) decision denying the contractor's December 2003 claim for additional compensation. Respondent's answer indicated its intent to file a motion to dismiss for lack of jurisdiction because appellant failed to file his appeal within 90 days of receiving the final decision. Soon thereafter, appellant moved for sanctions against respondent, and respondent moved on 20 May 2004 to dismiss the appeal as untimely. We deny both motions.[*]

STATEMENT OF FACTS (SOF)

1. On 27 November 2002, appellant was awarded labor-hour Contract No. F04666-03-P-0005 by the U.S. Air Force 9th Contracting Squadron to provide tax assistance services at Beale Air Force Base, CA, from 1 December 2002 to 2 May 2003 (R4, tab 1 at 1-2).

2. Contract No. F04666-03-P-0005 incorporated by reference the FAR 52.233-1 DISPUTES (JUL 2002) clause, which provided that the "contract was subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613)" (R4, tab 1 at 13 of 16).

[*] Respondent also has pending before us, motions to dismiss for failure to state a claim upon which relief can be granted, and for summary judgment. These motions will be dealt with in future decisions.

3. By facsimile on 7 December 2003 appellant submitted a claim to the CO requesting additional compensation for an "estimated 240 unpaid expended hours" at $38/hour, plus 880 hours at $8/hour (the difference between his alleged $38 hourly rate and the $30 contract hourly rate) totaling $16,160 (R4, tab 7).

4. The CO's 8 December 2003 letter to appellant stated:

> SUBJECT: Your Request for Payment, Contract F04666-03-P-0005
>
> Our office has received your claim, requesting an additional $16,160 in compensation. After careful consideration of your claim, we are denying your request. Per the contract, you were to be compensated at $30 per hour. Each of your invoices, billing at a rate of $30 per hour have [sic] been paid in full, along with all invoices for reimbursement of expenses. We consider this matter to be closed.

and was signed by Gary S. Metcalf, CO. That letter did not notify appellant of his appeal rights. It was not sent by certified mail, return receipt requested, or by any other method that provides evidence of receipt. (R4, tab 8) Appellant's complaint alleges the "Final Decision" was issued in January or February 2004. (Comp. ¶ 5)

5. The CO's affidavit states that the aforesaid letter was placed in the outgoing mail on 8 December 2003; "due to an oversight [it] was not sent return receipt [requested]"; and based on the "normal course of business" for outgoing mail at Beale Air Force Base and his "personal experience" delivery to appellant should not have taken more than three or four calendar days and should have occurred by 13 or 15 December 2003 (Metcalf aff., ¶¶ 3-4). The record contains no evidence of when appellant in fact received the CO's 8 December 2003 letter.

6. Appellant filed its Notice of Appeal on 18 March 2004 by facsimile. It was docketed as ASBCA No. 54538.

7. Respondent's answer indicated its intent to file a motion to dismiss for lack of jurisdiction because appellant failed to file his appeal within 90 days of receiving the final decision (answer at 3).

8. Appellant's 18 May 2004 reply to respondent's answer objected to its statement that appellant did not timely file his appeal, argued that the CO's 8 December 2003 decision did not comply with the FAR 33.211 requirements to state that the letter was the CO's final decision, notify him of his appeal rights, and furnish a copy of the

decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and moved for sanctions against respondent's attorney of the "cost of $912 to litigate the misrepresentation to defraud a pro se litigant."

DECISION

I.

The Contract Disputes Act of 1978, 41 U.S.C. § 606, provides that a contractor may appeal from a CO's final decision to an agency board of contract appeals within 90 days from the date of receipt of the decision. The boards cannot waive that statutory appeal period. *See Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982). In implementation thereof, FAR 33.211(b) requires the CO to "furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt." 48 C.F.R. § 33.211(b) (2002). The CO's 8 December 2003 letter was not sent return receipt requested or by any other method that provides evidence of receipt (SOF, ¶ 4).

The burden is on the government to prove the date of receipt of the CO's final decision. *See Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1372 (Fed. Cir. 2005) (government failed to produce "evidence of receipt" of CO's final decision required by 48 C.F.R. § 33.211(b) more than 12 months before appellant filed suit in the Court of Federal Claims, so the suit was timely); *David Grimaldi Co.*, ASBCA No. 49795, 97-2 BCA ¶ 29,201 at 145,296 ("It is the Government's burden to prove the date that appellant received either the fax or the mailed copy of the final decision.")

The CO states that based on the "normal course of business" for outgoing mail at Beale Air Force Base, and his "personal experience" delivery of the final decision to appellant should not have taken more than three or four calendar days and should have occurred by 13 or 15 December 2003 (SOF, ¶ 5). Thus, the latest date to file a timely appeal was Monday 15 March 2004, since the 90th day after 15 December 2003 was Sunday, 14 March 2004. Appellant filed its notice of appeal on 18 March 2004 (SOF, ¶ 6). Appellant argues that the CO "did not issue the decision using a method which would have proven receipt"; and "disregarded providing the appellant information about the appeal process" (app. resp. at 2-3). The actual date appellant received the CO's 8 December 2003 letter is not known (SOF, ¶ 5).

Movant argues that it may prove the date appellant received the final decision by affidavit. A credible, persuasive affidavit establishing the competency and qualifications of the affiant could constitute such proof. However, the CO's affidavit accompanying the instant motion is like the evidence in *Nachtmann Analytical Laboratories*, ASBCA No.

35037, 88-1 BCA ¶ 20,229, *recon. denied*, 88-1 BCA ¶ 20,276, where we stated, 88-1 BCA at 102,434:

> . . . [I]n *Willi Nillius*, ASBCA No. 31987, 87-1 BCA ¶ 19,677 . . . the [government's evidence] did not *prima facie* prove the date of receipt of the final decision by appellant. We stated:
>
> > All we are given is supposition. The evidence as to date of receipt is no better. There is a statement made as to the ordinary course of mails between two points . . . without any indication of the speaker's qualifications to make such statement or the basis thereof. cf. . . . *B. D. Click v. United States* . . . 1 Cl. Ct. 239 (. . . 1982) (undisputed affidavits of U. S. Postal Service employees accepted as establishing probable delivery dates of mailed documents).
>
> Since neither the exact mailing date nor the receipt date of the 24 February letter can be ascertained from the record, we are unable to state affirmatively that the notice of appeal was not mailed within the 90-day period.

The cases movant cites do not displace the holdings in *Nachtmann* and *Willi Nilius* on the adequacy of affidavit proof of when a contractor received a CO's final decision. *Bearing and Drive Systems, Inc.*, ASBCA No. 31175, 86-1 BCA ¶ 18,577 at 93,289, addressed proof of the date of filing a notice of appeal with the Board by affidavit or by other credible evidence (*e.g.*, postage meter stamp). It did not, however, decide the adequacy of a particular affidavit since none had been filed. Movant argues that "[w]hen the record does not reflect a date when Appellant received the final decision, two or three days can be assumed for regular mail," citing *Spicer Fuel Co., Inc,* ASBCA No. 26677, 82-2 BCA ¶ 15,848 (gov't mot. at 5). In *Spicer* we found that evidence of two or three days to deliver normal mail did not support a government contention that it mailed a check timely so as to entitle it to a prompt payment discount; we did not address the adequacy of a government affidavit to prove the date of receipt of a CO's final decision. 82-2 BCA at 78,565-66. In *Chicago Iron Works, Inc.*, GSBCA No. 3169, 70-2 BCA ¶ 8525, the Board relied on the fact that it took two to three days to deliver another letter to decide the timeliness of the contractor's notice of appeal. In *Schleicher Community Corrections Center, Inc*., DOT BCA Nos. 3046, 3067, 98-2 BCA ¶ 29,941, the Board assumed that regular mail was delivered in three days when the contractor had delayed several years before taking its appeal.

We hold that the government has failed to carry its burden of establishing the date appellant received the CO's 8 December 2003 letter to show that appellant's notice of appeal was untimely. Therefore, we need not address the jurisdictional consequences of the CO's failure to notify appellant of its appeal rights in the 8 December 2003 letter. We deny respondent's motion to dismiss for lack of jurisdiction.

II.

Appellant requests that the Board impose sanctions upon the "filing attorney Ronald J [sic] Goodeyon" for the "affirmative Defense Stand [sic] of Lack of Jurisdiction because appellant failed to timely file . . . . Appellant['s] cost of $912 to litigate the misrepresentation to defraud a pro se litigant" (app. mot. at 2). Rather than file a separate response thereto, respondent relies on the facts and arguments stated in its foregoing motion to dismiss for lack of jurisdiction.

The Board lacks jurisdiction to award attorneys' fees or costs as a sanction against the government during the course of an appeal. *See Turbomach*, ASBCA No. 30799, 87-2 BCA ¶ 19,756. "The only statutory authorization for the Board to award [costs and fees] that we are aware of is contained in the Equal Access to Justice Act. . . . [which], of course, deals with prevailing parties. An application under that Act would be premature at this time." 87-2 BCA at 99,954. We deny appellant's motion for sanctions in the form of $912 in costs.

Dated: 9 September 2005

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continue)

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. 54538, Appeal of Tyrone Shanks, rendered in conformance with the Board's Charter.
Dated:

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