ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
The Swanson Group, Inc.	)	ASBCA No. 54863
	)	
Under Contract No. N68711-91-C-9509	)	

APPEARANCE FOR THE APPELLANT: Mr. Johnny Swanson, III
President

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
Navy Chief Trial Attorney
John S. McMunn, Esq.
Senior Trial Attorney
Naval Facilities Engineering Command
West Coast Litigation Team
Daly City, CA

OPINION BY ADMINISTRATIVE JUDGE TODD
ON THE GOVERNMENT'S MOTION TO DISMISS

The government has filed a motion to dismiss the appeal for lack of jurisdiction on the grounds that the claim of appellant The Swanson Group, Inc. was not properly certified, that appellant Johnny Swanson, III lacks standing to bring the appeal, that the appeal was not timely filed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601 *et seq.*, and that the appeal is barred by the six-year statute of limitations in 28 U.S.C. § 2501. The government also maintains that appellant failed to timely file a claim or settlement proposal with the contracting officer as a non-jurisdictional, affirmative defense to the claim. This part of the motion refers to matters outside of the pleadings and is treated as a motion for summary judgment.

Appellant opposes the government's motion on the basis that dismissal can only be granted if a party can prove no set of facts in its complaint that would entitle it to recovery. Appellant refers to the history of the dispute underlying this appeal which preceded the Board's dismissal of *Swanson Group, Inc.*, ASBCA No. 52109, 04-1 BCA ¶ 32,603, pursuant to the mandate of the United States Court of Appeals for the Federal Circuit in *England v. Swanson Group, Inc.*, 353 F.3d 1375 (Fed. Cir. 2004). The Court vacated our decision awarding appellant $278,076.25 in termination settlement costs in *Swanson Group, Inc.*, ASBCA No. 52109, 02-1 BCA ¶ 31,836, *modified on reconsid.*,

02-2 BCA ¶ 31,906, and directed that that appeal be dismissed for lack of jurisdiction. Familiarity with the prior decisions is presumed.

STATEMENT OF FACTS

On 17 March 2004, appellant sent a letter to Ms. Melody K. Petersen, a Navy termination contracting officer (TCO), stating a claim in the amount of $278,076.25 for expenses related to the termination of Contract No. N68711-91-C-9509, dated 20 December 1991 (R4, tab 15). Appellant requested that the TCO consider the claim "as a Termination Cost settlement as well" (*id.* at 3). Appellant asked for a contracting officer's final decision if the government decided not to pay the amount determined by the Board as the amount due for settlement. Appellant enclosed an invoice # 2004-001 for $278,076.25. Appellant included the following sentence in its letter:

> Should the Contracting Officer or the Terminating Contract [sic] Officer fail to or refuse to reply to this correspondence within ninety (90) calendar days, or to pay the amount claimed herewith, that [sic] such failure will be regarded as a denial of this claim.

(*Id.* at 2) The letter stated appellant's understanding of the Court's decision that it "must or should file this claim before the Navy in order to secure funds due, and . . . follow the claims procedure again" (*id.* at 3). Appellant stated that it was perfecting the instructions provided by the Court (*id.*).

Mr. Johnny Swanson, III, appellant's president, certified the claim as follows:

> We hereby certify that the foregoing is a valid request, that the amounts claimed are valid monies due from the United States Government to this Corporation.

(*Id.*) Mr. Swanson's signature on the claim was notarized with the following statement:

> [H]e certifies that the foregoing claims made to the United States Government are valid claims for monies due.

(*Id.* at 4)

On 27 May 2004, Ms. Petersen acknowledged appellant's letter, dated 17 March 2004, and rejected appellant's request for settlement costs as untimely (R4, tab 18). The letter recited events following termination of the contract for default on 27 April 1992, and concluded as follows:

> The effective date of termination of the subject contract as established by the Court of Appeals was November 17, 1997. No "claim" or proposal related to the termination was submitted to our office until your letter dated March 17, 2004, received by this office on March 25, 2004, approximately 6 years and 5 months after the effective date of termination as established by the court. As such, your request for settlement costs under this contract is hereby rejected as untimely. This is not a final decision of the contracting officer.

(*Id.* at 2) Appellant received the letter on 2 June 2004 (*id.* at 3).

By letter dated 26 October 2004, appellant acknowledged receipt of Ms. Petersen's letter and again requested a final decision on the matter. Appellant had waited for a reply to its claim for more than 120 days. The letter stated that a continued failure to issue the requested final contracting officer's decision would be considered a contracting officer's determination denying the claim from which appellant intended to initiate legal proceedings. (R4, tab 19)

On 8 November 2004, Ms. Petersen sent appellant a letter stating that no further action would be taken on the contract and her response, dated 27 May 2004, remained unchanged (R4, tab 20). Appellant filed a notice of appeal from ". . . the final decision of the contracting officer received by us on or about November 4, 2004." The Board received appellant's undated notice of appeal on 6 December 2004, 187 days after 2 June 2004, the date appellant received Ms. Petersen's rejection of appellant's initial request for settlement costs.

In responding to the government's motion to dismiss, appellant included a letter, dated 21 May 2005, addressed to the TCO, the ASBCA, and government counsel that adopted its claim, dated 17 March 2004, with a request that the contracting officer review it as a revised termination settlement proposal. Appellant included the following amended certification signed by Mr. Swanson:

> I hereby certify that I am providing this certification for a claim filed with the United States in response to contract monies owed to The Swanson Group, Inc. As the President and Chief Executive Officer I am authorized to provide this certification.
>
> This claim is in excess of $100,000.00. I certify that the claim in this matter is made in good faith, , [sic] and that the

> certifying information provided in ASBCA opinions as attached at TAB A, are accurate as provided by the Armed Services Board of Contract Appeals. The amounts are clearly included in the ASBCA opinions and total $278,076.25. I certify that this claim is made in good faith, that the supporting data as provided by the ASBCA opinions are accurate and complete to the best of my knowledge and belief. Further I certify that the amount requested is accurate and reflects the contract adjustment that the government owes in this matter.

(App. resp., tab A at 2)

DECISION

The government argues that the appeal should be dismissed on the ground that appellant's purported claim is for an amount in excess of $100,000 and not properly certified. Whereas a claim exceeding $100,000 not accompanied by any certification precludes the Board from exercising jurisdiction, an incomplete or defective certification does not deprive the Board of jurisdiction over an appeal and can be corrected. *IMS P.C. Environmental Engineering*, ASBCA No. 53158, 01-2 BCA ¶ 31,422 at 155,163. Mr. Swanson's certification of appellant's claim did not include the statutory certification language requirements set forth in the CDA, 41 U.S.C. § 605(c), but could, and has been, corrected. The Board is not required to dismiss the appeal for the defective certification.

The government also argues that the appeal should be dismissed on the ground that appellant Johnny Swanson, III lacks standing to bring this appeal due to violation of the Assignment of Claims Act. In its complaint appellant alleged that the parties to the appeal included "The Swanson Group, Inc., and/or Johnny Swanson III" as appellant (compl. at 4). Appellant alleged that Mr. Swanson was an appellant as a result of an assignment made in November 1993 of appellant's rights to revenue under the claims. Appellant attached a copy of the Assignment of Corporate Interest agreement to the complaint. Appellant states in response that its listing of Johnny Swanson, III does not require that the complaint be dismissed, but a decision whether Mr. Swanson should remain a party should rest with the Board (app. resp. at 11). Under the CDA, we have jurisdiction to hear the appeal of a "contractor," defined as the party to a government contract other than the government. 41 U.S.C. § 601. The government does not question the standing of The Swanson Group, Inc., the signatory to the contract with the government. It was the "contractor" as defined by the CDA and has standing as the proper party to the appeal.

The government did not specifically assert that the appeal was not timely filed pursuant to the CDA, but this additional ground for dismissal is suggested by the declaration of Ms. Kathy L. Jones, a government contracting officer responsible for review and determination of claims, that was filed in support of the government's motion. The Board's subject matter jurisdiction, pursuant to the CDA, is dependent on a timely appeal to the Board by the contractor. *D.L Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Dual, Inc.*, ASBCA No. 53827, 04-2 BCA ¶ 32,636 at 161,494; *Eaton Contract Services, Inc.*, ASBCA Nos. 52888 *et al.*, 02-2 BCA ¶ 32,023 at 158,266-67. Under the CDA the Board lacks jurisdiction of an appeal filed more than 90 days after the contractor's receipt of a valid contracting officer's final decision. 41 U.S.C. § 606. The 90-day period is statutory and cannot be waived. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982). Appellant did not file this appeal to the Board within 90 days of its receipt of the government's 27 May 2004 rejection of its 17 March 2004 claim. Appellant's appeal was from a later decision that affirmed the rejection without reconsideration. The contracting officer's initial decision in this matter stated that it was not a final decision and thus did not give appellant notice of its appeal rights. Nevertheless, it determined appellant's claim and clearly constituted notice of the denial of the claim. Defective advice concerning appeal rights does not prevent the 90-day appeal limitation period from starting in the absence of detrimental reliance by the contractor. *Decker & Co. v. West*, 76 F.3d 1573, 1579-80 (Fed. Cir. 1996); *American Renovation & Construction Company*, ASBCA No. 54039, 03-2 BCA ¶ 32,296 at 159,804. During the 90-day appeal period of the contracting officer's rejection of its 17 March 2004 claim, appellant was aware of its appeal rights as evidenced by its timely appeal of the contracting officer's final decision terminating the contract for default. *Swanson Group, Inc.*, ASBCA No. 44664, 98-2 BCA ¶ 29,896 at 147,993. Mr. Swanson, however, appears to have understood that a further response to the claim would be forthcoming. Appellant thus relied to its detriment on the contracting officer's statement that the response was not a final decision. Appellant pursued its appeal rights within 90 days of its receipt of the contracting officer's second letter. We conclude that appellant has filed a timely appeal.[1]

The government further argues that the appeal is barred by the passage of time pursuant to 28 U.S.C. § 2501 as the claim or petition upon which it is based accrued more than six years before the appeal was filed. The statute provides in pertinent part:

[1] The CDA now contains a six-year statute of limitations, but it applies only to contracts entered into on or after 1 October 1995. *See RGW Communications, Inc., d/b/a Watson Cable Co.*, ASBCA Nos. 54495, 54557, 05-2 BCA ¶ 32,972 at 163,331; 163,338, n.9. This statutory limitation is not applicable to appellant's contract.

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

28 U.S.C. § 2501 (2005). Appellant maintains that time in this matter depends on procedures provided by the CDA and not 28 U.S.C. § 2501 (app. resp. at 11). 28 U.S.C. § 2501 by its terms applies only to court actions against the government and not to administrative determinations of claims. *Nager Electric Co. v. United States*, 177 Ct. Cl. 234, 259 (1966); *see Alabama Dry Dock & Shipbuilding Corp.*, ASBCA No. 39213 *et al.*, 90-1 BCA ¶ 22,559 at 113,214. The appeal is not barred by the passage of time pursuant to this statute, but is governed by the statutory limitations for the filing of appeals under the CDA, as discussed above.

The government's motion seeks a dismissal with prejudice on the grounds that appellant failed to timely file a claim or settlement proposal with the contracting officer based on Ms. Jones' declaration and the allegedly undisputed record. Appellant argues that the matter of timeliness has been resolved by the Board in previous opinions, and the tolling of limitations is proper here as the Board previously found (app. resp. at 4-5). Appellant further argues that the government has waived its rights to claim a lack of jurisdiction for timeliness (app. resp. at 9). The Board considered it had jurisdiction of an appeal from the contracting officer's unilateral determination of appellant's termination expenses. The Court held, however, that the Board did not have jurisdiction under the CDA to adjudicate the prior appeal because it was not an appeal from a contracting officer's final decision on a claim that appellant had submitted. A motion to dismiss on the ground that a claim is barred by a contractual time limitation is in the nature of an affirmative defense, which must be established by the asserting party. *Stradedile/Aegis Joint Venture*, ASBCA No. 39318, 95-1 BCA ¶ 27,397; *Lumanlan Portrait & Painting Service*, ASBCA No. 35709, 91-2 BCA ¶ 23,988, *motion for reconsid. denied*, 91-3 BCA ¶ 24,299. Failure to submit a termination settlement proposal timely constitutes an affirmative defense**.** The one-year period for the submission of termination settlement proposals required by FAR 52.249-2(e) has been held enforceable by the government to effect a waiver of a contractor's right to a termination for convenience settlement. *Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 641 (Fed. Cir. 1989).

When a motion presents a non-jurisdictional, affirmative defense to a claim and relies on material other than the pleadings, it is treated as a motion for summary judgment. *Bankruptcy Estate of Dr. William Barry*, ASBCA No. 50345, 99-2 BCA ¶ 30,469; *see Do-Well Machine Shop, Inc. v. United States, supra.* Summary judgment is appropriate where there are no material facts genuinely in dispute, and the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. We must draw all reasonable inferences against the party

whose motion is under consideration. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *South Carolina Public Service Authority*, ASBCA No. 53701, 04-2 BCA ¶ 32,651. A proper motion for summary judgment must set forth sufficient facts, shown by specific citation to the record, to establish that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *ITT Defense Communications Division*, ASBCA No. 44791, 94-2 BCA ¶ 26,931.

Appellant submitted a claim to the contracting officer that it has denominated a revised termination settlement proposal with reference to supporting data in the Board's decision in ASBCA No. 52109.[2] Appellant's claim was valid as a written demand to the contracting officer for a final decision, seeking as a matter of right the payment of money in a sum certain. *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995); *B.V. Construction, Inc.*, ASBCA No. 47766 *et al.*, 04-1 BCA ¶ 32,604 at 161,356. The claim was also timely under the CDA.

The submission of the termination settlement proposal, dated 17 March 2004, was not within a year of appellant's receipt of the notice of the termination. Ms. Jones' declaration states that appellant did not file either a termination settlement proposal or a request for an extension of time with the contracting officer by the time required, *i.e.* 16 November 1998 (Jones decl. ¶ 14). Appellant has referred to facts of its timely request for an extension of time in the Board's decision on the government's motion to dismiss the prior appeal for failure to file a termination for convenience settlement proposal with the contracting officer within one year of the Board's conversion of its termination for default. *Swanson Group, Inc.*, ASBCA No. 52109, 01-1 BCA ¶ 31,164 at 153,928. The contractor has a right to appeal a settlement termination determination if it submitted a timely termination settlement proposal or request for equitable adjustment or request for a time extension. FAR 52.249-2(j). Accordingly, appellant's right of appeal is not barred as a matter of law by its failure to submit a timely termination settlement proposal. The genuine issues of material fact as to the timelines of appellant's request for an extension of time preclude a grant of summary judgment for the government.

[2] The court vacated the Board's final decision in that appeal. The Board's previous decisions and their record citations nevertheless can be read for informational purposes. They do not constitute evidence of record in this appeal.

The government's motion is denied. The government shall within 30 days of its receipt of this decision supplement the Rule 4 file to provide documents relevant to the issue of fact regarding the timeliness of appellant's request for an extension of time and present any further argument in support of this part of its motion to dismiss. Appellant will then be permitted to file documents in its supplemental Rule 4 file and submit argument in opposition to the motion.

Dated: 13 October 2005

LISA ANDERSON TODD
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. 54863, Appeal of The Swanson Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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