

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Dick Pacific/GHEMM JV) ASBCA Nos. 55562, 55563
)
Under Contract No. DACA85-02-C-0004)

APPEARANCE FOR THE APPELLANT: Mr. Keith A. Moatz
Vice President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Sara Trent Gray, Esq.
Toni B. London, Esq.
Engineer Trial Attorneys
U.S. Army Engineer District, Alaska

OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON MOTIONS TO DISMISS FOR LACK OF JURISDICTION

The government moves to dismiss these appeals for lack of jurisdiction, alleging that they were not timely filed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. It seeks dismissals with prejudice. Appellant Dick Pacific/GHEMM JV (Dick Pacific) does not object to dismissals, provided they are without prejudice, stating that it will redirect the appeals to the U.S. Court of Federal Claims.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

Dick Pacific entered into a contract dated 19 February 2002 with the government to construct a replacement hospital (*see* complaint and answer in ASBCA No. 55562, ¶¶ 1, 2, 3). By letter dated 27 December 2005, Dick Pacific requested that the contracting officer (CO) issue a decision on the contractor’s \$12,824 claim for an alleged contract change concerning Louver L04 at Service Bay W1 (R4, ASBCA No. 55562, tab 3). The CO issued a final decision dated 17 April 2006 denying the claim, referred to as “Case 230.” A certified mail receipt reflects, and appellant has not disputed, that Dick Pacific received the CO’s final decision on 21 April 2006. (*Id.*, tab 1)

By separate letter dated 27 December 2005, Dick Pacific requested that the CO issue a decision on the contractor’s \$39,106 claim for an alleged contract change concerning top of wall anchoring for CMU walls (R4, ASBCA No. 55563, tab 3). The CO issued a final decision dated 10 April 2006 denying the claim, referred to as “Case

231.” A U.S. Postal Service “Track & Confirm” statement reflects, and appellant has not disputed, that Dick Pacific received the final decision on 21 April 2006. (*Id.*, tab 1)

By letter to the Board dated 22 August 2006, postmarked 24 August 2006, which was 125 days after its receipt of the CO’s final decisions concerning Cases 230 and 231, Dick Pacific appealed from the decisions. The Board received and docketed the notice of appeal on 28 August 2006. ASBCA No. 55562 relates to Case 230 and ASBCA No. 55563 relates to Case 231.

DISCUSSION

When a contractor appeals to the Board from a CO’s final decision, the CDA requires that it do so within 90 days from the date it received the decision. 41 U.S.C. § 606. If an appeal is sent to the Board by mail, as here, the postmarked date of mailing constitutes the filing date. *Birkart Globistics AG*, ASBCA Nos. 53458 *et al.*, 06-1 BCA ¶ 33,138 at 164,227. Compliance with the statutory 90-day filing period is considered to be a jurisdictional prerequisite under the CDA and the Board cannot waive it. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982).

Appellant does not dispute that it received the CO’s final decisions on 21 April 2006. It appealed to the Board from the decisions on 24 August 2006, 125 days after it received them – 35 days after the statutory deadline for filing its appeals. Therefore, the appeals are untimely and the Board lacks jurisdiction to entertain them. However, a dismissal for lack of jurisdiction is not on the merits and carries no *res judicata* effect. *See Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 640 (Fed. Cir. 1989). Thus, although appellant cannot re-file its untimely appeals at the Board, their dismissals for lack of jurisdiction are properly without prejudice. *See, e.g., United Partition Systems, Inc.*, ASBCA Nos. 53915, 53916, 03-2 BCA ¶ 32,264 (appeals dismissed without prejudice for lack of jurisdiction).¹ The government cites *Grand Service, Inc.*, ASBCA No. 42448, 91-3 BCA ¶ 24,164, in which the Board determined that it lacked jurisdiction because the contractor had not appealed within 90 days, and dismissed the appeal “with prejudice.” We interpret the Board’s dismissal in that case as being with prejudice to re-filing at the Board.

¹ Nevertheless, any appeals to the Court of Federal Claims from the final decisions at issue must be made within twelve months from the date appellant received them. 41 U.S.C. § 609(a)(3).

DECISION

The government's motions to dismiss on the ground that appellant's appeals to the Board were untimely are granted. The appeals are dismissed without prejudice.

Dated: 4 January 2007

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
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 Nos. 55562, 55563, Appeals of Dick Pacific/GHEMM JV, rendered in conformance with the Board's Charter.

Dated:

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