ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
RO.VI.B. Srl	)	ASBCA No. 56198
	)	
Under Contract No. W912PF-05-C-0047	)	

APPEARANCE FOR THE APPELLANT: Alessio Antonio Fantasia, Esq.
Pierluigi Angeloni Law Office
Gaeta, Italy

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
MAJ William J. Nelson, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellant, RO.VI.B Srl, entered into a fixed-price contract with the U.S. Army Regional Contracting Office (Sub Office Livirno) (the government or RCO) for construction services to be performed at Camp Darby, Italy. After its contract was terminated for default, appellant did not appeal until 138 days later. The government moves to dismiss the appeal in its entirety for lack of jurisdiction, contending that the appeal was untimely pursuant to 41 U.S.C. § 606.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 29 September 2005, the government awarded Contract No. W912PF-05-C-0047 (Contract 0047) to appellant for construction services to be performed at Camp Darby, Italy. (R4, tab 1) The contract incorporated by reference a number of clauses, among them, FAR 52.233-1, DISPUTES (JUL 2000), and FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (*id* at 19 of 26).

2. Clause 52.211-10, COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984), required appellant to complete the contract work no later than 240 calendar days after it received the notice to proceed (NTP) (R4, tab 1 at 6 of 26). NTP was given on 30 December 2006 (R4, tab 17).

3. Bilateral Modification No. P00001 was executed by the parties on 12 January 2006. It added and deleted certain work and added 50 calendar days to the contract performance period extending it to 15 October 2006. (R4, tab 67 at 5 of 6)

4. On 22 September 2006, the government issued Modification No. P00003 to have certain cable work performed. The contract completion date was extended to 27 February 2007. (R4, tab 51 at 4 of 5)

5. By letter dated 4 December 2006, contracting officer John E. Campos (CO Campos) identified several issues as delaying contract performance. The letter advised appellant that "unless this condition is cured within 10 days after receipt of this notice, the Government may terminate [the contract] for default" pursuant to the "Default" clause of the contract. (R4, tab 17)

6. In his 19 January 2007 letter, CO Campos alleged that appellant had "performed only 9% of the required work versus the scheduled percentage of 45%." According to CO Campos, appellant had until 27 February 2007 to complete the remaining 91% of the contract work. Appellant was directed to show cause within 10 days after receipt of the letter as to why its contract should not be terminated for default. (R4, tab 13)

7. On 12 April 2007, CO Campos issued Modification No. P00004 terminating Contract 0047 for default. The modification identified the specific failures and omissions which supported the decision. Appellant was told that it would be held liable for any excess costs and that it had "a right to appeal [this decision] under the Disputes clause." (R4, tab 10)

8. FAR Part 33 pertains to "Protests, Disputes, and Appeals." In 2007, when CO Campos terminated Contract 0047, FAR 33.211(a)(4)(v) required that a CO's decision contain a paragraph substantially as follows:

> This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of $50,000 or less or its accelerated procedure for claims of $100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in

> the Contract Disputes Act of 1978, 41 U.S.C. § 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

Modification No. P00004 was sent to appellant as a PDF attachment to CO Campos' 12 April 2007 e-mail. Modification No. P00004 did not include the paragraph prescribed by FAR 33.211(a)(4)(v).

9. Subsequent to the termination of its contract, appellant submitted two invoices to the Contracting Officer Representative (COR) at the Directorate of Public Works – Livorno. Both invoices were dated 6 June 2007. Invoice No. 23/07 was for the amount of €11,125.00. This invoice was allegedly for work stoppage from 27 April to 30 September 2006 due to "unexpected events." Invoice No. 22/07 was for the amount of €35,880.50. This invoice was for work performed at and for material delivered to the site. After the COR received the invoices on 27 June 2007, he forwarded them to CO Campos as attachments to his 28 June 2007 e-mail. (R4, tab 8)

10. In his letter dated 24 July 2007, CO Campos notified appellant that "[y]our invoice 23/07 for payment of €11,125 will not be processed for payment." CO Campos stated that he had reviewed appellant's "claim" and had "determined that your claim has no validity because the €43,000 financial liability against you as a result of your termination for default far exceeds the amount of your claim." The letter went on to state that "[y]ou are indebted to the United States Government for excess reprocurement costs in the amount of €43,000." Paragraph 5 of the letter advised appellant that "[a]ny amounts not paid within 30 days from the date of this letter will bear interest from the date of demand." This 24 July 2007 letter was written as a CO decision denying appellant's claim for €11,125 on the one hand, and asserting a government claim for €43,000 on the other hand. The decision included the paragraph relating to a contractor's right to file an appeal/action prescribed by FAR 33.211(a)(4)(v). (R4, tab 5)

11. In a separate letter also dated 24 July 2007, CO Campos addressed Invoice No. 22/07. He advised appellant No. 22/07 was not "certifiable" because:

> 2. The contract required a completed project and you did not meet this obligation. Therefore, the Government will not allow you to benefit from your failure. You have lost any right to compensation, so I will not process your invoice for payment of €35,880.50.

Unlike the letter relating to Invoice No. 23/07 and excess costs, the letter relating to Invoice No. 22/07 did not include the paragraph prescribed by FAR 33.211(a)(4)(v). (R4, tab 6)

12. By letter dated 28 August 2007 appellant, through counsel in Italy, appealed to the Board. The appeal letter identified its content as relating to:

-- Payment of invoice n. 23/07

-- Appeal against final decisions of 24/07/2007

In this appeal letter, appellant maintained that it was not in default, that the work stoppage at the job site had caused damage in the amount of €11,125, and that the €43,000 the government claimed was "groundless." The Board docketed the appeal as ASBCA No. 56198.

13. Although appellant did not allege any facts with respect to the government's refusal to pay Invoice No. 22/07, we believe it appealed CO Campos' refusal to pay that invoice as well. We come to this conclusion because appellant's 28 August 2007 appeal was "against final *decisions* of 24/07/2007" (emphasis added).

14. Due to appellant's failure to file a complaint as required by Board Rule 6, the Board issued a show cause notice directing appellant to file a complaint or show cause why the appeal should not be dismissed for failure to prosecute pursuant to Rule 31. In response, appellant's 19 March 2008 letter asserted it was not in default, and that it was entitled to payment for €35,880.50 (Invoice No. 22/07) for work performed, and for €11,125 for costs incurred due to work stoppage (Invoice No. 23/07). Due apparently to a misunderstanding in translation, appellant's 19 March 2008 letter also stated "we declare to renounce to present a formal claim."

15. On 19 May 2008, the government filed a motion to dismiss pursuant to Rule 31 (failure to prosecute) and Rule 35 (sanctions). The government contends that "[w]hile it is difficult to translate the language in the original Italian letter," "it is apparent that Appellant was trying to convey that it has renounced its appeal." The government said that appellant's failure to file a complaint and respond to the show cause notice "corroborates this interpretation." Appellant's 20 June 2008 response, translated, stated that its renunciation to present a formal appeal is "subordinated to the amicable resolution of the controversy," and since "there hasn't…been an amicable resolution," it shall not renounce to present a formal appeal." We understand the appellant to say that it will only withdraw its appeal if a settlement is reached.

16. Having cleared up the misunderstanding, the Board asked the government to file the initial pleading since default termination is considered a government claim. In lieu of a complaint, the government on 7 July 2008 filed a motion to dismiss for lack of jurisdiction. The government said it did so because it believed "the instant motion will resolve this case in its entirety" (mot. at 1). Appellant failed to respond to the government's motion as instructed by the Board. As a result of a show cause notice,

appellant responded by letter dated 2 January 2009. Instead of addressing the jurisdiction issue the government raised, appellant maintained that its failure to perform was excusable and that it performed 9% of the work for which it was entitled to €35,800.50.

DECISION

In moving to dismiss the appeal, the government relies upon 41 U.S.C.§ 606 which requires that a contractor file its appeal "[w]ithin ninety days from the date of receipt of a contracting officer's decision." The government tells us that "the contracting officer's decision to terminate the contract for default, a government claim, was sent to Appellant on April 12, 2007, via e-mail and facsimile. Appellant, however, did not file a Notice of Appeal with the Board until August 28, 2007 (138 days) after notice was sent" (mot. at 3 4)

Under the Contract Disputes Act (CDA), "All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer." 41 U.S.C. § 605(a). The CDA does not define the word "claim." FAR 2.101 defines "claim" to mean "a written demand or written assertion by one of the contracting parties, seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract…."

The government correctly points out that, under the CDA, once the CO issues a decision, if the contractor elects to appeal to the Board, it must appeal "[w]ithin ninety days from the date of receipt of a contracting officer's decision." 41 U.S.C.§ 606. Because the 90-day appeal period is a part of a statute waiving sovereign immunity, it cannot be waived. *Cosmic Construction Co. v. United States,* 697 F.2d 1389, 1390 (Fed. Cir. 1982).

In this case, CO Campos' Modification No. P00004 terminating Contract 0047 for default was sent to appellant by e-mail and facsimile on 12 April 2007, and appellant did not appeal to the Board until 28 August 2007, 138 days later. Even though appellant's appeal on default termination of its contract was late, it was not fatal. Under the *Fulford Doctrine,* a timely appeal from an assessment of reprocurement costs permits the appellant to challenge the validity of the default termination. *ARCO Engineering, Inc.,* ASBCA No. 52450, 01-1 BCA ¶ 31,218 at 154,096, n.1 *citing Fulford Manufacturing Co.,* ASBCA Nos. 2143, 2144, 6 CCF ¶ 61815; *see also Roxco, Ltd. V. United States,* 60 Fed. Cl. 39, 46 (2004) (noting that the Court of Federal Claims "has adopted the *Fulford Doctrine*.").

In this case, CO Campos by a decision dated 24 July 2007 asserted as a matter of right the government's entitlement to €43,000 in excess reprocurement costs and

demanded payment from appellant. We conclude that the government asserted an excess reprocurement cost claim against the appellant on 24 July 2007, and appellant filed a timely appeal of the assessment by notice dated 28 August 2007, 35 days later. Because appellant timely appealed CO Campos decision assessing excess costs, we hold that appellant is not time-barred to challenge the validity of the default termination.[1]

Subsequent to the termination of Contract 0047, appellant submitted Invoice No. 23/07 for €11,125. This invoice was allegedly for work stoppage as a result of "unexpected events" for the period 27 April to 30 September 2006. We conclude this invoice was a claim submitted by the contractor as defined in FAR 2.101. CO Campos treated Invoice No. 23/07 as a claim and denied it in the same decision in which he accessed €43,000 in excess costs against appellant. Since appellant timely appealed the 24 July 2007 decision on Invoice No. 23/07 by notice dated 28 August 2007, 35 days later, we hold we have jurisdiction over appellant's €11,125 claim.

Subsequent to the termination of Contract 0047, appellant submitted Invoice No. 22/07 for €35,880.50 on 27 June 2007. This invoice was for work performed at and material delivered to the site. In a separate letter also dated 24 July 2007, CO Campos advised appellant that Invoice No. 22/07 was not certifiable, and therefore would not be paid. Unlike the letter relating to Invoice No. 23/07, the letter relating to Invoice No. 22/07 did not include the paragraph prescribed by FAR 33.211(a)(4)(v).

We believe Invoice No. 22/07 qualified as a claim because it was for work performed and for material delivered to the site, and the invoice was submitted after Contract 0047 was terminated for default. Moreover, CO Campos' 24 July 2007 letter treated it as a claim and denied payment on the basis that appellant failed to complete the contract. Although appellant's 28 August 2007 appeal did not specifically mention Invoice No. 22/07 or €35,880.50, the notice of appeal did say that it was for "Appeal against final *decisions* of 24/07/2007." We believe appellant would not have used the word "decisions" in the plural had it intended to appeal only the CO's decision relating to Invoice No. 23/07 and the assessment of excess costs. Because appellant timely appealed the CO's denial of Invoice No. 22/07 for €35,880.50, we conclude that we have jurisdiction over the parties' dispute relating to that invoice.

CONCLUSION

For reasons stated, the government's motion to dismiss for lack of jurisdiction is denied. The Board has jurisdiction over the CO's decisions (1) terminating the contract

[1] We need not, therefore, decide whether the defective notice of appeal rights prejudiced appellant such that the appeal to the Board was timely for that reason. *See Decker & Co. v. West*, 76 F.3d 1573, 1579-80 (Fed. Cir. 1996).

for default, (2) assessing excess costs in the amount of €43,000, (3) denying appellant's claim for €11,125, and (4) denying appellant's claim for €35,880.50.

Dated: 29 January 2009

PETER D. TING
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. 56198, Appeal of RO.VI.B. Srl, rendered in conformance with the Board's Charter.

Dated:

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