

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
TTF, L.L.C. ) ASBCA No. 58494  
 )  
Under Contract No. SPM4A7-10-M-F069 )

APPEARANCE FOR THE APPELLANT: Mr. David Storey  
President

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.  
DLA Chief Trial Attorney  
Edward R. Murray, Esq.  
Trial Attorney  
DLA Aviation  
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD ON  
GOVERNMENT’S MOTION TO DISMISS FOR LACK OF JURISDICTION AND  
APPELLANT’S MOTION TO WITHDRAW APPEAL

Background

On 7 January 2013, the Board received an appeal from TTF, L.L.C. (TTF), which stated in part as follows:

Pursuant to Rule 2, an appeal is being taken for Contract Number SPM4A7-10-M-F069 with Defense Logistics Agency, the Contracting Officer[’s]...failure to provide a proper response to TTF, LLC’s CDA of 1978 claim within 60 days per the Contract Disputes Act of 1978....

....

TTF, LLC requests Contract SPM4A7-10-M-F069 be Terminated for Convenience and NOT Default.

On 4 February 2013, the Board received the government’s motion to dismiss the appeal for lack of jurisdiction alleging the appeal was untimely. The government also requested and was granted a stay of the requirements for providing an answer and Rule 4 file. For its reply to the motion to dismiss, TTF filed a motion for withdrawal of the appeal “due to significant new information being sent to the Contracting Officer.”

The government opposed the motion for withdrawal stating that the new information was merely another claim under the contract and that it added nothing relevant to the timeliness of the appeal. Further, the government asserted that it would not oppose appellant's motion for withdrawal if the appeal were dismissed with prejudice. Lastly, the government stated that "if TTF files a new appeal based on the 'new' Contract Disputes Act claim," it would "move for sanctions particularly if Respondent has to file another motion to dismiss as untimely."

### Discussion

We do not have a rule governing when an appellant may withdraw an appeal. Under these circumstances, we look to the Federal Rules of Civil Procedure (FED. R. CIV. P.) for guidance. *Thorington Electrical and Construction Co.*, ASBCA No. 56895 *et al.*, 10-2 BCA ¶ 34,511 at 170,177 n.3 ("[I]n appropriate circumstances, where our rules do not address a matter, we commonly look to the Federal Rules of Civil Procedure for guidance."). FED. R. CIV. P. 41 provides in pertinent part that a "plaintiff may dismiss an action without a court order by filing...a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." The effect of that dismissal is explained in the rule as follows:

Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal-or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

The final paragraph of FED. R. CIV. P. 41 speaks to what happens when a "plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant." The rule makes clear that the court might order that plaintiff pay the costs of that previous action.

Based upon FED. R. CIV. P. 41, we will allow appellant to withdraw its appeal without prejudice. While the government would agree to a dismissal so long as it is without prejudice, we observe that even if the government were to prevail on its motion to dismiss for lack of jurisdiction, the result is still a dismissal without prejudice. *Dick Pacific/GHEMM JV*, ASBCA Nos. 55562, 55563, 07-1 BCA ¶ 33,469 at 165,920 (a dismissal for lack of jurisdiction is not on the merits, carries no *res judicata* effect and is properly without prejudice).

Appellant's Motion to Withdraw the Appeal is granted. In light of our allowance of the motion for withdrawal of the appeal, the government's Motion to Dismiss for Lack of Jurisdiction is denied as moot.

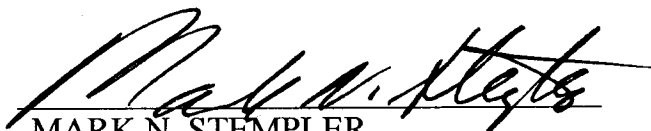
Dated: 19 June 2013



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RICHARD SHACKLEFORD  
Administrative Judge  
Armed Services Board  
of Contract Appeals


I concur



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MARK N. STEMPLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



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MARK A. MELNICK  
Administrative Judge  
Acting 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. 58494, Appeal of TTF, L.L.C., rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals