UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: November 16, 2007

CBCA 917

PINNELL BROWN CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Gregory G.T. Ervanian of Graham & Ervanian P.C., Des Moines, IA, counsel for Appellant.

Tony A. Ross, Charlma J. Quarles, and Phillipa L. Anderson, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **DeGRAFF**, **STEEL**, and **SHERIDAN**.

DeGRAFF, Board Judge.

The agency moves to dismiss this appeal for lack of jurisdiction upon the ground that it was not timely filed. Because we conclude the appeal was timely filed, we deny the motion.

Findings of Fact

Pinnell Brown Construction, Inc. (Pinnell or appellant) and the Department of Veterans Affairs (VA or agency) entered into a construction contract. On June 7, 2007, Pinnell received by telefacsimile a letter of the same date from the agency's contracting

officer which explained that Pinnell's response to the agency's cure notice was unacceptable for five reasons and, therefore, VA was terminating Pinnell's contract for default. The letter said it was the contracting officer's final decision and told Pinnell it could appeal the decision to either the United States Court of Federal Claims within twelve months, or the Department of Veterans Affairs Board of Contract Appeals "within 90 days from the date you receive this decision." Motion to Dismiss, Exhibit 1.

On June 22, 2007, Pinnell received by telefacsimile a second letter from the agency's contracting officer. In the letter, dated June 21, the contracting officer explained that Pinnell's response to the agency's cure notice was unacceptable for four reasons and, therefore, the agency was terminating Pinnell's contract for default. The first three reasons set out in the June 21 letter were the same as the first three reasons set out in the June 7 letter. The fourth reason set out in the June 21 letter was not quite the same as the fourth reason set out in the June 7 letter. The fifth reason contained in the June 7 letter was not contained in the June 21 letter. The June 21 letter said it was the contracting officer's final decision and told Pinnell it could appeal the decision to either the United States Court of Federal Claims within twelve months, or the Civilian Board of Contract Appeals "within 90 days from the date you receive this decision." The June 21 letter did not mention the June 7 letter. Motion to Dismiss, Exhibit 2.

On September 14, 2007, Pinnell mailed its notice of appeal to this Board. The notice said Pinnell was appealing from the June 21 decision. On October 23, 2007, VA filed a motion to dismiss for lack of jurisdiction. VA filed an amended motion on October 30. In its amended motion, VA argues that Pinnell's appeal was not timely filed because it was filed more than ninety days after Pinnell received the June 7 contracting officer's decision. Pinnell opposes the motion.

Discussion

We have jurisdiction only if Pinnell appealed within ninety days from the date it received the contracting officer's decision. 41 U.S.C. § 606 (2000). According to our rules of procedure, Pinnell appealed on September 14, when it mailed its notice of appeal to the Board. *Charles T. Owen v. Agency for International Development*, CBCA 694, 07-2 BCA ¶ 33,638. If the ninety days began to run on June 22, when Pinnell received the June 21 decision, the appeal is timely. If the ninety days began to run on June 7, when Pinnell received the June 7 decision, the appeal is untimely.

In its motion, VA relies upon *Tyger Construction Company, Inc.*, ASBCA 36100, 88-3 BCA ¶ 21,149. In *Tyger*, the contractor received a contracting officer's decision by telefacsimile and received the identical decision one week later in hard copy. Tyger's appeal

to the board was timely if the ninety-day appeal period began to run when Tyger received the hard copy of the contracting officer's decision, but not if the period began to run when it received the telefacsimile copy of the decision. Tyger stated in its appeal to the board that it was appealing from the decision it received by telefacsimile. The issue presented to the board was whether the ninety-day appeal period began to run when Tyger received the contracting officer's decision by telefacsimile. The board held Tyger's receipt of the decision sent by telefacsimile started the appeal period running because the decision did not suggest the telefacsimile copy was anything other than the contracting officer's final decision.

Pinnell refers us to *Eastern Computers, Inc.*, ASBCA 49185, 96-2 BCA ¶ 28,343, in which the board was faced with different facts and reached a different result from the one it reached in *Tyger*. In *Eastern Computers*, the contractor received a contracting officer's decision by telefacsimile and received the identical decision five days later in hard copy. The contractor's appeal to the board was timely if the ninety-day appeal period began to run when it received the hard copy of the contracting officer's decision, but not if the period began to run when it received the telefacsimile copy of the decision. The contractor stated in its appeal to the board that it was appealing from the decision it received in hard copy. The issue presented to the board was, once again, whether the ninety-day appeal period began to run when the contractor received the contracting officer's decision by telefacsimile.

In *Eastern Computers*, the board held the contractor's receipt of the hard copy of the contracting officer's decision started the appeal period running. The board decided the agency's actions were confusing because the decision said the ninety-day appeal period began to run upon receipt of the contracting officer's decision, but did not say whether the period began to run upon receipt of the telefacsimile copy or receipt of the hard copy of the decision. As a result of the unclear direction provided by the agency regarding when the ninety days began to run, the contractor was entitled to rely upon the appeal language contained in the hard copy of the decision it received and to begin counting the ninety days from its receipt of the hard copy. The board noted that *Tyger* warranted a different result because Tyger appealed to the board from the copy of the decision it received by telefacsimile which showed it considered the telefacsimile copy to be the contracting officer's final, appealable decision.

Instead of sending the same contracting officer's decision by two different means as the agencies did in *Tyger* and *Eastern Computers*, VA used the same means to send Pinnell two different versions of a decision. Although both versions notified Pinnell that its contract was being terminated for default, the second version of the decision stated somewhat different reasons for the termination action than did the first version of the decision. Both versions of VA's decision said Pinnell's time to appeal began to run when it received "this

decision" and did not make clear whether the time began to run when Pinnell received the first version or the second version of the decision. Pinnell stated in its appeal to the Board that it is appealing from the second version of the decision it received, which shows Pinnell did not consider the first version of the decision to be the contracting officer's final, appealable decision.

Agencies control the content and distribution of contracting officers' decisions, and statute requires the decisions to provide sufficiently clear information to enable contractors to make informed choices concerning their appeal rights. 41 U.S.C. § 605(a); *Eastern Computers*. "The focus of this requirement is the protection of the contractor." *Decker & Co. v. West*, 76 F.3d 1573, 1579 (Fed. Cir. 1996). Here, the agency provided the contractor with two versions of a decision, both of which expressly provided that the ninety-day time to appeal began to run "from the date you receive this decision" and neither of which made clear which version was legally effective to begin the running of the ninety-day appeal period. The agency's actions created understandable confusion as to when the time to appeal began to run and, as a result, Pinnell was entitled to rely upon the appeal language contained in the second version of the decision, which it did. *AST Anlagen-und Sanierungstechnik GmbH*, ASBCA 51854, 04-2 BCA ¶ 32,712. Pinnell's appeal is timely because it was filed within ninety days from June 22, 2007, when Pinnell received the second version of the contracting officer's decision.

Decision

The motion to dismiss is **DENIED**.

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MARTHA H. DeGRAFF
Board Judge

We concur:

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CANDIDA S. STEEL
Board Judge

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PATRICIA J. SHERIDAN
Board Judge