



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: May 1, 2013

CBCA 3210

SOTO CONSTRUCTION COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Walter D. Soto, President of Soto Construction Company, Inc., South Tucson, AZ, appearing for Appellant.

Patricia Leigh Disert, Office of the General Counsel, Department of Agriculture, Albuquerque, NM, counsel for Respondent.

Before Board Judges **SOMERS, GOODMAN, and STEEL.**

SOMERS, Board Judge.

The United States Department of Agriculture, Natural Resources Conservation Service, (USDA-NRCS, the Government, or respondent) awarded a firm fixed-price contract to Soto Construction Company, Inc. (Soto or appellant) for the installation of approximately one mile of buried pipeline and alfalfa valves. The Government issued its notice to proceed on October 20, 2011, and work commenced soon thereafter, on November 15, 2011. Soto immediately discovered a problematic utility line. It provided written notification to the contracting officer of a differing site condition.

The parties met and the contracting officer told Soto to proceed with performance while the Government revised the drawings for the pipeline profile. After contract completion, Soto submitted a claim for \$25,444.01 for delays allegedly arising from the differing site condition.

The contracting officer denied Soto's claim by letter dated October 15, 2012. The decision stated, in pertinent part:

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.

The decision also provided information concerning the right to bring an action directly to the United States Court of Federal Claims.

Both parties agree that appellant received the decision no later than October 16, 2012. The receipt of the final decision started the clock on the statutorily mandated ninety days during which appellant could file an appeal with the Board. The appeal had to be filed no later than January 11, 2013.

Appellant did not file a notice of appeal with the Board within ninety days of receiving the contracting officer's final decision. Instead, on January 11, 2013, appellant faxed and mailed a "notice of intent to appeal" to the USDA National Appeals Division, Western Regional Office, located in Lakewood, Colorado. On January 14, 2013, appellant mailed a copy of its notice to the contracting officer.

The agency received a copy of this notice on January 17, 2013. Upon receipt, agency counsel faxed a copy to the Board on January 17, 2013, with a note stating that "[w]e suspect that the Board has not received a copy of the appeal, therefore, we are sending it herewith." The Board docketed the appeal as CBCA 3210, ninety-six days after appellant received the contracting officer's final decision.

Appellant itself did not file its appeal with the Board until February 19, 2013. Upon review of the file and after conducting a teleconference, on February 21, 2013, the Board issued an order to show cause as to why the appeal should not be dismissed as untimely filed.

Appellant submitted its response to the order; the agency filed a motion to dismiss for lack of jurisdiction.

Discussion

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7107-7109 (Supp. IV 2011), under which the Board reviews contracting officer decisions, requires that an appeal of such a decision to a board of contract appeals be filed “[w]ithin ninety days from the date of receipt of [the] decision.” 41 U.S.C. § 7104(a).¹ Alternatively, within twelve months from the date of the contractor’s receipt of the contracting officer’s final decision, a contractor may file its appeal with the United States Court of Federal Claims. 41 U.S.C. § 7104(b). These deadlines for filing have been strictly construed by the Court of Appeals for the Federal Circuit because the authorization to make the filing is a waiver of sovereign immunity. Failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982); *Geo-Imaging Consulting, Inc. v. Environmental Protection Agency*, CBCA 1712, 10-1 BCA ¶ 34,318 (2009); *Pixl Inc. v. Department of Agriculture*, CBCA 1203, 09-2 BCA ¶ 34,187.

Here, appellant did not file its appeal with the Board until February 19, 2013, thirty-nine days after the jurisdictional ninety-day time frame. In its response to the order to show cause, appellant asserts that it filed its notice of appeal in accordance with the directions contained in the contracting officer’s final decision, stating as follows:

The Arizona office of the USDA-[NRCS] in its denial of [Soto’s] claim refers to the “agency board of contract appeals” four (4) separate times. Based on the undefined use of “agency,” and in the context that the Contracting Officer’s Final Decision was coming from the USDA-[NRCS], [Soto’s] understanding is that the referenced “agency board of contract appeals” was the USDA.

Appellant contends that sending a copy of the notice of appeal to the contracting officer fulfilled the timeliness requirements, citing *Brunner Bau GmbH*, ASBCA 35678, 89-1 BCA ¶ 21,315. In the subsequently filed opposition to the agency’s motion to dismiss, appellant expands this argument, contending that an otherwise proper notice of appeal misdirected to the agency contracting officer rather than to the board of contract appeals has been found to be a valid notice of appeal, citing various cases. Appellant concludes its argument by

¹ The referenced provisions of the CDA have been codified. The ninety-day limitation formerly found at § 606 is now found at § 7104(a).

contending that the contracting officer's final decision failed to give the contractor adequate notice of its appeal rights because it failed to identify the agency board with any specificity.

Appellant's argument must be rejected. As correctly noted by the agency, the Civilian Board of Contract Appeals is not a department or organization of the United States Department of Agriculture. Our enabling legislation states that "[t]he Civilian Board has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency . . . relative to a contract made by that agency." 41 U.S.C. § 7105(e). While the Board can decide cases arising out of executive agencies, these agencies cannot act as agents of the Board. Thus, an appeal sent only to the contracting officer or within the agency itself is not considered properly filed with the Board. *Geo-Imaging Consulting*, 10-1 BCA at 169,513 (citing *Charles T. Owen v. Agency for International Development*, CBCA 694, 07-2 BCA ¶ 33,638).

Appellant argues that the contracting officer's final decision failed to accurately provide Soto with the proper appeal rights. Without such, the decision did not trigger the running of the limitations period. We reject this argument. The language used in the final decision is consistent with that required by the CDA, more specifically, Federal Acquisition Regulation (FAR) 33.211(a). *See* 48 CFR 33.211(a) (2011). FAR 33.211(a) provides that the contracting officer shall prepare a written decision on the claim, using language substantially identical to that used in the case at hand, including the use of the generic reference to the "agency board of contract appeals." While it would be more precise to state that the agency board of contract appeals for this agency is indeed the Civilian Board of Contract Appeals, nothing in the regulations requires the contracting officer to be that specific. Ultimately, the onus is on the appellant to make certain that the appeal is timely and properly filed with the Clerk of the Board. The untimely appeal to this Board does not preclude the contractor from filing a timely suit in the Court of Federal Claims. *Olsberg Excavating Co. v. United States*, 3 Cl. Ct. 249 (1983).

Decision

Respondents motion to dismiss the appeal for lack of jurisdiction is granted. This appeal is **DISMISSED FOR LACK OF JURISDICTION**.

JERI KAYLENE SOMERS
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

CANDIDA S. STEEL
Board Judge