

U.S. Department of Labor

Board of Contract Appeals
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: Date Issued: April 7, 1997
In the Matter of:
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: Case No. 96-BCA-3
JAMCO CONSTRUCTORS NM, INC., :
Appellant :
:
CONTRACT NUMBER: E-4668-4-00-82-20:
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Before: Levin and Miller
Levin, Member, Board of Contract Appeals

ORDER DENYING CONTRACTING OFFICER’S MOTION TO DISMISS AND APPELLANT’S MOTION FOR SANCTIONS

On July 25, 1992, the United States Department of Labor awarded Contract No. E-4668-4-00-82-20 to Jamco Construction NM, Inc. (“Jamco”) to remove asbestos from Building J at the Albuquerque, New Mexico Job Corps Center. On April 4, 1995, Jamco filed with the Contracting Officer a monetary claim and a request for an extension of time. The Contracting Officer denied Jamco’s claim in a final decision dated August 4, 1995, received by Jamco on August 7, 1995. Appellant filed with the Contracting Officer a notice of appeal dated October 25, 1995. The appeal was docketed by this Board on March 12, 1996. The Contracting Officer moves to dismiss this appeal for lack of jurisdiction because Jamco did not file its notice of appeal directly with this Board within the 90-day appeal period. Jamco argues that it filed its notice of appeal in accordance with the rules of practice before this Board as promulgated and published by the Department of Labor at 41 C.F.R. § 29-60.201. Appellant also seeks as a sanction the costs it incurred defending against the Contracting Officer’s motion.

In the final Decision dated August 4, 1995, the Contracting Officer instructed Jamco as follows: “[s]hould you not agree with this decision, you may submit your response in accordance with Federal Acquisition Regulation (FAR) clause 52.233-1 titled Disputes, as set forth in your contract.” Clause (f) of the contract’s Disputes clause states that “[t]he Contracting Officer’s decision shall be final unless the Contractor appeals or files a suit as provided in the [Contract Disputes] Act.” Section 7 of the Contract Disputes Act of 1978 states that “[w]ithin ninety days from the date of receipt of a contracting officer’s decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals” 41 U.S.C. § 606(b).

Jamco looked to the Department's rules for further guidance in filing an appeal. The rules state that "[t]he original notice of appeal, together with two copies, addressed to the Secretary, shall be filed with the contracting officer from whose decision the appeal is taken. The notice of appeal must be mailed or otherwise filed within the time specified therefor in the contract." 41 C.F.R. § 29-60.201. Section 29-60.203 further provides that:

When a notice of appeal is received by the contracting officer, he shall transmit, directly to the Board, the original of the notice of appeal, together with the original of the envelope in which the notice of appeal was received with the date of receipt stamped thereon, and any receipt from the appellant showing the date of receipt of the decision of the contracting officer, or shall furnish information as to the date when his decision was received by the appellant. A copy of the same material shall be simultaneously furnished to the Solicitor of Labor. When the Board receives the original or copy of a notice of appeal from a source other than the contracting officer, the contracting officer shall be advised promptly, given a copy of the notice, and shall be requested to follow the same procedure as if he had received the notice directly from the appellant.

In accordance with 41 C.F.R. § 29-60.201, Jamco filed a notice of appeal, dated October 25, 1995, addressed to the Secretary of Labor, C/O John M. Steenbergen, Contracting Officer. (Jamco Reply Brief, Exh. A.) The cover letter, signed by Jamco's attorney and directed to the attention of Steenbergen, stated in pertinent part: "Pursuant to 41 C.F.R. § 29-60.201, I am enclosing Jamco's notice of appeal of your final decision dated August 4, 1995 regarding the referenced contract." The letter also requested reconsideration of the Contracting Officer's decision, and expressed an interest in settling the dispute. (JAMCO Reply Brief, Exh. A.)

In support of his motion, the Contracting Officer submitted his own affidavit and the affidavit of his consultant, Sandra Z. Bulls, representative of DMJM/HTB. Both affidavits set forth the following facts: on January 30, 1996, Steenbergen and Bulls met with Jamco's attorney, Raymond R. Flowers, to discuss a possible settlement of this dispute. Steenbergen indicated to Flowers that he did not have the original of Jamco's October 25, 1995 notice of appeal, and that he assumed that the original had been filed with this Board. Flowers then removed the original notice of appeal from his briefcase, stating that his secretary failed to mail it to the Secretary of Labor, and requested that Steenbergen file the notice of appeal with the Board. Steenbergen assured Flowers that he would forward the notice to the Board.

Flowers, in a sworn affidavit, contests the facts set forth in the affidavits of Steenbergen and Bulls. Flowers attests that on October 25, 1995, he sent to Steenbergen, by regular mail, an original and two copies of the October 25, 1995 notice of appeal addressed to the Secretary in care of the Contracting Officer. Flowers denies making the statement regarding his secretary's failure to mail the notice of appeal to the Secretary of Labor. (JAMCO reply Brief, Exh. B.)

The notice of appeal was received by this Board on March 1, 1996, and docketed on March

12, 1996.

DISCUSSION

The Contracting Officer moves to dismiss Jamco's appeal for lack of jurisdiction, arguing that Jamco did not file its notice of appeal with this Board within 90 days of receipt of the Contracting Officer's final decision as required by the Contract Disputes Act of 1978, 41 U.S.C. §606(b). Jamco argues that its notice of appeal is timely because it filed its notice of appeal with the Secretary of Labor, in care of the Contracting Officer, in compliance with 41 C.F.R. §29-60.201.

In support of its motion to dismiss, the Contracting Officer cites Meritt Lumber Co., AGBCA No. 88-313-1, 89-2 BCA ¶21,676, for the proposition that filing a notice of appeal with the Contracting Officer is not sufficient to confer jurisdiction on the Board. In that case, the contractor was relying on a Board rule similar to the one at issue. The Board in Meritt held that the rule upon which the Contractor relied was no longer in effect and, as a consequence, a notice of appeal delivered to a Contracting Officer did not constitute timely filing with that Board. The Agriculture Board of Contract Appeals has, however, reconsidered its position, and has subsequently held that timely filings of notices of appeal with the Contracting Officer are sufficient to confer jurisdiction on that Board. Frank Dufour, AGBCA No. 95-170-1, ___ BCA ¶ ____.

The Contracting Officer had the burden, under the regulations, of establishing the timeliness, or lack thereof, of Jamco's notice of appeal, and he failed to take the necessary steps to satisfy that burden.. The rules of practice before this Board require a contractor to file its notice of appeal with the Secretary of Labor, in care of the Contracting Officer within 90 days of receipt of the Contracting Officer's final decision. The rules further state that such service is timely if the notice of appeal was mailed or otherwise filed with the Contracting Officer within the 90-day appeal period. We find that Jamco complied with this requirement. Contrary to the assertions of the Contracting Officer, this procedure is not inconsistent with the appeal provision of §7 of the Contract Disputes Act. The Contract Disputes Act does not require a contractor to file its notice of appeal directly with the Board. Surety Roofing Contractors, ASBCA No. 37,894, 89-2 BCA ¶ 21,730.

The Postal Service Board of Contract Appeals and the Interior Board of Contract Appeals have rules which are virtually identical to ours. (See, 39 C.F.R. § 955.2 and 43 C.F.R. § 4.102, respectively). Although this Board has not had the opportunity to interpret the rule in dispute, the Postal Service Board has addressed the issue. In Auburn Flying Service, PSBCA No. 1509, 86-3 BCA ¶ 19,273, that Board upheld the application of its rule stating that a notice of appeal "need not be filed directly with the Board." Auburn Flying Service, citing Contraves-Goerz Corp., ASBCA No. 26317, 83-1 BCA ¶ 16,309, Yankee Telecommunications Laboratories, Inc., ASBCA No. 25240, 82-1 BCA ¶ 15,515; see also Frank Dufour, *supra*, Manistique Tool and Manufacturing Co., ASBCA No. 29,164, 84-3 BCA ¶ 17,599, Surety Roofing Contractors, ASBCA No. 37,894, McNamara-Lunz Vans & Warehouses, Inc., ASBCA No. 38,057, 89-2 BCA ¶ 21,636, Kos Kam, Inc., ASBCA No.

34,633, 88-1 BCA ¶ 20,311. We find the Board's rationale in Auburn persuasive. In this instance, Jamco fully complied with the rules of this Board and the Contract Disputes Act. Its notice of appeal was timely filed with the appropriate official, and this Board has jurisdiction to entertain this appeal.

The Contracting Officer had a duty to forward the notice of appeal when it was initially received, especially if, as he alleges, he had no intention to act upon the Motion to Reconsider. The Contracting Officer failed to forward Jamco's notice of appeal for approximately five months after Jamco attests it was initially mailed to the Contracting Officer, and approximately two months after the Contracting Officer promised Jamco's attorney that it would do so. The Agriculture Board of Contract Appeals has concluded that "a CO, who is the principal Government defendant, and who is fully and timely aware of the contractor's desire to appeal a final decision, should not be permitted to prevent the contractor from doing so by the 'unwarranted action' of failing to forward an appeal to the board." Frank Dufour, supra, citing Dawson Construction Co., EBCA No. 155-2-81, 81-2 BCA ¶ 15,162.

We note further that once the notice of appeal was filed Steenbergen also had pending before him a Motion to Reconsider which he never formerly resolved or denied. He stated in his affidavit that he never intended to reconsider his decision. He did, however, meet with Appellant's counsel on January 30, 1996, to discuss possible settlement of claim, but, in essence, he reaffirmed his final decision. During this meeting, the Contracting Officer, in effect, denied the Motion to Reconsider. See, William G. Barnes & Son Co., PSBCA No. 3405, ___ BCA ¶ ___. Since the notice of appeal was filed with this Board within 90 days of January 30, 1996, the date the Motion to Reconsider was effectively denied, we hold that the appeal was timely filed.¹ The Contracting Officer's Motion to Dismiss is, therefore, **DENIED**.

Jamco further argues that the Contracting Officer's motion should be denied because it was not promptly filed in accordance with 41 C.F.R. § 29-60.207-2. The rule, however, does not provide any specific time period for filing motions to dismiss for lack of jurisdiction. It is within the Board's discretion to decide if there has been an undue delay in filing the motion. L&V Machine and Tool Works, ASBCA No. 15,243, 71-2 BCA ¶ 9035. The Board does not find that the proceedings have been unduly delayed in this case. The Contracting Officer has filed responsive pleadings and the Appeal File as ordered, and the parties have been able to engage in discovery while this motion has been pending. There has been no delay in prosecuting this appeal, and Jamco has not been prejudiced by this motion.

¹The record before us does not reveal the date on which the Contracting Officer received Jamco's October 25, 1995 notice of appeal. Despite the mandate of 41 CFR §29-60.203, the Contracting Officer failed to date-stamp the notice of appeal upon receipt or forward to the Board the post-marked envelope in which the notice of appeal was mailed. By letter dated February 22, 1996, however, the Contracting Officer transmitted the Notice of Appeal to the Board which received it on March 1, 1996. The timeliness of the appeal is therefore established, by the Board's receipt of the notice of appeal within 90 days of January 30, 1996, the date Steenbergen effectively denied Jamco's request for reconsideration.

Finally, Jamco seeks sanctions against the Contracting Officer in an amount equal to the costs of defending against the Contracting Officer's motion. Although the prevailing view of the Boards of Contract Appeals is that the Boards do not have the authority to impose monetary sanctions, Stemaco Products, Inc., ASBCA No. 45,469, 94-3 BCA ¶ 27,060; Turbomach, ASBCA No. 30,799, 87-2 BCA ¶ 19,756; Charles C. Raszer dba Razor Trucking, PSBCA No. 1569, 87-2 BCA ¶ 19,788, we would note further that the evidence does not indicate that the Contracting Officer's motion was filed in bad faith or prejudiced Jamco. Jamco's motion for sanctions is hereby **DENIED**.

So Ordered.

Stuart A. Levin
Member, Board of Contract Appeals

Edward Terhune Miller
Member, Board of Contract Appeals