



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: September 13, 2012

CBCA 2838

JACOB CONSTRUCTION LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Ronald Jacob, President of Jacob Construction LLC, Louisville, KY, appearing for Appellant.

Tracy Downing, Office of Regional Counsel, Department of Veterans Affairs, Nashville, TN, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STERN**, and **HYATT**.

STERN, Board Judge.

The Department of Veterans Affairs (VA) moves to dismiss for lack of jurisdiction the appeal of Jacob Construction LLC (Jacob).

Background

On June 24, 2009, the VA awarded to Jacob a contract for kitchen renovation work at a building in Tennessee. On March 22, 2010, the contracting officer for the VA issued an order suspending work on the renovation project. The suspension remained in place until lifted on November 8, 2010. Thereafter, Jacob filed a claim for an equitable adjustment in the amount of \$73,398.37 for the overhead costs it alleges it incurred during the suspension

period (delay 1). On May 5, 2011, the contracting officer issued a decision denying the entire claim for overhead costs. The decision fully advised Jacob of its appeal rights to the Board and the Court of Federal Claims. The contracting officer also sent an email message to appellant with the decision, stating she would consider “reasonable costs for remobilization.” There were other problems on the project and Jacob filed two additional delay claims for extra work performed by it.

On February 2, 2012, Jacob wrote the contracting officer regarding the three delays under the contract. The first part of the letter was with regard to the delay 1 claim. Jacob reiterated that it sought \$73,398.37 as a result of this delay. The letter set forth the basis and dollar amounts for the other two delays (designated delays 2 and 3).

On February 7, 2012, the contracting officer met with Jacob and all three claims were discussed. A written memorandum of the meeting, apparently written by an employee of Jacob, attempted to summarize the meeting. This memorandum contains the following statement with regard to the claim for overhead costs (delay 1), denied in the contracting officer’s decision of May 5, 2011:

With regard to the claims, at face value she appears to be set on paying Jacob for the first delay for the suspension of work, her statement to the group was that the VA could not tell the contractor not to work for three months then continue to put them off month after month and not to be responsible for the contractors overhead costs.

Appellant’s Reply to Respondent’s Motion to Dismiss for Lack of Jurisdiction, Exhibit 15.

On May 2, 2012, the contracting officer issued a decision granting appellant \$73,468.23 for part of its claims on delays 2 and 3. Regarding the delay 1 claim for overhead, the contracting officer stated,

Delay 1 has already been ruled upon with [the] Contracting Officer deciding no equitable adjustments due to the contractor for this time. No further action will be considered for this delay.

The decision advised appellant of its appeal rights. The claims regarding delays 2 and 3 were resolved by the parties. On May 14, 2012, Jacob appealed the denial of the claim regarding delay 1 to the Board.

Discussion

The VA moves to dismiss the appeal on the basis that it was untimely filed. Jacob submits that the contracting officer's decision of May 5, 2011, was not final, due to the VA's actions subsequent to its issuance. Appellant submits that the VA continued to discuss and negotiate the claim after the issuance of the decision and that appellant was led to believe that its claim remained open and under consideration by the VA.

The Contract Disputes Act provides that a contracting officer's decision on a claim is final and conclusive and not subject to review unless the decision is appealed to a board of contract appeals within ninety days or to the Court of Federal Claims within twelve months of the contractor's receipt of the decision. 41 U.S.C. §§ 7103(g), 7104 (Supp. IV 2011). The statutory appeal period is strictly construed and cannot be waived by the Board. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982).

Yet, an exception has been made where events subsequent to the issuance of the decision by the contracting officer make it clear that the contracting officer did not consider the decision final. Thus, we have held where the parties continued to negotiate in an effort to settle the dispute, subsequent to the issuance of the decision and prior to the expiration of the appeal period, the finality of the decision was vitiated. *Devi Plaza, LLC v. Department of Agriculture*, CBCA 1239, 09-1 BCA ¶ 34,033 (2008); *see also Pixl Inc. v. Department of Agriculture*, CBCA 1203, 09-2 BCA ¶ 34,187.

The determinative factor in examining each such case "is whether the contractor presented evidence showing it reasonably or objectively could have concluded the [contracting officer's] decision was being reconsidered." *Sach Sinha and Associates, Inc.*, ASBCA 46916, 95-1 BCA ¶ 27,499, at 137,041.

We see no evidence for objectively concluding that the contracting officer reconsidered Jacob's claim for overhead costs within the ninety-day period after issuance of the decision. During this period the only evidence in the record is the contracting officer's statement that she would consider a claim for remobilization costs. But these costs were not part of appellant's claim or the contracting officer's decision. Jacob could not reasonably conclude that by this statement the contracting officer was reconsidering her final decision. There was no waiver. We find the contracting officer's decision became final and conclusive ninety days after Jacob received it.

Decision

Respondent's motion to dismiss is granted. The appeal is untimely and is **DISMISSED FOR LACK OF JURISDICTION.**

JAMES L. STERN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge