UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION
DENIED: December 16, 2008

CBCA 1239

DEVI PLAZA, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Nancy O. Dix and Arthur C. Rinsky of DLA Piper US LLP, San Diego, CA, counsel for Appellant.

Marnie G. Ganotis, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

Before Board Judges **BORWICK**, **GOODMAN**, and **McCANN**.

McCANN, Board Judge.

Respondent, the United States Department of Agriculture, Forest Service (Forest Service), has filed a motion to dismiss for lack of jurisdiction on the grounds that appellant, Devi Plaza, LLC (Devi Plaza) failed to timely file its notice of appeal from the contracting officers's final decision.

Background

The Forest Service and Devi Plaza were parties to lease number 57-91S8-7-2A05 for property located at 1731 Research Drive, Davis, California. On January 22, 2008, Devi Plaza submitted a letter to the lease contracting officer (LCO) claiming it was entitled to additional costs in the amount of $488,670. Appeal File, Exhibit 18 at 11. The LCO considered this letter to constitute a claim under the Federal Acquisition Regulation (FAR). Appeal File, Exhibits 19, 20. Negotiations between the parties ensued, but were unsuccessful. On March 25, 2008, the LCO issued his decision. Appeal File, Exhibit 23. This decision set forth appellant's appeal rights and specifically instructed appellant that if it decided to appeal, it must do so "within 90 days from the date you receive this decision." In this decision the LCO also stated "[T]he Government is willing to continue a meaningful and productive dialogue with a view to reach a fair and equitable final settlement." Appeal File, Exhibit 23 at 2. Appellant received the decision on March 27, 2008.[1] Accordingly, the appeal period expired on June 25, 2008, ninety days later.

After the decision, the parties continued to negotiate in an attempt to reach a resolution of the dispute. The parties had multiple telephone conversations following the decision. Appeal File, Exhibits 24, 25. On April 2, 2008, the LCO e-mailed appellant, stating "I'm willing to meet with you once again to discuss a settlement offer. . . . I agree to meet with you in the interest of settling this matter as quickly as possible." He also indicated that an upcoming meeting would be "a final effort to negotiate full settlement of your request for cost adjustment." Appeal File, Exhibit 24. In a May 29, 2008, e-mail message the LCO stated, "[W]e are willing to listen to any new material that you are prepared to present that could influence my written decision." Appeal File, Exhibit 25. The parties met on June 11, 2008, to "further discuss my decision concerning your request for cost adjustment." Appeal File, Exhibit 27.

By e-mail message dated May 29, 2008, the LCO indicated that appellant was advised of its appeal rights in the LCO's March 2008 decision. Appeal File, Exhibit 25. Also, by letter to appellant dated June 20, 2008, the LCO again indicated that appellant had been advised of its appeal rights in the March 25, 2008, decision and that the appeal period would expire on June 28, 2008. Appeal File, Exhibit 27. By letter dated June 26, 2008, which was received by the Board on June 27, 2008, appellant appealed that decision. Appeal File, Exhibit 28.

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[1] Respondent has alleged in its motion that appellant received the LCO decision on March 27, 2008. Appellant has not disputed this. Accordingly, the Board will accept this date as the date that appellant received the March 25, 2008, LCO decision.

Discussion

Respondent contends that the Board lacks jurisdiction over this appeal because the LCO's final decision was appealed after the expiration of the ninety-day time period allowed by the Contract Disputes Act. 41 U.S.C. § 606 (2000). Appellant, on the other hand, contends that the LCO's letter dated March 25, 2008, was not a final decision and that, even if it was a final decision when issued, the finality of that decision was vitiated by subsequent events, specifically, the parties' continued negotiations and attempts to settle the dispute. Appellant contends that this led it reasonably to believe that the decision was being reconsidered.

The standard for when a final decision is no longer effective because it is being reconsidered was comprehensively covered in *Sach Sinha and Associates, Inc*., ASBCA 46916, 95-1 BCA ¶ 27,499:

> It is well-established that, if a CO's decision is not truly "final," but being reconsidered, a "failure to appeal from the decision within the prescribed period will not defeat . . . [a] contractor's opportunity to be heard on the merits." E.g., *Johnson Controls, Inc*., ASBCA No. 28340, 83-2 BCA ¶ 16,915 at 84,170. As the Court of Claims explained in *Roscoe-Ajax Constr. Co. v. United States*, 458 F.2d 55, 63, 198 Ct. Cl. 133, 148 (1972) a CO's agreeing to meet with a contractor and "to reconsider the question, serve[s] to keep the matter open and necessarily destroy[s] any finality the [CO's] decision theretofore had." Accordingly, to ascertain if this appeal is timely, we must determine whether the "finality" of the CO's decision was vitiated.
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> . . . .
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> We have determined repeatedly that the issue to be resolved with respect to vitiation of "finality" is whether the contractor presented evidence showing it reasonably or objectively could have concluded the CO's decision was being reconsidered. E.g., *Royal International Builders Co.*, ASBCA No. 42637, 92-1 BCA ¶ 24,684 (finality vitiated where CO actions created sufficient uncertainty that contractor could reasonably believe decision not final); *Birken Manufacturing Co.*, ASBCA No. 36587, 89-2 BCA ¶ 21,581 (finality attached where contractor not reasonably led to believe decision being reconsidered); *Johnson Controls, Inc*., ASBCA No. 28340, 83-2 BCA ¶ 16,915 (finality vitiated where CO granted contractor audience to discuss decision and did not "make it very clear" that original appeal period was running); *Precision Tool & Engineering Corp*., ASBCA No. 16652, 73-1 BCA ¶ 9878 (use of word

> "reconsider" not "a sine qua non"; issue is whether contractor "reasonably concluded" CO was "reconsidering his final decision").
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> Other tribunals have determined likewise. *Edward R. Ester and Lorraine Ester*, PSBCA No. 3051, 92-2 BCA ¶ 24,822 (reasonable interpretation of letter was CO willing to reconsider; contractor led to believe decision would be reconsidered); *Summit Contractors v. United States*, 15 Cl. Ct. 806 (1988) (post-decision review of same record vitiated finality); *Jen's-Beck Associates*, VABCA No. 1988, 85-2 BCA ¶ 18,086 ("test is not limited to the subjective state of the [contractor's] mind but is an objective one considering all the facts"; finality not vitiated where meetings were to discuss matters other than decision); *Riverside General Constr. Co.*, IBCA No. 1603-7-82, 82-2 BCA ¶ 16,127 at 80,049 (issue is what CO caused contractor to believe after issuance; finality vitiated because CO "h[e]ld out the prospect . . . that what was described as a 'final decision' would be subject to further discussion and possibly reconsideration").

95-1 BCA at 137,041-42.

A board of contract appeals cannot waive the statutory appeal period. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982). Accordingly, the standard set forth in *Sach Sinha* applies as long as the events that give rise to the vitiation of the finality take place prior to the expiration of the appeal period. Once the appeal period expires, the decision becomes final and the contracting officer lacks the authority to reconsider it. As one of our predecessor boards indicated,

> Our research has not disclosed any case arising under the Contract Disputes Act where an untimely request for reconsideration, that is, one submitted after the 90-day appeal period expired, has been deemed to vitiate the finality of an unappealed decision. Moreover, the applicable decisions make clear that, under the Act, a request for reconsideration of a contracting officer's decision implicitly must be made within the statutory appeal period to avoid finality. (Citations omitted.)

Schleicher Community Corrections Center, Inc., DOT BCA 3046, et al., 98-2 BCA ¶ 29,941, at 148,148.

In the present situation there is much in the record to support appellant's position that it reasonably believed that the decision was being reconsidered. The LCO, in his April 25, 2008, decision, clearly indicated that he was willing to continue a meaningful and productive

dialogue after the decision in an attempt to reach a settlement. Furthermore, subsequent to the decision, there were multiple contacts, communications, and meetings held all in an effort to come to some kind of resolution of the dispute.

It was not until May 29, 2008, that the LCO informed the appellant by e-mail that he had provided appellant with its appeal rights in his original March 2008 decision. Such a statement is not a clear statement that the original appeal period is continuing to run, or that the contracting officer has not reconsidered his decision since that time. It is only a statement indicating that, when the decision was issued, the appellant had certain appeal rights. Later, in his June 20 letter, the LCO again referred to the fact that he had informed the appellant of its ninety-day appeal rights in his March 25 decision, and that those rights expired (incorrectly) on June 28, 2008. It seems clear then that at the very least, prior to the May 29, 2008, e-mail message, and more probably prior to the June 20, 2008 letter, appellant could reasonably have concluded that the contracting officer was reconsidering his decision. Accordingly, we find that the finality of the decision dated April 25, 2008, was vitiated at least until May 29, 2008. Therefore, the June 26, 2008, appeal letter received June 27, 2008, is timely.

Decision

For the above stated reasons, respondent's motion to dismiss for lack of jurisdiction is **DENIED**.

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R. ANTHONY McCANN
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

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ALLAN H. GOODMAN
Board Judge