PHENIX ENTERPRISES, INC.,	)	**AGBCA No. 2000-176-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Rick Albertini	)	
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Phenix Enterprises, Inc.	)	
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	)	
Representing the Government:	)	
	)	
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RULING ON GOVERNMENT'S MOTION TO DISMISS

January 26, 2001

Before HOURY, POLLACK, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

This appeal arises under Contract No. 54-04H1-7-8610 between Phenix Enterprises, Inc., of Pomona, California (Appellant or Phenix), and the U. S. Department of Agriculture, Forest Service, Region 6, Procurement and Property Management of Portland, Oregon (Respondent or FS). Under the terms of the contract awarded September 26, 1997, Appellant was to furnish 16 200-gallon or 300-gallon capacity fire engines assembled on FS fumished truck cabs and chassis. Appellant was to furnish, fabricate, assemble, install and paint the fire engine units.

The appeal was received at the Board on August 29, 2000. Upon review of the documents submitted with the notice of appeal, the Board noted that a Contracting Officer's (CO's) decision informing Phenix of its appeal rights had been issued August 19,1998. The Board's docketing letter, therefore,

directed both parties to address the issue of timeliness before the scheduling of any additional proceedings.

Each party has filed two submissions. Respondent's initial filing was a Motion to Dismiss with an accompanying Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction. Appellant addressed the timeliness issue in a letter dated September 29, 2000. Each party replied to the other's submission.

Respondent's position as articulated in the Motion to Dismiss was that the CO's decision both terminated the contractor's right to proceed and assessed excess administrative costs. Thus, argued Respondent, both issues were time barred. The Board considers the Motion to Dismiss and contentions of the parties pursuant to its jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613.

FINDINGS OF FACT

1. Contract No. 54-04H1-7-8610 to supply 16 Model 45 200/300 Gallon Fire Engines, was awarded to Appellant September 26, 1997, by the FS. Clause F.2 required delivery within 240 days after the date of the contract.

2. In November 1997 the parties orally agreed to a modification to the electronic throttle controls on the engines. Appellant requested a contract time extension of 30-60 days to be determined based on when the units were ordered and delivered. (Appellant's letter of November 24, 1997 to Respondent.)[1] The modification was memorialized as Modification No. 3 to the contract. The CO signed it February 17, 1998, and Appellant signed it February 20, 1998. The modification provided for an equitable adjustment in price of $783.46 per chassis, but was silent regarding an adjustment in the contract performance period. (Modification No. 3 to the contract.)

3. In a May 28, 1998 letter the CO informed Appellant that she had determined that a time extension of 7 days was warranted for the throttle commander change. This letter also stated that failure to perform the contract within the adjusted performance period and failure to present a revised progress schedule showing completion within that period would be grounds for the CO to consider terminating the contract for default. (CO's letter of May 28, 1998.) Appellant responded on June 3, 1998, complaining that the 7 days was an unreasonably short time extension to perform the change. Appellant also argued it should have been notified in a more timely manner that its request for a time extension was considered unreasonable. (Appellant's letter of June 3, 1998.)

4. From July 13 to August 18, 1998, the parties exchanged correspondence regarding the schedule. In the July 13 letter, the CO stated that termination was not in the best interest of the Government. Appellant, therefore, was being permitted to continue performance in default under a revised schedule which the CO set out in the letter (CO's letter of July 13, 1998). Finally, on

[1] No Appeal File has been filed to date. Documents referenced were attached to Appellant's notice of appeal.

August 19, 1998, the CO issued a decision in which she concluded that Appellant would be permitted to continue to perform in default until close of business September 1, 1998, at which time Appellant's right to proceed with any remaining work would be terminated. The CO's Representative (COR) would issue a "Suspend Work Order" effective close of business September 1, 1998, in order to assure compliance with the termination date. The CO stated:

> All applicable contract costs (transport of engines to delivery locations) and administrative costs, including all costs for an additional inspection (currently estimated at $3,000 per inspection), will be assessed to the Contractor. In addition, if the Government suffers any additional, ascertainable damages, including administrative costs, as a result of this default, appropriate action will be taken to assert the Government's demand for damages.

This letter identified itself as a CO's decision and provided a recitation of appeal rights. (CO's letter of September 19, 1998.) Appellant did not appeal to the Board within 90 days of receipt of the decision.

5. In a letter to the CO dated October 30, 1998, Appellant stated that he had spoken with the COR who had listed "back charge items" as an inspection trip at $2,899.74; installation of body bolts on one vehicle at $130.11; and replacement of the priming pump on one vehicle at $40.44. Appellant asked for a detailed listing of the costs associated with the inspection trip. (Appellant's October 30, 1998 letter.) Those costs were enumerated in an FS December 7, 1998 letter which stated that the costs would be billed on a Bill for Collection. The December 7, 1998 letter also made reference to some mutually agreed upon costs which would be included in the Bill for Collection. Finally, it stated that the total costs of repairs for the exhaust system interference on the 13 GM chassis was $1,575, and added that there was no final agreement or determination of what portion was to be charged to the contractor. According to the letter, a final determination would be forthcoming. This appears to have been the first mention of the possibility of a charge related to the exhaust systems. The CO signed the letter, but did so as "Contract Specialist." The letter did not identify itself as a CO's decision and contained no recitation of appeal rights. (CO's letter of December 7, 1998.) By letter dated December 11, 1998, the CO (in that capacity) informed Appellant that a Bill for Collection would be processed to include the total cost of the repairs. This letter was not identified as a CO's decision and did not advise regarding appeal rights. (CO's letter dated December 11, 1998.)

6. The parties continued to correspond on this subject. On March 1, 1999, the CO forwarded to Appellant a Bill for Collection in the total amount of $4,645.38. Excess inspection costs were in the amount of $2,899.93. An item described as "Hold Down Bolts Vehicle #6543" amounted to $130.11. Of the total, $40.44 was for "Defective Primer Vehicle #7183." The "Exhaust System Interference Repairs" costs totaled $1,575. Neither the Bill for Collection nor its transmittal letter was identified as a CO's decision.

7. In a letter dated March 15, 1999, Appellant acknowledged receipt of the Bill for Collection. Therein, Appellant stated that its previous questions concerning the technical need for the exhaust system changes had not been answered. Appellant complained that the FS officials requesting the modifications had provided no technical or engineering data to support the need for them. Appellant expressed its willingness to pay for the exhaust system modifications if the FS assumed responsibility for them. There is no indication in the file that the FS replied to this letter. Instead, sometime between March 1999 and April 2000, the FS turned the matter over to the Department of the Treasury (Treasury) for collection.

8. By letter dated April 10, 2000, Treasury sent Appellant a delinquent debt collection letter requesting payment, within 10 days, of $5,689.53, representing a principal amount of $4,772.97 plus administrative fees and interest (Treasury letter of April 10, 2000). Additional correspondence ensued among Appellant, Treasury, and the FS, including a June 23, 2000 letter in which Appellant alleged that the FS had failed to follow Federal Acquisition Regulation (FAR) procedures for turning a claim over to Treasury for collection (Appellant's letter of June 23, 2000). The last dated correspondence in the file were letters from Appellant to Treasury and a commercial collection agency stating that a demand for payment had been received from the collection agency and asking for the opportunity to address the issues raised in its June 23, 2000 letter (Appellant's August 10, 2000 letters).

9. Appellant's notice of appeal was received at the Board on August 29, 2000. Included with it were 107 pages of correspondence and a copy of the contract. The notice of appeal made reference to (1) Phenix's request for a time extension of 60 days to perform an FS directed change, for which a 7-day time extension was granted; (2) an FS demand for payment of up to $3,000 for an additional inspection trip; and (3) an FS request for modifications to the exhaust pipes on 13 of the units. The notice of appeal indicated that the FS had forwarded its monetary claims against Appellant to Treasury for collection.

MOTION TO DISMISS AND RESPONSES

Upon review of the documents submitted with the notice of appeal of August 25, 2000, the Board noted that a CO's decision terminating Appellant's right to proceed and informing Appellant of its appeal rights had been issued August 19,1998. This raised concerns of timeliness. Therefore, the Board after the notice of appeal directed both parties to address the issue of timeliness before the scheduling of any additional proceedings.

Respondent moved for dismissal on the ground that because the appeal was not filed within the 90-day time limit set by 41 U.S.C. § 601, it was time barred and the Board lacked jurisdiction. The FS pointed out that the CO's decision was dated August 19, 1998, more than 2 years prior to the appeal.

Appellant's initial submission, on the other hand, argued that its appeal related to three issues arising out of the contract and that the decision of August 19, 1998, had addressed only one. Appellant characterized that issue as concerning a contract time extension. Regarding its request for a time

extension, Appellant contends that if its request for 60 days had been granted in full, it would have timely completed performance.

According to Appellant, the remaining two issues addressed in its notice of appeal, those pertaining to costs of an additional inspection trip and costs and liability associated with the FS's vehicle exhaust system modification were raised after the date of the decision. Although no Appeal File has yet been submitted, each party has provided to the Board a copy of the referenced August 19, 1998 CO's decision. Therein, the CO declared the contractor in default for failure to complete within the contract performance period and allowed it to continue to perform in default until September 1, 1998, at which time the contractor's right to proceed with any remaining work was thereby to be terminated. The decision went on to state that to assure compliance with the termination date, the COR was to issue a "suspend work order" effective at the close of business on September 1, 1998. No mention was made of costs of either the additional inspection trip or repairs to the vehicle exhaust system. The decision informed Appellant of its appeal rights to the Board, including the 90-day time limitation from date of receipt of the decision.

In its reply, Respondent conceded that its claim against Appellant relating to the repair of the vehicle exhaust system was not asserted in the CO's decision. However, Respondent contended that its claim against Appellant for what it terms "excess administrative costs, including $2,899.38 for an additional inspection" were "clearly assessed and included in the Contracting Officer's decision."

Appellant's second submission noted Respondent's concession that no decision has been rendered on the vehicle exhaust system claim and requested that the FS remove its claim with Treasury. Regarding the additional inspection trip, Appellant argues that the August 19, 1998 decision contained only an estimate not to exceed $3,000. Appellant contends that it had agreed to pay the reasonable costs of an additional inspection trip up to $3,000, and provides its rationale regarding the unreasonableness of the costs incurred. Specifically, Appellant questions its liability to pay travel and per diem for a driving trip for the COR and an inspector from Oregon to California. Appellant contends that an inspector was on-site in California and that the COR could have flown alone to the site for an inspection together with the local inspector in mitigation of costs.

DISCUSSION

An appeal to the Board of a CO's adverse decision must be filed within 90 days of its receipt. 41 U.S.C. § 606. This limitation is jurisdictional and not subject to waiver. Kato Corp., AGBCA No. 93-169-1, 94-1 BCA ¶ 26,508. Appellant's notice of appeal outlines three claim items, the first of which was its claim for a time extension of 60 days. As articulated, and conceded, by Appellant, this claim is based on the same operative facts as underlie the termination for default. The CO decided this claim in the August 19, 1998 decision, providing an appropriate explanation of the appeal procedures to Phenix. Appellant's right to appeal the decision on its claim for a time extension, or the propriety of the termination for default expired 90 days after its receipt of the decision. The Board grants Respondent's motion as it pertains to the appeal of the decision to terminate Appellant's right to proceed under the contract. This appeal is dismissed with prejudice.

The second claim item concerns the dispute over the amount of Respondent's assessment against Appellant for the costs of an additional inspection trip. The CDA provides that all claims by the Government against a contractor relating to a contract shall be the subject of a decision by the contracting officer and shall state the reasons for the decision and inform the contractor of rights under the Act. 41 U.S.C. § 605(a). Respondent argues that the CO decided this dispute in the August 19, 1998 decision ("[the costs] were clearly assessed and included in the Contracting Officer's decision of August 19, 1998 which estimated the cost at $3000.00 per inspection"). The decision itself, however, contains the following language:

> All applicable contract costs (transport of engines to delivery locations) and administrative costs, including all costs for an additional inspection (currently estimated at $3,000 per inspection), will be assessed to the Contractor. In addition, if the Government suffers any additional, ascertainable damages, including administrative costs, as a result of this default, appropriate action will be taken to assert the Government's demand for damages.

This wording is not indicative of a final decision. Rather, it repeatedly refers to future action. Thereafter, the CO, in fact, did make future specific demands for payment against Appellant. However, they were not a subject of the August 19, 1998 decision and when issued were not in the form of a CO's decision nor did the demand recite the required appeal rights. No decision having been rendered on the claim for costs of the additional inspection trip, the Board therefore lacks jurisdiction to decide the issue. It is dismissed for lack of jurisdiction.

The parties are in agreement that the Government claim for costs of repairs to the vehicle exhaust systems has not been decided by the CO and the record contains no indication to the contrary. The Board therefore lacks jurisdiction to decide the issue and it, also, is dismissed for lack of jurisdiction. In the event that the FS issues decisions assessing excess administrative costs or cost of repairs to vehicle exhaust systems in the future, Appellant may then appeal those decisions to the Board. The Board has no jurisdiction to reverse Respondent's ongoing referrals to collect those costs from Appellant. However, the Board observes that they are, at best, premature.

RULING

The Government's Motion to Dismiss is granted in part and denied in part as explained above.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____
EDWARD HOURY
Administrative Judge

_____
HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
January 26, 2001