

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

CRS SIRRINE, INC./TYROC CONSTRUCTION)	
CORP., J.V.)	
)	CAB No. D-968
Under Contract No. 3477-71)	

OPINION ON MOTION TO DISMISS

Appellant, CRS Sirrinc, Inc./Tyroc Construction Corp., J.V. ("Tyroc") filed a notice of appeal of a deemed denial by the Director of the Department of Administrative Services ("DAS") of its claim for unpaid contract balances and unpaid overhead and profit. The District filed a motion to dismiss the appeal for Tyroc's alleged failure to prosecute its claim in a timely manner. We conclude that the appellant did not fail to prosecute its claim in a timely manner. Accordingly, we deny the motion.

FACTS

On or about January 1, 1984, Tyroc entered a contract with the Department of Public and Assisted Housing ("DPAH") for the performance of construction management services. (Motion to Dismiss). There were subsequent changes to the contract by Change Order #1 dated May 23, 1986, and by Addendum #1, dated June 6, 1986. (Motion to Dismiss).

By a letter dated December 1, 1992, Tyroc requested the Contracting Officer's decision on the following claims: (1) contract balance of \$43,326; (2) overhead and profit on amendment No.1 of \$142,500; and (3) Phase II preconstruction delay costs of \$60,744. (Notice of Appeal, Attachment). The Contracting Officer did not issue a final decision on the claims. (Opposition to Motion to Dismiss).

By a letter dated March 29, 1993, Tyroc filed the same claims with the Director, DAS. (Notice of Appeal, Attachment). On February 16, 1994, the Contracting Officer requested that the DAS claims officer postpone the hearing on Tyroc's claim. (Opposition to the Motion to Dismiss, Morrison Affidavit and Exhibit 2). The hearing was postponed. By a letter dated July 20, 1994, Tyroc stated that there had been no settlement negotiations and requested that the DAS hearing officer set a hearing date. (Opposition to the Motion to Dismiss, Morrison Affidavit and Exhibit 8). By a letter dated January 25, 1995, Tyroc stated that settlement negotiations had been held but not concluded and requested that DAS provide a hearing on the merits. (Opposition to the Motion to Dismiss, Morrison Affidavit and Exhibit 11). The Director of DAS did not issue a decision on the claims. (Notice of Appeal).

On May 11, 1995, Tyroc filed this appeal with the CAB.

DECISION

The District's primary arguments are that the appeal is untimely filed because it is in violation of (1) the provisions of the contract; (2) the District of Columbia statute of limitations; and (3) the District of Columbia Procurement Practices Act ("PPA" or "Act").^{1/}

I. Applicable Remedy

The initial question raised by the District's motion is whether the PPA applies to an appeal filed by a contractor with the Board after the effective date of the Act where the appeal involves a contract executed prior to the Act. The District alleges that the disputes clause of the contract provides the appropriate remedy for the resolution of Tyroc's claims, and that it precludes the contractor's right to appeal to the Board pursuant to the PPA.^{2/}

Based on the disputes clause, Tyroc had a right to appeal the decision of the Director of the Department of Housing and Community Development ("DHCD") to the Contract Appeals Board within 30 days of the date of receipt of the Director's written decision^{3/}. The District asserts that in accordance with the disputes clause, it was not necessary that Tyroc submit its claim to the Director of DAS, but that Tyroc should have proceeded directly to file its appeal with the Board rather than await a DAS Director's decision or deemed denial pursuant to the PPA.

^{1/}D.C. Code § 1-1189.1, *et seq.* (1992).

^{2/}In conjunction with this argument, the District asserts that the PPA's implementing regulations found at Chapter 38 of 27 DCMR provide that disputes and claims are to be initially resolved by the contractor and the contracting officer. However, the District has not developed this allegation into an argument of merit that would warrant consideration by the Board at this time.

^{3/}The dispute's clause of the contract provides, in pertinent part, as follows:

23.0 DISPUTES

- a. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by DHCD, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the CM. The decision of the DHCD shall be final and conclusive unless within 30 days from the date of receipt of such copy, the CM mails or otherwise furnishes to the Contract Appeals Board of the District of Columbia a written appeal. The decision of the Contract Appeals Board shall be final and conclusive.

....

The PPA became effective on February 21, 1986. In accordance with the PPA, all government claims by a contractor against a District government contract covered by the PPA must be submitted to the DAS Director for a decision. D.C. Code § 1-1188.5(a). If the Director fails to issue a timely decision on the claim, the Director's inaction is deemed a denial of the claim and authorizes the contractor to commence an appeal to this Board. *Id.* §1-1188.5(d). If the Director issues a decision on the contractor's claim, the contractor must appeal the decision to this Board within 90 days of receiving the Director's decision. *Id.* §1-1189.4(a).

A comparison of the remedy available to Tyroc pursuant to the disputes clause of its contract and the remedy provided pursuant to the PPA reveals that both provide administrative procedures for the resolution of disputes that the contractor may appeal to the Board. However, the disputes clause required that the claim be presented to the Director of DHCD whose written decision was appealable to the Board within 30 days of its receipt; whereas, the PPA required that the claim be presented to the Contracting Officer and then to the Director of DAS, whose decision is appealable to the Board within 90 days of its receipt. Section 904 of the PPA, D.C. Code §1-1189.4 (1992), governs the contractor's right of appeal to the Board.

The Board has held that the PPA applies to post-Act appeals involving pre-existing agreements. *See Dynaletric-Computran-Network, A Joint Venture*, CAB Nos. D-734, D-756, and D-757 (Order [on Motion to Dismiss]) (April 28, 1989) (holding that three cases originating pre-PPA, but filed with the Board after the effective date of the PPA fall under the purview of the Act and finding that "[i]n enacting the PPA, the Council of the District of Columbia made clear that it was establishing a new procedure for the submission of claims at the agency level beginning with the effective date of the PPA.>").

See also Lumbermen's Mut. Cas. Co. v. District of Columbia, 566 A.2d 480 (App. D.C. 1989) (holding (1) that the PPA eliminated the bifurcation of claims and that all claims arising under or relating to a contract shall be submitted to the Director of the Department of Administrative Services for an informal hearing and decision and that the contractor may appeal the decision of the Director to the Contract Appeals Board; and (2) that, in the absence of a clear legislative indication to the contrary, the PPA was intended to apply to the extent that it affects only the forum in which appellant may make its claim).

See also Diversified Resources, Inc., CAB No. 735, (Decision and Order on Motion to Dismiss) (April 20, 1987) (holding that D.C. Code §1-1188.5(a) in requiring that all contractor claims against the District government be submitted to the Director, DAS was remedial or procedural in nature and as such, in the absence of legislative intent to the contrary, applied to a post-Act appeal involving pre-existing agreements).

Therefore, Tyroc's claims are properly appealable to this Board pursuant to the procedures established by the PPA although such claims arose pursuant to a contract executed prior to the PPA which contained a disputes clause that provided for a different administrative procedural prerequisite to appeal to this Board.

II. Timeliness

The District's next argument is that Tyroc's claims are precluded by the statute of limitations^{4/} for bringing an action in simple contract. The question presented is whether the statute of limitations governing simple contracts applies to appeals brought pursuant to the PPA.

The statute of limitations applicable to actions brought in simple contract provides in pertinent part as follows:

Sec. 12-301. Limitation of time for bringing actions

Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

(7) on a simple contract, express or implied--3 years;

D.C. Code §12-301(7).

The Board recently defined the scope of actions covered by D.C. Code §12-301 as "actions" which are commonly understood as proceedings in a court of law, not an administrative tribunal, such as the Contract Appeals Board. *See, MCI Constructors, Inc.*, CAB No. D-985, October 31, 1996, 8 P.D. 7203 (holding that the statute of limitations for statutory penalty actions found at D.C. Code §12-301(5) was not applicable to Quick Payment Act claims before the Contract Appeals Board). Therefore, it was held that a claim before the Contract Appeals Board was not an action which invoked that statute of limitation.

The Board adopts this definition of the scope of actions established in *MCI Constructors, Inc.* and in applying it to D.C. Code §12-301(7), determines that the statute of limitation for actions in simple contract is not applicable to PPA claims before this Board in the absence of legislative intent to the contrary. The PPA provides a specific statutory time limitation for the Contractor's right of appeal to the Board at D.C. Code §1-1189.4. Any other statute of limitation would not supersede the specifically mandated time limitations within which the contractor can appeal unless so provided by the PPA. The PPA has no such provision and the District provides no evidence that the legislature intended to make D.C. Code §12-301(7) applicable to these appeals under the PPA. Therefore, the statute of limitations for bringing actions in simple contract has no application to this appeal.

^{4/}"Statutes of limitation are statutes of repose and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced." *Black's Law Dictionary*, (5th ed. 1979).

The District's final argument is that even assuming that Tyroc had a right to go to the Director of DAS for a decision, Tyroc took over two years to apply to this Board when it only had 120 (sic) days within which to appeal after an adverse decision or a deemed denied decision. The applicable provisions of the PPA are found at D.C. Code §1-1188.5 and §1-1189.4^{5/}

Tyroc correctly cites *A.S. McGaughan Co., Inc.*, CAB No. D-926, December 10, 1992, 40 D.C. Reg. 4855, in support of its argument of the timeliness of its appeal pursuant to the PPA. In *McGaughan*, the Board reviewed language of the Contract Disputes Act and pertinent federal decisions comparable to the PPA language in question and concluded that (1) the language of the PPA, its legislative history and its basic purposes show that the 90-day limitations period begins to run only after the Director, DAS has issued a written final decision on the contractor's claim; (2) . . . where the Director, DAS does not issue a decision within the 90-day statutory time period, a contractor is permitted but not required, to commence an appeal; and (3) . . . the contractor's right to institute an appeal under the "deemed denied" provision is permissive, not mandatory. *Id.* at 4861. *See also, Belcon, Inc.*, CAB No. 829, June 14, 1990, 38 D.C. Reg. 3090 (May 1991) which is one of the few decisions by this Board wherein D.C. Code sections 1-1188.5(c), 1-1188.5(d) and 1-1189.4(a) of the PPA are interpreted. However, in determining that the "weight of argumentation" lies heavily with *Belcon* in favoring an interpretation that §1-1188.5(d) merely authorizes an appeal within a reasonable time, rather than mandates a 90-day appeal period, the Board stopped short of a full analysis and decision of this issue.

Tyroc filed its claims with the Contracting Officer, on or about December 1, 1992, and with the Director of DAS on March 29, 1993. Hearings on the claims were postponed and

^{5/}In pertinent part, these provisions are as follows:

§1-1188.5. Claims by Contractor against District Government.

(a) All claims by a contractor against the District government arising under or relating to a contract shall be submitted to the Director for an informal hearing and decision.

(c) Within 90 days of receipt of a claim over \$50,000, the Director shall issue a decision, whenever possible taking into account factors such as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(d) Any failure by the Director to issue a decision on a contract claim within the required time period will be deemed to be denial of the claim, and will authorize the commencement of an appeal on the claim as otherwise provided in this title.

D.C. Code §1-1188.5.

§ 1-1189.4. Contractor's right of appeal to Board.

(a) Except as provided in § 1-1188.5, within 90 days from the date of receipt of a decision of the Director, the contractor may appeal the decision to the Board.

D.C. Code §1-1189.4.


inconclusive settlement negotiations were held for some time after the filing. The record reflects an attempt by Tyroc as recently as January 25, 1995, to obtain a hearing at DAS on the merits of its claims. The Director, DAS did not issue a decision on Tyroc's claims and on May 11, 1995, Tyroc filed this appeal. Therefore, Tyroc filed its appeal with this Board approximately two years after filing its claim with the Director.

Consistent with the interpretation favored in *Belcon*, this Board finds that §1-1188.5(d) does not limit the time within which appeal from a deemed denial must be taken to this Board. This statutory provision simply authorizes the right of appeal to be taken within a reasonable time after mandatory time periods for a decision by the Director have been met. Upon review of the record, it is the finding of this Board that Tyroc has provided sufficient evidence of delays that preceded its appeal to this Board which were not the fault of Tyroc, but were the result of the District's action or inaction, including postponement of hearing dates, interim meetings, settlement negotiations, and lack of decision. See "Facts", *infra*. Accordingly, the Board finds that Tyroc's appeal was filed within a reasonable time pursuant to the provisions of the PPA.

Therefore, based upon all of the facts and circumstances and the authorities cited herein, the District's motion to dismiss is **DENIED**; and it is hereby

ORDERED, that the Appellee shall file a response to the Appellant's Motion for Summary Judgment on or before November 20, 1996.

DATE: November 5, 1996



PHYLLIS W. JACKSON
Administrative Judge

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