

**DIVERSIFIED CONTRACTORS, INC.  
(MOORHEAD ELECTRIC INC.  
SUBCONTRACTOR),**

Appellant

**Representing the Subcontractor:**

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**AGBCA No. 1999-191-1**

**RULING ON GOVERNMENT'S MOTION  
TO DISMISS APPEAL AS UNTIMELY**

**November 24, 1999**

**OPINION BY ADMINISTRATIVE JUDGE EDWARD HOURY**

This appeal arose under Contract No. 50-82HW-8-15 between the Agricultural Research Service (ARS), U. S. Department of Agriculture (USDA) and Diversified Contractors, Inc., of Fargo, North Dakota (Appellant). The contract was for restoration of the Vivarium Area at the ARS Grand Forks Human Nutrition Research Center in North Dakota.

Appellant filed a claim with the Contracting Officer (CO) on behalf of its electrical subcontractor, Moorhead Electric Inc. Appellant's claim was denied by the CO's decision dated May 10, 1999, received by Appellant May 18, 1999. The subcontractor filed an appeal postmarked August 12, 1999.

The Board docketed the appeal by the subcontractor, but advised the parties that the appeal might be untimely, because it did not appear that the subcontractor had been authorized to make the appeal on behalf of Appellant. Subsequently, the Government filed a Motion to Dismiss which was opposed by counsel for the subcontractor.

The Findings of Fact (FF) below are not in dispute and the facts set forth above will not be repeated.

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**FINDINGS OF FACT**

1. In the Notice of Appeal, counsel for the subcontractor attached a copy of the CO's decision received by Appellant. The decision was stamped "Received May 18, 1999." The Board in its August 24, 1999 docketing letter stated:

The CO's decision appears to have been received May 18, 1999, and the appeal was postmarked August 12, 1999. Therefore, the appeal appears to be filed within 90 days of the receipt of the CO's decision, even though the Board did not receive the appeal until August 20, 1999. However, the appeal was filed by Moore Electric Inc., a subcontractor to Diversified Contractors, Inc. Generally, the Board has no jurisdiction over appeals from subcontractors unless the appeal was made by the prime contractor on behalf of the subcontractor, or unless the prime contractor authorized the appeal.

Appellant is hereby afforded thirty (30) days from receipt hereof in which to file a Complaint in accordance with Board Rule 6. Since it does not appear that the prime contractor appealed on behalf of Appellant, such Complaint shall also address the issue and present proof that the appeal had been authorized by the prime contractor. If the prime contractor had not authorized the appeal, such appeal will probably be held to have been ineffective. If this turns out to be the case, an appeal can be filed with the U.S. Court of Appeals of Federal Claims within 1 year of the CO's decision, as provided in such decision.

2. In the Complaint counsel for the subcontractor stated that Appellant had received the CO's decision on May 10, 1999 (¶ 16). As proof that the subcontractor had authority to appeal, counsel included as Attachment A to the Complaint, a September 16, 1999 letter from Appellant to the subcontractor stating:

The Contracting Officer issued a final decision denying our request for an equitable adjustment in a letter dated May 10, 1999. Diversified Contractors, Inc. is aware that you have provided Notice of Appeal and we hereby authorize you to pursue that appeal as the affected subcontractor on this project.

3. In a telephone conference call with the parties on October 12, 1999, the presiding judge advised that based upon the Complaint and Attachment A thereto, the appeal appeared to be

untimely, because the letter did not indicate that the subcontractor had authority to appeal on behalf of Appellant at the time the appeal was made.

4. By letter dated October 13, 1999, counsel for the subcontractor provided the affidavits of Appellant's president and the subcontractor's project manager. These affidavits indicate that Appellant and the subcontractor discussed the CO's decision by telephone in late May 1999, probably May 25. There was an understanding reached that Appellant would not pursue the matter further, but that the subcontractor was free to do so. Both Appellant and the subcontractor indicated that authorization to pursue the appeal existed at this time.

5. The Government filed a Motion to Dismiss the appeal as untimely. The Government noted that the CO's decision had been received May 18, 1999, that the September 16, 1999, letter indicated that authorization did not pre-date the appeal (see FF 2), and that the affidavits, at best, provide only retroactive authorization, and retroactive authorization is not sufficient.

6. Counsel for the subcontractor opposed the Government's Motion, stating that Appellant received the CO's decision May 18, 1999, that the affidavits indicated that the subcontractor was authorized to appeal as early as May 25, 1999, and that accordingly, the appeal was timely.

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### DISCUSSION

The Government is correct on the law that subcontractors have no standing to sue the Government absent sponsorship by the prime contractor, or without the authorization and consent of the prime contractor. Erickson Air Crane Co. v. United States, 731 F.2d 810 (Fed. Cir. 1984); United States v. Johnson Controls, Inc., 713 F.2d 1541 (Fed. Cir. 1983). Moreover, authorization of the subcontractor by the prime after the expiration of the 90-day appeal period is insufficient authorization. Wayne L. Grist, Inc., AGBCA No. 89-135-3, 89-3 BCA ¶ 22,073, citing Door Pro Systems, Inc., ASBCA No. 34114, 87-3 BCA ¶ 19,997.

While the Government is correct on the law, the subcontractor is correct regarding the facts. The CO's decision was received by Appellant May 18, 1999 (FF 1, 5, 6), notwithstanding counsel's incorrect Complaint assertion that the Complaint was received May 10, 1999 (FF 2). Even though there is no contemporaneous evidence, the facts support a conclusion that the subcontractor received verbal authorization to appeal prior to filing the appeal, notwithstanding counsel's ineffectual attempt to address the Board's jurisdictional concerns (FF 2-4). We, therefore, hold that the appeal was timely filed. Powers Construction Co., ASBCA No. 36713, 88-3 BCA ¶ 21,057.

**RULING**

The Government's Motion to Dismiss is denied.

**EDWARD HOURY**  
Administrative Judge

Concurring:

**HOWARD A. POLLACK**  
Administrative Judge

**ANNE W. WESTBROOK**  
Administrative Judge

Issued at Washington, D.C.  
November 24, 1999