

LEONARD-S MEAT CO., INC.,

AGBCA No. 2002-107-1

Appellant

Representing the Appellant:

Leonard Collins, President
675 N. Third Street
Memphis, Tennessee 38107

Representing the Government:

Michael Gurwitz, Esq.
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U.S. Department of Agriculture
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RULING ON GOVERNMENT-S MOTION TO DISMISS

June 25, 2002

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK.

This appeal arises out of Contract No. 12-02-0-4379, a contract between Leonard-s Meat Co., Inc. (Appellant), of Memphis, Tennessee, and the U.S. Department of Agriculture, Agricultural Marketing Service (AMS) of Washington, D.C. The contract called for Appellant to provide the Government with 21 units (831,600 pounds) of consumer pack whole chicken. As reported by the Contracting Officer (CO) in his decision, the Appellant failed to deliver the product on October 15, October 31, November 15 and November 30, 2000. As of November 30th, only 3 of the 21 units contracted for by AMS had been produced. AMS reported that it had written Appellant asking that Appellant cure the failure to deliver or present a plan explaining how Appellant intended to complete delivery. In the alternative, AMS gave Appellant the opportunity to explain how its failure to deliver arose from factors beyond its control and without its fault or negligence. The Appellant failed to provide AMS with the requested information.

By decision dated December 29, 2000, the CO partially terminated the Appellant-s contract for the reasons stated above. AMS stated that it was accepting the product that had been produced

according to the contract specifications, and then directed Appellant to immediately stop all work except that work necessary to perform the non-terminated portion of the contract.

By letter of December 26, 2001, sent by facsimile on that date, the Appellant filed an appeal with this Board from the December 2000 decision. Along with the letter the Appellant attached the CO decision of December 29, 2000. Upon receipt by the Board, it appeared from the face of the documents that the appeal to the Board was untimely, given the CO decision having been issued a year earlier, December 2000.

The date for appeal to the U.S. Court of Federal Claims, however, had not yet run and therefore, since the appeal was filed by a non-attorney, the Board attempted to telephone Appellant in order to hold an immediate conference call, so as to point out the timeliness issue. Those attempts were unsuccessful with the call to Appellant's listed number being identified as disconnected.

On December 31, 2001, the Board wrote to the Appellant. The certified letter was signed as having been received on behalf of the Appellant on January 7, 2002. In the Board's letter of December 31, the Board advised the parties that it appeared that the appeal had not been filed within 90 days of receipt of the CO's decision and as such, it was likely that the appeal was untimely, absent special circumstances. The Board directed that before having the parties provide it with the standard pleadings, both parties were to first address the timeliness issue. (See Board Rule 5, Dismissal for Lack of Jurisdiction.) The parties were given until January 24, 2002, to make their response.

Thereafter, AMS, through its counsel, filed a Motion to Dismiss on the basis that Appellant's appeal was untimely. A certificate of service shows that a copy of the Motion was sent to Appellant. The Board received no response from the Appellant either to the Board's letter or to the AMS Motion. Thereafter, the Board again attempted by telephone to contact the Appellant and left word on Appellant's answering machine on February 7, 2002, requesting that Appellant contact the Board as to its intentions on the appeal. The Board received no response from the Appellant.

The Contract Disputes Act requires that an appeal be filed within 90 days of receipt of the final decision by the Appellant. The appeal submitted by the Appellant in this matter was filed well beyond that time limit. Accordingly, the appeal is untimely. The Board lacks jurisdiction over this matter, 41 U.S.C. ' 606.

RULING

The Board grants the Government's motion and dismisses the appeal for lack of jurisdiction..

HOWARD A. POLLACK
Administrative Judge

Concurring:

JOSEPH A. VERGILIO
Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D. C.
June 25, 2002