

**MALASPINA INVESTMENTS, INC.**  
**(SAMPSON STEEL CO., INC., Subcontractor),**

**AGBCA Nos. 2003-180-1**  
**2003-189-1**

Appellant

**Representing the Appellant:**

Lowell Peterson, President  
Malaspina Investments, Inc.  
P. O. Box 270  
Yakutat, Alaska 99689

Bruce R. Morgan, President  
Sampson Steel Company, Inc.  
6148 Nielson Way  
Anchorage, Alaska 99518

**Representing the Government:**

Maria Lisowski, Esquire  
Office of the General Counsel  
U.S. Department of Agriculture  
P. O. Box 21628  
Juneau, Alaska 99802-1628

**RULING ON GOVERNMENT'S MOTION TO DISMISS**

**November 12, 2003**

**Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.**

**Opinion for the Board by Administrative Judge WESTBROOK.**

These appeals arose under Contract No. 50-0116-2-00529, the Yakutat Warehouse Retrofit Project, between the U. S. Forest Service, an agency of the U. S. Department of Agriculture (FS or the Government) and Malaspina Investments, Inc. of Yakutat, Alaska (Malaspina).

Malaspina filed a claim with the Contracting Officer (CO) on behalf of its subcontractor, Sampson Steel Co., Inc., (Sampson). The claim was denied by the CO's decision dated May 20, 2003. The subcontractor filed an appeal received at the Board August 13, 2003.

The Board docketed the appeal by the subcontractor as AGBCA No. 2003-180-1, but set up a telephonic conference between Sampson and the Government on August 21, 2003. During that conference the presiding judge advised representatives of Sampson and the Government that the Board lacked jurisdiction to consider a direct appeal from a subcontractor. The presiding judge also stated that an appeal from the prime might be untimely depending on when the prime had received the CO's decision. Subsequently, the prime filed an appeal which was docketed as AGBCA No. 2003-189-1. Thereafter, the Government filed a motion to dismiss AGBCA No. 2003-189-1. For reasons explained below, the motion is moot.<sup>1</sup>

### **FINDINGS OF FACT**

1. On behalf of Sampson, Malaspina presented a claim to the CO during a meeting on February 20, 2003, regarding payment of Davis-Bacon Act wages. Present at the meeting were Malaspina's president, Lowell Peterson, Malaspina's representative, Eric Ohlson, and the CO. By letter of May 20, 2003, the CO denied the claim. (CO's decision dated May 20, 2003). A copy of the U.S. Postal Service return receipt furnished as Exhibit A to the Government's motion indicates that the decision was signed for by B.J. Bremler on May 23, 2003. Ninety days from May 23, 2003, is August 21, 2003.

2. In a letter to the Board dated August 7, 2003, and signed by its president, Bruce R. Morgan, Sampson stated that it had presented a claim for equitable adjustment to the prime contractor which was denied by the CO. Sampson stated that it wished to appeal the decision. The appeal letter was received at the Board August 13, 2003. (Sampson's letter dated Aug. 7, 2003.) The appeal was docketed as AGBCA No. 2003-180-1.

3. The Board contacted the parties on August 21, 2003, to schedule a conference call which was held on that date. In the absence of Mr. Morgan, Ms. Amy Anderson represented Sampson. Ms. Maria Lisowski represented the Government. The presiding judge explained that the Board had no jurisdiction to decide a direct appeal from a subcontractor absent prime contractor sponsorship. The Board also stated that, depending on when the prime contractor has received the CO's decision, there might still be time for an appeal by Malaspina. (Board letter dated Aug. 21, 2003.)

4. On August 27, 2003, the Board received by facsimile Malaspina's letter dated August 25, 2003. The letter was signed by Malaspina's president, Lowell Peterson. Therein, Malaspina stated that its major subcontractor had presented a claim for equitable adjustment "(to) us on the above

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<sup>1</sup> The appeal docketed as AGBCA No. 2003-180-1(the August 13, 2003, appeal from Sampson) involving the same subject, as noted in the discussion below, was timely and properly sponsored. As such, it will continue in the name of the prime contractor, Malaspina.

mentioned project.” The letter also stated that additional information to substantiate the claim is available “by the subcontractor.” The final paragraph of the letter is as follows:

I was unavailable to present this appeal earlier, so on August 7<sup>th</sup>, 2003, our subcontractor, Sampson Steel Company, Inc. sent this appeal directly to the Board by the request of our project coordinator. Please excuse the confusion.

(Malaspina’s letter dated Aug. 27, 2003.)

### **DISCUSSION**

The Government correctly states that Malaspina’s appeal of August 27, 2003, is itself untimely and absent any other circumstance the Board would lack jurisdiction to adjudicate it. It is also well established that appeals from adverse CO decisions may not be pursued by a subcontractor directly in its own name. Such appeals must be sponsored by the prime contractor and pursued in its name. Erickson Air Crane Co. v. United States, 731 F. 2d 819 (Fed. Cir. 1984). A direct appeal, however, may be taken if the subcontractor secures authorization within the 90-day appeal period. Diversified Contractors, Inc., AGBCA No. 1999-191-1, 00-1 BCA ¶ 30,586 (facts supported conclusion that subcontractor received verbal authorization to appeal prior to filing the appeal); Wayne L. Grist, Inc., AGBCA No. 89-135-3, 89-3 BCA ¶ 22,073 (prime contractor’s president advised the Board in writing that he had discussed and apparently approved action prior to expiration of 90-day appeal period). Retroactive authorization is not sufficient to allow jurisdiction. Door Pro Systems, Inc., ASBCA No. 31114, 87-3 BCA ¶ 19,997.

The crucial factor is whether the prime, in fact, has sponsored the appeal. Forster Co., ASBCA No. 28,995, 84-2 BCA ¶ 17,481 (claim had been submitted and certified by the prime originally); Algernon Blair Industrial Contractors, ASBCA No. 25277, 83-2 BCA ¶ 16,737 (authorization to appeal derived from a course of “consistent cooperation” by the prime contractor with the subcontractor throughout the claim process).

In the instant case, the claim was first submitted to the CO in a meeting attended by two prime contractor representatives. In addition, the prime’s subsequent notice of appeal affirmatively states that because the prime’s president was unavailable to present the appeal, the subcontractor sent it directly to the Board “by the request of our project coordinator.” The facts demonstrate that at the time Sampson timely appealed the CO’s decision, the subcontractor was acting with the authorization of the prime contractor. Therefore, the original appeal, AGBCA No. 2003-180-1, was a sponsored appeal and the Board has jurisdiction to consider it. The timeliness of the original appeal, therefore, renders the timing of the second appeal moot.

**RULING**

Because the initial appeal was timely filed, the Government's motion to dismiss the subsequent appeal, AGBCA No. 2003-189-1, is moot and so dismissed. The Board has jurisdiction to decide AGBCA No. 2003-180-1, which will continue in the name of the prime contractor, Malaspina. Sampson has been authorized to pursue the appeal and is to file a complaint within 30 days of receipt of this ruling.

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**ANNE W. WESTBROOK**  
Administrative Judge

**Concurring:**

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**HOWARD A. POLLACK**  
Administrative Judge

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**JOSEPH A. VERGILIO**  
Administrative Judge

**Issued at Washington, DC**  
**November 12, 2003**