

## A TALE OF TWO APPEALS

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This blog discusses two contractors who sought to appeal a contracting officer's final decision on their claims, which final decisions were defective in not advising of the contractors' appeal rights. In one case, the appeal date was tolled because the contractor detrimentally relied on the omission of appeal rights. *Access Personnel Servs., Inc.*, ASBCA No. 59900, June 15, 2016. In the other case, the defective appeal notice did not cause prejudice to the contractor, who had actual knowledge of its appeal rights, and a late filed appeal was dismissed for lack of jurisdiction. *Mansoor Int'l Dev. Servs.*, ASBCA Nos. 59466 et al. May 19, 2016.

The Contract Disputes Act requires that a contracting officer's final decision on a claim state the reasons for the decision reached and "inform the contractor of the contractor's rights as provided in this chapter." 41 U.S.C. § 7103(e). Those rights include appeal rights, and Federal Acquisition Regulation ("FAR") 33.211(a)(4)(v) implements that section of the law by stating:

This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number...

Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in 41 U.S.C. 7102(d), regarding Maritime Contracts) within 12 months of the date you receive this decision...

Remember that in order to be timely and give the Board jurisdiction, an appeal must be filed "within 90 days from the date of receipt of a contracting officer's decision." 41 USC § 7104(a).

In *Access Personnel*, the contractor sought payment in a claim for six cost items in a Navy time and materials contract. In two separate letters denying payment, the contracting officer failed to advise that they were a final contracting officer's decision or provide a statement of the contractor's appeal rights. Four years after receiving these letters, Access filed a notice of appeal to the Armed Services Board of Contract Appeals ("ASBCA"). The Navy asserted that the Board lacked jurisdiction because Access failed to file the appeal within 90 days of receipt of the contracting officer's decision. The ASBCA disagreed, holding that it is "well settled that proof of detrimental reliance on a defective CO's decision will toll the 90 day appeal period." Access was unfamiliar with the contract dispute process in general and the ASBCA in particular—it was completely unaware of the existence of the ASBCA. Further, the Contract Disputes Act imposes no affirmative obligation on a contractor to ascertain its appeal rights—the requirement in law is that the government must notify the contractor in writing of those rights. The ASBCA tolled the 90 day appeal period and accepted jurisdiction of the appeal.

In *Mansoor*, the contractor filed appeals from five separate decisions of the contracting officer on a transportation contract at the Bagram Regional Contracting Center, but all appeals were filed more than a year after Mansoor received the contracting officer's decisions. None of the appeals contained proper notification of appeal rights in FAR 33.211(a)(4)(v). The ASBCA

dismissed all of the appeals, noting that “the absence of notifications of appeal rights in the contracting officer’s decisions is harmless error if [the contractor] had actual knowledge of its rights when it received the decisions. Unlike *Access Personnel*, Mansoor knew of its rights by a previous termination under the contract which provided a proper notice of appeal rights. Mansoor had filed a notice of appeal on that termination which stated that the termination for default gives 90 days to appeal the default. And the counsel used to file the earlier appeal remained Mansoor’s counsel until long after the company had received the decisions it sought to appeal. The Board stated “by the time these decisions were issued, the contractor had received notice of its appeal rights under this contract, demonstrated an understanding of the 90 day limitation...and had access to counsel to advise it upon the subject.” Accordingly the absent or defective notices of appeal rights in the final decisions were harmless error, and the appeals were dismissed because they were filed more than a year after Mansoor received the contracting officer’s final decisions.

**TIP:** You cannot hide behind ignorance of the U.S. Code or the Federal Acquisition Regulation. You can avoid these types of disputes by filing your notice of appeal within 90 days of receipt of a CO decision that you wish to appeal. All it takes is a one-sentence “notice of appeal” to the ASBCA. No formal complaint with the details is due until 30 days after you have filed the notice.