



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: November 17, 2015

CBCA 4963

ESTES BROTHERS CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Philip E. Beck of Smith, Currie & Hancock LLP, Atlanta, GA, counsel for Appellant.

Milton Hsieh, Office of Counsel, Federal Highway Administration, Department of Transportation, Sterling, VA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **POLLACK**, and **ZISCHKAU**.

DANIELS, Board Judge.

We hold here, on motion of respondent, that our rules regarding filing of appeals of contracting officer decisions mean what they say and are to be construed strictly. A notice of appeal which was filed later than the ninetieth day after the contractor's receipt of a contracting officer decision, as that date is construed by the rules, must be dismissed for lack of jurisdiction.

Background

In 2013, the Department of Transportation's Federal Highway Administration (FHWA) awarded to Estes Brothers Construction, Inc. (Estes) a contract for rehabilitation

of portions of Newfound Gap Road in Tennessee. On January 29, 2015, Estes submitted to FHWA a claim in the amount of \$868,489 under this contract. By decision dated June 10, 2015, a FHWA contracting officer denied the claim and notified Estes of its “right to appeal this Decision within 90 days from the date of receipt . . . to the Civilian Board of Contract Appeals” or to “bring an action directly in the United States Court of Federal Claims within 12 months of the date you receive this Decision.” Estes received the decision at 1:27 p.m. on June 11, 2015. The contractor submitted a notice of appeal to this Board by electronic mail at 4:35 p.m. on Wednesday, September 9, 2015. The Board accepted the notice on Thursday, September 10, 2015.

Discussion

The Contract Disputes Act provides that a contractor may appeal a contracting officer’s decision to an agency board of contract appeals “within 90 days from the date of receipt of [that] decision.” 41 U.S.C. § 7104(a) (2012). The ninetieth day after Estes received the contracting officer’s decision at issue was September 9, 2015. Estes transmitted its notice of appeal to the Board at 4:35 p.m. Eastern Time on that day. Was that filing timely?

We have held that the Act’s deadline for appealing a decision has “been strictly construed by the Court of Appeals for the Federal Circuit because the authorization to make the filing is a waiver of sovereign immunity. Failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits.” *Treasure Valley Forest Products v. Department of Agriculture*, CBCA 3604, 14-1 BCA ¶ 35,549, at 174,207 (citing *Systems Development Corp. v. McHugh*, 658 F.3d 1341 (Fed. Cir. 2011); *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982); and several Board decisions); see also *DekaTron Corp. v. Department of Labor*, CBCA 4444, 15-1 BCA ¶ 36,045, at 176,061.

We recognize that within the past year, in *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320-22 (Fed. Cir. 2014), the Court of Appeals held that another deadline imposed by the Contract Disputes Act – for submitting a claim to the contracting officer – is not jurisdictional. The Court did not address in that decision whether established case law as to the deadline for filing an appeal with a board of contract appeals should be revisited. In the absence of a Court ruling on that matter, we continue to follow prior Court decisions that consider this deadline jurisdictional.

The Board’s Rules of Procedure explain the requirements for filing an appeal with the Board. Rule 1(b), 48 CFR 6101.1(b) (2014), includes the following provisions:

(5) *Filing.* (i) . . . A notice of appeal . . . is filed upon the earlier of its receipt by the Office of the Clerk of the Board or if mailed, the date on which it is mailed to the Board. . . . A United States Postal Service postmark shall be prima facie evidence that the document with which it is associated was mailed on the date of the postmark.

. . . .

(iii) Filings submitted by electronic mail (e-mail) are permitted, with [exceptions not relevant here]. . . . The filing of a document by e-mail occurs upon receipt by the Board on a working day, as defined in . . . Rule 1(b)(9)[]. All e-mail filings received by 4:30 p.m., Eastern Time, on a working day will be considered to be filed on that day. E-mail filings received after that time will be considered to be filed on the next working day.

. . . .

(9) *Working day.* The term “working day” means any day other than a Saturday, Sunday, federal holiday, day on which the Office of the Clerk is required to close earlier than 4:30 p.m.,¹ or day on which the Office of the Clerk does not open at all, as in the event of inclement weather.

Under these Rules, it is clear that a notice of appeal which is not “mailed” is filed when it is received by the Office of the Clerk of the Board. “Mailed,” in the context of the Rules, means placed into the custody of the United States Postal Service. *Tobias Schunck v. General Services Administration*, CBCA 3079, 13 BCA ¶ 35,222, at 172,828; *FM Diaz Construction, Inc. v. Department of Agriculture*, CBCA 1870, 12-1 BCA ¶ 35,049, at 172,179 n.1 (2010). Contrary to Estes’ position, mail and e-mail are treated differently by the Rules, so a notice of appeal which is e-mailed is not “mailed.” A filing which is submitted by e-mail is received on the day of its transmission only if it is received by 4:30 p.m., Eastern Time, on that day. If the filing is received after that time, it is considered to be filed on the next working day. The next working day, September 10, was the ninety-first day after Estes received the contracting officer’s decision – too late to meet the Contract Disputes Act’s ninety-day limitation on filing.

¹ 4:30 p.m. Eastern Time is the end of the Board’s working hours on each working day. Rule 1(b)(10).

Estes contends that “while the Board can create rules to govern its administration of proceedings before it, it cannot adopt Rules which expand or contract the jurisdiction granted to it by the United States Congress, and the Board’s Rules should not be interpreted to do so.” We agree with this position, but note that our Rules do not expand or contract our statutory jurisdiction over appeals of contracting officer decisions. The Rules allow filing of appeals as late as 11:59 p.m. on the ninetieth day after a contractor receives a decision. The Rules limit the use of certain vehicles for filing that late in the day – vehicles other than mail may only be used through 4:30 p.m. on that day – but they allow filing throughout the day as long as the filing is by mail.

Even if the Rules limited the filing vehicle to electronic means, court decisions have held that a forum may end its day for receipt of e-filed pleadings at a particular time. W. Kelly Stewart and Jeffrey L. Mills, “New Risks Every Litigator Should Know,” *For the Defense* (June 2011) at 29 (citing *PHL Variable Insurance Co. v. U.S. Bank National Ass’n*, Civ. No. 10-1197, 2010 WL 3926310 (D. Minn. Oct. 4, 2010) (“The Court will not excuse PHL’s dilatoriness in filing the Complaint when it slept on its rights.”); *Stark v. Right Management Consultants*, 247 F. App’x 855 (8th Cir. 2007) (“the district court did not abuse its discretion by deeming Stark’s complaint untimely under its Local Rule 5.1”); *People ex. rel. Madigan v. Illinois Commerce Commission*, 231 Ill. 2d 370, 385 (Ill. 2008) (“imposing a 5 p.m. deadline is perfectly compatible with e-filing,” as shown by an “extensive list of other agencies and jurisdictions that have imposed rules and regulations providing for such a deadline”)).

And even if the ninety-day limit for appealing a contracting officer decision to a board of contract appeals were to be considered non-jurisdictional, Estes’ filing would still be untimely. The Court of Appeals for the Federal Circuit has held that the non-jurisdictional time limit for submitting a claim to a contracting officer is subject to equitable tolling. *Arctic Slope Native Ass’n, Ltd. v. Sebelius*, 583 F.3d 785, 798 (Fed. Cir. 2009) (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990)). Equitable tolling is “[t]he doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired.” *Black’s Law Dictionary* 656 (10th ed. 2014). “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Estes does not argue that either of these elements is present here, so equitable tolling is not available to it. Instead of trying to make the requisite showing, the contractor says that our Rules 1(a), (c), and (d) give the Board the power to waive the Rules in a particular case when their application would work an injustice and urges us to employ that power to allow its appeal to proceed. But without good cause, such as must be present for equitable tolling, we have no reason to waive the Rules even if the ninety-day limit were deemed non-

jurisdictional. Estes has cited no justification other than its desire to have its appeal heard here.

As Estes understands, our ruling does not preclude the contractor from challenging the contracting officer decision in another forum: it may initiate an action directly in the United States Court of Federal Claims within twelve months of the date it received the decision. *See Tasunke Witco Owayawa (Crazy Horse School) v. Department of the Interior*, CBCA 2381-ISDA, 11-2 BCA ¶ 34,810, at 171,312 (citing *Geo-Imaging Consulting, Inc. v. Environmental Protection Agency*, CBCA 1712, 10-1 BCA ¶ 34,318, at 169,513 (2009)).

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

STEPHEN M. DANIELS
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

JONATHAN D. ZISCHKAU
Board Judge