



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: June 29, 2016

CBCA 5240

BLUEGRASS CONTRACTING CORPORATION,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Dave Luttrell, Vice President of Bluegrass Contracting Corporation, Lexington, KY, appearing for Appellant.

Grace Reidy, Office of Chief Counsel, Federal Highway Administration, Department of Transportation, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **GOODMAN**.

SOMERS, Board Judge.

Bluegrass Contracting Corporation (Bluegrass) entered into a contract with the Department of Transportation, Federal Highway Administration, to repair and improve drainage chases and to mill and overlay asphalt roadway at the Devil's Courthouse Tunnel along the Blue Ridge Parkway in North Carolina. On October 7, 2015, Bluegrass submitted a claim for \$71,522 for additional costs incurred during the project. The contracting officer denied the claim by letter dated November 16, 2015, and provided Bluegrass with notice of its appeal rights.

Bluegrass received the final decision on November 17, 2015, and appealed the decision to the Board. The Board received the notice of appeal on March 9, 2016, and docketed it on March 18, 2016. On May 18, 2016, the agency filed a motion to dismiss for lack of jurisdiction, stating that the appeal had not been timely filed, based upon the statement in the docketing notice that the appeal had been filed on May 9, 2016. Bluegrass “disputes” the agency’s motion to dismiss, asserting that “it mailed [the] appeal on February 12, 2016 and this document should have been received by the CBCA by the February 16, 2016 deadline.” Bluegrass states “[i]n retrospect we put too much trust in the U.S. Postal Service and should have used overnight service.”

Discussion

The Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012), requires that an appeal of a contracting officer’s final decision to a board of contract appeals must be filed “[w]ithin ninety days from the date of receipt of [the] decision.” 41 U.S.C. § 7104(a). Alternatively, a contractor may file its appeal with the United States Court of Federal Claims within twelve months. 41 U.S.C. § 7104(b). “Failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits.” *Soto Construction Co. v. Department of Agriculture*, CBCA 3210, 13 BCA ¶ 35,301, at 173,286 (citing *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982)); *Geo-Imaging Consulting, Inc. v. Environmental Protection Agency*, CBCA 1712, 10-1 BCA ¶ 34,318 (2009); *Pixl Inc. v. Department of Agriculture*, CBCA 1203, 09-2 BCA ¶ 34,187.

The Board’s Rules of Procedure detail the requirements for filing an appeal. Rule 1(b), 48 CFR 6101.1(b) (2015), provides as follows:

(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 a document with which it is associated was mailed on the date of the postmark.

Bluegrass alleges that it mailed the notice of appeal on February 12, 2016. “‘Mailed,’ in the context of the Rules, means placed into the custody of the United States Postal Service.” *Estes Brothers Construction, Inc. v. Department of Transportation*, CBCA 4963, 15-1 BCA ¶ 36,166, at 176,482 (citing *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)). The Board received the notice of appeal from Bluegrass in a postage-stamped and properly addressed envelope. The envelope contains a postmark from the United States Postal Service indicating that it was

received by the Postal Service on February 16, 2016. We need not determine whether Bluegrass mailed its notice on February 12 or February 16, 2016. Both dates meet the Contract Disputes Act's ninety-day limitation on filing.¹

Decision

Respondent's motion to dismiss is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ALLAN H. GOODMAN
Board Judge

¹ Although February 16 was the ninety-first day after Bluegrass received the contracting officer's decision, a filing on that day is considered timely under our Rules, since the ninetieth day (Monday, February 15) was a federal holiday. See Board Rule 3(c) (48 CFR 6101.3(c) (2015)).