



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: December 7, 2009

CBCA 1712

GEO-IMAGING CONSULTING, INC.,

Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

William H. Gammon of Nelson Mullins Riley & Scarborough LLP, Raleigh, NC, counsel for Appellant.

Sara E. McGraw, Office of General Counsel, Environmental Protection Agency, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **STEEL**, and **SHERIDAN**.

SHERIDAN, Board Judge.

We dismiss this appeal for lack of jurisdiction because it was filed more than ninety days after the contractor received the contracting officer's final decision denying the contractor's claim for reimbursement of certain outstanding expenses. Appellant has not demonstrated that it timely mailed its notice of appeal to the Board; rather, the record shows that appellant timely sent, in separate envelopes, the original notice and a copy to the contracting officer.

Findings of Fact

Respondent, the Environmental Protection Agency (EPA), issued task order EP-06-H-001513 to Geo-Imaging Consulting, Inc. (Geo-Imaging) on April 18, 2006. Work was to commence on April 18, 2006, and conclude on October 30, 2007. Appellant filed an undated claim in the amount of \$84,029.53, which the contracting officer received on January 3, 2009. The contracting officer issued a final decision denying the claim in its entirety. The final decision was delivered to appellant on May 18, 2009, using United States Postal Service (USPS) certified mail, with return receipt service.¹ The receipt of the final decision started the clock on the statutorily mandated ninety days during which appellant could file an appeal with the Board. An appeal to the Board was to be filed no later than close of business on August 17, 2009.

When it did not receive a notice of docketing, appellant contacted the Clerk of the Board on September 1, 2009, to inquire about the status of docketing. At that time, appellant was informed by the Clerk that the Board had no record of receiving its appeal. On that same day, appellant submitted, by facsimile and mail, a copy of its appeal dated August 6, 2009. The appeal was docketed as CBCA 1712 on September 1, 2009, 105 days after Geo-Imaging received the contracting officer's final decision.

Appellant asserts that it submitted a timely appeal to the Board on August 6, 2009, and that "it is either the fault of the USPS or the CBCA that it was not received or was misplaced by the CBCA." Appellant sought guidance from the Board on the question of the appeal's timeliness and whether jurisdiction was vested by its original August 6 submission. The Board issued an order to show cause, requiring the parties to brief whether appellant's alleged August 6 submission provided jurisdiction to the Board.

In support of its position that the Board has jurisdiction, appellant proffers the affidavits of the administrative assistant who prepared the appeal and its photocopy for mailing, the site manager who retrieved the envelopes, and the customer service representative who personally applied postage to the envelopes. Appellant relies on these affidavits to support the assertion that it properly addressed and mailed two envelopes pursuant to a consistent, systematic, inter-office model. Specifically, appellant alleges that the two envelopes were properly addressed and mailed; one envelope contained the original

1

The EPA examined the USPS return receipt on the contracting officer's final decision and found the delivery date to be unclear in that different dates appear on the return receipt, some of which are illegible. For purposes of this decision we have used the latest delivery date, May 18, 2009, which is based on the date stamp that appears on the USPS return receipt.

appeal and was directed to the Board, and the other envelope contained a photocopy of the appeal which was directed to the contracting officer. Following an exhaustive search, appellant asserts, no envelope containing the August 6 filing has been returned undelivered or has been found to be misplaced. While appellant cannot affirmatively state that the original was delivered to the Clerk of the Board, and subsequently misplaced by the Board, it alleges that all facts that can be ascertained seem to point in that direction.

The EPA received two identical envelopes from appellant on or about August 12, 2009; one envelope contained the notice of appeal and showed an original blue ink signature, while the other envelope contained a photocopy of the notice with a photocopy signature in black ink. Both envelopes were postmarked August 6, 2009, and both were addressed to the contracting officer. In its response to the Board's order to show cause, EPA posits that the only viable conclusion is that appellant addressed both envelopes to the contracting officer. Once it became apparent that two envelopes had been delivered to the contracting officer, one containing the original notice of appeal, appellant attempted to explain that its administrative assistant had a business practice of using 8½ x 11" envelopes for Board submissions and it was likely that the Board was sent one of the additional copies.

Respondent argues that however unintentional the oversight might have been, the August 6 appeal was not timely submitted to the Board and appellant's appeal submitted on September 1, 2009, was filed more than two weeks after the statutory deadline for the appeal had passed. The EPA maintains that the Board lacks jurisdiction over the appeal.

The Clerk of the Board represents that she did not receive the notice of appeal until a copy of the August 6 notice was transmitted to her via facsimile and by mail on September 1, 2009.

Discussion

The Board raised the issue of jurisdiction in response to appellant's inquiry of September 1, 2009, as to why its appeal had not been docketed earlier.

The Contract Disputes Act of 1978 (CDA) permits a contractor to contest a contracting officer's decision in either of two fora. Within ninety days from the date of the contractor's receipt of the contracting officer's final decision, a contractor may file its appeal with a board of contract appeals. 41 U.S.C. § 606 (2006). Alternatively, within twelve months from the date of the contractor's receipt of the contracting officer's final decision, a contractor may file its appeal with the United States Court of Federal Claims. 41 U.S.C. § 609(a).

The timing provisions are jurisdictional and the boards and the Court of Federal Claims do not have authority to waive them. *See Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982).

Deadlines for filing appeals have “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.” *Hallwood Plaza, Inc. v. General Services Administration*, GSBCA 16808, 06-2 BCA ¶ 33,299. The Board has consistently followed Federal Circuit precedent by dismissing for lack of jurisdiction appeals filed more than ninety days after the contractor received the contracting officer’s final decision.

The Board’s rules of procedure also reflect its adherence to the Federal Circuit’s directive. Pursuant to Board Rule 1(b)(5)(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. 48 CFR 6101.1(b)(5)(i) (2008). In sum, a late filing precludes jurisdiction to consider a case on its merits. *D. L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Cosmic Construction Co.*, 697 F.2d at 1390.

The Board is an independent institution and the contracting officers of the various agencies whose disputes it reviews are not agents of the Board. As such, and as expressly stated in the rule above, an appeal sent only to the contracting officer is not filed with the Board. *Charles T. Owen v. Agency for International Development*, CBCA 694, 07-2 BCA ¶ 33,638.

In the instant case, the Clerk of the Board, the intended recipient of appellant’s original notice of appeal, did not receive the August 6 notice. At the same time, the contracting officer received two notice of appeals which were identical in substance and in form to the notices appellant alleges were mailed to different recipients. Appellant’s additional attempts to convince the Board that a properly addressed envelope containing counsel’s copy of the original notice of appeal was delivered to the Office of the Clerk was not compelling. Based on the evidence, the Board finds that the original August 6 notice was not timely mailed to the Board.

Ultimately, the onus is on the appellant to make certain that the appeal is timely and properly filed with the Clerk of the Board. The untimely appeal to this Board does not preclude the contractor from filing a timely suit in the Court of Federal Claims. *Olsberg Excavating Co. v. United States*, 3 Cl. Ct. 249 (1983).

Decision

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

PATRICIA J. SHERIDAN
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

CANDIDA S. STEEL
Board Judge