



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: March 25, 2014

CBCA 3604

TREASURE VALLEY FOREST PRODUCTS,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Dan Balbach of Treasure Valley Forest Products, Boise, ID, appearing for Appellant.

Heather R. Hinton-Taylor, Office of the General Counsel, Department of Agriculture, Ogden, UT, counsel for Respondent.

Before Board Judges **SOMERS**, **McCANN**, and **STEEL**.

SOMERS, Board Judge.

The United States Department of Agriculture, Forest Service (the Forest Service or the Government) moves to dismiss this appeal for lack of jurisdiction on the ground that appellant failed to file its appeal within the time constraints set forth in the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (Supp. IV 2011). Appellant disputes that the appeal was untimely filed. For the reasons set forth below, the motion to dismiss is granted.

Background

On January 9, 2009, the Forest Service entered into a contract with appellant. The contract required appellant to remove timber and to perform other specific work, such as installing culverts and decommissioning roads.

On August 2, 2013, the contracting officer served his final decision to appellant by email message, hand-delivery, and certified mail. Appellant responded to the contracting officer's final decision that same day by email, questioning the contracting officer's rationale for terminating the contract.

Appellant had ninety days to file its notice of appeal from the date that it received the contracting officer's final decision. Appellant had to file its notice of appeal no later than October 31, 2013. Appellant submitted its appeal to the Board on Friday, November 1, 2013, at 10:01 p.m. ET, by electronic mail. Because the Board received the email filing after 4:30 p.m., ET, the Board docketed receipt of the appeal on the next working day, which was Monday, November 4, 2013.

Discussion

The CDA, under which the Board reviews CO decisions, requires that an appeal of such a decision to a board of contract appeals be filed "[w]ithin ninety days from the date of receipt of [the] decision." 41 U.S.C. § 7104(a). Alternatively, within twelve months from the date of the contractor's receipt of the CO's final decision, a contractor may file its appeal with the United States Court of Federal Claims. 41 U.S.C. § 7104(b).

These deadlines for filing 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. Failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits. *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); *Soto Construction Co. v. Department of Agriculture*, CBCA 3210, 13 BCA ¶ 35,301; *Tobias Schunck v. General Services Administration*, CBCA 3079, 13 BCA ¶ 35,222; *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.

Regarding the deadline for filing an appeal with the Board, Board Rule 1(b)(5)(iii) provides that:

Filings submitted by electronic mail (email) are permitted The filing of a document by email occurs upon receipt by the Board on a working day, as defined in 6101.1(b)(9) (Rule 1(b)(9)). All email filings received by 4:30 p.m., Eastern Time, on a working day will be considered to be filed on that day. Email filings received after that time will be considered to be filed on the next working day.

48 CFR 6101.1(b)(5)(iii) (2013). A working day means any day other than Saturday, Sunday, a federal holiday, a day on which the Office of the Clerk is required to close earlier than 4:30 p.m., or a day on which the Office of the Clerk does not open at all, as in the event of inclement weather. Board Rule 1(b)(9). The Board's working hours are 8:00 a.m. to 4:30 p.m., ET, on each working day. Rule 1(b)(10).

In computing the ninety-day timeframe, the Board has held that "mailed" means placing the notice of appeal "into the custody of the U.S. Postal Service." *Tobias Schunck*, 13 BCA at 172,827 (citing *FM Diaz Construction, Inc. v. Department of Agriculture*, CBCA 1870, 12-1 BCA ¶ 35,049, at 172,179 n.1 (2010)). Appeals that are not transmitted by the United States Postal Service, such as this one, are deemed filed when received by the Board. *Id.* (citing *CWI Consultants & Services v. General Services Administration*, GSBCA 13889, 98-1 BCA ¶ 29,343 (1997), *reconsideration denied*, 98-1 BCA ¶ 29,476; *Charles T. Owen v. Agency for International Development*, CBCA 694, 07-2 BCA ¶ 33,638).

With these rules in mind, we note that appellant received its first copy of the final decision on August 2, 2013, both by email and by hand-delivery. Accordingly, under the rules, the notice of appeal was due by October 31, 2013. Appellant filed its notice of appeal after this date.

Appellant argues that the ninety-day time period started on August 8, 2013, and ran until November 6, 2013, because it did not receive a copy of the decision by certified mail until August 7, 2013. Appellant does not dispute, however, the fact that it received identical copies of the final version of the CO's final decision on August 2, 2013, first by email and second by hand-delivery, in addition to receiving a third copy by certified mail. No matter how many additional times appellant received the final decision, the calculation begins to run from the first time appellant received the final decision, *i.e.*, August 2, 2013. Ninety days from that date is October 31, 2013. By filing its notice of appeal after October 31, 2013, it failed to meet the deadline.

Decision

The motion to dismiss is granted. The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

JERI KAYLENE SOMERS
Board Judge

We concur:

R. ANTHONY McCANN
Board Judge

CANDIDA S. STEEL
Board Judge