UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 23, 2015

CBCA 4444

DEKATRON CORPORATION,

Appellant,

v.

DEPARTMENT OF LABOR,

Respondent.

Ralph C. Thomas III of Barton Baker Thomas & Tolle LLP, McLean, VA, counsel for Appellant.

David R. Koeppel and Colin W. O'Sullivan, Office of the Solicitor, Department of Labor, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **DRUMMOND**, and **SHERIDAN**.

SHERIDAN, Board Judge.

The Department of Labor (DOL) requests that we dismiss the appeal filed by DekaTron Corporation (DekaTron) for lack of jurisdiction. DOL argues that, among other grounds, dismissal is warranted because DekaTron failed to file a timely appeal to the Board. DekaTron opposes the dismissal. For the reasons discussed below, we dismiss the appeal for lack of jurisdiction.

Background

DekaTron submitted its second certified claim to the DOL contracting officer on September 24, 2013, and its revised second certified claim on July 11, 2014. The claim sought lost profits and lease expenses incurred when DOL refused to exercise the option to

renew DekaTron's contract DOLJ109630970 (contract), and task orders DOJB129633991 (DOL task order) and DOJB129634128 (VA task order). The contracting officer denied the claim in its entirety, and furnished her final decision to DekaTron via email message and certified mail.[1] The contracting officer transmitted the final decision by email on October 10, 2014, to the following DekaTron representatives: president and CEO, Steve Silva, at his DekaTron email address; executive vice-president, Rick Brunner, at his DekaTron email address as well as a second email address; and DekaTron's counsel, Ralph C. Thomas III, at his business email address. The October 10 email message read, in part:

> Attached please find the Contracting Officer's Final Decision on [DekaTron's] Second (Revised) Claim. A hard copy is being sent via United States Postal Service, First Class, Certified Mail.

DOL's Microsoft Outlook program immediately confirmed that "delivery to these recipients or groups is complete." The contracting officer sent a hard copy of the final decision by certified mail on October 10, 2014, addressed to DekaTron's president at its corporate offices.

That same day, the contracting officer received two email non-delivery notices, which read in pertinent part:

> Delivery has failed to these recipients or groups:
> [President and CEO's DekaTron email address]
>
> . . . .
>
> [Executive Vice-President's DekaTron email address]
>
> A problem occurred while delivering this message to this email address. Try sending this message again. If the problem continues, please contact your help desk.

The contracting officer contacted DekaTron's counsel by email on October 16, 2014, regarding the email non-delivery notices:

> Please be advised that I received a non-delivery notice when sending [the October 10 email message] to [DekaTron's president]. Similarly, when sent

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1 On October 10, 2014, by separate email message, the contracting officer also sent her final decision regarding DekaTron's first claim. DekaTron appealed this decision, too, and the Board docketed the appeal as CBCA 4428. DOL's request that we dismiss CBCA 4444 does not affect CBCA 4428.

> by [certified mail] on 10/10/2014, we received a notice that the package is being held at the post office and delivery has not been made. Do you have another email address or delivery address for [DekaTron's president]? As I will be out of the office starting tomorrow, I am arranging to have copies of both CO Final Decisions sent to your office by [certified mail].

DekaTron's counsel responded that day:

> I received everything. I can't understand why that happened with [DekaTron's president]. I was just talking with him a few days ago. I'll check it out. Thank you for the alert.

DekaTron received the final decision by certified mail on October 20, 2014, and filed its notice of appeal from the contracting officer's final decision by email on January 13, 2015. The Board docketed the appeal as CBCA 4444.

Discussion

Parties' Arguments

DOL argues that DekaTron's appeal must be dismissed because it is untimely. DOL maintains that DekaTron's receipt of the October 10 email message, evidenced by DOL's email service delivery confirmation, as well as DekaTron's counsel's October 16, 2014, response, i.e., "I received everything," began the ninety-day appeal period. DOL argues that, because DekaTron received the contracting officer's final decision on October 10, 2014, but waited until January 13, 2015–95 days later–to file its appeal, its appeal therefrom was untimely.

DekaTron opposes the motion, arguing that its appeal was timely because its president did not receive the notice of final decision until he accepted the certified letter on October 20, 2014.[2] DekaTron offers October 16, 2014, the date the contracting officer sent a follow-up email message to DekaTron's counsel concerning the failed delivery of the October 10 email message, as the proper date for measuring the appeal period, arguing that the ninety-day appeal period begins from the latest notification. Appellant's Opposition to Request for Dismissal at 14.

Timing Requirements

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2 DekaTron only addresses the lack of receipt by its president, who purportedly did not receive the final decision until by certified mail on October 20, 2014. DekaTron does not state when or if its president received the final decision by email message. So, too, is DekaTron silent in its response as to when its executive vice-president and its counsel received the October 10 email message containing the final decision.

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), provides that a contracting officer shall issue a final decision in writing and shall mail or otherwise furnish a copy of the decision to the contractor. *Id*. § 7103(d). The CDA further provides that an appeal from the contracting officer's final decision must be filed with the Board "within 90 days from the date of receipt of [such a] decision." *Id*. § 7104(a).[3] The ninety-day filing deadline is strictly construed and may not be waived by the Board. *D.L. Braughler Co. v. West*, 127 F.3d 1476 (Fed. Cir. 1997); *Cosmic Construction Co. v. United States*, 697 F.2d 1389, (Fed. Cir. 1982); *Treasure Valley Forest Products v. Department of Agriculture*, CBCA 3604, 14-1 BCA ¶ 35,549; *Tasunke Witco Owayawa (Crazy Horse School) v. Department of the Interior*, CBCA 2381-ISDA, 11-2 BCA ¶ 34,810.

The burden is on the Government to provide sufficient objective evidence that the contractor received the final decision. *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369 (Fed. Cir. 2005); *Brickwood Contractors, Inc. v. United States*, 77 Fed. Cl. 624 (2007) (a facsimile confirmation indicating that the final decision had been successfully transmitted did not meet the CDA requirement that a contracting officer's final decision be provided to the contractor "by certified mail, return receipt requested, or by any other method that provides evidence of receipt"); *Trygve Dale Westergard v. General Services Administration*, CBCA 2522, 11-2 BCA ¶ 34,842.

The Government has met its burden. The contracting officer furnished her final decision to DekaTron's president, executive vice-president, and counsel by email message on October 10, 2014. While DekaTron asserts that its president did not actually receive notice of the final decision until October 20, DekaTron does not dispute that its vice president and counsel did receive the October 10 email message. On October 16, DekaTron's counsel confirmed that he had received the October 10 email message. Counsel's notice is the client's notice, unless the applicable provision expressly requires otherwise. *See Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) (citing *Smith v. Ayer*, 101 U.S. 320 (1879) ("[E]ach party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'") (internal citation omitted)); *Belton Industries, Inc. v. United States*, 6 F.3d 756, 761 (Fed. Cir. 1993); *Florida Dehydration Co. v. United States*, 101 F. Supp. 361, 363 (Ct. Cl. 1951). The CDA requires only "receipt" of the final decision by the contractor and not "notice" specific to a particular addressee to initiate the ninety-day period in which to appeal. *Tasunke Witco Owayawa (Crazy Horse School),* 11-2 at 171,310 (citing *Robert T. Rafferty v. General Services Administration*, CBCA 617, 07-1 BCA ¶ 33,577). Receipt of a final decision by

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3 Alternatively, a contractor may file its appeal with the United States Court of Federal Claims within twelve months of receipt of the contracting officer's final decision. 41 U.S.C. § 7104(b). An untimely appeal to the Board does not preclude a contractor from filing a timely suit in the Court of Federal Claims. *Geo-Imaging Consulting, Inc. v. Environmental Protection Agency*, CBCA 1712, 10-1 BCA ¶ 34,318 (2009).

email occurs on the day the contractor receives the email message. *Government Services Corp. v. Department of Homeland Security*, CBCA 4204, 15-1 BCA ¶ 35,807 (2014).

DekaTron was in receipt of the contracting officer's final decision on October 10, 2014. As we have held before, in the event that the contracting officer delivers multiple, identical copies of the final decision, the ninety-day calculation "begins to run from the first time appellant received the final decision." *Treasure Valley Forest Products,* 14-1 BCA at 174,207. Therefore, DekaTron's window to appeal to this Board began on October 10, 2014. Ninety days from that date is January 8, 2015. Because DekaTron filed its appeal of that final decision on January 13, 2015–95 days after it received the contracting officer's final decision–DekaTron's appeal is untimely. Accordingly, we lack jurisdiction to consider this matter.

Decision

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

PATRICIA J. SHERIDAN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

JEROME M. DRUMMOND
Board Judge