



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS IN PART FOR LACK OF JURISDICTION DENIED:
August 24, 2016

CBCA 5049

JONATHAN NOELDNER,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Jonathan Noeldner, pro se, Eau Claire, WI.

James L. Rosen, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

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

DANIELS, Board Judge.

Respondent, the Department of Agriculture, moves the Board to dismiss this appeal in part for lack of jurisdiction. Respondent maintains that some portions of the case were filed too late to be considered by us. We deny the motion, which is based on a misunderstanding as to the filing of the appeal.

Background

The United States Forest Service, an entity within the Department of Agriculture, awarded to Jonathan Noeldner a contract to harvest ponderosa pine timber in the Inyo

National Forest of California. The contract was awarded on August 17, 2006, and is known as the Sentry Fuelwood Sale contract. Mr. Noeldner made fifteen separate, numbered claims under this contract. A Forest Service contracting officer denied them all in a single decision which was dated June 29, 2015. The decision was received by Mr. Noeldner on July 27, 2015. (Mr. Noeldner was evidently not at the address to which the contracting officer initially sent the decision. The contracting officer re-sent the decision to a different address on July 22.)

Mr. Noeldner filed four notices of appeal, each one challenging the contracting officer's decision as to specific claims. The notices of appeal were filed by two separate means: via facsimile transmission (fax) and through the United States Postal Service mails.

Two faxed versions were sent to the Board on Friday, October 23, 2015, and received by us on that date. The first faxed version (received at 3:25 p.m.) challenged the decision as to claims one, five, six, and eight. The second faxed version (received at 4:20 p.m.) challenged the decision as to claims four, seven, and ten.

One mailed version was postmarked on October 23, 2015, and received by the Board on Wednesday, October 28. It challenged the decision as to all of the claims referenced in both faxed versions. The second mailed version was postmarked on Saturday, October 24, 2015, and received by the Board on Thursday, October 29. It challenged the decision as to every one of the fifteen claims.

Our Clerk docketed the appeal as having been filed on October 23.

In November 2015, agency counsel called the Board to request a copy of the notice of appeal. Regrettably, what our clerical personnel sent to him by fax was only the first faxed version, which referenced claims one, five, six, and eight.

On June 13, 2016, Mr. Noeldner filed complaints in this case. He filed separate complaints for claims one, three, five, six, eight, nine, and ten. In a telephonic conference with the Board on July 5, 2016, Mr. Noeldner stated that he is no longer pursuing any of the other claims.

Discussion

Pursuant to the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012), "The contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by [the Act]." *Id.* § 7103(g). The Act authorizes appeals and

actions in section 7104, which states, “A Contractor, within 90 days from the date of receipt of a contracting officer’s decision . . . , may appeal the decision to an agency board [of contract appeals].” *Id.* § 7104(a). With an exception not relevant here, “in lieu of appealing the decision . . . to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, . . . within 12 months from the date of receipt of a . . . decision.” *Id.* § 7104(b)(1), (3).

Consistent with these requirements, the contracting officer advised Mr. Noeldner in his decision:

This is the final decision of the Contracting Officer. This decision may be appealed to the Civilian Board of Contract Appeals. To find out more about the process for filing such an appeal go [to] the website:
<http://www.cbca.gsa.gov/howto/rules/procedure.html>.

If you decide to make such an appeal, you must mail or otherwise furnish written notice thereof to the Civilian Board of Contract Appeals within 90 days from the date you receive this decision. . . . In lieu of appealing to the Civilian Board of Contract Appeals, you may bring an action directly in the Court of Federal Claims within 12 months of the date you receive this decision.

The ninetieth day after the date on which Mr. Noeldner received the decision, July 27, 2015, was Sunday, October 25, 2015. Under the Board’s Rules of Procedure, if the last day on which a filing is permitted is a Sunday, the filing may be made on the next working day. Rule 3(c) (48 CFR 6101.3(c) (2015)). Thus, a notice of appeal of the contracting officer’s decision in question had to be filed by Monday, October 26, 2015, to meet the statutory ninety-day deadline.

Respondent posits that the only claims which Mr. Noeldner challenged on or before October 26 were claims one, five, six, and eight, which were referenced in the notice of appeal sent to respondent by the Board in November 2015. The remaining claims were not timely filed, respondent says, so the Board has no jurisdiction to consider them. Respondent concludes that we may not consider claims three, nine, and ten – the remaining claims which Mr. Noeldner continues to pursue.

Respondent is correct in asserting that the Contract Disputes Act’s “ninety day deadline is . . . part of a statute waiving sovereign immunity, which must be strictly construed . . . and which defines the jurisdiction of the . . . board.” *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982) (citations omitted); *see also Alaska Excavating, LLC v. Department of Transportation*, CBCA 5342 (Aug. 2, 2016); *DekaTron Corp. v.*

Department of Labor, CBCA 4444, 15-1 BCA ¶ 36,045, at 176,060; *Three Rivers Timber, Inc. v. Department of Agriculture*, CBCA 1044, 08-1 BCA ¶ 33,833. The Board has no authority to waive the ninety-day deadline. *Cosmic Construction*, 697 F.2d at 1390-91 & n.3.¹

Respondent is also correct in stating that “because the notice of appeal rather than the complaint initiates a case, it is generally the notice of appeal, not the complaint, that establishes the bounds of jurisdiction.” *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,603 (quotation marks and citations omitted); *see also Cafritz Co. v. General Services Administration*, GSBCA 13525, 97-1 BCA ¶ 28,969, at 144,263. And respondent is further correct in maintaining that where an appellant raises in its notice of appeal only some of the issues addressed in a contracting officer’s decision, “the portions which are not covered by the notice of appeal must be dismissed.” *Cafritz Co.*, 97-1 BCA at 144,263.

Although respondent’s legal analysis is well founded, its conclusion that we must dismiss from the appeal some of Mr. Noeldner’s claims is not. The conclusion is based on misunderstandings which must be shared among appellant, respondent, and the Board. Appellant filed four separate notices of appeal, thereby sowing confusion as to which claims he was seeking to pursue. When agency counsel asked for a copy of the notice of appeal, Board personnel sent him only one of the four – the first faxed version. Although respondent is also in possession of the second mailed version, counsel has assumed that this version was submitted by fax or electronic filing. *See Respondent’s Motion to Dismiss* at 2 n.2. This version was actually mailed. The distinction is important, for under our rules, a document which is faxed or electronically transmitted to us is filed “when it is received by the Office of the Clerk of the Board during the Board’s working hours,” while a notice of appeal which is mailed is filed on “the date on which it is mailed.” Rule 1(b)(5). The second mailed

¹ The Court of Appeals for the Federal Circuit, which held in *Cosmic Construction* that the time limitation for the filing of an appeal is jurisdictional, has never decided otherwise. Thus, we continue to follow this determination. We do appreciate, however, that the holding of *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320-22 (Fed. Cir. 2014), and dicta in *Guardian Angels Medical Service Dogs, Inc. v. United States*, 809 F.3d 1244, 1252-53 (Fed. Cir. 2016), indicate that the validity of the *Cosmic* determination is in doubt. *See Nova Group/Tutor-Saliba v. United States*, No. 15-885C, slip op. at 5 n.2 (Fed. Cl. July 22, 2016); *Estes Brothers Construction, Inc. v. Department of Transportation*, CBCA 4963, 15-1 BCA ¶ 36,166, at 176,482. Whether the time limitation is jurisdictional or not is immaterial to our ruling on respondent’s motion, for as we explain, the entire appeal survives under the jurisdictional constraint.

version of the notice of appeal, which clearly challenges the contracting officer's decision as to every one of appellant's fifteen claims, was postmarked by the United States Postal Service prior to the last day for filing of a notice of appeal. This notice timely placed all fifteen claims before us. We therefore have jurisdiction to consider all of those claims. We will review the matters raised solely by claims one, three, five, six, eight, nine, and ten, however, because subsequent to filing the notices of appeal, appellant has informed us that he is now pursuing only those claims.

Appellant has asked us to deny the motion to dismiss because “[a]ll the Complaints . . . are very important because certain Forest Service personnel acted repeatedly with openly malicious intent toward me and my family with no regard for the written Contract specifications, or, in certain cases included in my Complaints, the law.” Appellant specifically alleges, as a reason for denying the motion, that “the Forest Service personnel repeatedly intentionally violated 18 USC 1001^[2] as specified in Contract Documents.” These arguments are irrelevant to the merits of the motion, and we have not considered them in ruling on it.

Decision

Respondent's motion to dismiss the appeal in part for lack of jurisdiction is **DENIED**.

STEPHEN M. DANIELS
Board Judge

² Section 1001 of title 18, United States Code, provides that generally, anyone who, in a matter within the jurisdiction of the Government, “knowingly and willfully – (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry,” shall be fined, imprisoned for not more than five years, or both.

We concur:

CATHERINE B. HYATT
Board Judge

ALLAN H. GOODMAN
Board Judge