



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: August 2, 2016

CBCA 5342

ALASKA EXCAVATING, LLC,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Michael A. Grisham of Dorsey & Whitney, LLP, Anchorage, AK, counsel for Appellant.

Rayann L. Speakman, Western Federal Lands Division Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

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

SOMERS, Board Judge.

The United States Department of Transportation, Federal Highway Administration (FHA 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 (2012). Appellant, Alaska Excavating, LLC (Alaska Excavating or appellant), does not dispute that it failed to timely file its appeal. For the reasons set forth below, the motion to dismiss is granted.

Background

On November 7, 2013, FHA awarded a contract to Alaska Excavating for construction of walls along a road.¹ On August 3, 2015, appellant submitted a claim to the contracting officer. On February 24, 2016, the contracting officer determined that the Government owed Alaska Excavating \$16,183.61, but denied the remainder of the claim. The contracting officer sent her final decision to appellant by express mail. The contracting officer's final decision contained the standard language concerning appeal rights, stating, in pertinent part:

This is a final decision of the Contracting Officer. You may appeal the decision to the Civilian Board of Contract Appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Civilian Board of Contract Appeals (mailing address: 1800 F Street, N.W., Washington, DC, 20405; physical address: 6th Floor, 1800 M Street, N.W., Washington, DC 20036; telephone number (202) 606-8800), and provide a copy to the Contracting Officer from whose decision this appeal is taken.

The contracting officer concluded her decision by explaining that an appeal of the decision may, alternatively, be filed with the Court of Federal Claims within twelve months of the contractor's receipt of the final decision. Appellant acknowledges that it received the final decision on February 26, 2016.

Appellant had ninety days from the date that it received the contracting officer's final decision to file its notice of appeal at the Board. Accordingly, in order for its notice of appeal to be timely, appellant's notice of appeal had to be filed with the Board no later than Thursday, May 26, 2016. Instead, appellant submitted its appeal to the Board on Friday, May 27, 2016, at 1:20 p.m. Eastern Time, by electronic mail. In addition, appellant presented its appeal on GSA Form 2465, entitled "Notice of Appeal," and dated the form May 27, 2016.

¹ Neither party submitted the contract as part of the appeal file or the supplemental appeal file, so the information that we can glean about the contract requirements is based upon the facts identified in appellant's claim and the contracting officer's final decision.

Discussion

As we have stated previously, “[t]he CDA, under which the Board reviews [contracting officer] 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.’” *Treasure Valley Forest Products v. Department of Agriculture*, CBCA 3604, 14-1 BCA ¶35,549, at 174,206 (citing 41 U.S.C. § 7104(a)). Failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits. *Id.* at 174,207 (citing *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. Appeals that are not sent by mail through the United States Postal Service, such as this one, are deemed filed when received by the Board. *Tobias Schunck*, 13 BCA at 172,828 (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).

Appellant received the contracting officer’s final decision on February 26, 2016. Accordingly, under the rules, the notice of appeal was due by May 26, 2016. Appellant filed its notice of appeal on May 27, 2016.

Appellant does not dispute that it failed to file the notice of appeal timely, noting merely that appellant “can only plead leniency under these circumstances. A significant portion of the issues presented by this appeal arose because the government was significantly late in making decisions and payments.” This argument does not excuse the late filing. Appellant was not only represented by counsel, but also informed in the final decision of the contracting officer exactly how, when, and to whom the written notice of appeal should be sent. Accordingly, because appellant did not transmit its notice of appeal within ninety days from receipt of the contracting officer’s final decision, we lack jurisdiction to review the merits of this appeal.

Appellant is reminded that an untimely appeal to the Board does not preclude it from filing a timely suit in the Court of Federal Claims. *Tasunke Witco Owayawa (Crazy Horse School) v. Department of the Interior*, CBCA 2381-ISDA, 11-2 BCA ¶ 34,810, at 171,312 (citing *GEO-Imaging Consulting*).

Decision

Respondent's motion to dismiss is granted. The appeal is untimely and therefore **DISMISSED FOR LACK OF JURISDICTION.**

JERI KAYLENE SOMERS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

HAROLD D. LESTER, JR.
Board Judge