



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: December 6, 2017

CBCA 5918

CARL & SON'S CONSTRUCTION COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Carl L. Parker, Sr., President of Carl & Son's Construction Company, Inc., Leland, NC, appearing for Appellant.

Adrienne D. Bolton, Office of the Regional Solicitor, Department of the Interior, Atlanta, GA, counsel for Respondent.

Before Board Judges **VERGILIO**, **ZISCHKAU**, and **LESTER**.

LESTER, Board Judge.

On November 13, 2017, the Board docketed this appeal from a contracting officer's decision dated June 26, 2017. Because of the date on the face of the contracting officer's decision, the Board issued a show cause order on November 15, 2017, requesting that the parties address whether the appeal was timely. Appellant, Carl & Son's Construction Co., Inc. (Carl & Son), did not respond to the order, but the Bureau of Indian Affairs (BIA), acting upon behalf of respondent, the Department of the Interior, provided the Board with

copies of documents relevant to the timeliness issue and argued that the Board lacks jurisdiction to entertain the appeal. We agree with BIA.

Background

On April 25, 2017, Carl & Son submitted a certified claim to the BIA contracting officer, seeking an equitable adjustment of \$279,916.94 for various unanticipated cost increases and delays under contract RA001510129 (later renumbered as A10PC75022), a road reconstruction project on the Catawba Indian Reservation in Rock Hill, South Carolina.

The BIA contracting officer issued a decision denying the claim on June 26, 2017, and, in the decision, notified the contractor of its appeal rights using the language set forth in Federal Acquisition Regulation 33.211(a)(4)(v), 48 CFR 33.211(a)(4)(v) (2016). The contracting officer sent the decision to Carl & Son by Federal Express that same day. BIA has provided the Board with a copy of the Federal Express tracking receipt showing that the decision was delivered to Carl & Son on June 27, 2017, and identifying the name of the individual who signed for the package upon Carl & Son's behalf.

On November 9, 2017, Carl & Son sent a notice of appeal to the Board by Federal Express. Because the Board was closed because of a Federal holiday on November 10, 2017, the Board's Office of the Clerk did not receive the appeal notice until November 13, 2017.

Discussion

Pursuant to section 7104(a) of the Contract Disputes Act (CDA), if a contractor wants to appeal a contracting officer's decision to the Board, it must file its appeal within ninety days from the date that it receives the decision. 41 U.S.C. § 7104(a) (2012). "Failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits." *Estes Brothers Construction, Inc. v. Department of Transportation*, CBCA 4963, 15-1 BCA ¶ 36,166, at 176,478-79 (quoting *Treasure Valley Forest Products v. Department of Agriculture*, CBCA 3604, 14-1 BCA ¶ 35,549, at 174,207).

Under 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," with the United States Postal Service postmark constituting "prima facie evidence" of the date of mailing. 48 CFR 6101.1(b)(5)(i). "Where a contractor uses a courier service other than the United States Postal Service, such as Federal Express, a notice of appeal is deemed filed on the date that it is received by the Board," rather than the date of mailing. *FM Diaz Construction, Inc. v. Department of Agriculture*, CBCA 1870, 12-1 BCA ¶ 35,049, at 172,178 (2010) (quoting *CWI Consultants & Services v. General Services Administration*,

GSBCA 13889, 98-1 BCA ¶ 29,343, at 145,894 (1997), *motion for reconsideration denied*, 98-1 BCA ¶ 29,476).

Carl & Son received the contracting officer's decision on June 27, 2017. Carl & Son sent its notice of appeal to the Board by Federal Express, and the Office of the Clerk did not receive it until November 13, 2017 – 159 days after Carl & Son's appeal time began to run. Because the Office of the Clerk received the notice of appeal after the ninety-day statutory deadline had expired, and because we lack authority to waive that ninety-day deadline, *see Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982); *Mattress Makers, Inc. v. General Services Administration*, CBCA 2176, 11-1 BCA ¶ 34,645, at 170,733, we must dismiss Carl & Son's appeal for lack of jurisdiction.

Our decision here does not preclude Carl & Son from attempting to challenge the contracting officer's decision in another forum: as an alternative to an appeal to the Board, the CDA permits a contractor to initiate an action directly in the Court of Federal Claims within twelve months of the date upon which it received the contracting officer's decision. 41 U.S.C. § 7104(b)(3).

Decision

For the foregoing reasons, this appeal is **DISMISSED FOR LACK OF JURISDICTION**.

HAROLD D. LESTER, JR.
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

JONATHAN D. ZISCHKAU
Board Judge