



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION:
May 1, 2018

CBCA 6043-ISDA

SHONTO GOVERNING BOARD OF EDUCATION, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Samantha B. Kelty and Nathan D. Schott of Hufford, Horstman, Mongini, Parnell & Tucker, P.C., Flagstaff, AZ, counsel for Appellant.

Chaitna Sinha, Office of the Solicitor, Department of the Interior, Albuquerque, NM, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **LESTER**, and **O'ROURKE**.

LESTER, Board Judge.

Appellant, Shonto Governing Board of Education, Inc. (SGBE), has filed a motion asking the Board to dismiss this appeal without prejudice to allow the parties to negotiate a resolution of their dispute outside the context of litigation. SGBE also acknowledges, however, that the Board lacks jurisdiction to entertain this appeal because SGBE filed its notice of appeal more than ninety days after receiving the awarding official's decision

denying its claim. Because it is clear that SGBE's appeal was untimely filed, we dismiss this appeal for lack of jurisdiction.

Background

SGBE holds a tribally controlled school grant that the Department of the Interior's Bureau of Indian Education (BIE) awarded under the auspices of the Tribally Controlled Schools Act (TCSA), 25 U.S.C. §§ 2501-2511 (2012). As required by statute, an audit was conducted of SGBE's costs for the fiscal year ending June 30, 2016. The results of that audit were set forth in Single Audit Report ARTT 2016-5053, which was delivered to BIE on March 31, 2017. According to SGBE, even though the audit report did not question any of SGBE's costs for the fiscal year in question, the BIE awarding official issued findings and determinations (F&D) on July 28, 2017, questioning and disallowing \$624,863 of SGBE's costs for the 2016 fiscal year. Accompanying the F&D was a decision by the awarding official notifying SGBE of its obligation to repay the costs to BIE and of SGBE's right pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, to appeal the awarding official's decision to the Board within ninety days or, alternatively, to file suit in the Court of Federal Claims challenging the decision within twelve months of receipt. SGBE acknowledges that it received the awarding official's decision by email on July 28, 2017.

Almost seven months later, on February 21, 2018, SGBE filed its notice of appeal with the Board. In that notice, SGBE represented that its school superintendent had executed a letter on July 30, 2017, intending to appeal the July 28, 2017, decision, and SGBE attached that letter to its notice of appeal. Nevertheless, SGBE inadvertently did not mail the letter when it was executed and did not file any appeal until February 21, 2018. Citing to Board Rule 1(d), 48 CFR 6101.1(d) (2017), SGBE requested in its notice of appeal that the Board use its "equitable powers" to accept and consider the appeal.

On February 22, 2018, the parties jointly requested a stay of proceedings to allow them to discuss settlement, a request that the Board granted by order dated that same day. On March 27, 2018, SGBE filed a motion to dismiss the appeal without prejudice, indicating that BIE had agreed to work amicably with SGBE to attempt to resolve the issues raised in the appeal, but only if SGBE first voluntarily dismissed this appeal. Subsequently, on April 21, 2018, following a telephonic status conference with the Board, SGBE filed a supplement to its motion to dismiss, conceding that "there is an incurable jurisdictional defect due to Appellant's untimely Notice of Appeal" and indicating that it would not object to dismissal of the appeal for lack of jurisdiction.

Discussion

“Pursuant to section 7104(a) of the [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.” *Carl & Son’s Construction Co. v. Department of the Interior*, CBCA 5918, 18-1 BCA ¶ 36,920, at 179,873 (citing 41 U.S.C. § 7104(a)). By statute, Congress made the CDA applicable to contracts awarded pursuant to the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. § 5331(d) (Supp. 2017) (formerly 25 U.S.C. § 450m-1(d) (2012)), and the ISDA contracts, along with applicable regulations, treat “the awarding official as the equivalent of a contracting officer for purposes of resolving a dispute under [such contracts] and the CDA.” *Confederated Salish & Kootenai Tribes of the Flathead Nation v. Department of the Interior*, CBCA 692-ISDA, 07-2 BCA ¶ 33,677, at 166,736; *see* 25 CFR 900.219 (2017). Accordingly, once an ISDA contractor receives an awarding official’s decision responding to a contractor claim or asserting a government claim, the contractor has ninety days to appeal that decision to the Board. The appellant’s failure timely to file its notice of appeal following its receipt of the awarding official’s decision is a jurisdictional defect that precludes us from entertaining the appeal. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); *DekaTron Corp. v. Department of Labor*, CBCA 4444, 15-1 BCA ¶ 36,045, at 176,059.¹

Here, the BIE awarding official issued a decision on July 28, 2017, asserting a government claim for reimbursement of \$624,863 in previously paid costs, and SGBE acknowledges that it received the decision the day it was issued. Although SGBE immediately prepared an appeal notice, it inadvertently failed to mail or otherwise submit it to the Board within the required ninety-day appeal period and, therefore, did not perfect an appeal. *See Carl & Son’s Construction*, 18-1 BCA at 179,873 (notice of appeal is filed when received by the Board or, if mailed, on the date on which it is mailed). The Court of Appeals

¹ We recognize that, in *Guardian Angels Medical Service Dogs, Inc. v. United States*, 809 F.3d 1244 (Fed. Cir. 2016), the Court of Appeals for the Federal Circuit questioned whether, in light of the rationale underlying the Supreme Court’s decision in *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013), compliance with the CDA’s filing deadlines should still be viewed as a jurisdictional requirement. *See Guardian Angels*, 809 F.3d at 1252. Yet, the Court in *Guardian Angels* did not disturb its prior precedential decision in *Cosmic Construction*, 697 F.2d at 1390, in which the Court held that the ninety-day appeal deadline is, in fact, jurisdictional. Unless and until the Federal Circuit modifies its precedential determination in *Cosmic Construction*, we will continue to follow it. *Jonathan Noeldner v. Department of Agriculture*, CBCA 5049, 16-1 BCA ¶ 36,473, at 177,727 n.1.

for the Federal Circuit has previously held that we have no power to waive the ninety-day deadline, whether based upon equitable considerations or for other reasons. *Cosmic Construction*, 697 F.2d at 1390-91 & n.3; see *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) (boards of contract appeals “cannot waive jurisdictional requirements”). Even if we could, a contractor’s failure to file its notice of appeal for reasons other than the Government’s fault or interference or some other external obstacle is not the type of activity that generally would allow for a delay in a filing deadline, even under some type of equitable estoppel or equitable tolling theory. See *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755-57 (2016) (even if equitable tolling were available, it would require the appellant to show extraordinary circumstances that stood in its way in filing its case); *Estes Brothers Construction, Inc. v. Department of Transportation*, CBCA 4963, 15-1 BCA ¶ 36,166, at 176,480 (same).

As the Board recently held, “[o]nce we are aware that we lack jurisdiction to entertain an appeal, we have ‘no other recourse but to dispose of the case by dismiss[ing]’ it based upon the jurisdictional defect.” *Duke University v. Department of Health & Human Services*, CBCA 5992, 18-1 BCA ¶ 37,023, at 180,291 (quoting *Rex Systems Inc. v. United States*, No. 92-411C, 1993 WL 13726058, at *3 (Fed. Cl. Dec. 13, 1993), *appeal dismissed*, 41 F.3d 1517 (Fed. Cir. 1994) (table)). In *Duke University*, as here, the parties had jointly requested that we dismiss an appeal without prejudice, subject to reinstatement upon the timely request of a party, but we found that, because we had become aware of a jurisdictional defect in the appeal, we had no choice but to dismiss it for lack of jurisdiction. *Id.* That same rule applies here.

Although SGBE’s appeal to the Board was untimely, “[o]ur decision here does not preclude [the appellant] from attempting to challenge the [awarding official’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 [awarding official’s] decision.” *Carl & Son’s*, 18-1 BCA at 179,874 (citing 41 U.S.C. § 7104(b)(3) (2012)); see *Duke University*, 18-1 BCA at 180,291 & n.1 (discussing how a dismissal for lack of jurisdiction by the Board does not preclude an appellant from pursuing a suit challenging a contracting officer’s decision in court). Because the awarding official’s decision was issued less than a year ago, SGBE still has time, if the parties are not able amicably to resolve their dispute, to ensure that its challenge to the awarding official’s decision does not become completely time-barred.

Decision

For the foregoing reasons, SGBE's appeal is **DISMISSED FOR LACK OF JURISDICTION**.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge

We concur:

Jeri Kaylene Somers

JERI KAYLENE SOMERS

Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge