



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: August 23, 2018

CBCA 6095

RAKS FIRE SPRINKLER, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Rashad N. Ali, President of RAKS Fire Sprinkler, LLC, Hattiesburg, MS, appearing for Appellant.

Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **GOODMAN**.

SOMERS, Board Judge (Chair).

RAKS Fire Sprinkler, LLC (RAKS) appealed the General Services Administration's (GSA) decision to terminate its contract for default. GSA filed a motion to dismiss the appeal for lack of jurisdiction. We grant the motion and dismiss the appeal because it was not timely filed.

Background

By letter dated November 28, 2017, the contracting officer informed RAKS, by email to W.R. Hayes, RAK's authorized representative, that GSA had terminated its contract for

default. The notice advised the contractor that it “constitutes the final decision of the contracting officer . . . and that you have the right to appeal under the Disputes clause.”

On January 10, 2018, the contracting officer sent RAKS a second email, stating, in part:

I neglected to include the following information from the letter by which I terminated the contract for default.

You may appeal this decision to the agency 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 agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board’s small claim procedure for claims of \$50,000 or less or its accelerated procedure for claims of \$100,000 or less.

The contracting officer appended the initial November 28, 2017, termination notice and the modification terminating the contract to this email. The contracting officer sent the January 10, 2018, notice to Mr. Hayes and to another RAK representative, Romero Ali. RAKS filed its appeal to the Board on April 12, 2018.

In its initial filing, RAKS claims that “[w]e were afforded an extension to respond by April 13, 2018.”¹ In its complaint, filed in conjunction with the notice of appeal, RAKS contends that the agency’s decision is wrongful because RAKS never received a complete copy of the contract, nor did it receive a notice to proceed from the contractor.

GSA moves to dismiss the claim for lack of jurisdiction because RAKS filed its appeal with the board late, either 135 days from the notice of termination or 92 days from the contracting officer’s final decision. GSA notes that the contracting officer initially issued a notice of termination for default on November 28, 2017. GSA acknowledges that the contracting officer’s notice did not include the appeal rights language required by the Federal Acquisition Regulation (FAR). GSA asserts that the failure to include the appeal rights is not fatal to its argument. Alternatively, even if the time to appeal did not begin to run until

¹ As we noted in our July 2, 2018, order, RAKS provided no details about this alleged extension, nor did it address this issue in its surreply.

the second notice to the contractor that it had been terminated for default, RAKS failed to meet the ninety-day deadline.

In response to the motion to dismiss, RAK submitted a document (addressed to GSA's counsel) rebutting the arguments set forth by the GSA. In the document, RAKS contends that (1) the ninety-day filing process is ambiguous because it is unclear whether ninety-days refers to calendar days or business days; (2) the termination for default is invalid in the absence of having received a notice to proceed; (3) the termination for default should be converted to a termination for convenience; and (4) GSA's procedural policies in the Detroit office as relates to service-disabled veteran-owned businesses (SDVOB) should be examined. On June 18, 2018, in a "supplemental" filing submitted in response to our request for clarification, RAKS suggested that GSA failed to send the notice of termination to the "new contact persons" for RAKS. Also, although the original "supervisor" informed RAKS that the appeals clock would not be adjusted, RAKS asserts that other GSA employees may have suggested that RAKS requests would be reviewed, potentially leading to a new 90-day appeals clock.

By order dated July 2, 2018, we asked GSA to provide an appeal file containing any correspondence between RAKS and GSA employees relating to the termination of the contract. In addition, we asked GSA to specifically address whether any of the communications between the parties constituted reconsideration of a decision by the contracting officer. We also required RAKS to file a surreply addressing those same issues.

GSA filed an appeal file and a reply brief. The appeal file included declarations from three GSA employees. In these sworn statements, each employee denied that he or she had informed RAKS that the contracting officer would reconsider the decision to terminate the contract for default. GSA noted in its reply brief that the record contained nothing to indicate that RAKS had changed its authorized contract representative from Mr. Hayes to someone else.

RAKS filed a surreply. RAKS did not dispute the accuracy of the statements contained in the declarations, but, instead, focused on the merits of its underlying claim.

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)). The appellant's failure to file its notice of appeal within ninety days following its receipt of the

contracting officer's final 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). The party seeking to invoke the Board's jurisdiction "bears the burden of establishing [it] by a preponderance of the evidence." *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988).

In assessing whether the Board has subject matter jurisdiction, the allegations of the complaint should be construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). However, when a motion to dismiss for lack of subject matter jurisdiction challenges the truth of alleged jurisdictional facts, the Board may consider relevant evidence beyond the pleadings to resolve disputed facts. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993) (when jurisdiction is at issue, the tribunal is not limited to the pleadings).

Here, RAKS does not dispute that it received the contracting officer's final decision, as amended with the addition of the appeal rights, on January 10, 2018. Under the CDA, appellant's notice of appeal was due no later than April 10, 2018. Although RAKS dated its notice of appeal April 10, 2018, it did not transmit its notice to the Board until April 12, 2018, two days late. *See, e.g., Alaska Excavating, LLC v. Department of Transportation*, CBCA 5342, 16-1 BCA ¶ 36,465 (board dismissed appeal filed one day late). Thus, we conclude that the notice of appeal is untimely.²

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. *Alaska Excavating*, 16-1 BCA ¶ 36,465, at 177,691.

² In light of this conclusion, we do not address whether the earlier notice of termination of default was deficient because it did not include the necessary appeal language.

Decision

Respondent's motion to dismiss for lack of jurisdiction is **GRANTED**.

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge