



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: November 16, 2020

CBCA 6934

JAF SUPPLY, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS

Respondent.

Jorge A. Flores, President of JAF Supply, Inc., Boca Raton, FL, appearing for Appellant.

Natica Chapman Neely, District Contracting National Practice Group, Department of Veterans Affairs, Jackson, MS, counsel for Respondent.

Before Board Judges **BEARDSLEY, RUSSELL, and O'ROURKE.**

RUSSELL, Board Judge.

JAF Supply, Inc. (JAF) appealed the Department of Veterans Affairs' (VA) decision to deny its claim for payment. JAF does not dispute that it failed to file its appeal within the time constraints set forth in the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). Due to the untimely filing, we dismiss the appeal for lack of jurisdiction.

Background

On April 27, 2020, JAF submitted a claim to the VA for payments associated with the parties' contract for the rental of mobile medical equipment used by a VA facility in Puerto Rico. In a response dated June 30, 2020, the VA denied JAF's claim for payments, noting that this was the final decision of the contracting officer. The contracting officer's final decision contained the following language concerning JAF's appeal rights:

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.

JAF had ninety days from the date that it received the contracting officer's final decision, June 30, 2020, to file its notice of appeal with the Board. Accordingly, JAF's notice of appeal had to be filed with the Board no later than September 28, 2020. JAF's notice of appeal was received by electronic mail on September 29, 2020, at 11:52 p.m. Eastern Standard Time.

Discussion

“The 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 Prods. v. Department of Agriculture*, CBCA 3604, 14-1 BCA ¶35,549 (citing 41 U.S.C. § 7104(a)). An appellant's failure to timely file an appeal following receipt of a contracting officer's final decision “is a jurisdictional defect that precludes [a board] from entertaining the appeal.” *Raks Fire Sprinkler, LLC v. General Services Administration*, CBCA 6095, 18-1 BCA ¶37,122 (citing *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982)). “Appeals that are not sent by mail through the United States Postal Service. . . are deemed filed when received by the Board.” *Alaska Excavating, LLC v. Department of Transportation*, CBCA 5342, 16-1 BCA ¶36,465. The Board, through its Clerk, accepts electronic filings (efilings), including notices of appeal, through the Board's email system. Board Rule 1(b) (48 CFR 6101.1(b) (2018)). An e-filing occurs upon receipt by the Board's email system. *Id.*

JAF received the contracting officer's final decision on June 30, 2020. For JAF's appeal to be timely in accordance with the CDA and the Board's rules, the Board must have received JAF's emailed appeal by September 28, 2020. However, the Board did not receive JAF's appeal until September 29, 2020, ninety-one days after JAF received the contracting officer's final decision. Moreover, JAF does not dispute that its filing was untimely, explaining that its “missing of the deadline by one (1) day was not a planned neglect . . . and that the Respondent has not been prejudiced in any way.” However, these points cannot cure the jurisdictional defect. “The Court [of Appeals for the Federal Circuit] has repeatedly held that, because the authorization to make [a] filing [under the CDA] is a waiver of the Government's sovereign immunity, failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits.” *Safe Haven Enterprises,*

LLC v. Department of State, CBCA 3871, 15-1 BCA ¶ 35,928. Accordingly, because JAF failed to file its notice of appeal within ninety days of receipt of the contracting officer's final decision, we lack jurisdiction to review the merits of this appeal.

Although the untimely filing precludes the Board's jurisdiction, an untimely appeal to the Board does not preclude JAF from filing a timely suit in the U.S. Court of Federal Claims. *Tasunke Witco Owayawa (Crazy Horse School) v. Department of the Interior*, CBCA 2381-ISDA, 11-2 BCA ¶ 34,810 (citing *GEO-Imaging Consulting, Inc. v. Environmental Protection Agency*, CBCA 1712, 10-1 BCA ¶ 34,318 (2009)).

Decision

The appeal is untimely and therefore is **DISMISSED FOR LACK OF JURISDICTION**.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge