



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 8, 2021

CBCA 7107

CHEROKEE 8A GROUP,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

John Llewellyn, Project Executive of Cherokee 8A Group, Wharton, NJ, appearing for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Bend, OR, counsel for Respondent.

Before Board Judges **DRUMMOND**, **SHERIDAN**, and **O'ROURKE**.

SHERIDAN, Board Judge.

The Cherokee 8A Group (Cherokee) appeals a claim arising out of contract VA243-14-C-0029 with the Department of Veterans Affairs (VA) for construction services at the VA Medical Center in East Orange, New Jersey. The VA moved to dismiss, asserting that the appeal did not meet the ninety-day statutory threshold of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), for filing an appeal before the Civilian Board of Contract Appeals (CBCA). *Id.* § 7104(a). We agree and dismiss the appeal as untimely.

Background

Cherokee submitted an uncertified claim to the VA's contracting officer on September 12, 2018, for the amount of \$473,669.42. Cherokee certified this claim on September 25, 2018. The claim sought an outstanding balance, time extensions, and additional costs for work beyond the scope of the contract.

The contracting officer, Ms. Sharon F. Pierce, approved the claim for the outstanding balance but denied the time extension and additional costs. She notified Cherokee's President, Mr. John Hopka, of the final decision via a letter dated May 2, 2019. Neither party disputes this date. Cherokee's receipt of the final decision marked the start of the ninety-day time limit for filing an appeal at the CBCA, which ended on July 31, 2019. *See* Rule 2(d)(1) (48 CFR 6101.2(d)(1) (2018)).

In the contracting officer's final decision letter, dated May 2, 2019, Ms. Pierce included appeal language mandated for a contracting officer's final decision. She instructed Cherokee:

Please Note that this is the final decision of the Contracting Officer. 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 the decision, and identify the contract and project number.

With regards to appeals to the agency board of contract appeals, you may, solely at your election proceed under the board's--(1) small claim procedure for claims of \$50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), \$150,000 or less; or (2) Accelerated procedures claims of \$100,000 or less. Instead of appealing to the agency board of contract appeals, you may also bring an action directly in the United States Court of Federal Claims . . . within 12 months of the date you receive this decision.

On May 9, 2019, one week after receiving the contracting officer's final decision, Cherokee responded via letter to Ms. Christina M. Katz, the Veterans Integrated Service Network (VISN) 2, New York/New Jersey VA Healthcare Network Branch Chief of Construction, acknowledging receipt of the contacting officer's decision dated May 2, 2019, and requesting that the VA reconsider its decision. The VA did not reply to Cherokee's letter.

On July 11, 2019, Cherokee sent an email to Ms. Katz and Ms. Pierce, asking if the VA's Office of Construction and Facilities Management was the correct forum to appeal the contracting officer's final decision. In a letter dated July 22, 2019, Cherokee notified the "Board of Appeals, Office of Construction & Facilities Management" of its intent to appeal the contracting officer's final decision. This letter further stated, "We trust this is being sent to the proper authority." On July 30, 2019, Cherokee sent another email to Ms. Katz and Ms. Pierce stating, "Given the fact that you did not respond to our request to confirm the delivery address we presume [the appeal] was sent to the proper address." The next day, after receiving no response from the VA, Cherokee sent still another email to Ms. Katz and Ms. Pierce, which was similar in form and content to its previous emails.

On December 14, 2020, Cherokee emailed Ms. Katz and Ms. Pierce requesting information about its appeal. Cherokee followed up on its December request with another email to Ms. Katz on March 16, 2021, with a similar query for information. Ms. Katz responded that same day via email, stating that if the appeal "was filed properly, the case would have been referred to [the VA's] litigation department by now. To date, we have not been notified of an appeal." This email included contact information for the CBCA. Cherokee filed its notice of appeal from the contracting officer's final decision by an email a month later, on April 21, 2021. The Board docketed the appeal as CBCA 7107, 720 days after appellant received the contracting officer's final decision. Respondent filed a motion to dismiss for lack of jurisdiction on April 22, 2021, arguing that Cherokee untimely filed the appeal.

Discussion

The VA moves that Cherokee's appeal must be dismissed, arguing that it is untimely. Neither party disputes that Cherokee's receipt of the contracting officer's final decision on May 2, 2019, started the ninety-day appeal period. In addition, both parties agree that Cherokee submitted its appeal on April 21, 2021, which was 720 days after receipt of the final decision.

Cherokee opposes the motion, asserting that the VA misled it about the appropriate forum for its appeal and that the VA was on notice of its appeal since May 2019. Pointing to multiple communications to the VA contracting officer and branch chief, Cherokee maintains that it acted in good faith and repeatedly requested information from the VA about the appropriate agency board of contract appeals. Only on March 16, 2021, did the VA reply with information regarding the appropriate forum to lodge its appeal. Cherokee asserts that the VA's omission of information was intentional or negligent. Cherokee posits that, but for the VA's lack of response, it would have timely and correctly filed the appeal, as evidenced by the fact that Cherokee filed its appeal one month after the VA provided it with the correct information.

The CDA provides that a contractor may appeal a contracting officer's decision to an agency board of contract appeals "within 90 days from the date of receipt of the decision." 41 U.S.C. § 7104(a). The ninety-day deadline is "part of a statute waiving sovereign immunity, which must be strictly construed." *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982). This deadline may not be waived by the Board. *Id.*; *Mahavir Overseas v. Agency for International Development*, CBCA 6704, 20-1 BCA ¶37,619 (citing *Mattress Makers, Inc. v. General Services Administration*, CBCA 2176, 11-1 BCA ¶ 34,645); *Bass Transportation Services, LLC v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464 (holding that the CDA does not permit the Board to review the appeal because the decision is not subject to review after the ninety-day period).

Cherokee bears the burden of properly filing its appeal with the CBCA. *See Mahavir Overseas; Soto Construction Co. v. Department of Agriculture*, CBCA 3210, 13 BCA ¶ 35,301. Cherokee did not fulfill this burden. A contractor must timely file an appeal even when the agency fails to respond to the contractor's inquiries. *See Mahavir Overseas* (holding that the contracting officer's silence until after the appeal window closed does not excuse an untimely filing). The Federal Acquisition Regulation (FAR) does not require the contracting officer to identify the CBCA in the final decision. *See* 48 CFR 33.211(a)(4)(v) (FAR 33.211(a)(4)(v)); *Mahavir Overseas*; *see also Soto Construction Co.* The final decision contained the appropriate language from the FAR as to Cherokee's appeal rights, stating that Cherokee had ninety days to appeal to "the agency board of contract appeals." Because Cherokee filed its notice of appeal 720 days after its receipt of the decision, we must dismiss this appeal.

A holding from the Department of Transportation (DOT) Board of Contract Appeals, one of our predecessor boards, states that an exception may exist to the ninety-day deadline when an agency misleads the contractor and remains silent as to the appropriate forum for an appeal. *See P&L Management & Consulting, Inc.*, DOT BCA 4086, 00-1 BCA ¶ 30,759 (holding that the agency's mistake in identifying the agency itself as the appropriate forum for appeal excuses the contractor's untimely filing). However, that exception does not apply in this case because the VA did not misdirect Cherokee in regard to filing an appeal.

Similarly, in *Wise Developments, LLC*, the Board held that the statutory appeal time may never begin if the agency fails to give notice to the contractor. *Wise Developments, LLC v. General Services Administration*, CBCA 6659, 21-1 BCA ¶ 37,774 (holding that "the contractor must show prejudice from, or detrimental reliance upon, the absence of a proper appeal rights notice" in order for the appeal time not to run). Here, the contracting officer's

final decision includes appropriate language from the FAR as to Cherokee's appeal rights.¹ The CBCA has previously held that this information is sufficient notice of appeal rights. *See Mahavir Overseas* (holding that the notice of appeal rights does not require the contracting officer to identify the CBCA); *Soto Construction Co.* (holding that identical language to the FAR suffices for informing the contractor of its appeal rights). The VA's notice of appeal rights is not insufficient, defective, or misleading.

Cherokee finally posits that the VA was put on notice of its attempt to appeal in July 2019, before the appeal deadline had passed, when it sent a letter to the VA, dated May 9, 2019, noting its intention to appeal the denial of its claim if the VA did not reconsider its May 2, 2019, determination. This argument is unavailing because the CBCA does not view contracting officers as agents that may accept appeals on the Board's behalf. *See Mahavir Overseas; Soto Construction Co.* The agency's silence in the face of Cherokee's questions, posed on numerous occasions about where to file an appeal, did not prejudice Cherokee because the information was publicly available. *Mahavir Overseas*.

Because Cherokee filed its appeal of the decision 720 days after it received the contracting officer's final decision, its appeal is untimely. Accordingly, we lack jurisdiction to consider this matter.

Decision

This appeal is **DISMISSED FOR LACK OF JURISDICTION**.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

¹ Although FAR 33.211(a)(4)(v) does not specify to which agency board of contract appeals a contractor must appeal, the VA Acquisition Regulation (VAAR) identifies the CBCA as the forum to appeal a final decision. *See* 48 CFR 833.211(c). The VAAR instructs the contracting officer to insert the clause set forth in FAR 33.211(a)(4)(v) that requires notice of appeal to the agency board of contract appeals, but it does not require the contracting officer to specify the CBCA by name. *Id.*

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge