



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: December 4, 2024

CBCA 8185

ACABAY INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Frank J. Motter, President of Acabay Inc., Colchester, VT, appearing for Appellant.

Brett A. Pisciotta, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Judges **BEARDSLEY** (Chair), **SHERIDAN**, and **KULLBERG**.

BEARDSLEY, Board Judge.

The respondent, the General Services Administration (GSA), moved to dismiss this appeal for lack of jurisdiction asserting that the appellant, Acabay Inc. (Acabay), filed its appeal more than ninety days after it received the contracting officer's final decision. Acabay argues that it timely filed its appeal via the United States Postal Service (USPS) within the ninety-day period. For the reasons set forth below, we find that Acabay did not timely file its appeal and dismiss this appeal for lack of jurisdiction.

Statement of Facts

This appeal arises from a lease between Acabay and GSA for office and related space that included design and construction of certain tenant improvements. Appellant's Notice of Appeal at 6. Acabay submitted a certified claim to recover "lost rent revenue" and "additional fees for Acabay's construction/design team[,] including opportunity cost[s]" for alleged delays caused by GSA in issuing the notice to proceed. *Id.*

On May 20, 2024, Acabay received the lease contracting officer's (LCO) final decision denying Acabay's claim. Appellant's Response to Respondent's Motion to Dismiss for Lack of Jurisdiction (Appellant's Response) at 2. The LCO's final decision notified Acabay of its appeal rights and provided the mailing address for the Civilian Board of Contract Appeals (CBCA or Board). *Id.*; Appellant's Notice of Appeal at 14. On August 21, 2024, Acabay electronically filed (efiled) its notice of appeal with the CBCA. Appellant's Response at 3; Appellant's Notice of Appeal at 1. The electronic filing made no mention of an earlier USPS mailing, but it did contain a letter dated July 17, 2024, which was titled "Notice of Appeal." Appellant's Notice of Appeal at 3. This July letter, addressed to the CBCA and signed by Acabay's President, Frank J. Motter, indicated that it was to be sent "[v]ia email" and that the contracting officer was to be copied. *Id.* at 3-4.

GSA moved to dismiss Acabay's appeal for lack of jurisdiction, arguing that Acabay failed to submit its appeal to the CBCA within the ninety-day deadline required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). In its response to GSA's motion to dismiss, Acabay claimed that Mr. Motter mailed Acabay's notice of appeal to the Board at 1800 M Street, N.W., 6th Floor, Washington, DC 20036 via the USPS on August 5, 2024. Appellant's Response at 2. Acabay noted that the Board's website identified USPS mailing as a proper method for filing documents with the Board. *Id.* at 4-5. Acabay also pointed to a photograph of the mailbox into which Mr. Motter allegedly dispatched the notice of appeal on August 5, 2024. Appellant's Comments in Response to the Respondent's Reply to the Appellant's Response to the Motion to Dismiss for Lack of Jurisdiction at 2-3, 5. Mr. Motter stated, "I can only provide the mailbox from which I mailed the letter[;] it is less than 100 feet away from the office door of our office." *Id.* at 2. He further indicated, "I regretfully tell the court I cannot prove [the mailing] beyond the photograph and telling the court I have done so." *Id.* at 5. Acabay also explained that it efiled the notice of appeal on August 21, 2024, to provide additional information that was not included in the earlier mailing, including the LCO's final decision and other exhibits. *Id.* at 4. The Clerk of the Board has confirmed that there is no record of the CBCA receiving a notice of appeal from Mr. Motter or Acabay by mail.

Discussion

Standard of Review

In response to [a motion to dismiss], appellant[], even though appearing pro se, bear[s] “the burden of establishing subject matter jurisdiction by a preponderance of the evidence.” *Selrico Services, Inc. v. Department of Justice*, CBCA 3084, 13 BCA ¶ 35,268, at 173,132 (quoting *Ron Anderson Construction, Inc. v. Department of Veterans Affairs*, CBCA 1884, et al., 10-2 BCA ¶ 34,485, at 170,070). Typically, in considering a motion to dismiss for lack of jurisdiction, we look to the allegations contained in the complaint, construed favorably to the pleader, and we look beyond the complaint only if the respondent challenges the alleged jurisdictional facts. *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685, at 166,758. Here, because we have not required the submission of a formal complaint, we have properly “looked to the documents submitted with the motions,” and the documents contained in the appeal file and elsewhere in the record, “to evaluate the jurisdictional issues presented by th[is] appeal[.]” *Id.*; see *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993) (“In establishing the predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings, including affidavits and deposition testimony.”).

Brent Packer v. Social Security Administration, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,896.

Jurisdiction

Per the CDA, a contractor has the right to appeal a contracting officer’s final decision “within 90 days from the date of receipt” of the decision. 41 U.S.C. § 7104(a) (2018). The Court of Appeals for the Federal Circuit “has repeatedly held that, because the authorization to make the filing 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, et al., 15-1 BCA ¶ 35,928, at 175,605 (citing *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *West Coast General Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994); *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982)).

Our previous decisions, relying on binding precedent from the Court of Appeals for the Federal Circuit, have held that the ninety-day requirement may

not be waived as it is strictly construed and failure to comply creates a “jurisdictional defect” which precludes the appeal from consideration. *MINACT, Inc v. Department of Labor*, CBCA 7575, 23-1 BCA ¶ 38,243, at 185,701 (2022) (citing *Treasure Valley Forest Products v. Department of Agriculture*, CBCA 3604, 14-1 BCA ¶ 35,549, at 174,207, and quoting *Duke University v. Department of Health & Human Services*, CBCA 5992, 18-1 BCA ¶ 37,023, at 180,291); *Shonto Governing Board of Education[, Inc. v. Department of the Interior]*, [CBCA 6043-ISDA,] 18-1 [BCA ¶ 37,038,] at 180,319[-20] (citing [*Cosmic Construction*, 697 F.2d at 1390]; *Dekatron Corp. v. Department of Labor*, CBCA 4444, 15-1 BCA ¶ 36,045, at 176,059).

Yerington Paiute Tribe v. Department of the Interior, CBCA 7818-ISDA, 24-1 BCA ¶ 38,508, at 187,161-62; see also *Mahavir Overseas v. Agency for International Development*, CBCA 6704, 20-1 BCA ¶ 37,619, at 182,641 (citing *Mattress Makers, Inc. v. General Services Administration*, CBCA 2176, 11-1 BCA ¶ 34,645, at 170,733). The contractor bears the burden of properly filing its appeal with the Board within the ninety-day deadline. *Cherokee 8A Group v. Department of Veterans Affairs*, CBCA 7107, 21-1 BCA ¶ 37,894, at 184,035 (citing *Mahavir Overseas* and *Soto Construction Co. v. Department of Agriculture*, CBCA 3210, 13 BCA ¶ 35,301).

It is undisputed that Acabay received the contracting officer’s final decision on May 20, 2024. Accordingly, Acabay’s notice of appeal was due to the CBCA by August 19, 2024.¹ Because the CBCA only received Acabay’s efiled notice of appeal on August 21, 2024 — two days after the ninety-day deadline — and Acabay has failed to carry its burden of showing that its notice of appeal was properly mailed, the Board must dismiss Acabay’s appeal for lack of jurisdiction.

Board Rule 1(b) provides that “[a] notice of appeal or application is filed upon the earlier of its receipt by the Clerk or, if mailed through the United States Postal Service (USPS), the date it is mailed to the Board.” 48 CFR 6101.1(b) (2023). In computing the ninety-day CDA deadline, a notice of appeal is “mailed” when it is placed into the “custody of the USPS.” *FM Diaz Construction, Inc. v. Department of Agriculture*, CBCA 1870, 12-1 BCA ¶ 35,049, at 172,178 (2010) (“Only notices of appeal placed in the custody of the USPS

¹ According to Board Rule 3(a), “[i]f a computed period would otherwise end on a nonbusiness day, it ends on the next business day.” 48 CFR 6101.3(a) (2023). Here, ninety days from the date Acabay received the contracting officer’s final decision fell on Sunday, August 18, 2024. Thus, the deadline shifted to the next business day, Monday, August 19, 2024.

are ‘mailed.’”) (footnote omitted); *see also Premier Group*, ASBCA 58263, 13 BCA ¶ 35,349, at 173,500-01 (“The term ‘mailed’ requires a proper address, sufficient postage, and transfer of the notice of appeal into the custody of the USPS.”). Board Rule 1(b) explains that a “USPS postmark is prima facie evidence of a mailing date.” However, here, there is no postmarked envelope, so the burden of proof is on the appellant to show by a preponderance of evidence that the appeal was timely and properly mailed. *Micrographic Technology, Inc.*, ASBCA 25577, 81-2 BCA ¶ 15,357, at 76,070; *see Visutron, Inc., Security Electronics*, GSBCA 7139, 84-1 BCA ¶ 17,022, at 84,771 (“If the Government discharges its burden to make a prima facie showing that the appeal is late, the burden of going forward shifts to the contractor to establish that a timely notice of appeal was in fact mailed, even though not received.” (citing *Astro Industries Inc.*, ASBCA 19082, 74-2 BCA ¶ 10,921, at 51,970)). Thus, in the absence of a USPS postmark, the Board is left to weigh the evidence. *See Micrographic*, 81-2 BCA at 76,069-70 (finding that the appellant properly mailed its notice of appeal, despite the Armed Services Board of Contract Appeals not having received it, because “the witnesses and their testimony as to the preparation of the letter, the circumstances surrounding its preparation and the normal follow through procedures for handling the mail, [demonstrated] that it is more probable than not that the appeal was mailed.”); *see also Geo-Imaging Consulting, Inc. v. Environmental Protection Agency*, CBCA 1712, 10-1 BCA ¶ 34,318, at 169,513 (2009) (finding that the appeal was untimely filed with the CBCA, despite several affidavits in which witnesses attested to mailing the notice, because evidence indicated that the appellant sent both copies of its appeal to the contracting officer).

As proof that it mailed the appeal to the CBCA, Acabay offers only Mr. Motter’s statement that he mailed the appeal and a photograph of the mailbox from which he purportedly mailed it. The statement and photograph, however, do not carry Acabay’s burden to show that its appeal was properly mailed. Unlike the witness testimony in *Micrographic*, which offered detailed accounts of the circumstances surrounding the preparation and mailing of the letter, Acabay offers little to recount the mailing of the notice of appeal on August 5, 2024. Mr. Motter does not provide any information about the preparation of the notice of appeal, does not explain his or Acabay’s typical process for mailing important, time-sensitive documents, and does not describe any efforts to follow up on the mailing to ensure that the Board received it. Moreover, Acabay does not assert that it also mailed a notice of appeal to the agency contracting officer, and there is no evidence in the record that the agency contracting officer, instead of the CBCA, received a notice of appeal mailed by Acabay in August 2024. Instead, Acabay’s August 21, 2024, electronic filing indicates that Acabay did not mail its notice of appeal on August 5, 2024. Acabay claims that it sent the electronic filing to provide additional information that was missing from its earlier mailed notice of appeal; however, Acabay fails to explain why its electronic filing did not reference this earlier notice of appeal. Moreover, the letter that Acabay

electronically submitted as its notice of appeal on August 21 is dated July 17, 2024, titled “Notice of Appeal,” addressed to the CBCA, copied to the contracting officer, and signed by Mr. Motter. Acabay fails to explain this earlier, different date on the notice of appeal or the fact that this notice of appeal indicates that it was to be sent “[v]ia email,” not USPS, to the CBCA and the contracting officer. In addition to the fact that the CBCA never received the mailed notice of appeal, these indicia undercut Mr. Motter’s statement that he mailed the notice of appeal on August 5, 2024. Weighing the evidence in the record before the Board, we cannot find that Acabay meets its burden to prove by a preponderance of the evidence that it placed its notice of appeal into the custody of USPS on August 5, 2024.

Acabay filed its notice of appeal with the Board on August 21, 2024, ninety-three days after Acabay received the contracting officer’s final decision. Since the ninety-day deadline cannot be waived, Acabay’s appeal is untimely, and we must dismiss for lack of jurisdiction. This decision does not, however, preclude Acabay from challenging the contracting officer’s decision in another forum. Acabay may initiate an action in the United States Court of Federal Claims within twelve months of the date it received the contracting officer’s final decision. *See* 41 U.S.C. §§ 7104(b)(1), (3).

Decision

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

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

We concur:

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge