



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: November 14, 2025

CBCA 8184

KLAMATH WILDLIFE RESOURCES,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Brian Shaw, Owner of Klamath Wildlife Resources, Redding, CA, appearing for Appellant.

Adam J. Hermann, Office of the General Counsel, Department of Agriculture, Kansas City, MO, counsel for Respondent.

Before Board Judges **VERGILIO**, **SHERIDAN**, and **ZISCHKAU**.

Opinion for the Board by Board Judge **ZISCHKAU**. Board Judge **VERGILIO** concurs.

ZISCHKAU, Board Judge.

Respondent, the Department of Agriculture, United States Forest Service (Forest Service or agency), contracted with Klamath Wildlife Resources (Klamath or KWR) for stationary bat acoustic surveys. The agency subsequently terminated the contract for default, claiming that Klamath did not perform in accordance with contract specifications. After Klamath appealed the termination, the agency moved to dismiss the appeal, claiming that Klamath failed to file its notice of appeal within the ninety-day deadline required by

41 U.S.C. § 7104(a) (2018). Because Klamath untimely filed its appeal, we grant the motion and dismiss the appeal for lack of jurisdiction.

Background

On June 26, 2023, the Forest Service awarded a contract to Klamath in the amount of \$25,750 for Klamath to conduct stationary acoustic bat monitoring in areas of the Ouachita National Forest. Appeal File, Exhibit A at 214-15.¹ The contract was an order issued under a General Services Administration (GSA) multiple award schedule contract.

On May 21, 2024, the Forest Service contracting officer notified Klamath by email that the contract had been terminated for cause. Exhibit A at 542. The May 21, 2024, email attached modification P00001, which provides, in relevant part:

Award 12444223F0154 for Stationary Bat Acoustic Surveys is Terminated for Cause. Per FAR 52.212-4(m), Contract Terms and Conditions Commercial Products and Commercial Services, Termination for Cause. As such, the remaining funding on this award, \$20,177.44 will be de-obligated and the award will be closed in it's [sic] entirety. No additional work is to be completed, nor will any additional payments be made.

Id. at 540.

Although Klamath states that it received notice of the termination on May 20, 2024, we agree with the agency that the termination letter was sent to Klamath on May 21, 2024. Klamath asserts that it tried to file its notice of appeal on either Friday, August 16, 2024, or Saturday, August 17, 2024, but was unable to do so because the Board's "system" was "down." Klamath claims that it successfully filed it the following Monday, August 19, 2024. However, the record shows that Klamath, in fact, efiled its notice of appeal on Tuesday, August 20, 2024, at 7:47 p.m. Klamath's August 20, 2024, notice of appeal was ninety-one days after its receipt of the termination notice on May 21, 2024. During this period of time, the Board was using its efile system for filing documents, which consisted of a party sending an email to the Board's efile address (cbca.efile@cbca.gov) with the document(s) to be filed as attached pdf file(s). Although Klamath asserts that the Board's "system" was "down" on the preceding Friday (August 16) and throughout the weekend, we find no evidence that the government email system was "down" during that period. Emails sent to government email

¹ All exhibits are found in the appeal file, unless otherwise noted. The page numbers cited are the Bates numbers on the exhibits.

servers during that period were timely received and showed the proper time stamp. Board rules also permitted filing by United States Postal Service mail; however, Klamath did not mail its notice of appeal. In a related case, CBCA 8130, Klamath timely filed a notice of appeal on June 16, 2024, using the same email efilings process.

Discussion

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), provides that “[a] contractor, within ninety days from the date of receipt of a contracting officer’s decision . . . , may appeal the decision to an agency board.” *Id.* § 7104(a). In the alternative, a contractor may appeal a contracting officer’s decision to the United States Court of Federal Claims within twelve months of receipt. *Id.* § 7104(b)(1), (3).

Klamath received the contracting officer’s decision on May 21, 2024, and ninety-one days later, August 20, 2024, efiled its notice of appeal with the Board. Klamath states in its opposition to the agency’s motion to dismiss:

There were circumstances around the date of the initial attempt by KWR to submit the [notice of appeal] into the CBCA system, as at that time it was gathered via notification on the CBCA website . . . that their “system was undergoing maintenance”, thus CBCA files could not be submitted. This was beginning on August 17, 2024 which was a Friday, [which was] our first attempt to submit the [notice of appeal]. The termination letter was sent to KWR on May 20, 2024 by the [Forest Service]. Thus, that was day 89 of the timeframe between dates. The CBCA system on that day, [when] the first attempt by KWR to submit the [notice of appeal was made], stated that it was currently down and may be down through that weekend, which ended up being the case, as KWR attempted the two other days of that weekend, unsuccessfully with the same “maintenance” message given by the website. The system did end up working again that following Monday, which was the day the file was submitted and accepted. This was[,] of course, taken into consideration by the responding email system of the CBCA to our submission of the [notice of appeal].

Appellant’s Opposition to Respondent’s Motion to Dismiss at 2.

As noted by the agency in its reply, there are a number of factual errors in what Klamath states. First, Klamath refers to August 17, 2024, as a Friday, but August 17 was a Saturday. There is no evidence that the Board’s website displayed any sort of notification that the “system was undergoing maintenance” on any day between August 16 and 18.

Indeed, the Government's email servers that handle the Board's cbca.efile@cbca.gov email account are independent of the Board's website. If Klamath had efiled its notice of appeal any day on or before Monday, August 19, 2024, the efilings by email would have been properly time stamped with the date and time of receipt. The email account for efilings was functioning and receiving emails routinely during this time period.

Klamath received its notice of termination on May 21, 2024. To be timely, Klamath had to file its notice of appeal within ninety days of May 21, 2024. Day ninety was Monday, August 19, 2024. Klamath states that the "system did end up working again that following Monday, which was the day the file was submitted and accepted." However, Klamath did not file its notice of appeal on Monday, August 19, 2024, but rather filed it at 7:47 p.m. on Tuesday, August 20, 2024, ninety-one days after receiving the contracting officer's notice of termination.

Klamath also seems to argue that because the Board's efilings system noted receipt of the notice of appeal on August 20, 2024, and the Board's docketing notice indicated that it had received the notice of appeal on August 20, those notices somehow deemed Klamath's notice of appeal as timely filed. That is not correct. Only the panel assigned to the case can make a determination on the timeliness of an appeal.

We have recognized that an "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." *RAKS Fire Sprinkler, LLC v. General Services Administration*, CBCA 6095, 18-1 BCA ¶ 37,122, at 180,676 (citing *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982)). "The ninety day deadline is thus part of a statute waiving sovereign immunity, which must be strictly construed." *Cosmic Construction Co.*, 697 F.2d at 1390. More recent decisions of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit cast some doubt on whether the ninety-day filing deadline is jurisdictional. Regardless of whether we treat the late filing as jurisdictional or as procedural, we conclude that dismissal is appropriate as Klamath has not identified any valid reason why it failed to file on time. Even if a contractor files its appeal one day late, which is the case in this appeal, dismissal is appropriate absent justification. See *Outside the Box, LLC v. General Services Administration*, CBCA 8335, 25-1 BCA ¶ 38,854, at 189,053 (appeal dismissed when notice was filed one day late); *JAF Supply, Inc. v. Department of Veterans Affairs*, CBCA 6934, 20-1 BCA ¶ 37,729, at 183,126 (same). Consequently, we grant the agency's motion to dismiss this appeal based on Klamath's untimely filing of its notice of appeal.

Decision

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

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

I concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

VERGILIO, Board Judge, concurring.

I agree with the determination to dismiss this appeal for lack of jurisdiction because the appeal was untimely filed. The contractor's owner states that on May 20, 2024, he received the termination for default decision; the outcome here is the same if received on May 20 or 21. The contractor filed its notice of appeal on Tuesday, August 20, 2024. The filing occurred beyond the ninetieth day after the contractor received the contracting officer's decision. A ninety-day window exists within which a contractor may file an appeal at the Board. 41 U.S.C. § 7104(a) (a contractor may file an appeal at an agency board within ninety days of receipt of a contracting officer's decision); Board Rules 2(d)(1) (appeal must be filed within ninety days of receipt of contracting officer's decision) and 3 (Board cannot extend statutory deadline), 48 CFR 6101.2(d)(1), .3 (2024).

Board precedent dictates that a prerequisite to Board jurisdiction is that the appeal be filed no later than ninety days after receipt of the contracting officer's disputed decision. *Top Level Construction Co. v. Department of State*, CBCA 8301, 25-1 BCA ¶ 38,815, at 188,814 (the ninety-day requirement may not be waived as it is strictly construed; failure to comply creates a "jurisdictional defect" such that the Board cannot consider the merits of the appeal); *Outside the Box, LLC v. General Services Administration*, CBCA 8335, 25-1 BCA ¶ 38,854, at 189,053 (failure to file a notice of appeal within ninety days after receipt of a contracting officer's decision precludes the Board from entertaining the appeal).

One can assume to be true the various obstacles allegedly endured by, and understandings of, the contractor's owner regarding the attempts to file the appeal. The dismissal is the proper result. The contractor states that it successfully and timely filed its notice of appeal on August 19, 2024, as evidenced by the receipt from the Board's Clerk's Office. However, the record indicates that the contractor submitted the notice of appeal on August 20; on August 21 the Clerk acknowledged receipt of the submission made on August 20. The notice of appeal submitted and received on August 20 was beyond the ninety-day period permitted for an appeal at this Board. The contractor has not established that it timely filed the appeal. The appeal was filed too late for the Board to proceed to resolve the merits of the dispute.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge