



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: March 25, 2013

CBCA 3044

EXECUTIVE PERSONNEL SERVICES, INC.,

Appellant,

v.

SMALL BUSINESS ADMINISTRATION,

Respondent.

Gary T. Williams of The Law Offices of C. Gregory Stewart, Washington, DC, counsel for Appellant.

Meagan K. Guerzon, Office of General Counsel, Small Business Administration, Washington, DC, counsel for Respondent.

Before Board Judges **McCANN**, **DRUMMOND**, and **ZISCHKAU**.

ZISCHKAU, Board Judge.

Respondent, the Small Business Administration (SBA), moves to dismiss this appeal on the ground that appellant, Executive Personnel Services, Inc. (EPSI), failed to file timely its notice of appeal. EPSI filed its notice of appeal with us ninety-two days after receipt of the final decision. Because the Contract Disputes Act requires a contractor to file its notice of appeal within ninety days of receipt of the contracting officer's final decision, we dismiss the appeal as untimely filed.

Background

EPSI performed under a task order contract, SBAHQ-04-F-0043, entered into on December 31, 2003, with the SBA to provide temporary clerical and administrative support services for the SBA's Office of Disaster Assistance. Performance ended in approximately April 2009. On July 14, 2011, the Department of Labor notified EPSI that EPSI owed \$93,778.83 in back wages to its employees. On November 16, 2011, the Department of Labor notified the SBA contracting officer that EPSI had defaulted on paying the back wages and requested SBA to withhold the amount owed from any contract payments to be made by SBA.

On April 26, 2012, EPSI submitted a certified claim to the SBA contracting officer seeking \$135,013.27 from the SBA for increases in the minimum wages during EPSI's period of performance from October 1, 2007, through April 19, 2009. The contracting officer issued a final decision denying the claim on July 5, 2012. There is no dispute in the record that EPSI received the final decision on July 5, 2012. EPSI filed its notice of appeal by fax with the Board on October 5, 2012 (a Friday), which is ninety-two days after receipt of the final decision. On October 19, 2012, the respondent filed a motion to dismiss, arguing the notice of appeal was untimely. In response to a show cause order, EPSI responded to the motion, arguing that the notice of appeal should be considered timely in light of "the extent of the activity and delays by SBA for three (3) years after performance of the contract" and "the existence of reasonable excuses for the one (1) day delay."

Discussion

The Contract Disputes Act provides that a contractor may appeal a contracting officer's final decision to the Board within ninety days from the date of receipt of the contracting officer's decision, or may bring an action directly in the United States Court of Federal Claims within twelve months from the date of receipt of the contracting officer's decision. 41 U.S.C. § 7104(a), (b) (Supp. IV 2011); *Systems Development Corp. v. McHugh*, 658 F.3d 1341, 1344 (Fed. Cir. 2011). Failure to file an appeal with the Board within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits. *E.g.*, *FM Diaz Construction, Inc. v. Department of Agriculture*, CBCA 1870, 12-1 BCA ¶ 35,049 (2010) (filed ninety-three days after receipt of the final decision); *Pixl, Inc. v. Department of Agriculture*, CBCA 1203, 09-2 BCA ¶ 34,187. Here, EPSI concedes that the notice of appeal was filed beyond the ninety-day deadline for appeal to the Board. Thus, we do not have jurisdiction to consider EPSI's appeal.

Decision

Accordingly, the appeal is **DISMISSED FOR LACK OF JURISDICTION.**

JONATHAN D. ZISCHKAU
Board Judge

We concur:

R. ANTHONY McCANN
Board Judge

JEROME M. DRUMMOND
Board Judge