



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: April 8, 2022

CBCA 5955

EAGLE PEAK ROCK & PAVING, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Bennett J. Lee and Stephen L. Pessagno of Varela, Lee, Metz & Guarino, LLP, San Francisco, CA; and David B. Wonderlick of Varela, Lee, Metz & Guarino, LLP, Tysons Corner, VA, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA; and Milton Hsieh, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Sterling, VA, counsel for Respondent.

Before Board Judges **RUSSELL**, **KULLBERG**, and **SULLIVAN**.

RUSSELL, Board Judge.

This appeal arises from a contract entered into between Eagle Peak Rock & Paving, Inc. (Eagle Peak) and the Department of Transportation's Federal Highway Administration (FHWA) for construction work in Yellowstone National Park. Eagle Peak challenges FHWA's withholding of payments for the company's alleged failure to timely submit a work schedule pursuant to 48 CFR 52.236-15 (2016). Although FHWA did not contest the Board's jurisdiction to entertain this appeal, the Board raised the issue, sua sponte, and asked

the parties to brief the issue of jurisdiction. Based on the briefing and evidence produced by the parties, we find that we lack jurisdiction to consider this appeal.¹

Background

Eagle Peak filed its notice of appeal with the Board on December 1, 2017. In its notice of appeal and in its complaint, Eagle Peak stated that it received the contracting officer's decision serving as the basis for this appeal on September 5, 2017. FHWA, in its answer to appellant's complaint, however, stated that the contracting officer's decision was delivered to Eagle Peak via Federal Express (FedEx) on September 1, 2017.

FHWA produced a FedEx receipt with a timestamp indicating that the package containing the contracting officer's final decision was delivered at 2:35 p.m. on September 1, 2017, to the address identified in the contract as the location of Eagle Peak's offices. The receipt was signed by an individual identified by Eagle Peak as a receptionist in its office.

Anthony Cruse, Eagle Peak's president, provided two declarations. Mr. Cruse asserted that Eagle Peak received the contracting officer's decision on September 5, 2017, which was the Tuesday after the Labor Day holiday. Declaration of Anthony Cruse ¶ 3 (Dec. 29, 2020). He explained that, "[i]n September 2017, Eagle Peak employed . . . a receptionist" whose "regular duties did not include the receipt or distribution of correspondence or packages addressed to Eagle Peak." Supplemental Declaration of Anthony Cruse ¶ 2 (April 27, 2021). Mr. Cruse noted that Eagle Peak's general manager at the time handled such duties. *Id.* ¶ 3. Specifically, the general manager received, signed for, and distributed packages at Eagle Peak's physical office. *Id.* Mr. Cruse further stated:

[T]he Eagle Peak office to which the [contracting officer's] letter was addressed was closed September 4, 2017 in observance of Labor Day. That office likely was closed the preceding workday, September 1, 2017, as the California Department of Transportation projects which Eagle Peak managed from that office during that time typically prohibited project work both on Labor Day and the workday preceding Labor Day. Thus, [the receptionist]

¹ In December 2018, the Board conducted a ten-day hearing in CBCA 5692, in which Eagle Peak challenged FHWA's termination of their construction contract for default. While the parties presented evidence in this appeal (CBCA 5955) at the hearing, the Board deferred a determination on the merits in this appeal and requested that the parties brief the issue of the Board's jurisdiction. By decision dated December 7, 2020, the Board granted Eagle Peak's appeal in CBCA 5692. *See Eagle Peak Rock & Paving, Inc. v. Department of Transportation*, CBCA 5692, 21-1 BCA ¶ 37,752 (2020), *appeal docketed*, No. 21-1837 (Fed. Cir. April 8, 2021).

likely was the only Eagle Peak employee physically present at that office on September 1, 2017 for the purpose of answering calls.

Id. ¶ 4.

Discussion

Under the Contract Disputes Act (CDA), “a notice of appeal must be filed within 90 calendar days after the date of receipt of a contracting officer’s decision on a claim.” 41 U.S.C. § 7104(a) (2018). 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)). “Once we are aware that we lack jurisdiction to entertain an appeal, we have ‘no other recourse but to dispose of the case by dismiss[ing]’ it based upon the jurisdictional defect.” *Duke University v. Department of Health & Human Services*, CBCA 5992, 18-1 BCA ¶ 37,023 (quoting *Rex Systems Inc. v. United States*, No. 92-411C, 1993 WL 13726058, at *3 (Fed. Cl. Dec. 13, 1993), *appeal dismissed*, 41 F.3d 1517 (Fed. Cir. 1994) (table)).

The United States Court of Appeals for the Federal Circuit has interpreted “receipt” of a contracting officer’s decision to mean “actual physical receipt of that decision by the contractor [or its representative].” *Borough of Alpine v. United States*, 923 F.2d 170, 172 (Fed. Cir. 1991) (quoting *Pathman Construction Co. v. United States*, 817 F.2d 1573, 1577 (Fed. Cir. 1987)). “[O]bjective indicia of receipt by the contractor” must be shown to establish the date of proper delivery of the decision by the contracting officer. *Id.* Specifically, “[t]he contracting officer [must] furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt.” 48 CFR 33.211. It is the Government’s burden to prove the date that the contractor received the final decision. *See Tasunke Witco Owayawa (Crazy Horse School) v. Department of the Interior*, CBCA 2381-ISDA, 11-2 BCA ¶ 34,810 (citing *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1372 (Fed. Cir. 2005)); *see also Uniglobe General Trading & Contracting Co. v. United States*, 115 Fed. Cl. 494, 510 (2014).

Here, we find that FHWA, in producing the FedEx receipt, showed that Eagle Peak received the contracting officer’s decision on September 1, 2017, at the address designated in the contract as the delivery address for notices under the contract. The ninety-day statutory period of limitations started on that date. To be timely, this appeal should have been filed with the Board by November 30, 2017, but was not received until December 1, 2017.

Eagle Peak asserts that it did not receive the package until September 5, 2017, the day following Labor Day, because its offices were not open on September 1. The offices may have been closed, but there was an Eagle Peak receptionist in the office. The receptionist signed for the package, although she may not have been authorized to do so. *Tasunke Witco Owayawa*. Rather than engage in a further inquiry regarding the “internal mail procedures” of Eagle Peak, *Borough of Alpine*, 923 F.2d at 172, we find objective evidence of receipt by Eagle Peak on September 1.

Decision

The appeal was not timely filed and is **DISMISSED FOR LACK OF JURISDICTION**.

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge