



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: February 1, 2024

CBCA 7818-ISDA

YERINGTON PAIUTE TRIBE,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Charles R. Zeh of The Law Offices of Charles R. Zeh, Reno, NV, counsel for Appellant.

Christopher Ruedas, Office of the Solicitor, Department of the Interior, Salt Lake City, UT, counsel for Respondent.

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

SHERIDAN, Board Judge.

The Board issued a show cause order questioning the timeliness of this appeal. After considering the facts associated with timeliness, we dismiss the appeal for lack of jurisdiction because appellant, Yerington Paiute Tribe (the Tribe), failed to file the appeal within ninety days of receiving the regional awarding officer's final decision as required by the Contract Disputes Act (CDA), 41 U.S.C. § 7104(a) (2018).

Background

Pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 5301–5423, the Tribe is required to file single-agency audit reports with the

Federal Audit Clearinghouse within nine months of the close of each fiscal year. *See* 25 U.S.C. § 5305(f). By certified mail on February 21, 2023, the regional awarding officer of the Department of the Interior (DOI) sent the final decision at issue to appellant, informing the Tribe that the agency would be imposing sanctions due to its failure to comply with the annual audit requirements. The final decision included language instructing the Tribe that it could appeal the decision to the Civilian Board of Contract Appeals (CBCA or the Board) within ninety days of receipt of the decision or bring an action directly in the United States Court of Federal Claims within twelve months of the date the decision was received.

On July 11, 2023, almost five months after receiving DOI's final decision, the Tribe filed its first notice of appeal with the Board. In response to the Board's inquiry regarding the appeal's timeliness, on July 12, 2023, the Tribe answered that its initial appeal had been timely, but, due to a lack of clarity, the appeal had been submitted to the wrong office. The Board subsequently issued a show cause order on July 21, 2023, directing the Tribe to provide justification, no later than August 3, 2023, for why the case should not be dismissed as being filed beyond the ninety-day filing time. The Tribe failed to provide a response to this order. The Board issued a second show cause order on September 22, 2023, again directing the Tribe to provide justification for why the case should not be dismissed. The Board received the Tribe's reply to the show cause order on November 1, 2023.

The Tribe posited that the filing deadline was not jurisdictional and that equitable tolling principles applied to the ninety-day time frame. According to the Tribe's Chairman, its Tribal Council consists of seven members with three-year terms. Four of the current Council were elected to the new Council, and three were incumbent holdovers from the prior Council. Although the Chairman was on the prior Council, neither he nor the new Council members were privy to the Tribe's financial records before assuming office in December 2021. The Chairman states that the prior Council left the Tribe in "a financial mess," going back to 2015, which the Tribe is currently unraveling. A new financial officer was hired by the Tribe, as was a consultant auditor. The Tribe anticipated completion of the FY 2020 audit by November 17, 2023, and completion of the FY 2021 audit by March 31, 2024, but it has not advised the Board whether the November audit has been submitted to DOI.

Discussion

The CDA applies to contracts and regulations awarded under the ISDEAA and treats "the awarding official as the equivalent of a contracting officer for purposes of resolving a dispute under [such contracts] and the CDA." *Shonto Governing Board of Education, Inc. v. Department of the Interior*, CBCA 6043-ISDA, 18-1 BCA ¶ 37,038, at 180,319 (quoting *Confederated Salish & Kootenai Tribes of the Flathead Nation v. Department of the Interior*, CBCA 692-ISDA, 07-2 BCA ¶ 33,677, at 166,736); *see* 25 CFR 900.219 (2022). 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 [that] decision,” or alternatively, may file suit in the United States Court of Federal Claims within twelve months of its receipt. 41 U.S.C. § 7104(a)–(b). Therefore, if a contractor wishes to appeal the decision of a contracting officer to this Board, its appeal must be filed within ninety days from the date that it receives the decision. *Carl & Sons’s Construction Co. v. Department of the Interior*, CBCA 5918, 18-1 BCA ¶ 36,920, at 179,873 (2017) (citing 41 U.S.C. § 7104(a)). Pursuant to the ISDEAA, this time frame applies to decisions of Bureau of Indian Affairs awarding officials when appealing to the CBCA. 25 U.S.C. § 5331(d).¹

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*, 18-1 BCA at 180,319 (citing *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); *Dekatron Corp. v. Department of Labor*, CBCA 4444, 15-1 BCA ¶ 36,045, at 176,059).

Certain decisions from the Supreme Court have raised questions as to whether certain statutory procedural requirements are, in fact, jurisdictional. *See Boechler, P.C. v. Commissioner of Internal Revenue*, 596 U.S. 199 (2022); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). The Federal Circuit, the Board’s appellate court, has not overruled its precedential decision in *Cosmic Construction* holding that the CDA’s deadline of ninety days to file an appeal with a board is jurisdictional. It did, however, in *Guardian Angels Medical Service Dogs, Inc. v. United States*, 809 F.3d 1244 (Fed. Cir. 2016), discuss, without deciding, the question of whether the twelve-month filing period for a contractor to bring a CDA action in the United States Court of Federal Claims is jurisdictional. The Court stated that, for purposes of the issues in the case, it need not “decide whether compliance with the twelve-month filing period set

¹ Although the ISDEAA identifies the Interior Board of Contract Appeals (IBCA) as the appropriate board for an appeal, on January 6, 2007, pursuant to the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136, most of the civilian boards of contract appeals, including the IBCA, were consolidated into the CBCA. 41 U.S.C. § 7105(b). Pursuant to the ISDEAA, tribes may also initiate an action against the Secretary of the Interior in the appropriate United States district court or, alternately, in the United States Court of Federal Claims within twelve months of receipt of an awarding official’s decision. 25 U.S.C. § 5331(a).

out in section 7104(b)(3) [of the CDA] is a jurisdictional requirement,” but it noted that “[t]he Supreme Court in recent years has repeatedly emphasized that ‘filing deadlines ordinarily are not jurisdictional.’” 809 F.3d at 1252 (quoting *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 154 (2013)).

Further, the Federal Circuit, relying significantly on *Boechler*, recently held that the sum certain requirement set forth in the Federal Acquisition Regulation (FAR), which is not contained in statute, was not jurisdictional notwithstanding Circuit precedent that stated the contrary. *ECC International Constructors, LLC v. Secretary of the Army*, 79 F.4th 1364, 1376 (Fed. Cir. 2023). The Federal Circuit explained that it, “as instructed by the Supreme Court,” was invoking “a clear statement rule and ‘treat[ing] a procedural requirement as jurisdictional only if Congress ‘clearly states’ that it is.’” *Id.* at 1371 (quoting *Boechler*, 596 U.S. at 203). Notwithstanding these decisions, our precedential case law remains controlling. See *Mahavir Overseas v. Agency for International Development*, CBCA 6704, 20-1 BCA ¶ 37,619, at 182,641 (“Unless and until the Federal Circuit modifies its precedential determination in *Cosmic Construction*, we must continue to view the ninety-day appeal deadline as jurisdictional.”).

Although the CDA limits the time for a contractor to appeal a contracting officer’s decision to the Board to ninety days after the contractor’s receipt of the decision, 41 U.S.C. § 7104(a), the ISDEAA, as indicated above, provides a tribe with twelve months after receipt of a decision to file suit with an appropriate United States district court or the Court of Federal Claims. 25 U.S.C. § 5331(a). Because we have not resolved the merits, the Tribe still has time to seek relief in an appropriate United States district court or the Court of Federal Claims.

Decision

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

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge

We concur:

Beverly M. Russell

BEVERLY M. RUSSELL

Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Board Judge