



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 28, 2010

CBCA 1870

FMDIAZ CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Jill M. Himlan of Lang, Richert & Patch, P.C., Fresno, CA, counsel for Appellant.

Marnie G. Ganotis, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

Before Board Judges **GILMORE**, **BORWICK**, and **STEEL**.

STEEL, Board Judge.

Respondent has moved to dismiss the above-captioned appeal on the ground that the Board does not have subject matter jurisdiction to hear the appeal because the notice of appeal was not timely filed with the Board. Appellant disputes that the appeal was untimely filed. The Board finds that the appeal was not filed timely, and the motion to dismiss is granted.

Factual Background

The following facts are undisputed. On October 21, 2009, a contracting officer (CO) of the Department of Agriculture, Forest Service, issued a final decision denying appellant's claim involving construction of the Dinkey Creek Amphitheater in the Sierra National Forest. In the final decision, the CO notified appellant that it had ninety days from the date of receipt of the final decision to appeal the decision to this Board. Appellant received the CO's final decision on October 26, 2009. Counsel sent appellant's notice of appeal to the Board via Federal Express standard overnight delivery on January 25, 2010. The notice of appeal was delivered to the Board on January 27, 2010. The Board issued a notice of docketing on January 27, 2010, indicating that it had received appellant's notice of appeal on that day. With the Board's permission, on March 26, 2010, respondent filed the instant motion to dismiss for lack of jurisdiction in lieu of its answer.

Discussion

The Contract Disputes Act of 1978, which governs the Board's review of contracting officer decisions, requires that an appeal of such a decision be filed "[w]ithin ninety days from the date of receipt of [the] decision." 41 U.S.C. § 606 (2006). This deadline for filing has been strictly construed by the Court of Appeals for the Federal Circuit because the authorization to make the filing is a waiver of sovereign immunity. A late filing divests the Board of jurisdiction to consider the case on its merits. *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); *Robert T. Rafferty v. General Services Administration*, CBCA 617, 07-1 BCA ¶ 33,577, at 166,340; *Tiger Natural Gas, Inc. v. General Services Administration*, GSBCA 16039, 03-2 BCA ¶ 32,321, at 159,910-11.

Regarding the deadline for filing an appeal with the Board, Board Rule 1(b)(5)(i) states:

A notice of appeal or an application for award of fees and other expenses is filed upon the earlier of its receipt by the Office of the Clerk of the Board or if mailed, the date on which it is mailed to the Board. A United States Postal Service postmark shall be prima facie evidence that the document with which it is associated was mailed on the date of the postmark.

48 CFR 6101.1(b)(5)(i) (2009).

Appellant does not dispute that the notice of appeal was delivered by Federal Express to the CBCA Office of the Clerk on January 27, 2010, nor that this was ninety-three days after appellant received the CO's final decision. It argues, however, that having placed the notice of appeal in the hands of a courier service on Monday, January 25, 2010, it thus "mailed" the document in a timely fashion, and the notice of appeal was therefore timely.

It has long been settled that the only exception to the requirement that a notice of appeal be received by the Board within ninety days of the receipt of a final decision by an appellant is when the notice of appeal is given into the custody of the United States Government by delivery, properly addressed and with adequate postage affixed, to the United States Postal Service (USPS) within the ninety-day timeframe, regardless of when the notice is actually received at the Board. Only in that instance does the date of mailing satisfy the requirement that a notice of appeal be "received" by the Office of the Clerk within ninety days of the receipt of a final decision.

In fact, boards of contract appeals have clearly stated that the use of a private delivery service for hand-delivery is not afforded the same status as use of the USPS and therefore the boards do not have jurisdiction over late-received appeals that were transmitted through delivery services. For example, the General Services Board of Contract Appeals has held that:

A notice of appeal is "filed" at the Board upon the earlier of (A) its receipt by the Office of the Clerk of the Board or (B) if mailed, the date on which it is mailed through the United States Postal Service. Board Rule 101(b)(5). Where a contractor uses a courier service other than the United States Postal Service, such as Federal Express, a notice of appeal is deemed filed on the date that it is received by the Board. *T and D Metal Products Co.*, GSBCA 10279, 90-2 BCA ¶ 22, 924. Appellant did not file a notice of appeal with the Board within ninety days. . . . The notice, sent by Federal Express, arrived at the Board . . . ninety-one days after receipt of the contracting officer's decision. This was too late to confer on the Board jurisdiction over the appeal.

CWI Consultants & Services v. General Services Administration, GSBCA 13889, 98-1 BCA ¶ 29,343 (1997), reconsideration denied, 98-1 BCA ¶ 29,476; *see also Owen v. Agency for International Development*, CBCA 694, 07-2 BCA ¶ 33,638; *Dan Nelson*, AGBCA 97-130-1, 97-1 BCA ¶ 28,967; *Fireman's Fund Agribusiness*, AGBCA 2004-189-F, 04-2 BCA

¶ 32,779. Only notices of appeal placed in the custody of the USPS are “mailed.”¹ All other forms of delivery do not constitute mailing, and thus require actual delivery to the Board within the ninety-day time period to come within the jurisdiction of the Board. *Tiger Natural Gas; Elaine Dunn Realty*, HUD BCA 98-C-101-C1, 98-1 BCA ¶ 29,581.

In *Tiger*, the GSBCA noted that “counsel’s choice of the means of filing was a significant contributing factor to the late filing. . . . Had Tiger placed the notice in the mail on the day it gave the notice to Federal Express for courier delivery . . . [appellant] would have filed on time. The Postal Service’s postmark would have been proof of timely filing.” 03-2 BCA at 159,913. Instead, a courier was entrusted with delivery as appellant’s agent, and by using its services appellant “assumed the risk that Federal Express might lose the packet, might not find the building, or finding the building, might not be able to find someone to deliver it to, resulting in a late delivery.” *California Packaging v. General Services Administration*, GSBCA 13448-C(13299), 96-2 BCA ¶ 28,544. The same applies here. Counsel’s decision to entrust the notice of filing to a courier service for hand-delivery resulted in late filing, which deprived the Board of jurisdiction to hear the appeal.²

Decision

For the foregoing reasons, respondent’s motion to dismiss the appeal for lack of jurisdiction is granted. The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

CANDIDA S. STEEL
Board Judge

¹ To “mail” a document means that it must be delivered “into the custody of the U.S. Postal Service.” *Davis v. Brown*, 7 Vet. App. 298, 303 (1994).

² Appellant seeks sanctions against respondent for failure to consult with counsel for appellant before filing its motion as required by Rule 8(a). In fact, respondent’s counsel did inform appellant’s counsel of her intention to file a motion to dismiss. Furthermore, if respondent had not filed a motion to dismiss, the Board would have had to dismiss the appeal for lack of jurisdiction *sua sponte*. This request is meritless and is denied.

We concur:

BERYL S. GILMORE
Board Judge

ANTHONY S. BORWICK
Board Judge