



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: September 15, 2011

CBCA 2522

TRYGVE DALE WESTERGARD,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Trygve Dale Westergard, pro se, Ketchikan, AK.

Marian Leah Wright, Office of Regional Counsel, General Services Administration, Auburn, WA, counsel for Respondent.

Before Board Judges **BORWICK**, **GOODMAN**, and **WALTERS**.

WALTERS, Board Judge.

The above-captioned appeal was received by the Board on August 5, 2011, and was docketed on August 10, 2011. Respondent, the General Services Administration (GSA), submitted its appeal file on September 8, 2011. On September 13, 2011, respondent moved the Board to dismiss the appeal for lack of jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (previously 41 U.S.C. §§ 601-613 (2006)), arguing that the appeal to the Board was untimely, having been submitted supposedly more than ninety days after appellant's receipt of the contracting officer's final decision. Because respondent has not established when the final decision was received, the motion fails.

Background

The instant appeal relates to a GSA auction contract under which appellant, Trygve Dale Westergard, had bid on a boat being offered for sale. After Mr. Westergard was notified that he had been awarded the contract for the boat on January 21, 2011, he sought to cancel the contract, because he learned, upon inquiry, that the boat trailer depicted in a photograph of the boat that had accompanied the solicitation was not included in the sale. After several exchanges of communications, Mr. Westergard, by email message of February 18, 2011, advised that he wished to start the appeal process and asked that a contracting officer's decision be issued in writing. The GSA contracting officer thereafter transmitted to Mr. Westergard, via email dated February 23, 2010, a final decision denying Mr. Westergard's claim for contract revocation. The email decision advised Mr. Westergard of his appeal rights under the CDA. It is not clear when Mr. Westergard received that final decision email message.

Respondent alleges that, on February 23, 2011, the custodian of the boat in question informed the contracting officer that Mr. Westergard had not removed the boat and that, on February 24, 2011, the contracting officer sent Mr. Westergard another email message, indicating that she had issued her final decision, but had not yet placed his contract in default. That email message (Appeal File, Exhibit 10) indicated that Mr. Westergard needed to remove the boat by March 2, 2011, in order to avoid being placed in default. On March 15, 2011, respondent states, the contracting officer sent notification by certified mail to Mr. Westergard that his contract had been terminated for default. The default notification (Appeal File, Exhibit 11, page 2), which seeks Mr. Westergard's payment of liquidated damages totaling \$325, is not itself couched as a contracting officer's final decision, and appeal rights are not mentioned. Also, the notification does not reference, incorporate, or append the February 23, 2011, final decision. Respondent included in the appeal file a certified mail receipt purportedly for that March 15 default notification, a receipt that appears to have been signed by a Sonja Westergard on April 4, 2011. Appeal File, Exhibit 11 at 1.

Appellant, by email message dated July 18, 2011, addressed to the Board's Chief Counsel, inquired about the status of an appeal he purportedly had filed with the Board several months earlier:

Hello,
I sent in an appeal a few months ago.
I have not heard anything back so I wanted to check and see the status.
Attached is a new appeals form that I filled out so you had my info to check the status.

The “new appeals form” that was attached indicated that it was an appeal of a contracting officer’s final decision of an “unknown” date [the word “unknown” being handwritten next to the typed date “01/01/2011”], relating to a contract for “sale of a vessel.” This appeals form briefly describes the nature of the dispute revolving around Mr. Westergard’s discovery that the boat trailer was not being included in the sale, and seeks to have the sale rescinded (“terminated”) and his “user rights” (ability to submit bids on future auctioned items) “reinstated.”

On July 19, 2011, the Clerk of the Board attempted to reach Mr. Westergard by telephone to inform him that the Board had no record of an appeal from him, but was advised by his mother at that time that he was at sea. Mr. Westergard is in the Merchant Marine. His mother stated that she would speak with appellant’s father, since he had been the one that had mailed the notice of appeal earlier in 2011, and would also attempt to make contact with appellant. By email message to appellant dated July 29, 2011, the Clerk confirmed to him that the Board had no record of his initial appeal. Appellant responded by email, indicating that he was “still currentally [sic] still out on the ship.” The Clerk, on August 2, 2011, notified appellant via email that he could file a notice of appeal electronically with the Board via email at the address for efileing: cbca.efile@cbca.gov. Mr. Westergard, on August 2, 2011, sent both the Clerk and his father the following email response:

Hello,
I am currentally [sic] out on a ship in the pacific ocean.
I do not have the information to file the appeal.
I will try to get aholt [sic] of my father who has the original.
And get it summited [sic] ASAP.
Thank you for your help.
Tryg

On August 5, 2011, the Board received from appellant’s father at the above efileing address an email message enclosing a copy of the notice of appeal form he indicated had been submitted earlier. The form appears to have been signed by appellant. Although the elder Mr. Westergard’s email message indicates that that notice of appeal document had been “sent earlier by regular mail,” the earlier notice of appeal form (which states it is an appeal from a February 23, 2011, contracting officer final decision – not an “unknown” date – and which describes the nature of the dispute more fully than the “new” form transmitted to the Board by appellant in July) is itself undated. Further, the email message from the elder Mr. Westergard does not indicate either the date when the final decision was received by appellant or the date the earlier notice of appeal form had been transmitted by regular mail. Upon receipt of the August 5, 2011, email filing, the Clerk contacted Mr. Westergard’s father to obtain contact information for the contracting officer. Upon

receiving that information from him, the Clerk contacted the contracting officer, obtained from her a copy of the final decision in question, and sent out to both parties the Board's formal notice of docketing on August 10, 2011.

Discussion

An appeal to this Board may be brought under the CDA, if filed within ninety days of receipt of the contracting officer's decision. 41 U.S.C. § 7104(a). The Federal Acquisition Regulation (FAR) mandates that a contracting officer transmit to the contractor a final decision – on either a contractor or Government contract claim – “by certified mail, return receipt requested, or by any other method that provides evidence of receipt.” 48 CFR 33.211(b) (2010) (FAR 33.211(b)). In this regard, the burden is upon the Government to prove the date of receipt by “objective indicia.” *Riley & Ephraim Construction Co. v. United States*, 408 F.3d 1369 (Fed. Cir. 2005); *Tasunke Witco Owayawa (Crazy Horse School) v. Department of the Interior*, CBCA 2381-ISDA (July 22, 2011).

In the present case, the contracting officer chose to transmit the February 23, 2011, final decision by email. Respondent has offered no proof as to the date of receipt of that decision. Respondent, for example, might have sought and received from appellant reply email confirmation for receipt of the decision. The certified mail receipt respondent relies upon relates to a March 15, 2011, default notification that was not issued in the form of a final decision and that did not incorporate, reference, or append a copy of the February 23 decision.

The Government here has not met its burden of proving the timing of receipt, by “objective indicia” or otherwise. It is clear that appellant received the February 23 decision and that an appeal therefrom has been filed. It is unclear, however, that the appeal to this Board was untimely, i.e., that it was filed more than ninety days after the decision was received by appellant. In short, without proof of the date of receipt of that decision, respondent cannot establish when the CDA's ninety-day period began to run and thus cannot demonstrate that Mr. Westergard's appeal to the Board was untimely.

Decision

For the above reasons, respondent's **MOTION TO DISMISS** is **DENIED**.

RICHARD C. WALTERS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

ALLAN H. GOODMAN
Board Judge