



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: January 31, 2013

CBCA 3079

TOBIAS SCHUNCK,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Tobias Schunck, pro se, Longmont, CO.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **DRUMMOND**, and **KULLBERG**.

DRUMMOND, Board Judge.

Respondent moves to dismiss this appeal on the ground that it was not timely filed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (Supp. IV 2011). Appellant disputes that the appeal was untimely filed. For the reasons stated below, the motion to dismiss is granted.

Factual Background

The following facts are undisputed. On August 14, 2012, a contracting officer (CO) of the General Services Administration (GSA) issued a final decision denying appellant's claim for the refund of the purchase price of twelve cameras purchased at a GSA online auction. In the final decision, the CO notified appellant that he 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 August 15, 2012. Appellant sent his notice of appeal to the Board via Federal Express standard overnight delivery on November 13, 2012. The notice of appeal was delivered to the Board on November 14, 2012. The Board issued a notice of docketing on November 15, 2012, confirming that it received appellant's notice of appeal on November 14, 2012. Respondent subsequently filed the instant motion to dismiss for lack of jurisdiction.

Discussion

The CDA, 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. §§ 7103(g), 7104(a). The 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. *Systems Development Corp. v. McHugh*, 658 F.3d 1341, 1347 (Fed. Cir. 2011); *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); *FM Diaz Construction, Inc. v. Department of Agriculture*, CBCA 1870, 12-1 BCA ¶ 35,049 (2010).

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) (2011).

In computing the 90-day timeframe, the Board has held that "mailed" means placing the notice of appeal "into the custody of the U.S. Postal Service." *FM Diaz*, 12-1 BCA at 172,179, n.1, quoting *Davis v. Brown*, 7 Vet. App. 298, 303 (1994). Appeals that are not transmitted by United States Postal Service, such as this one, are deemed filed when received by the Board. *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 of International Development*, CBCA 694, 07-2 BCA ¶ 33,638.

Appellant argues that the ninety days expired on November 15, 2012, and therefore his filing was timely. We disagree. Ninety days from August 15, 2012 is November 13,

2012. Here the notice, sent by Federal Express, arrived at the Board ninety-one days after receipt of the CO's decision. This was too late to confer on the Board jurisdiction over the appeal.

Decision

Respondent's motion to dismiss the appeal for lack of jurisdiction is granted. This appeal is **DISMISSED FOR LACK OF JURISDICTION**.

JEROME M. DRUMMOND
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

H. CHUCK KULLBERG
Board Judge