



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: June 16, 2020

CBCA 6704

MAHAVIR OVERSEAS,

Appellant,¹

v.

AGENCY FOR INTERNATIONAL DEVELOPMENT,

Respondent.

Avinash Jain, Owner of Mahavir Overseas, New Delhi, India; and Vivek Aggarwal of A&A Lawcorp LLP, New Delhi, India, appearing for Appellant.

John B. Alumbaugh, Office of the General Counsel, Agency for International Development, Washington, DC, counsel for Respondent.

¹ When preparing this decision, the Board discovered that the individual who the appellant identified as its counsel, Vivek Aggarwal, never provided the Board with a bar number for a state in which he is licensed to practice law, as required by Board Rule 5(b), 48 CFR 6101.5(b) (2019). Under the Board's rules, only an attorney who is "licensed to practice law in a State, commonwealth, or territory of the United States or in the District of Columbia" may represent a party before the Board. *Id.* 6101.1. Although Mr. Aggarwal's status is unclear, the appellant's original notice of appeal was filed jointly by Mr. Aggarwal and the appellant's owner, Avinash Jain. Because our rules permit a corporation to "appear by one of its officers," *id.* 6101.5(a)(1), we designate Mr. Jain as the appellant's representative in this appeal and need not at this time resolve Mr. Aggarwal's status. Nevertheless, to the extent that Mr. Aggarwal files future appeals with the Board, he will need to indicate that he is licensed to practice in the manner required by the Board's rules.

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

LESTER, Board Judge.

On February 12, 2020, respondent, the Agency for International Development (USAID), filed a motion to dismiss this appeal for lack of jurisdiction, arguing that the USAID contracting officer had withdrawn the final decision asserting a government claim against appellant, Mahavir Overseas (Mahavir), and that, absent an outstanding final decision, the Board lacks jurisdiction over the appeal. Alternatively, USAID argued that the contracting officer's decision asserting the government claim was never valid under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018), because the dollar amount that USAID demanded Mahavir pay, although stated in a "sum certain," was inconsistent with the written explanation supporting that demand.

Although we question the merits of USAID's jurisdictional arguments,² we need not resolve them. During the Board's review of the parties' submissions, the Board discovered that Mahavir's notice of appeal was filed more than ninety days after Mahavir received the contracting officer's decision. That untimeliness bars us from considering the merits of Mahavir's appeal, although, because USAID has now withdrawn its contracting officer's decision, Mahavir will not be time-barred from returning to the Board if, at a later date, USAID restarts a new appeal deadline by reissuing it. Unless and until the USAID contracting officer issues a new decision reasserting USAID's claim, however, we cannot entertain Mahavir's challenge to it and therefore dismiss this appeal for lack of jurisdiction.

Background

On October 4, 2019, the USAID contracting officer issued a final decision, captioned a "Final Measure Notice," alleging that USAID had to destroy 30,989 hygiene kits provided by Mahavir under Blanket Purchase Agreement (BPA) call award numbers AID-OAA-BC-

² We note that, once a contractor establishes jurisdiction through its timely appeal of a contracting officer's decision asserting a government claim, it is not (as USAID argues) the subsequent withdrawal of the contracting officer's decision that moots the action, creating a jurisdictional deficiency. It is the elimination of the *dispute* between the parties that was embodied within the decision that causes a case to become moot. *See AT&T Corp.*, GSBICA 13931-TD, 98-2 BCA ¶ 29,897 (the contracting officer's act of withdrawing a decision, "in and of itself, does not necessarily deprive us of our jurisdiction"); *Security Services, Inc.*, GSBICA 11052, 92-1 BCA ¶ 24,704 (1991) ("[E]ven though the final decision has been withdrawn by the contracting officer, the dispute remains.").

17-00019 and AID-OAA-BC-17-00033 because of mold growth and demanding that Mahavir repay \$1,023,204 to USAID. Mahavir, which is located in India, received that decision by email on October 5, 2019.

Consistent with Federal Acquisition Regulation (FAR) 33.211 (48 CFR 33.211 (2019)), the decision notified Mahavir that it could “appeal this decision to the agency board of contract appeals” within ninety days from the date of the decision’s receipt or, alternatively, could file an action in the Court of Federal Claims within twelve months of receipt. The decision did not specifically name the Civilian Board of Contract Appeals as the relevant board or provide an address or contact information for the Board.

By email dated December 4, 2019, Mahavir notified the USAID contracting officer of its intention to “file a review petition with the Agency Board of Contract Appeals within the prescribed time limit as per law” and that “[w]e hereby seek the intervention for review by the deemed Agency Of Board.” By email dated December 11, 2019, Mahavir asked the USAID contracting officer “to kindly provide us with the contact details and email of ‘Agency Board of Contract Appeals’ in order to proceed further.” On January 6, 2020, ninety-three days after issuing the final decision asserting the government claim, the USAID contracting officer provided Mahavir with the name of the Civilian Board of Contract Appeals and its mailing address.

The next day, on January 7, 2020, Mahavir efiled a notice of appeal with the Board. In its notice, Mahavir represented that it had previously mailed a copy of its appeal notice to the USAID contracting officer on January 4, 2020; that it did not know either the name of the Board or its address until the contracting officer’s communication on January 6, 2020; and that it found the Board’s email address from an Internet search after learning the Board’s name. The Board docketed the appeal as CBCA 6704.

On February 12, 2020, USAID filed a motion to dismiss the appeal for lack of jurisdiction. Attached to its motion was a letter from the USAID contracting officer to Mahavir dated February 11, 2020, with the subject line “Withdrawal of Formal Measure Notice: AID-OAA-E-00002 of October 4, 2019,” formally rescinding the previously issued final decision, but reserving the right to reissue it:

USAID rescinds the Formal Measure Notice: AID-OAA-E-17-00002 of October 4, 2019 in its entirety, without prejudice. Among the reasons for the withdrawal, the Agency acknowledges the discrepancy in the sums certain demanded in the Formal Measure Notice. The Agency also intends to reconsider its positions in light of the Appeal filed by Mahavir Overseas.

....

This withdrawal does not affect USAID's right to file a bill of collection and final decision regarding BPA Call award numbers AID-OAA-17-00019 and AID-OAA-BC-17-00033 in the future.

Exhibit B to Respondent's Motion to Dismiss. USAID provided no further explanation about why it had withdrawn the decision or whether, or when, it intended to reissue it. In its motion to dismiss, USAID argued that, as a matter of law, the Board loses jurisdiction to continue an appeal involving a government claim whenever the contracting officer withdraws the final decision upon which the appeal is based.

Mahavir filed an opposition to USAID's motion, arguing that dismissal without prejudice "would leave the appellant vulnerable to the whims and wishes of the respondent" and "to passing of another decision by the respondent regarding the same issue in the same Contract" on the same dispute that is pending before the Board now. Response ¶ 24.

Subsequently, the Board asked the parties to brief the issue of the timeliness of Mahavir's notice of appeal. In reviewing the parties' briefs, the Board recognized that, if Mahavir had received the contracting officer's decision on October 5, 2019 (as it appeared from the record), Mahavir's notice of appeal, filed on January 7, 2020, was filed more than ninety days after Mahavir's receipt of the decision. In response to the Board's inquiry, Mahavir confirmed its receipt of the decision on October 5, 2019, and USAID argued that, because the appeal was untimely, the Board lacked jurisdiction to entertain it.

Discussion

Mahavir received the USAID contracting officer's final decision by email on Saturday, October 5, 2019, but did not submit its notice of appeal to the Board until ninety-four days later on Tuesday, January 7, 2020. 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." 41 U.S.C. § 7104(a). "Failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits." *Treasure Valley Forest Products v. Department of Agriculture*, CBCA 3604, 14-1 BCA ¶ 35,549.³ Even if we viewed Mahavir's official receipt of the emailed decision as

³ USAID notes that its contracting officer sent the decision to Mahavir at 6:39 p.m. Eastern Standard Time (EST) on Friday, October 4, 2019, and suggests that the appeal deadline started to run on October 4. When the USAID contracting officer emailed the

occurring on Monday, October 7, 2019 (Mahavir's first official business day after receipt), see *Supreme Edgelight Devices, Inc.*, B-295574, 2005 CPD ¶ 58 (Mar. 4, 2005) (holding in the bid protest context that, unless a contractor actually opens a contract award decision received by email on a non-business day, the time for filing a challenge to the decision does not commence until the contractor's first business day after receipt), Mahavir would have to have filed its appeal notice by Monday, January 6, 2020, to be timely. Because Mahavir filed its notice of appeal beyond the ninety-day window from its receipt, we must dismiss this appeal.

Mahavir asks us to excuse its tardy filing because, in the final decision, the USAID contracting officer indicated that Mahavir could appeal to "the agency board of contract appeals" and did not specifically identify the Civilian Board of Contract Appeals by name or provide the Board's address. Yet, the prescribed notice of appeal rights, as set forth at FAR 33.211, does not require the contracting officer to identify the Board's address, or even the board's specific name, in the decision. *Soto Construction Co. v. Department of Agriculture*, CBCA 3210, 13 BCA ¶ 35,301; *Grand Service, Inc.*, ASBCA 42448, 91-3 BCA ¶ 24,164. Further, the USAID supplement to the FAR publicly designates the Civilian Board of Contract Appeals as USAID's board for hearing and deciding appeals of contracting officer decisions. 48 CFR 733.270. Both that supplement and the Board rules identifying the Board's mailing and efile addresses (48 CFR 733.270, 6101.1(b)) are contained in the Code of Federal Regulations (CFR), and contractors are charged with legal notice of that information. *United International Investigative Services*, DOT BCA 3076, 00-1 BCA ¶ 30,598 (1999); *Tom Shaw, Inc.*, DOT BCA 2110, 90-2 BCA ¶ 22,775 (citing *Federal Crop Insurance Co. v. Merrill*, 332 U.S. 380, 384-85 (1947)).

That being said, we recognize that Mahavir asked the USAID contracting officer in mid-December 2019 to provide it with the name and contact information of the Board and that the contracting officer did not respond until January 6, 2020, after the time to appeal to the Board had passed. Although that delay in providing the requested information may appear somewhat unseemly, the jurisdictional nature of the filing deadline precludes us from accepting Mahavir's untimely appeal. *Cosmic Construction, Inc. v. United States*, 697 F.2d

decision, it was already Saturday, October 5, 2019, at Mahavir's location in India. The appeal deadline runs from the date of the contractor's actual receipt of the decision, not when the contracting officer sent it. 41 U.S.C. § 7104(a). Nothing in the FAR requires the contractor to calculate its appeal deadline by reference to wherever the contracting officer was when he or she sent the decision by email.

1389, 1391 (Fed. Cir. 1982).⁴ Although the Federal Circuit in *Guardian Angels Medical Service Dogs, Inc. v. United States*, 809 F.3d 1244 (Fed. Cir. 2016), questioned whether, in light of the rationale underlying the Supreme Court’s decision in *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013), compliance with the CDA’s filing deadlines should still be viewed as a jurisdictional requirement, *Guardian Angels*, 809 F.3d at 1252, it did not disturb its prior precedential decision in *Cosmic Construction*, 697 F.2d at 1390, holding that the ninety-day appeal deadline is, in fact, jurisdictional. 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. *Shonto Governing Board of Education, Inc. v. Department of the Interior*, CBCA 6043-ISDA, 18-1 BCA ¶ 37,038, at n.1. In any event, because the information that Mahavir requested from the contracting officer was publicly available in the CFR, there was no legal prejudice to Mahavir in the circumstances here.⁵

Mahavir also asserts that it sent a notice of appeal to the contracting officer and other USAID employees in early January 2020, before the appeal deadline had passed, hoping that those individuals would forward it to the appropriate board of contract appeals, and that we should consider that submission to constitute a timely appeal. Under the Board’s rules, however, “[a] notice of appeal . . . is filed upon the earlier of its receipt by the Clerk [of the Board] or, if mailed through the United States Postal Service (USPS), the date it is mailed to the Board.” 48 CFR 6101.1. Although other boards may view contracting officers for the agencies that they serve as “agents” for the purpose of accepting appeal notices on those boards’ behalf, see *Auburn Flying Service*, PSBCA 1509, 86-3 BCA ¶ 19,273; *Contraves-Goerz Corp.*, ASBCA 26317, 83-1 BCA ¶ 16,309, the unique independent position of the Civilian Board of Contract Appeals, which hears disputes involving numerous agencies of which the Board is neither an affiliated department nor an organization, precludes us from doing so. *Soto Construction Co. v. Department of Agriculture*, CBCA 3210, 13 BCA ¶ 35,301; *Charles T. Owen v. Agency for International Development*, CBCA 694, 07-2 BCA ¶ 33,638. Mahavir’s submission of its notice of appeal to the contracting officer did not suspend the filing deadline.

⁴ We do not have here a situation in which the contracting officer affirmatively responded to an inquiry with incorrect appeal information that misdirected the appellant, a situation that might require a different analysis. See *P&L Management & Consulting, Inc.*, DOT BCA 4086, 00-1 BCA ¶ 30,759 (discussing effect of misleading information provided by the contracting officer).

⁵ Mahavir also represents that the Board’s website does not work in India, which made it impossible, Mahavir says, for it to find the Board’s address before the contracting officer provided it. Assuming that Mahavir’s representation is true, that information was still available in the CFR.

Finally, Mahavir asks for leeway because it is a foreign citizen, and it asks that we retroactively grant it a four-day extension of time for the filing of its notice of appeal. Because the ninety-day period for filing is jurisdictional, it “may not be waived,” *Mattress Makers, Inc. v. General Services Administration*, CBCA 2176, 11-1 BCA ¶ 34,645, and we lack authority to extend the filing deadline. *Tyger Construction Co.*, GSBCA 8652, 87-2 BCA ¶ 19,783.

Notwithstanding our current lack of jurisdiction to entertain this appeal, USAID has now withdrawn the contracting officer’s decision upon which this appeal is based. If and when the USAID contracting officer reissues a new decision reasserting the government claim at issue here, Mahavir’s time to appeal will start anew, and Mahavir will be able to file a new appeal with the Board within ninety days after receiving any new decision. *See Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 36,117 (contractor’s appeal time starts anew when a contracting officer’s final decision is effectively withdrawn within the one-year period before it became fully final and then reissued).

Because we lack jurisdiction because Mahavir did not timely file its appeal, we need not address the bases for dismissal that the Government raised.

Decision

Because Mahavir filed its appeal more than ninety days after receiving the contracting officer’s final decision, this appeal is **DISMISSED FOR LACK OF JURISDICTION**.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge

We concur:

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL

Board Judge