



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS TO STRIKE AND DISMISS DENIED: July 2, 2021

CBCA 6658

KNIGHT'S CONSTRUCTION,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Andrew Dutkanych III of Biescker Dutkanych & Macer, LLC, Evansville, IN; and Devan A. Dannelly of Biesecker Dutkanych & Macer, LLC, Louisville, KY, counsel for Appellant.

Vincent Vukelich, Office of the General Counsel, Department of Agriculture, Milwaukee, WI, counsel for Respondent.

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

RUSSELL, Board Judge.

Appellant, Knight's Construction (Knight), appeals the decision of the United States Department of Agriculture, Forest Service (Forest Service or Service), terminating two contracts for default. The Forest Service moves to dismiss the appeal for lack of jurisdiction on the basis that the appeal was untimely filed and to strike certain exhibits that Knight filed in support of its opposition. Knight opposes the Forest Service's motion to dismiss. For the reasons set forth below, we deny the Forest Service's motion to strike and its motion to dismiss this appeal.

Background

On June 4, 2018, the Forest Service awarded two contracts to Knight for the purpose of maintaining the early successional habitat characteristics of designated wildlife openings at Lost River South and Shirley Creek in Hoosier National Forest. Work included bush-hogging to inhibit the growth of tree species, identification and removal of unwanted tree species, and mowing as needed. The contracts also required Knight to pull and then replace barrier posts when egress to the contract area was needed. Work was scheduled to begin on July 2, 2018, and conclude on January 2, 2019. However, because of rain, the Forest Service extended the contract completion date to August 19, 2019.

By letter dated August 1, 2019, the Forest Service informed Knight that the Service was considering terminating the contracts for default due to concerns that Knight would not be able to timely complete the contract terms and had also caused resource damage while working in one location. The Forest Service provided Knight ten days to respond, which Knight did on or around August 11, 2019. In its response, Knight objected to the proposed termination, arguing, in part, that the Forest Service should have provided an additional extension of the contract completion date due to rain and the shutdown of the Federal Government from December 22, 2018, through January 25, 2019.

By letter dated August 19, 2019, the Forest Service terminated its contracts with Knight. The Forest Service asserted that Knight had ample time to complete the project within the contract performance period and that Knight's request for an additional extension was not possible due to other projects that needed to be completed in the Lost River South and Shirley Creek areas. Also in the letter, the Forest Service informed Knight that it could appeal the termination decision "by contacting the Board of Contract Appeals of the U.S. Department of Agriculture, Washington D.C." By email dated August 19, 2019, the same day that it received the termination decision, Knight objected to the Forest Service's characterization of its performance, stating that it wanted to appeal the termination decision and asking how to do that. In an email response dated August 20, 2019, the Forest Service again informed Knight that it could "appeal this decision by contacting the Board of Contract Appeals of the U.S. Department of Agriculture, Washington D.C."

On or around November 13, 2019, Knight shipped its appeal by United Parcel Service (UPS) to the following address: "U.S. Dept of Agriculture, Contract Appeals Board, 441 4th St NW, 350, Washington, DC 20001-2714." Knight's appeal was returned to the company, and on or around November 19, 2019, apparently following a telephone conversation between Knight and the Forest Service, Knight re-shipped its appeal documentation using UPS to "U.S. Dept of Agriculture, Contract Appeals Board, 1400 Independence Ave SW, Washington, DC 20250-0001." According to documentation provided by Knight, that

shipment was “voided,” presumably meaning returned. Also on November 19, 2019 (at 5:25 p.m. Eastern Standard Time (EST)), the Service emailed Knight, advising that the Department of Agriculture Board of Contract Appeals’ functions had been transferred to the Civilian Board of Contract Appeals. In the email, the Forest Service stated that “[f]or mail, the [Board’s] address is 1800 F Street, NW, Washington, DC 20405.” Also in the email, the Service provided a link to the Board’s website, stating that the link “provides options and instructions for filing, including e-file.” The information on the Board’s webpage accessible by the provided link stated at the time that filings could be sent by e-filing; facsimile; U.S. Postal Service mail service only to 1800 F Street, NW, Washington, DC 20405; and overnight or courier delivery to 1800 M Street, NW, Room 600 South, Washington, DC 20036.¹ After this email communication from the Forest Service, Knight, on November 20, 2019, shipped its appeal via “UPS Next Day Air Saver” to the Civilian Board of Contract Appeals, 1800 F Street, NW, Washington, DC 20405-0001. The Board docketed Knight’s appeal on November 22, 2019.

The Forest Service has moved to dismiss Knight’s appeal for lack of subject matter jurisdiction because the appeal was not timely filed and has also moved to strike from the record certain exhibits Knight provided in support of its opposition to the Forest Service’s motion. In its motion to dismiss, the Forest Service explained that it sent its termination notice to Knight by certified and electronic mail on August 19, 2019, and, on that same day, Knight informed the Forest Service of its intent to appeal the termination. The Forest Service noted that Knight had ninety days to timely file its appeal, i.e., until November 17, 2019. Because this date falls on a Sunday, and the following day was a holiday, Knight had until Tuesday, November 19, 2019, to file its appeal. However, Knight’s appeal was not received by the Board until November 22, 2019.

In opposing the Forest Service’s motion, Knight asserted that it acted diligently in attempting to timely appeal the Forest Service’s termination decision. The company argued that, because of the Service’s provision of incorrect information, on multiple occasions, as to where to send the appeal notice, the appeal period should not have begun to run until the Forest Service provided the correct information for the Board (i.e., starting on November 19, 2021), or alternatively, the company should receive an extension of the time period for filing its appeal.

¹ The Board’s physical mailing address for all hard copy or paper filings is now 1800 M St., NW, 6th Floor, Washington, DC 20036. It no longer uses the address of 1800 F Street, NW, Washington, DC 20405 to receive hard copy or paper filings regardless of the mail or courier used. *See* 85 Fed. Reg. 5334, 5335 (Jan. 30, 2020) (codified at 48 CFR ch.61 (2020)).

Discussion

I. The Forest Service’s Motion to Strike is Denied

We first address the Forest Service’s motion to strike certain exhibits that Knight filed in support of its opposition, including various email communications between the parties, as well as UPS shipping documentation. The Board’s rules do not specifically provide for motions to strike. However, they do state that the Board “may apply principles of the Federal Rules of Civil Procedure to resolve issues not covered by [our] rules.” Rule 1(c) (48 CFR 6101.1(c) (2019)); *see also SBBI, Inc. v. International Boundary & Water Commission*, CBCA 4994, 17-1 BCA ¶ 36,786; *Mission Support Alliance, LLC v. Department of Energy*, CBCA 4985, 16-1 BCA ¶ 36,210.

As an initial matter, nothing in the Board’s rules, nor the Federal Rules of Civil Procedure (FRCP or federal rules), precludes a party from providing documents or other evidence to support or oppose a motion to dismiss for lack of subject matter jurisdiction. *See* Rule 8; Fed. R. Civ. P. 12. Here, we find the materials produced by Knight in support of its opposition helpful in providing background on the timing of the shipped appeal documents.

Further, FRCP 12(f) addresses motions to strike, stating that a “court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Although the federal rules provide for such motions, federal courts have been reluctant to respond favorably to them. *Mission Support Alliance*; *see also Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 201 (D.C. Cir. 1981) (“[M]otions to strike, as a general rule, are disfavored.”).

Additionally, courts generally construe the term “pleading” in FRCP 12(f) narrowly, *see, e.g., Fisherman’s Harvest, Inc. v. United States*, 74 Fed. Cl. 681, 690 (2006), with only the following defined as such under the FRCP—a complaint, an answer to a complaint, an answer to a counterclaim, an answer to a crossclaim, a third-party complaint, an answer to a third-party complaint, and if the court orders one, a reply to an answer. Fed. R. Civ. P. 7(a). Accordingly, a Rule 12(f) motion “only may be directed towards pleadings as defined by Rule 7(a); thus motions, affidavits, briefs, and other documents outside of the pleadings are not subject to Rule 12(f).” 5C Arthur R. Miller, Mary Kay Kane & A. Benjamin Spencer, *Federal Practice and Procedure* § 1380 (3d. ed. 2021); *see also Hardy v. United States*, No. 14-388L, 2021 WL 1940658, at *2 (Fed. Cl. May 14, 2021) (court declines to strike a reply because not a pleading); *Hernandez-Butler v. Ikea U.S. East, LLC*, 435 F. Supp. 3d 816, 832-33 (S.D. Ohio 2020) (In declining to strike evidentiary material submitted in support of a summary judgment motion, the court stated, “Rule 12(f), by its very language, is directed toward ‘pleadings,’ a term that has a clear meaning under the Federal Rules of Civil

Procedure. That definition, as a general matter, does not include evidentiary materials submitted in connection with summary judgment.”); *Topps Co. v. Koko’s Confectionery & Novelty*, 482 F. Supp. 3d 129, 132 n.1 (S.D.N.Y. 2020) (“Defendant’s motion to strike Plaintiff’s motion for summary judgment is improper because Rule 12(f) permits a court to *strike pleadings* only.”); *Charter Oak Fire Insurance Co. v. SSR, Inc.*, No. CV 11-118-HRW, 2015 WL 10890126, at *6 (E.D. Ky. July 13, 2015) (“Arguments contained in a reply to a motion to amend are not ‘pleadings’ . . . and are therefore not subject to a motion to strike under Rule 12(f).”).

Thus, for the foregoing reasons, we decline to strike the exhibits filed in support of Knight’s opposition to the Forest Service’s motion to dismiss.

II. Knight’s Appeal is Timely Filed

Turning to the Forest Service’s jurisdictional motion, the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), requires that a contractor appeal a contracting officer’s decision to an agency board of contract appeals “within 90 days from the date of receipt of [that] decision[,]” *Id.* § 7104(a), and “[f]ailure to file an appeal within [this] 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. However, “[t]here are two situations . . . in which a contractor’s receipt of a contracting officer’s decision on a CDA claim [may] not start the time for appeal. The first situation is when the decision wholly fails to advise the contractor of its appeal rights. . . . The second arises when a notice of appeal rights is provided but is defective.” *Hof Construction, Inc. v. General Services Administration*, CBCA 6306, 19-1 BCA ¶ 37,219 (citations omitted). When talking about the latter situation, which is the one at issue in this appeal, the Board in *Wise Developments, LLC v. General Services Administration*, CBCA 6659, 21-1 BCA ¶ 37,774, stated as follows:

[A] termination decision containing a defective notice of appeal rights does not automatically invalidate the decision. Instead, . . . “[w]hen the contractor’s determination regarding [where or when to] appeal is unaffected by the defect’ in a notice of appeal rights, ‘the notice does not fail in its protective purpose,’ and the contractor ‘must demonstrate that the [defect] actually prejudiced its ability to prosecute its timely appeal before the limitation period will be held not to have begun.’” *Hof Construction* (quoting *Decker [& Co. v. West*, 76 F.3d 1573, 1579-80 (Fed. Cir. 1996))). Accordingly, “a contracting officer’s decision can be final for purposes of appeal without using all of the language required by regulation, provided the contractor was not prejudiced by the omissions.” *Id.*

The Forest Service argues that this appeal should be dismissed as untimely, asserting that the Service, although providing Knight with incorrect information on where to file an appeal on multiple occasions, finally, on the last day of the filing period (i.e., November 19, 2019, at 5:25 p.m. EST), via email, provided Knight with a link to the Board's website. In the email, the Service also noted that the Board's website included information on e-filing. Essentially, the Forest Service asserts that, if Knight had filed its appeal between 5:25 p.m. EST and 11:59 p.m. EST, on November 19, 2019, using, e.g., e-file or facsimile, the appeal would have been timely. *See* Rule 1(b). Given that Knight failed to file its appeal during these hours and, instead, sent its appeal the following day using UPS, the Forest Service urges dismissal.

Knight asks that we find its appeal timely filed because the Forest Service, on multiple occasions, provided erroneous information and, but for the Forest Service's errors, Knight's appeal would have been timely filed. We agree with Knight. This case is somewhat analogous to our predecessor board's decision in *P&L Management & Consulting, Inc.*, DOT BCA 4086, 00-1 BCA ¶ 30,759. In *P&L Management*, the agency, about nine days before the appeal period was to expire, provided incorrect board of contract appeals information to the contractor on where its appeal should be sent and did not provide correct information until three or so days after the filing deadline. The contractor in *P&L Management* filed its appeal the day after receiving the contracting officer's decision with the correct board information. In *P&L Management*, the board rejected the agency's motion to dismiss the appeal as untimely filed, stating:

When an appeal has been taken, a contracting officer should not, and indeed, cannot, extinguish a contractor's right to appeal by failing to timely provide adequate information relating to appeal procedures. . . . Such actions [are] contrary to the spirit of the Contract Disputes Act which imposes upon the Government a duty to provide contractors with timely and sufficient information concerning their rights to allow them to make informed choices relative to the review of a contracting officer's decision. . . . [S]uch actions themselves are sufficient to cause the 90-day limitations period to be held in abeyance.

In *Wise Developments*, this Board stated, "The requirement [for an agency] to notify a contractor of its appeal rights in the contracting officer's decision is for the contractor's benefit." *Wise Developments*. And "[i]n the end, we have to look to the specific circumstances of the contractor involved in the dispute to determine whether it detrimentally relied on *and was prejudiced by*" an appeal rights notice. *Id.* (emphasis added).

Here, the Forest Service provided incorrect board information to Knight on at least three dates—August 19, 2019, August 20, 2019, and November 19, 2019—and did not provide correct information until the evening of the last day for Knight to timely file its appeal. On the one hand, at the time that the Forest Service provided correct board information, Knight did have about six hours or so to timely file its appeal using, for example, e-filing or facsimile—a situation slightly less egregious than the one in *P&L Management* in which the agency failed to provide the correct board information until a few days after the appeal period had expired. However, on the other hand, had the Forest Service provided accurate board information to Knight in its contracting officer’s decision of August 19, 2019, or on the following day in its email to Knight, the company’s appeal, originally mailed on November 13, 2021, would likely have been timely received by the Board. Given this circumstance, we find that Knight was prejudiced by the erroneous information that the Forest Service provided, and, accordingly, the Service’s motion to dismiss the appeal is denied. *See Wise Developments* (“Prejudice requires ‘injury or damage,’ with at least ‘a showing of . . . some reasonable possibility that the outcome would have been different had [the contractor] received [timely] notice.’” (quoting *Old Republic Insurance Co. v. Underwriters Safety & Claims, Inc.*, 306 F. App’x, 250, 255 (6th Cir. 2009))); *see also Hof Construction* (noting the two situations in which a contracting officer’s decision does not start the time for appeal, one being a defective notice of appeal rights, if the contractor is prejudiced by the defect).

Decision

The Forest Service’s motions to strike and dismiss are **DENIED**.

Beverly M. Russell

BEVERLY M. RUSSELL

Board Judge

We concur:

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Board Judge