
Appeal of: :
: :
ELAINE DUNN REALTY, : HUDBCA No. 98-C-101-C1
: :
Appellant :
_____ :

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DECISION AND ORDER

Statement of the Case
and Uncontested Facts

On October 20, 1997, the Board protectively docketed this appeal from a final decision of a contracting officer, but ordered the parties to address the issue of whether the Board has jurisdiction to hear and decide this case, inasmuch as the notice of appeal was received by the Board more than 90 days after Appellant had received the contracting officer's final decision. The notice of appeal had been sent by Federal Express.

Appellant's counsel has provided documentation in the form of a Federal Express activity summary that indicates that Appellant's notice of appeal had been delivered to Federal Express 90 days after the date of receipt of the contracting officer's final decision. The notice of appeal, sent "Priority Overnight," was to be delivered by Federal Express on the next business morning, which would have been 91 days after the date on which Appellant received the contracting officer's final decision. For reasons unknown to this Board, Federal Express changed the date of sending on the service order form, and sent it out for delivery seven days after Appellant's counsel had originally provided the notice of appeal to Federal Express. The Board received Appellant's notice of appeal 98 days after the date that Appellant had received the contracting officer's final decision.

Discussion

Section 7 of the Contract Disputes Act of 1978, 41 U.S.C. § 606, provides that "[w]ithin 90 days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title." The United States Court of Appeals for the Federal Circuit has ruled that the filing of a notice of appeal within 90 days of receipt of a contracting officer's decision is a jurisdictional prerequisite, and cannot be waived. Cosmic Construction Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982).

Board Rule 1 (a) states that "[n]otice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a final written decision of the contracting officer." Board Rule 16 states that "[p]apers shall be considered filed with the Board when mailed or otherwise furnished to the Board." 24 C.F.R., Part 20.

The Government contends that this appeal should be dismissed by the Board for lack of jurisdiction because it was not mailed or otherwise furnished to the Board within 90 days from when Appellant received the contracting officer's final decision. Appellant argues that delivery of the notice of appeal to Federal Express should be treated as being "mailed or otherwise furnished" to the Board on time. Appellant further argues that the Board should equitably toll the 90 day statute of limitations in this case.

Boards of Contract Appeals with rules identical to this Board's Rule 1(a) do not treat delivery by Federal Express or any other delivery service as tantamount to being mailed. For a notice of appeal to be "mailed," it must be properly addressed, have adequate postage affixed, and be placed in the custody of the United States Postal Service. Warren Oliver Company, VABCA No. 1657, 82-1 BCA ¶ 15,709; Visutron Inc. Security Electronics, GSBICA No. 7139, 84-1 BCA ¶ 17,022; Micrographic Technology, Inc., ASBCA No. 25577, 81-2 BCA ¶ 15,357. If Federal Express or another delivery service is used to deliver a notice of appeal to a Board, it must be "furnished," that is, actually received by the Board within the 90-day jurisdictional time period. North Coast Remanufacturing, Inc. ASBCA No. 38599, 89-3 BCA ¶ 22,232; Associate Engineering Company, VABCA No. 2673, 88-2 BCA ¶ 20,709. The date of surrendering a notice of appeal to Federal Express for delivery is not the date on which the notice of appeal is "furnished" to the Board; it is furnished only when delivered. Ibid. Delivery by the United States Postal Service is the only exception to actual delivery to the Board's premises. Pete's Construction Company, ASBCA No. 37460, 89-1 BCA ¶ 21,519.

We agree with the Boards who have construed the language "mailed or otherwise furnished to the Board" to mean that only notices of appeal placed in the custody of the United States Postal Service are "mailed," and that all other forms of delivery do not constitute a mailing and, thus, require actual delivery to the Board within the 90-day time period. The general principle of equitable tolling is inapplicable to this case, in light of the Court of Appeal for the Federal Circuit's strict construction of the 90-day filing requirement as jurisdictional and unwaivable. Cosmic Construction v. United States, supra. See also, Associate Engineering Company, supra.

For these reasons, the notice of appeal filed by Appellant was untimely, and this Board lacks the jurisdiction to hear and decide this case. We note that though this Board may lack the jurisdiction to hear this case, Appellant is not without a forum to hear its case. The Contract Disputes Act provides that Appellant may file suit directly with the United States Court of Federal Claims within 12 months from the date of receipt of the contracting officer's final decision. Appellant's election to file its notice of appeal with this Board does not constitute a binding election of forum because the notice of appeal was untimely. National Neighbors. Inc. v. United States, 839 F.2d 1539 (Fed. Cir. 1988)

DECISION AND ORDER

For the foregoing reasons, this Board lacks the jurisdiction to hear and decide this case because the notice of appeal was not mailed or otherwise furnished to the Board within 90 days from the date of receipt of the final written decision of the contracting officer. This case is dismissed for lack of jurisdiction.

SO ORDERED, February 23, 1998.

Jean S. Cooper
Administrative Judge

Concurrence:

David T. Anderson
Chief Administrative Judge

Lynn J. Bush
Administrative Judge