ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
KAMP Systems, Inc.	)	ASBCA No. 55317
	)	
Under Contract No. F41608-97-D-0862	)	

APPEARANCE FOR THE APPELLANT: Mr. Mel McCullough
Secretary/Treasurer

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
Chief Trial Attorney
Carol L. Matsunaga, Esq.
Senior Trial Attorney
Stacy R. Procter, Esq.
Trial Attorney
Defense Contract Management Agency
Carson, CA

OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON MOTION FOR RECONSIDERATION

The government has timely moved for reconsideration of the Board's decision denying its motion to dismiss this appeal for lack of jurisdiction on the ground that it was not timely filed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. *KAMP Systems, Inc.*, ASBCA No. 55317, 07-1 BCA ¶ 33,460. Appellant opposes. Familiarity with our decision is presumed. We reiterate and augment some findings relevant to the government's motion.

The CDA provides that "[w]ithin ninety 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." 41 U.S.C. § 606. The 90-day deadline is part of a statute waiving sovereign immunity, which defines the Board's jurisdiction, and must be strictly construed, such that the filing period is mandatory and the Board cannot waive it. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982); *see also Bowles v. Russell*, 127 S. Ct. 2360, 2363-64 (2007).

Federal Acquisition Regulation (FAR) 33.211(a)(4)(v) provides that the contracting officer's (CO) final decision shall include a paragraph "substantially as follows:"

"This is the final decision of the [CO]. You may
appeal this decision to the agency board of contract appeals.

> If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the [CO] . . . ."

Similarly, Board Rule 1 states:

> (a) Notice 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 [CO's] decision. A copy thereof shall be furnished to the [CO] from whose decision the appeal is taken.

We noted in our decision that:

> In computing the 90-day timeframe, the Board has held that the date of filing is the date of transfer to the U.S. Postal Service, *i.e*., the postmarked date of mailing. *Thompson Aerospace, Inc*., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232. Appeals that are not transmitted by U.S. mail, such as the instant appeal, are deemed filed when received by the Board. *Innovative Refrigeration Concepts*, ASBCA No. 48869, 96-1 BCA ¶ 28,231.

KAMP Systems, supra, 07-1 BCA at 165,877. We also noted that filing an appeal with the CO is tantamount to filing at the Board (*id*.).

On 14 October 2005 appellant, a small business, received the termination contracting officer's (TCO) "Final Decision/Unilateral Determination and Demand for Payment," issued after the parties did not agree upon a convenience termination settlement. Appellant's appeal from that decision was docketed as ASBCA No. 55317, at issue. The TCO's decision offset an amount deemed owed to appellant against alleged unliquidated progress payments and determined that appellant had been overpaid by $1,630,821. Of that amount, the decision sought $986,905.26, noting that an earlier CO's decision had sought the $643,915.74 balance, and that appellant's appeal from that decision was pending with the Board as ASBCA No. 54253.

The TCO's decision at issue notified appellant of its appeal rights, including that, if it appealed to the Board, "you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the [Board] and provide a copy to me" (R4, tab 17 at 6). By letter to the Board and to the TCO dated 12 January 2006, appellant appealed, *pro se*. The Board received the appeal notice, sent to it by Federal Express, on 13 January 2006, 91 days after appellant received the TCO's decision. The record at the time did not indicate the method of delivery of the appeal notice to the TCO,

who, in a sworn declaration, stated that he had received it on 12 or 13 January 2006. We accepted his acknowledgement of a potential 12 January 2006 receipt date and found that he had received it that day, which was 90 days after appellant had received his final decision. We held that, although the Board received the appeal notice one day after the time for appealing to it had expired, the TCO received it within the CDA's 90-day limit, and the appeal was timely.

The government supports its reconsideration motion with the TCO's new sworn declaration that, after receipt of the Board's decision, he reviewed his office's records and determined that he had received the appeal notice by Federal Express on 13 January 2006. The motion also includes a government attorney's sworn declaration that the TCO indicated to her on 13 January 2006 that he had received the notice that day. Appellant's opposition acknowledges that on 12 January 2006 it sent its appeal notice by Federal Express to the ASBCA and the TCO; an appended Federal Express record reflects delivery of the TCO's copy on 13 January 2006. (App. opp'n at 3, ex. 1, McCullough decl., ¶ 3, ex. 3) Therefore, we now find that the TCO received the appeal notice on 13 January 2006.

The standard for reconsideration is whether the motion presents newly discovered evidence not previously reasonably available to the moving party, errors in our fact findings, or legal theories the Board failed to consider. *See Management Resource Associates, Inc*., ASBCA Nos. 49457, 50866, 04-1 BCA ¶ 32,491 at 160,723; *ITT Avionics Division*, ASBCA No. 50403 *et al*., 03-2 BCA ¶ 32,378 at 160,214. The government gives no persuasive reason why the TCO could not have examined his office's records prior to his original declaration to ascertain the date he received appellant's appeal notice. However, we made what has now been established to be an erroneous fact finding and a jurisdictional challenge can be raised at any time. *See Fanning, Phillips and Molnar v. West*, 160 F.3d 717, 720 (Fed. Cir. 1998); *Todd Pacific Shipyards Corp*., ASBCA No. 55126, 06-2 BCA ¶ 33,421 at 165,684. Thus, we reconsider our decision.

Appellant alleges that it is inexperienced in termination procedures; it relied upon the TCO's instructions; they were defective because they omitted significant information; and this evidences the government's bad faith (app. opp'n at 2-4). The TCO's appeal language virtually mirrors that of FAR 33.211(a)(4)(v), and we find no evidence of bad faith.

Appellant asserts that various government agencies commonly rely upon the postmarked date of mailing or date of delivery to a third-party service. It refers us to Internal Revenue Service (IRS) 2006 Form 1040 filing instructions, which provide that taxpayers can use commercial delivery services designated by the IRS, including only DHL, Federal Express, and United Parcel Service, "to meet the 'timely mailing as timely filing/paying' rule for tax returns and payments" and that "[t]he private delivery service can tell you how to get written proof of the mailing date" (app. opp'n, ex. 2 at third page).

However, the Board previously rejected such an argument in the context of a reconsideration motion. *Corbett Technology Co.*, ASBCA No. 49477, 00-2 BCA ¶ 30,922 (Board Rule 29 requires motion be filed within 30 days from moving party's receipt of Board's decision; motion untimely when delivered to Board by Federal Express one day after time limit, despite appellant's contention that, as a *pro se* litigant, it was misled because IRS accepts filing by Federal Express).

Appellant states that it sent its appeal notice by Federal Express because it was an important document and Federal Express is reliable and tracks receipt, whereas the U.S. Postal Service is not always reliable (app. opp'n at 3, exs. 3, 4). The Board also previously rejected an appeal timeliness argument that was based, among other things, upon Federal Express's reliability. *Tyger Construction Co.*, ASBCA Nos. 36100, 36101, 88-3 BCA ¶ 21,149.

Under established Board precedent, notices of appeal sent via commercial delivery services are deemed to be filed when received by the Board, which requires the dismissal of this appeal without prejudice as untimely. Such a dismissal is not on the merits and carries no *res judicata* effect. *Dick Pacific/GHEMM JV*, ASBCA Nos. 55562, 55563, 07-1 BCA ¶ 33,469 at 165,920.

DECISION

Having reconsidered our decision based upon new evidence, we reverse it. This appeal is untimely and is therefore dismissed without prejudice for lack of jurisdiction.

Dated: 5 December 2007

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

SEPARATE ADDITIONAL OPINION BY ADMINISTRATIVE JUDGE SCOTT

Appellant raises reasonable arguments that the TCO's appeal instructions do not clearly distinguish between "regular mail" or furnishing written notice by another method, and they do not warn that there is a difference in the Board's computation of the 90-day appeal period depending upon the manner in which an appeal is sent (app. opp'n at 2-3). The same can be said for FAR 33.211(a)(4)(v) and Board Rule 1(a), which do not define "otherwise furnished" to the Board. Moreover, the FAR and the Board's Rules do not elsewhere define "filing" with the Board. The CDA itself does not specify a method of filing an appeal or the manner in which the 90-day time period is to be computed. The FAR provisions and our Rules, concerning the filing date of a notice of appeal, are procedural, not jurisdictional, and can be modified. *See DLT Solutions, Inc.*, ASBCA No. 55822, 07-2 BCA ¶ 33,658.

There are no statutory or regulatory requirements that either clearly equate filing an appeal notice with its receipt by the Board (or the CO), or limit a receipt exception to the U.S. Postal Service's postmark date. Absent such clear requirements, there is no practical reason to treat notices of appeal entrusted to commercial services for delivery to the Board (or CO) differently in this modern age. Such services are commonly-used competitors of the Postal Service that typically maintain records of receipt of a document for delivery, and of delivery.[1] Any issues, probably rare, associated with an appellant's burden to prove timely delivery to a commercial service are evidentiary matters that can be resolved on a case-by-case basis, just as might occur, for example, when a postmark is obscured. The uneven effect of our current precedent is that an appeal sent via a commercial delivery service on the 90th day after an appellant's receipt of a CO's decision, but which arrives at the Board on the 91st day, will be deemed untimely, whereas an appeal mailed via the Postal Service on the 90th day, but which arrives several days later, will be deemed timely. A statutory or, more likely, regulatory change is warranted. At a minimum, the regulation and the

[1] In the context of determining compliance with the FAR's one-year time limit for a contractor to submit a termination settlement proposal to the CO, the Board treated the date of delivery to the Postal Service's Express Mail delivery service as the date of submittal to the CO. *Voices R Us, Inc.*, ASBCA No. 51565, 99-1 BCA ¶ 30,213. There is no compelling reason to treat Federal Express and other such services differently.

Board's Rule 1(a) should be clarified to express precisely how the Board determines the filing date of a notice of appeal.

Dated: 5 December 2007

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55317, Appeal of KAMP Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals