

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Premier Group) ASBCA No. 58263
Under Contract No. W9124B-12-P-0429)

APPEARANCE FOR THE APPELLANT: Cynthia Malyszek, Esq.
Malyszek & Malyszek
Westlake Village, CA

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Ildiko E. Szentkiralyi, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES ON RESPONDENT'S
MOTION TO DISMISS FOR LACK OF JURISDICTION

The government moves to dismiss this appeal for lack of jurisdiction asserting that it was not timely filed. The 90-day appeal period ended 30 July 2012. The notice of appeal was received at the Board on 3 August 2012 in an envelope without a U.S. Postal Service cancellation date stamp (postmark). Appellant's declarant states that the appeal was placed in a U.S. Postal Service (USPS) mailbox on 30 July 2012. We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 16 January 2012, the U.S. Army Mission and Installation Contracting Command, Fort Irwin, California (government or respondent), and Premier Group (Premier or appellant) entered into Contract No. W9124B-12-P-0429 for the lease/rental of tables and chairs on behalf of the National Training Center. The contract price was \$5,129.40 with a period of performance from 7-24 February 2012. (R4, tab 1 at 1, 3)

2. On 1 March 2012, Premier submitted a claim in the amount of \$5,405 for replacement or repair of certain tables and chairs under the contract which were damaged or were missing as a result of alleged government negligence (R4, tabs 6, 8). The contracting officer (CO) denied Premier's claim by final decision dated 30 April 2012 (R4, tab 9). Premier received the CO's 30 April 2012 final decision by email dated 1 May 2012 (app. opp'n, attach. 2), thus requiring the notice of appeal to be filed within 90 days, which ended 30 July 2012.

3. Premier filed a notice of appeal and complaint which were dated 30 July 2012 and received at the Armed Services Board of Contract Appeals (Board) on 3 August 2012 in a manila envelope. The manila envelope was correctly addressed and stamped with sufficient postage but did not have a USPS postmark.

4. The government filed a motion to dismiss for lack of jurisdiction on the ground that the appeal was not timely filed under the Contract Disputes Act (CDA), 41 U.S.C. § 7104(a).

5. In opposition to the motion to dismiss, appellant included a declaration by its counsel, Cynthia Malyszek, which states in pertinent part:

4. That on 30 July 2012, I personally addressed, stamped and placed in an envelope a copy of the written Notice of Appeal/Complaint of Premier Group.

5. That on 30 July 2012, I personally took that envelope directly to the U.S. Post Office.

6. That on 30 July 2012, I personally placed, and caused to be mailed, the filled, stamped and addressed envelope containing the Notice of Appeal/Complaint in an authorized U.S. Postal Service Mail box [sic] at the U.S. Post Office Building on Peyton Avenue in Chino Hills, CA.

....

I declare under penalty of perjury that the foregoing is true and correct.

The declaration was dated 4 December 2012 and signed by Ms. Malyszek. (Bd. corr. file, Malyszek declaration) The government offered no credible evidence to specifically rebut the evidence contained in the declaration.

DECISION

The government moves to dismiss for lack of jurisdiction on the ground that appellant's notice of appeal was untimely, and its declaration contains inconsistencies and inaccuracies which bear on its credibility. Appellant bears the burden of proof on timeliness of its appeal. *Mid-Eastern Industries, Inc.*, ASBCA No. 51286, 98-2 BCA ¶ 30,022 at 148,541.

The CDA provides that a contractor "[w]ithin 90 days from the date of receipt of a contracting officer's decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105." 41 U.S.C. § 7104(a). This 90-day appeal period is statutory, strictly construed and cannot be waived. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982).

Board Rule 1(a) provides that a notice of appeal "shall be in writing and mailed or otherwise furnished" to the Board. The term "mailed" requires a proper address, sufficient postage, and transfer of the notice of appeal into the custody of the USPS. *Premier Consulting & Management Services*, ASBCA No. 54691, 05-1 BCA ¶ 32,949 at 163,256-57. In computing the 90-day timeframe, the date of filing is the date of transfer to the USPS. *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 at 149,569.

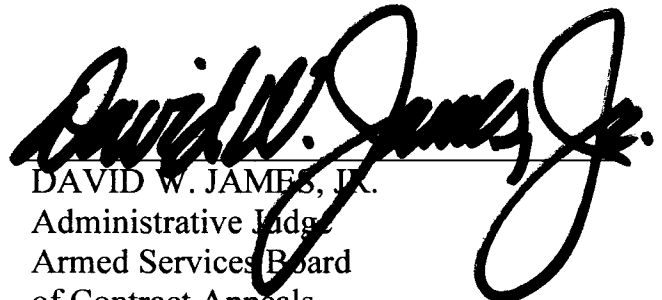
Appellant mailed its notice of appeal via the USPS. Appellant's notice of appeal was properly addressed with sufficient postage. Thus the issue is whether, in the absence of a USPS postmark on its notice of appeal, appellant's declaration regarding transfer of custody of the notice of appeal to the USPS on 30 July 2012 is sufficient to establish that its notice of appeal was timely.

It is sufficient that a preponderance of credible evidence show that the appeal was properly and timely mailed. *Micrographic Technology, Inc.*, ASBCA No. 25577, 81-2 BCA ¶ 15,357 at 76,070. As stated in *Premier Consulting*, 05-1 BCA ¶ 32,949 at 163,257: "The transfer of custody takes place when the notice of appeal is deposited in the mails.... [T]he postmark is prima facie evidence that transfer had occurred by that date; but, it does not establish that the transfer could not have taken place on an earlier date." In *Premier* we accepted sworn testimony as credible evidence that the transfer occurred on an earlier date than the USPS postmark. *A fortiori*, therefore, appellant's December 2012 unopposed declaration (*see* SOF ¶ 5) is sufficient proof of the date of transfer of the notice of appeal to the USPS. We hold by the preponderance of evidence that appellant's notice of appeal was properly and timely mailed.

CONCLUSION


The appeal was timely filed. We have jurisdiction. The motion to dismiss is denied.

Dated: 21 June 2013




DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



OWEN C. WILSON
Administrative Judge
Acting Vice Chairman
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. 58263, Appeal of Premier Group, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals