



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: November 19, 2014

CBCA 4204

GOVERNMENT SERVICES CORP,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Gregory R. Rauch of Magyar, Rauch & Thie, PLLC, Moscow, ID, counsel for Appellant.

Melanie T. Dasher, Office of Assistant Chief Counsel, Customs and Border Protection, Department of Homeland Security, Indianapolis, IN, counsel for Respondent.

Before Board Judges **VERGILIO**, **McCANN**, and **WALTERS**.

VERGILIO, Board Judge.

On October 16, 2014, Government Services Corp (contractor) filed its appeal at this Board from a contracting officer's decision concerning a contract, 20074623, with Customs and Border Protection of the Department of Homeland Security (agency). The contractor received the contracting officer's decision on July 17, 2014, at 4:48 p.m. local time. The appeal was filed at this Board ninety-one days thereafter, which is beyond the statutory time permitted for filing an appeal at the Board. The agency has moved to dismiss for lack of jurisdiction. The contractor opposes the motion. It contends that its date of receipt was July 18, because it received the decision after normal business hours.

The contractor received the contracting officer's decision on July 17. Statute, Board rules, and precedent do not support counting days as the contractor proposes. Because the

contractor untimely filed its appeal, the Board grants the agency's motion, without reaching the merits of the underlying claim. This case is dismissed for lack of jurisdiction.

Findings of Fact

The material facts are not disputed. The contractor received the contracting officer's decision underlying this appeal on Thursday, July 17, 2014, at 4:48 pm local time for the contractor (or 6:48 pm local time for the agency's office). The contractor filed its appeal to this Board on Thursday, October 16, 2014. This filing occurred on the ninety-first day after the contractor received the disputed decision of the contracting officer.

Discussion

Statute specifies that a contracting officer shall issue a decision in writing and shall mail or otherwise furnish a copy of the decision to the contractor. 41 U.S.C. § 7103(d) (2012). This contracting officer furnished a copy of the decision to the contractor by email on July 17, 2014. That day the contractor received the decision by email message at 4:48 p.m. local time for the contractor.

Statute dictates that within ninety days from the date of receipt of a contracting officer's decision, a contractor may appeal a decision to an agency board. 41 U.S.C. § 7104(a). In keeping with this requirement, the Board's rules state that an appeal from a decision of a contracting officer shall be filed no later than ninety calendar days after the date the contractor receives that decision. Rule 2(b)(1) (48 CFR 6101.2(b)(1) (2013)). The date of receipt is not tied to the time of receipt or the business hours of a contractor and is not based upon work days. Rather, filing must occur no later than ninety calendar days after the date of receipt of the contracting officer's decision. Such a statutorily established waiver of sovereign immunity is to be strictly construed. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982).

The contractor attempts to construct a date of receipt based upon the normal business day at the Board for filing submissions and an agency work day. The statute and Board rules make no provision for such a construct. In any event, the Board would conclude, if deemed material, that the contractor has failed to establish that its receipt of the contracting officer's decision occurred after its actual work day on July 17, 2014.

The contractor concludes that the 4:48 p.m. receipt was after the close of business pursuant to Government regulations. The contractor references, and argues to be controlling, provisions of the Federal Acquisition Regulation (FAR) dealing with (1) protests, which define filing to be the complete receipt of a document, state that documents received after

the close of business are considered filed the next business day, and specify that the presumed close of business for an agency is 4:30 p.m., unless otherwise stated; (2) commercial item instructions to offerors, stating that the time for receipt of submissions to an agency is 4:30 p.m., local time, if no time is specified in the solicitation; and (3) bid submissions, which require receipt at an agency office by 4:30 p.m., local time, if no time is specified. 48 CFR 33.101, 52.212-1(f), 52.214-7(a). Also, the contractor references regulatory provisions dealing with prompt payment standards which state that invoices to an agency, if electronically transmitted, are considered received on the date received by the agency, or the next business day if received after normal working hours. 5 CFR 1315.4(b) (2013). These all deal with an agency's receipt of material, and a constructive work day for the agency--a situation here not relevant.

The normal business day of the agency is no more relevant here than the filing times for submissions at the Board or the normal business day of the Board, Rule 1(b)(5)(iii), (10) (48 CFR 6101.1(b)(5)(iii), (10)), for purposes of determining the date of receipt by a contractor of the contracting officer's decision. *CWI Consultants & Services v. General Services Administration*, GSBCA 13889-R, 98-1 BCA ¶ 29,476 (the contractor's receipt of the contracting officer's decision after 4:30 p.m. local time on Friday constituted the date of receipt, such that the first day of the ninety-day period began on Saturday). These various references are not keyed to the normal business day of a contractor; no provision defines receipt by a contractor to occur only during particular hours. In construing the ninety-day period for filing an appeal, the Board rejects the contractor's definition of the word "receipt" to reflect receipt during the Board's, an agency's, or the contractor's normal work hours. Receipt occurred on the day the contractor received the email message.

It is undisputed that the contractor received the contracting officer's decision on July 17, 2014. Consistent with statute, Board rules, and the *CWI* decision, that date of receipt started the running of the ninety-day period for filing an appeal at this Board. The first day of that period was July 18, the final day was October 15. The filing was untimely to invoke Board jurisdiction.

Decision

Because the appeal was filed beyond the time permitted by statute, the Board **DISMISSES FOR LACK OF JURISDICTION** the appeal.

JOSEPH A. VERGILIO
Board Judge

We concur:

R. ANTHONY McCANN
Board Judge

RICHARD C. WALTERS
Board Judge