



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: December 3, 2015

CBCA 4735

BOB L. WALKER,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Bob L. Walker, pro se, Hamilton, MT.

Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

Before Board Judges **HYATT**, **WALTERS**, and **SULLIVAN**.

SULLIVAN, Board Judge.

Appellant, Bob L. Walker, appeals the termination of a supplemental project agreement (SPA) to Timber Sale contract #01-03-02-023891, which he entered into with respondent, the Department of Agriculture, Forest Service (Forest Service). The Forest Service moves to dismiss the appeal for lack of jurisdiction on the ground that Mr. Walker's appeal is untimely. For the reasons set forth below, we grant the Forest Service's motion.

Findings of Fact

Award, Performance, and Termination of the Contract

On February 1, 2006, the Forest Service awarded to Mr. Walker a contract to cut timber in the Darby Ranger District of Montana's Bitterroot National Forest.¹ Following award, the parties disagreed regarding the requirements for acceptable winter logging conditions. The record contains several requests by Mr. Walker for contract adjustments and time extensions because of poor weather conditions. While the Forest Service apparently granted several of Mr. Walker's requests, in January 2013, the Forest Service denied Mr. Walker's requests for a further extension of the time to perform and to delete work from the sale contract.

The Forest Service terminated the timber sale contract as uncompleted on February 8, 2013, but granted Mr. Walker additional time, until July 31, 2013, to complete erosion control work required under the contract. The Forest Service re-advertised the remaining timber under the sale on September 19, 2013, but there were no bidders. On December 6, 2013, Mr. Walker was notified that the timber sale "terminated with unresolved Purchaser obligations."

Contracting Officer's Final Decision Assessing Damages and Reprocurement Costs

In a contracting officer's final decision dated February 20, 2014, the Forest Service assessed damages arising from the termination for default of Mr. Walker's contract. The final decision set forth the calculation of the Forest Service's damages arising from the termination of Mr. Walker's contract:

1. Contract Value	\$3,350.08
2. Other Damages	
a. Cost of resale or reoffering	\$ 24.90
b. Interest to midpoint of the contract resale period	\$ 76.62
3. Total Potential Damages (Sum of 1 and 2)	\$3,451.60
4. Appraised and Resale Value at Termination	- \$1,259.89
5. Total Damages	\$2,191.71

The contracting officer notified Mr. Walker that the amount would be deducted from his performance bond on the contract.

¹ The agency filed its motion to dismiss before the appeal file was submitted. The facts are taken from the parties' submissions.

At the end of the decision, the contracting officer advised Mr. Walker of his appeal rights and deadlines for filing any appeal:

This is the final decision of the Contracting Officer. This decision may be appealed to the Civilian Board of Contract Appeals (CBCA). . . . If you decide to make such an appeal, you must mail or otherwise furnish written notice thereof to the [Board] within 90 days from the date you receive this decision. . . . In lieu of appealing to the [Board], you may bring an action directly in the Court of Federal Claims within 12 months of the date you receive this decision.

With his notice of appeal, Mr. Walker provided a United States Postal Service (USPS) certified mail receipt, for a letter postmarked February 20, 2014, sent to Mr. Walker's address. Mr. Walker also provided a USPS tracking printout that the certified letter was delivered to Mr. Walker's address in Hamilton, Montana, on February 21, 2014.

Appellant's Response to Contracting Officer's Final Decision

In a letter to the contracting officer dated May 9, 2014, Mr. Walker challenged the termination of the contract, arguing that it was improper due to the persistent issues related to winter logging requirements. Mr. Walker also asserted that, as a result of the termination, he was injured in the amount of \$21,060, which he calculated as the remaining volume of timber under the sale at termination (1620 tons) multiplied by the value per haul (\$13 per ton).

By letter dated July 10, 2014, the contracting officer informed Mr. Walker she had reviewed his May 9, 2014, letter, which the Forest Service viewed as an appeal of the February 20, 2014, final decision. The contracting officer stated that she would not issue a final decision in response to this letter and referred to paragraph 5 of the February 20, 2014, decision, which set forth Mr. Walker's appeal rights.

SPA Contract Closure Letter

By certified letter dated January 13, 2014, the contracting officer notified Mr. Walker that the contract requirements were completed and that the contract was closed. Mr. Walker refers to this correspondence in his appeal as the "SPA closure letter." Mr. Walker avers that this closure letter, whether by inadvertence or "intentional pre-dating," bears an incorrect date. He asserts the letter should bear the date January 13, 2015, as he received the letter by hand in January 2015. This letter appears to be administrative in nature and does not state

that it is a final decision in response to a claim submitted by Mr. Walker or advise Mr. Walker of any appeal rights.

On February 12, 2015, Mr. Walker submitted another claim to the Forest Service, again asserting that closure of the timber sale contract was improper. The letter was similar in substance to Mr. Walker's May 9, 2014, letter. The Forest Service replied by letter dated March 13, 2015. The response acknowledged receipt of Mr. Walker's February 12, 2015, letter and stated that his correspondence appeared to be an appeal of the February 20, 2014, final decision. As in its previous letter, the Forest Service's reply referenced paragraph 5 of the decision outlining his appeal rights and advised that a contracting officer's final decision would not be issued in response to his most recent correspondence.

On May 4, 2015, Mr. Walker filed a notice of appeal with the Board, to which he attached the SPA closure letter and alleged he received the letter in January 2015. However, in the notice of appeal, in addition to the \$21,060 he sought in his May 2014 letter, Mr. Walker also sought \$2191.71, the amount the Forest Service had retained from his performance bond, for a total of \$23,251.71. The Forest Service moved to dismiss Mr. Walker's appeal as untimely because the contracting officer had issued a final decision more than a year before Mr. Walker filed his notice of appeal.

In its July 6, 2015, Order on Further Proceedings, the Board requested that Mr. Walker identify the final decision that he was appealing, provide evidence of the date he received the final decision, and respond to the agency's motion to dismiss. In response to this order, Mr. Walker identified the SPA closure letter and provided a USPS tracking report confirming that the SPA closure letter was received in Hamilton, Montana, on January 14, 2015. Mr. Walker also adduced an affidavit that was signed by three witnesses, who attested that they were present with Mr. Walker when he received the SPA closure letter “[i]n February 2015.”

Discussion

I. Jurisdictional Limits for Appeal of a Contracting Officer's Final Decision

Pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7107-7109 (2012), the Board hears appeals of contracting officers' final decisions. A contractor who wishes to appeal such a decision to a board of contract appeals must do so “within ninety days from the date of receipt of [the] decision.” 41 U.S.C. § 7104(a). Alternatively, within twelve months from the date of the contractor's receipt of the contracting officer's final decision, a contractor may bring an action on the matter to the United States Court of Federal Claims. 41 U.S.C. § 7104(b). If a contractor elects to file an appeal with the Board, the contractor must submit its appeal to the Board. “[A]n appeal sent only to the contracting officer or

within the agency itself is not considered properly filed with the Board.” *Soto Construction Co. v. Department of Agriculture*, CBCA 3210, 13 BCA ¶ 35,301, at 173,286 (citation omitted). A contractor’s untimely submission divests the Board of jurisdiction to hear its appeal. *Id.*

The United States Court of Appeals for the Federal Circuit has strictly construed this filing deadline because the authorization to make the filing is a waiver of sovereign immunity. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982). “A board of contract appeals cannot waive the statutory appeal period.” *Devi Plaza, LLC v. Department of Agriculture*, CBCA 1239, 09-1 BCA ¶ 34,033, at 168,338 (2008) (citing *Cosmic*); *see DekaTron Corp. v. Department of Labor*, CBCA 4444, 15-1 BCA ¶ 36,045, at 176,060 (citing cases) (“The ninety-day filing deadline is strictly construed and may not be waived by the Board.”). “The strict limits of the CDA constitute jurisdictional prerequisites to any appeal.” *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,603 (quoting *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004)) (internal quotation marks omitted). “If jurisdiction is found to be lacking, the Board must dismiss the case.” *Id.* (citing *Universal Canvas, Inc. v. Stone*, 975 F.2d. 847, 850 (Fed. Cir. 1992)). Absent a contractor’s timely appeal of a contracting officer’s final decision or the timely filing of an action on the matter in the Court of Federal Claims, the “decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal government agency.” 41 U.S.C. § 7103(g).

The party seeking to invoke the Board’s jurisdiction must establish jurisdiction by a preponderance of the evidence. *Safe Haven*, 15-1 BCA at 175,603 (quoting *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988)). The Board looks to an appellant’s notice of appeal in determining its jurisdiction, as “it is generally ‘the notice of appeal, not the complaint, that establishes the bounds of [the Board’s] jurisdiction.’” *Id.* “Pursuant to CBCA Rule 2(a)(1), [48 CFR 6101.2(a)(1) (2014),] an appellant is expressly required to identify the basis of the Board’s jurisdiction in its notice of appeal by describing the contracting officer’s final decision being appealed ‘in enough detail to enable the Board to differentiate that decision from any other.’” *Safe Haven*, 15-1 BCA at 175,604 (quoting Rule 2(a)(1)(I)). Thus, before the Board, the appellant bears the “burden to plead ‘facts sufficient to establish the Board’s jurisdiction.’” *Id.* at 175,603 (quoting *Integrated Systems Analysts, Inc.*, GSBCA 10750-P, 91-1 BCA ¶ 23,477, at 117,776 (1990)).

“‘Receipt’ of a *contracting officer’s decision*, as that term is used in the [CDA], means actual physical receipt of the decision by the contractor or its representative.” *Robert T. Rafferty v. General Services Administration*, CBCA 617, 07-1 BCA ¶ 33,577, at 166,340 (citing *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1372 (Fed. Cir. 2005); *Borough of Alpine v. United States*, 923 F.2d 170, 172-73 (Fed. Cir. 1991)) (emphasis

added); *see also Pathman Construction Co. v. United States*, 817 F.2d 1573, 1578 (Fed. Cir. 1987) (discussing receipt of the contracting officer’s final decision as the triggering event for filing a suit in the United States Claims Court (now the Court of Federal Claims)).

II. The Board is Without Jurisdiction to Consider Mr. Walker’s Appeal

A. Mr. Walker is Out of Time to Challenge the Final Decisions Terminating the Contract or Assessing Reprocurement Costs

The contracting officer rendered her final decision terminating the SPA timber sale contract for default and assessing damages on February 20, 2014.² The evidence in the record provided by Mr. Walker confirms that the contracting officer’s final decision was delivered to Mr. Walker on February 21, 2014. To comply with the strict limits of the CDA, Mr. Walker was required, within ninety days of his receipt of that decision, to submit a notice of appeal to the Board. Accordingly, Mr. Walker’s appeal had to be filed with the Board within ninety days of his receipt, i.e., May 22, 2014. On the record before us, we find Mr. Walker did not satisfy this jurisdictional prerequisite.

Mr. Walker appealed the Forest Service’s final decision to the agency itself on May 9, 2014, and February 12, 2015, respectively. However, those appeals were improperly directed to the Forest Service. *See Soto Construction Co.*, 13 BCA at 173,286. On each of those occasions, the Forest Service’s response referenced paragraph 5 of its February 20, 2014, letter, which advised Mr. Walker that an appeal should be made to the Board. Moreover, although Mr. Walker described each of these submissions to the agency as claims and included monetary claims, both were challenges to the final decision terminating his contract. Mr. Walker’s claim submissions to the agency cannot be considered by the Board unless and until the underlying termination for default is overturned. *See Almeda Industries, Inc.*, ENG BCA 5148, 87-1 BCA ¶ 19,401, at 98,105 (1986) (“contractor had no right to any dollar recovery until a termination for convenience has been declared either by the contracting officer or by the board of contract appeals when it found that the contracting officer had acted invalidly in asserting a default termination”).

² Mr. Walker had two opportunities to challenge the default termination of his contract. First, Mr. Walker could have challenged the original decision terminating the contract in 2013. Second, Mr. Walker could have challenged the underlying termination when the Forest Service rendered its final decision assessing repprocurement costs. *See Hearthstone, Inc. v. Department of Agriculture*, CBCA 3725, 15-1 BCA ¶ 35,895, at 175,482-83 n. 2 (noting the practice of allowing the contractor to challenge the underlying default termination *after* the Government has assessed repprocurement costs, arising from the decision *Fulford Manufacturing Co.*, ASBCA 2143, et al., 1955 WL 808 (May 20, 1955)).

Mr. Walker did not file a notice of appeal with this Board until May 4, 2015 – more than one year after he received the final decision on February 21, 2014. Mr. Walker’s failure to appeal within the required statutory period renders his filing untimely and leaves the Board without jurisdiction to hear the case on the merits. *Soto Construction Co.*, 13 BCA at 173,286; *EHR Doctors, Inc. v. Social Security Administration*, 14-1 BCA ¶ 35,773, at 175,006 (noting a contractor’s appeal of a final decision must be made on a “timely basis (i.e., within ninety days of receipt of the decision if appealed to a board and one year if a claim is filed at the Court of Federal Claims) if it wishes to challenge the decision.”).

B. The SPA Closure Letter Is Not a Final Decision

From Mr. Walker’s notice of appeal and his response to the motion to dismiss, it appears that Mr. Walker seeks to appeal the SPA closure letter. In this letter, the Forest Service indicated that it was closing the contract files and that a final statement of account would be sent at a later date. However, this letter is not a contracting officer’s final decision on a claim from which an appeal can be taken. The letter, although signed by the contracting officer, does not state that it is a final decision and does not provide Mr. Walker notice of any appeal rights. Cf. *Frank Bonner v. Department of Homeland Security*, CBCA 605, et al., 07-2 BCA ¶ 33,592, at 166,387 (citing *Armentrout Construction, Inc.*, ASBCA 29118, 84-2 BCA ¶ 17,263, at 85,962, and rejecting appellants’ argument that a letter from the contracting officer terminating the contract constituted a final decision because it neither decided a claim nor stated a claim against the appellants).

For purposes of the Board’s jurisdiction under the CDA, it is not the receipt of the closure letter that is relevant. See 41 U.S.C. § 7104(a). Instead, it is the date Mr. Walker received the contracting officer’s final decision – and only the contracting officer’s final decision – that “start[s] the clock on the statutorily mandated ninety days during which appellant could file an appeal with the Board.” *Soto Construction Co.*, 13 BCA at 173,285; see also *Pathman Construction Co.*, 817 F.2d at 1578 (“The legislative history [of the CDA] also indicates that Congress intended the ‘receipt’ of the contracting officer’s decision by the contractor to be the *sole* event that triggers the running of the limitations period.” (emphasis added)). Although Mr. Walker has gone to great lengths to prove the date he received the SPA closure letter, our jurisdiction is founded only upon appeals of contracting officers’ final decisions. See *Robert T. Rafferty*, 07-1 BCA at 166,340.

Decision

Respondent's motion is granted. The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

MARIAN E. SULLIVAN
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

RICHARD C. WALTERS
Board Judge