

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS DENIED: October 11, 2000

GSBCA 15296

R. M. SHOEMAKER CO.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

James D. Hollyday of Pepper Hamilton LLP, Philadelphia, PA, counsel for Appellant.

David M. Smith, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **NEILL**, **WILLIAMS**, and **GOODMAN**.

WILLIAMS, Board Judge.

In this appeal, appellant, R. M. Shoemaker Co. (Shoemaker), seeks general requirements costs. Appellant claims entitlement to its bid price for general requirements costs which it subsequently reduced in consideration for a shorter performance period. However, appellant contends that the duration of its performance was increased from 360 days to 480 days as the result of delays, holds, impacts, and change orders for which the General Services Administration is responsible.

This matter comes before the Board on respondent's motion to dismiss for lack of jurisdiction. Respondent contends that the appeal is untimely since appellant has not

demonstrated that it mailed its notice of appeal on March 28, 2000, the ninetieth day after it received the contracting officer's final decision. Because we find that sufficient evidence supports appellant's contention that its notice of appeal was mailed on this date, we deny the motion.

Background

On July 19, 1999, appellant submitted a certified claim to the contracting officer. Appeal File, Exhibit 24. The contracting officer issued her final decision on December 27, 1999. *Id.*, Exhibit 26. Appellant received the final decision on December 29, 1999, making the statutory due date for the filing of the notice of appeal ninety days later, March 28, 2000.

Under Board Rule 101(b)(5)(i), a notice of appeal is considered filed upon the date on which it is mailed. Appellant claims that it timely mailed its notice of appeal on March 28, but respondent disputes this because the notice of appeal was not actually received by the Board until April 7, 2000, some ten days later. Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction (Respondent's Memorandum), Exhibit 3.

According to appellant, the pertinent chronology of events is as follows. On March 28, 2000, appellant's counsel prepared the notice of appeal. Affidavit of James D. Hollyday (June 29, 2000) (Hollyday Affidavit) ¶ 2. During the afternoon of March 28, 2000, counsel for appellant telephoned Mr. Wayne W. Martin, appellant's Vice President of Operations, to advise him that contrary to counsel's prior analysis the notice of appeal needed to be filed that day by mail in order to be timely. *Id.* ¶ 3. In response to the telephone call, Mr. Martin traveled to counsel's offices, arriving at 6:00 p.m., and executed the notice of appeal in counsel's presence. *Id.* Counsel then executed the notice of appeal and the accompanying certificate of service, and had two envelopes prepared, one addressed to the Board and the other to the contracting officer in Philadelphia. *Id.* ¶¶ 3, 4, Exhibit A.

Counsel then hand-carried both envelopes to the law firm's mail services department prior to its closing at 7:00 p.m., and personally requested that metered postage be applied to both envelopes. Hollyday Affidavit ¶¶ 5, 6. An employee of the mail services department applied the requested metered postage in the presence of counsel on March 28, and the copy of the envelope containing the notice of appeal received by the Board bears that date. *Id.* ¶ 6; Notice of Appeal, accompanying envelope (Board's official docket file).

Counsel copied the envelopes and then returned to the mail services department at approximately 6:45 p.m. He handed both envelopes to the same employee and told him "that it was important that both envelopes be mailed that evening, which he acknowledged." Hollyday Affidavit ¶ 8. The assistant supervisor of mail services at the law firm testified that

all outgoing mail from the law firm must be accompanied by a service request slip indicating the date of the service, the charge numbers, the name of the person requesting the service, and the service requested. Affidavit of Mark Wallace (June 28, 2000) (Wallace Affidavit) ¶ 5. Such a service slip confirms that \$1.98 was charged to the Shoemaker account on March 28, 2000, for first-class postage, requested by appellant's counsel in this appeal. Id. ¶ 6, Exhibit A.

The law firm's assistant supervisor of mail services further testified that at 7:00 p.m. each business day an employee of the mail services department hand-delivers all of the collected mail to Rapid Delivery Service, Inc., which provides courier services to the mail department on an ongoing basis. Wallace Affidavit ¶ 7; Supplemental Affidavit of Mark Wallace (July 7, 2000) ¶ 3. Both the law firm's mail room supervisor and the president of this courier service, testified that once the mail services department delivers the collected mail to the courier service the mail is immediately delivered to the United States Post Office at 30th and Market Streets in Philadelphia, where it is then deposited with the United States Postal Service for delivery. Wallace Affidavit ¶ 7; Affidavit of Howard Wool (July 7, 2000) (Wool Affidavit) ¶¶ 3-5. Specifically, the president of Rapid Delivery Service testified that on every business day the Pepper Hamilton mail is deposited with the United States Postal Service for delivery that same day and is not held, and that these procedures were followed on March 28. Wool Affidavit ¶¶ 4, 5.

A copy of the notice of appeal was simultaneously mailed on March 28, 2000, to the contracting officer, Claudia Ramsbacher, and this copy of the notice of appeal was received on March 30, 2000, according to a date-received stamp on the appeal file copy. Appeal File, Exhibit 27.

Discussion

Under the Contract Disputes Act, 41 U.S.C. § 606, a contractor's appeal to the Board must be filed "within ninety days from the date of receipt of a contracting officer's decision." The ninety-day deadline is part of a statute waiving sovereign immunity, which must be strictly construed and which defines our jurisdiction. Cosmic Construction Co. v. United States, 697 F.2d 1389, 1390 (Fed. Cir. 1982).

The parties agree that in order to have been timely filed this notice of appeal must have been mailed by March 28, 2000. Board Rule 101(b)(5)(i) provides:

A notice of appeal . . . is filed upon the earlier of (A) its receipt by the Office of the Clerk of the Board or (B) if mailed, the date on which it is mailed. A

United States Postal Service postmark shall be prima facie evidence that the document with which it is associated was mailed on the date thereof.

Respondent correctly argues that because the postmark was privately metered by appellant's counsel, it does not constitute "prima facie evidence" of the date on which the notice was mailed, within the meaning of the Board's rules. Although appellant's postmark is not "prima facie evidence of the date of mailing," it is nonetheless evidence. See Dawson Construction Co., ASBCA 29447, 85-1 BCA ¶ 17,862 (private postage meter stamp coupled with affidavit stating that the notice was mailed on the date indicated by the metered stamp was sufficient to establish timeliness). Together with the affidavit of counsel, as well as the affidavits of the assistant supervisor of the law firm's mail room and the president of the law firm's daily courier service, this postmark supports appellant's contention that the notice was in fact mailed on the evening of March 28.

Respondent has not offered any direct evidence that the notice of appeal was not in fact mailed on the date claimed. Rather, respondent asks the Board to conclude that the notice could not have been timely mailed based on the date of receipt and United States Postal Service statistics.¹ We decline to make this conclusion. Rather, we find the consistent affidavits of three individuals, one of whom is an officer of the court, coupled with the postmark and evidence of the law firm's daily mailing practices to be more persuasive evidence than inference based on the date of receipt and general postal delivery statistics. Accord Zinco General Contractors, GSBCA 5652, 80-2 BCA ¶ 14,785 (contractor deemed to have timely mailed notice of appeal based upon testimony of appellant's president and his secretary and her file, even though notice of appeal was never received). Further, this inference that the notice of appeal was not mailed on March 28 is undermined by the fact that the contracting officer received her copy of the notice two days later, on March 30.

¹ Specifically, according to the principal statistician for the United States Postal Service, recent Postal Service measurements predict a zero percent likelihood that a piece of first-class mail would take ten days to go from Philadelphia to Washington.

Decision

Respondent's motion to dismiss for lack of jurisdiction is **DENIED**. Respondent shall file its answer within **ten calendar days of the date of this decision**. The Board will convene a telephonic conference in this appeal on **October 23, 2000, at 11:00 a.m.**, to discuss scheduling.

MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

ALLAN H. GOODMAN
Board Judge