Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DISMISSED FOR LACK OF JURISDICTION: May 16, 2006

GSBCA 16808

HALLWOOD PLAZA, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Timothy W. Mizerowski and Margaret A. Schiano of Mizerowski & Associates, P.C., Walled Lake, MI, counsel for Appellant.

Torrie N. Harris, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **PARKER**, and **BORWICK**.

PARKER, Board Judge.

The General Services Administration (GSA) moves to dismiss the above-captioned appeal for lack of jurisdiction, arguing that Hallwood Plaza's (appellant's) notice of appeal was untimely filed. We agree and dismiss the appeal.

Findings of Fact

The following facts are undisputed. On October 14, 2005, Hallwood Plaza received a contracting officer's decision denying Hallwood's claim for $142,926.86 in additional costs incurred in connection with the construction of office space in a building that GSA leased from appellant.

On December 29, 2005, appellant's attorney mailed to the contracting officer several documents, including one entitled "Notice of Appeal." The documents were sent to the contracting officer's address in Chicago, Illinois. On January 24, 2006, GSA informed appellant's counsel by telephone that he needed to file the notice of appeal with the Board, the offices of which are in Washington, D.C.[1] Appellant's counsel obtained the correct filing information from the Board's website and faxed a copy of the notice of appeal to the Board. The notice was received by the Board on January 24, 2006.

Discussion

The Contract Disputes Act of 1978 provides: "Within ninety days from the date of receipt of a contracting officer's decision . . . , the contractor may appeal such decision to an agency board of contract appeals." 41 U.S.C. § 606 (2000). The deadline for filing an appeal is unforgiving; it has been strictly construed by the Court of Appeals for the Federal Circuit because the authorization to make the filing is a waiver of sovereign immunity. As that court has held, "If no appeal to the Board is taken within the ninety day statutory period set forth in section 606, the Board has no jurisdiction to hear the claim." *D. L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997) (citing *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982)). The Board has consistently followed the court's directive by dismissing for lack of jurisdiction appeals which are filed more than ninety days after the filers received the subject contracting officer decisions. *E.g.*, *Ray Communications, Inc. v. General Services Administration*, GSBCA 16056, 03-1 BCA ¶ 32,175*; Mid-South Metals, Inc. v. General Services Administration*, GSBCA 15702, 02-1 BCA ¶ 31,723 (2001); *D. L. Woods Construction, Inc. v. General Services Administration*, GSBCA 13882, 97-2 BCA ¶ 29,009 (1996); *Wood & Co. v. Department of the Treasury*, GSBCA 12452-TD, 94-1 BCA ¶ 26,395 (1993).

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[1]Appellant says that he spoke to the contracting officer and a person named Carl Smith, whom appellant says indicated that he was an "Attorney for the Agency Board of Contract Appeals." In fact, Mr. Smith is an Assistant Regional Counsel in GSA's Office of Regional Counsel in Chicago. He represents GSA in various matters, but has no affiliation with the Board. Although the issue has no effect on our decision, we are quite certain that Mr. Smith did not indicate that he worked for the Board.

The ninetieth day after the date on which Hallwood's representative received the contracting officer's decision was Tuesday, January 12, 2006. Because the Board did not receive a notice of appeal until January 24, 2006, the question to be decided here is whether Hallwood's notice of appeal, mailed to the contracting officer in Chicago on December 29, 2005, was a "filing" for purposes of conferring jurisdiction upon the Board.

Since 1993, the Board's rules have provided that 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." 48 CFR 6101.1(b)(5)(i) (2005). Prior to that, the applicable rule was different:

> *Filing*. Filing occurs upon receipt by the Office of the Clerk of the Board during working hours, except that in an appeal and in a petition, and not in any other kind of case:
>
> (i) Filing may also be made with the Board by submitting a written notice of appeal to the contracting officer or to the head of the contracting agency[.]

48 CFR 6101.1(b)(3) (1992).

In publishing the final rules after a period for notice and comment, the Board explained the effect of the 1993 rule change:

> At the suggestion of one commentator, the statement that an appeal may be filed by submitting a written notice of appeal to the contracting officer has been deleted from section 6101(b)(5) [of the proposed rule]. *An appeal is to be filed with the Clerk of the Board.*

59 Fed. Reg. 69,248 (Dec. 30, 1993) (emphasis added). To put it simply, since 1993, a notice of appeal is considered to be filed upon receipt by the Clerk or, if mailed, the date the notice is mailed to the Clerk. There is no provision for filing an appeal by serving, by mail or otherwise, a notice upon the contracting officer.

In *S. A. Ludsin & Co. v. Small Business Administration*, GSBCA 14175-C(13777-SBA), 97-2 BCA ¶ 29,185, the Board dismissed for lack of jurisdiction an application for recovery of costs pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000). The application was sent to the agency's attorney, but did not reach the Board until after the statutory deadline for filing. Responding to Ludsin's argument that sending the application to the agency, rather than the Clerk of the Board, constituted a valid filing, the Board explained:

> The rules, by treating the Board separately from the agency, are consistent with what we comprehend to be the intent of Congress and the understanding of that intent by our appellate authority. The Board, like all boards of contract appeals established under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1994) (CDA), is an "entity quite distinct from the contracting agency." *Boeing Petroleum Services, Inc. v. Watkins*, 935 F.2d 1260, 1261 (Fed. Cir. 1991). As a quasi-judicial tribunal, we function as a court and must consequently have the "requisite independence" to resolve disputes between agencies and their contractors. S. Rep. No. 1118, 95th Cong., 2d Sess. 13, 24-26 (1978), reprinted in *1978 U.S. Code Cong. & Admin. News* 5235, 5247, 5258-60 (1978). As emphasized by the Court of Appeals, we "do not act as a representative of the agency." *Boeing*, 935 F2d at 1261 (quoting S. Rep. No. 1118 at 26). If this functionally independent Board may not act as a representative of the agency, it seems even less likely that the agency might act as a representative of the Board -- for example, in receiving case filings.

97-2 BCA at 145,156. Although *Ludsin* involved the filing of an EAJA application, the applicable Board rule is the same, and it specifies its application to both cost applications and notices of appeal. 48 CFR 6101.1(b)(5)(i).

Appellant cites *Sharp Construction*, DOT BCA 3094, 98-1 BCA ¶ 29,567, a decision by the Department of Transportation Board of Contract Appeals, as well as several cases from the Armed Services Board of Contract Appeals (ASBCA), as authority for the proposition that service of a notice of appeal upon the contracting officer within the ninety-day period constitutes the valid filing of an appeal. These cases, however, are not applicable to this situation; they were filed with different boards, under different rules. *See* 48 CFR 6302.1 (1998) (DOT BCA rules); ASBCA Rule 1 (ASBCA rules can be found at http://docs.law.gwu.edu/asbca/rule.htm).

The Court of Appeals for the Federal Circuit, the appellate authority for all of the boards of contract appeals, has explained how the Court views the Board's application of its own rules:

> We give considerable deference to the [GSA] Board's interpretation of its operating rules and procedures and "that interpretation ordinarily will be accepted 'unless it is plainly erroneous or inconsistent with the regulation.' " *Data General v. Johnson*, 78 F.3d 1556, 1561 (Fed. Cir. 1996) (giving deference to agency's interpretation of its 10-day protest filing deadline).

Bonneville Associates, Ltd. Partnership v. Barram, 165 F.3d 1360, 1364 (Fed. Cir. 1999).

In 1993, after a period for notice and comment, the Board's rules were changed to require that notices of appeal be filed with the Clerk of the Board. Since that time, we have interpreted the rule consistent with both its letter and stated intent. We have assured that the public has access to the Board's rules by publishing them in the *Federal Register* for inclusion in the *Code of Federal Regulations*, as well as on the Board's website. The rules have also been published in a number of other online and printed publications.

Appellant has not pointed to, nor are we aware of, any statute or regulation that would prevent the Board from telling aggrieved contractors how and where to file a notice of appeal. Because the Board's rules specifically require that such a notice be filed with the Clerk of the Board, appellant's argument that sending a notice of appeal to the contracting officer constitutes a "filing" at the Board is just plain wrong. Accordingly, Hallwood's notice of appeal, which was received by the Clerk 102 days after Hallwood's receipt of the underlying contracting officer decision, was not filed within the CDA's ninety-day period for appealing a contracting officer's decision to this Board, and the Board lacks jurisdiction to consider it.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

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ROBERT W. PARKER
Board Judge

We concur:

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STEPHEN M. DANIELS
Board Judge

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ANTHONY S. BORWICK
Board Judge