

Know Your Claims Appeal Rights: Don't Rely on the Agency to Tell You Where to File Your Appeal

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In our last *Government Contracts Issue Update*, we wrote about a decision from the Civilian Board of Contract Appeals (CBCA or Board) holding that an appeal of a Contracting Officer's final decision must be filed with the Board within 90 calendar days, not "three months" or 90 working days. The decision further held that while a notice of appeal is deemed "filed" under CBCA rules on the date it is postmarked by the United States Postal Service, a notice of appeal served via a commercial delivery service is not "filed" until it is received by the Board. Another recent CBCA decision provides an additional timeliness lesson: Don't rely on the agency to tell you where to file your claims appeal.

In *Soto Construction Company, Inc. v. Department of Agriculture, CBCA 3210*, the Contracting Officer issued a final decision on October 15, 2012, denying the contractor's claim for delays arising from a differing site condition. The decision advised Soto that it "may appeal this decision to the agency board of contract appeals . . . within 90 days from the date you receive this decision . . ." Appellant Soto received the decision no later than October 16, 2012; thus, the appeal had to be filed on or before January 11, 2013.

Soto did not file a notice of appeal with the CBCA within 90 days of receiving the contracting officer's final decision. Instead, on January 11, 2013, Soto faxed and mailed a "notice of intent to appeal" to the U.S. Department of Agriculture (USDA) National Appeals Division, Western Regional Office, located in Lakewood, CO. On January 14, 2013, Soto mailed a copy of its notice to the Contracting Officer. Agency counsel subsequently faxed a copy of the notice to the Board,

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which docketed the appeal as CBCA 3210, 96 days after Soto received the Contracting Officer's final decision. Upon review of the file, the Board issued an order to show cause as to why the appeal should not be dismissed as untimely filed.

Soto argued that the final decision failed to provide adequate notice of Soto's appeal rights because it advised Soto that it could file an appeal with the "agency board of contract appeals," which Soto apparently misunderstood to mean the USDA, rather than the CBCA. The Board rejected this argument because the language used in the final decision was consistent with that required by the Contract Disputes Act and FAR 33.211(a), which uses language "substantially identical" to that used in the final decision, "including the use of the generic reference to the 'agency board of contract appeals.'" The Board concluded that "[w]hile it would be more precise to state that the agency board of contract appeals for this agency is indeed the Civilian Board of Contract Appeals, nothing in the regulations requires the contracting officer to be that specific. Ultimately, the onus is on the appellant to make certain that the appeal is timely and properly filed with the Clerk of the Board."

The Board also rejected Soto's contention that sending a copy of the notice of appeal to the Contracting Officer fulfilled the timeliness requirements: "While the Board can decide cases arising out of executive agencies, these agencies cannot act as agents of the Board. Thus, an appeal sent only to the contracting officer or within the agency itself is not considered properly filed with the Board."

Luckily for Soto, the Board's decision dismissing its appeal for lack of jurisdiction was issued in time for Soto to file a timely suit in the United States Court of Federal Claims (COFC). Unlike appeals to the Boards, which must be filed within 90 days of the contractor's receipt of the Contracting Officer's final decision, contractors have 12 months to file an appeal with the COFC. Other contractors may not be so fortunate, however. This decision thus serves as yet another reminder to contractors not to wait until the last minute to file their notice of appeal from a Contracting Officer's final decision, so that they have time to confirm that the Board received the appeal prior to expiration of the 90-day appeal period.