UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: August 31, 2011

CBCA 2446-ISDA

MARTY INDIAN SCHOOL BOARD, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Mike Elsberry, Superintendent of Marty Indian School, Marty, SD, appearing for Appellant.

Stuart N. Radde, Office of the Field Solicitor, Department of the Interior, Bloomington, MN, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **SHERIDAN**.

DANIELS, Board Judge.

Marty Indian School Board, Inc. (MIS) appeals the decision of an awarding official of the Department of the Interior's Bureau of Indian Education which disallows costs in the amount of $827,123 with regard to a grant for fiscal year 2009. The Department moves the Board to dismiss the case for lack of jurisdiction. MIS opposes the motion. For the reasons explained below, we grant the motion and dismiss the case.

Background

All events relevant to the motion and the opposition to it occurred in 2011. The decision was received by MIS on January 13. The appeal was filed by placing it in the United States mails on May 26. The Department submitted its appeal file of documents relevant to the case on July 1. It filed the motion to dismiss on August 19.

Discussion

The grant in question was provided to MIS under the Tribally Controlled Schools Act, 25 U.S.C. §§ 2501-2511 (2006). Disputes involving grants under this Act are handled as if they were contracts under the Indian Self-Determination and Education Assistance Act. *Id.* § 2507(e); *see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Department of the Interior*, CBCA 2024-ISDA, 11-1 BCA ¶ 34,685. The provisions of the Contract Disputes Act, 41 U.S.C. § 7101-7109 (West Supp. 2011) (CDA), apply to such contracts – with the proviso that all decisions be issued by an awarding official, rather than a contracting officer. *California Valley Miwok Tribe v. Department of the Interior*, CBCA 817-ISDA, 07-2 BCA ¶ 33,680, at 166,749. We therefore consider the motion under the law established with regard to the CDA.

The CDA provides that "[a] contractor, within 90 days from the date of receipt of a contracting officer's decision . . . , may appeal the decision to an agency board." 41 U.S.C. § 7104(a). The Civilian Board of Contract Appeals is the "agency board" for appeals from contracting officers (and awarding officials) of the Department of the Interior. *Id.* § 7105(e)(1)(B). Consistent with these provisions of law, the awarding official's decision from which the appeal is taken informed MIS, "You may appeal this decision to the Civilian Board of Contract Appeals . . . (CBCA) . . . . If you should decide to appeal, a written notice of your appeal . . . must be submitted to the CBCA within 90 days of receipt of this decision."

The Court of Appeals for the Federal Circuit has held that "[t]he ninety day deadline is . . . part of a statute waiving sovereign immunity, which must be strictly construed, and which defines the jurisdiction of the tribunal, here the board." *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982) (citations omitted); *see also D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997) ("If no appeal to the Board is taken within the ninety day statutory period set forth in [the CDA], the Board has no jurisdiction to hear the claim." (citing *Cosmic*)).

MIS received the awarding official's decision on January 13, 2011, and filed its appeal on May 26, 2011, 133 days later. The filing plainly occurred more than ninety days

after the appellant received the decision. Following the Court's holding, as we must do, we have no alternative but to dismiss the appeal for lack of jurisdiction.

In our decision in *Tasunke Witco Owayawa (Crazy Horse School) v. Department of the Interior*, CBCA 2381-ISDA (July 22, 2011), we dismissed an appeal for the same reason we dismiss this one, but noted that recent court decisions have raised doubts as to whether the ninety-day deadline is subject to equitable tolling. In *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 3505 (2010), and *Menominee Indian Tribe of Wisconsin v. United States*, 614 F.3d 519 (D.C. Cir. 2010), courts of appeals held that the statutory requirement for presentation of CDA claims to a contracting officer is subject to equitable tolling. In *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011), the Supreme Court held that "a rule should not be referred to as jurisdictional unless it governs [an Article III] court's adjudicatory capacity." A "claim-processing rule" – one that "seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain times" – may not be jurisdictional, the Court said, and therefore may be subject to equitable tolling. This is so particularly if the rule involves an action at a non-Article III tribunal.

MIS makes two points in its opposition to the motion. One may be construed as an argument for equitable tolling of the ninety-day deadline: MIS has been "undergoing change that would be difficult to handle under the best of circumstances," in that it fired three superintendents and hired a fourth during the 2009-10 school year. Tolling of deadlines is appropriate only in limited situations, where a litigant has been diligently pursuing its rights, but some extraordinary circumstance – such as the litigant's having been the victim of a fraud or of duress – stood in its way. *Cloer v. Secretary of Health & Human Services*, No. 2009-5052 (Fed. Cir. Aug. 5, 2011), slip op. at 45 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). The predicament in which MIS found itself, while unfortunate, is not the sort of situation that might merit equitable tolling.

MIS's other reason for denying the motion is that its appeal was "accepted" by the Board and the Department submitted its appeal file before contesting the Board's jurisdiction to hear the case. Because the Court of Appeals has held that an appellant's failure to meet the CDA's ninety-day deadline deprives the Board of jurisdiction, the lateness of the filing of the motion is immaterial. It has long been the "inflexible" rule that a tribunal must deny its jurisdiction to hear a case whenever the issue is raised – even initially at the highest appellate level. *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570-71 (2004); *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 381-82 (1884); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804).

Decision

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

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STEPHEN M. DANIELS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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PATRICIA J. SHERIDAN
Board Judge