UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 22, 2011

CBCA 2381-ISDA

TASUNKE WITCO OWAYAWA (CRAZY HORSE SCHOOL),

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Rebecca L. Kidder of Fredericks, Peebles & Morgan, LLP, Rapid City, SD, counsel for Appellant.

Alice A. Peterson, Office of the Field Solicitor, Department of the Interior, Fort Snelling, MN, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GILMORE**, and **DRUMMOND**.

DRUMMOND, Board Judge.

The Department of the Interior has moved to dismiss the subject appeal, brought by appellant, Tasunke Witco Owayawa (Crazy Horse School), as untimely under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (as codified by Pub. L. No. 111-350, 124 Stat. 3677, 3816-3826 (2011)). We grant the motion and dismiss the appeal.

Findings of Fact

Respondent, by contracting officer's final decision dated December 27, 2010, issued audit determinations which disallowed $1,110,525 in costs identified in audit number IEA

07-5150 for the fiscal year ending June 30, 2007, and demanded repayment of these costs by appellant. The final decision was addressed to "Mr. John Haas, School Board Chair" and sent to appellant's business address using United States Postal Service (USPS) certified mail, with return receipt service. The USPS delivered the final decision on December 28, 2010, and an employee at appellant's business address signed the postal return receipt and took possession of the final decision.

On April 4, 2011, ninety-seven days following the signed receipt of the final decision, appellant mailed its notice of appeal and complaint to the Board. The Government promptly moved to dismiss for lack of jurisdiction because the appeal was not filed within ninety days of receipt of the final decision, as required by the CDA. The Government maintains that the ninety-day period expired on March 28, 2011, and that mail delivered to appellant's place of business is "receipt."

Appellant does not dispute that the USPS delivered the final decision to its business address on December 28, 2010. Rather, appellant argues that it submitted a timely appeal to the Board on April 4, 2011, because the employee who signed the return receipt was not authorized to do so on behalf of the addressee and it was not until January 13, 2011, that Mr. Haas, the addressee, personally received the final decision. Appellant alternatively argues that it submitted a timely appeal because the employee who signed the receipt lacked authority to do so and the final decision was not received until January 3, 2011, which was the first day that an authorized representative of Mr. Haas was available at appellant's address. As a third alternative, appellant argues that equitable considerations should allow its case to proceed. Appellant asserts that the appeal period should be tolled because, within the required ninety-day period, it had orally informed the Government of its intention to appeal. Appellant also asserts that the appeal period should be tolled due to the Government's delay in responding to appellant's request to reconsider and settle the questioned costs.

In support of its position that the Board has jurisdiction, appellant has produced an affidavit by Mr. Haas, dated May 31, 2011. Mr. Haas states, *inter alia*, that:

> 2. I am Chairman of the Board of Education of Tasunke Witco Owayawa (Crazy Horse School) . . . and among other duties, receive correspondence from the Bureau of Indian Education that is addressed to the School Board.
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> . . . .

4. Under the CHS [Crazy Horse School] school calendar, the school is closed for business during the Christmas break which was from December 23, 2010 until January 3, 2011. During this time period, none of the staff were regularly scheduled to be at work. Administrative staff and maintenance staff had the option to work, but work was not regularly scheduled for any employee during the Christmas break. All certified staff, the Superintendent, and the Board of Education were not present or at work from December 23, 2010 until January 3, 2011.

. . . .

6. I actually received the . . . [final decision] on January 13, 2011, after the Board meeting scheduled in January 2011. There were no other Board meetings nor was I present at the School from December 27, 2010 until January 13, 2011 at any time.

7. The [final decision was] not addressed to any other staff . . . and therefore, no other staff were authorized to open the . . . [final decision].

. . . .

8. It was physically impossible for . . . [appellant] to receive actual notice until . . . [I received the decision]. The Superintendent was not present at the School during Christmas break and could not have received the . . . [final decision] any earlier than January 3, 2011.

. . . .

11. CHS has been requesting since December 2010 that BIE [Bureau of Indian Education] revise its Findings and Determinations on the FY 2006, 2007, 2008, and 2009 audits on several grounds, and that BIE meet to discuss settling the disallowed cost determinations, but has not received any response from BIE. For this reason, CHS also requested a response in writing to these [oral] requests in its April 1, 2011, letter to BIE. I am aware that the BIE Education Line Officer informed CHS that a response would be provided. Given that CHS was awaiting a response from BIE on the request for revised Findings and Determinations, and a response to the request to meet to settle the disallowed costs since December . . . to the present, the time period for filing the appeal should be tolled due to . . . [the Government's] inaction.

Mr. Haas, however, did not explain how mail was received at the school in December 2010, when both he and the Superintendent were away. There is no evidence in the record which proves that the employee who signed the receipt lacked authority to do so.

Appellant has also produced a letter addressed to the Government dated April 1, 2011, as an exhibit to Mr. Haas's affidavit. Although the letter and paragraph 11 of Mr. Haas's affidavit, *inter alia*, suggest that the Government's inaction in responding to appellant's oral requests to reconsider the questioned costs and enter into settlement discussions caused appellant's delay in timely filing an appeal, the record contains no persuasive evidence to corroborate the statements in the letter and affidavit as being true. The record also contains no evidence of misconduct by the Government.

Discussion

The CDA requires that an appeal to a board of contract appeals such as this Board be brought "within ninety days from the date of receipt of a contracting officer's decision." 41 U.S.C. § 7104(a). The ninety-day requirement is statutory and cannot be waived by the Board. *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); *BIP, Inc. v. Department of Homeland Security*, CBCA 2216, 11-1 BCA ¶ 34,709. We must determine when appellant "received" the final decision.

First, appellant asserts its appeal to the Board on April 4, 2011, was timely because the employee who signed the return receipt was not authorized to open or receive mail on behalf of the addressee, and the addressee, Mr. Haas, did not personally receive the decision until January 13, 2011. Appellant argues that the ninety-day period ran not from December 28, 2010, but rather from January 13, 2011, the date that Mr. Haas personally received the decision. We disagree.

While it may be true that the decision did not come to Mr. Haas' attention until January 13, 2011, the CDA requires only "receipt" by the contractor, not "notice" to the particular addressee, to initiate the ninety day period in which to appeal. *Robert T. Rafferty v. General Services Administration*, CBCA 617, 07-1 BCA ¶ 33,577, at 166,340. The addressee is not required to have the letter in hand to constitute receipt for purposes of starting the time period. *Zobe, L.L.C.*, PSBCA 6239, et al., 10-1 BCA ¶ 34,342 (2009). Receipt of the final decision means "actual physical receipt of that decision by the contractor." *Borough of Alpine v. United States*, 923 F.2d 170, 172 (Fed. Cir. 1991). The burden is upon the Government to prove the date of receipt by objective indicia. *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1372 (Fed. Cir. 2005). Therefore, if the Government proves by objective indicia that a contracting officer's decision

was received at the location designated by appellant for receipt of correspondence, the ninety day appeal period effectively commences. *Zobe, L.L.C.*, 10-1 BCA at 169,611. A certified mail return receipt form demonstrates such receipt. *See Quillen v. United States*, 89 Fed. Cl. 148, 150 (2009); *Images II, Inc.*, ASBCA 47943, 94-3 BCA ¶ 27,277. We find that the Government has met its burden by establishing that it properly addressed the final decision; it mailed the decision by certified mail; and the decision was subsequently received and signed for on December 28, 2010. No one disputes that the USPS delivered the final decision to appellant's business address on December 28, 2010.

Alternatively, appellant argues that because the employee who signed the return receipt was not authorized to do so, the final decision was not received until January 3, 2011. According to appellant, January 3, 2011, was the first day that a proper representative of Mr. Haas was available to receive mail at appellant's address. The contention is immaterial. The fact that the employee who signed the receipt was not authorized to do so, does not alter the fact that the final decision was actually received at appellant's business on December 28, 2010. *See Penole Industries*, ASBCA 42025, 91-2 BCA ¶ 23,857, at 119,545-46.[1] Likewise, it is immaterial that appellant first took possession of the final decision through an employee on a non-work day. *See Columbia Products, Inc.*, ASBCA 19076, 74-2 BCA ¶ 10,688; *Maney Aircraft Parts, Inc.*, ASBCA 14363, 70-1 BCA ¶ 8076.

Finally, appellant argues that the appeal period should be tolled because, within the required period, it had orally informed the Government of its intention to appeal. Appellant refers to Mr. Haas's affidavit and the exhibit as support for this argument. Appellant further cites *Poysky Brothers*, ASBCA 37373, 89-1 BCA ¶ 21,478 (1988), in support of its position and notes that boards of contract appeals have "historically taken a liberal reading of contractor's communications in finding effective appeals, notwithstanding some futurity in the expression of the intent to appeal."

Appellant also contends that the appeal period should be tolled due to the Government's delay in responding to appellant's requests to reconsider certain questioned costs and enter into settlement discussions. Appellant asserts that it had verbal discussions

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[1] In that appeal, a contractor went out of business and a member of the cleaning crew signed for the contracting officer's final decision. The contractor argued that the signer was not its proper representative and was unauthorized to sign the receipt. The Armed Services Board of Contract Appeals held that since the letter was actually delivered to the contractor's business address, the letter was received for purposes of initiating the ninety- day appeal period. That a member of the cleaning crew may have signed for the letter did not alter the fact that the letter was actually received at the contractor's place of business.

with the Government prior to March 28, 2011, and was awaiting the Government's response. As support, appellant refers to Mr. Haas's affidavit and the letter dated April 1, 2011.

We are not persuaded by either argument. The holding of the Court of Appeals for the Federal Circuit that a CDA appeal must be dismissed for lack of jurisdiction unless it is taken within ninety days of the contractor's receipt of a contracting officer's decision is both clear and venerable. The Court has honored the statutory time limit because it is a waiver of sovereign immunity and therefore must be construed strictly. *D.L. Braughler Co. v. West*, 127 F. 3d 1476, 1480 (Fed. Cir. 1997); *Cosmic Construction Co. v. United States*, 697 F. 2d 1389, 1390 (Fed. Cir. 1982).

Recent decisions of two courts of appeals and the Supreme Court have caused some to doubt, however, whether the time limitation is as clear as the earlier decisions held, or whether it is subject to equitable tolling. In *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009), 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.

The first of these recent decisions alone has caused two judges of the Court of Federal Claims to question the firmness of time limitations for challenging a contracting officer's decision. *Environmental Safety Consultants, Inc. v. United States*, 95 Fed. Cl. 77, 92 n.18 (2010); *Nwogu v. United States*, 94 Fed. Cl. 637, 653 (2010). We will appreciate guidance from the Federal Circuit as to whether this limitation is subject to equitable tolling. This case, however, is not one in which to pursue the matter. Equitable tolling is appropriate only where a contractor has been pursuing its rights diligently and some extraordinary circumstance stood in the way of the contractor's filing in timely fashion. It is not appropriate where the contractor simply was neglectful. *Arctic Slope Native Association, Ltd. v. Sebelius*, CBCA 1953(190-ISDA)-REM, slip op. at 4 (June 9, 2011) (citing *Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); and *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)), *appeal docketed*, No. 2011-1485 (Fed. Cir. July 13, 2011).

Appellant's arguments and evidence do not excuse the late filing under the doctrine of equitable tolling, even if the doctrine is legally applicable. *See Glenna Romero*, PSBCA 5137, 04-2 BCA ¶ 32,790. Appellant has not shown that it was pursuing its rights diligently

during the ninety-day appeal period. Further, appellant has failed to point to any conduct by the contracting officer or any other employee of the Government which reasonably could or should have contributed to its tardy filing of the notice of appeal. Not only was appellant represented by counsel, it was also informed in the final decision of the contracting officer exactly how, when, and to whom the written notice of appeal should be sent. Accordingly, because appellant did not transmit its notice of appeal within ninety days from receipt of the contracting officer's final decision, we lack jurisdiction to review the merits of this appeal.

Appellant is reminded that an untimely appeal to the Board does not preclude it from filing a timely suit in the Court of Federal Claims. *GEO-Imaging Consulting, Inc. v. Environmental Protection Agency*, CBCA 1712, 10-1 BCA ¶ 34,318 (2009).

Decision

The appeal was not timely filed under the CDA and is **DISMISSED FOR LACK OF JURISDICTION**.

JEROME M. DRUMMOND
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

BERYL S. GILMORE
Board Judge