

RANSOMWARE AND JURISDICTION

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A recent decision at the Court of Appeals for the Federal Circuit explains the timeliness requirement for appeal from a Board of Contract Appeals decision, and how it may be affected by Ransomware preventing email notification. *Jemison & Partners, Inc. v. Secretary of the Army*. Fed Cir. No. 2023-1773 (April 16, 2024). Although the claim was for \$53,000, the Court ultimately held that it had jurisdiction over the case, and affirmed the Board's decision denying the claim.

The case turns on the exclusive jurisdiction of the Federal Circuit to hear an appeal from a final decision of an agency board of contract appeals pursuant to 41 U.S.C. § 7107(a)(1). A contractor may appeal the Board's decision "within 120 days from the date the contractor receives a copy of that decision." 41 U.S.C. § 7107(a)(1)(A). The deadline defines the Federal Circuit's jurisdiction and can't be waived.

Chronology:

January 4, 2021 – Jemison submitted its claim to the contracting officer. The contracting officer denied the claim.

(unstated date) – Jamison appealed the CO's final decision to the Board

Dec. 5, 2022 – the Board denied Jamison's appeal

Dec. 7, 2022 – The Board's Recorder's office emailed Jamison a copy of the Board's decision.

April 7, 2023 – Jemison actually received a copy of the Board's decision (see below)

April 14, 2023 – Jamison's appeal to the Federal Circuit was received (More than 120 days after the Board's decision, but less than 120 days after receipt of the Board's decision).

The Court, concluded that the statutory scheme required the contractor to submit its appeal within 120 days after *receipt* of the Board's decision, which may not be the same date that the Board emailed the decision to the contractor. Jemison submitted a sworn declaration stating that it first received notice of the Board's decision on April 7, 2023 because his firm could not receive any emails sent between December 2, through 12, 2022 because of a ransomware attack on its email service provider. When Jemison's counsel became aware of the Board's decision on April 7, 2023, he called the Board's Recorder and explained that he had not received notice of the decision when originally issued. The Recorder's Office then emailed him a copy of the decision on April 7, 2023,

It should be noted that the Board's December 7, 2022 email requested that Jemison's counsel "acknowledge receipt of the attached decision by return email. There was no evidence that Jemison's counsel responded to the email. The Court also pointed to the Board's re-sending of the decision at Jamison's counsel's request. Based on the facts, Jamison had provided sufficient evidence that the Federal Circuit had received a timely filing of the appeal, based on actual receipt of the Board's decision on April 7, 2022.

Takeaway: There are very special circumstances where a contractor can prove it did not receive a copy of the Board decision, and this was one of them. The written communications clearly

indicated that the contractor had filed the appeal within 120 days of its *receipt of the decision*, and had met its burden to show that the Board should accept jurisdiction.

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