

## UNTIMELY APPEAL

Copyright 2023 Richard D. Lieberman, Consultant & Retired Attorney

Under the Contract Disputes Act, the final decision of a contracting officer “is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced.” 41 U.S.C. § 7103(g). To initiate an appeal from such a final decision to an agency board, a contractor must do so within 90 from its receipt of the decision. 41 U.S.C. §7104(a). The 90 day appeal period is statutory and may not be waived or extended. In *MECTS Services Joint Venture*, ASBCA No 63441, July 19, 2023, the contractor (“MECTS”) filed outside of the 90 day period, and the Board held that the appeal was untimely filed, and dismissed it for lack of jurisdiction.

The contracting officer at the Defense Contract Management Agency (“DCMA”) disallowed certain direct costs, and issue a final decision on July 6, 2022. The final decision to three representatives of MECTS, and was mailed by the US Postal Service by certified mail. One copy of the decision was successfully delivered to the contractor on July 11, 2022, and the government produced a proof of delivery. Two other copies of the decision were returned as undeliverable. Not receiving any response from MECTS on the cost disallowance, the DCMA contracting officer emailed a copy of the final decision on August 1, 2022 to two other company representatives.

The appellant stated that it first became aware of the final decision by email on August 1, 2022, however, in briefing the case for the Board, MECTS stated it “did not contest” the fact that the US Postal Service had successfully delivered the final decision to the CEO on July 11, 2022. MECTS filed its notice of appeal on October 27, 2022. The Board noted that October 27, 2022 is 108 days after July 11, 2022.

The Board noted that appellant bears the burden of proof to establish that its appeal to the board was timely filed, but the government bears the burden of establishing the receipt date of the final decision by the contractor. To meet its burden, the government must provide “objective indicia” of actual physical receipt. The Board held that receipt of delivery was provided by the government by certified mail, and constituted “objective indicia” of the delivery of the final decision to the contractor. Having established that the appeal was untimely (108 days after receipt of the final decision—and the 90 day period for filing the notice of appeal had expired) the board dismissed the appeal for lack of jurisdiction.

Takeaway. When dealing with a board or court, contractors must be aware of filing deadlines. A statutory deadline is unlikely to be waived, and even a non-statutory deadline may create a problem for a contractor. File all documents on time in order to avoid any problems.

**For other helpful suggestions on government contracting, visit:  
Richard D. Lieberman’s FAR Consulting & Training  
at <https://www.richarddlieberman.com/>, and Mistakes in Government Contracting  
at <https://richarddlieberman.wixsite.com/mistakes>.**