

CAN AN APPEAL TO A BOARD BE FILED AFTER THE 90 DAY DEADLINE?

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The Contract Disputes Act, 41 U.S.C. §§ 7101-7109 requires that a contractor appeal a contracting officer's decision to an agency Board (such as the Civilian Board or the Armed Services Board) "within 90 days from the date of receipt" of that decision. *Id.* § 7104(a). The Act further states that failure to file an appeal within this 90 day deadline divests the Board of jurisdiction to consider the case on its merits. Although the 90 days is a "hard deadline" there are two situations when the contractor's receipt of the decision may not start the time for appeal:

- (1) When the decision wholly fails to advise the contractor of its appeal rights and
- (2) When a notice of appeal rights is provided but is defective.

The notice of appeal rights is required by Federal Acquisition Regulation ("FAR") 33.211 which states:

This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

Consider two cases with two different outcomes: *Knight's Const. v. Dept of Agriculture*, CBCA 6658, July 2, 2021 and *Cherokee 8A Group v. Department of Veterans Affairs*, CBCA 7107, July 8, 2021.

In *Cherokee*, the contracting officer's notice of appeal rights tracked directly with FAR 33.211. It did not include the identification of the proper Board for an appeal, and the CBCA noted that the FAR does not require that it identify the Board. The CBCA held that it lacked jurisdiction because Cherokee filed its appeal of the contracting officer's decision 720 days after it received that final decision.

The situation in *Knight's* was different. The notice to the contractor identified the wrong Board (stating the Department of Agriculture Board, not the CBCA, which succeeded the Agriculture Board.) The CBCA examined whether the defect actually prejudiced the contractor's ability to prosecute its timely appeal before the limitation period ended. The Department of Agriculture's contracting officer provided incorrect Board information to Knight on at least three dates, and did not provide correct information until the evening of the last day for Knight to timely file its appeal. The CBCA noted that if it had provided accurate information, Knight's appeal would likely have been timely received. As a result, Knight was prejudiced by the erroneous information the Department provided it, and the CBCA therefore found it had jurisdiction to hear the appeal on its merits.

Takeaway: File your appeal within 90 days of receipt of a final decision. Only if you can show prejudice (meaning injury to damage) and at least some reasonable possibility that the outcome would have been different had you received timely notice, will the 90 days period be extended.

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