

UNTIMELY RECEIPT OF APPEAL-FEDEX DELIVERY

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A recent Civilian Board of Contract Appeals decision reminds us all of the jurisdictional nature of filing an appeal with the Board within 90 days of receipt of the contracting officer's ("CO") decision. *Eagle Peak Rock & Paving, Inc. v. Dept of Transportation*, CBCA 5955, April 8, 2022.

Eagle Peak had a contract with the Department of Transportation ("DOT") for Construction Work. The company challenged DOT withholding of payments for alleged failure to submit a work schedule on time. DOT provided evidence that the CO's decision was delivered to Eagle Peak on Sept. 1, 2017 (a FedEx receipt with a time stamp indicating delivery at 2:35 PM on Sept 1, 2017 to the address identified in the contract as the location of Eagle Peak's offices. The receipt was signed by an individual identified by Eagle Peak as a receptionist in its office.). Eagle Peak filed its notice of appeal with the Board on December 1, 2017.

Eagle Peak offered evidence that it did not receive the CO decision until Sept. 5, 2017 because the receptionist's regular duties did not include receipt or distribution of correspondence or packages addressed to Eagle Creek. Furthermore, the Eagle Creek offices were closed on September 1, 2017 and on September 4, 2017 for Labor Day.

The Board made short work of Eagle Creek's reasoning. The Contract Disputes Act states that a "notice of appeal must be filed within 90 calendar days after the date of the CO decision on a claim." 41 USC § 7014(a). Therefore, if Eagle Creek received the CO decision on September 1, 2017, the appeal had to be filed by November 30, 2017—but was not received until December 1, 2017 (one day late). The Federal Circuit has interpreted "receipt" of a CO decision to mean "actual physical receipt of that decision by the contractor [or its representative]."

In rejecting and dismissing the appeal, the CBCA noted that even though Eagle Peak alleged it did not receive the package until Sept. 5, 2017, the day after Labor Day, the firm's office may have been closed, but there was a receptionist in the office. The receptionist signed for the package, even though she may not have been authorized to do so. That receipt was sufficient.

Takeaway: Receipt of a CO decision is actual physical receipt, notwithstanding duties in a person's job description. Ensure that your notification of appeal (which may now be made by Email), is made within 90 days of the receipt of the CO's decision.

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