

Claims Reminder: Federal Express Is Not U.S. Mail for Purposes of Establishing Timeliness of Board Appeal

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In the past, we've written about common pitfalls in the claims process, such as affixing an electronic signature reference (e.g., "//s//") instead of a signature to a claim certification and failing to identify a "sum certain" in a claim. See "CDA Claim Reminder: State a 'Sum Certain,'" *Government Contracts Issue Update*, Spring 2009 and "Put Your John Hancock on It!" *Government Contracts Issue Update*, Summer 2008. A recent decision from the Civilian Board of Contract Appeals warrants an additional reminder: An appeal of an adverse contracting officer's final decision must be appealed to the Board within 90 days—that's 90 calendar days, not "three months" or 90 working days and, moreover, Federal Express (no matter how reliable) is not U.S. Mail.

This claim lesson was recently reinforced in *Schunck v. GSA*, CBCA 3079, decided on January 31, 2013. There, a General Services Administration (GSA) contracting officer (CO) issued a final decision on August 14, 2012, denying appellant's claim for a refund of the purchase price for 12 cameras purchased at a GSA online auction. Appellant Schunck received the final decision on August 15, 2012, and sent his notice of appeal to the Board via Federal Express, standard overnight delivery, on November 13, 2012. The Board received the notice on November 14, 2012, and it docketed the appeal on November 15, 2012. GSA promptly moved to dismiss the appeal.

The Board stated that the 90-day appeal period in the Contract Disputes Act, 41 U.S.C. 7104(a), "has been strictly construed by the Court of Appeals for the Federal Circuit because the authorization to

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make the filing is a waiver of sovereign immunity. A late filing divests the Board of jurisdiction to consider the case on its merits." Furthermore, CBCA Rule 1(b)(5)(i) provides: "[a] notice of appeal . . . is filed upon the earlier of its receipt by the Office of the Clerk of the Board or if mailed, the date on which it is mailed to the Board. A United States Postal Service postmark shall be prima facie evidence that the document with which it is associated was mailed on the date of the postmark." (Emphasis added); see also ASBCA Filing Guidance, July 25, 2012 ("Documents may be filed via a governmental postal service. Filing occurs when the document, properly addressed and with sufficient postage, is transferred into the custody of the postal service."); *Kamp Systems, Inc.*, ASBCA No. 55317, 08-1 BCA ¶ 33748 (2007) ("Under established Board precedent, notices of appeal sent via commercial delivery services are deemed to be filed when received by the Board . . ."). Thus, the Board held, a notice of appeal served via a commercial delivery service is deemed "filed" at the Civilian Board when the Board receives the notice, not on the date it is placed into the custody of the commercial delivery service provider. Schunk's notice, therefore, was "filed" on November 14, 2012, when the Board received it.

Schunck also argued that the 90 days expired on November 15, 2012, making his filing received on November 14, 2012, timely. The Board disagreed: "[n]inety days from August 15, 2012 is November 13, 2012. Here the notice, sent by Federal Express, arrived at the Board ninety-one days after receipt of the CO's decision." Accordingly, the claim was dismissed.

Upon receipt of an adverse contracting officer's final decision, contractors should not wait until the last minute to file their notice of appeal. Although both Boards now support filing via email, even email is not risk free. Accordingly, "best practices" still counsel that a notice of appeal should be filed in sufficient time so that the contractor can confirm the Board's timely receipt of the notice of appeal (and take corrective action if, for some reason, the notice is waylaid on route).