



- a. This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613) (“the Act” or “CDA”).
- b. Except as provided in the Act, all disputes arising under or relating to this contract must be resolved under this clause.
- c. “Claim,” as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. . . .
- d. 1. A claim by the supplier must be made in writing and submitted to the contracting officer for a written decision.

(AF 1 at 3, 47).

3. The Contract also included a Termination with Notice clause which provided: “The contracting officer or the supplier, on 60 days written notice, may terminate this contract or the right to perform under it, in whole or in part, without cost to either party.” (AF 1 at 3, 45-46).

4. The Postal Service and the American Postal Workers Union (APWU) agreed in their collective bargaining agreement (CBA) to transfer certain work from contractors to Postal Service employees. An arbitrator determined that this CBA requirement applied to the work done by CBF under the Contract. (AF 9 at 216, 219, 221).

5. On November 4, 2013, the contracting officer terminated the Contract effective January 5, 2014 under the Termination with Notice clause. The termination notice did not include language informing CBF that it could appeal the termination to the Board or Court of Federal Claims. (AF 13).

6. CBF filed a notice of appeal challenging the Postal Service’s termination of the contract, which the Board docketed as PSBCA No. 6540.

7. CBF then filed its complaint asserting that the Postal Service breached the contract because the termination was arbitrary and capricious (Complaint ¶ 17).

8. In lieu of an answer, the Postal Service moved to dismiss because CBF had not filed a claim seeking “payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract.” (Motion at 1, 6-8).

9. On April 18, 2014, the Board conducted a conference with the parties to address the Motion. The Board’s resulting Order summarizing the conference, provided: “[CBF] is considering filing a claim in lieu of opposing the motion. If the claim is denied, [CBF] would then need to file a new notice of appeal (i.e., a new lawsuit).” (Order and Memorandum of Teleconference, April 18, 2014 at 1).

10. On May 13, 2014, CBF submitted a certified claim to the contracting officer seeking \$1,408,861.20 and alleging that the Postal Service breached the contract (Respondent’s Response in Opposition to Request for Relief to File Appeal (Response), Exh. B).

11. By final decision dated July 14, 2014, the contracting officer denied the claim (Response, Exh. C).

12. The contracting officer’s decision provided CBF with notice of its appeal rights:

This is the final decision of the contracting officer pursuant to the Contract Disputes Act of 1978. You may appeal this decision to the Postal Service Board of Contract Appeals by mailing or otherwise furnishing written notice (preferably in triplicate) to the contracting officer within 90 days from the date you receive this decision. The notice should identify the contract by number, reference this decision, and indicate that an appeal is intended. Alternatively, you may bring an action directly in the

United States Court of Federal Claims within 12 months from the date you receive this decision.

(Response, Exh. C).

13. On July 15, 2014, the Postal Service informed the Board that the contracting officer had issued a final decision (Status Report, July 15, 2014).

14. CBF received the final decision on July 18, 2014 (Response, Exh. D; Appellant's Response to Opposition to Request Fro [sic] Relief to File Appeal at 2).

15. Also on July 18, 2014, the parties discussed a different dispute pending before the Board (PSBCA Nos. 6482 and 6518). As part of those discussions, the Postal Service's counsel sent an email to CBF:

Attached for your review is the draft joint motion for a stay of proceedings in our case [PSBCA Nos. 6482 and 6518]. . . .

Also, keep in mind that this stay would not affect your 90 day deadline to appeal the recent final decision in the other matter.

(Response, Exh. E).

16. The Board then advised:

By status report dated July [15], 2014, the Postal Service explained that the contracting officer denied Clifford B. Finkle Jr., Inc.'s May 13, 2014 claim on July 14, 2014. The Board does not have jurisdiction until Clifford B. Finkle Jr., Inc. files a notice of appeal. See 41 U.S.C. § 7103(g); 39 C.F.R. § 955.2 Notice of Appeals ("Notice of an appeal must be in writing, and the original, together with two copies, may be filed with the contracting officer from whose decision the appeal is taken, or may be filed directly with the Board.").

If Clifford B. Finkle Jr., Inc. would like the Board to review the July 14, 2014 contracting officer final decision (and consolidate the review with the case docketed as PSBCA No. 6540), it should file a notice of appeal with the Board.

(Order, July 23, 2014).

17. By Order dated October 8, 2014, the Board advised:

The contracting officer issued a final decision on July 14, 2014 . . . . The Board has not received a notice of appeal related to this final decision. See 39 U.S.C. § 7104 (“A contractor, within 90 days from the date of receipt of a contracting officer’s decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title.”). The 90 day requirement is jurisdictional. The Board may not waive the 90 day requirement. The Board granted a stay in proceedings in PSBCA Nos. 6482 and 6518, not 6540.

If Clifford B. Finkle Jr.[,] Inc. wishes to appeal the July 14, 2014 final decision, it must send a notice of appeal within the 90 day period.

18. On October 27, 2014, CBF filed its *Request for Relief to File Appeal* (Request) in which CBF acknowledged that it did not appeal within the 90-day deadline, but requested permission to appeal the final decision late. The Postal Service opposed CBF’s Request.

### **DECISION**

The Postal Service moves to dismiss for lack of jurisdiction arguing that the Board lacks jurisdiction because CBF challenged a termination with notice without a monetary claim and receiving a decision from the contracting officer. The Postal Service further argues that the Board lacks jurisdiction over CBF’s subsequent monetary claim for breach damages because CBF failed to file a notice of appeal within 90 days of receiving the contracting officer’s final decision.

#### **Legal Standards**

The Contract Disputes Act (CDA) requires that contractor claims “shall be in writing” and “shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 7103(a)(1) and (2). Contractor claims over \$100,000 shall be certified. 41 U.S.C. § 7103(b). “The contracting officer shall then issue a decision in writing . . . .” 41 U.S.C. § 7103(d). “A contractor, within 90 days from the date of receipt of a contracting

officer's decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title." 41 U.S.C. § 7104. The Board's Contract Disputes Act jurisdiction authorizes us "to decide any appeal from a decision of a contracting officer of the United States Postal Service . . . ." 41 U.S.C. § 7105(e)(1)(C).

#### Appeal from Termination with Notice

In *Shawn G. Logan*, PSBCA No. 6507, 14-1 BCA ¶ 35,609, we addressed whether a contractor's challenge of a termination with notice, standing alone, conferred jurisdiction:

Unlike a termination for default which constitutes a government claim, requires a contracting officer's decision, and which can be challenged under the CDA without an additional monetary claim, see *Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988), a termination with notice or termination for convenience is a contract action, not a claim. The termination notice itself is not a contracting officer's decision. Without a monetary claim submitted to the contracting officer, the Board has no jurisdiction over a challenge to a termination for convenience or termination with notice action. See *Charles Mullens*, ASBCA No. 56927, 11-2 BCA ¶ 34,857, 12-2 BCA ¶ 35,163; *CME Group, Inc.*, ASBCA No. 57446, 11-2 BCA ¶ 34,792.

In the present case, CBF's notice of appeal challenged only the Postal Service's termination with notice (Finding 6). Before that date, CBF had not filed a monetary claim (Findings 9, 10). Accordingly, the notice of appeal challenging only the termination with notice does not confer jurisdiction.

#### Appeal 90 Days After Contracting Officer's Decision

CBF filed a monetary claim which the contracting officer denied (Findings 10, 11, 12). The Board and Respondent informed CBF that it was required to file a notice of appeal within 90 days of receiving the decision in order to provide the Board jurisdiction to address the monetary claim (Findings 9, 15, 16, 17). However, CBF did not file an

appeal within 90 days of receiving the final decision (Findings 14, 18). The 90-day deadline to file a notice of appeal after receiving a final decision has been strictly construed and failure to appeal within 90 days precludes the Board from taking jurisdiction to consider the case on its merits. See *Cosmic Constr. Co. v. United States*, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982). A board of contract appeals “may not waive this ninety-day statutory period.” *West Coast Gen. Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994) (citing *Cosmic Constr. Co.*, 697 F.2d at 1391). This Board has dismissed cases for lack of jurisdiction when an appeal was filed more than 90 days after receipt of the contracting officer’s decision pursuant to the Federal Circuit’s precedent. See, e.g., *47 Main Street Old Mystic LLC*, PSBCA No. 6370, 11-2 BCA ¶ 34,798; *J. Leonard Spodek Nationwide Postal Mgmt.*, PSBCA No. 3584, 94-2 BCA ¶ 26,850.

CBF argues, however, that the 90-day statutory period is not jurisdictional, but rather should be construed as an affirmative defense subject to equitable tolling. See *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315 (Fed. Cir. 2014). The Federal Circuit determined that the CDA’s six-year statute of limitations, 41 U.S.C. § 7103(a)(4)(A), is not jurisdictional because § 7103 is not phrased in jurisdictional terms and the claim is submitted to the contracting officer, rather than a tribunal. See *Sikorsky Aircraft*, 773 F.3d 1321-22.

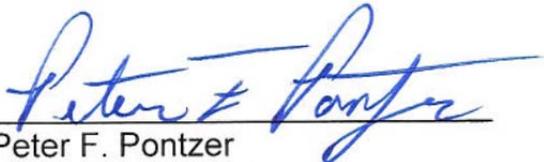
As opposed to the six-year statute of limitations in § 7103, the 90-day appeal period is jurisdictional. Section 7104 provides that “A contractor, within 90 days from the date of receipt of a contracting officer’s decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title.” 41

U.S.C. § 7104(a). Significantly, and lest there be any misunderstanding, section 7105(e) is labeled “Jurisdiction”. Section 7105(e)(1)(C) then refers directly to appeals. “Postal Service Board. – The Postal Service Board of Contract Appeals has **jurisdiction to decide any appeal from a decision of a contracting officer** of the United States Postal Service or the Postal Regulatory Commission relative to a contract made by either agency.” 41 U.S.C. § 7105(e)(1)(C)(emphasis added). We conclude that the 90-day period is jurisdictional and not subject to equitable tolling. See *Cosmic Constr.*, 697 F.2d at 1390-91; *Waterstone Env'tl. Hydrology and Eng'g*, ASBCA No. 57557, 12-1 BCA ¶ 35,028.

Finally, CBF argues that its January 13, 2014 notice of appeal challenging the termination with notice also should be construed to cover the subsequently issued July 18, 2014 contracting officer’s decision. However, the Federal Circuit has “long held that the jurisdictional standard must be applied to each claim, not an entire case; jurisdiction exists over those claims which satisfy the requirements . . . .” *K-Con Bldg. Sys., Inc. v. United States*, 2015 WL 570935, \*3 (Fed. Cir. 2015) (citing *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1281 (Fed. Cir. 1985) (“Congress did not intend the word ‘claim’ to mean the whole case between the contractor and the Government . . . .”)). Therefore, we cannot construe the January 14, 2014 notice of appeal to cover the contracting officer’s decision issued seven months later.

**CONCLUSION**

We grant the Postal Service's Motion to Dismiss for Lack of Jurisdiction. The appeal is dismissed.

  
Peter F. Pontzer  
Administrative Judge  
Board Member

I concur:

  
William A. Campbell  
Administrative Judge  
Chairman

I concur:

  
Gary E. Shapiro  
Administrative Judge  
Vice Chairman