



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED FOR LACK OF JURISDICTION: December 1, 2015

CBCA 5033

COBURN CONTRACTORS, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Jason S. Coburn, Managing Member of Coburn Contractors, LLC, Montgomery, AL, appearing for Appellant.

Laetitia C. Coleman, Office of General Counsel, Department of Veterans Affairs, Jackson, MS, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **DRUMMOND**.

**DANIELS**, Board Judge.

Coburn Contractors, LLC (Coburn) appealed a Department of Veterans Affairs (VA) contracting officer's decision which denied a claim in the amount of \$34,256.46. The claim had been made by Coburn under a contract for mechanical upgrades to buildings at the Tuskegee, Alabama, Veterans Affairs Medical Center. On the VA's uncontested motion, we dismiss the appeal for lack of jurisdiction because it was filed more than ninety days after the contractor's receipt of the decision.

### Background

The United States Postal Service delivered the decision to Coburn on Friday, July 17, 2015. Coburn filed its appeal on Monday, October 19, 2015. October 19 is the ninety-fourth day after July 17.

### Discussion

The Contract Disputes Act provides that a contractor may appeal a contracting officer's decision to an agency board of contract appeals "within 90 days from the date of receipt of [that] decision." 41 U.S.C. § 7104(a) (2012). We have held that the Act's deadline for appealing a decision has "been strictly construed by the Court of Appeals for the Federal Circuit because the authorization to make the filing is a waiver of sovereign immunity. Failure to file an appeal within the ninety-day deadline divests the Board of jurisdiction to consider the case on its merits." *Treasure Valley Forest Products v. Department of Agriculture*, CBCA 3604, 14-1 BCA ¶ 35,549, at 174,207 (citing *Systems Development Corp. v. McHugh*, 658 F.3d 1341 (Fed. Cir. 2011); *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982); and several Board decisions); *see also DekaTron Corp. v. Department of Labor*, CBCA 4444, 15-1 BCA ¶ 36,045, at 176,061.

In *Estes Brothers Construction Inc. v. Department of Transportation*, CBCA 4963, slip op. at 2 (Nov. 17, 2015), we recently said:

We recognize that within the past year, in *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320-22 (Fed. Cir. 2014), the Court of Appeals held that another deadline imposed by the Contract Disputes Act – for submitting a claim to the contracting officer – is not jurisdictional. The Court did not address in that decision whether established case law as to the deadline for filing an appeal with a board of contract appeals should be revisited. In the absence of a Court ruling on that matter, we continue to follow prior Court decisions that consider this deadline jurisdictional.

Even if the deadline were not jurisdictional, and consequently subject to equitable tolling, because Coburn chose not to respond to the VA's motion, we would dismiss the appeal because we have no basis for tolling the ninety-day limit.

As the VA maintains, because Coburn filed its appeal more than ninety days after it received the contracting officer's decision, the appeal must be dismissed for lack of jurisdiction.

We note, as we did in *Estes*, that our ruling does not preclude the contractor from challenging the contracting officer's decision in another forum: it may initiate an action directly in the United States Court of Federal Claims within twelve months of the date on which it received the decision. *See* 41 U.S.C. § 7104(b)(3).

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

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STEPHEN M. DANIELS  
Board Judge

We concur:

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ALLAN H. GOODMAN  
Board Judge

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JEROME M. DRUMMOND  
Board Judge