

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DISMISSED FOR LACK OF JURISDICTION: December 20, 2001

GSBCA 15702

MID-SOUTH METALS, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Nicholas G. Simonowich, President of Mid-South Metals, Inc., Greenville, NC, appearing for Appellant.

Michael D. Tully, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **WILLIAMS**.

DANIELS, Board Judge (Chairman).

Mid-South Metals, Inc. entered into a contract with the General Services Administration (GSA). On February 9, 2001, the GSA contracting officer issued a decision telling Mid-South that if it did not comply with the terms and conditions of the contract by February 16, the contract would be terminated. On October 16, 2001, Mid-South filed with this Board an appeal of the contracting officer's decision.¹

Upon receipt of the appeal, the Board ordered Mid-South to show cause why the case should not be dismissed for lack of jurisdiction as untimely filed. We directed Mid-South's attention to 41 U.S.C. § 606 (1994) and D. L. Woods Construction, Inc. v. General Services Administration, GSBCA 13882, 97-2 BCA ¶ 29,009 (1996).

In response, Mid-South alleges that it "continued to negotiate with the contracting officer long after the letter of February 9" and that it understood from the contracting

¹The notice of appeal was not received by the Board until November 29, 2001. Because the notice was postmarked on October 16, however, we consider that it was filed on that date. Rule 101(b)(5)(i) (48 CFR 6101.1(b)(5)(i) (2000)).

officer's decision that it could file an appeal "until February 9, 2001 [sic – presumably 2002]."

The contracting officer's decision concludes by telling Mid-South: "This is the final decision of the Contracting Officer. You may appeal this decision to the 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 Board of [C]ontract Appeals" The decision further informs the contractor that "instead of appealing to the Board of Contract Appeals you may bring an action directly in" the United States Court of Federal Claims "within 12 months of the date you receive this decision."

Section 606 of title 41, United States Code – referenced in both the contracting officer's decision and the Board's show cause order – states:

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

In D. L. Woods, we wrote:

Because the time limitation is part of a statute waiving sovereign immunity, it must be strictly construed. The Board may not consider personal circumstances or equity, or in any other way exercise discretion as to acceptance of an appeal filed later than the statutory deadline. We have no jurisdiction to hear such a case. Cosmic Construction Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982).

Mid-South's understanding of the amount of time in which it might file an appeal is incorrect. As the contracting officer's decision said, under the Contract Disputes Act of 1978, a decision may be appealed only within ninety days from the date of the contractor's receipt of that ruling. The Contract Disputes Act does allow a contractor to contest a contracting officer's decision within twelve months of the contractor's receipt of such a ruling – but only by bringing an action directly on the claim in the United States Court of Federal Claims, not by filing an appeal with a board of contract appeals. 41 U.S.C. § 609(a) (Supp. V 1999). The rule enunciated by the Court of Appeals in Cosmic Construction, most recently repeated by that court in D. L. Braughler Co. v. West, 127 F.3d 1476, 1480 (Fed. Cir. 1997), remains in force.

It may well be that as Mid-South effectively maintains, the contracting officer's decision it has appealed did not really decide anything. Because the time for appealing this particular decision has now passed, however, we lack the jurisdiction to address the issue. Mid-South's contention must remain for a tribunal with jurisdiction to evaluate. We note, though, that the decision in question did not actually terminate the contract. If the contracting officer has issued a separate termination decision, that decision could separately be appealed to us (provided that the appeal is filed in a timely fashion).

Decision

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

STEPHEN M. DANIELS
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

MARY ELLEN COSTER WILLIAMS
Board Judge