

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
 )  
AquaTerra Contracting, Inc. ) ASBCA Nos. 55134, 55135, 55136  
 ) 55137, 55138, 55139,  
 ) 55140, 55141, 55142,  
 ) 55143, 55144, 55145,  
 ) 55146, 55147, 55148  
 ) 55149, 55150  
 )  
Under Contract No. DACW29-03-C-0001 )

APPEARANCES FOR THE APPELLANT: James F. Butler III, Esq.  
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Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
Denise D. Frederick, Esq.  
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U.S. Army Engineer District,  
New Orleans

OPINION BY ADMINISTRATIVE JUDGE ROME ON GOVERNMENT'S  
MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellant, AquaTerra Contracting, Inc. (ATI), has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the alleged failure of the contracting officer (CO) to render a decision on, and thus deemed denial of, its certified "Comprehensive Claim," which covers numerous separate claim items for contract changes, delays and impacts, totaling about \$5 million (hereafter sometimes "claims"). In its answer to appellant's complaint, the government asserted that the Board lacks jurisdiction over these appeals on the ground that appellant filed them prematurely, prior to the date the CO set for issuance of his final decision on appellant's claims. The Board treated this allegation as a motion to dismiss and directed the parties to brief the issue. For the reasons that follow, we deny the motion.

## FINDINGS OF FACT FOR PURPOSES OF THE MOTION

On 21 October 2002 the U.S. Army Corps of Engineers (the Corps), New Orleans Area Office, awarded ATI the captioned contract for construction of a Hurricane Protection Project at Cousins Pumping Station Complex in Jefferson Parish, Louisiana (R4, tab 9). On 5 January 2005, ATI submitted its Comprehensive Claim, in the amount of \$4,253,886.28, to the CO (R4, tab 2). The included claims pertain, *inter alia*, to alleged unresolved contract changes, including unilateral no-cost, no-time modifications dating from April 2003 (R4, Vol. II). On 4 March 2005, the CO notified ATI that he would issue a final decision no later than 23 September 2005, a total of eight and one-half months after the contractor had submitted its claims (R4, tab 4).

By letter to the CO dated 7 March 2005, ATI submitted a certified addendum to its claims, seeking an additional \$218,951.76 for expenses pertaining to financing alleged additional and changed work under the contract (R4, tab 5). By letter to the CO dated 1 June 2005, ATI submitted a revision to its claimed impact costs, to include costs through contract completion, bringing ATI's total claimed amount to \$5,150,958.88 (R4, tab 6).

On 17 June 2005, the CO issued a final decision denying a different claim, filed by ATI on 13 December 2004 (certified on 14 January 2005), which had alleged that the Corps' contract modifications and changes (at issue in the instant claims) had caused excusable delays that should extend the contract completion date. ATI had sought release of liquidated damages withheld by the government and a contract time extension. On 17 August 2005, ATI appealed the denial to the Board, which docketed the appeal as ASBCA No. 55118. (*See* ASBCA No. 55118, R4, tab 3) On 1 September 2005, 22 days before the final decision deadline set by the CO on the claims in question here, ATI appealed to the Board from his alleged failure to issue a decision within a reasonable time. The contractor contended in its notice of appeal that the CO's decision denying its claim for remission of liquidated damages and for a contract time extension had effectively denied the instant claims, rendering pointless any request that the Board direct the CO to issue a decision on the claims.

The government has not submitted any sworn statement by the CO. Apart from his 4 March 2005 letter setting the period by which he would render a decision, the record does not contain any communication from the CO to appellant concerning its claims. To date, the CO has not issued a final decision on the claims.

## DISCUSSION

Under 41 U.S.C. § 605(c)(2)-(5), within 60 days of receipt of a certified claim exceeding \$100,000, a CO is either to issue a decision on the claim or to notify the contractor of the time by which the decision will issue. The decision time period is to be

reasonable, taking into account factors such as the claim's size and complexity and the adequacy of the support provided by the contractor. If there is undue delay, a contractor may ask the Board to direct the CO to issue a decision. Any failure by the CO to issue a decision within the required period will be deemed to be a decision denying the claim, authorizing an appeal. If an appeal is commenced without a prior decision by the CO, the Board, at its option, can stay proceedings to obtain a final decision.

The government contends that the CO notified ATI near the end of the initial 60-day period that his decision would issue no later than six and one-half months later; the decision period, totaling eight and one-half months, was reasonable because the claims are "rather complex and voluminous in both content and character" (gov't br. at 5); but ATI nonetheless appealed prematurely to the Board.\* Appellant counters that the decision time was unreasonable; the Corps was familiar with the matters in dispute commencing as early as three years ago; the CO effectively denied the current claims when he denied the contractor's claim for a time extension and remission of liquidated damages; the CO has not inquired of ATI about its claims since they were filed; and he still has not issued a final decision.

We agree with appellant. Not only had the CO denied related claims by the time appellant filed the instant appeals, but the time period set by the CO for deciding the current claims had nearly expired. It is now over five months past the CO's stated deadline. He has not issued a decision and has not communicated with appellant or the Board concerning any possibility of a decision. The amount of time that has passed without a decision is unreasonable. Under the circumstances, we have jurisdiction to entertain the appeals. *Dillingham/ABB-SUSA, a Joint Venture*, ASBCA Nos. 51195, 51197, 98-2 BCA ¶ 29,778; *accord Fru-Con Construction Corp.*, ASBCA No. 53544, 02-1 BCA ¶ 31,729.

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\* Some of the individual claims are in the amount of \$100,000 or less. In view of our result, we need not address them separately.

DECISION

The motion to dismiss is denied.

Dated: 13 March 2006

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CHERYL SCOTT ROME  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 55134, 55135, 55136, 55137, 55138, 55139, 55140, 55141, 55142, 55143, 55144, 55145, 55146, 55147, 55148, 55149, 55150, Appeals of AquaTerra Contracting, Inc., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals