

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Northrop Grumman Ship Systems, Inc.) ASBCA No. 55616
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Under Contract No. N00024-93-C-2205)

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OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON GOVERNMENT'S MOTION TO DISMISS

Appellant Northrop Grumman Ship Systems, Inc. (NGSS) appeals under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the contracting officer's deemed denial of its certified claim for costs of ship repair under the subject contract's Insurance clause. The Navy moves to dismiss for lack of jurisdiction, alleging that the appeal is premature because appellant did not ask the Board to direct the contracting officer to issue a decision and that appellant submitted an insurance claim, which is an administrative matter, not a contract claim covered by the CDA. Appellant opposes the motion. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On 20 November 1992 the Naval Sea Systems Command (NAVSEA) awarded the subject contract to Avondale Industries, Inc., Shipyards Division, for, *inter alia*, the design and construction of strategic sealift ships (R4, tab 1 at award page and 2). At least as of bilateral Modification No. P00059, which was effective 4 August 2003, the contractor had become Northrop Grumman Ship Systems, Inc. (Avondale Operations) (R4, tab 2; *see also* notice of appeal).

The contract incorporates by reference the Federal Acquisition Regulation (FAR) 52.233-1, DISPUTES (DEC 1991) and ALTERNATE I (DEC 1991) clauses (R4, tab 1 at 116).

The Disputes clause states that the contract is subject to the CDA and that, except as provided in the Act, all disputes arising under or relating to the contract are to be resolved under the clause (¶¶ (a), (b)). The clause further provides in part:

(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.

The contract contains the NAVSEA 5252.228-9105, INSURANCE-PROPERTY LOSS OR DAMAGE-LIABILITY TO THIRD PERSONS (FT) (JAN 1990) clause, which provides in part:

(a) The Contractor shall not, unless otherwise directed or approved in writing by the Department, carry or incur the expense of any insurance against any form of loss of or damage to the vessels or to the materials or equipment therefor to which the Government has acquired title or which have been furnished by the Government for installation by the Contractor. The Government assumes the risks of loss of and damage to the vessels and such materials and equipment which would have been assumed by the underwriters if the Contractor had procured and maintained throughout the term of this contract, on behalf of itself and the Government, insurance with respect to the vessels and such materials and equipment for full value against pre-keel and post-keel laying risks (i) under the forms of Marine Builders Risk (Navy Form-Syndicate) policy, including the rider attached to the “Free of Capture and Seizure” clause thereof, and War Damage policy, both as set forth in the pamphlet entitled “Standard Forms of Marine Builders Risk (Navy Form-Syndicate) and War Damage Insurance Policies referred to in Vessel Contracts to the Bureau of Ships,” dated 23 November 1942, or (ii) under any other policy forms which the Assistant Secretary of the Navy (R, D&A), Insurance Office shall determine were customarily carried or would have been customarily carried by the Contractor in the absence of the foregoing requirement that the Contractor not carry or incur the expense of insurance, . . .

. . . .

(e) In the event of loss of or damage to any of the vessels or any of the materials or equipment therefor which may result in a claim against the Government under the insurance requirements of this contract, the Contractor promptly shall notify the Contracting Officer of such loss or damages, and the Contracting Officer may, without prejudice to any other right of the Government, either:

(i) Order the Contractor to proceed with replacement or repair in which event the Contractor shall effect such replacement or repair. The Contractor shall submit to the Contracting Officer a request for reimbursement of the cost of such replacement or repair together with such supporting documentation as the Contracting Officer may reasonably require, and shall identify such request as being submitted under this insurance requirement. If the Government determines that the risk of such loss or damages is within the scope of the risks assumed by the Government under this requirement, the Government will reimburse the Contractor for the reasonable, allowable cost of such replacement or repair, plus a reasonable profit, less the deductible amount specified in paragraph (a) of this requirement. Payments by the Government to the Contractor under this insurance requirement are outside the scope of and shall not affect the pricing structure of the contract (firm fixed price or incentive type arrangement, as applicable), and are additional to the compensation otherwise payable to the Contractor under this contract; or

(ii) In the event the Contracting Officer decides that the loss or damage shall not be replaced or repaired,

(A) Modify the contract appropriately consistent with the reduced requirements reflected by the unreplaced or unrepaired loss or damage, or

(B) Terminate the construction of any part or all of the vessel(s) under the clause of this contract entitled "TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE)" (FAR 52.249-2).

(R4, tab 1 at 86, 88-89)

On 16 December 2003 NGSS sought \$1,058,174 under the quoted insurance clause for costs of repair of damage to a port aft strut bearing and propeller blade on the USNS BENAVIDEZ (T-AKR 306) said to have occurred during sea trials (R4, tab 7). By memorandum to NGSS dated 15 February 2005, the contracting officer denied that the clause covered the claimed damage (R4, tab 15). By letter dated 21 July 2005 NGSS submitted a properly certified claim in the amount of \$1,040,141 to the contracting officer under the CDA, citing the Insurance clause, and requested a contracting officer's final decision on the disputed insurance claim (R4, tab 16).

By letter of 13 June 2006 to the administrative contracting officer, NGSS stated that, following Hurricane Katrina, the contracting officer had informally requested an extension of time to respond to appellant's claim, and that it had not received a response to date. NGSS noted that more than 60 days had passed since it had submitted its claim and it had not received a final decision or notification of a time within which a decision would be made. It sought a final decision by 14 August 2006 stating that, otherwise, it would treat the lack of response as a deemed denial of its claim and would appeal. (App. resp., attach.; *see also* gov't reply, decl. of contracting officer John A. Kimener, ¶ 4)

On 9 October 2006 NGSS appealed to the Board, stating that the contracting officer had not issued a decision or notified it of the time by which one would issue. The Navy does not dispute this. Rather, the contracting officer declares that he is "prepared to issue a contracting officer's final decision within 30 days of receipt of any order to do so" (gov't reply, Kimener decl., ¶ 6).

DISCUSSION

The CDA provides that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). Within 60 days of receipt of a certified claim over \$100,000 a contracting officer is either to issue a decision, 41 U.S.C. § 605(c)(2)(A), or to notify the contractor of the time within which a decision will be issued, 41 U.S.C. § 605(c)(2)(B). A contractor "may request" the Board to direct a contracting officer to issue a decision in a specified period of time, as determined by the Board, in the event of undue delay on the part of the contracting officer. 41 U.S.C. § 605(c)(4). Any failure by the contracting officer to issue a decision on a contract claim within the period required is deemed to be a decision denying the claim and authorizes the commencement of an appeal. 41 U.S.C. § 605(c)(5). The Board has jurisdiction to decide any appeal from a decision of a contracting officer of the Department of the Navy on a claim relative to a contract made by the Department. 41 U.S.C. § 607(d).

In this case, the contracting officer neither issued a timely decision nor notified appellant when he would do so. The CDA does not require the contractor to ask the Board to direct the contracting officer to issue a decision before the contractor can appeal

from the deemed denial of its claim; it merely permits the contractor to do so, at its option. Appellant's appeal to the Board was proper and not premature.

Further, appellant's claim is based upon the contract's Insurance clause, under which the contractor can obtain monetary relief for losses covered under the clause or the contracting officer can act to modify or terminate the contract in whole or in part. Appellant's claim seeks the payment of money in a sum certain and will require that the Board interpret contract terms. The U.S. Court of Appeals for the Federal Circuit recently decided an appeal from a Board decision involving the same Insurance clause as here. *Winter v. Bath Iron Works Corp.*, 503 F.3d 1346 (Fed. Cir. 2007), *vacating Bath Iron Works Corp.*, ASBCA No. 54544, 06-1 BCA ¶ 33,158, *recons. granted in part*, 06-1 BCA ¶ 33,272. The Court vacated and remanded the decision in part, but did not question the Board's jurisdiction. *See also Braswell Shipyards, Inc.*, ASBCA No. 40610, 90-3 BCA ¶ 23,167 (interpreting contract's Insurance clause and denying claim thereunder).

We clearly have jurisdiction to entertain this appeal.

DECISION

The Navy's motion to dismiss is denied.

Dated: 25 January 2008

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

JACK DELMAN
Administrative Judge
Acting 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 No. 55616, Appeal of Northrop Grumman Ship Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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