

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Public Warehousing Company, K.S.C. ) ASBCA No. 56888  
 )  
Under Contract No. SPM300-05-D-3128 )

APPEARANCES FOR THE APPELLANT: Michael R. Charness, Esq.  
Bryan T. Bunting, Esq.  
Jamie F. Tabb, Esq.  
Vinson & Elkins LLP  
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.  
Associate General Counsel  
Defense Logistics Agency  
Fort Belvoir, VA  
  
Michael L. McGlinchey, Esq.  
Chief Trial Attorney  
Defense Supply Center,  
Philadelphia (DLA)

OPINION BY ADMINISTRATIVE JUDGE TING  
ON MOTION TO DISMISS

Defense Supply Center Philadelphia (DSCP or government), a field activity of the Defense Logistics Agency (DLA), awarded a contract to Public Warehousing Company, K.S.C. (PWC) to provide Prime Vendor subsistence services to military customers in Kuwait, Iraq and Jordan. In April 2009, PWC submitted a \$119 million claim to the contracting officer (CO) contending that it was entitled to withheld "Performance Based Distribution Fees" (PBDFs) for services performed under the contract. The CO's reply in late June 2009 stated that in view of the size and complexity of the claim and the ongoing Department of Justice (DOJ) investigation, she expected to issue a decision on or before 3 December 2009. PWC appealed under the "deemed denied" provision of the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(5), contending the 3 December 2009 date "is illusory because she [CO] also states that she cannot issue a final decision until the fraud investigation has been concluded" (mot., attach. 9). DSCP moves to dismiss PWC's appeal for lack of jurisdiction on the basis that the CO notified PWC of a specific date that a decision would be issued, and that the time she needed to issue her decision was reasonable.

## STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. DSCP is a field activity of the DLA. DSCP supports U.S. military personnel by providing them with food, clothing, textiles, medicine, medical equipment, and general and industrial equipment (mot. at 2, ¶ 1). PWC is a logistics company organized under the laws of Kuwait (*id.* ¶ 2).

2. On 7 July 2005 DSCP awarded Contract No. SPM300-05-D-3128 (PV2 Contract) to PWC effective 3 June 2005. The contract was a “prime vendor” (PV) subsistence contract to provide food to U.S. Military personnel and other authorized customers in Kuwait, Iraq and Jordan (mot., attach. 1). The contract has a base period plus three option periods. The base period and the third option period are for 18 months; the first and second option periods are for 12 months. (Mot., attach. 1 at 4) PWC began to perform under the PV2 Contract on 5 December 2005 (compl. ¶ 26). DSCP exercised all three options. Performance under the third option is continuing (mot. at 4, ¶ 7).

3. Under the PV2 Contract, PWC purchases and delivers food and beverages to specified U.S. and allied military facilities, and charges DSCP a “unit price” for each item delivered (mot., attach. 7, ex. 1 at 3). The unit price consists of the “delivered price” and the “distribution price.” The distribution price is also referred to as the “distribution fee” (*id.*; compl. ¶ 10).

4. For goods purchased from suppliers within the continental United States (CONUS), the “delivered price” is “the manufacturer/supplier’s actual invoice price (in U.S. currency) to deliver product to PWC’s CONUS distribution point.” For goods purchased from suppliers outside the continental United States (OCONUS), the “delivered price” is “the manufacturer/supplier’s actual invoice price (in U.S. currency) to deliver product to PWC’s OCONUS distribution point.” (*Id.*, compl. ¶ 11)

5. The “distribution price” or “distribution fee” is “a firm fixed price, offered as a dollar amount, which represents all elements of the unit price, other than the delivered price” (emphasis in original). The distribution fee therefore consists of general and administrative costs, overhead, profit, transportation costs, and other expenses. (*Id.*, compl. ¶ 12)

6. With respect to the distribution fee, the contract distinguishes between the “Performance Based Distribution Fees” and the “standard contract distribution fees” (mot., attach. 7, ex. 1 at 5; compl. ¶ 13). Distribution fees “negotiated for each category at the time of award,” are defined as “standard contract distribution fees” (mot., attach. 7, ex. 1 at 5, ¶ 2). The PBDFs are incorporated into the contract to incentivize the contractor to perform “at an optimal level and achieving customer satisfaction.” Thus, the “Performance Based Distribution Fees” clause (PBDF clause) of the contract provides

that “[t]he actual distribution fees paid...have the potential to be greater or lesser based on the performance of the vendor as measured by fill rate and current CPARS.” (*Id.*)

7. The “fill rate” is “the total number of cases shipped and accepted divided by the total number of cases ordered” (mot., attach. 7, ex. 1 at 5, ¶ 5). Thus, if the government ordered 100 cases of an item, and PWC delivers 95 cases, PWC’s fill rate for that item would be 95 percent (compl. ¶ 17).

8. “CPARS” refers to the “Contractor Performance Assessment Reporting System,” and an individual evaluation under the CPARS is called a “CPAR” for “Contract Performance Assessment Report.” Multiple evaluations are called “CPARS” (compl. ¶ 18). Relevant to the contract’s PBDF provisions, at the conclusion of each CPAR, the “Assessing Official” is to make a “recommendation” which states whether he or she would award the contract to the same contractor given what the Assessing Official knew of the contractor’s performance. The Assessing Official must state whether he or she “definitely would,” “probably would,” “might or might not,” “probably would not,” or “definitely would not” make an award to the contractor “given that [he or she] had the choice.” (*Id.* at ¶ 21)

9. The PBDF clause in the PV2 contract provides:

10. The following standards will be used by the Contracting Officer in evaluating the application of distribution fee increases/decreases:

**Excellent** – (Vendor receives distribution fees increased by 5% for the period) Vendor’s fill rate after excepted date is 97.51% or higher and CPARS rating is “would definitely,” award to the vendor today given that I had the choice.

**Good** – (Vendor receives standard fees for the period) Vendor’s fill rate after excepted date is 96.50% or higher and CPARS rating is “would definitely,” award to this vendor today given that I had the choice.

**Fair** – (Vendor receives distribution fees decreased by 5% for the period) Vendor’s fill rate after excepted data is 96.50% or less or CPARS rating is “probably would not,” award to this vendor today given that I had the choice.

**Poor** – (Vendor receives distribution fees decreased by 10% for the period. Repetitive “poor” ratings should be viewed as a red flag.) Vendor’s fill rate after excepted data is less than

96.5% and CPARS rating is “probably would not” or “would not,” award to this vendor today given that I had the choice.

(Mot., attach. 7, ex. 1 at 6)

10. The PBDF clause also provides:

PWC’s performance will be reviewed/evaluated every six (6) months. Evaluations are anticipated to include (but are not limited to) the following:

- ACO/COR Reports
- DCMA Reports
- Customer Satisfaction Surveys
- Food Audit Reports
- CPAR Data
- Fill Rates
- NIS Reports
- Rejection Reports
- Recalls (proper notification/action taken)

**NOTE:** These Performance indicators are listed in descending order of importance.

(Mot., attach. 7, ex. 1 at 7) In its complaint, PWC alleges that the foregoing “additional nine-criteria evaluation scheme was added to the Contract, but did not appear in the RFP (which was incorporated into the Contract by reference)” (compl. ¶ 33). PWC maintains that “[t]he additional paragraph does not alter the standards by which the Contracting Officer is required to award the PBDF.... Rather, the additional paragraph only states that DSCP would conduct a bi-annual review that could include seven other non-exclusive factors in addition to the fill rate and the CPAR” (*id.* ¶ 34)<sup>1</sup>.

11. The PBDF clause provides the following with respect to adjustments of distribution fees:

4. Upon performing a six-month review subsequent to the completion of implementation, and again every six months thereafter, the contracting officer may determine to either maintain the standard distribution fees, or to invoke a

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<sup>1</sup> We do not decide here whether DSCP is contractually entitled to use all nine or more criteria in determining PWC’s PBDF. We note only if DSCP were to use the nine or more criteria, PBDF determination could be a complex process involving evaluation of numerous reports, surveys, and data.

distribution fee increase or decrease for the subsequent period. Increases/decreases will not be compounded but will always be referenced to the standard fee.... After six months of receiving an adjustment, the vendor will return to the standard fees unless/until notified by the Contracting Officer of any future 6 month adjustments.

(Mot., attach. 7, ex. 1 at 5)

12. By letter dated 27 April 2009, PWC submitted a certified claim to the contracting officer, Linda L. Ford (CO Ford). The claim sought \$119,853,882.61 as withheld PBDFs to which PWC contended it was entitled<sup>2</sup>. PWC requested “a final decision on this claim within 60 days.” In support of its claim, PWC alleged that, contrary to the requirements of the PV2 Contract, DSCP “has never performed any review of PWC’s performance for the purpose of awarding a PBDF.” According to PWC, had DSCP fulfilled its contractual obligations, “it would have had to conclude that PWC is entitled to receive a PBDF increase for the entire period of performance,” and “[t]he amount of the unpaid PBDF increase accrued through December 31, 2008 is \$119,853,882.61.” PWC acknowledged that DSCP did perform an evaluation for the period December 2005 through May 2006 as reflected in a document entitled “Determination and Findings (D&F),” but contended that this D&F was not a CPAR evaluation because it used evaluation criteria not in the RFP but used criteria added when DSCP awarded the PV2 contract. (Mot., attach. 7 at 1-2)

13. PWC’s claim also charged that “DSCP has ulterior motives for its failure to issue CPARs under the present Contract.” PWC pointed out that before being awarded the PV2 Contract, it was the incumbent on two prior PV contracts referred to as the “PV1 Contract” (SPO300-03-D-3061) and the “PV Bridge Contract” (SPM300-05-D-3119). According to PWC, under the PV1 Contract, DSCP “timely fulfilled its obligations, issuing two CPARs,” one on 29 November 2004 and the second on 18 July 2005, and “[u]nder both of these CPARs, the Assessing Official stated that he or she “definitely would award to [PWC] today given that I had a choice” (emphasis in claim letter). The PV1 Contract, however, had no provision for a PBDF, and PWC did not receive a fee increase. (Mot., attach. 7, claim at 6-7)

14. Also, according to PWC’s claim letter, performance under the PV Bridge Contract was less than a year, and by the time DSCP issued its CPAR, DOJ had initiated its investigation. PWC asserted that based on that investigation, the Assessing Official concluded that she “might or might not award to [PWC] today given I had a choice.”

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<sup>2</sup> Exhibit 10 of Attachment 7 of the government’s motion contains a month-by-month breakout of PWC’s claim for the period running from December 2005 through December 2008.

Unhappy with this CPAR rating, PWC brought suit in the United States Court of Federal Claims and obtained a Temporary Restraining Order enjoining DSCP from basing its evaluation on the basis of the DOJ investigation. The parties subsequently reached a settlement under which DSCP agreed to reassess PWC's performance based on the DoD-mandated criteria, and not on the basis of the DOJ investigation. According to PWC, "DSCP reissued the PV Bridge CPAR, explicitly disclaiming that it considered the DOJ investigation as a part of the assessment," and concluded that she "probably would award to [PWC] today given that I had a choice." Against this background, PWC's claim letter asserted "Now with the DOJ investigation on-going and over three years into performance of the current Contract, DSCP has failed to issue any CPAR. Consequently, DSCP appears to be continuing to intentionally and improperly delay issuance of a CPAR based only on the existence of the investigation." (Mot., attach. 7, claim at 7-8) PWC's claim asserted that by failing to evaluate PWC for purposes of awarding a PBDF in accordance with the terms of the PV2 Contract, DSCP has breached its implied duty to cooperate, and breached the contract (*id.* at 8-9).

15. CO Ford acknowledged receipt of PWC's claim in her letter dated 26 June 2009. The letter acknowledged that determination of whether PWC should receive PBDFs required an evaluation under the CPARS for each period and that "no CPARS ratings have been provided concerning PWC's performance under the contract." The letter continued:

As you are aware, there is an on-going fraud investigation being conducted by the Department of Justice concerning this contract. I understand there is credible and significant evidence that DOJ is investigating that indicates PWC has been engaged in a systematic and continuous course of conduct during the entire performance of contract SPM300-05-D-3128 that has resulted in PWC defrauding the Government of potentially hundreds of millions of dollars[.] If these allegations are substantiated, and PWC has in fact engaged in fraud over the course of the contract, this would impact on any performance evaluation of PWC[.] A determination that a contractor has engaged in significant fraud on a contract would be an important factor that any reasonable and prudent contracting officer would consider in evaluating contractor performance.

Hence, because the fraud investigation is on-going and I have not been made privy to all the evidence and facts that have been developed by DOJ thus far, there is insufficient information available to me at this time to evaluate PWC's performance under the contract. Hence, no determination

concerning your claim can be made at this time. Once the facts from the DOJ fraud investigation have been determined, PWC's performance dating back to the start of the contract will be evaluated and a decision made concerning performance fees. Given the extensive nature of the fraud investigation (I understand it involves numerous investigators, auditor, and attorneys, large volumes of documents, and many witness) which is still on-going, it will take some time before I am able to determine if PWC has committed fraud on the contract and what impact that will have on its performance evaluations. I have also been working on evaluating PWC's performance on matters unrelated to the fraud investigation. Given the multi-billion dollar nature of the contract and its complexity, that information by itself takes considerable time to obtain and review. Based on the discussion above, I expect to issue a final decision on the claim on or before Thursday, December 3, 2009.

(Mot., attach. 8)

16. By notice dated 23 July 2009, PWC appealed the "deemed denial of its claim" stating:

PWC timely and properly submitted its certified claim to DSCP's Contracting Officer, Linda Ford, on April 27, 2009.... By letter dated June 26, 2009...the Contracting Officer informed PWC's counsel that she cannot issue a Contractor Performance Assessment Report, a prerequisite to determining PWC's entitlement to the PBDF, until the conclusion of an ongoing fraud investigation by the Department of Justice that was initiated in 2005 and that has no end in sight. She therefore would not issue a Final Decision on the Claim within 60 days.

(Mot., attach. 9) PWC's notice of appeal contends that even though CO Ford said that she "expect[s]" to issue a decision on or before December 3, 2009, that date is illusory because she also states she cannot issue a final decision until the fraud investigation has been concluded." PWC argues "it is clear that she will not issue a Contractor Performance Assessment Report and, therefore, not make a determination regarding PWC's claim for PBDF for an indefinite period long into the future." PWC contends that its claim should be considered deemed denied notwithstanding CO Ford's plans to "issue a final decision on December 3, 2009 or some indefinite time thereafter" because "it is

clear that the Contracting Officer has no intention to issue a final decision within a ‘reasonable time.’” (*Id.*)

### DECISION

In moving to dismiss for lack of jurisdiction, the government points to what the CO said: “I expect to issue a final decision on or before Thursday, December 3, 2009” (mot. at 10). The government argues that the CO’s letter “clearly pinpointed a particular date within which a decision would be issued, and hence complied with 41 U.S.C. § 605(c)(2)(B)” (mot. at 11). Having pinpointed a specific date – 3 December 2009 – on which the CO expected to issue her decision, the government contends that this “additional five months and one week” (from the CO’s 26 June 2009 letter) is reasonable in light of the size (\$119.4 million) and complexity (covering three years of contract performance) of the claim, and the fact she “will have to work with the DOJ attorneys or investigators to determine if in fact PWC has committed fraud on the contract” (mot. at 12-13). While acknowledging that the CO said she “expects” to issue a decision on 3 December 2009, PWC contends in response that the date “is purely illusory” because the CO also indicated that she cannot issue a decision while the DOJ continues its four-year investigation (app. resp. at 1).

This appeal is subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. When a CO receives a certified claim of over \$100,000, the CDA requires him or her to (a) issue a decision within sixty days of receipt of the claim, or (b) notify the contractor within sixty days of receipt of the claim “of the time within which a decision will be issued.” 41 U.S.C. § 605(c)(2)(A), (B). In the event the CO fails to issue a decision on the claim “within the period required,” such failure would be “deemed to be a decision by the contracting officer denying the claim,” and would “authorize the commencement of the appeal or suit on the claim.” 41 U.S.C. § 605(c)(5). In addition, the CDA requires that a CO decision on submitted claims “be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.” 41 U.S.C. § 605(c)(3).

Court and board decisions have interpreted 41 U.S.C. § 605(c)(2)(B) to require the CO to provide a fixed date or date certain on which a decision will be issued. *Cubic Defense Applications, Inc.*, ASBCA No. 56097, 07-2 BCA ¶ 33,695 at 166,790 (holding the CO’s statement that the government “intends to respond approximately December 14, 2007” did not comply with 41 U.S.C. § 605(c)(2)(B)); *Defense Systems Company, Inc.*, ASBCA No. 50534, 97-2 BCA ¶ 28,981 (government motion to dismiss for lack of jurisdiction granted because CO notified contractor that his decision “will be issued on or before July 11, 1997.”); *Aerojet General Corporation*, ASBCA No. 48136, 95-1 BCA ¶ 27,470 (government motion to dismiss denied because CO’s notice that a decision would be issued in the early March 1995 time frame contingent upon the contractor’s

cooperation failed to provide a specific time); *Boeing Co. v. United States*, 26 Cl. Ct. 257, 259 (1992) (“That a fixed date is required is clear from the tolling provision.”).

### I. Did the CO Provide a Date Certain on Which to Issue a Decision?

Reading CO Ford’s 26 June 2009 letter, it appears to us that the qualifications regarding the DOJ investigation are offered as reasons a decision cannot be issued “at this time” and as reasons it will take five months and a week to issue a decision. We do not consider these qualifications as making the 3 December 2009 date “illusory.” Indeed, the last sentence in the letter as quoted above states “Based on the discussion above, I expect to issue a final decision on the claim on or before Thursday, December 3, 2009” (SOF ¶ 15). We find nothing equivocal in this last sentence. The CO set a specific date based on consideration of, among other things, the time needed to evaluate the fraud charges which she described in the preceding sentences of the paragraph.

Because we read CO Ford’s statement that she expects to issue her final decision on or before Thursday, 3 December 2009 as unequivocal, we conclude, it does meet the requirement of 41 U.S.C. § 605(c)(2)(B).

### II. Was the Time the CO Required to Issue a Decision Reasonable?

Whether the time a CO needs to issue a decision is reasonable must be determined on a case by case basis. *Eaton Contract Services, Inc.*, ASBCA Nos. 52686, 52796, 00-2 BCA ¶ 31,039 (finding eight months reasonable given the volume of documentation, number of issues and time needed to gather information due to relocation of personnel); *Defense Systems Company, Inc.*, ASBCA No. 50534, 97-2 BCA ¶ 28,981 (finding nine months reasonable when claimed amount exceeded \$71 million and narrative portion of the claim alone exceeded 162 pages); *Dillingham/ABB-SUSA, a Joint Venture*, ASBCA Nos. 51195, 51197, 98-2 BCA ¶ 29,778 (finding 14-16 month unreasonable for a small construction claim and an impact claim that had been extensively analyzed and audited).

PWC began performance on the PV2 Contract in December 2005, over three years ago (SOF ¶ 2). For purposes of adjusting fees under the PBDF clause, the government was supposed to review PWC’s performance every six months (SOF ¶ 11). The government has issued no CPARS ratings (SOF ¶ 15). Thus, in addition to the size of the claim (\$119 million), CO Ford is left with having to go back and conduct three years’ worth of CPAR and PBDF evaluations that should have been done during the course of the contract. Under the circumstances, we conclude that taking five months (from 26 June 2009) to issue her decision on or before 3 December 2009 is reasonable under 41 U.S.C. § 605(c)(3).

CONCLUSION

Because the CO committed to issuing a decision on DWC’s claim on a specific date – 3 December 2009, and that date is reasonable, we dismiss the appeal for lack of jurisdiction.

Dated: 25 September 2009

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PETER D. TING  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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MONROE E. FREEMAN, JR.  
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. 56888, Appeal of Public Warehousing Company, K.S.C., rendered in conformance with the Board's Charter.

Dated:

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