

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Metag Insaat Ticaret A.S. ) ASBCA No. 58616  
 )  
Under Contract No. W912ER-10-C-0027 )

APPEARANCES FOR THE APPELLANT: Thomas J. Fraser, Jr., Esq.  
Ivania Perez, Esq.  
Reznicsek, Fraser, White & Shaffer, P.A.  
Jacksonville, FL

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
James D. Stephens, Esq.  
Engineer Trial Attorney  
Tania Wang, Esq.  
Assistant District Counsel  
U.S. Army Engineer District, Middle East  
Winchester, VA

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

The government moves to dismiss this appeal for lack of jurisdiction as premature because when the appeal was filed the contracting officer (CO) had not yet issued a final decision on appellant's claim and fewer than 60 days had elapsed between appellant's submission of the claim and the filing of the appeal. As of the date of the government's motion, roughly 176 days had elapsed since submission of the claim and the CO still had not issued a decision. We conclude that we have jurisdiction, and we deny the government's motion to dismiss.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 19 April 2010, the United States Army Corps of Engineers (the government) awarded Contract No. W912ER-10-C-0027 (the contract) to Metag Insaat Ticaret, A.S. (appellant) at a price of \$24,200,000 for the design and construction of three storage warehouses and a vehicle maintenance facility at Bagram Air Field, Afghanistan (R4, tabs 11, 12).

2. The contract incorporates by reference FAR 52.233-1, DISPUTES (JUL 2002) (R4, tab 10 at 42 of 126), which defines "claim" at paragraph (c) as:

[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.

3. The procedures for evaluating the appellant's contractual performance are identified in the contract at part "N" of section 00800, "CONTRACTOR PERFORMANCE EVALUATIONS," which states:

In accordance with the provisions of Subpart [sic] 36.201 (Evaluation of Contractor Performance) of the Federal Acquisition Regulation (FAR), construction Contractor's performance shall be evaluated throughout the performance of the contract.... For Construction Contracts awarded at or above \$100,000.00, the USACE will evaluate Contractor's performance and prepare a performance report using the Construction Contractor Appraisal Support System (CCASS)....

(R4, tab 12 at 73 of 84) The Construction Contractor Appraisal Support System (CCASS) "provides procedures for systematically assessing contractor performance as required by FAR Part 42," including accurate and timely performance reviews to ensure the performance of construction contractors is evaluated "fairly and objectively." Department of Defense, *CCASS Policy Manual 1-2 (2010)*, available at [http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/Topical/Past\\_Performance/guides/ccasspolicy\\_manual\\_2010.pdf](http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/Topical/Past_Performance/guides/ccasspolicy_manual_2010.pdf).

4. The CO issued to appellant a "final" performance evaluation dated 18 October 2012. The CO rated appellant's performance as "MARGINAL" or "UNSATISFACTORY" on 11 of the 33 listed performance elements and gave appellant an overall rating of "MARGINAL." Appellant provided a detailed written response to the CO's position and stated that it did not concur with the evaluation. On 25 November 2012, the government's performance evaluation reviewer entered his concurrence with the CO's evaluation. (R4, tab 88 at 1, 6)

5. By claim letter dated 19 February 2013, appellant requested the CO to issue a CO's final decision pursuant to 41 U.S.C. § 7103(1) on the 25 November 2012 performance evaluation, seeking reconsideration of that evaluation. Appellant stated that, based upon various project occurrences described in its claim letter, the government's performance evaluation was "neither fair nor accurate." Appellant requested the CO to issue an overall above-average performance evaluation. Appellant did not request a monetary adjustment to the contract, and did not request a decision within a specific time frame. (R4, tab 89 at 1, 5)

6. The CO responded to appellant's claim by letter dated 19 February 2013. This letter was not identified as a decision under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, nor did it advise appellant of its appeal rights under the CDA. In the letter the CO informed the appellant that its performance was "still being evaluated based on continued problems with correction of punchlist items and warranty response," and cited to letters and emails sent to the appellant that indicated that various performance elements were "Presently...considered Unsatisfactory." The CO concluded: "Please work to improve this unsatisfactory performance." (R4, tab 77)

7. On 10 April 2013, the appellant filed a notice of appeal with the Board asserting that the CO had failed to issue a final decision within a reasonable time. This appeal was dated about 51 days after submitting its claim to the CO. On 14 August 2013, the government moved to dismiss the appeal for lack of jurisdiction, alleging the appeal was premature. As far as the record shows, no CO decision was issued by the date of the government's motion, roughly 176 days after submission of the claim.

#### DECISION

Under the CDA, a CO's decision on a claim or a CO's failure to timely issue a decision is a prerequisite to the Board's jurisdiction. *Madison Lawrence, Inc.*, ASBCA No. 56551, 09-2 BCA ¶ 34,235 at 169,206 (citing to *Paragon Energy Corp. v. United States*, 645 F.2d 966, 967 (Ct. Cl. 1981)); *Birkart Globistics AG*, ASBCA No. 53458 *et al.*, 06-1 BCA ¶ 33,138 at 164,227. For claims of \$100,000 or less, the CO must issue a decision within 60 days after receiving a written request from the contractor that a decision be rendered within that period. 41 U.S.C. § 7103(f)(1). For certified claims in excess of \$100,000, the CO must issue a decision within 60 days or else "notify the contractor of the time within which a decision will be issued." 41 U.S.C. § 7103(f)(2)(B). For all claims, however, the CO's decision must be issued within a reasonable amount of time from receipt of the claim, "taking into account such factors as the size and complexity of the claim and the adequacy of information in support of the claim provided by the contractor." 41 U.S.C. § 7103(f)(3).

The CDA does not define the term "claim," so in order to assess whether an action amounts to a claim we look to the regulations implementing the CDA, the language of the contract in dispute, and the facts of the case. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995); *Garrett v. General Elec. Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993). According to FAR 2.101 and the contract's Disputes clause, a "claim" is "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.*" (Emphasis added) The Board has held that a performance evaluation dispute may constitute a CDA claim where it seeks the interpretation of contract terms and relief arising under or relating to the

contract. See *Sundt Construction, Inc.*, ASBCA No. 56293, 09-1 BCA ¶ 34,084 at 168,518; *Versar, Inc.*, ASBCA No. 56857, 10-1 BCA ¶ 34,437 at 169,959; *Colonna's Shipyard, Inc.*, ASBCA No. 56940, 10-2 BCA ¶ 34,494 at 170,140. Such is the case here. The contract's Contractor Performance Evaluations clause, which incorporates FAR subpart 42.15 by its reference to FAR section 36.201 and the CCASS procedures, requires fair, accurate, and objective evaluation of the contractor's performance (SOF ¶ 3). Appellant's 19 February 2013 claim letter questions the correctness of the CO's actions based upon the express and incorporated terms of the contract and seeks relief with respect thereto (SOF ¶ 5).

We need not decide, however, whether the government's 19 February 2013 response to appellant's claim constitutes an appealable CO decision under the CDA for purposes of our jurisdiction. Assuming *arguendo* it was not, we retain jurisdiction on other grounds.

The question we address is whether the contractor provided the CO a reasonable period of time to issue a decision prior to taking its appeal, taking into account the size and complexity of the claim and the adequacy of the supporting information. 41 U.S.C. §§ 7103(f)(1), (f)(3); FAR 33.211(c)(1). It is true that appellant filed its appeal only about 51 days from the CO's receipt of the claim. However roughly 176 days elapsed between the date of claim submission and the government's motion, and the CO still had not filed a CO decision as requested by appellant. Indeed the government has not indicated to us that such a decision has been filed to date.

We find this extended passage of time without a CO decision to be unreasonable given the nature of the claim, and supports an appeal on a deemed denial basis. The government was aware of appellant's objections to the adverse performance rating even before the claim was filed. The CO was able to respond promptly, by letter dated the very same day as the claim, that appellant's performance was "Presently...considered Unsatisfactory" and appellant should "work to improve this unsatisfactory performance" (SOF ¶ 6). As we have stated: "[W]hen at the time we consider a motion to dismiss, an unreasonable period of time has elapsed, no useful purpose would be served by dismissing an appeal and requiring appellant to refile." *Fru-Con Construction Corp.*, ASBCA No. 53544, 02-1 BCA ¶ 31,729 at 156,757.

Thus, assuming *arguendo* that 51 days was not a reasonable amount of time to issue a CO decision here, the CO has now had a reasonable amount of time to do so and has failed to do so, supporting an appeal to this Board on a deemed denial basis. As we have stated under similar circumstances: "Dismissal, followed by the taking of a new appeal, and then redocketing, would be inefficient and an elevation of form over substance." *Cessna Aircraft Company*, ASBCA No. 43196, 92-1 BCA ¶ 24,425 at 121,909. Therefore, we retain jurisdiction.

CONCLUSION

The government's motion to dismiss the appeal for lack of jurisdiction as premature is denied.

Dated: 4 November 2013



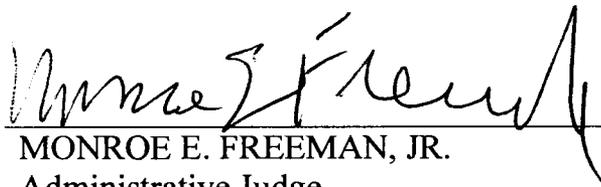
JACK DELMAN  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



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. 58616, Appeal of Metag Insaat Ticaret A.S., rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals