ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Fru-Con Construction Corp.	)	ASBCA No. 53544
	)	
Under Contract No. DACW69-93-C-0022	)	

APPEARANCES FOR THE APPELLANT: Sara B. Farabow, Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
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U.S. Army Corps of Engineers,
Huntington District

OPINION BY ADMINISTRATIVE JUDGE STEMPLER
ON THE GOVERNMENT' S MOTION TO DISMISS

The Government moves to dismiss this appeal for lack of jurisdiction, alleging it was prematurely filed. We deny the motion for the reasons discussed *infra*.

FINDINGS OF FACT
FOR PURPOSES OF THE MOTION

1. In June 1993, the U.S. Army Corps of Engineers (Corps or Government) awarded Contract No. DACW69-93-C-0022 (contract) to Fru-Con Construction Corp. (Fru-Con or appellant) at a price of $35,582,600. The contract called for Fru-Con to rehabilitate and refurbish a dam on the Ohio River near Hogsett, West Virginia. Fru-Con subcontracted a portion of the work to Noell, Inc. (Noell). (Complaint at ¶¶ 4-5; affidavit of contracting officer JoAnna Black at ¶¶ 2-3)

2. Appellant maintains that, during the course of the project, actions by the Corps increased the time and cost required to complete performance (complaint, *passim*). On 28 December 2000, Fru-Con, on behalf of itself and Noell, submitted to the Corps a certified Request for Equitable Adjustment (REA) seeking $7,699,671 and a 733-day time extension (Black aff. at ¶ 4). Fru-Con stated that its REA was submitted for purposes of

negotiation and did not at that time constitute a formal claim under the Contract Disputes Act of 1978 (CDA), as amended, 41 U.S.C. §§ 601-613 (app. opp. mot. at ex. 5).

3. It is undisputed that Fru-Con in 1996 submitted to the Corps an REA alleging substantially similar issues to those raised in the December 2000 REA (Black aff. at ¶¶ 5, 11; NOA at ex. 2). Representatives of the Corps, Fru-Con, and Noell discussed the earlier REA at subsequent negotiating sessions, but no agreement was ever reached (app. opp. mot. at exs. 3, 5; NOA at ex. 3). According to Fru-Con, the December 2000 REA is more comprehensive than the earlier REA and "incorporates changes based on the Corps' various comments and questions raised in the previous negotiations" (app. opp. mot. at ex. 5).

4. By letter dated 5 March 2001, counsel for the Corps wrote Fru-Con concerning the efficacy of the December 2000 REA with respect to future negotiations. His letter stated that the December 2000 REA "could not have reasonably been intended to further negotiation" because it merely "tell[s] the Corps what it already knew" and "is essentially the same as the previous REA. No new theory or concept was proffered. It essentially restates Noell's position prior to the parties' last negotiation meeting." (App. opp. mot. at ex. 3) Shortly thereafter, the contracting officer's representative (COR) wrote Fru-Con to report that he had performed a "cursory review" of the December 2000 REA and found "nothing new in your position" and no merit to the allegations (app. opp. mot. at ex. 2; Black aff. at ¶ 6). The COR's letter referred Fru-Con to the contracting officer in the event that it disagreed with his position. On 16 May 2001, Corps counsel further notified Fru-Con that "[t]he revised REA has been reviewed completely and has been rejected" (app. opp. mot. at ex. 6).

5. By letter of 24 May 2001, Fru-Con requested that the contracting officer issue a final decision on its December 2000 REA (Black aff. at ¶ 8; NOA at ex. 1).[*] The Corps responded by asking Fru-Con to produce additional documentation in support of its claim (app. opp. mot. at ex. 7; Black aff. at ¶ 9). Fru-Con provided some, but not all, of the requested material (NOA at ex. 2; app. opp. mot. at ex. 8; Black aff. at ¶¶ 10, 17-18, 24).

6. On 16 July 2001, the contracting officer advised Fru-Con that she would issue a final decision on the claim by 28 June 2002 (NOA at ex. 2; Black aff. at ¶ 13). According to the contracting officer, this deadline was chosen after considering the complexity of the claim and the magnitude of supporting documentation (Black aff. at ¶¶ 21-23). Other factors relevant to her decision were Fru-Con's failure to provide all requested documents,

[*] We note that Fru-Con did not provide a claim certification with its 24 May 2001 letter. However, since Fru-Con merely adopted its previously-certified REA as its claim, no new certification was required. *D.L. Braughler Co., Inc. v. West*, 127 F.3d 1476, 1483 (Fed. Cir. 1997); *HKH Capitol Hotel Corp.*, ASBCA No. 47575, 98-1 BCA ¶ 29,548 at 146,472.

a shortage of Corps attorneys to assist with the review, and participation by members of her staff in disaster relief efforts in southern West Virginia during July and August 2001 (Black aff. at ¶¶ 24-28).

7. Fru-Con objected that 28 June 2002 was an unreasonably long time for the contracting officer to issue a final decision (NOA at ex. 3; Black aff. at ¶ 14). According to Fru-Con, the claim is not voluminous, consisting only of a 28-page narrative, a 54-page cost impact analysis, and a one-volume appendix. In response, the contracting officer agreed to advance the due date for a final decision to 15 April 2002, but reserved the right to request reinstatement of the original due date in the event that the new date was contested (NOA at ex. 4; Black aff. at ¶ 15).

8. On 19 September 2001, Fru-Con appealed to this Board, contending that the contracting officer's failure to issue a final decision within a reasonable period of time constituted a deemed denial of its claim. The Corps moved to dismiss for lack of jurisdiction on the ground that the appeal is premature. The Corps further asks that we reestablish the 28 June 2002 deadline for issuance of a final decision.

DECISION

Under the CDA, the contracting officer must, within 60 days from receipt of a claim, issue a final decision on claims exceeding $100,000, or "notify the contractor of the time within which a decision will be issued." 41 U.S.C. § 605(c)(2). Decisions must be issued within a "reasonable time" of receipt, "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). In the event that the contracting officer fails to issue a decision within the time permitted by law, the claim may be deemed to have been denied, and the contractor may pursue an appeal notwithstanding the absence of a final decision. 41 U.S.C. § 605(c)(5); FAR 33.211(g).

Here, on 24 May 2001, appellant submitted a claim exceeding $100,000 to the contracting officer (findings 2, 5). The Corps did not issue a final decision on the claim, but instead timely advised that a decision would be forthcoming by 28 June 2002 (findings 5, 6). At appellant's request, the Corps amended the deadline to 15 April 2002 (although it now seeks to reinstate the original timetable) (finding 7). There is no indication that the claim is defective in any respect, or that the Corps does not comprehend the basis and amount of the claim.

The CDA authorizes appellant to deem its claim denied and to appeal it when the contracting officer fails to issue a decision on the claim within the time required by the CDA (41 U.S.C. § 605(c)(5)). It is this mechanism that appellant has chosen to bring this matter before us. Appellant did not choose to file a petition pursuant to 41 U.S.C. § 605(c)(4) and Board Rule 1(e) which authorize us to direct the contracting officer to

issue a decision in a specified period of time in the event we determine that there has been undue delay by the contracting officer in issuing a decision. Therefore, our inquiry here is whether or not at the time of the appeal, the contracting officer had exceeded the reasonable time permitted by 41 U.S.C. § 605(c)(3), and not whether the date the contracting officer set for the issuance of the decision is reasonable.

As noted *supra*, the contracting officer was required to issue a decision within a reasonable time from receipt of the claim. Appellant converted its REA to a claim with its 24 May 2001 request for a decision. Appellant then appealed on 19 September 2001, less than four months after the filing of its claim. On a matter of this size and complexity, four months is an unreasonable period of time for a contracting officer to issue a decision.

However, our inquiry does not end there. We have held that when 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. In those circumstances, we will retain jurisdiction. *E.g., Dillingham/ABB-SUSA, a Joint Venture*, ASBCA Nos. 51195, 51197, 98-2 BCA ¶ 29,778. While we consider less than 4 months to have been unreasonable, there has now passed almost 7-1/2 months and no decision has been issued (nor does the Government intend to issue one until either April or June 2002). Given the Government's extensive history involving appellant's previously filed REA concerning the same matter, and its statements relating to its review of the REA (*see* findings 2-4), we consider that a reasonable period for issuance of the decision has passed.

The Corps' attempt to justify its 28 June 2002 deadline on grounds that (1) the Corps is faced with a shortage of attorneys to assist with the review; (2) Fru-Con failed to produce all relevant documents to support its claim; and (3) Fru-Con's REA was not converted into a formal claim until 24 May 2001 are not persuasive (findings 5, 6). The purported scarcity of attorneys is a matter wholly and exclusively within the control of the Corps, and in any event it is the contracting officer, not counsel, who is charged with preparing the final decision. Fru-Con's reported failure to produce additional documentation may make it more difficult for the contracting officer to evaluate the merits of the claim, but the Federal Circuit has made clear that a valid claim need not be accompanied by additional supporting documentation or detailed evidence of the alleged operative facts. *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). Thus, if the contracting officer believed Fru-Con's claim to be inadequately documented, her "most effective response would have been simply to issue an adverse final decision" denying the claim for lack of proof. *Harbert Int'l, Inc.*, ASBCA No. 44873, 97-2 BCA ¶ 29,234 at 145,432, *aff'g on recons.* 97-1 BCA ¶ 28,719. Lastly, we reject the Corps' suggestion that a "reasonable" evaluation period can only be measured from 24 May 2001, because the REA was not a formal "claim" prior to that date. As our earlier discussion indicates, in these circumstances, it is appropriate to consider the Government's prior familiarity with the issues raised in the claim for purposes of determining whether additional time is reasonably necessary.

CONCLUSION

Accordingly, the motion to dismiss is denied. The Government's request that proceedings be stayed pending our decision on the motion is moot. The Board directs the Government to submit its answer and Rule 4 file within 30 days of this decision.

Dated: 15 January 2002

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

I concur

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

I concur

CARROLL C. DICUS, JR.
Administrative Judge
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. 53544, Appeal of Fru-Con Construction Corp., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals