

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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American Renovation & Construction Co.) ASBCA No. 53946
)
Under Contract No. DACA67-00-C-0220)

APPEARANCES FOR THE APPELLANT: Robert G. Watt, Esq.
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Watt, Tieder, Hoffar &
Fitzgerald, L.L.P.
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Pedro J. Durand, Esq.
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U.S. Army Engineer District,
Seattle

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON GOVERNMENT'S MOTION TO SUSPEND
PURSUANT TO RULES 30 AND 1(d)

The hearing in this appeal is presently scheduled to begin on 21 June 2004. As a result of appellant's submission of an amended claim, the government moves to suspend pursuant to Rule 30 to give the contracting officer additional time in which to analyze the claim. In the alternative, the government moves to suspend pursuant to Rule 1(d) in order to obtain a contracting officer's final decision on the amended claim. Appellant opposes the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. The government awarded Contract No. DACA67-00-C-0220 to replace military family housing at Mountain Home Air Force Base, Idaho, to appellant on 31 March 2000 (R4, tab D-2).

2. Paragraph 5.2.1 of the Site Data section of the specification required the contractor to assume that rock would be found at an average depth of 600 mm for all foundation and utility work and to quantify the actual quantity of rock encountered during construction. The clause indicated that rock excavation in excess of that base line would be handled under the Changes clause. (R4, tab D-1 at 00860-10)

3. On 11 April 2001, appellant submitted a certified claim for an equitable adjustment of \$2,014,541.98 under the Changes clause for rock excavation costs. The claim was supported by an estimate. (R4, tab D-10)

4. The government terminated the contract based on appellant's voluntary default on 20 February 2002 (R4, tab D-15).

5. The contracting officer denied the claim on 28 June 2002. In the final decision, the contracting officer stated that paragraph 5.2.1 of specification section 00860 required appellant to measure the depths and quantities of all rock excavation. If the average depth of the rock material was above 600 mm, appellant was to be compensated under the Changes clause. However, appellant was required to include the cost of rock excavation below 600 mm in its bid. The contracting officer concluded that appellant failed to prove it surveyed the existing grade prior to excavation. Without that information, the contracting officer stated that there was no proof of the average depth or quantities of rock excavated and denied the claim. (R4, tab B)

6. On 20 September 2002, appellant appealed the denial of its claim to this Board.

7. By letter dated 15 April 2003, appellant and its surety submitted an amended claim to the contracting officer. Neither party has submitted a copy of the amended claim to the Board. According to the government, the amended claim consists of several hundred pages, three compound exhibits and a schedule section (gov't mot., ¶ 2). The government asserts that the amended claim includes "in addition to . . . the contract interpretation [question] . . . now before the Board, a differing site condition for the rock excavation." The amended claim requested \$4,315,640.00 and a 189-day extension of the contract completion date. (Gov't mot., ¶ 4)

8. On 28 May 2003, the government moved to suspend the appeal pursuant to Board Rules 30 and/or 1(d) in order to give the contracting officer time to analyze the amended claim, to discuss settlement and/or to issue a final decision on the amended claim.

9. On 4 June 2003, the Board set a hearing date of 10 May 2004. The hearing was subsequently rescheduled until 21 June 2004. Five days were set aside.

10. Appellant opposes the motion on the grounds that there is adequate time between now and 21 June 2004 for the contracting officer to analyze the amended claim and discuss settlement.

DECISION

In support of its motion to suspend pursuant to Rule 30, the government argues that the contracting officer needs more time to analyze the amended claim and to engage in settlement discussions with appellant. The government did not submit an affidavit from the contracting officer substantiating the need for additional time and we have not seen the amended claim. Contracting officers have extensive expertise in analyzing claims and have competent technical personnel to advise them, including engineers, contracting officer's representatives and consultants. Given the fact that the hearing is almost a year away, we are of the opinion that the contracting officer has adequate time to analyze the amended claim. We are also mindful of the fact that appellant opposes the suspension. Since it is appellant's claim, we must take its need for finality into account. Weighing all these factors together, the government has failed to persuade us that it is appropriate to suspend the proceedings pursuant to Rule 30.*

Under section 41 U.S.C. § 605(c)(5) of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-13, a contractor may appeal the deemed denial of a contracting officer's failure to issue a final decision. Rule 1(d) authorizes us, in our discretion, to stay the proceedings to obtain a contracting officer's final decision where the appeal is based on a deemed denial. In this case, there is no deemed denial pending before the Board. The contracting officer issued a final decision on the original claim and appellant took an appeal from that decision. Accordingly, we conclude that it would be inappropriate for us to suspend the proceedings pursuant to Rule 1(d).

The motion is denied.

Dated: 10 September 2003

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

* We do not decide any future motion for a continuance in the event the amended claim does result in an appeal and it is consolidated with the instant appeal. We have no basis to determine at this time if adequate time for discovery is available.

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

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 No. 53946, Appeal of American Renovation & Construction Co., rendered in conformance with the Board's Charter.

Dated:

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