ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Cubic Defense Applications, Inc.	)	ASBCA No. 56097
	)	
Under Contract No. N00039-03-C-0024	)	

APPEARANCES FOR THE APPELLANT: Paul F. Khoury, Esq.
Nicole J. Owren-Wiest, Esq.
Wiley Rein LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Stephen R. O'Neil, Esq.
Assistant Director/Trial Team Chief
Evadne Sanichas, Esq.
Senior Trial Attorney
Genifer M. Tarkowski, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING

Cubic Defense Applications, Inc. (Cubic) appeals to the Board on the basis that the contracting officer (CO) failed to issue a decision on its certified claim. The Space and Naval Warfare Systems Command (SPAWAR) (the government or the Navy) moves to dismiss for lack of jurisdiction on the basis that Cubic's appeal was premature.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 13 March 2003, SPAWAR awarded Contract No. N00039-03-C-0024 (the Contract) to Cubic to design, develop, manufacture, test, and supply Communications Data Link (CDL) Systems (compl., ¶ 10). The CDL System is an integrated suite of hardware and software (*i.e.*, the Surface Communications Element (SCE)) that is to be installed aboard U.S. Navy ships to allow these ships to exchange intelligence information with the Platform Communications Element (PCE) aboard military aircraft (compl., ¶ 11). As a part of the Contract, SPAWAR provided a specification known as the "Revision F Specification." The parties disagree whether the specification contains performance requirements or is a "blueprint." (Compl./answer, ¶ 12; R4, tab 1)

2. On 5 May 2006, Cubic submitted a "Request for Equitable Adjustment Proposal" (REA). The REA requested an increase in the contract price of $6,227,975 and an adjustment in the contract delivery schedule. The REA identified six entitlement issues: "(1) Defects in the Revision F Specification provided by the Government; (2) Deficiencies in Government furnished Interoperability Test Assets; (3) The Government's failure to furnish Wideband Platform Communications Element Assets; (4) The Government's failure to furnish Command Control Processor Software in a timely manner; (5) The Government's continued failure to approve test plans and procedures and Government actions to require expanded and additional test requirements to be included in test plans and procedures; and (6) The Government's furnishing of defective KGV-135 Devices." (R4, tab 33 at GOV001011)

3. According to Cubic, it met with the Director of Contracts for SPAWAR to discuss a schedule for fact-finding and negotiation of the REA on 13 October 2006. Cubic claims that a schedule to complete settlement negotiations of the REA by 23 March 2007[1] was established at a meeting held with the CO on 18 October 2006 (compl., ¶ 55). According to the government, the CO specifically advised Cubic that he could not commit to a schedule because progress of negotiation would depend upon Cubic's cooperation in providing the support needed for the REA (answer, ¶ 55).

4. Cubic says that despite its best efforts, the parties were unable to complete negotiations by "the March 31, 2007 deadline they had established" (compl., ¶ 56). The government says the parties did not reach agreement by 31 March 2007 "due to Cubic's failure to provide necessary information to support its allegations" (answer, ¶ 56). Cubic says that as a result of the parties' failure to reach agreement by 31 March 2007, it "converted its REA into a certified claim, which it submitted to the Contracting Officer on May 3, 2007" (compl., ¶ 56).

5. As reflected in its 23 April 2007 cover letter, Cubic's certified claim sought $6,511,103. This amount was made up of four primary elements: "(a) the increased costs incurred by Cubic as a result of the substantial number of defects associated with the Revision F Specification provided by the Government; (b) the increased costs incurred by Cubic as a result of the Government's delivery of late, incomplete, and otherwise defective Government-Furnished Property; (c) the increased costs incurred by Cubic as a result of the Government's failure to respond in a reasonable, timely manner to Cubic's submission of necessary test plans and procedures; and (d) the increased costs incurred by Cubic as a result of the Government's unilateral modification of the Contract to add heavy weight 'barge' testing." The cover letter explains that the certified claim

[1] Cubic might have mistakenly used 23 March 2007 as the alleged negotiation completion date in ¶ 55 of its complaint. We note that Cubic subsequently alleged 31 March 2007 as the negotiation completion date (*see* compl., ¶ 56).

"incorporates and supersedes" the REA submitted on 5 May 2006, updates the REA through February 2007 to take into account the additional costs incurred after May 2006; and addresses all issues identified in the DCAA's August 2006 audit. (R4, tab 41 at GOV001794)

6. By letter dated 14 June 2007, the CO notified Cubic:

> . . . The Space and Naval Warfare System Command (SPAWAR) acknowledges receipt of the referenced claim proposal, received at SPAWAR on May 8, 2007. In accordance with FAR 52.233-1(e) Disputes[2], please be advised that SPAWAR intends to respond approximately December 14, 2007.

(R4, tab 43, ex. 1 at GOV002564) By notice dated 3 July 2007, Cubic filed an appeal with the Board pursuant to 41 U.S.C. § 605(c)(5) on the basis that the CO had failed to issue a decision. The Board docketed the appeal as ASBCA No. 56097 on 5 July 2007.

7. Cubic explains in its complaint that the CO "had been aware of the issues underlying Cubic's claim for over a year and had been aware of the fourth ('barge' testing) issue since at least July 2006." It contends that the CO "*refused even to respond* to Cubic's certified claim until December 2007 – approximately seven months after receipt of the certified claim and seventeen months after Cubic submitted its REA – much less provide a deadline by which a final decision might be issued." (Compl., ¶ 57) In its answer, the government points out that Cubic submitted its certified claim on or about 3 May 2007. The government says that the claim "differs in significant respects" from the REA, and "due to its complexity and size," the CO reasonably requires the time he has indicated to Cubic in which to issue a final decision. (Answer, ¶ 57)

8. On 17 August 2007, the government filed a motion to dismiss Cubic's appeal (mot.). The motion alleges that the appeal was "premature" because the CO complied with the requirements of 41 U.S.C. § 605(c)(2) in advising Cubic "that a final decision would be issued on 14 December 2007" (mot., mem. at 5). The motion contends that the

---

[2] FAR 52.233-1(e) provides:

> For Contractor claims of $100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $100,000, the Contracting Officer must, within 60 days, decide the claim or notified the Contractor of the date by which the decision will be made.

"simple and straightforward legal issue" before the Board is "[w]hether the Contracting Officer selected a reasonable date, 14 December 2007, to issue a final decision on a certified claim submitted . . . on 23 April 2007" (*id.)*. The motion argues that given that "the new claim rearranges the organizational structure of the issues previously presented in the REA, adds a new entitlement item, and changes both the amount and methodology of the claimed costs," the CO's date of 14 December 2007 is entirely reasonable (*id.* at 6-7).

9. Cubic's opposition, filed on 28 August 2007, disputes that its appeal was "premature," and that the CO should be allowed an additional seven months to provide a "response" to the claim without promising a final decision because the CO, according to Cubic, had missed every other "approximate deadline" he set over the past fifteen months (app. opp'n at 1-2). Cubic explained that the claimed amount became higher because of "the passage of time" but the quantum methodology remained the same, that there were four issues because it consolidated issues 1 and 2; 3, 4 and 6; and added the heavy weight barge testing issue which became a dispute in July 2006, shortly after it submitted its REA. Cubic says that its claim essentially relates to a defective government specification, and to late, incomplete, or defective Government-Furnished Property. It argues that while the underlying technology is complex, the legal issues are relatively straightforward (*id.* at 4). Cubic contends that the CO's refusal to address its claim "until December 2007" is "a quintessential example of a deemed denial" under 41 U.S.C. § 605(c)(5) (*id* at 6).

10. To rebut the government's contention that the certified claim was substantially different from the REA, Cubic supplemented its opposition by forwarding an email from Manuel Gomez (Gomez), the Navy Program Manager (supp.). This email notified several individuals that "Cubic has formally turned the REA into a legal claim. This requires us to review it one more time." The email asked several individuals to execute and return a Non-Disclosure Agreement so that they could participate in the review effort of the claim. Gomez's email also said "It is basically a slightly polished version of the REA. The arguments are the same except for a new added issue: Barge Test requirements." (App. supp. at attach. A) Cubic's supplement argues that this email "belies Respondent's claim . . . that the certified claim is significantly different, such that the agency needs another six months for review" (app. supp. br. at 1).

11. The government's 14 September 2007 reply maintains that complexity in reviewing Cubic's claim stemmed from "the lack of specificity used to describe the entitlement elements" (govt. reply br. at 3). The government tells us that throughout the claim, Cubic "alleges broad entitlement issues and offers bundles of documents as proof of entitlement," that Cubic uses "examples" of an entitlement issue which left the government "pondering whether each entitlement issue is limited to only the 'examples' set forth in the certified claim or . . . to the entire universe of issues" (*id.*). The

government says that the Cubic opposition overly simplified the significant changes made in its certified claim, and "[t]he costs, technical, and legal analysis performed by [the government on the REA] . . . required reevaluation in order to correlate with the organizational structure and new issue [Cubic] . . . put forth." With regard to the Gomez email, the government points out that Gomez sent the email only days after it received the certified claim before the government had "reviewed the claim in depth and discovered the differences between the REA and the claim." (*Id.* at 4-5)

DECISION

When a CO receives a certified claim of over $100,000, the Contract Disputes Act, 41 U.S.C. §§ 601-613, requires him or her to either (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 this case, Cubic submitted a $6.5 million certified claim which was received by the CO on 8 May 2007. Thus, under the CDA, the CO had until 9 July 2007[3] to either issue a decision or notify Cubic when a decision would be issued. Here, the CO chose not to issue a decision within sixty days; instead, he chose the only other alternative available to him under 41 U.S.C. § 605(c)(2)(B). In a letter dated 14 June 2007, 37 days after he received Cubic's certified claim, the CO notified Cubic that "SPAWAR intends to respond approximately December 14, 2007." Unhappy with the CO's response, Cubic appealed to the Board pursuant to 41 U.S.C. § 605(c)(5) by notice dated 3 July 2007.

In moving to dismiss Cubic's appeal as "premature," the government couched the issue as "[w]hether the Contracting Officer selected a reasonable date, 14 December 2007, to issue a final decision on a certified claim submitted" (mot. at 1; mem. at 5). We believe that a more fundamental inquiry here is whether the CO's notification within sixty days of receipt of the claim, was sufficiently definite with respect to when a decision would be issued.

In this regard, 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. *Defense Systems Company, Inc.*, ASBCA No. 50534, 97-2 BCA ¶ 28,981 (government motion to dismiss for lack of jurisdiction granted because CO notified

[3] Sixty days from 8 May 2007 fell on 7 July 2007, a Saturday. Thus, the CO had until the following Monday, 9 July 2007, to comply with 41 U.S.C. § 605(c)(2).

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); *The Boeing Co. v. United States,* 26 Cl. Ct. 257, 259 (1992) ("That a fixed date is required is clear from the tolling provision").

Instead of establishing a fixed date on which his decision will be issued, the CO in this case hedged and stated only that "SPAWAR intends to respond approximately December 14, 2007." We cannot conclude that the CO's notification complied with 41 U.S.C. § 605(c)(2)(B). First, "approximately December 14, 2007" did not provide a fixed or specific date. Second, the CO did not commit to issuing a decision; he only stated that "SPAWAR intends to respond." Both the CO's own intention and the nature of the response were unclear.

Because the CO failed to comply with 41 U.S.C. § 605(c)(2)(B) in notifying Cubic of a date certain a CO decision would be issued on its claim, we hold that Cubic properly invoked 41 U.S.C. 605(c)(5) and appealed.

We believe it is useful for the CO to address the issues as structured and as updated in the certified claim if for no other reason than to avoid confusion going forward. When an appeal is commenced pursuant to 41 U.S.C. § 605(c)(5), we are authorized to "stay the proceedings to obtain a decision on the claim by the contracting officer." By letter dated 18 September 2007, we suspended proceedings pending resolution of this motion. Now that we have resolved the motion on jurisdiction in favor of Cubic, we suspend proceedings for the CO to issue a reasoned decision. We have considered the size and complexity of the claim, and we consider 14 December 2007 reasonable for the CO to issue such a decision.

For the forgoing reasons, the government's motion to dismiss the appeal as premature is denied.

Dated: 2 October 2007

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

(signatures continued)

I concur

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 certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56097, Appeal of Cubic Defense Applications, Inc., rendered in conformance with the Board's Charter.

Dated:

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