ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Kelly-Ryan, Inc.	)	ASBCA No. 57168
	)	
Under Contract No. W911KB-05-C-0016	)	

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OPINION BY ADMINISTRATIVE JUDGE DICKINSON
ON GOVERNMENT MOTION TO DISMISS
FOR LACK OF JURISDICTION AS PREMATURE
OR, IN THE ALTERNATIVE, MOTION TO STAY PROCEEDINGS

This appeal arises under a contract awarded by the U.S. Army Corps of Engineers, Alaska District (USACE or government), to appellant Kelly-Ryan, Inc. (KRI) for the False Pass Harbor Improvements project. KRI appealed from a deemed denial of its 24 November 2009 claim. The government has moved to dismiss the appeal for lack of jurisdiction as premature or, in the alternative, to stay the proceedings until the contracting officer (CO) issues a final decision.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 11 July 2005 the USACE awarded Contract No. W911KB-05-C-0016 to KRI in the amount of $19,729,300.00 for the False Pass Harbor project which included the construction of three breakwaters, a causeway on top of one of the breakwaters, a bridge and the dredging of the False Pass Harbor (gov't mot., exs. 1-2, 4-5). The contract completion date, as awarded, was 5 January 2008 and was eventually extended to 5 January 2009 (gov't mot., exs. 1, 3).

2. On 14 May 2008 KRI submitted to the CO a Request for Equitable Adjustment (REA) in the amount of $16,049,937.00. The pricing of the REA was described by KRI

as using the Modified Total Cost method and the supporting documentation provided by KRI was detailed job cost accounting records and reports for the entire contract performance period. Instead of specific details as to alleged delays/impacts and the causal relationship between the alleged delays/impacts and the costs alleged to have been incurred, KRI stated "[t]he basis for this Request has been documented in extensive correspondence over the past year-and-a-half." (Gov't mot., ex. 21)

3. On 29 May 2008 the CO requested that, due to the amount of the REA, KRI certify its REA as a claim and request a final decision. The CO also stated that he did not concur with KRI's statement that the basis for the REA had been documented in correspondence over a 1½ year period:

> I do not concur with this statement, and simply referencing correspondence in a general basis does not sufficiently address your claim. Further, the government needs to determine the merit of your claim before any discussion regarding the resolution of disputed costs can occur.

(Gov't mot., ex. 22) The CO then requested that KRI provide details to support:

> 1. Government action in violation of your contract or that gave rise to your REA.
> 2. Proof that government action caused impacts on your schedule/costs.
> 3. Proof of what schedule delays or additional costs that are reimbursable.
>
> Once we have received in writing the cause and effect information detailed above, then a meeting between the Government and Kelly-Ryan to discuss this matter would be acceptable.

(Gov't mot., ex. 22)

4. A year and a half later, on 24 November 2009 KRI submitted a certified claim for $36,231,362.00 (gov't mot., ex. 23). The claim asserted seven alleged bases for breaches of contract and/or negative impacts to KRI's contract performance by the government, as well as associated damages allegedly flowing from them (gov't mot. at 8-10; app. opp'n at 18-23). The claim document was comprised of 3,546 pages[1] as follows:

[1] KRI's breakout of page counts by category actually totals 3,764. The difference is immaterial to the jurisdictional matter now before us.

98 pages	narrative
221 pages	exhibits to the narrative
1,083 pages	May 2008 REA
1,407 pages	various documents submitted by KRI to the Corps during contract performance
270 pages	Materials Cost Reports
333 pages	Equipment Cost Analyses
352 pages	ON Equipment Reports

(App. opp'n at 22) It is undisputed that KRI's claim did not include any delay/impact schedules or analyses (gov't mot. at 8-11; app. opp'n at 18 ("KRI's Claim postulates that no schedule analysis is required in order to determine the recoverable damages")).

5. On 22 January 2010, the CO acknowledged receipt of KRI's claim. The entirety of his response was:

> On November 24, 2009 via email we received your claim in the amount of $36,231,362.00, for Equitable Adjustment of the Contract Price/Breach of Contract Damages. The government subsequently received hard copies of your claim.
>
> Due to the complexity of your claim, a [CO] Decision is expected to be issued no later than November 24, 2010. If you have questions, please call me….

(Gov't mot., ex. 24) The letter contains no rationale or justification by the CO, other than a statement of general complexity, for setting the decision date exactly one year after receipt of KRI's claim. In support of its motion to dismiss which is now before us, the government submitted the CO's affidavit in which he states the following reasons for his setting the final decision date:

> 7. On 24 November 2009 KRI submitted its certified claim for $36,231,362.00. I was again shocked at the amount of the claim. At this point I had many questions about the claim.… The claim raised many questions but I did not have the expertise to answer any of them.
>
> 8. Not only did I have numerous questions about the claim, the claim suffered from the same defects found in the REA. In spite of its 98 pages the Narrative did not provide

> the cause and effect analysis I needed to determine whether the Government had impacted the schedule much less determine the costs associated with those impacts.
>
> 9. I determined that I needed a schedule analysis to determine what impacts, if any, delayed the project and who was responsible for that delay. I also determined that I needed a Defense Contract Audit Agency (DCAA) audit of the claim to review the claim narrative and the over 2900 pages of backup documentation. The audit would also verify the costs and together with the schedule analysis would paint a complete picture of the project so that I could make an intelligent, informed decision on KRI's claim.
>
> 10. I am neither a scheduling expert nor an accountant so I am relying on the Alaska District's Construction Support Branch (CSB) to conduct the scheduling analysis and DCAA to conduct the audit. After discussing the timelines with…CSB…and…DCAA…I determined that I needed to extend the [decision] due date to 24 November 2010 to allow them time to conduct their analysis as well as leaving me sufficient time to incorporate their analysis into my decision.
>
> 11. Given the amount of the claim, the size of the claim package, the need for a detailed scheduling analysis of a three year project and the need for a DCAA audit I believe my extension to 24 November 2010 for my [decision] is reasonable.

(Gov't mot., tab 9, ¶¶ 7-11) On 14 June 2010 the CO reaffirmed his commitment to issue a final decision by 24 November 2010 (gov't resp., ex. 1).

6. On 2 March 2010, after having a telephone discussion with, and receiving several letters from, KRI's president, the CO advised KRI as follows:

> As stated verbally in our telephone call on February 9, 2010, your claim is currently being analyzed. Due to the dollar amount of the claim, $36,231,362.00, it is my fiscal responsibility to conduct a thorough and detailed analysis of your claim. I have requested analysis by our Contract Support Branch and a DCAA audit of your claim. Your claim will be processed in accordance with applicable Federal Acquisition Regulations (FAR) and Supplements including

> Engineering FAR Supplement, Appendix A, Part 3 – Contract Requests, Claims, and Appeals. While I will consider any additional information you wish to provide, any discussion concerning your claim is premature until a thorough analysis has been completed. If you have any questions, please call me….

(App. opp'n, exs. 1-3)

7. On 31 March 2010 the Board received KRI's Notice of Appeal dated 4 March 2010. KRI appealed to the Board on the basis of a deemed denial of its 24 November 2009 claim and filed its complaint. The appeal was docketed as ASBCA No. 57168.

8. On 26 April 2010, instead of filing an answer and Rule 4 file, the government filed a motion to dismiss the appeal for lack of jurisdiction as premature or, in the alternative, to stay the proceedings until the CO issues a final decision on 24 November 2010. The government included 24 exhibits as attachments to its motion. On 28 May 2010 KRI opposed the government's motion to dismiss and submitted three affidavits in support of its opposition motion. The government responded to KRI's opposition motion on 15 June 2010 and submitted an additional, brief affidavit of the CO. These attachments to the parties' motion filings comprise the documentary record for purposes of the motion now before us.

9. On 13 September 2010 the government advised the Board by letter, with a copy to counsel for KRI, that the CO had extended the date by which the final decision would be issued to 14 January 2011 as a result of alleged delays in completion of the DCAA audit of the claim.

10. On 21 September 2010 KRI objected to the government's 13 September 2010 letter as an *ex parte* communication with the Board and objected to characterizations in the letter as they related to KRI and the conduct of the DCAA audit. KRI's objection included a copy of a letter from KRI's president to the CO in which he disputed various characterizations as they relate to the DCAA audit. The government responded by letter opposing KRI's objections.

DECISION

As a preliminary matter, we address KRI's objection to the government's 13 September 2010 letter as an *ex parte* communication. Board Rule 34 provides:

> No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved

> in an appeal, submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This provision does not apply to consultation among Board members or to *ex parte* communications concerning the Board's administrative functions or procedures.

The government's letter advising that the CO had extended the date for issuance of the final decision to 14 January 2011 was directed simultaneously to both the Board and counsel for appellant and was, therefore, not "off the record" nor *ex parte*. KRI's objection in that regard is overruled. With respect to KRI's objection to characterizations in the government's September 2010 letter, we recognize the parties' factual disputes relative to the DCAA audit. For the reasons addressed below, we find these disputed facts to be immaterial to our decision on the government's motion.

We next address the government's motion to dismiss the appeal for lack of jurisdiction as premature. Section 605(c)(2) of the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, requires the CO, within 60 days after receipt of a certified claim over $100,000.00, to either issue a decision on the claim or notify the contractor of a date certain by which a decision will be issued. In this case KRI submitted its certified claim on 24 November 2009 and, within 60 days of receipt of the claim, on 22 January 2010 the CO advised KRI of the date by which a decision would be issued. The CO's response was, therefore, timely under the CDA. Section 605(c)(3) of the CDA further requires that the decision of the CO be issued within a reasonable time, taking into consideration the size and complexity of the claim and the adequacy of the supporting information provided by the contractor. At issue here is whether the original 24 November 2010 date and/or the 14 January 2011 extended date given by the CO as the date by which a final decision would be issued is reasonable. Whether the date stated by a CO for issuance of a final decision is reasonable must be determined on a case-by-case basis. *Public Warehousing Co., K.S.C.*, ASBCA No. 56888, 09-2 BCA ¶ 34,265 at 169,307.

KRI's claim seeks $36,231,362.00 in damages resulting from seven alleged breaches of contract and/or negative impacts to KRI's contract performance by the government. The amount of the claim is nearly twice the $19,729,300.00 amount of the contract as awarded. The claim document was comprised of more than 3,500 pages but the record before us indicates, and KRI does not dispute, that the claim did not contain a schedule analysis of the alleged impacts to show a cause and effect relationship between the alleged government delays/impacts and the damages claimed by KRI (SOF ¶ 4). In its motion to dismiss KRI's appeal as premature, the government argued that it needed one year to issue a CO's final decision because, prior to issuance of a decision, a DCAA audit of the claim was needed and because, in the absence of a schedule analysis from KRI supporting its alleged government-caused delays, the government needed to perform such an analysis in order to assess KRI's claim (SOF ¶ 5). In September 2010 the

government advised that the date by which the CO's final decision would be issued was extended to 14 January 2011 as a result of alleged delays in the DCAA audit. KRI objected to the extension. The government has submitted an affidavit of the CO to provide reasons for his selection of the original 24 November 2010 date for issuance of a final decision, but has not submitted a statement of the CO justifying the extended date of 14 January 2011.

In *Defense Systems Co.*, ASBCA No. 50534, 97-2 BCA ¶ 28,981 ("*DSC*"), we held that nine months was a reasonable period of time in which to render a CO final decision on a complex, high dollar claim and dismissed the appeal for lack of jurisdiction as premature. In that case, the contractor had filed a $72,000,000 breach claim on a $48,000,000 contract, the claim involved complex issues requiring external technical analysis and support, and many witnesses with personal knowledge of the facts no longer worked for the government. The claim consisted of 162 pages of narrative and 49 exhibits. In support of its motion to dismiss, the government in *DSC* submitted the affidavit of the CO which stated the specific work to be done in analyzing DSC's claim and approximate dates by which each step of work would be completed (*id*. at 144,326). Just as KRI has argued notice to the government in correspondence over 1½ years in the appeal now before us (SOF ¶ 2), the contractor in *DSC* objected to the time period stated by the CO as unreasonable because "[t]he substantive issues raised by the claim were raised by DSC throughout contract performance" (*id*. at 144,325).

In *Cubic Defense Applications, Inc.*, ASBCA No. 56097, 07-2 BCA ¶ 33,695, the contractor opposed the CO's date for a final decision seven months after receipt of the certified claim, arguing that the CO had missed every other deadline he had set in the previous fifteen months. Likewise, KRI argues here that the CO's determination that a year was necessary for a final decision was just a continuation of the "four year history of delay and avoidance" allegedly experienced by KRI since the award of the contract (app. opp'n at 1-18, 20-21, 23, 25-26). Also, as was the case in *Cubic*, KRI argues that the government had plenty of notice of the issues in its claims because of correspondence during the contract performance period as well as its previously submitted REA (SOF ¶ 2). In *Cubic*, the CO's response after receipt of the certified claim was held to be inadequate and the government's motion to dismiss the appeal as premature was denied. We then held that "[w]e 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" and stayed the proceedings so the CO could issue a "reasoned decision." *Id*. at 166,790.

We have found no Board cases, nor have we been cited to any by the parties, that have held more than 9 months to be a reasonable period of time within which to issue a CO's final decision. In *Dillingham/ABB-SUSA, a Joint Venture*, ASBCA Nos. 51195, 51197, 98-2 BCA ¶ 29,778, we held that 14-month and 16-month periods within which to issue final decisions were unreasonable where the claims at issue were, respectively, a

small, straightforward construction claim and a larger, more complex impact claim that had already been extensively analyzed and an audit performed and where the government offered no explanation by the CO of the need for the extended period of time within which to issue a final decision. In the case now before us, the government argues that 12-14 months (from 24 November 2009 to 24 November 2010, then extended to 14 January 2011) is a reasonable time for it to take to issue a final decision because, unlike the situation in *Dillingham*, appellant's claim of more than 3,500 pages had not yet been audited and did not include a schedule or cause-and-effect analysis of the alleged delays/impacts which required the government to perform such an analysis before a decision could be issued. The government has submitted the affidavit of the CO in which he states very general reasons for deciding a year was necessary to analyze KRI's claim and issue a final decision (SOF ¶ 5). However the CO's affidavit here, unlike the detailed statement in *DSC*, does not set forth the steps he determined were necessary to be accomplished and the approximate dates of their completion, nor does it make any attempt to demonstrate "any relationship between the ten month extension and either the DCAA audit or the supposed schedule analysis" (app. opp'n at 23). Further, the government has not submitted any affidavit at all of the CO in which he states detailed reasons demonstrating how he arrived at the extended date of 14 January 2011 for the final decision. The lack of detail in the CO's affidavit fails to meet the government's burden of demonstrating the reasonableness of the final decision dates set by the CO and we, therefore, find the dates to be unreasonable. The government's motion to dismiss for lack of jurisdiction as premature is denied.

The government's motion requested in the alternative that, in the event the Board denied its motion to dismiss, the Board grant a stay of proceedings to 24 November 2010. The government advised in September 2010 that the CO had extended the date for issuance of the final decision to 14 January 2011; we interpret the letter to also request a stay to the later date.

KRI opposes the grant of a stay of proceedings, arguing that the appeal should go forward and the government can continue its audit and analysis during the discovery phase of the appeal (app. opp'n at 18-19, 27-28). We agree.

For the same reasons we held the dates established by the government for issuance of a final decision to be unreasonable, we deny the government's motion to stay proceedings.

CONCLUSION

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

Dated: 29 November 2010

DIANA S. DICKINSON
Administrative Judge
Armed Services Board
of Contract Appeals

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. 57168, Appeal of Kelly-Ryan, Inc., rendered in conformance with the Board's Charter.

Dated:

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