



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: May 27, 2011

CBCA 2423

DESIGN ONE BUILDING SYSTEMS, INC.,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Christopher W. Martin of Ayres & Parkey, Knoxville, TN, counsel for Petitioner.

Thomas J. Mitchell and Phillipa L. Anderson, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **KULLBERG**.

DANIELS, Board Judge.

Design One Building Systems, Inc. (Design One) and the Department of Veterans Affairs (VA) entered into a contract under which Design One would renovate and lease to VA a building in Knoxville, Tennessee. The building serves as a Veterans Affairs Outpatient Clinic. We consider here a petition by the contractor, Design One, that the Board direct the VA contracting officer to issue a decision on its most recent claims sooner than the date selected by the contracting officer.

Background

Design One submitted to the contracting officer at the end of November 2010, and the contracting officer received in early December of that year, a series of claims which according to the VA seeks more than \$34,400,000 from the agency. On December 21, 2010, the contracting officer wrote to Design One:

Due to the complexity and the amount of your claims, VA is going to hire a claims consultant. The claims consultant will be contacting you for information and documents. The earliest a Contracting Officer's decision will be issued is November 15, 2011. I will notify you in writing if additional time is needed beyond November 15, 2011, for the Contracting Officer's decision.

On May 13, 2011, Design One filed a "Petition to Shorten Claims Response Time." The contractor asserts in its petition, "[T]he time required by the VA is too long, unnecessary, and is resulting in continuous harm to [Design One] by delaying the payment of funds which are legitimately due and owing." The contractor asks the Board to shorten the time for the contracting officer to issue a decision, but does not specify a length of time by which the deadline should be shortened.

In a response filed on May 23, VA maintains that hiring a claims consultant is "completely reasonable and necessary" for an evaluation of the contractor's "multifaceted, complex claims." The agency alleges that it "has now" hired Contract Solutions (CS) as its claims consultant and that CS says it needs approximately six months to assess the claims and provide a report. Six months from today is a little later than November 15, the date on which the contracting officer says that he expects to issue his decision. Consequently, VA objects to our granting the petition.

Discussion

The Contract Disputes Act provides that when in receipt of a certified claim in an amount greater than \$100,000, a contracting officer shall, within sixty days, either issue a decision on the claim or notify the contractor of the time within which a decision will be issued. 41 U.S.C. § 7103(f)(2) (as codified by Pub. L. No. 111-350, 124 Stat. 3677, 3819 (2011)). If the contracting officer chooses the second of these alternatives, his decision "shall be issued within a reasonable time, in accordance with regulations prescribed by the agency, 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." *Id.* § 7103(f)(3). The statute also provides that "[a] contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as

determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer.” *Id.* § 7103(f)(4).

The Board is troubled by both parties’ approach to this matter. Design One has not provided any evidence to support its contention that VA should be able to evaluate the claims in less than six months, and it has not supplied the claims to the Board so that we could make an independent assessment of the contention. Design One has also informed us – in a telephonic conference with the presiding judge – that it is about to hire its own consultant to evaluate the claims, and that its consultant believes an evaluation could be completed within three months. This statement causes us to wonder why the consultant was hired *after* the claims were submitted, rather than *before*, and whether CS’s work might be made more time-consuming in that CS may have to re-evaluate some or all of the claims in light of changes made pursuant to analysis by Design One’s consultant. We also do not understand why, if Design One is concerned about the length of time the contracting officer is taking to write his decision, the contractor did not file its petition until nearly five months after receiving his letter which specified the November 2011 date.

On the other hand, VA could have moved considerably faster to analyze the claims. The contracting officer knew in December 2010 that he needed help in this task, but did not hire a consultant until May 2011. Further, the agency has not provided any evidence as to why the consultant needs six months to complete its work; an affidavit from the consultant would have been useful in this regard.

The party making a claim bears the burden of proof. Here, Design One is the party asking the Board to direct the contracting officer to issue a decision earlier than November 15, 2011. If CS is correct in thinking that a consultant would need six months to evaluate the contractor’s claims, the decision would soon be in hand if the contracting officer had, after receiving the claims, promptly hired a consultant. Nevertheless, Design One has not provided any evidence that beginning on the date on which it filed its petition, the agency’s estimate of time needed to perform an evaluation is unreasonable. Consequently, we do not prescribe a date earlier than November 15, as requested by the contractor.

We are concerned, however, that resolution of the claims not be unduly delayed. We therefore grant the petition to the extent of fixing November 15, 2011, as the deadline for issuance of the contracting officer’s decision.

Decision

The petition is **GRANTED IN PART**. The contracting officer shall issue his decision on Design One's claims no later than November 15, 2011.

STEPHEN M. DANIELS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

HAROLD C. "CHUCK" KULLBERG
Board Judge