



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: May 12, 2017

CBCA 5636

SAVANNAH RIVER NUCLEAR SOLUTIONS, LLC,

Petitioner,

v.

DEPARTMENT OF ENERGY,

Respondent.

Karen L. Manos and Erin N. Rankin of Gibson, Dunn & Crutcher, LLP, Washington, DC, counsel for Petitioner.

Lucy M. Knowles, Ralf Wilms, and Jennifer B. Farmer, Office of Chief Counsel, Department of Energy, Aiken, SC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **ZISCHKAU**.

GOODMAN, Board Judge.

On February 10, 2017, Savannah River Nuclear Solutions, LLC (SRNS or petitioner) filed a submission which it titled as a “Petition” pursuant to the Contract Disputes Act. The petition stated that SRNS had submitted a claim to the Department of Energy’s contracting officer on November 16, 2016, and attached a copy of the claim to the petition as Exhibit 1. The petition requested two forms of alternate relief—“that the Board direct the Contracting Officer to issue a final decision on the attached claim . . . within thirty days, or treat it as a deemed denial in accordance with 41 U.S.C. § 7103(f)(5)[2012].”

According to the petition, the contract at issue is the Management and Operating contract for the Savannah River Site in Aiken, South Carolina (the contract), and “the claim

seeks, as a matter of right, an interpretation of the contract terms determining that . . . [certain] costs being charged by and reimbursed to SRNS under the Contract are allowable.”

The petition stated further:

The Contract Disputes Act mandates that, within 60 days of receipt of SRNS’s claim, the CO [contracting officer] take one of two actions: (1) issue a final decision, or (2) notify SRNS “of the time within which a decision will be issued.” 41 U.S.C. § 7103(f)(2); *see also Whiteriver Constr., Inc. v. Dep’t of Interior*, CBCA No. 2349, 12-1 BCA ¶ 34,938 at 171,773 (finding jurisdiction over the deemed denial of a claim and explaining that “[o]nce the claim was submitted, the contracting officer was required to issue a decision on it or notify the contractor of a reasonable time in which the decision would be issued”). The CO failed to take either of those actions by January 9, 2017, the 60th day after receipt of SRNS’s claim. Instead, by letter dated January 9, 2017^[1], the CO informed SRNS that “[d]ue to ongoing investigations and in accordance with Federal Acquisition Regulation 33.211(c)(2), the Request for Final Decision will be delayed until August 10, 2017.”

The Board docketed the petition and issued an order on proceedings which stated that the panel chair would schedule a conference with counsel after government counsel filed an appearance. The Board did not issue its standard order on proceedings for an appeal which would have established a schedule for the submission of a complaint, answer, and appeal file. Once government counsel filed an appearance, on February 22, 2017, a conference was held to discuss the issues and schedule further proceedings. By order of the Board dated February 23, 2017, the parties were then directed to brief the following issues raised in the petition:

- 1) [Whether] the contracting officer failed to timely meet the obligation pursuant to the Contract Disputes Act to issue a final decision or notify the contractor of a reasonable time in which the decision would be issued.
- 2) If the contracting officer is found to have notified the contractor as to a time when the decision would be issued, whether that time is reasonable.

¹ A copy of this letter was attached to the petition as Exhibit 2.

The parties filed briefs as directed, and additional reply briefs.²

Discussion

Petitioner's Request to Direct the Contracting Officer to Issue a Decision

SRNS's submission was designated a petition. CBCA Rule 1(b)(7)(48 CFR 6101.1(b)(7) (2016) defines a petition as "request filed under 41 U.S.C. 7103(f)(4) that the Board direct a contracting officer to issue a written decision on a claim." The provision of the CDA cited in the rule, 41 U.S.C. § 7103(f)(4), reads as follows: "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."

The petition requested that the Board direct the contracting officer to issue a final decision on the claim. If the Board were to make such direction, the time within which the contracting officer is required to issue a decision must be determined. As discussed below, the Board cannot grant this relief, based upon the existing record.

Petitioner's Request to "Treat It as a Deemed Denial"

Petitioner's ambiguous and inconsistent assertions in its petition, claim, and briefs

The petition requested alternative relief—that the Board "treat it³ as a deemed denial in accordance with 41 U.S.C. § 7103(f)(5)." The referenced section of the CDA reads as follows:

Failure by a contracting officer to issue a decision on a claim within the required time period is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal or action on the claim as otherwise provided in this chapter. However, the tribunal concerned may, at its option,

² By letter dated February 21, 2017, the contracting officer revised his letter of January 9, 2017, stating that "the Final Decision will be issued on August 10, 2017." The parties' briefs discussed the alleged import of the first letter and the revised letter. We do not address the issues raised with regard to these letters, as we do not decide the issues in the Board's Order dated February 23, 2017, as discussed herein.

³ As discussed herein, respondent states that "it" is not defined in the petition.

stay the proceedings of the appeal or action to obtain a decision by the contracting officer.

The CDA contains two time periods within which the contracting officer is required to issue a decision on a claim—for claims of \$100,000 or less and for claims of more than \$100,000:

(f) TIME FOR ISSUANCE OF DECISION.—

(1) CLAIM OF \$100,000 OR LESS.—A contracting officer shall issue a decision on any submitted claim of \$100,000 or less within 60 days from the contracting officer’s receipt of a written request from the contractor that a decision be rendered within that period.

(2) CLAIM OF MORE THAN \$100,000.—A contracting officer shall, within 60 days of receipt of a submitted certified claim over \$100,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

41 U.S.C. § 7103.

A claim of more than \$100,000 must be certified as required by 41 U.S.C. § 7103(b). The petition implies that the claim was for more than \$100,000, which is required to be certified, because the petition cites 41 U.S.C. § 7103(f)(2) and states that the contracting officer failed to take one of two actions specified in that section: (1) issue a final decision, or (2) notify SRNS “of the time within which a decision will be issued.” However, petitioner’s initial brief states that the claim “does not demand money and is not certified” and states further:

The CO did not issue a final decision by January 9, 2017, the 60th day after receipt of SRNS’s claim, and therefore failed to meet the deadline imposed by 41 U.S.C. § 7103(f)(1). The CO also did not take either of the actions required by 41 U.S.C. § 7103(f)(2). Instead, by letter dated January 9, 2017, the CO informed SRNS that “[d]ue to ongoing investigations and in accordance with Federal Acquisition Regulation 33.211(c)(2), the Request for Final Decision will be delayed until August 10, 2017.” Notably, the CO’s letter did not state that the *final decision* would be issued on August 10, 2017; it stated that the

Request for Final Decision (i.e., SRNS's claim) will be "delayed until August 10, 2017."

Petitioner's Brief in Support of Petition at 2.

Thus, petitioner's brief raises an issue not stated in its petition—that the CO "failed to meet the deadline imposed by 41 U.S.C. § 7103(f)(1)," the provision that applies to claims for \$100,000 or less. Petitioner's position is ambiguous, as it requests that the Board alternatively treat its claim as deemed denied pursuant to either of two CDA provisions that apply to different circumstances—the submission of a claim or more than \$100,000 or a submission of a claim of less than \$100,000.

To compound the ambiguity in petitioner's submissions in this case, while the petition did not cite 41 U.S.C. § 7103(f)(1) or allege that the contracting officer failed to comply with that provision, the claim cites 41 U.S.C. § 7103(f)(1), and states:

In accordance with the Contract Disputes Act, . . . and the Disputes Clause of the Contract, SRNS submits this claim for an interpretation of the Contract terms. As required by 41 U.S.C. § 7103(f)(1), SRNS requests that within 60 days of your receipt of this claim, you issue a final decision determining that . . . costs charged by and reimbursed to SRNS under the Contract are allowable.

Petition, Exhibit 1 at 1.

The claim does not reference 41 U.S.C. § 7103(f)(2), cited in the petition, which applies to claims of \$100,000 or more. Thus, petitioner's claim is not consistent with the relief requested in the petition, and the relief requested in the brief is ambiguous as it cites the provisions for claims equal to or less than \$100,000 and for claims of more than \$100,000, which contain different requirements.

Respondent's challenge to relief available pursuant to a petition

Respondent questioned whether the relief requested by the petitioner with regard to a deemed denial was available in response to a petition:

Under the rules of the Board, the term "petition" specifically "means a request for a decision filed under 41 U.S.C. 7103(f)(4) that the Board directs [sic] a contracting officer to issue a written decision on a claim." *See Rule of Procedure for the Civilian Board of Contract Appeal[s] Rule 1.b.7.* The code

section referenced in the definition of “petition”, 41 U.S.C. 7103(f)(4), provides that a contractor “may request the tribunal concerned to direct a contracting officer to issue in a specific period of time, . . . in the event of undue delay or the part of the contracting officer.” No other relief is cited in any of these sections, which are unambiguous. Therefore the only remedy available to SRNS for its petition is direction from the Board to the Contracting Officer to issue a final decision on SRNS’s claim within a specific time. The relief SRNS request[s] in its Petition is direction to the Contracting Officer to issue a final decision which is consistent with 41 U.S.C. 7103 (f)(4). . . . The petition is ambiguous in that it then requests the Board to treat an undefined “it” as a deemed denial. It is unclear whether the deemed denial should be declared before or after the thirty days. However, a deemed denial is not an appropriate remedy for a petition and must be raised by an appeal, not a petition.

Respondent’s Reply Brief at 2.

Petitioner’s assertion that the petition fulfills the requirement of a notice of appeal

The Board directed petitioner to respond to respondent’s assertion that “a deemed denial is not an appropriate remedy for a petition and must be raised by an appeal, not a petition.” Petitioner responded, asserting yet another alternative argument—that its petition satisfied the requirements of a notice of appeal of a claim which has been deemed denied, and therefore the Board should treat it as such and assume jurisdiction. Petitioner stated:

Respondent’s allegation would have more force if the relief sought in SRNS’s petition were limited to requesting that the Board direct the Contracting Officer (CO) to issue a final decision in accordance with 41 U.S.C. § 7103(f)(4). However, SRNS’s petition seeks relief in the alternative, and specifically requests that the Board treat the CO’s failure, within 60 days after receipt of SRNS’s claim, to either issue a decision or notify SRNS of the time within which a decision will be issued, as a deemed denial in accordance with 41 U.S.C. § 7103(f)(5).^[4] . . .

⁴ Petitioner changes its position stated in its initial brief, referring only to the requirement for claims over \$100,000—41 U.S.C. § 7103f(2)—and does not refer to 41 U.S.C. § 7103(f)(1), pertaining to claims of \$100,000 or less.

SRNS styled its request as a “petition” rather than a “notice of appeal” solely to avoid the risk of dismissal if the Board were to disagree with SRNS’s belief that the claim had been deemed denied

However, notwithstanding the caption, SRNS’s February 10, 2017 filing fully satisfied the requirements for a notice of appeal under CBCA Rule 2.a.1 and 41 U.S.C. §§ 7014(a), 7105. SRNS’s filing describes in detail (and attaches) the claim the CO has failed to decide, and alleges jurisdictional facts demonstrating that the CO’s failure to issue a decision constitutes a deemed denial in accordance with 41 U.S.C. § 7103(f)(5). In addition, SRNS’s filing provides all of the information required by CBCA Rule 2.a.1.ii, and SRNS sent a copy of the filing to the CO before whom its claim is pending as required by CBCA Rule 2.a.1.iii.

CBCA Rule 2.a.1.ii states that “[a] written notice in any form, including the one specified in the Appendix to the rules of this chapter, is sufficient to initiate an appeal.” *See also* CBCA Rule 1.c (“The rules of this chapter shall be construed to secure the just, informal, expeditious, and inexpensive resolution of every case.”). Accordingly, notwithstanding its caption, SRNS’s February 10, 2017 filing is sufficient to initiate an appeal. Moreover, even if the Board were to determine that the caption renders SRNS’s February 10, 2017 filing deficient as a notice of appeal, because a jurisdictional basis is identifiable from the record, the Board can and should assume jurisdiction over the appeal.

Petitioner’s Reply to Respondent’s Allegations at 2-3.

Petitioner’s response lacks merit. The petition was not designated as a notice of appeal and it did not contain an affirmative statement that petitioner was appealing a claim that had been deemed denied.⁵ Rather, the petition requested that this Board make alternate determinations, one of which was to “treat it as a deemed denial in accordance with 41 U.S.C. § 7103(f)(5).” This request required that the Board determine if the contracting officer’s actions resulted in a deemed denial—a determination of jurisdiction. Petitioner suggests in its subsequent briefing that the Board should review its petition—which petitioner characterizes as “sufficient to initiate an appeal,” because petitioner believes that its petition alleges “jurisdictional facts” and “provides all necessary information”—so the Board can determine if there was a deemed denial. If the Board does determine that there was a

⁵ Petitioner did not make this assertion in its initial brief, but did so for the first time in its reply brief.

deemed denial, petitioner suggests that the Board should then “assume jurisdiction over the appeal.” As discussed above, there are factual and legal ambiguities and inconsistencies in this case when one compares the petition, petitioner’s initial brief, petitioner’s reply brief, and its claim. Petitioner makes inconsistent arguments as to when the alleged failure to issue a contracting officer’s decision occurred, citing provisions of the CDA pertaining to different dollar amounts and raising the issue of whether certification of the claim was required.

Petitioner states further that it “styled its request as a ‘petition’ rather than a ‘notice of appeal’ solely to avoid the risk of dismissal if the Board were to disagree with SRNS’s belief that the claim had been deemed denied.” This justification is not logical and lacks merit. If petitioner believed the contracting officer’s actions had resulted in a deemed denial of its claim, it was not prevented from filing a notice of appeal of a deemed denial of its claim and titling it as such. Petitioner cites *Safe Haven Enterprises LLC v. Department of State*, CBCA 3871 et al., 15-1 BCA ¶ 35,928,⁶ and *Cooley Constructors, Inc. v. General Services Administration*, CBCA 3905, 15-1 BCA 36,001, to support its assertion that its petition, which it intentionally did not designate as a notice of appeal, contains information sufficient to initiate an appeal and should be treated as a notice of appeal. The circumstances of these cases are not factually or procedurally similar to the circumstances of the instant case. In those cases, notices of appeal were filed, and the Board resolved motions to dismiss on jurisdictional grounds. Thus, in those cases, jurisdiction was challenged after notices of appeal were filed. Those cases do not stand for the proposition that a party may intentionally misname a notice of appeal and omit an affirmative statement of intent to appeal a deemed denial to avoid the risk of a negative jurisdictional determination, and then request the Board to make a jurisdictional determination as to an appeal that has not been affirmatively stated.

The petition in the instant case was not a notice of appeal, and we do not treat it as such.

Decision

This Board will not make a jurisdictional determination with regard to a notice of appeal that has not been filed. We therefore deny the petitioner’s request to “treat it as a deemed denial.” 41 U.S.C. § 7103(f)(5).

⁶ Petitioner quotes *Safe Haven Enterprises, LLC*, where the Board opines that “[a] contractor should not lose its right to an appeal merely because it makes an initial misstep in identifying existing jurisdictional facts.” 15-1 BCA at 175,604. There has been no assertion in this proceeding that petitioner has lost its right to appeal.

We also deny the alternate relief requested—to direct the contracting officer to issue a final decision on the attached claim within thirty days—because we are unable to determine from the existing record, which contains ambiguous and inconsistent factual and legal allegations with regard to the claim, when the contracting officer was required to issue a final decision on the claim. We therefore cannot determine whether there has been “undue delay on the part of the contracting officer” in issuing a decision. 41 U.S.C. § 7103(f)(4).

The petition is **DENIED**.

ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JONATHAN D. ZISCHKAU
Board Judge