UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO STAY GRANTED: January 12, 2017

CBCA 5456

AHTNA ENVIRONMENTAL, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Anne Marie Tavella and Traeger Machetanz of Davis Wright Tremaine LLP, Anchorage, AK, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Western Federal Lands Division, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

LESTER, Board Judge.

ORDER

Respondent, the Department of Transportation (DOT), acting through the Federal Highway Administration (FHWA), has requested that the Board stay proceedings in this appeal to permit the FHWA contracting officer time to prepare and issue a decision on the merits of the certified claim underlying this appeal. Appellant, Ahtna Environmental, Inc. (AEI), has filed a written opposition to that request.

Background

AEI submitted a request for equitable adjustment (REA) to the FHWA on December 11, 2015, which the FHWA's Construction Operations Engineer (COE) for the contract denied by letter dated April 5, 2016. On April 28, 2016, AEI, based upon essentially the same arguments identified in its REA, submitted a certified claim to the FHWA contracting officer in the amount of $2,263,619.30. The FHWA contracting officer issued a decision denying that claim on August 17, 2016, finding that the claim was barred based upon what the contracting officer viewed as a prior release of claims. The contracting officer considered and denied AEI's request to recover costs associated with the preparation of its REA, but did not otherwise address the merits of AEI's claim in her decision.

On August 26, 2016, AEI appealed the contracting officer's August 17, 2016, decision to this Board, and the Board soon thereafter issued a scheduling order directing AEI to file a complaint and the FHWA to submit the appeal file pursuant to Board Rule 4 (48 CFR 6101.4 (2015)) by late September 2016. The FHWA then filed a motion asking the Board to defer the agency's need to submit a comprehensive appeal file, asserting that it intended to file a dispositive motion, which the Board was later informed would address the FHWA's argument that AEI's claim was barred by the doctrine of release. AEI, which did not oppose the FHWA's motion, then requested that its obligation to submit a complaint similarly be suspended pending the summary relief briefing. By order dated September 15, 2016, the Board suspended AEI's obligation to submit a complaint, suspended the FHWA's obligation to submit a comprehensive appeal file encompassing documents associated with the merits of AEI's claim, and ordered the FHWA to submit an appeal file limited to the issue(s) to be addressed in the summary relief briefing. On September 30, 2016, the FHWA filed that limited appeal file along with its motion for summary relief, and AEI subsequently responded to the motion and filed a supplemental appeal file limited to the release of claims issue addressed in the FHWA's summary relief motion.

By decision dated December 22, 2016, the Board denied the FHWA's motion for summary relief, finding that there was no effective release of the claim that AEI was pursuing. On December 23, 2016, the Board issued a scheduling order in which the FHWA was directed to supplement the existing appeal file no later than January 24, 2017, with any documents and material required by Board Rule 4(a) relating to the merits of the dispute underlying AEI's appeal that had not already been filed with the Board. Similarly, in that December 23, 2016, order, the Board directed AEI to file its complaint by January 24, 2017.

On January 5, 2017, the FHWA filed its motion asking the Board to stay proceedings in this appeal for a period of sixty days from the issuance of the Board's December 23, 2016, order, to and including February 24, 2017. The FHWA indicated that its contracting officer

intends to evaluate the merits of AEI's claim and to issue a new contracting officer's decision addressing the claim's merits by February 24. It represents that AEI's $2.263 million claim consists of approximately five parts that are further divided into twenty subparts, which it will take the contracting officer some time to digest. It further asserts that, although it cannot represent that the contracting officer will find any merit in any of AEI's claim, "it is worth the effort and the time to determine whether [areas of potential agreement] exist," which could potentially "narrow the issues in dispute." Motion to Stay at 3.

Discussion

I. Stays Under Section 7103

In its motion, the FHWA asks us to stay proceedings pursuant to the authority of section 7103(f)(5) of the Contract Disputes Act (CDA), 41 U.S.C. § 7103(f)(5) (2012), which provides 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, stay the proceedings of the appeal or action to obtain a decision by the contracting officer*.

Id. (emphasis added).

Pursuant to that statute, if a contracting officer does not issue a decision on a contractor's claim within the time period permitted by the CDA and the contractor elects to file an appeal to the Board or the Court of Federal Claims on a "deemed denial" basis, the tribunal "may issue a stay" in the appeal "to obtain a final decision [from the contracting officer] when the [tribunal] believes that such a decision would be beneficial to the parties and assist resolution of the matter." *United Partition Systems, Inc. v. United States*, 59 Fed. Cl. 627, 641-42 (2004) (citing *Sparks v. United States*, 36 Fed. Cl. 488, 492-93 (1996)); *see 6800 Corp.*, GSBCA 5880, 81-2 BCA ¶ 15,388, at 76,241 ("A stay for a reasonable period of time would enable the contracting officer to evaluate and reach a decision on appellant's claims."). "If the Board chooses to stay, it may direct the contracting officer to obtain additional information that would facilitate a decision." *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1566 (Fed. Cir. 1995). "[I]t may be that such a post-appeal final decision will, by allowing all or a portion of a claim, moot all or a portion of the appeal" if the contractor chooses to accept the decision, "thereby lessening the volume of litigation." *Consolidated Marketing Network, Inc.*, DOT CAB 1680, et al., 85-3 BCA ¶ 18,384, at 92,207. Even if a

contracting officer decides to deny a contractor's claim in his or her decision, the contracting officer's analysis can prove useful in further proceedings in summarizing relevant and potentially complex facts and in framing the scope of the dispute between the parties.

Nevertheless, "[t]he exercise of the [tribunal's] authority to issue a stay" pursuant to the statutory provision "is committed to the [tribunal's] discretion." *United Partition*, 59 Fed. Cl. at 641-42 (citing *Durable Metal Products, Inc. v. United States*, 21 Cl. Ct. 41, 47 (1990)). Tribunals are less likely to exercise that discretion in favor of a stay if the delay would work an undue hardship on the contractor. *See Rudolph & Sletten, Inc. v. United States*, 120 Fed. Cl. 137, 143 (2015) (granting stay to give contracting officer time to issue decision where "a short stay would not work an undue hardship on the parties"). Further, if the Government's prior analysis of a claim is evident from documents other than an actual decision, or if a contracting officer has had ample time to consider a claim without showing any effort to conduct the necessary analysis, the Board may properly find it "more appropriate and less wasteful of resources to process [an] appeal without a time-consuming and unnecessary suspension and referral to the contracting officer." *Fuel Storage Corp.*, ASBCA 26994, 83-1 BCA ¶ 16,418, at 81,683; *see Jake Sweeney Auto Leasing, Inc.*, PSBCA 3279, 93-3 BCA ¶ 26,186, at 130,347; *Emerson Electric Co.*, ASBCA 31184, 86-2 BCA ¶ 18,979, at 95,856-57. In any event, the Board's discretion to entertain a stay request is broad, empowering the tribunal to enter a stay even in situations in which both parties object to a stay. *Cincinnati Electronics Corp. v. United States*, 32 Fed. Cl. 496, 505 (1994).

II. Stays When the Claim Was Actually Decided

Technically, section 7103(f)(5) does not apply in the situation here. It applies when a contractor appeals on a "deemed denial" basis. *See TKC Aerospace v. Department of Homeland Security*, CBCA 2119, 10-2 BCA ¶ 34,554, at 170,409 (statutory provision permits stay "when an appeal has been filed *prior to* a final decision being rendered on a properly submitted claim" (emphasis added)).[1] AEI did not appeal a "deemed denial" of its claim. The contracting officer actually issued a decision (on August 17, 2016), denying AEI's claim in its entirety based upon what she viewed as AEI's prior release of its claim, and AEI timely filed an appeal of that actual decision to the Board. In her decision, though, the contracting officer did not address the merits of AEI's claim. Now that the Board has

[1] To the extent that the FHWA might argue that the sentence in section 7103(f)(5) dealing with the Board's authority to stay does not reference the need for a "deemed denial," it is clear from the context of the sentence (and the use of the word "however" to refer back to the preceding sentence, which addresses a contractor's ability to appeal a "deemed denial") that the stay provision incorporates and relates to the "deemed denial" provision.

rejected the FHWA's release defense, the FHWA asks that we provide the contracting officer time to evaluate the merits of the claim and issue another decision on the claim in which the contracting officer could address those merits.

Despite the technical inapplicability of section 7103(f)(5) to the situation here, the Board possesses the inherent authority to suspend proceedings when circumstances warrant, separate and apart from that statutory authority. *Hardrives, Inc.*, IBCA 2319, et al., 91-2 BCA ¶ 23,769, at 119,063; *Regional Scaffolding & Hoisting Co.*, GSBCA 5487, et al., 80-2 BCA ¶ 14,491, at 71,445. Although we review the merits of a contractor's claim de novo, without deference to the contracting officer's findings, *Wilner v. United States*, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994) (en banc), Congress made clear in the CDA that the contracting officer's consideration and analysis of the claim in the first instance, before judicial review of the claim's merits commences, is an essential element of the claim resolution process that can be helpful to the reviewing tribunal, as one of our predecessor boards, the Energy Board of Contract Appeals, explained in *DHR, Inc.*, EBCA 401-12-87, 88-1 BCA ¶ 20,451 (1987):

> The CDA places great emphasis on the role of the Contracting Officer in resolving contract claims and makes the Contracting Officer's decision an indispensible precondition to the assertion of a contract appeal. It has been characterized as "the linchpin" for the contract appeal process under the CDA. . . . We are, therefore, loath to take actions which diminish this role or which may result in an appeal without the Contracting Officer having first considered and decided the claim and without the Contractor having thereafter reviewed the decision and concluded that it is wrong. Such interplay delineates the issues and fosters responsible deliberation and careful assessment by each party of its own position. It requires each party to take affirmative actions based upon carefully made determinations. Most importantly, it provides a last clear chance to avoid litigation.

Id. at 103,430. "Congress' focus on having the contracting officer make the initial determination is easily understood" in light of "the technical complexity of many equitable adjustment claims, particularly in the construction field; the potential for multiple claims arising from a single contract; and the expertise and experience that the contracting officer can bring to bear in balancing the competing equities of the claim." *Pathman Construction Co. v. United States*, 10 Cl. Ct. 142, 146 n.2 (1986), *rev'd on other grounds*, 817 F.2d 1573 (Fed. Cir. 1987). "Congress did not wish to substitute the courts, or the contract boards, for such government official, or have his role easily bypassed or usurped." *Id.*

Although the contracting officer already issued a decision on AEI's claim, it does not address the merits of AEI's claim and, given our rejection of the release defense, is not

particularly helpful in achieving the CDA's goals. Yet there is nothing in the CDA that contemplates more than one "final" decision on each issue raised in a claim. It is true that, if a contractor places multiple segregable issues into a single certified claim, the contracting officer can choose "to address matters separately or cumulatively" and can "decide all claims or issues presented to him [or her] in one decision or can issue separate decisions for various issues," with each decision being separately appealable. *Staff Inc.*, AGBCA 95-181-1, et al., 96-1 BCA ¶ 28,051, at 140,070 (1995). In this instance, though, the contracting officer did not do that. She instead denied all issues in AEI's claim in a single decision. Although it is conceivable that a contacting officer could withdraw a previously issued decision (at least before the time limit for appeal has expired) in favor of issuing a new one, *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 36,117, at 176,324 n.6, that is not what the FHWA is proposing here. Further, AEI has already appealed the existing decision to the Board, and, because our jurisdiction is established at the time an appeal is filed, *Bass Transportation Services, LLC v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464, at 177,687, any purported withdrawal of the existing decision could not affect that jurisdiction. *See Consolidated Marketing*, 85-3 BCA at 92,207 (jurisdiction, "once having vested, cannot be divested by any subsequent action of the contracting officer"). Accordingly, with the appeal already pending, there is no basis for the contracting officer to issue a second "final" decision on the claim.

Yet, because the existing decision does not address the merits of AEI's claim, it would appear to further Congress' goals under the CDA to permit the contracting officer to analyze the merits of AEI's claim and issue her analysis of them. Such an analysis could result in what essentially would be an offer of settlement and/or could resolve or at least narrow some issues in the appeal. Whether we label it a new contracting officer's decision or a memorandum reflecting the contracting officer's analysis of the claim issues, any effort to reach a resolution of some or all issues short of litigation would be a worthwhile endeavor. Because the contracting officer has offered to engage in such an effort, we will analyze the FHWA's stay request here using the same standards that we would apply to a request for a stay under section 7103(f)(5), essentially comparing the benefits that a stay might provide with the harms resulting from a delay.

III. The FHWA's Stay Request

The FHWA makes two arguments in support of its stay: first, it asserts that, in the circumstances here, the contracting officer has had an inadequate time to analyze the merits of AEI's claim; and, second, it asserts that the requested stay is relatively short in duration and offers potential benefits that outweigh any minimal effect upon these proceedings.

We reject the FHWA's first argument. In arguing that the contracting officer has had insufficient time to conduct a thorough analysis of AEI's claim, the FHWA asserts that the contracting officer only received the claim on April 28, 2016; that she quickly denied the claim on the basis of the release; and that she had no reason to begin to analyze the merits until the Board rejected the FHWA's release argument on December 22, 2016. AEI responds that the FHWA received its REA in December 2015 and that, because the REA largely mirrors its April 2016 certified claim, the agency has, in reality, had more than a year to evaluate the issues that it raises in its claim. The FHWA responds that the COE, not the contracting officer, evaluated the REA and that we essentially should not count that time against the contracting officer. In *Brad West & Associates, Inc. v. Department of Transportation*, CBCA 3879, 14-1 BCA ¶ 35,744, we rejected the argument that the FHWA is making, finding that, where the contractor had previously submitted an REA providing the agency with the opportunity to become familiar with matters that the contractor later raised again in a formal claim, the time that the agency had to analyze the REA should be considered in evaluating how much time the contracting officer should reasonably need to decide the claim:

> [T]he certified claim was submitted on February 28, 2014. This was not a new claim. Over six months prior to Brad West's claim submission, DOT had reviewed appellant's request for an equitable adjustment. It thus was familiar with Brad West's claim and the issues presented by appellant. DOT's assertion that its attorney is busy reviewing other claims is likewise unpersuasive. The statute requires that a decision be provided in a reasonable time. DOT has an obligation to assign additional attorneys to review the claim, if the designated personnel are unable to review it in a reasonable time frame.

Id. at 174,931. Even though the contracting officer's declaration, which accompanies the FHWA's motion to stay, indicates that the contracting officer was extremely busy during the pendency of AEI's REA and had insufficient time to become involved with it, such internal matters wholly and exclusively within the Government's control are generally not factors used to determine whether a time extension for deciding a claim is "reasonable" under the CDA. *Hawk Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 5527, 16-1 BCA ¶ 36,572, at 178,119. The FHWA has had ample time to review the merits of AEI's claim.

Despite that fact, we believe that the benefits of the short stay proposed by the FHWA outweigh AEI's concerns about delay. Except for the Board's resolution of the FHWA's release argument, this appeal is in its infancy. AEI has not yet filed its complaint, and the only appeal file submitted thus far was limited to the release issue. Discovery has not yet

begun, and there is not yet a discovery plan or discovery schedule. The FHWA asks us to delay proceedings only until February 24, 2017, a period of less than sixty days from the date of the request, to allow the contracting officer to evaluate the claim's merits. The potential benefits that might result from such an analysis, including the possible resolution or narrowing of some of the issues in dispute, warrant granting the contracting officer time to conduct the analysis. Further, judicial efficiency, which is another factor that we can consider in granting the stay, *Kaman Precision Products, Inc.*, ASBCA 56305, et al., 10-2 BCA ¶ 34,499, at 170,153, favors a short stay. If we required the FHWA to file its appeal file and AEI to file its complaint immediately, we likely would receive subsequent motions by both parties to amend the appeal file and the complaint to incorporate additional documents, information, and/or findings resulting from the contracting officer's subsequent merits analysis. Judicial economy favors eliminating those duplicative efforts by deferring submission of the appeal file and complaint until after the contracting officer's merits analysis is complete on February 24, 2017. To account for AEI's concerns about delay, the Board can enter a schedule of proceedings that, once the contracting officer's analysis is complete, expedites the submission of the appeal file and any supplement, the complaint, and the answer.

Decision

The FHWA's motion to stay is **GRANTED**. Proceedings in this appeal are **stayed** until **February 24, 2017**, by which date the contracting officer shall issue the results of her analysis of the merits of AEI's claim. Whether labeled a contracting officer's decision or something else, AEI will not need to file a new appeal of that decision, given that the Board already possesses jurisdiction to entertain AEI's appeal associated with its April 28, 2016, claim. The Board's scheduling order of December 23, 2016, is **amended** to reflect that the FHWA's appeal file and AEI's complaint are due to be filed by **March 3, 2017**, and that AEI's supplemental appeal file, the FHWA's answer to the complaint, and the parties' joint status report proposing a schedule for further proceedings are due to be filed no later than **March 22, 2017**.

HAROLD D. LESTER, JR.
Board Judge