



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO DISMISS DENIED: February 25, 2009

CBCA 1424, 1425

SOUTHERN SCRAP MATERIAL CO., L.L.C.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Marc C. Hebert and Stanley A. Millan of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P., New Orleans, LA, counsel for Appellant.

Janis P. Rodriguez and Ryan M. Kabacinski, Office of Chief Counsel, Department of Transportation, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **STEEL**, and **McCANN**.

GILMORE, Board Judge.

Respondent moved to dismiss CBCA 1424 and CBCA 1425 on the grounds that the appeals were filed prematurely. It contends that the sixty-day period provided under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (2006), for issuing a final decision had not run on these claims when the appeals were filed. Appellant counters that it submitted the claims to the contracting officer (CO) on September 13, 2008, that they were received by the CO on September 19, 2008, and that it filed the appeals on November 26, 2008, after sixty days had passed and it had not received a final decision. For reasons below, we deny respondent's motion to dismiss.

Factual Background

During the past few years, appellant entered into a number of contracts with respondent to purchase and dismantle marine vessels. CBCA 1424 relates to the purchase and dismantling of the “Pennsylvania Trader” and CBCA 1425 relates to the purchase and dismantling of the “Hunley.”

On May 22, 2008, appellant submitted a request for an equitable adjustment requesting a time extension of sixty days for delays encountered on the Pennsylvania Trader and Hunley contracts. These delays were allegedly due to delays experienced on the dismantling of a vessel under an earlier contract, and encountering unforeseeable vessel conditions under the subject contracts. Respondent advised that it would not grant a time extension under either contract. By letter dated September 13, 2008, appellant submitted a claim to the CO on the Pennsylvania Trader contract and requested a final decision within sixty days.¹ It sought a time extension of sixty days and remission of liquidated damages in the amount of \$40,200. On the same date, appellant also submitted a similar claim letter to the contracting officer on the Hunley contract requesting a time extension of sixty days and remission of liquidated damages in the amount of \$46,000. That letter also stated that it was submitting the claim under the CDA and was requesting a final decision within sixty days.

By letter dated November 6, 2008, appellant advised respondent that according to its records, the claim was received by the CO on September 19, 2008, and that because each claim was below the \$100,000 threshold, it expected a final decision by November 18, 2008. On November 7, 2008, appellant advised respondent that it was amending its May 22, 2008, request for an equitable adjustment to include a request for an additional eleven-day time extension on the Pennsylvania Trader contract and an additional 321-day time extension on the Hunley contract, due to hurricanes Gustav and Ike. At this time, appellant had not received a final decision on its September 13, 2008, claims. Appellant on November 26, 2008, filed appeals on the September 13, 2008, claims after it had not received a final decision within sixty days from the CO’s receipt of the claims.

¹ The CDA provides at 41 U.S.C. § 605(c)(1) that “[a] contracting officer shall issue a decision on any submitted claim of \$100,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period.” The CDA further provides at 41 U.S.C. § 605(c)(5) that “[a]ny failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter.”

On January 8, 2009, respondent moved to dismiss CBCA 1424 and CBCA 1425, alleging that appellant's November 7, 2008, notice to amend the May 22, 2008, request for an equitable adjustment amended the earlier claims. Respondent argues that this amendment "tolled" the running of the sixty-day period in which the CDA requires the CO to issue a final decision. Respondent argues that the sixty-day period was "tolled" but does not contend that a new date was established for the CO to issue a final decision. It seems to contend that a new "combined" delay claim must now be submitted before the CO is required to issue a final decision. Respondent, thus, contends that appellant's notices of appeal filed on November 26, 2008, were premature and should be dismissed for lack of jurisdiction.

Appellant contends that the additional requests for equitable adjustments made on November 7, 2008, presented totally different issues than those presented in the September 13, 2008, claims, since it was advising respondent that it had additional days of delay due to hurricanes Gustav and Ike. Appellant contends that these later requests have not yet ripened into claims since it has not submitted these requests to the CO as CDA claims or requested final decisions.

Discussion

_____The Pennsylvania Trader and Hunley claims were submitted to the CO on September 13, 2008, and received by the CO on September 19, 2008. They were CDA claims under \$100,000 and appellant requested that the CO issue final decisions within sixty days. These claims were for delays to the subject contracts resulting from delays experienced under a prior contract and encountering unknown vessel conditions under the subject contracts. Appellant filed notices of appeal with the Board after the running of the sixty-day period for a final decision. They were filed as claims "deemed denied," since the CO had not issued a final decision within the sixty-day time period required by the CDA.

The appeals are properly before the Board. The fact that on November 7, 2008, appellant submitted additional requests for time extensions due to hurricanes Gustav and Ike under these same contracts did not toll the time period or restart the date for the running of the sixty-day period. The subsequent November 7, 2008, submissions were not intended to amend the earlier claims. The submissions were not presented as CDA claims and did not request a CO's final decision. On November 7, these requests for additional time extensions had not yet ripened into claims. They presented issues separate and apart from the claims submitted by appellant in the two September 13, 2008, letters. Furthermore, they did not change the September 13, 2008, claims. The fact that the earlier claims were again addressed in the November 7 submissions did not negate the fact that proper claims had been received by the CO on September 19, 2008, addressing previous separate and distinct contract delays. The appeals were not premature.

Decision

_____ Respondent's motion to dismiss CBCA 1424 and CBCA 1425 for lack of jurisdiction is **DENIED**.

BERYL S. GILMORE
Board Judge

We concur:

CANDIDA S. STEEL
Board Judge

R. ANTHONY McCANN
Board Judge