



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 2, 2016

CBCA 5527

HAWK CONTRACTING GROUP, LLC,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Thomas R. Krider and Alix K. Town of Oles Morrison Rinker & Baker LLP, Seattle, WA, counsel for Petitioner.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA, counsel for Respondent.

Before Board Judges **VERGILIO**, **KULLBERG**, and **LESTER**.

LESTER, Board Judge.

Pursuant to section 7103(f)(4) of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), and Board Rules 1(b)(7) and 2(a)(2) (48 CFR 6101.1(b)(7), .2(a)(2) (2015)), petitioner, Hawk Contracting Group, LLC (Hawk), requests that the Board direct the Department of Veterans Affairs (VA) contracting officer to issue a decision earlier than the date that the contracting officer has identified for its expected issuance. For the reasons set forth below, we deny Hawk's request.

Background

On September 17, 2013, the VA awarded contract no. VA69D-13-C-0289 (the contract) to Hawk to remodel and expand the material management area at the Jesse Brown Veterans Affairs Medical Center in Chicago, Illinois. The VA terminated the contract for the convenience of the Government on June 11, 2015, and requested that Hawk submit a termination settlement proposal. Hawk submitted that proposal on December 31, 2015, along with a cover letter expressing a desire for a prompt resolution of the negotiation and settlement process.

On January 29, 2016, in response to a status update request from Hawk, the VA indicated that, pursuant to the requirements of the Federal Acquisition Regulation (FAR), it would need to audit Hawk's proposal because Hawk was seeking recovery of more than \$100,000. Over the course of the next few months, Hawk sought further updates from the VA and was eventually informed that the VA Office of the Inspector General (OIG) had declined the contracting officer's request for an audit of Hawk's proposal, requiring the VA to search for a private contractor if it wished to have an audit conducted. Subsequently, the VA informed Hawk that an audit had been deemed not to be feasible.

After further negotiations did not result in a settlement, Hawk on August 4, 2016, converted its termination settlement proposal into a certified claim and requested that the VA contracting officer issue a decision within sixty days, in accordance with the contract's Disputes clause. On October 3, 2016, the VA contracting officer notified Hawk that he anticipated a decision on or before January 20, 2017.

On October 24, 2016, Hawk filed its current petition with the Board, asking that we direct the contracting officer to issue his decision no later than November 30, 2016. Hawk further requested that, to the extent that the VA contracting officer does not comply with that Board order and issue a decision by November 30, 2016, the Board permit Hawk to appeal the contracting officer's "deemed denial" immediately thereafter. Finally, Hawk has requested that, to the extent that we do not shorten the contracting officer's existing deadline of January 20, 2017, we preclude any further extensions beyond that date.

Discussion

Pursuant to the CDA, within sixty days of receiving a contractor's written certified claim of more than \$100,000, the contracting officer must 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). If the contracting officer fails to issue a decision on the claim "within the required time period," that failure may be "deemed to be a decision by the contracting

officer denying the claim and authorizes an appeal or action on the claim” before, respectively, a board of contract appeals or the Court of Federal Claims. *Id.* § 7103(f)(5).

Here, before the sixty-day period for issuing a decision on Hawk’s claim had expired, the contracting officer indicated that he anticipated issuing a decision on or before January 20, 2017. We treat this as a commitment to issuing a decision no later than that date. Until there is a decision on Hawk’s claim, or the date for issuance passes, Hawk cannot maintain an appeal with the Board or a suit at the Court of Federal Claims on its claim. *See Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981); *John C. Grimberg Co.*, ASBCA 42695, 91-3 BCA ¶ 24,074, at 120,520-21.

While the CDA permits the contracting officer to extend the deadline, it also requires that any written decision “be issued within a reasonable time, . . . 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.” 41 U.S.C. § 7103(f)(3); *see Rudolph & Sletten, Inc. v. United States*, 120 Fed. Cl. 137, 141 n.2 (2015) (“Section 7103(f)(3) places a reasonableness limitation on section 7103(f)(2)(B) and prevents the contracting officer from setting a final decision date far in the future.”); *Monster Government Solutions, LLC v. Department of Justice*, CBCA 2834, 12-2 BCA ¶ 35,153, at 172,529 (contracting officer’s decision must be issued within “a reasonable time”). If the contractor believes that the contracting officer’s extension of the deadline for deciding its claim is unreasonable, it “may request the tribunal concerned to direct [the] 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.” 41 U.S.C. § 7103(f)(4); *see USProtect Corp. v. Department of Homeland Security*, CBCA 65, 08-1 BCA ¶ 33,782, at 167,200 (“In the event of delay by a contracting officer in rendering a decision on a contractor’s claim, . . . a contractor may petition a board of contract appeals to direct the contracting officer to render a decision within a specified time.”). Under section 7103(f)(4), the Board is authorized to alter a time extension that the contracting officer has granted himself, and to allow a contractor to appeal on a “deemed denial” basis if the contracting officer fails to issue a decision by the Board’s revised deadline for a decision, if it finds that the contracting officer’s extension was unreasonable. *See, e.g., Rudolph & Sletten*, 120 Fed. Cl. at 141-42 n.2 (“If the contracting officer does set an unreasonable decision date, section 7103(f)(4) allows the contractor to ask a [tribunal] to direct the contracting officer to issue a decision within a specified period of time.”); *Volmar Construction, Inc.*, ASBCA 60710-910, 16-1 BCA ¶ 36,519, at 177,904 (reducing the time extension that the contracting officer had identified for issuance of a decision); *Brasfield & Gorrie, LLC v. Department of Veterans Affairs*, CBCA 3728, slip op. at 2 (Feb. 21, 2014) (same); *Inslaw, Inc.*, DOT BCA 1609, et al., 90-2 BCA ¶ 22,701, at 114,003 (remedy for non-compliance with a board order directing

issuance of a contracting officer decision by a date certain is to allow appeal on deemed denial basis).

“Whether the date stated by a [contracting officer] for issuance of a final decision is reasonable must be determined on a case-by-case basis.” *Kelly-Ryan, Inc.*, ASBCA 57168, 11-1 BCA ¶ 34,629, at 170,634 (2010). Typically, in evaluating undue delay and reasonableness, a tribunal considers a number of factors, including the underlying claim’s complexity, the adequacy of contractor-provided supporting information, the need for external technical analysis by experts, the desirability of an audit, and the size of and detail contained in the claim. *See Navajo Health Foundation-Sage Memorial Hospital, Inc. v. Burwell*, 110 F. Supp. 3d 1140, 1190-91 (D.N.M. 2015) (citing and summarizing several board of contract appeals decisions on standards applicable to reviews under section 7103(f)(4)); *VECO, Inc.*, DOT BCA 2961, 96-1 BCA ¶ 28,108, at 140,299 (1995). Matters that are wholly and exclusively within the Government’s control, such as internal staffing and agency funding levels, are generally not factors used to determine whether a time extension is “reasonable” under the CDA. *See Volmar*, 16-1 BCA at 177,904; *VECO*, 96-1 BCA at 140,299.

During a telephonic conference that the Board conducted with the parties on November 8, 2016, the VA reported that a significant reason for the contracting officer’s need to extend the decision deadline was his recent recognition that, pursuant to FAR 49.107 (48 CFR 49.107), he had been required to obtain an audit of Hawk’s settlement proposal – something that he initially had pursued, but then abandoned because of the unavailability of the OIG audit team and the cost of an outside auditor. The VA’s delay in commencing the current audit is plainly something that was within the VA’s control. The VA has had Hawk’s settlement proposal since December 31, 2015, meaning that it has had almost a year to conduct an audit. Although Hawk did not formally convert its termination settlement proposal into a “claim” under the CDA until August 2016, we cannot ignore the agency’s pre-claim awareness and ability to act when considering the reasonableness of the contracting officer’s extension of his decision deadline. *See VECO*, 96-1 BCA at 140,299 (“we cannot take the position that the time between the date of a request for equitable adjustment and the date it is perfected into a claim is to be completely disregarded in determining what is a reasonable time for purposes of § [7103(f)(4)]”); *Fru-Con Construction Corp.*, ASBCA 53544, 02-1 BCA ¶ 31,729, at 156,758 (“it is appropriate to consider the Government’s prior familiarity with the issues raised in the claim for purposes of determining whether additional time is reasonably necessary”). The contracting officer’s delayed realization that an audit of termination settlement proposals exceeding \$100,000 was mandatory is not Hawk’s fault and should not normally be a basis for delaying Hawk’s right to pursue action on its claim. At this time, the termination settlement proposal period has passed, and the contracting officer has a certified claim before him for a decision.

Notwithstanding the time that the contracting officer has already had to review Hawk's settlement proposal and claim, we conclude, considering all of the existing circumstances, that the January 20, 2017, date for the issuance of a decision does not represent undue delay. In setting that deadline, we recognize that an audit of Hawk's claim, followed by a thorough contracting officer's decision on that claim, would benefit Hawk, the Government, and any tribunal asked to review Hawk's claim. We further recognize that the VA now appears (albeit belatedly) to be attempting to expedite the conduct of an audit. With only a few weeks remaining before the contracting officer's stated decision deadline, we will not disrupt the existing schedule. Nevertheless, given the amount of time that has already elapsed since the VA received Hawk's settlement proposal (and its claim), we can see no justification for any further extensions that would preclude Hawk from immediately beginning the litigation process after January 20 if that is what it wants to do. If the VA contracting officer does not issue a written decision by January 20, 2017, Hawk may consider its claim to have been deemed denied and may immediately file an appeal. *See Design One Building Systems, Inc. v. Department of Veterans Affairs*, CBCA 2423, 11-1 BCA ¶ 34,766, at 171,106.

Decision

For the foregoing reasons, we **DENY** Hawk's petition. The VA contracting officer is to issue his decision no later than January 20, 2017.

HAROLD D. LESTER, JR.
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

H. CHUCK KULLBERG
Board Judge