



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

---

MOTION TO DISMISS DENIED: September 6, 2013

CBCA 3464

TRICON TIMBER, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Julie A. Weis of Haglund Kelley Jones & Wilder LLP, Portland, OR, counsel for Appellant.

Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DRUMMOND**.

**DANIELS**, Board Judge.

The Department of Agriculture (USDA), respondent, moves the Board to dismiss this case, or alternatively to stay proceedings pending receipt of a contractor claim. We deny the motion.

Background

USDA's Forest Service (FS) entered into a contract with Tricon Timber, LLC (Tricon) which included reconstruction of a road in the Lolo National Forest in Montana. As part of this work, Tricon was required to cut and remove trees along the route. According to Tricon,

it was required to cut and remove many more trees than the fifty estimated by the FS. Tricon maintains that it is entitled to be paid \$35,905 more than the FS has paid because it cut and removed the additional trees.

In November 2012, the FS proposed a contract modification under which Tricon would have received \$1274 for what the contractor believed to have been extra, required work. Tricon refused to accept the proposed modification. Later in November, a FS contracting officer told the contractor that “[i]t appears that undesignated timber may have been cut outside of contract specifications for brushing” on the road.

In December, the contracting officer wrote that he had “concluded that the Contractor did cut undesignated timber.” Tricon objected and, with detailed explanation, “ask[ed] that [the contracting officer] pay us for that work at the contract rate in the schedule of items for Removal of Individual Trees.” In February 2013, the contracting officer responded:

A Forest Service Law Enforcement investigation has concluded that the Contractor cut undesignated timber along Road 17444, in violation of federal regulations. Consequently, the Contractor’s request for an equitable adjustment to the contract price allowing payment for these actions is not being considered further.

On May 8, 2013, the FS reported that it had “presented the facts of the investigation to the United States Attorney’s Office for review of criminal prosecution. The case was declined. The incident has been referred back to Forest Service Contract Administrators for potential administrative remedies.”

On May 21, Tricon sent to the contracting officer a “letter . . . to submit our invoice for payment for the actual quantity of individual trees that were removed under the terms of the contract.” The letter explained Tricon’s position on the matter and asked the contracting officer to process payment in the amount of \$35,905.

On May 23, the contracting officer responded. His letter reads in full:

Invoice No. 7 Roads, dated May 22, 2013 is rejected. The Government will not process this invoice for payment.

The invoice is being rejected for several reasons. Included among the reasons is the fact that the Contractor cut undesignated timber, and no contract modification was ever issued increasing the quantity of this item on the contract.

### Discussion

The Board “has jurisdiction to decide any appeal from a decision of a contracting officer of an executive agency (other than [specified agencies, of which the FS is not one]) relative to a contract made by that agency.” 41 U.S.C. § 7105(e)(1)(B); *see also Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1264 (Fed. Cir. 1999); *Sharman Co. v. United States*, 2 F.3d 1564, 1568-69 (Fed. Cir. 1993). Contracting officer decisions are issued on claims. 41 U.S.C. § 7103. A “claim” is “a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.” *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) (adopting definition in the Federal Acquisition Regulation).

The Court of Appeals for the Federal Circuit has held that a routine request for payment, such as an invoice for regular payment under a contract, is not a claim. *Reflectone*. The FS seizes on this conclusion to argue that Tricon’s May 21 communication to the contracting officer, which used the term “invoice,” is not a claim. Further, the FS suggests, the contracting officer’s response was not a “decision” because it did not advise Tricon of its appeal rights. According to the FS, the response merely established the existence of a dispute, entitling the contractor to submit a claim.

We find all of these arguments misguided. A request for payment “when unforeseen or unintended circumstances . . . cause an increase in contract performance costs” is “anything but a ‘routine request for payment.’” *Reflectone*, 60 F.3d at 1577. Tricon’s communication, which was based on an alleged FS requirement to cut and remove trees vastly in excess of the number contemplated in the contract, was such a non-routine request. Although the communication was termed an “invoice,” it was clearly submitted to bring to a formal close a dispute which had been established six months earlier. The written communication was a “clear and unequivocal statement that [gave] the contracting officer adequate notice of the basis and amount of the claim.” *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). Thus, it was a claim.

The fact that the contracting officer’s response did not advise Tricon of its appeal rights is immaterial. A response to a claim may be a contracting officer’s decision even if it does not include such a statement or label itself a final decision. *Alliant Techsystems*, 178 F.3d at 1267 (citing *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)). The letter the FS contracting officer sent to Tricon was a decision which brought administrative finality to the dispute and was appealable to the Board.

Decision

The **MOTION TO DISMISS** this case, or alternatively to stay proceedings pending receipt of a contractor claim, is **DENIED**. The FS shall file its answer to Tricon's complaint within ten calendar days of the date of this decision.

---

STEPHEN M. DANIELS  
Board Judge

We concur:

---

CATHERINE B. HYATT  
Board Judge

---

JEROME M. DRUMMOND  
Board Judge