



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR IMMEDIATE RELEASE
OF FUNDS DENIED: August 29, 2017

CBCA 5640

BES DESIGN/BUILD, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Adam M. Milam of Milam & Milam, LLC, Daphne, AL, counsel for Appellant.

Mary A. Mitchell, Office of the General Counsel, Department of Veterans Affairs, Houston, TX, counsel for Respondent.

Before Board Judges **SOMERS**, **SHERIDAN**, and **SULLIVAN**.

SOMERS, Board Judge.

Appellant, BES Design/Build, LLC (BES), has filed a motion seeking the immediate release of funds granted by the contracting officer in a December 3, 2016, final decision. Respondent, Department of Veterans Affairs (VA), opposes the motion, arguing that because proceedings before the board are wholly de novo, the contracting officer's final decision is not binding upon the agency.¹ For the reasons set forth below, we find the VA's argument consistent with statute and binding precedent. We deny appellant's motion.

¹ The VA contends that the contracting officer had not released the funds because BES failed to sign a modification which would have permitted payment. In light of our holding below, we need not address this contention.

Findings of Fact

On September 21, 2015, the VA awarded a contract to BES to renovate an area located in the Veterans Health Care System of the Ozarks' campus in Fayetteville, Arkansas. The contract called for the project to be completed within 270 days, with an anticipated completion date of June 17, 2016.

At the preconstruction conference, the VA notified BES that sampling conducted of the area to be renovated revealed the presence of asbestos. By email message sent on November 23, 2015, the contracting officer submitted to BES a request for proposal and a corresponding statement of work for asbestos abatement.

In January 2016, BES submitted a change order proposal to the contracting officer for subcontractor expenses, direct expenses, and delay resulting from the asbestos abatement. On March 21, 2016, the VA issued a unilateral modification for the asbestos removal. After performing the work, BES submitted a certified claim on August 25, 2016, for \$168,847.06 and additional time to the contracting officer.

On December 3, 2016, the contracting officer issued a final decision. The contracting officer found that BES would be entitled to sixteen additional calendar days and \$21,998.34 for the additional costs for asbestos abatement. The contracting officer prepared a modification to the contract consistent with the final decision. BES received the modification, and proposed that the VA include interest due pursuant to prompt payment guidelines. The VA calculated the interest due and returned the modification for signature. However, BES made "pen and ink" changes to the modification, which, it asserts, it submitted in an attempt to preserve its appeal rights for the remainder of its claim. The contracting officer refused to change the modification. The contracting officer informed BES that, to receive payment, BES would need to sign the modification in its current form and submit an invoice. BES did not sign the modification, nor did it submit an invoice for the amount to be paid.

Appellant filed an appeal of the contracting officer's final decision, docketed by the Board on February 14, 2017. On May 30, 2017, BES filed this motion for the immediate release of funds "awarded" in the contracting officer's final decision of December 3, 2016. The VA opposes the motion.

Discussion

Appellant's motion presupposes that the agency is bound to pay BES for amounts set forth in the contracting officer's final decision. A final decision, however, is not binding upon the agency, because, once appealed, that decision is reviewed de novo by the Board.

The CDA provides that "(e)ach claim by a contractor against the [Government] relating to a contract shall be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1) (2012); *CompuCraft, Inc. v. General Services Administration*, CBCA 5516, 17-1 BCA ¶ 36,662, at 178,538. The contracting officer's final decision need not include specific findings of fact, but "[i]f made, specific findings are not binding in any subsequent proceeding." 41 U.S.C. § 7103(e). On appeal, the Board proceeds to conduct a de novo review. *Id.* § 7104(b)(4). "[O]nce an action is brought following a contracting officer's final decision, the parties start in court or before the board with a clean slate." *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994) (en banc); *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 16-1 BCA ¶ 36,468, at 177,706.

Because of the de novo nature of proceedings under the CDA, "the contracting officer's [decision] is not to be treated [as] the unappealed determination of a lower tribunal which is owed special deference or acceptance on appeal." *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987). Accordingly, the fact that the contracting officer made specific findings, including quantifying costs owed to BES, does not bind the agency once appellant has appealed the final decision.

Decision

Appellant's motion for the immediate release of funds is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

MARIAN E. SULLIVAN
Board Judge