



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: September 18, 2014

CBCA 3879

BRAD WEST & ASSOCIATES, INC., SUCCESSOR-IN-INTEREST TO WEST
CONSTRUCTION COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Traeger Machetanz and Jessica Andrade of Dorsey & Whitney, LLP, Seattle, WA,
counsel for Appellant.

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

Before Board Judges **STERN**, **HYATT**, and **WALTERS**.

STERN, Board Judge.

On May 29, 2014, Brad West and Associates, Inc. (Brad West) filed an appeal from the failure of a contracting officer for the United States Department of Transportation's Federal Highway Administration (DOT) to issue a decision on its claim. On June 6, 2014, the Board directed DOT to issue a decision within thirty days, or advise the Board as to why such a decision could not be issued.

On June 16, 2014, respondent filed a motion to dismiss with the Board. In the motion DOT argues that it has complied with the Contract Disputes Act's (CDA) requirement that it notify appellant of the time when a contracting officer's decision will be issued on its claim. DOT's motion, however, failed to set forth any rationale for its purported inability to issue a decision prior to December 17, 2014, as it had previously advised Brad West. In its reply to appellant's opposition to the motion to dismiss, DOT sets forth three reasons why it should be granted over ten months to issue a decision on appellant's claim.

Brad West filed a request for an equitable adjustment with DOT on June 19, 2013. DOT granted some of appellant's claim, but denied other portions. On February 28, 2014, appellant submitted a certified claim to DOT in the amount of \$1,375,453. On March 14, 2014, appellant received a response from DOT stating, "we anticipate issuing a contracting officer's decision by December 17, 2014." Brad West filed the instant appeal based on this DOT response.

First, DOT maintains that the claim is complex, consisting of six separate claims with sub-items. DOT notes that the claim is in the amount of \$1,375,453, over half of the original contract price. Next, DOT points out that the contracting officer, who is the only authorized contracting officer in the Federal Highway Administration office reviewing the claim, had two other requests for a final decision at the time that appellant submitted its claim. Finally, DOT argues for more time on the basis that the contracting officer reviewing the claim has had no prior involvement in this claim and is reviewing the request de novo.

The CDA provides that on a submitted claim seeking more than \$100,000, a contracting officer must issue a decision within sixty days or notify the contractor of the time within which a decision will be issued. 41 U.S.C. § 7103(f)(2) (2012). This time period is not limitless. The CDA imposes the requirement that the 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" provided by the contractor in support of the claim. *Id.* § 7103(f)(3).

The issuance of a contracting officer's decision should not be delayed unless the Government demonstrates a rational basis for delay beyond the sixty-day period for review envisioned by the statute. Thus, the Armed Services Board of Contract Appeals (ASBCA) has held that a three-month delay for performance of an audit, where the Government had previously seen the claim, was unreasonable. *Eaton Contract Services, Inc.*, ASBCA 54054, et al., 03-2 BCA ¶ 32,273. Similarly, delays by the Government allegedly due to a shortage of attorneys has been held to be unreasonable. *Fru-Con Construction Corp.*, ASBCA 53544, 02-1 BCA ¶ 31,729. In *Fru-Con*, the ASBCA also held that the Government's familiarity with the issues, based on the contractor's prior submission, may be considered in determining

the reasonableness of the period required for a decision. In *Suh 'dutsing Technologies, LLC*, ASBCA 58760, 14-1 BCA ¶ 35,596, the ASBCA held that the date provided by the Government for the issuance of the contracting officer's decision must be definite and not approximate.

Here, the 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. In addition, we find that DOT's "anticipated" date to issue its decision to be indefinite and not in accord with the intent of the statute to provide a date certain when the decision will be issued.

DOT has failed to carry its burden of demonstrating that the size and complexity of the claim, or other circumstances, require a period in excess of ten months to review the claim. Further, DOT has not shown why the contracting officer could not have issued a decision prior to today's date. The claim is deemed denied and we assume jurisdiction pursuant to the CDA. 41 U.S.C. § 7103(f)(5). The stay previously imposed by the Board is lifted. The appeal will proceed in accordance with the Board's rules. As provided in those rules, the appeal file and complaint shall be filed within thirty days from the date of this decision.

Decision

Respondent's motion to dismiss is **DENIED**.

JAMES L. STERN
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

RICHARD C. WALTERS
Board Judge

