



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: January 31, 2017

CBCA 5529

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 General Counsel, Department of Veterans Affairs, Houston, TX, counsel for Respondent.

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

SOMERS, Board Judge.

The Department of Veterans Affairs (VA) entered into a construction contract with BES Design/Build, LLC (BES). The contract required BES to renovate a VA clinic in Fayetteville, Arkansas. Pending before the Board is the VA's motion to dismiss for lack of jurisdiction. For the reasons set forth below, we grant the motion to dismiss.

Background

On August 25, 2016, BES submitted a claim for \$168,847.06 to the contracting officer and requested a "final decision." By letter dated October 24, 2016, the contracting officer advised BES that "the Contracting Officer Final Decision will not be issued within the 60 days required by FAR Part 33.211(c)(2) but will be issued within the next 30 days." Subsequently, the contracting officer advised BES that she would need an additional ten days

to prepare her final decision. The contracting officer issued her final decision on December 3, 2016.

Meanwhile, on October 26, 2016, BES filed its appeal with the Board.

Discussion

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), grants boards of contract appeals jurisdiction over actions brought on claims within ninety days following receipt of a contracting officer's final decision. For certified claims over \$100,000, the contracting officer has sixty days from receipt of the claim to either "issue a decision" or "notify the contractor of the time within which a decision will be issued." 41 U.S.C. § 7103(f)(2); *Agbayani Construction Corp. v. Department of Commerce*, CBCA 5534, 17-1 BCA ¶ 36,582. The Federal Acquisition Regulation (FAR) reiterates this requirement, adding that "[t]he contracting officer shall issue a decision within a reasonable time, taking into account (1) the size and complexity of the claim; (2) the adequacy of the contractor's supporting data; and (3) any other relevant matters." 48 CFR 33.211(c)(2), (d) (2015). Finally, the FAR provides that "[i]n the event of undue delay by the contracting officer in rendering a decision on a claim, the contractor may request the tribunal concerned to direct the contracting officer to issue a decision within a specified time period determined by the tribunal." 48 CFR 33.211(f). A contractor is only authorized to file an appeal when the contracting officer fails to issue a decision within the required time period, at which point the failure to act is "deemed a decision by the contracting officer denying the claim." 41 U.S.C. § 7103(f)(5); 48 CFR 33.211(g).

As noted by the Court of Appeals for the Federal Circuit:

"A CDA action may be brought in the Court of Federal Claims or before a board of contract appeals only if (i) the contracting officer has issued a final decision on the contractor's claim," 41 U.S.C. § [7103(f)], *Reflectone Inc. v. Dalton*, 60 F.3d 1572, 1573 (Fed. Cir. 1995), or (ii) the contracting officer has failed to issue a final decision on the contractor's claim or to notify the contractor of the time within which a decision will be issued, and at least 60 days have passed since the date the claim was submitted for a decision, 41 U.S.C. [§§ 7103(f)(5), 7104(a), (b)]; *Do-Well Mach. Shop, Inc. v. United States*, 870 F.2d 637, 640 (Fed. Cir. 1989).

Case, Inc. v. United States, 88 F.3d 1004, 1008-09 (Fed. Cir. 1996); also see *Stobil Enterprise v. Department of Veterans Affairs*, CBCA 5246-R, slip op. at 3 (Nov. 16, 2016).

“Until there is a decision on [the contractor’s] claim, or the date for issuance passes, [the contractor] cannot maintain an appeal with the Board or a suit at the Court of Federal Claims on its claim.” *Hawk Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 5527, 16-1 BCA ¶ 36,572; see *Sipco Services & Marine Inc. v. United States*, 30 Fed. Cl. 478, 484 (1994). If a contractor files an appeal before there is a final decision (either written or through a deemed denial after the statutory deadline has passed), such an appeal is premature. *Primestar Construction v. Department of Homeland Security*, CBCA 5510, slip. op. at 6 (Dec. 9, 2016) (citing *Fire Security Systems, Inc. v. General Services Administration*, GSBCA 12350, 93-3 BCA ¶ 26,047, at 129,487).

Here, the VA received BES’s claim (in excess of \$100,000) on August 25, 2016, and notified BES that a decision would be rendered by November 23, 2016. BES filed its notice of appeal before that date, on October 26, 2016. Because BES failed to follow the requirements of the CDA, the Board does not possess jurisdiction over the matter.

Appellant argues that the issuance of the contracting officer’s final decision on December 3, 2016, rendered the VA’s motion moot. The Board did not possess jurisdiction at the time that the appeal was filed. Issuance of the CO’s decision cannot cure the jurisdictional defect. In this case, because the Board does not possess jurisdiction to entertain the claim, “it has no power to do anything but strike the case from its docket, the matter being *coram non judice*.”* *Johns-Manville Corp. v. United States*, 893 F.2d 324, 327 (Fed. Cir. 1989).

Decision

For the foregoing reasons, the Government’s motion to dismiss is granted and the claim is **DISMISSED** for lack of jurisdiction.

JERI KAYLENE SOMERS
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

MARIAN E. SULLIVAN
Board Judge

*“Coram non iudice” is a latin phrase meaning “outside the presence of a judge” or “before a judge or court that is not the proper one or that cannot take legal cognizance of the matter.” Black’s Law Dictionary at 412 (10th ed. 2014).