



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 6, 2022

CBCA 7344

CONSTRUCTION SERVICES GROUP, INC.,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Andy Moody, Vice President of Construction Services Group, Inc., Charleston, SC, appearing for Petitioner.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

LESTER, Board Judge.¹

Construction Services Group, Inc. (CSG) has filed a petition with the Board pursuant to section 7103(f)(4) of the Contract Disputes Act (CDA), 41 U.S.C. § 7103(f)(4) (2018), requesting that the Board direct a contracting officer with the Department of Veterans Affairs (VA) to issue a decision on CSG's certified claim, dated August 31, 2021, by a date certain. The purpose of that statutory provision is to allow the contractor, if a decision of the contracting officer is not forthcoming, to accelerate the date by which it can appeal a "deemed denial" of its claim. Here, CSG's claim is already "deemed denied" because the

¹ Pursuant to Board Rule 1(d) (48 CFR 6101.1(d) (2020)), "[t]he presiding judge may without participation by other panel members decide . . . any petition." Because resolution of this petition does not raise novel issues, it is being decided by a single judge.

contracting officer neither issued a decision within sixty days after receiving CSG's claim nor timely extended the deadline for issuing that decision. For the same reasons that the Board discussed in *CTA I, LLC v. Department of Veterans Affairs*, CBCA 5800, 17-1 BCA ¶ 36,829, we must deny the petition because the petitioner has already obtained the only relief that we could effectively provide.

Background

On or about September 30, 2019, the VA awarded task order no. 36C24719N0948 under contract no. 36C24718D0140 to CSG for the renovation of Building 10 at the W.J.B. Dorn VA Medical Center campus in Columbia, South Carolina. The original contract completion date of January 13, 2021, was eventually extended through various contract modifications to August 15, 2021.

On July 28, 2021, the VA contracting officer issued unilateral modification P00006, increasing the contract price by \$460,000 for a change involving porch repairs. Even though the modification provided CSG with a price increase, the contracting officer requested that CSG provide a cost proposal for the work referenced in the modification. In the modification, the contracting officer indicated that, if CSG did not submit a cost proposal, "consideration will be given to issuing a settlement by determination based on the government's estimate of equitable cost and time."

Instead of submitting a cost proposal, CSG on August 31, 2021, submitted a document titled "Request for Equitable Adjustment VA Renovations of Building 10" to the VA contracting officer. In that document, CSG sought \$415,339.74 in home office overhead costs calculated under the *Eichleay* formula and an additional \$204,385 as the "[d]elta between MOD P00006 Proposal and Amount Added." CSG indicated that it was entitled to 394 calendar days of compensable excusable delay (a number that it used to calculate the amount of its home office overhead) and a total contract time extension of 180 calendar days. As part of the submission, CSG signed a certification using the language set forth in Federal Acquisition Regulation (FAR) 33.207 and requested "a decision to be issued within 60 days of submission." *See* 48 CFR 33.207 (2020) (FAR 33.207).

On September 14, 2021, CSG submitted what it titled "Revision 1 – Originally Submitted 8/31/2021" to its "Request for Equitable Adjustment VA Renovations of Building 10." In this document, CSG addressed only its home office overhead request, slightly reducing the amount and number of compensable excusable delay days requested from what it had submitted on August 31, 2021. Although CSG included a new certification in accordance with FAR 33.207 and a request that a decision be issued within sixty days in this document, CSG has informed us that it intended revision 1 as a clarification of its August 31 claim, not a new claim in and of itself.

Separately on September 14, 2021, CSG also submitted a document to the VA contracting officer titled “Response for Equitable Adjustment – MOD #P00006 VA Renovations of Building 10,” with a subheading of “Revision 1 (Originally Submitted 8/31/2021 in the REA).” In the document, CSG indicated that it was submitting information “regarding the additional porch work added to the project via modification P00006” and reiterated its August 31 assertion that it was entitled to an additional \$204,385 for the added P00006 work and an additional 180 days to complete the contract.

In a declaration filed with the Board, the VA contracting officer has indicated that, when he received these documents on August 31 and September 14, 2021, he did not originally perceive any of them to be a claim. Instead, he viewed them as requests to negotiate. As a result, he did not issue a written decision in response to them.

On March 10, 2022, CSG filed its petition with the Board requesting that we direct the VA contracting officer “to render a decision on CSG’s certified claim submitted on August 31, 2021, by a date determined reasonable by the CBCA.” In its petition, CSG represents that, “[a]s of the date of this petition, the [contracting officer] has failed to issue a decision and has failed to provide CSG with a reasonable date by which a decision would be issued.”

In response to CSG’s petition, the VA contracting officer has notified us that he expects to render a decision on CSG’s prior submissions by May 2, 2022.

Discussion

“The CDA grants a contracting officer sixty days, after receipt of a certified claim exceeding \$100,000, to either decide the claim or notify the contractor ‘of the time within which a decision will be issued.’” *CTA I* (quoting 41 U.S.C. § 7103(f)(2)). Once the contracting officer issues a written decision, the contractor has ninety days from the date of the decision’s issuance to file an appeal with this Board or twelve months to file suit in the Court of Federal Claims. 41 U.S.C. § 7104. If the contracting officer fails to issue a decision within that sixty-day window, “the contractor may, at its option, appeal from a ‘deemed’ denial of its claim” unless the contracting officer notified the contractor within the initial sixty-day window that he or she was extending the time for issuing a decision. *CTA I* (citing 41 U.S.C. § 7103(f)(5)). If the contracting officer notifies the contractor of a new deadline for issuance of a decision, the claim will not be “deemed denied” (and appealable) unless and until the extended deadline passes by without a contracting officer’s decision. *John C. Grimberg Co.*, ASBCA 42695, 91-3 BCA ¶ 24,074.

It is in that last circumstance that the contractor’s right to ask the Board to direct the contracting officer to issue a decision earlier than the date identified typically comes into

play. Section 7103(f)(4) of the CDA “empowers us ‘to direct a contracting officer to issue a decision [on a claim] 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.’” *CTAI* (quoting 41 U.S.C. § 7103(f)(4)). Although, on its face, that provision might read as though the Board has some power to force the contracting officer actually to issue a written decision, we do not, in reality, possess authority to demand specific performance or grant injunctive relief. *MicroTechnologies, LLC*, ASBCA 59911, 15-1 BCA ¶ 36,125. Instead, under that statutory provision, “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.” *Hawk Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 5527, 16-1 BCA ¶ 36,572.

Here, the VA contracting officer did not issue a decision within sixty days of CSG’s August 31, 2021, submission and did not extend the time for issuing a decision beyond the original sixty-day statutory window. The VA properly does not dispute that the certified August 31, 2021, submission was a claim: it described the basis for CSG’s monetary requests, sought payment of a sum certain, was certified in accordance with FAR 33.207 (which identifies the certification language for CDA claims), and requested issuance of a contracting officer’s decision within sixty days.² See *Bon Secour Management, LLC v. Department of Veterans Affairs*, CBCA 4703, 17-1 BCA ¶ 36,888 (describing elements of a claim). Once the contracting officer failed to issue a decision within sixty days after CSG submitted its claim, it was “deemed denied,” and CSG was entitled immediately to appeal that deemed denial to the Board or to file suit in the Court of Federal Claims.

Given that CSG already has the right to appeal as a result of the deemed denial, there is no further relief that we can effectively provide. *CTA I*. CSG can file an appeal of the “deemed denial” of its claim immediately, or it may elect to wait until the contracting officer actually issues a written decision by the May 2, 2022, date that the contracting officer has

² The VA notes that CSG’s second September 14, 2021, submission, titled “Response for Equitable Adjustment – MOD #P00006 VA Renovations of Building 10,” was not a valid claim because it contained no certification and did not request a final decision. It seems clear, however, that this document and the other September 14, 2021, submission were simply supplements adding information to the certified claim that CSG had already submitted on August 31, 2021, and were not intended to be independent claims. The submission of additional data does not retroactively invalidate the original claim submission. See *Newell Clothing Co.*, ASBCA 24482, 80-2 BCA ¶ 14,774 (“Even after a certification has been submitted, a contractor is not precluded from . . . producing additional data.”).

identified before deciding whether to appeal. *See id.* We lack authority to grant CSG any broader rights than it already has.

Decision

For the foregoing reasons, the contractor's petition is **DENIED**.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge