



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED:
December 18, 2025

CBCA 8323

HARBOR SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Luke R. Gleissner of Gleissner Law Firm, L.L.C., Columbia, SC; and Benjamin C. Bruner of Bruner, Powell, Wall, & Mullins, LLC, Columbia, SC, counsel for Appellant.

Laetitia C. Coleman, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Board Judges **RUSSELL**, **VOLK**, and **NEWSOM**.

NEWSOM, Board Judge.

Respondent, the Department of Veterans Affairs (VA), moved to dismiss this appeal for lack of jurisdiction on the ground that the notice of appeal was untimely. The issue turns on the date of the contracting officer's final decision. We conclude that, on the facts presented, (1) the contracting officer's decision in 2023 was not final; and (2) after appellant submitted a claim in 2024, there was a deemed denial of this claim. We conclude that the Board possesses jurisdiction and deny the motion.

Background

The VA awarded contract VA246-16-C-0035 to Harbor Services, Inc. (appellant or HSI) to renovate a portion of a VA medical center. Respondent's Motion to Dismiss at 1; Exhibit 1.¹ According to HSI, as the work progressed, the VA changed the design and caused delays. In 2021 and 2022, HSI submitted requests for equitable adjustment (REA), seeking reimbursement for delay costs, but the VA denied most of the costs. Appellant's Opposition to Motion to Dismiss at 2-3; Exhibits C, D, E at 4.

Thereafter, the parties exchanged correspondence that lay at the heart of this dispute. In January 2023, HSI submitted another request for \$1,925,342.24 in delay costs (January 2023 submission). Exhibit F at 6. The VA characterizes HSI's January 2023 submission as a claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), while HSI contends that the January 2023 submission was not a claim because it lacked a request for a contracting officer's decision.

The contracting officer responded to the January 2023 submission with a series of letters. In the first two letters, he offered to negotiate and requested additional support for HSI's costs. Apparently disappointed with HSI's response, on April 10, 2023, the contracting officer issued a letter labeled "CONTRACTING OFFICER'S FINAL DECISION" (April 2023 purported final decision), which denied HSI's "REA/Claim," referencing HSI's January 2023 submission. Exhibit J at 20.

An internal government email states that the VA's objective, in issuing the two requests to negotiate as well as the 2023 purported final decision, was to "get [HSI] to the table." Exhibit K at 3. Two days after issuing the 2023 purported final decision, notwithstanding having issued what he labeled a "final" decision, the contracting officer emailed HSI and asked about the contractor's "plan for providing the documentation" that the VA had requested. Exhibit K at 1-2.

On May 10, 2023, HSI responded to the 2023 purported final decision, asserting that the parties had agreed not to treat HSI's January 2023 submission as a claim while they negotiated. HSI asserted that it never requested a final decision and that the January 2023 submission should not be called a claim until Harbor decided otherwise, stating:

The VA continues to reference this discussion as a "Claim" but *per our discussions, emails, agreement, and at the Government[']s request Harbor*

¹ Exhibits with numerals are attachments to respondent's motion to dismiss, and exhibits with letters are attachments to appellant's opposition to the motion to dismiss.

agreed to postpone submitting this REA as a “Claim” as the Government requested to “Negotiate” prior to Harbor Moving forward with a Claim. These discussions are concerning the “REA” and should not be called a Claim any longer until Harbor decides to submit a Claim.

Exhibit L at 2 (emphasis added).

The contracting officer responded on May 24, 2023, insisting that HSI’s January 2023 submission was a claim, yet he acknowledged that HSI “doesn’t want to call this a Claim” and wanted to continue “to negotiate.” Exhibit M at 4. He then offered to re-review the submission if HSI “ma[d]e the necessary corrections and changes.” *Id.* at 10. After further fruitless exchanges, the contracting officer, on July 5, 2023, wrote HSI that he “repeated[ly] notified [HSI] . . . in several references that [the Government does] not intend to move forward with further discussions . . . until [HSI has] made corrections . . . and re-certified the REA.” Exhibit O.

On October 20, 2023, HSI then submitted a revised request, which it called REA 17060, reducing the amount sought to \$1,125,261.43 and segregating subcontractor costs. Exhibit Q at 3-6. HSI requested that the VA engage in alternative dispute resolution (ADR) proceedings to resolve the matter. Exhibit P at 7-8.

The VA did not respond for many months. HSI repeatedly sent emails requesting a response. Exhibit P. Finally, on April 12, 2024, the contracting officer replied only: “Please refer to my COFD dated 4/10/2023, which explained your appeal rights.” Exhibit P at 1.

More than six months later, on November 22, 2024, Harbor submitted a letter to the contracting officer titled “Claim of Harbor Services, Inc. Under Contract No. VA246-16-C-0035.” This November 2024 document included a CDA certification signed by HSI’s president and stated “HSI requests a final decision.” Notice of Appeal at 33-39. In it, HSI sought payment of \$504,028.19, which is less than the amount it sought in the January 2023 submission. *Id.* at 42; Exhibit F at 6.

On December 18, 2024, the contracting officer, apparently regarding the document as a repeat of HSI’s January 2023 submission, responded that “[t]hese matters were addressed in the COFD issued on April 10, 2023 in response to the certified ‘Notice of Claim’ dated January 5, 2023.” Notice of Appeal at 41. HSI filed a notice of appeal with the Board on January 15, 2025.

Discussion

The VA moves to dismiss this appeal on the ground that HSI's notice of appeal was untimely. The VA contends that HSI submitted a claim in January 2023, that the contracting officer issued a contracting officer's final decision (COFD) on that claim on April 10, 2023, and that the appeal period expired ninety days thereafter. Because the notice of appeal was filed January 15, 2025, the VA argues that it was untimely by more than a year.

"The Board gains jurisdiction under the CDA only after a claim is presented to the contracting officer and is either decided or deemed denied, and the contractor files a timely appeal." *Bass Transportation Services, LLC v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464, at 177,688 (citing *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); *C-Shore International, Inc. v. Department of Agriculture*, CBCA 1696, 10-1 BCA ¶ 34,379, at 169,741). To be timely, a contractor must file an appeal at the Board within ninety days after the receipt of a contracting officer's final decision on the claim. 41 U.S.C. § 7104(a).

Only "final" contracting officer decisions, however, may be appealed. *Guardian Angels Medical Services Dogs, Inc. v. United States*, 809 F.3d 1244, 1247 (Fed. Cir. 2016). If, after issuing a decision on a claim, the contracting officer expresses willingness to consider new arguments or reconsider previous arguments, these actions can vitiate the finality of the decision. *Id.* at 1249-50. For instance, in *Devi Plaza, LLC v. Department of Agriculture*, CBCA 1239, 09-1 BCA ¶ 34,033, the contracting officer stated in a purportedly final decision that the Government was "willing to continue a meaningful and productive dialog" about the claim, and the parties thereafter continued to negotiate. *Id.* at 168,338. The Board concluded that the contractor reasonably believed that the contracting officer was reconsidering the decision, which vitiated its finality. *See also Roscoe-Ajax Construction Co. v. United States*, 458 F.2d 55, 61, 63 (Ct. Cl. 1972) (finding that the contracting officer's denial of a contractor's claim was not final where the contracting officer offered to "discuss and consider the problem further").

Here, the contracting officer issued a purported final decision on the January 2023 submission, and, in response, HSI proposed that the parties should not treat its January 2023 submission as a claim but rather continue to negotiate. The contracting officer acknowledged HSI's proposal and then repeatedly offered to review a revised submission. In these circumstances, it was reasonable for HSI to believe that the contracting officer had accepted HSI's proposal not to treat the January 2023 submission as a claim and, instead, to review more information. Indeed, not only was that perception objectively reasonable, but, based on the VA's internal email, the evidence suggests that such a course of action was also the VA's subjective intent.

The VA argues that the contracting officer's actions did not vitiate the finality of the 2023 purported final decision because the parties never actually negotiated. The VA asserts that HSI never provided the information that the contracting officer wanted. Respondent's Reply Brief at 5. The Federal Circuit, however, rejected an analogous argument in *Guardian Angels*, holding that whether the Government actually considered the contractor's request for reconsideration is not the relevant standard. 809 F.3d at 1248, 1252. What matters is whether the contractor reasonably believed that the contracting officer was willing to reconsider the decision. As we have explained, HSI did so reasonably believe.

The VA also argues that the contracting officer reinstated his final decision in his April 12, 2024, email. The VA asserts that this April 2024 email "clearly articulated" that the April 10, 2023, decision was final and placed HSI on notice of its appeal rights, effectively restarting the appeal period. Respondent's Reply Brief at 5. We disagree because that is not what the email stated. The email does not state, let alone clearly articulate, that the April 10, 2023, purported decision was final, and it states nothing about HSI's then-current appeal rights. Rather, it simply referred to the earlier, purported final decision without further explanation.

The contracting officer's April 12, 2024, email here is similar to that in *Devi Plaza, LLC*. In that case, after a period of negotiation, the Government similarly argued that the contracting officer issued a letter reinstating his final decision. The Board noted that the contracting officer's letter was "only a statement indicating that, when the decision was issued, the appellant had certain appeal rights." 09-1 BCA at 168,338. The Board found that the letter was not sufficiently clear and, thus, did not trigger the appeal period. Here, too, even were we to assume that the January 2023 submission was a claim, the contracting officer's April 12, 2024, email was not sufficiently clear to start the appeal period.

We conclude that the April 10, 2023, purported final decision was not final and, thus, did not trigger the appeal period, and the contracting officer did not clearly notify the contractor otherwise. As a result, the appeal period did not expire.²

Basis for the Board's Jurisdiction

Although the appeal period did not expire, that fact, by itself, does not establish the Board's jurisdiction. We still must confirm that a claim was presented to the contracting

² Because we conclude that the contracting officer's decision on HSI's January 2023 submission was not final, it is not necessary for us to address HSI's remaining arguments: that its January 2023 submission was not a claim and that the contracting officer's April 10, 2023, decision was invalid.

officer, that the contracting officer decided the claim or there was a deemed denial, and that the appeal was timely. *Bass Transportation*, 16-1 BCA at 177,688.

HSI submitted a new document to the contracting officer on November 22, 2024, which met all of the requirements for a CDA claim: it was in writing, requested a sum certain, included a signed CDA certification, and requested a contracting officer's decision. *Zafer Construction Co. v. United States*, 40 F.4th 1365, 1367 (Fed. Cir. 2022); 41 U.S.C. § 7103(b)(1); 48 CFR 2.101 (2024). Significantly, it was different from HSI's January 2023 submission, as shown by the fact that it sought a different amount.

The contracting officer responded to HSI on December 18, 2024, but that response was not a decision on the November 22, 2024, claim. The contracting officer's response neither addressed the substance of the November 22, 2024, claim, nor explained the contractor's then-current appeal rights. The contracting officer's response merely referred HSI to the Government's *prior* April 10, 2023, purported final decision on HSI's *prior* January 2023 submission.

In the absence of a contracting officer's decision within the statutory period, which in this case is sixty days from the date of the claim, the contracting officer is deemed to have denied the claim, and the contractor may appeal from the deemed denial. 41 U.S.C. § 7103(f). Accordingly, we conclude that HSI submitted a CDA claim which was deemed denied by the contracting officer.

The deadline for the contracting officer's decision was January 21, 2025, and HSI filed this appeal on January 15, 2025, six days prior to this deadline. Thus, this appeal was premature at the time it was filed. A premature appeal to the Board can ripen into maturity if the appeal is still pending when the contracting officer's deadline for issuing the decision expires, as it did in this case. *Widescope Consulting and Contracting Services v. Department of Health & Human Services*, CBCA 6895, 22-1 BCA ¶ 38,034, at 184,713-14; *Primestar Construction v. Department of Homeland Security*, CBCA 5510, 17-1 BCA ¶ 36,612, at 178,330-31. In such a circumstance, "no useful purpose would be served by dismissing the appeal as premature and requiring appellant to refile." *R.W. Electronics Corp.*, ASBCA 46592, et al., 95-1 BCA ¶ 27,327, at 136,212. The appeal was pending at the Board as of January 21, 2025, when the contracting officer's deadline for a decision expired. Accordingly, the November 22, 2024, claim was deemed denied, and the premature appeal ripened into a mature appeal. The Board possesses jurisdiction to entertain this appeal.

Decision

The respondent's motion to dismiss is **DENIED**.

Elizabeth W. Newsom
ELIZABETH W. NEWSOM
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Daniel B. Volk
DANIEL B. VOLK
Board Judge