GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

CENTEX-SIMPSON CONSTRUCTION	)	
	)	CAB No. D-931
Under Contract No. JB/890070	)	

For the Appellant: Brian Cohen, Esquire. For the Government: Duane A. Brown, Contracts Manager.

Opinion by Administrative Judge Terry Hart Lee, with Administrative Judge Zoe Bush concurring.[1/]

OPINION AND ORDER ON MOTION TO DISMISS

On March 1, 1993, District of Columbia General Hospital[2/] filed a motion to dismiss the instant appeal on the following grounds: (1) the Board lacks jurisdiction under its rules, the contract and DCGH regulations to grant relief from an appeal on a "deemed denied" basis; (2) the Board lacks jurisdiction because appellant has failed to exhaust its administrative remedies; and (3) the Board lacks jurisdiction because appellant expressly waived its right to a contracting officer's final decision.

In support of its position on the first ground, the Hospital asserts that because it is not bound, as an independent agency, by the Procurement Practices Act of 1985 (PPA),[3/] the appellant has no right to appeal to the Board from a "deemed denial" of its claim. DCGH contends further that neither the contract, DCGH regulations nor the Board's rules provide for an appeal of a "deemed denied" claim. Therefore, argues the Hospital, the appeal should be dismissed; for no procedure exists to allow an appeal from a "deemed denied" claim.

In support of its position on the second ground, appellee contends that pursuant to the contract, appellant has the right to appeal only from a contracting officer's final decision; and because no final decision has been issued on appellant's claim, appellant has failed to exhaust its administrative remedies, thus depriving the Board of jurisdiction.

[1/]Administrative Judge Benjamin B. Terner did not take part in this decision because of an extended illness.

[2/]Hereinafter referred to as "appellee", "DCGH" or "Hospital".

[3/]D.C. Code § § 1-1181.1, et seq. (1987).

In support of its position on the third ground, DCGH contends that appellant waived its right to a contracting officer's final decision by submitting "ambiguous and conditional" requests and then withdrawing these requests. The Hospital cites a letter dated February 7, 1992, from appellant, wherein it allegedly requested a final decision and simultaneously suggested negotiation of the claim in lieu of a final decision. DCGH contends that appellant's participation in negotiations after March 12, 1992, was viewed by the Hospital as a "de facto" retraction of the request for a contracting officer's final decision. Additionally, DCGH argues that by virtue of certain language in a June 26, 1992, letter from appellant, it (the Hospital) "perceived" another waiver of a request for a contracting officer's final decision.

On March 12, 1993, appellant filed its memorandum of points and authorities in opposition to the Hospital's motion to dismiss. Therein, appellant asserts that DCGH's motion is the latest attempt to delay resolution of the appeal and that the facts set out in the motion are at best fragmentary and thoroughly misleading. Appellant further contends that even if DCGH is not bound by the PPA, it does not follow that it may take as long as it wants to issue a contracting officer's final decision with no consequences. Otherwise, argues appellant, the appellee's position would lead to the absurd result that if the Hospital failed to issue a contracting officer's final decision, for whatever reason, a contractor would have no remedy. Appellant further claims that the Hospital's position is not an accurate reflection of the law and is wholly devoid of merit.

FACTS

1. On May 18, 1989, appellant entered into a contract with the Hospital to construct an ambulatory and critical care center. (Appeal File, Exhibit 1).

2. By letter dated June 27, 1989, appellant advised Gilbane Building Company ("Gilbane"), apparently the construction manager, that its subcontractor, Metrex Excavating, Inc. ("Metrex") had encountered ". . . additional concrete walls to demolish and additional rubble not shown on the contract drawings. . . ." (Points and Authorities in Support of Opposition by Appellant to Appellee's Motion to Dismiss, Exhibit 1).[4/] Appellant requested a meeting as soon as possible to determine how to document the additional work and how compensation would be made.

3. By letter dated June 28, 1989, Gilbane advised appellant that it (appellant) should have reasonably expected the conditions encountered and that as a result, no change to the contract cost or time was warranted. (Opp., Ex. 2).

4. By letter dated July 5, 1989, appellant informed Gilbane that neither it nor Metrex agreed with Gilbane's position regarding cost and time and that a Metrex reply would be submitted on that date. (Opp., Ex. 3).

[4/]Hereinafter referred to as "Opp., Ex(s). ___".

5. By letter dated July 18, 1989, appellant submitted to Gilbane a July 3, 1989, letter from Metrex and gave notice to the contracting officer under Article 3 of the GENERAL PROVISIONS on the contract. (Opp., Ex. 4).

6. About seven months later, on February 7, 1990, Gilbane advised appellant that it needed additional information from Metrex regarding its claim for additional costs for wall and rubble removal. Gilbane advised that it would again review the request when all of the data was received. (Opp., Ex. 5). Gilbane also advised that it had forwarded appellant's request to the owner and architect.

7. By letter dated July 26, 1990, appellant submitted copies of Metrex' June 22, 1990, response (and documentation) to Gilbane's February 7, 1990, request. (Opp., Ex. 6). In the second paragraph, appellant stated, in pertinent part: "We request negotiation and settlement or issuance of a final decision as requested by Metrex Excavating, Inc. attached letter. . . ." (emphasis added). This was appellant's first request for a final decision; however, it was made to Gilbane, not the contracting officer.

8. Six months later, by letter dated January 31, 1991, appellant wrote to DCGH and referenced its proposal of July 26, 1990, regarding Metrex' differing site conditions claim for additional rubble removal. This letter was submitted pursuant to Article 7 of the contract. (Opp., Ex. 7). The amount of Metrex' claim through January 31, 1991, was $664,281.00, plus interest.

9. By letter dated February 20, 1991, appellant again submitted Metrex' claim to the Hospital, pursuant to Article 7 of the contract. Therein, appellant stated: "We request that you issue a Contracting Officer's final decision as required by Article 7." (Opp., Ex. 8). This was the appellant's first direct request to DCGH for a contracting officer's final decision. In this submission, Metrex' revised the amount of its claim to $599,758.00, plus interest.

10. By letter dated March 29, 1991, to DCGH, appellant, apparently in response to the Hospital's March 26, 1991, letter to counsel, again requested a contracting officer's final decision. (Opp., Ex. 9).

11. Apparently, in April 1991, the contracting officer asked appellant to re-submit its claim; and appellant did so by letter dated May 3, 1991. (Opp., Ex. 10). Therein, appellant made its third request for a contracting officer's final decision.

12. The Hospital's April 1991 letter raised an issue with respect to appellant's support of its subcontractor's claim. (Opp. Ex. 11). This necessitated a response from appellant's counsel, explaining its legal position. (Id.). Therein, inter alia, counsel reiterated appellant's request for a final decision, thus making it the fourth request since February 1991.

13. By letter dated June 21, 1991, the DCGH contracting officer sought additional information from appellant in order to clarify "certain discrepancies" contained

in the May 3, 1991, submission. (Opp., Ex. 12). Therein, the contracting officer stated: "We will attempt to render a Final Decision as expeditiously as possible after receiving your reply." The contracting officer also requested that appellant's response be attested to before a notary public. However, nowhere in the contract documents or the DCGH procurement regulations is there any requirement for a verified claim.

14. Approximately six months later, by letter dated December 20, 1991, appellant submitted its and Metrex' revised proposal for additional rubble removal. (Opp., Ex. 13). The third paragraph of the letter states:

> As per Article 7 of the contract document, we request the Contracting Officers [sic] final decision within 30 days, or schedule a negotiation meeting in an effort to resolve this matter within the same time frame. (emphasis added).

This letter constituted appellant's fifth request for a final decision. It also revised the amount of Metrex' claim to $486,808.00, plus interest.

15. By letter dated January 9, 1992, the acting contracting officer[5/] for DCGH asked appellant to re-submit its December 21, 1991, response because the reply was not verified. (Opp., Ex. 14). In pertinent part, the letter states: "Once your reply is properly submitted, the Hospital will consider your request for a Contracting Officer's Final Decision. . . ."

16. By letter dated February 7, 1992, appellant re-submitted its response to the appellee's June 21, 1991, letter. (Motion to Dismiss, Exhibit I).[6/] This time the submission was verified. It also reiterated appellant's request for a final decision or the scheduling of a negotiation session. This was appellant's sixth request for a final decision.

17. By letter dated March 12, 1992, the acting contracting officer acknowledged appellant's February 7, 1992, submission and its request for a final decision. (Opp., Ex. 15; MD, Ex. II). However, the acting contracting officer stated:

> After an extensive review of your answers by the Hospital, there appears to be a number of issues which remain unsettled. Consequently. . ., I am inclined to forego the issuance of a Contracting Officer's Final Decision at this time. In lieu of the written decision, I propose that Centex and the Hospital enter into negotiations in an effort to conciliate this matter and clarify the outstanding issues. (emphasis added).

[5/]Sometime between June 1991 and January 1992, there was a change in contracting officers. David L. Moore appears to have been the original contracting officer. In January 1992, Duane A. Brown was designated "acting" contracting officer; and by April 1992, Brown became the contracting officer. (See Opp., Ex. 17).

[6/]Hereinafter referred to a "MD, Ex(s). ___".

18. A meeting between the parties was scheduled for April 1, 1992; however, it was cancelled on March 30, 1992, by DCGH. (Opp., Ex. 16). Apparently, no subsequent meeting was scheduled. As a result, and because of the inordinate delay in resolving the claim, appellant made its seventh demand for a contracting officer's final decision on April 7, 1992. (Id.). Appellant stated:

> . . . [I]f you do not issue a Contracting Officer's Final Decision or schedule a negotiation meeting by close of business Friday, April 10, 1992, we will treat you action as a constructive denial of this claim, from which an immediate appeal will be taken.

19. On March 20, 1992, appellant filed a claim for delay costs associated with the construction project. (Opp., Ex. 17).

20. By letter dated April 9, 1992, the contracting officer responded to appellant's April 7, 1992, letter. (Opp., Ex. 17). While acknowledging the inordinate delay in resolving Metrex' claim, the contracting officer blamed the delay on appellant. He also advised appellant that in view of its March 20, 1992, delay claim and information concerning potential additional claims associated with the project, he was not going to issue a final decision on Metrex' discrete claim. The contracting officer stated that he intended to treat all of appellant's claims as one. He said further:

> Your claims have not been denied and you have no basis from which to file an appeal without first exhausting the appropriate administrative process described in your contract with the Hospital.

21. Neither the delay claim nor the potential claims on the project were in any way related to Metrex' claim for an equitable adjustment for differing site conditions.[7/]

22. By letter dated June 23, 1992, appellant made its eighth request for a contracting officer's final decision. It asked for a response by July 7, 1992, or it would consider the claim to be denied and take the necessary steps to file an appeal with the Board. (Opp., Ex. 18).

23. By letter dated June 25, 1992, the contracting officer responded to appellant's June 23 letter. (Opp., Ex. 19). Therein, and significantly, he stated that Metrex had requested that he forego issuance of a final decision, in lieu of attempting to negotiate settlement. He also said that he remained committed to settling the matter. Further, he said that appellant would receive a reply to its "most recent submission" by July 20, 1992. In closing, the contracting officer said;

> . . . Moreover, the Hospital will reject any attempt by Centex to appeal to the CAB on a 'deemed denial basis' since it is the Hospital's intent, short of

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[7/] See CAB No. D-931, Opinion and Order on Motion to Consolidate, dated December 22, 1992.

> settlement, to render a Contracting Officer's Final Decision in this matter. It is the Contracting Officer's Final Decision that will provide you a basis for appeal to the CAB.

24. By letter dated June 26, 1992, appellant responded to DCGH's June 25 letter. (Opp., Ex. 20; MD, Ex. III). Therein, appellant stated that it was "encouraged" that the Hospital remained committed to settling Metrex' claim. It then reiterated its concerns regarding the appellee's handling of the claim: (1) that neither Gilbane nor Baker-Cooper had reviewed its proposal adequately to enter into any meaningful discussions; and (2) there appeared to be an effort to deny the claim based on selected language in Metrex' contract taken out of context. Appellant ended the letter by saying:

> In order to enter into meaningful negotiations, we need to clearly understand your concerns or objections to our proposal. If we move forward to settle this matter, we do not need a Contracting Officer's Final Decision; we just need a clear response to our latest submission.

25. On July 30, 1992, the appellant filed a notice of appeal with the Board, as a result of the ". . . failure of the contracting officer. . . to issue a contracting officer's decision on the claim Centex submitted in February 1991, as amended pursuant to the request of D.C. General Hospital in January 1992." (Opp., Ex. 21; MD, Ex. IV).

26. Again, after submission of additional information at the contracting officer's request and that official's continued failure to issue a final decision, appellant submitted a second notice of appeal dated November 6, 1992. (Opp., Ex. 22).

OPINION

D.C. Code § 1-1181.4(a) states:

> Nothing in this chapter shall abrogate the authority of a separate branch of government or an independent agency, as defined in subchapter I of Chapter 15 of this title, to enter into contracts or to issue rules and regulations for the awarding of contract pursuant to existing law. (emphasis added).

D.C. Code § 1-1181.4(e) states:

> Any branch or agency of government exempted from the provisions of this chapter by subsection (a) of this section may formally agree to be bound by any provisions of this chapter, or by the final rules and procedures adopted pursuant to this chapter. (emphasis added).

In 1977, the D.C. General Hospital Commission was established as an independent agency of the District of Columbia. D.C. Code § 32-211 (1987). Its authority includes, but is not limited to entering into contracts,

> . . . including contracts for capital construction projects for which funds have been authorized and made available. . . .

D.C. Code § 32-220(8). However, the Hospital Commission's authority to enter into contracts shall be exercised:

> . . . only pursuant to procurement rules which the Commission shall promulgate that conform to all District of Columbia and federal laws regarding procurements by the District of Columbia government. . . . (emphasis added).

Id. The applicable procurement regulations of DCGH became effective in 1978, seven years prior to the enactment of the PPA. The regulations' only reference to contract disputes is found at section 1-1.318-1, which states:

> (a) When a final decision of the contracting officer concerns a dispute that is or may be subject to the Disputes Clause, a paragraph substantially as follows [shall] be included in the decision:
>
> (1) This decision is made in accordance with the Disputes Clause and shall be final and conclusive as provided therein, unless, within 30 days from the date of receipt of this decision, a written notice of appeal addressed to the Contract Appeals Board is mailed or otherwise furnished to the Contracting Officer. The notice of appeal, which is to be signed by you as the contractor or by an attorney acting on your behalf, and which may be in letter form, should indicate that an appeal is intended, should refer to this decision and should identify the contract by number. The notice of appeal may include a statement of the reasons why the decision is considered to be erroneous.
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> (2) A copy of each contracting officer's decision shall be furnished to the contractor by certified mail, return receipt requested, or by any other method which provides evidence of the date of receipt of the decision by the contractor.

The District of Columbia Procurement Regulations are contained in Title 27 of the District of Columbia Municipal Regulations (DCMR) (July 1988). Chapter 38 governs protests, claims and disputes. Section 3801.2 of 27 DCMR requires that each District contract contain a disputes clause, ". . . that provides for resolution of disputes in accordance with the provisions of this chapter." Section 3803 of 27 DCMR establishes the mechanism for handling claims against the District. Section 3803.5 states, in pertinent part:

> If the claim is not resolved by mutual agreement, the contracting officer shall issue a written decision on the claim within sixty (60) calendar days after the receipt of the claim. . . . (emphasis added).

The Disputes Clause contained in the contract in question provides:

> A. If a dispute arises relating to the contract, the contractor may submit a claim to the Contracting Officer who shall issue a written decision on the dispute. (emphasis added).[8/]

As can be seen from the statutory and regulatory provisions set out above, neither the DCGH procurement regulations nor the Disputes Clause set forth in the contract complies with the Hospital's statutory requirement to promulgate procurement regulations ". . . that conform to all District of Columbia and federal laws regarding procurements by the District of Columbia government." (emphasis added). D.C. Code § 32-220, supra. Consequently, we must apply the provisions of the PPA and its implementing regulations to the dispute before us.[9/]

[8/]The Disputes Clause of the contract is found at Article 7 of the Standard Contract Provisions for Use with Specifications for District of Columbia General Hospital Construction Projects (1973), incorporated by reference into the subject contract. However, Article 7 was deleted in its entirety by Transmittal No. 9 (undated) to the contract and was replaced with the language set forth herein.

[9/]We note here that in May 1989, the Board was advised by the Hospital that the procurement regulations were currently being re-written by one Duane A. Brown, Contracts Manager. We also note that in November 1989, pursuant to D.C. Code § 1-1181.4(e), the Board and DCGH entered into an agreement, the purpose of which is:

> . . . to hear and decide appeals from its Contracting Officer's final decision or failure to issue a timely decision on . . . contract disputes between the Hospital's contractors and the Hospital. . . . (emphasis added).

Paragraph 2 of the agreement states, in pertinent part:

> The CAB shall serve as the exclusive administrative tribunal with jurisdiction to hear and decide, de novo, an appeal from the final decision of the Hospital's Contracting Officer (or his or her failure to issue a final decision within the time required by the Hospital's regulations) on. . . (2) any contract dispute between the Hospital and its contractors arising under or relating to a contract made by the Hospital. . . . (emphasis added).

Because there is no time requirement contained in the Disputes provisions of the DCGH regulations (much less the Disputes Clause), and because these regulations are clearly not in conformance with current law, we must apply the provisions of the PPA and its implementing regulations to the instant dispute. Moreover, the purpose of the 1989 agreement between the Hospital and the Board evinces a clear intent for the Board to hear and decide appeals where the Hospital's contracting officer fails to issue a timely decision on a contractor's claim.

We further note the following language in DCGH's agreement with the Board:

(continued...)

As stated earlier herein, section 3803.5 of 27 DCMR requires the contracting officer to issue a written decision on a claim within 60 days of receipt of the claim. The facts of the present matter show that appellant's claim for additional costs associated with rubble removal was submitted to the Hospital on January 31, 1991, pursuant to Article 7 of the contract. The claim was submitted again on February 20, 1991, wherein appellant made its first direct request for a final decision, pursuant to Article 7. The evidence also shows that to date, not only has the contracting officer failed to issue a final decision within the 60-day time frame, but he has also refused to do so for reasons which have no merit and which have delayed inordinately a decision on the claim in question. For example, after demanding re-submission of the claim, the contracting officer requested, in June 1991, that in answering the appellee's questions, the contractor verify its response. However, neither the Hospital's nor the District's procurement regulations require such verification. Nevertheless, one year after the claim was submitted and subsequent to appellant's extensive additional responses to the appellee's questions, the contracting officer demanded re-submission of the responses because they were not verified.[10/]

In addition, that the contracting officer purportedly needed additional information on which to render a final decision does not excuse his glaring failure and refusal to issue a timely final decision. In this regard, the facts clearly show that while he acknowledged his obligation to render a final decision and stated on more than one occasion his intent to do so, the contracting officer continued to delay issuance of a final decision. These actions on the part of the contracting officer placed appellant in an untenable position. As stated by the Court of Appeals for the Federal Circuit in Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987):

> We know of no requirement in the Disputes Act that a 'claim' must be submitted in any particular form or use any particular wording. All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.

[9/](...continued)

> . . . Recognizing that its current procurement regulations are not in complete harmony with this agreement, the Hospital, during the interval between the execution of this agreement and the final publication of its conforming procurement regulations, wishes to provide the right for. . .all contractors to file a . . . claim initially with the Hospital and subsequently with the CAB in a manner consistent with the provisions of this agreement. (emphasis added).

Conveniently, DCGH's motion to dismiss fails to make any reference to the November 1989 agreement.

[10/]It is significant to note here that in its motion to dismiss, DCGH refuses to even acknowledge that the contractor made a claim before February 7, 1992, the date it re-submitted its verified response to extensive questions posed by the Hospital. This is absurd, in view of the fact that there is no legal requirement for verification.

For sure, a contracting officer may demand more to grant an equitable adjustment, but he or she must issue a final decision within 60 days after receipt of a claim which provides adequate notice and for which a decision is requested. Bridgewater Construction Corp., VABCA Nos. 2866, etc., 90-2 BCA ¶ 22,764.

In sum, under the PPA's implementing regulations, the contracting officer is required to issue a final decision within 60 days of receipt of the claim. Having failed to do so here, the contractor was within its right to deem the claim denied and to appeal to this Board on that basis. Thus, we have jurisdiction over this appeal.

Assuming arguendo that the regulatory 60-day requirement is not applicable, we look to pre-PPA law for guidance because both the DCGH statute and its procurement regulations were enacted and promulgated prior to enactment of the PPA. As set forth earlier herein, the Disputes Clause contained in the contract contains no time limit for issuance of a contracting officer's final decision. That being the case, we must determine whether it was reasonable for the contracting officer to have delayed for almost two years the rendering of a decision on appellant's claim, thereby obviating any requirement for exhaustion of an administrative remedy prior to appeal to this Board.

Here, the facts and circumstances support the conclusion that the delay was so long and so unjustified that the Hospital must be held to have breached its implied covenant to render a timely and appropriate decision. New York Shipbuilding Corp. v. United States, 385 F.2d 427 (Ct. Cl. 1967); Universal Ecsco Corp. v. United States, 385 F.2d 421 (Ct. Cl. 1967). Indeed, the 21 months that passed from the date of initial submission of appellant's claim to the date of the second notice of appeal, where the contracting officer clearly had adequate notice of the claim, evinces a situation where no adequate administrative remedy existed, thereby excusing the appellant from pursuit of the administrative remedy required by the contract. Universal Ecsco Corp., supra, at 426, citing H.B. Zachry Co. v. United States, 344 F.2d 352 (Ct. Cl. 1965). See The Dewey Electronics Corp., DOTCAB No. 1224, 82-2 BCA ¶ 15,828; Westclox Military Products, ASBCA No. 25592, 81-2 BCA ¶ 15,270.

Finally, contrary to the appellee's position, there is no evidence that appellant waived its right to a contracting officer's final decision Indeed, its expressions of intent and willingness to negotiate a settlement on the claim do nothing to counter that fact.[11/] The facts show, too, that appellant met the standard for providing adequate notice for the

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[11/]The evidence reveals that it was the contracting officer who unilaterally decided, in March 1992, to forego issuance of a final decision in order to pursue settlement. He did the same thing in April 1992, but that time on the basis that he was unwilling to consider Metrex' claim as separate and apart from one filed by appellant in March 1992, over one year after Metrex' claim was filed. However, by June 1992, he began to distance himself from that position by expressly stating that a final decision was forthcoming, in view of appellant's threats to consider his failure to render a decision a constructive denial of the claim. Faced with that possibility, the contracting officer acknowledged his obligation and duty to issue a final decision, while simultaneously "rejecting" the possibility of a "deemed denial" of the claim, even though the entire record shows that he had no intention of issuing a final decision.

basis and amount of its claim. The fact that in its many letters to the contracting officer, appellant frequently expressed the hope that the dispute could be settled and suggested and participated in meetings to accomplish that result does not mean that it had not submitted a claim or waived its right to a final decision. Contract Cleaning Maintenance, Inc., 811 F.2d 586, supra; G. Bliudzius Contractors, Inc., ASBCA Nos. 42370, 42369, 92-1 BCA ¶ 24,604.

In conclusion, the facts and circumstances of this matter reveal a blatant and inexcusable failure on the part of the Hospital to render a contracting officer's final decision in a timely and appropriate manner, thereby providing appellant a right to appeal from a deemed denial of its claim and obviating any need for it to exhaust an administrative remedy which for all practical purposes does not exist. To hold otherwise would result, as appellant has argued, in a situation where, if it chose to do so, DCGH would never issue a final decision; and a contractor would never have the right to appeal. That would be a patently absurd consequence and would make a mockery of the procurement system and the law.

Consequently, for the reasons set forth herein, and based upon all of the facts and circumstances, it is hereby

ORDERED, that the Hospital's motion to dismiss be, and the same is, **DENIED**.

DATE: April 9, 1993

TERRY HART LEE
Administrative Judge

CONCUR:

ZOE BUSH
Chief Administrative Judge