The ASBCA Thunders to the Government: Do Your Job!

M&E Government Contracts Alert

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As most contractors know all too well, doing business with the Government can be quite frustrating. One of the most – if not the most – prominent sources of that frustration is that the Government often operates with a callous disregard for the laws and regulations that are supposed to dictate the course of play under the contracts to which it is a party. With its December 28, 2017 decision in *Fluor Federal Solutions, LLC*, ASBCA No. 61431-983, the Armed Services Board of Contract Appeals ("ASBCA" or "Board") cast a searing spotlight on the Government's dilatory conduct in the context of repeatedly failing to respond to a contractor's claim. The facts are troubling:

- On December 13, 2011, the Navy awarded a contract for the provision of regional base operations support services.
- On June 30, 2015, the contractor submitted a consolidated request for equitable adjustment ("REA"), seeking an adjustment to the price of the contract and a modification of certain Contractor Performance Assessment Reporting System evaluations.
- Approximately seven months later – on February 3, 2016 – the Navy denied the consolidated REA.
- The contractor subsequently submitted a consolidated claim valued at $50,584,810 (plus interest) on September 30, 2016.
- The Government acknowledged receipt of the consolidated claim and indicated that the Defense Contract Audit Agency ("DCAA") would need to audit the claim.
- The Navy promised that the contracting officer's final decision ("COFD") would be issued "on or before April 28, 2017" – *211 days* after the contractor submitted its certified claim.
- Beginning in November 2016 – and continuing through May 15, 2017 – the contractor organized and participated in numerous in-person meetings and telephonic conferences regarding the claim and provided multiple written responses to DCAA's requests for information.
- On April 14, 2017, the Navy indicated that it was still waiting on DCAA to complete its audit and that it anticipated issuing the COFD by December 1, 2017 – *428 days* after the contractor submitted its certified claim.
- On September 21, 2017, DCAA repeated requests to which the contractor had already provided written responses on January 20 and March 15, 2017. On September 25, 2017, the contractor advised DCAA that it had already provided responses to the requests.

- On October 23, 2017, DCAA issued a "Formal Request for Access to Records" to the contractor.
- On October 31, 2017, the contractor advised DCAA that it had already provided all of the information that was available. DCAA ignored the contractor's letter.
- On November 8, 2017, the Navy notified the contractor that it was awaiting DCAA's audit and "other independent analyses" and promised a new COFD by March 2, 2018 – *519 days* after the contractor had submitted its certified claim.
- Just two weeks later, on November 22, 2017, DCAA canceled the audit.

Understandably frustrated by the foregoing sequence of events, the contractor petitioned the Board to direct the Government to issue a decision on the consolidated claim. In reaching its decision, the Board acknowledged that "the consolidated claim is clearly large and complex" but pointed to the fact that the Government "has had the information regarding the consolidated REA and claim for over two years." In addition, the Board was confounded by the number of "promised COFDs" that the Government failed to issue and stated that "it is unclear when the CO will be issuing a final decision." Accordingly, the Board *ordered* the contracting officer to issue a final decision on the claim by January 31, 2018.

Practical Advice

The *Fluor* opinion typifies the unwelcome and disconcerting reality faced by contractors that initiate claims against the Government. Simply stated, Uncle Sam doesn't usually lose sleep agonizing over punctilious compliance with laws or regulations, and he seldom keeps promises to contractors. That said, the decision also offers hope for companies that find themselves waiting – and waiting – to receive a COFD. If your company encounters such a situation, we suggest you keep the following guidance in mind:

- If the claim is below $100,000, the Contract Disputes Act ("CDA") requires that the contracting officer issue a decision on the claim within 60 days.
- If the claim is above $100,000, the CDA requires that the contracting officer either issue a decision within 60 days *or* notify the contractor of the time within which the decision will be issued.
- If you don't receive a response from the Government within the applicable time frame, you should ask the contracting officer – in writing – to explain the delinquency and to affirmatively indicate a date certain by which you will receive a response.
- If the Government fails to respond or otherwise dithers with its answer, consider filing an appeal to the cognizant Board of Contract Appeals or to the Court of Federal Claims on the basis that the claim was deemed to have been denied.
- In lieu of lodging an appeal, consider filing a petition to the appropriate tribunal in which you specifically request the imposition of a firm deadline by which the Government must issue its decision on the claim.

It is shameful, of course, that contractors often find themselves expending precious time and finite resources trying to ensure that the Government plays by the rules. If contractors acted like the Government did in this case, they would soon be out of business and would in all likelihood find themselves in receipt of default termination notices and in the crosshairs of Government-initiated litigation. Hopefully, the lessons of *Fluor* will deter such Government misconduct in the future. Only time will tell.

If you would like additional information on this topic, please contact the author, a member of the Government Contracts & Export Controls Group, or your lawyer at McCarter & English, LLP.