**NEW CONTRACTING OFFICER IS NO REASON TO DELAY DECISION ON CLAIM**



The Contract Disputes Act ("CDA") requires timely final decisions on claims, except when there is a reasonable basis for a delay. (See discussion below). Despite the statutory requirements, Contracting Officers ("CO") frequently delay making a final decision on a contract claim. A recent Board case addressed a delay that was primarily due to a change in contracting officers, and concluded that "internal staffing matters are not one of the factors used to determine a reasonable time under the CDA." *Volmar Const., Inc.,* ASBCA No. 60710-910, October 7, 2016.

**What the CDA Requires:** When a CO receives a claim under $100,000, the CDA requires the CO to issue a decision within 60 days "from the contracting officer's receipt [of the claim]." 41 U.S.C. § 7103(f)(1).

When a CO receives a certified claim over $100,000, the CDA requires that within sixty days of receipt of the claim, the CO shall either (a) issue a decision or (b) notify the contractor of the time for the decision. 41 U.S.C. §§ 7103(f)(2). (Under the caselaw the CO must specify the exact date/time for the decision, and can delay the decision only one time).

The CDA also requires that the decision of the CO on a contractor claim "shall be issued within a reasonable time ... taking into account such factors as the size and complexity of the claim and the adequacy of information in support of the claim provided by the contractor." 41 U.S.C. § 7103(f)(3). The CDA also states that "[a] contractor may request the tribunal concerned to direct a contracting officer to issue a decision 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." 41 U.S.C. § 7103(f)(4).

There was a good reason for placing these requirements in the CDA. Prior to the law, CO's would frequently "sit on" claims for long periods, making it impossible to appeal them to a Board or a Court, because there was no CO decision to appeal. Accordingly, the CDA even included a "deemed denial" provision in the law, which states that "[f]ailure by a contracting officer to issue a decision on a claim within the required time period is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal [without such a decision]." 41 U.S.C. § 7103(f)(5). This provision was specifically included to enable a contractor to obtain a judicial determination of its claim (or a determination by a board of contract appeals) without awaiting the decision of a contracting officer who has failed to render a decision within the specified time limits. *Pathman Const. Co. v. United States*, 817 F.2d 1573, 1577 (Fed. Cir. 1987).

**The Volmar Case:** On May 19, 2016, Volmar submitted eight claims to its CO on its construction contract. The substance of these claims had previously been submitted to the CO either as claims or requests for equitable adjustment ("REA") in January, February and March 2016. On July 18, 2016, the CO issued a final decision on one of Volmar's claims, and by letter

of counsel advised Volmar that the other seven final CO decisions would be issued on or before March 31, 2017.

Although, arguably, Volmar could have deemed all of its seven remaining claims denied by 41 U.S.C. § 7103(f)(5), instead, Volmar petitioned the Board for an order directing the CO to issue a decision on those seven other claims no later than a reasonable time set by the Board. The March 31, 2017 date was considered unreasonable by Volmar because it was more than 10 months from the submission of its May 19, 2016 claims and approximately 13 months from the original claim or REA submissions.

The government argued that the CO who would issue the decision had had "no exposure to the issues raised in Volmar's claims and that an outside scheduling expert [was needed to be hired to examine delay and impact damages]."

The Board rejected the government's arguments as "not wholly persuasive" and stated clearly that internal staffing matters, such as bringing on a new CO were not one of the factors used to determine a "reasonable time" under the CDA. The Board noted that Volmar's original submissions had been in the government's possession for well over 7 months, and Volmar's claims had been in their possession for over four months. Furthermore, the outside expert's report could be produced by mid-October 2016, and a five month period to analyze it was simply not required. The Board directed the government to issue a final decision no later than January 13, 2017.

TIP: There is a benefit to *both* the government and the contractor in obtaining a CO final decision on any claim. A well-reasoned decision could eliminate the need for litigation, or could clearly indicate to the contractor the weakness in its claim and convince that contractor not to appeal. For the contractor, it gives a better understanding of the government's logic, and a "preview" of any litigation.