

“DEEMED DENIAL” OF CLAIMS AND HOW THIS HELPS CONTRACTORS

Copyright Richard D. Lieberman, Consultant and Retired Attorney

A final decision on a claim by a contracting officer is a jurisdictional requirement for the Court of Federal Claims or a Board of Contract Appeals to consider an appeal of a contractor’s claim. Absent such a decision, neither the Court nor a Board will have jurisdiction to consider an appeal. However, the Contract Disputes Act of 1978 (the “CDA”) contains provisions for failure of a contracting officer to issue a final decision on a claim. This is the “deemed denied” provision of the CDA, which generally requires that a contracting officer make a final decision within 60 days of receipt of a proper claim. Prior to the CDA, the timing of issuance of a final decision was within the discretion of the contracting officer, subject only to a broad requirement that the decision be issued within a “reasonable time” after submission of a claim. But, there was no limit, and contracting officers often took years to render a decision. Recognizing the problem, the Congress remedied this problem by including in the CDA the following requirements for the issuance of the contracting officer’s decision on any proper claim:

(f) Time for Issuance of Decision.

(1) Claim of \$100,000 or less. A contracting officer shall issue a decision on any submitted claim of \$100,000 or less within 60 days from the contracting officer’s receipt of a written request from the contractor that a decision be rendered within that period.

(2) Claim of more than \$100,000. A contracting officer shall, within 60 days of receipt of a submitted certified claim over \$100,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) **General requirement of reasonableness.** The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations prescribed by the agency, 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.

(4) **Requesting tribunal to direct issuance within specified time period.** 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.

(5) **Failure to issue decision within required time period.** Failure 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 or action on the claim as otherwise provided in this chapter. However, the tribunal concerned may, at its option, stay the proceedings of the appeal or action to obtain a decision by the contracting officer.

41 U.S.C. § 7103(f). A Contracting Officer must issue a final decision on any proper claim within 60 days of its submission. For claims over \$100,000, the contracting officer may defer the decision, but must “notify the contractor of the time within which a decision will be issued.” Any failure to issue the decision within the required period is deemed to be a denial of the claim, and authorizes an immediate appeal to a Board of Contract Appeals or to the Court of Federal Claims.

In a recent decision, the Court of Federal Claims held that subsection (f)(2) of the above section of the CDA gives the government the right to extend the deadline for issuing a final decision only *once* and that the deadline must be set *during* the initial 60-day period. *Rudolph and Sletten*,

Inc. v. United States, No. 14-647C (Fed. Claims, Feb. 23, 2015). There are several other rules that the government must comply with, if it wants to extend the 60 day period, and these are:

FOR CLAIMS OF \$100,000 or LESS:

- (1) The contracting officer is not permitted to extend the time for the final decision on any claim less than \$100,000. The final decision must be made within 60 days or the claim under \$100,000 is deemed denied.

FOR CLAIMS OVER \$100,000:

- (2) The contracting officer may extend the sixty day time limit, but must do so within the 60 day period, and must pinpoint the exact date for a decision. That is, the contracting officer may extend the decision for a specific number of days, or until a date certain. The contracting officer may not use indefinite or uncertain time frames like “after an audit,” or “in approximately 45 days” or “some time after June 1, 2015”. Failure to provide a date certain results in the deemed denial of the claim at the 60 day mark. (*Cubic Defense Applications, Inc.*, ASBCA No. 56097, 07-2 BCA ¶ 33,695, contracting officer’s letter advising that the government intends to respond to the contractor’s claim “approximately December 14, 2007” held insufficient as a “fixed or specific date” for issuing a decision).
- (3) The contracting officer may extend the sixty day time limit only once. Any attempt to extend the time limit a second time results in deemed denial at the end of the first time extension beyond 60 days. *Rudolph and Sletten, supra*.
- (4) The contracting officer must pinpoint the date, and may not make the decision contingent upon some future event, such as like “after the audit has been completed.” The use of an indefinite time period will result in deemed denial of the claim at the 60 day mark. (*Northrop Grumman Corp.*, ASBCA No. 52263, 00-1 BCA ¶ 30,676, appeal authorized on a deemed denial basis where contracting officer letter stated a decision will be issued no later than 90 days if alternative dispute resolution did not result in resolution of all issues); (*Inter-Con Security Systems, Inc.*, ASBCA No. 45749, 93-3 BCA ¶ 26,062, appeal on a deemed denied basis allowed when CO advised that she would render a decision “within 60 days of receipt of the audit report” that she intends to request.)
- (5) The contracting officer on submitted claims must establish a date that is within a *reasonable time*, in accordance with regulations prescribed by the agency, 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. Where a contracting officer specifies an unreasonable amount of time, the claim will be deemed denied at the 60 day mark (three-month delay for performance of an audit, where the Government had previously seen the claim, was held unreasonable. *Eaton Contract Services, Inc.*, ASBCA 54054, et al., 03-2 BCA ¶ 32,273); (delays by the Government allegedly due to a shortage of attorneys in the agency held to be unreasonable. *Fru-Con Construction Corp.*, ASBCA 53544, 02-1 BCA ¶ 31,729.)

If you want to move the appeals process along, and the contracting officer does not issue a final decision on your claim within 60 days, you should use the “deemed denied” provisions of the CDA to authorize an appeal. If the contracting officer attempts to extend the 60 day period, but fails to comply with the rules listed above, you may properly take your appeal to the Board or the Court of Federal Claims without a final contracting officer’s decision.