

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CADDELL CONSTRUCTION CO.)
(DE), LLC)
445 Dexter Avenue, Suite 11000,)
Montgomery, AL 36104)

Plaintiff,)

v.)

Case No.: 1:21-cv-00697

THE DEPARTMENT OF THE NAVY)
1000 Navy Pentagon)
Washington, DC 20350-1000)

Defendant.)

_____)

COMPLAINT

Plaintiff, Caddell Construction Co. (DE), LLC (“Caddell” or “Plaintiff”), by and through its undersigned counsel, brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* to compel Defendant, the Department of the Navy (“Defendant”) to produce non-exempt records responsive to Caddell’s FOIA request and, in support thereof, states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331.

2. This Court has authority to grant injunctive relief pursuant to FOIA, 5 U.S.C § 552(a)(4)(B).

3. This Court has authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

4. Venue is proper under FOIA, 5 U.S.C § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

5. Caddell has exhausted all administrative remedies and otherwise satisfied all conditions precedent necessary to bring this action.

PARTIES

6. Caddell is a limited liability company formed under the laws of the State of Delaware with its principal place of business located at 445 Dexter Avenue, Suite 11000, Montgomery, AL 36104.

7. Defendant is an agency of the United States Government and is headquartered at 1000 Navy Pentagon, Washington DC 20350-1000.

STATEMENT OF FACTS

8. On or about August 20, 2014, Caddell and Naval Facilities Command Southeast (“NAVFAC SE”), acting on behalf of Defendant, entered into Contract No. N69450-14-C-1756 (the “Contract”) for the construction of the Nuclear Power Training Facilities, Naval Weapons Station, located in Charleston, South Carolina (the “Project”).

9. On or about December 19, 2020, Caddell submitted a claim (subsequently amended on or about July 7, 2020) for damages incurred and a time extension related to a government-caused delay under the Contract (the “Claim”).

10. On or about September 16, 2020, the Project Contracting Officer (“CO”) issued the Contracting Officer’s Final Decision (“COFD”). The CO published a corrected copy of the COFD on September 17, 2020.

11. On or about October 7, 2020, Caddell submitted its FOIA request to Defendant for copies of the following 10 categories of documents:

- a. All drafts or outlines related to the COFD. All communications between and among Navy personnel relating or pertaining to the COFD, whether before or after issuance of the COFD.
- b. Independent Technical Analysis – In the COFD, the CO wrote, “To assess Caddell’s delay claim the Contracting Officer commissioned an in-depth independent technical analysis to examine the claim submissions and project records and provide opinions and recommendations using Caddell’s Critical Path Method (CPM) schedules.” Please produce:
 - i. The contract, purchase order, or other form of agreement between the Navy and the independent technical analyst for the assignment described by the CO.
 - ii. The in-depth independent technical analysis produced by the independent technical analyst, and any drafts, outlines, or presentations of the same.
 - iii. Opinions of the independent technical analyst in any form.
 - iv. Recommendations of the independent technical analyst in any form.
 - v. All communications between the independent technical analyst and any person, agency, or entity acting on behalf of the Navy, relating in any way to the Project.
 - vi. All communications between the independent technical analyst and any person, agency, or entity acting on behalf of the Navy, relating in any way to the Claim.

- vii. All communications between the independent technical analyst and any person, agency, or entity acting on behalf of the Navy, relating in any way to the in-depth independent technical analysis.
 - viii. All Claim submissions and project records or communications examined by the independent technical analyst.
 - ix. All presentations (including drafts) made by or on behalf of the Navy to the independent technical analyst relating in any way to the Project or Claim.
 - x. All presentations (including drafts) made by or on behalf of the independent technical analyst to the Navy relating in any way to the Project or Claim.
- c. All communications between and among Navy personnel related to NAVFAC's assertion of a claim for liquidated damages against Caddell.
 - d. All communications between and among Navy personnel related to Alternative Dispute Resolution (ADR) procedures, commitment, or possibilities with Caddell.
 - e. All project schedules prepared for or by the Navy in any form (preferably in native format).
 - f. SITREPs – On or about November 13, 2019, NAVFAC provided to Caddell (among others) a Word document entitled “NPTU SITREP 20191105,” a copy of which is attached hereto as Attachment 2. Please provide:
 - i. All SITREPs (and similar documents, even if called by a different name) relating in any way to the Project, including any drafts of the same.
 - ii. All communications between and among Navy personnel and others (whether within the Navy, or outside the Navy) relating in any way to the SITREPs for this Project.

- g. All communications between NAVFAC and NPTU relating to the Project on and after January 1, 2015 through the present.
- h. All communications between Burns & McDonnell and Navy relating to the Project on and after January 1, 2015 through the present.
- i. Any claims (or drafts thereof) asserted by the Navy against Burns & McDonnell relating in any way to the Project.
- j. P00002 – Effective November 13, 2017, NAVFAC issued Contract Modification P00002, a copy of which is Attachment 3 hereto. Please produce:
 - i. All documents discussing or pertaining to P00002.
 - ii. All documents discussing or pertaining to the negotiation and making of the agreement that became Modification P00002.
 - iii. All documents discussing or pertaining to the interpretation or scope of Modification P00002, whether before or after November 13, 2017.

A copy of Caddell's FOIA request is attached hereto as Exhibit "A".

12. Pursuant to FOIA, 5 U.S.C § 552(a)(6)(A)(i), Defendant was required, but failed to, make a determination with respect to Caddell's FOIA request within twenty (20) business days of receipt.

13. On or about December 1, 2020, Defendant responded to Caddell's FOIA request (No. DON-NAVY-2021-000162) by acknowledging the request and requesting Caddell agree to pay \$12,288.00 in fees to process the request. Defendant's response also alleged that Caddell's request "falls within 'unusual circumstances'" because the records requested "require a search in another office." A copy of Defendant's response is attached hereto as Exhibit "B".

14. On or about December 8, 2020, Caddell responded to Defendant's December 1, 2020 letter agreeing to pay the estimated fee of \$12,288.00 and requesting the prompt processing of its request and a reasonable date for production of responsive documents. A copy of Caddell's response is attached hereto as Exhibit "C".

15. In its December 8, 2020 response, Caddell also objected Defendant's failure to comply with FOIA. Specifically, Defendant's response to Caddell's FOIA request does not comply with FOIA because: (i) the response was not timely provided within twenty (20) business days of receipt; (ii) Defendant did not provide written notice of the alleged "unusual circumstances" within this twenty (20) day time period; and (iii) Defendant did not provide a "date on which a determination is expected to be dispatched" as required by FOIA, 5 U.S.C. § 552(a)(6)(B)(i).

16. Additionally, in its December 8, 2020 response, Caddell objected to Defendant's entitlement to recover fees from Caddell on grounds that, under FOIA, Defendant waived the ability to recover fees due to its failure to timely respond to the FOIA request and the majority of the fee estimate is comprised of "review" costs, which Defendant is not entitled to recover under the circumstances. Notwithstanding its objection, however, Caddell agreed to pay the fees Defendant demanded, reserving all rights.

17. Since its December 8, 2020 response, Caddell has corresponded, via email, with Defendant, to no avail, requesting Defendant comply with FOIA and provide a determination regarding the FOIA request and a timeline for production of responsive documents.

18. In January 2021, Defendant indicated that it was reviewing documents for production.

19. On or about February 17, 2021, Defendant confirmed to Caddell that it intended to produce some responsive documents on or by February 19, 2021 but, without explanation, failed to do so.

20. On or about February 25, 2021, Defendant notified Caddell that it had received additional documents for review but, for the first time, represented that Caddell was required to make payment of estimated production fees before any documents could be produced.

21. On or about February 26, 2021, Caddell timely submitted its appeal of Defendant's deemed adverse determination on Caddell's FOIA request. A copy of Caddell's appeal is attached hereto as Exhibit "D".

22. As set forth in Caddell's appeal, Defendant has failed to comply with FOIA. Specifically:

- a. To date, Defendant has failed to provide Caddell with a determination, a copy of a single responsive document, or a timeline for production of responsive documents.
- b. Defendant's failure to produce responsive documents on alleged grounds that Caddell has not paid for production fees is unwarranted. In its December 8, 2020 letter, Caddell agreed, as requested, to pay the estimated fee of \$12,288.00. Defendant never responded to Caddell's December 8, 2020 and has never provided Caddell with an invoice or any means by which it could pay the estimated fees.

23. On or about March 4, 2021, Defendant responded to Caddell's FOIA appeal, granting the appeal "insofar as it pertains to time" and remanding the matter to the FOIA officer to "act upon" the request "typically within 30 days" or longer. Defendant's appeal response further noted that if the final action is adverse, Caddell will have the opportunity to appeal the decision. A copy of Defendant's appeal response is attached hereto as Exhibit "E".

24. Defendant's response to Caddell's FOIA appeal is not responsive and does not comply with FOIA. Essentially, Defendant's response to the appeal remands Caddell's request to the same FOIA officer with whom Caddell has been corresponding with for the last five months – the same individual whose failure to comply with FOIA and to provide a determination or responsive documents to Caddell gave rise to the appeal in the first instance.

25. Additionally, Defendant's response to Caddell's FOIA appeal gives the FOIA officer an unlimited timeframe to take action upon Caddell's FOIA request (30 days or longer).

26. Defendant's unilateral decision to give itself an unlimited timeframe to act upon Caddell's FOIA request does not comply with FOIA. Additionally, Defendant's representation that if, and when, the FOIA officer issues an adverse determination, Caddell would then have to administratively appeal such a determination, if true, would have the effect of perpetuating Defendant's chosen course of action to take an indefinite amount of time to afford Caddell the rights to which Caddell is entitled under FOIA.

COUNT I
(Violation of FOIA, 5 U.S.C. § 552)

27. Plaintiff re-alleges and incorporates paragraphs 1 through 26 as if fully stated herein.

28. Defendant is an "agency" within the meaning of 5 U.S.C. 551(1).

29. The records requested by Caddell's FOIA request are "agency records" within the meaning of FOIA and Defendant has possession, custody, and control of the records requested.

30. Defendant has violated FOIA by its acts and omissions including, but not limited to, the following:

- a. Failure to timely comply with FOIA requirements;

- b. Failure to make and provide Caddell with a determination regarding its FOIA request;
- c. Failure to make reasonable efforts to search for records responsive to Caddell's FOIA request;
- d. Failure to disclose and produce all non-exempt records responsive to Caddell's FOIA request;
- e. Failure to reasonably segregate non-exempt portions of documents responsive to Caddell's FOIA request from those portions subject to an exemption; and
- f. Failure to demonstrate that any of the records responsive to Caddell's FOIA request are exempt from production.

31. Caddell is being harmed by Defendant's improper withholding of the requested records in violation of Caddell's rights under FOIA, and Caddell will continue to be harmed unless Defendant is compelled to produce to Caddell all non-exempt records responsive to Caddell's FOIA request.

32. Caddell is entitled to its reasonable attorneys' fees and costs pursuant to FOIA, 5 U.S.C § 552(a)(4)(E).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Caddell, respectfully requests that this Court:

(a) order Defendant to search for any and all records responsive to Caddell's FOIA request and demonstrate that it employed search methods reasonably calculated to uncover all records responsive to the request;

(b) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Caddell's FOIA request;

(c) order Defendant to produce, by a date certain, any and all non-exempt records responsive to Caddell's FOIA request and a *Vaughan* Index of any responsive records withheld under claim of exemption;

(d) grant Caddell an award of attorneys' fees and costs reasonably incurred in this action;
and

(e) grant such other relief as this Court deems just and proper.

SUBMITTED this 16th day of March 2021.

Respectfully submitted,

SMITH, CURRIE & HANCOCK LLP

/s/ Sarah Carpenter

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