

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
M&W Construction Corporation) ASBCA No. 53482
)
Under Contract No. N62470-98-C-5322)

APPEARANCES FOR THE APPELLANT: Michael J. Gardner, Esq.
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APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
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OPINION BY ADMINISTRATIVE JUDGE STEMLER

This appeal involves a contract to repair a coal and ash handling system at the United States Marine Air Station, Cherry Point, North Carolina. The appeal involves both appellant's request for an equitable adjustment and a warranty claim by the Government. M&W Construction Company (M&W or appellant) has filed a motion for partial summary judgment and a motion to compel.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. The Government awarded Contract No. N62470-98-C-5322 to M&W in September 1999 (App. Proposed Findings of Uncontroverted Fact (PF), ¶ 2; Gov't Statement of Facts (SF), ¶ 1). The contract incorporated by reference the Federal Acquisition Regulation clause 52.246-21 WARRANTY OF CONSTRUCTION (MAR 1994) (R4, tab 1, Doc. 00721 at 17).
2. The contract required M&W to repair boilers (complaint and answer, ¶ 8). Appellant completed work under the contract on 4 April 2001 (complaint and answer, ¶ 7).

3. In her final decision the contracting officer alleged problems were experienced during the warranty period with the boilers repaired by M&W. The Government asserts that the subsequent inspection and repair of the problems required that the boilers be taken out of operation and forced the use of less efficient boilers. (R4, tab 24 at 4-5; SF, ¶¶ 4-6)

4. Appellant filed an equitable adjustment claim for \$188,373 for alleged additional work. The contracting office's final decision granted this claim in the amount of \$78,327 and asserted a Government warranty claim of \$148,714 for a net Government claim of \$70,387. The final decision then offset against this amount the contract balance of \$500 under this contract and \$2,000 under Contract No. N62470-99-C-3619 resulting in a Government claim of \$67,887. The Government's claim under the warranty clause, set out the components of that amount as follows.

Facilities Maintenance Dept Labor Cost	\$ 11,611.00
Detroit Stoker's investigation report	\$ 7,317.00
Grate bar repairs by McGraw Morgan	\$ 13,125.00
Cost to run oil-fired boilers	<u>\$116,661.00</u>
Warranty repair cost	\$148,714.00

(R4, tab 24 at 5) (emphasis added)

5. Appellant filled a timely appeal.

6. In paragraphs 36-41 of its complaint, M&W pleads concerning the contracting officer's decision. In paragraph 39, appellant stated the following:

The Government alleges that it incurred the following costs for which M&W is liable under the Warranty of Construction Clause:

Labor by Government Employees:	\$ 11,611.00
Manufacturer's Report:	\$ 7,317.00
Grate Bar Repairs:	\$ 13,125.00
<u>Consequential Damages:</u>	<u>\$116,661.00</u>
Total:	\$148,714.00

(Emphasis added)

7. The Government admitted the allegations of paragraph 39 of the complaint in paragraph 39 of the answer.

8. Appellant filed a motion for partial summary judgment on 9 November 2001 and the Government responded on 8 January 2002. On 24 January 2002, M&W filed a motion

to compel responses to discovery. The Government filed a response to that motion on 26 February 2002 and appellant filed a reply to the Government's response on 15 March 2002.

DECISION

Appellant's Motion to Compel

Appellant filed a discovery request on 9 November 2001. The Government states that it did not receive M&W's discovery requests until 8 January 2002 due to delays required by the shipping of all counsel's mail to New Jersey or Ohio for irradiation as a precaution against anthrax. It goes on to say that preparing its responses has required the assistance of the project manager for the contract who is now stationed in Illinois. The Government anticipated that it would provide responses by 22 March 2002. We have not been informed that the Government has failed to meet this date. The motion is dismissed as moot. Any concerns that appellant has about the sufficiency of the response should be the subject of a new motion to compel.

As to appellant's request for expedited proceedings in its motion to compel, the appeal clearly does not qualify for processing under Board Rule 12. Accordingly, the appeal will be processed without preference and the speed at which the appeal moves will largely be dependent on the time it takes the parties to prepare for hearing.

Appellant's Motion for Partial Summary Judgment

In its motion for partial summary judgment, M&W asks the Board to conclude that the Government is not entitled to the \$116,661 that is claimed as the cost of running oil-fired boilers while Boilers 1 and 2 were being repaired, as a matter of law. Based on paragraph 39 of the complaint and answer, appellant contends that the Government has admitted that that part of the Government's claim constituted consequential damages which, it goes on to argue, cannot be recovered under the WARRANTY clause.

The Government makes two points in responding to appellant's motion. The first is that the issue of the type of damages being sought should be decided only after a trial on the merits. As to its admission with respect to paragraph 39, the Government avers that it was only admitting to the accuracy of the amounts claimed and requests denial of the motion and permission to amend its answer to paragraph 39. It also says that, in any event, the characterization of the cost to run oil-fired boilers as consequential damages is a legal conclusion that is not binding on the Government.

Appellant is correct that Government drafted warranty clauses will be strictly construed and the Government is limited to the remedies enumerated in the clause. *Kordick and Son, Inc. v. United States*, 12 Cl. Ct. 662, 668 (1987); *Dreadnought Marine, Inc.*, ASBCA No. 45055, 95-2 BCA ¶ 27,650 at 137,827; *O.F. Paulson Construction Co.*,

VABCA No. 1214, 79-1 BCA ¶ 13,623. The WARRANTY clause in this contract provides in part:

(c) The Contractor shall remedy at the Contractor's expense any failure to conform, or any defect. In addition, the Contractor shall remedy at the Contractor's expense any damage to Government-owned or controlled real or personal property, when that damage is the result of—

- (1) The Contractor's failure to conform to contract requirements; or
- (2) Any defect of equipment, material, workmanship, or design furnished.

....

(f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the Government shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

Appellant would have us strike the Government's claim for \$116,661, the alleged additional cost to run the oil-fired boilers while the boilers under contract were undergoing alleged warranty repairs. The basis for this request is the Government's admission of ¶ 39 of the complaint where appellant relabeled the damages demanded by the contracting officer in her final decision as "consequential damages." (*Compare* findings 4, 6) The Government has stated that its intent in its pleading was to admit the accuracy of the amounts but not the legal issue of how the damages should be classified. (Response at 5) The Government has moved for leave to amend ¶ 39 of its answer to substitute the following:

The factual allegations of the paragraph are admitted to the extent that they are supported by the final decision and represent the amounts claimed by the Government under the Warranty clause. No responsive pleading is required to the legal conclusion that the \$116,661 for oil-fired boilers represents consequential damages. As noted in the final decision, that amount represents costs to run oil-fired boilers as assessed under the Warranty clause.

(Response at 6)

We grant the Government's motion for leave to amend its answer. As we have stated in the past, the label "consequential damages" is generally a confusing and unfavored term

and not particularly helpful in determining what damages are recoverable. *Joseph Becks and Associates, Inc.*, ASBCA No. 31126, 86-3 BCA ¶ 19,299 at 97,583. Our real inquiry in this regard will be whether the costs being sought by the Government fall within the remedies available under the WARRANTY clause, *supra*. That inquiry is fact-bound and not susceptible of disposition on summary judgment. There is no evidence of record as to whether the work necessary to replace, repair, or otherwise remedy the alleged failure, defect, or damage properly includes providing an alternate source of steam (whether through the use of temporary boilers or the oil-fired boilers) during the warranty work.

CONCLUSION

Appellant's motion to compel is dismissed as moot. Appellant's motion for partial summary judgment is denied. The Government shall file its amended answer within ten days of receipt of this decision.

Dated: 27 March 2002

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

ALLAN F. ELMORE
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53482, Appeal of M&W Construction Corporation, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals