

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Todd Pacific Shipyards Corporation) ASBCA No. 53674
)
Under Contract No. N00024-92-H-8038)

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OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The Department of the Navy (Navy or government) has filed a motion for partial summary judgment, contending that the government is entitled to judgment as a matter of law on appellant's claim for acceleration. Appellant, Todd Pacific Shipyards Corporation, opposes the motion and has filed a cross-motion for partial summary judgment, seeking a judgment that the contract placed upon the government the sole responsibility to insure that warranty work ordered under another contract would not interfere with work under the subject contract, and that the government would be responsible for any costs arising from such interference. We believe that the record contains disputes of material fact related to each motion, and we deny both motions.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. By Standard Form 33, the Navy issued a solicitation for offers dated 6 December 1999 for the Post Shakedown Availability (PSA II) of the USCGC Healy (R4, tab 2). At or around this time, the Healy was delivered to the government pursuant to a contract with Avondale Industries, Inc. (Avondale). Under this latter contract, certain guarantee/warranty work was required to be performed.

2. The government conducted a pre-proposal conference for the above solicitation on 4 May 2000. Insofar as pertinent, the government's minutes of the conference provided as follows: "There will be concurrent warranty work being performed during the PSA at the Coast Guard Station on a not to interfere basis." Amendment No. 6, effective 12 May 2000, added these minutes to the solicitation. (Gov't opp'n, tab 11 at 2, ¶ 2(d); at 7, ¶ 1(4))

3. By purchase order dated 2 May 2000, Avondale issued a time and materials contract to appellant to perform the guarantee/warranty work on the Healy (*id.*, tab 10). The government awarded the PSA II contract to appellant on or about 14 July 2000, with a performance completion date of 12 December 2000 (R4, tab 2). Hence, appellant was the prime contractor on the Healy under the PSA II contract and was also Avondale's subcontractor to perform the warranty work on the vessel.

4. The PSA II contract was modified a number of times. Bilateral contract Modification No. P00003, effective 17 August 2000, changed the place of performance from the Coast Guard Station in Seattle, Washington to appellant's facility in Seattle, Washington. There appears to be a dispute as to whether Modification No. P00003 also included an obligation for appellant to provide a comprehensive schedule for the PSA II work and any and all warranty work. (R4, tab 14) Appellant offers evidence that such a schedule was not a contract obligation (app. opp'n, Miller decl., ¶ 5). The government offers evidence that this was a contract obligation (gov't opp'n, tab 8, Wing decl., ¶ 15).

5. After certain warranty work was identified by representatives from the government and Avondale, it was provided to appellant to perform under its purchase order with Avondale. The government stated to appellant that PSA II work was to be given priority over the warranty work (*id.*, ¶ 14), but appellant offers evidence to the effect that the government gave priority to certain warranty work, *i.e.*, the underwater warranty work (app. opp'n, Miller decl., ¶ 7). According to appellant, it advised government representatives that conflicts between PSA II work and the warranty work were impacting the delivery schedule of the PSA II contract (*id.*, ¶ 5).

6. By letter dated 7 November 2000 (gov't mot., ex. 8), appellant requested a time extension under the PSA II contract from 12 December 2000 to 20 December 2000, which was granted by the government under bilateral contract Modification No. A00008,

effective 21 November 2000 (*id.*, ex. 9). Appellant made no further requests for time extension in writing. According to appellant, its practice was to first submit its requests for time extension to the government orally and these requests were denied (app. opp'n, Risvas decl., ¶ 14). According to appellant, the government's insistence upon timely performance in the face of work interferences made further written time extension requests pointless (*id.*, ¶ 17). The government disputes these contentions.

7. On or about 9 February 2001, appellant submitted a request for equitable adjustment for various claim items to the government under the PSA II contract (R4, tab 15). Pursuant to Supplemental Agreement No. A00016 dated 13 July 2001, the parties resolved all but four of appellant's claim items. These four claim items include two items for alleged acceleration, based on the alleged impact of the warranty work on the PSA II contract. (Gov't mot., ex. 5, Riplinger decl., ¶ 11) Appellant certified these claims by letter dated 18 September 2001 (R4, tab 19).

8. The contracting officer did not issue a contracting officer's decision under the Disputes clause. By letter dated 31 October 2001, he advised appellant that the issues arising out of the warranty work under the Avondale subcontract were not cognizable under the PSA II contract (R4, tab 21). This appeal followed.

DECISION

We grant summary judgment where no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. We are not to resolve factual disputes, but to ascertain whether disputes of material fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

The government contends that appellant's acceleration claim must be denied as a matter of law because appellant has failed to show at least two of the elements necessary for its *prima facie* case: (1) that appellant requested a time extension for excusable delay which the government denied or unreasonably delayed before granting; and (2) that the government expressly or constructively directed acceleration. *See Trepte Construction Co.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595¹. However, appellant has offered evidence to the effect that it requested time extensions orally which were denied by the government; it also cites evidence to the effect that the government insisted upon timely performance in the face of excusable delay, which made additional written requests for

¹ Appellant challenges the government's formulation of the legal standard governing acceleration. We need not address this issue for purposes of deciding the motion.

time extension pointless. Such government action may be considered a constructive order to accelerate under certain circumstances. *See, e.g., Gibbs Shipyard, Inc.*, ASBCA No. 9809, 67-2 BCA ¶ 6499 at 30,159-160.

We are mindful that the government has offered evidence to dispute appellant's contentions. However at this juncture we are not obligated to weigh the evidence but to determine whether the record contains disputed issues of material fact. We believe it does, and this precludes our granting summary judgment for the government.

With respect to appellant's motion, appellant would have us conclude as matter of law that based upon Amendment No. 6 to the solicitation, the contract placed upon the government the sole responsibility to insure that warranty work would not interfere with the work under the PSA II contract. However, the parties dispute whether the contract as modified obligated appellant to schedule both the contract work and the warranty work in a comprehensive and integrated manner. The existence and nature of any such obligation may have a bearing on the parties' responsibilities related to the management and coordination of this work. We believe that the record needs further development in this respect. We believe that there are disputed material facts related to the scheduling issue, which preclude the grant of summary judgment for appellant.

In view of the foregoing, the parties' cross-motions for partial summary judgment are denied.

Dated: 11 March 2004

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
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. 53674, Appeal of Todd Pacific Shipyards Corporation, rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals