

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Tkacz Engineering, LLC) ASBCA No. 60358
)
Under Contract No. W91JA4-11-P-4078)

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APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
ChristinaLynn E. McCoy, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MELNICK
ON APPELLANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT

Tkacz Engineering, LLC (Tkacz) seeks partial summary judgment upon entitlement in ASBCA No. 60358.¹ In that docket number it contends that the government constructively changed or breached the contract identified above. The contract sought four primary capabilities for the Armed Contractor Oversight Directorate supporting United States Forces-Afghanistan. It described the duties of a database designer, a webmaster, an information assurance engineer, and a training and documentation specialist. Among other things, the contract incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010). (R4, tab 1 at 3)

After reciting 271 proposed undisputed facts, Tkacz maintains that the government required it to develop comprehensive custom case management software, known as the Armed Civilian Web-enabled Accountability & Reporting System (ACWARS), which was beyond the contract’s requirements. The government then allegedly ordered changes to that software, resulting in the conversion of this fixed-price contract to an open-ended software development contract. The government inconsistently responds that the scope of Tkacz’s contract is in dispute, while also saying that all of the extra work alleged was within the contract’s plain language.

¹ This decision pertains only to ASBCA No. 60358 which is consolidated with ASBCA No. 59919.

Summary judgment should be denied when there are “disputes over facts that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A constructive change arises from the contractor’s performance of work “beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government.” *Agility Pub. Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1385 (Fed. Cir. 2017) (quoting *Int’l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007)). The doctrine arises from standard “Changes” clauses authorizing the contracting officer to “unilaterally...alter the contractor’s duties under the agreement.” *Len Co. and Assocs. v. United States*, 385 F.2d 438, 441-43 (Ct. Cl. 1967). If a contract’s Changes clause does not authorize unilateral action by the contracting officer, then an erroneous contract interpretation by the government is not a constructive change. It might generate a breach of contract. *Id.* at 443-47.

This contract does not contain a standard “Changes” clause. Instead, it incorporates the Commercial Items Changes clause contained in FAR 52.212-4(c), CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010). That clause dictates that “[c]hanges in the terms and conditions of this contract may be made only by written agreement of the parties.” There is no provision for unilateral action by the contracting officer. Tkacz has not cited a decision of this Board applying the constructive change doctrine to a Commercial Items contract. *See Hawaii CyberSpace*, ASBCA No. 54065, 04-2 BCA ¶ 32,744 at 161,946 n.1 (declining to decide whether the constructive change doctrine applies to a contract containing the FAR 52.212-4(c) Changes clause given the absence of unilateral change authority by the contracting officer), *appeal dismissed sub nom. Blackman v. Roche*, 133 F. App’x 743 (Fed. Cir. 2005); *but cf. Agility Pub. Warehousing Co.*, 852 F.3d at 1385-86 (remanding to the Board initial consideration of a constructive change claim made with respect to a Commercial Items contract); *see also* JOHN CIBINIC, JR., *ET AL.*, ADMINISTRATION OF GOVERNMENT CONTRACTS, 379-80 (4th ed. 2006) (suggesting the Commercial Items Changes clause severely limits the government’s powers when acquiring such items).²

Regardless of whether this appeal is viewed through the lens of a constructive change or a breach, summary judgment is denied. The general elements of a constructive change are (1) compelled performance by the contracting officer of work beyond the contract terms; (2) the change was directed by someone with contractual authority to unilaterally alter the contractor’s duties; (3) the contractor’s performance requirements were enlarged; and (4) the added work was not volunteered. *See Innoventor, Inc.*, ASBCA No. 59903, 17-1 BCA ¶ 36,798 at 179,353. Also, “[f]ailure by the promisor to perform at the time indicated for performance in the contract establishes an immediate breach.” *Franconia Assocs. v. United States*, 536 U.S. 129 (2002) (citing RESTATEMENT

² In future proceedings, both parties should establish positions regarding the applicability of the constructive changes doctrine.

(SECOND) OF CONTRACTS § 235(2)). Among other things, in the context of a constructive change, genuine issues of material fact exist as to the lengthy events alleged to constitute changed performance, and whether they were compelled by someone possessing unilateral authority to do so. Furthermore, Tkacz has not shown how the government failed to perform at the required time.

Resolving either the constructive change or breach claim requires settling upon the meaning and application of the contract terms. The government relies upon very broad contract language to justify Tkacz's creation of ACWARS, such as the requirement to "develop, produce, and maintain structural design of various systems, applications, and databases, including back-end databases for [a] database-driven Web site." It also points to language seeking the design, monitoring, improvement, and updating of a website. Unambiguous contract language requires no extrinsic evidence to interpret. *See Agility Pub. Warehousing Co.*, 852 F.3d at 1381. This contract's requirements are facially vague and their intended application is hotly contested. The extent of their obligation upon Tkacz is not clear. "When the meaning of a contract and the parties' intentions are both relevant and in dispute, there are mixed questions of fact and law that pose triable issues precluding summary judgment." *Hanley Indus., Inc.*, ASBCA No. 58198, 16-1 BCA ¶ 36,244 at 176,833 (quoting *AshBritt, Inc.*, ASBCA Nos. 56145, 56250, 09-2 BCA ¶ 34,300 at 169,434); *see also Delfasco LLC*, ASBCA No. 59153, 15-1 BCA ¶ 35,853 (denying summary judgment after identifying at least one disputed issue for trial).

CONCLUSION

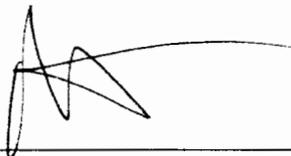
Accordingly, Tkacz's motion for summary judgment is denied.

Dated: 7 December 2017



MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
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. 60358, Appeal of Tkacz Engineering, LLC, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals