ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
DCX-CHOL Enterprises, Inc.	)	ASBCA Nos. 61636, 61637
	)	
Under Contract No. N00104-10-C-FA09	)	

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OPINION BY ADMINISTRATIVE JUDGE SWEET
ON THE GOVERNMENT'S MOTION FOR RECONSIDERATION

On July 11, 2019, we issued a decision granting the government's motion to strike the delay and constructive change defenses of appellant DCX-CHOL Enterprises, Inc. (DCX-CHOL) to the government's default termination, and denying the government's summary judgment motion. *DCX-CHOL Enterprises, Inc.*, ASBCA Nos. 61636, 61637, 19-1 BCA ¶ 37,394 (*DCX-CHOL I*). Familiarity with our previous decision is presumed. The government has timely moved for reconsideration of our denial of its summary judgment motion. For the reasons discussed below, we grant that motion, grant the government summary judgment, and deny these appeals.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTION

I. Factual Background

1. On August 2, 2006, the government and DCX-CHOL executed Contract No. N00104-06-C-FA67 (FA67 Contract) for Hull Penetrator Assemblies (R4, tab 1 at 1-2). On November 5, 2009, the government and DCX-CHOL executed Contract No. N00104-10-C-FA09 (FA09 Contract) for Electric Lead Assemblies (R4, tab 7 at 67-68). The Hull Penetrator Assemblies and Electric Lead Assemblies are components of Trident class submarine sonar systems (gov't mot. for summ. judg. at ex. 1, Palm decl. ¶ 3).

2. The FA09 Contract and the FA67 Contract (collectively, contracts) incorporated by reference Federal Acquisition Regulation (FAR) 52.249-8, DEFAULT FIXED-PRICE SUPPLY AND SERVICE (APR 1984), which allowed the government to terminate the contracts if DCX-CHOL failed to perform within the time specified in the contracts (R4, tab 1 at 16; tab 7 at 81).

3. The contracts required first article testing (FAT) and approval (R4, tab 1 at 3; tab 7 at 69). The contracts, as modified, incorporated FAR 52.209-4, FIRST ARTICLE APPROVAL-GOVERNMENT TESTING (SEP 1989), which required DCX-CHOL to deliver FAT samples within 180 days for the FA09 Contract and 90 days for the FA67 Contract (R4, tab 2 at 49; tab 8 at 124).

4. After several other modifications, the parties entered into bilateral modifications of the FA09 Contract and the FA67 Contract on March 23, 2018, and April 18, 2018, respectively (modifications). The modifications extended the FAT sample delivery deadline to April 30, 2018 (deadline), at no cost to either party. The modifications indicated that "[n]o equitable adjustments are authorized." (R4, tab 5 at 53-54; tab 10 at 147-48)

5. On April 21, 2018, DCX-CHOL notified the government that it had failed the FA09 Contract FAT (gov't mot. summ. judg. at ex. 2, Kurek decl. ¶ 4, exs. A-B). DCX-CHOL did not successfully deliver a FA09 Contract FAT sample or test report by the deadline (*id.* at ex. 1, Palm decl. ¶ 14).

6. On April 30, 2018, DCX-CHOL contacted the government to schedule the FA67 Contract FAT. DCX-CHOL sought a FA67 Contract FAT test date after the deadline. (Gov't mot. for summ. judg. at ex. 1, Palm decl. ¶¶ 23-24; ex. 2, Kurek decl. ¶¶ 8-9, ex. C)

7. On May 11, 2018, the government terminated the contracts for default (R4, tabs 6, 11).

II. Procedural History

8. On May 29, 2018, DCX-CHOL filed notices of appeal, challenging the validity of the government's default terminations of the FA09 Contract and the FA67 Contract, which we docketed as ASBCA Nos. 61636 and 61637, respectively.

9. On July 2, 2018, DCX-CHOL filed complaints in ASBCA Nos. 61636 and 61637, which are substantially similar (collectively, compls.). The complaints assert delay, constructive change, and waiver defenses to the default termination (*id.* ¶¶ 9, 14).

10. The government then moved to strike the delay and constructive change defenses, and for summary judgment on the waiver defense (gov't mot. for summ. judg.).

11. In opposition to the government's summary judgment motion, DCX-CHOL submitted a declaration from Tom Shafer (Shafer declaration I)—DCX-CHOL's Vice President and General Manager (app. opp'n to gov't mot. for summ. judg. at ex. 1, Shafer decl. I). Shafer declaration I stated that "[f]rom the award of the Contract in 2006 the Government repeatedly waived and ignored the Contract's schedule as awarded" (*id.* ¶ 5). Shafer declaration I fails to establish that any of the purported conduct waiving the schedule occurred after the modifications (*id.*). Shafer declaration I also stated that "[s]ubsequent to the issuance of the modification(s). . . new circumstances arose outside of Appellant's control entitling it to assume that the Government would continue to waive the schedule" (*id.* ¶ 6). Shafer declaration I does not identify what "new circumstances" entitled DCX-CHOL to assume that the government would continue to waive the schedule, let alone attribute those circumstances to the government's conduct (*id.*).

12. In *DCX-CHOL I*, we granted the government's motion to strike the delay and constructive change defenses, and denied the government's summary judgment motion (*DCX-CHOL I*). We denied the summary judgment motion because we found that, while Shafer declaration I could have contained more detail, it was sufficient to raise a genuine issue of material fact at that early stage of the proceeding as to whether the government waived the deadlines (*id.* at 5). An unstated assumption underlying that conclusion was that a fact-finder reasonably could infer that the government waived the deadlines after the modifications based upon two statements in Shafer declaration I—namely that (1) "[f]rom the award of the Contract in 2006 the Government repeatedly waived and ignored the Contract's schedule as awarded[;]" and (2) "[s]ubsequent to the issuance of the modification(s). . . new circumstances arose outside of Appellant's control entitling it to assume that the Government would continue to waive the schedule."

III. Contentions of the Parties

13. Now, the government has moved for reconsideration of the denial of its summary judgment motion contending:

> 1) the Board's finding that the modifications did not "state" that the government revived its right to strictly enforce the schedule was both a mistake of fact and an error of law,
>
> 2) the Board's application of the constructive waiver doctrine was an error of law, and

> 3) the Board's denial of the government's motion for summary judgment or partial summary judgment was an error of law.

(Gov't mot. for reconsideration)

14. In response to that motion, appellant filed an opposition maintaining that the record did not support the government's assertions in its motion (app. opp'n). Accordingly, we ordered appellant to file a second declaration, specifying whether the government purportedly waived the deadlines *after the modifications*, or coerced DCX-CHOL into executing the modifications (Bd. Order dtd. September 12, 2019).

15. DCX-CHOL submitted a second declaration from Mr. Shafer (Shafer declaration II). Shafer declaration II reiterated that "the Government waived the delivery schedule set forth in the Contract" without specifying whether that waiver occurred after the modifications (Shafer decl. II ¶¶ 6, 18). Shafer declaration II also reiterated that "[s]ubsequent to the issuance of the modification(s) . . . new circumstances arose outside of Appellant's control entitling it to assume that the Government would continue to waive the schedule" (*id.* ¶ 13). Again, Mr. Shafer did not identify what "new circumstances" entitled DCX-CHOL to assume that the government would continue to waive the schedule, or attribute the circumstances to the government's conduct (*id.*). Shafer declaration II also added a vague reference to the "Government's stated willingness to allow the extension of the delivery schedule" (*id.* ¶¶ 15, 21). However, Shafer declaration II did not identify any specific statements expressing a willingness to allow an extension of the delivery schedule, let alone indicate that the government made any such statements after the modifications (*id.*).

16. Attached to Shafer declaration II was an email chain (Shafer decl. II at ex. 1). The email chain first contained an internal government email from a Quality Assurance Specialist to a Mechanical Engineer stating that "[t]he contractors question relates to whether the operational testing . . . is the same Operation testing noted in 26.D of the drawing and subsequently MIL-C-24231 Operation testing paragraph 4.7.8" (*id.* at 2). The Mechanical Engineer responded that "[t]he testing is MIL-C-24231 Paragraph 4.7.8" (*id.* at 1). The Quality Assurance Specialist then forwarded the Mechanical Engineer's response to DCX-CHOL (*id.*). Shafer declaration II asserted that the information provided by the government was erroneous because the revision of MIL-C-24231 in effect at the time of the email was Revision E, and the appropriate paragraph of Revision E would have been 4.5.8—not 4.7.8 (Shafer decl. II ¶ 24). As a result of the error, Shafer declaration II asserted that DCX-CHOL proposed a schedule—which was incorporated into the modifications—that DCX-CHOL could not meet (*id.* ¶ 25).

DECISION

I. Standard of Review

We will grant a motion to reconsider a decision only if it is "based upon newly discovered evidence, mistakes in the findings of facts, or errors of law." *CDM Constructors, Inc.*, ASBCA No. 60454 *et al.* 19-1 BCA ¶ 37,332, at 181,556 (internal citations omitted). Summary judgment is appropriate only if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). There is a "genuine" dispute as to such a fact if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Moreover, we draw all reasonable inferences in favor of the non-movant. *Id.* at 248-49.

II. *DCX-CHOL I* Erroneously Found That DCX-CHOL Raised a Genuine Issue of Material Fact Suggesting That the Government Waived the Deadlines

DCX-CHOL I erroneously found that DCX-CHOL raised a genuine issue of material fact suggesting that the government waived the deadlines (SOF ¶ 12). When the parties agree—through a modification—to a new delivery deadline, a contractor generally may not rely upon pre-modification conduct to establish waiver of the modified delivery deadline. *Forest Scientific, Inc.*, ASBCA No. 18789, 74-2 BCA ¶ 10,868, at 51,712; *Honig Industrial Diamond Wheel, Inc.*, ASBCA No. 46875, 94-3 BCA ¶ 27,228, at 135,687. However, the government may waive a modified delivery deadline in certain limited circumstances—such as if the government waives the deadline after the modification, or coerces the contractor into executing the modification. *See Forest Scientific*, 74-2 BCA ¶ 10,868 at 51,712; *Carb Mfg. Co.*, ASBCA No. 5249, 65-2 BCA ¶ 5189, at 24,407.

Here, *DCX-CHOL I* incorrectly assumed that a fact-finder reasonably could infer that the government waived the deadlines after the modifications based upon the Shafer declaration I statement that "the Government repeatedly waived and ignored the Contract's schedule" (SOF ¶ 12). That inference is not reasonable because that general statement does not specify that the government's purported waiver occurred after the modifications (SOF ¶ 11). Likewise, *DCX-CHOL I* incorrectly assumed that a fact-finder reasonably could infer that the government waived the deadlines after the modifications based upon the Shafer declaration I statement that "[s]ubsequent to the issuance of the modification(s). . . new circumstances arose outside DCX-CHOL's control entitling it to assume that the Government would continue to waive the schedule" (SOF ¶ 12). That inference is not reasonable because, while that statement specifies that the purported waiver occurred after the modifications, it fails to identify what new circumstances entitled DCX-CHOL to assume that the government would continue to waive the

schedule, let alone attribute those circumstances to the government's conduct (SOF ¶ 11). Because it is not reasonable to infer from Shafer declaration I that the government waived the deadlines after the modifications, *DCX-CHOL I* erroneously found that DCX-CHOL raised a genuine issue of material fact suggesting that the government waived the deadlines.

III. The Government Is Entitled to Judgement as a Matter of Law on DCX-CHOL's Waiver Defense

The government is entitled to judgment as a matter of law on DCX-CHOL's waiver defense because DCX-CHOL has failed to raise a genuine issue of material fact suggesting that the government waived the deadlines after the modifications, or coerced DCX-CHOL into executing the modifications. As discussed above, in order to establish that the government waived a modified deadline, a contractor must show that there is a narrow exception, such as that the government waived the deadline after the modification, or coerced the contractor into executing the modification. *See Forest Scientific*, 74-2 BCA ¶ 10,868, at 51,712; *Carb Mfg. Co.*, 65-2 BCA ¶ 5189, at 24,407. Further, as discussed in greater detail above, Shafer declaration I fails to raise a genuine issue of material fact suggesting that the government waived the deadlines after the modifications.

As part of our consideration of the government's motion for reconsideration, we provided DCX-CHOL with an opportunity to present any other evidence suggesting that the government waived the deadlines after the modifications, or coerced DCX-CHOL into executing the modifications (SOF ¶ 14). In response, Mr. Shafer submitted a second declaration, which added a vague reference to "the Government's stated willingness to allow the extension of the delivery schedule" (SOF ¶ 15). That statement does not raise a genuine issue of material fact suggesting that the government waived the deadlines after the modifications because Shafer declaration II does not identify any specific statements expressing a willingness to allow an extension of the delivery schedule, let alone indicate that the government made any such statements after the modifications. Therefore, DCX-CHOL has failed to point to any evidence raising a genuine issue of material fact suggesting that the government waived the deadlines after the modifications.

Shafer declaration II also appears to attempt to show that the government coerced DCX-CHOL into executing the modifications by suggesting that the government referenced an erroneous paragraph number to DCX-CHOL (SOF ¶ 16). As an initial matter, the underlying emails appear to show that the source of the mistake was DCX-CHOL, not the government. In any event, such a mistake does not rise to the level of coercion. Therefore, Shafer declaration II does not raise a genuine issue of material fact suggesting that the government coerced DCX-CHOL into executing the modifications.

Because DCX-CHOL has failed to raise a genuine issue of material fact suggesting that the government waived the deadlines after the modifications, or coerced

DCX-CHOL into executing the modifications, the government is entitled to judgment as a matter of law on DCX-CHOL's waiver defense.

CONCLUSION

For the reasons discussed above, we grant the government's motion for reconsideration, and grant the government's motion for summary judgment on DCX-CHOL's waiver defense. Because waiver is the only remaining defense to the default termination, *DCX-CHOL I* at 3-4, these appeals are denied.

Dated: December 9, 2019

James R. Sweet

JAMES R. SWEET
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 Order of Dismissal of the Armed Services Board of Contract Appeals in ASBCA Nos. 61636, 61637, Appeals of DCX-CHOL Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals