

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Essex Electro Engineers, Inc.) ASBCA No. 49915
)
Under Contract No. M67854-90-C-0018)

APPEARANCE FOR THE APPELLANT: Charles E. Raley, Esq.
Hilton Head Island, SC

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
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OPINION BY ADMINISTRATIVE JUDGE TODD

The United States Court of Appeals for the Federal Circuit remanded this appeal to the Board in *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283 (Fed. Cir. 2000) (*Danzig*). The Court affirmed in part and vacated in part our decisions in *Essex Electro Engineers, Inc.*, ASBCA No. 49915, 99-1 BCA ¶ 30,229, *modified on reconsid.*, 99-2 BCA ¶ 30,418 (*Essex*) with direction to further consider whether the parties' delays are apportionable. The contract included contract data requirements¹ for review and approval by the Government before first article testing or production of the floodlight sets could start. As a result of various delays, contract completion was extended for 468 days from 10 September 1992 to 31 December 1993.

In the appeal appellant Essex Electro Engineers, Inc. (Essex) claimed that the total 468-day delay in contract completion was caused by the Government. The Board held that the Government was liable for 89 days of delay and that other delays attributable to the Government for drawing errors, delayed approval of the FAIP, and unsuitable Government-furnished property (GFP) were not compensable because they were concurrent with contractor-caused delays. Essex appealed the Board decisions to the Court arguing that the Board improperly concluded that most of the Government-caused delay was concurrent with contractor-caused delay.

The Court concluded that the Government was liable for an additional 15 days of delay based on its determination that first article approval was delayed by the defective GFP, but not by any concurrent contractor-caused ECP delay after the start of first article

testing. The Court has directed the Board to make “[a] more definite attribution” of delays and decide what caused the overall delay in contract performance. *Danzig*, 224 F.3d at 1292. Specifically, we address the following issues that have been remanded:

1. Whether Essex acted reasonably in taking 70 days to submit the original ECPs, and if not, what constituted a reasonable period to prepare the ECPs (at 1291).
2. Whether the Government acted reasonably in the substance and pace of its responses to Essex’s various submissions, keeping in mind that the need for the ECPs arose from the Government’s defective specifications (at 1291).
3. Whether the ECP-related delays can be definitely apportioned due to the sequential nature of Essex’s ECP submissions and the Government’s responses (at 1292).
4. Whether the Government’s communications failed adequately to apprise Essex of the need to provide a list of all the equipment to be used in the first article testing (at 1293).
5. Whether the Government’s delays in its second, third and fourth responses to Essex’s FAIP submissions were reasonable (at 1294).
6. Whether the Government’s and Essex’s delays in the FAIP submissions were apportionable (at 1294).
7. Whether Essex began production in June or on 17 August 1992 (at 1295).
8. Whether the Government’s unreasonable delays in response to the ECP and FAIP submissions, without consideration of unrelated Essex delays, affected contract completion and caused Essex to incur delay in its overall contract performance (at 1295-96).

Familiarity with the Court’s opinion and the Board’s decisions is presumed.

The parties have not supplemented the evidentiary record on remand. Appellant’s position in its briefs on remand is that the Government is solely responsible for 276 days of overall delay to the start of first article testing (from the scheduled start on 3 June 1991 to the actual start on 5 March 1992) and an additional 40 days of delay resulting from

defective GFP during the first article testing and FAIR period. The Government's position is that the Government is responsible for 123 days of delay, which includes 89 days that the Board held the Government responsible for, the 15 additional days the Court held the Government responsible for, and an additional 19 days of delay which it agrees it is responsible for in its brief.

We make additional findings of fact regarding the reasonableness of the parties' delays and the cause of overall delay in contract completion. We conclude that appellant is entitled to compensation for 156 days of Government-caused delay to its contract performance in addition to the 89 days to which appellant was entitled in our original decisions, or a total of 245 days of delay.

ADDITIONAL FINDINGS OF FACT

61. The contract provided schedule milestones for first article testing. The test was 270 days after contract award, submission of the FAIR was 300 days after contract award, and Government review of the FAIR was 330 days after contract award (R4, tab 1 at 56). Accordingly, we find that the contract required Essex to start first article testing on 3 June 1991 and submit the FAIR on 3 July 1991. The Government was required to review and comment on the FAIR on 2 August 1991.

62. Several offices of the Marine Corps were involved in the administration of the contract for the Government. The procuring contracting officer (PCO) and the project officer were in the program office at Quantico, Virginia and the technical office was in Albany, Georgia (R4, tab 51). The administrative contracting officer (ACO) was in Chicago, Illinois. Essex was located in Schaumburg, Illinois. The contract required the contractor to send contract submittals to more than one office before the PCO issued Government approval (R4, tab 1 at 69, 72, 89-91). We find that a reasonable time for the Government to provide its comments on appellant's resubmissions of all contract data requirements was 30 days.

63. The contract required the submission of ECPs for all changes that affected Government established baselines (R4, tab 1 at 69). ECPs were required to conform to MIL-STD-480B, which defined a Class I ECP as an ECP impacting, *inter alia*, configuration or compatibility and affecting cost to the Government. The contractor was required to recommend the priority of a Class I change for purposes of requesting processing time by the Government. (SR4, tab 147) Paragraph 4.4.2 of MIL-STD-480B provided the target for decision as follows:

The criticality of the need for decision will dictate the actual processing time for the ECPs. Emergency and Urgent ECPs should be proposed based upon the targets below unless otherwise agreed to between the contractor and procuring

activity. Processing targets for routine ECPs will be tailored to maximize cost effectiveness, recognizing the program, system and the ECP complexity. The target for decision and contractual authorization on Class I ECPs assigned the various priorities will be the following:

- a. Emergency 48 hours
- b. Urgent 30 calendar days
- c. Routine 90 calendar days

(*Id.* at 21)

64. On 21 May 1991, the PCO advised Essex that ECPs were needed (ex. A-1).

65. We find that the requirement to submit a complete list of test equipment was clear in the Government's initial letter, dated 21 May 1991, and known to appellant. In its submission on 24 June 1991, Essex failed to submit a complete list of test equipment that it was directed to submit (R4, tab 36). On 12 August 1991, the Government referred to the absence of a list of test equipment with a confusing item reference that caused Essex in its letter, dated 22 August 1991, responding to the rejection of the FAIP, to assert that it did not understand the Government's comment (R4, tabs 47, 52). The Government did not take any steps to resolve the confusion it had generated until the parties discussed the test equipment list at the meeting held on 8 November 1991. The Government's delay of 78 days from 22 August to 8 November 1991 was unreasonable. On 22 November 1991, Essex made a timely revised submission in accordance with the parties' agreement at the meeting for the time for resubmission, but did not include a complete list of test equipment (R4, tabs 60, 62). The Government delayed responding for 35 days until 27 December 1991. The Government's delay of five days was beyond a 30-day reasonable period.

66. On 12 August 1991, the Marine Corps technical office sent comments on the original ECPs to the PCO (tab 51). We find that, in view of the PCO's receipt of the technical review, a reasonable time for the Government to advise Essex of the Government reasons for rejection of the ECPs was 30 days. We find that a reasonable time for Essex to obtain estimated cost data and prepare the ECPs for resubmission in view of the nature of the Government's comments was no more than five days.

67. On 30 September 1991, when counsel for Essex objected to the Government's directive to submit the ECPs in accordance with MIL-STD-480 as "arbitrary, capricious, . . . irrational," and "absurd," Essex indicated that it recommended a priority of urgent for the ECPs (R4, tab 59 at 4).

68. There was no unreasonable delay by Essex in its conduct of the first article tests from 5 March to 11 May 1992.

69. On 5 May 1992, appellant submitted a claim for additional costs for the defective technical data package which included 60 hours to perform the engineering work and prepare ECPs (R4, tab 85). Assuming an eight-hour work day, we find this could not equate to more than eight work days, or 13 calendar days.² The Government concedes this is a reasonable approximation of the delay it caused (Gov't br. at 28).

70. On 17 August 1992, Essex began production upon receipt of the Government's authorization (R4, tab 92; supp. R4, tab 103).

DECISION

In our decisions we stated that appellant must show that the Government-caused delay was not intertwined with other delays. *Essex*, 99-1 BCA at 149,560. The Court has held on remand that if there is in the proof a clear apportionment of the delay, then the Government will be liable for its delays. *Danzig*, 224 F.3d at 1292.

The Court held that the Government was liable for whatever period of time Essex reasonably needed to respond to the Government's written request for the ECPs, but not for any longer. The Court directed the Board to determine the reasonable period for Essex to prepare the ECPs. Appellant argues that the reasonable period was the time that it actually took (app. br. at 24). Appellant claims a total of 70 days was reasonably required because it discovered additional defects (app. br. at 29). Essex took 18 days to develop cost data after the meeting on 8 November 1991 (app. reply br. at 9) and states that at least 16 days was a reasonable time to prepare the initial submission of ECPs made on 30 July 1991 (app. reply br. at 10). The Government submits that Essex was reasonably able to prepare the ECPs in eight days (Gov't br. at 28).

The Government based its argument on the estimate in appellant's claim regarding engineering labor for preparation of ECPs. Appellant has not supported an alternative to this estimate. (Gov't br. at 38; app. reply br. at 3-4) Appellant argues that the Essex estimate pertains only to three approved ECPs, but has not provided evidence of the estimated engineering labor to prepare the disapproved ECPs (app. reply br. at 4). Appellant's cost of disapproved ECP B520-5 was significantly higher than that of the other ECPs, but we do not agree with appellant's suggestion that the cost of the ECP work compares directly with the cost of preparing an ECP. Appellant failed to show why the amount of time it took to prepare the ECPs was reasonable. We conclude that Essex reasonably needed 13 calendar days to prepare and submit the original ECPs (finding 69).

We held the Government responsible for the 25-day delay from notice of the drawing errors to 10 May 1991. *Essex*, 99-2 BCA at 150,374. The PCO advised Essex that ECPs were needed on 21 May 1991 (finding 64). The Government has conceded that it is responsible for an additional 11 days of delay from 10 May to 21 May 1991 after providing

information to Essex and before requesting the ECPs (Gov't br. at 28, 40). In accordance with the Court's holding, the Government is responsible for the time Essex reasonably needed for its response, which was 13 calendar days, or until 3 June 1991. Essex made its initial submission on 30 July 1991, 57 days later, which was an unreasonable delay (finding 31). The Government is solely responsible for an initial 49 days of delay resulting from its defective specifications.

The contract required the Government to review original data submittals within 30, 45, or 60 days (findings 5-8) and ECPs in 30 or 90 days, depending on whether the ECP was classified as urgent or routine (finding 63). There is no time provision in the contract, and no representation was made by the Government, regarding the processing time for a resubmission by the contractor. Where the contract does not specify a time period for the Government's review and approval, we have held that the Government is entitled to a reasonable time to complete the review. *Idela Construction Company*, ASBCA No. 45070, 01-2 BCA ¶ 31,437, and cases cited therein. The conduct of the contractor does not relieve the Government of its obligation to proceed reasonably thereafter. *Danzig*, 224 F.3d at 1291. To make an apportionment of the delays from untimely Government responses to the ECP resubmittals, we are required first to find the reasonable time for the Government to provide its review and approval. Reasonableness is a matter to be determined objectively by the trier of fact in weighing various factors established by the evidence. We must analyze the reasonableness of the Government's actions in the particular context of the issues presented. See *Youngdale & Sons Construction Co., Inc. v. United States*, 27 Fed. Cl. 516 (1993); *Commerce International Company, Inc. v. United States*, 167 Ct. Cl. 529, 338 F.2d 81 (1964).

Appellant did not present any evidence of what its expectations were as to a reasonable time for Government review of resubmittals. We considered the contract provisions and several factors to establish a reasonable allowance of time. The submittals were technically complex. The contract did not present a highly compressed schedule for manufacture and delivery of the floodlight sets, but allowed for contract performance during more than two years. The Government offices responsible for administration of this contract were in different locations for deliveries among them as well as between them and the contractor's facility. In the circumstances of this case, 30 calendar days was reasonable for the Government to respond to letters from Essex, requests for a meeting, and resubmissions (finding 62).³

With respect to the various ECP-related submissions made by Essex, we have found that the Government did not act reasonably in the pace of responses (findings 62, 63). Appellant contends that the Government failed to correct its defective specifications without delay and all delay due to the errors in the Government drawings was *per se* unreasonable and the responsibility of the Government (app. br. at 30). The Government argues that it cannot be held responsible since Essex caused the delay by failing to use the proper form and submit the necessary cost data (Gov't br. at 32-33). We reject

appellant's argument in conformance with what the Court said, "[d]elays caused by factors outside the government's control relieve the government of liability 'irrespective of its faulty specifications.'" *Danzig*, 224 F.3d at 1290.

The first Government response, which was to the original ECPs submitted on 30 July 1991, was not provided within 30 days (*i.e.*, by 29 August 1991). The Government delayed forwarding the comments from the technical office to Essex for 18 days until 16 September 1991. (Finding 31) The Government directed use of the form provided by DOD-STD-480 in the contract which was self-explanatory in requiring the estimated costs or savings impact each ECP would have on the contract (finding 31). On 30 September 1991, Essex through its counsel objected to the Government directive and failed to make a responsive resubmittal (finding 32).

The Disputes clause in FAR 52.233-1 DISPUTES (APR 1984) requires the contractor to proceed diligently with performance of the contract in accordance with clear directions from the contracting officer. *See Kahaluu Construction Co., Inc.*, ASBCA No. 31187, 89-1 BCA ¶ 21,308, *motion for reconsid. denied*, 89-1 BCA ¶ 21,525. After the contracting officer has given an interpretation of the contract requirements, the contractor must perform as directed and may not stop work. If the contractor believes the interpretation erroneous, the determination may be appealed through the claims procedure. *Benju Corporation*, ASBCA No. 43648 *et al.*, 97-2 BCA ¶ 29,274 at 145,654-55. In *Benju* we made clear that even if the Government interpretation were wrong, the contractor is not justified in refusing to do as directed since the merits of the controversy have no effect on the requirement that a contractor continue performance. The contractor may disagree with the Government's representatives as to how the work is to be completed, but nevertheless is under a duty to proceed diligently with performance. *Advanced Mechanical Services, Inc.*, ASBCA No. 38832, 94-3 BCA ¶ 26,964. Essex was responsible for the delay that occurred beginning 21 September 1991, five days after it received the Government's comments, until it resubmitted the ECPs on 26 November 1991, a period of 66 days.

When the Government received revised ECPs with estimates of total costs on 26 November 1991, the Government took 77 days, until 11 February 1992, to approve the ECPs subject to submission of a cost breakdown (findings 32, 33). According to the time period (30 days) provided in MIL-STD-480B in the contract, the Government's unreasonable delay was 47 days. Essex delayed its cost breakdown resubmission 79 days beyond a reasonable five-day period, until 5 May 1992 (findings 35, 66). However, since Essex started first article testing on 5 March 1992, this delay is not measured by the time Essex delayed responding to the contracting officer's directives for the submission of cost details, which did not end until 5 May 1992, a period of 79 days, but by the start of first article testing, a delay chargeable to Essex of 18 days. With respect to the substance of its responses to the ECPs, we considered that the Government acted reasonably. *Essex*, 99-1 BCA at 149,558. The Court agreed that Essex did not submit compliant ECPs. *Danzig*, 224 F.3d at 1291. Accordingly, we have concluded that the Government was responsible

for a total of 114 days of delay in the ECP submittal process that resulted from its defective specifications; Essex was responsible for 141 days of delay in the ECP submittal process.

With respect to the FAIP submissions, the Court has directed the Board to make express findings on an issue of ambiguity in the requirement that Essex provide a list of all equipment to be used in the first article testing. It is well-established that the Government has a contractual duty to cooperate with its contractors. This duty involves the specific obligation to clarify specifications after valid requests from contractors. *Turbine Aviation*, ASBCA No. 51323, 98-2 BCA ¶ 29,945; *Kahaluu Construction Co.*, *supra*; *Pacific Devices, Inc.*, ASBCA No. 19379, 76-2 BCA ¶ 12,179; *Hardie-Tynes Mfg. Co.*, *supra*, 76-2 BCA at 57,379. When Essex responded to the Government's rejection of the FAIP on 22 August 1991, it requested a meeting with Government cognizant technical personnel to discuss the comments that were the basis of the Government's rejection. We have found that Essex was confused by the Government's second request for the list of test equipment (finding 65). The meeting was not held until 8 November 1991, 78 days after the Government received the request, and the Government is, accordingly, responsible for this delay.

The Government was obligated to respond to the multiple submissions of the FAIP made by Essex within a reasonable period of time. Essex maintains that the times the Government took in responding to its submissions were unreasonable (app. br. at 27). The Government argues that viewing the totality of the circumstances, the Government's actions were timely (Gov't br. at 35-37).

The Government failed to provide timely responses to the FAIP submissions. The contractually required time for response to the initial FAIP (submitted 6 March 1991) was 45 days, which made it due on 22 April 1991⁴, but the Government did not provide its response until 21 May 1991, 29 days late (finding 23). This period overlaps the period that the Government has acknowledged responsibility for ECP-related delay and could not have added to appellant's delayed performance. After 21 May 1991, Essex failed to submit its final version of the FAIP, including a complete list of the test equipment, within the contractually required 30 days (finding 62). Essex resubmitted the FAIP on 24 June 1991, which was a delay of three days (finding 24). A reasonable time for the Government's response thereafter was 30 days (finding 62), but the Government unreasonably delayed sending its comments rejecting the FAIP to Essex until 12 August 1991, a delay of 19 days. We have found those comments generated confusion that was not resolved for 78 days of Government-caused delay. Essex resubmitted the FAIP on 22 November 1991, and the Government delayed responding until 27 December 1991 for an additional delay of five days. (Finding 65) The Government-caused FAIP delay, however, to the extent it occurred during the same periods as Government-caused ECP delay, did not increase the overall delay to contract completion.

We have made an analysis of the sequential nature of the parties' overlapping actions instance by instance, which is shown in the following summary chart, to attribute days of delay to Essex or the Government.

<u>Party</u>	<u>Activity</u>	<u>Delay Period</u>	<u>No. of Days Delay</u>
Government	ECPs	04-15-91 to 06-03-91	49
Government	FAIP	04-22-91 to 05-21-91	29
Essex	FAIP	06-21-91 to 06-24-91	3
Essex	ECPs	06-03-91 to 07-30-91	57
Government	FAIP	07-24-91 to 08-12-91	19
Government	ECPs	08-29-91 to 09-16-91	18
Government	FAIP	08-22-91 to 11-08-91	78
Essex	ECPs	09-21-91 to 11-26-91	66
Government	FAIP	12-22-91 to 12-27-91	5
Government	ECPs	12-26-91 to 2-11-92	47
Essex	ECPs	02-16-92 to 03-05-92	18

The Court directed the Board to determine the apportionment of the overall delay in contract performance according to the causal link between the Government's wrongful acts and the extended contract completion. The Court explained the inquiry it intended as follows:

This inquiry requires the Board to focus on the overall effect that government-caused delay had on the beginning of First Article testing, and not to focus on each discrete period of delay and then automatically treat as concurrent delay any period of government-caused delay during which Essex was causing unrelated delay. That type of instance-by-instance analysis of the delays could result in distortion of the proper measure of overall delay. The reason is that, in the absence of any government-caused delay, Essex's unrelated delays might have been concurrent with each other (rather than concurrent with government-caused delays), so that the overall delay in contract completion would not have been as great.

Danzig, 224 F.3d at 1296.

We interpret the mandate of the Court to be that the Essex delays in the submittal approval process in taking an unreasonable amount of time to prepare the ECPs and FAIP and in failing to perform in response to directives of the contracting officer as required by the Disputes clause do not lessen the amount of its equitable adjustment for Government delays in overall contract completion. The overall delay in contract performance was

caused in part by delayed first article testing which could not start without ECP and FAIP approval. From 15 April 1991, when Essex notified the Government of the drawing errors to 16 January 1992, when the FAIP was approved, both ECP and FAIP approval were critical for the start of first article testing. From 5 March to 11 May 1992, when Essex completed first article testing, there were no submittals that affected contract completion.

The Court held that since Essex started first article testing on 5 March 1992 before the ECPs were finally approved, delay in the final approval of the ECPs did not delay the start of first article testing. The Court rejected our conclusion that contractor-caused ECP delay was concurrent with delay due to defective GFE that affected completion of the testing. *Danzig*, 224 F.3d at 1294. Essex's concurrent delay after the start of testing on 5 March 1992, is, therefore, unrelated and the Government is solely responsible for its later delays that impacted the completion of first article testing or the start of production. The defective GFE caused 40 days of delay during first article testing from 6 March to 15 April 1992 (finding 41). There is no evidence of unreasonable delay by Essex in the conduct of the tests (finding 68). Accordingly, the Government is solely responsible for 40 days of delay due to defective GFE.

The overall delay in contract performance was also caused by the delayed start of production and delay during production. We found attributable to the Government a five-day delay in furnishing GFM (finding 53) and the unreasonable delay in approval of the FAIR for 59 days from 19 June 1992 until the authorization of production on 17 August 1992 (finding 45). The Government is solely responsible for these 64 days of delay.

We have made an apportionment of the overall delay in contract completion taking into account the relationship of Essex's concurrent delays to determine the actual cause of delay in contract performance. We conclude that the overall effect of the Government's wrongful acts that caused delay in first article testing was 114 days of delay from the defective specifications, 27 days for FAIP delays, and 40 days from the defective GFP for a total of 186 days and that delay in production and consequently the rescheduling and completion of contract deliveries was caused by five days from delayed GFM, and 59 days from delayed review and approval of the FAIR. The Government was solely responsible for causing 245 days of overall delay in contract completion.

The appeal is sustained. Appellant is entitled to 156 days of compensable delay in addition to the 89 days in our decision as modified on reconsideration.

Dated: 19 December 2001

LISA ANDERSON TODD

Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

DAVID W. JAMES, JR.
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

¹ We discuss only the Engineering Change Proposals (ECPs) (R4, tab 1 at 69); First Article Inspection Procedure (FAIP) (*id.* at 89); and First Article Inspection Report (FAIR) (*id.* at 90) in this decision.

² In 1991 the reasonable time for Essex to prepare the ECPs after 21 May 1991 excluded the weekend and holiday period 25-27 May and the following weekend 1-2 June.

³ *Cf. Hardie-Tynes Mfg. Co.*, ASBCA No. 20582, 76-2 BCA ¶ 11,972 at 57,379.

⁴ In 1991 the due date was 22 April 1991, since 20 April 1991 was a Saturday.

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. 49915, Appeal of Essex Electro Engineers, Inc., rendered in conformance with the Board's Charter.

Dated:

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