

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Paranetics Technology, Inc.) ASBCA No. 54629
)
Under Contract No. N00406-01-C-5144)

APPEARANCE FOR THE APPELLANT: Mr. Joseph R. Little
President

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
Chief Trial Attorney
William F. Manley, Esq.
Trial Attorney
Defense Contract Management
Agency
Boston, MA

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON
MOTION FOR RECONSIDERATION

Appellant, Paranetics Technology, Inc., seeks reconsideration of our Rule 12.3 decision in *Paranetics Technology, Inc.*, ASBCA No. 54629, 05-1 BCA ¶ 32,827.¹ We denied appellant’s request for an equitable adjustment due to government delay on the grounds that appellant failed to show that the contract work was wrongfully suspended or delayed by the contracting officer in the administration of the contract. Familiarity with our decision is presumed.

Appellant contends that the Board failed to properly consider that the contracting officer breached an affirmative duty under the contract and the Defense Priorities and Allocations System (DPAS) regulation to assist appellant to obtain the parts it needed to timely perform the contract. According to appellant, when the contracting officer became aware of delivery delays, he had the obligation, *sua sponte*, to initiate action under the DPAS regulation to assure that appellant was able to timely perform. According to appellant, since the contracting officer failed to take such action, his

¹ Because of the inordinate amount of time – over 4 weeks – it took for appellant to receive the Board’s decision by mail, the government contends that appellant’s motion is untimely. However, the record shows that appellant filed this motion within 30 days of receipt of the decision. We conclude that the motion is timely. Board Rule 29.

inaction was wrongful and appellant's delayed performance constituted compensable delay for which appellant was entitled to an equitable adjustment.

The government opposes appellant's motion. The government contends, *inter alia*, that the contract and the DPAS regulation contemplate that the *contractor* is responsible to take the initiative to seek assistance from the contracting officer to expedite contract performance, and that neither the contract nor the regulation places an affirmative duty upon the contracting officer to, *sua sponte*, explore ways to facilitate a contractor's performance, absent a request from the contractor. According to the government, appellant failed to make such a request, and therefore appellant failed to show any wrongful government action or inaction for which appellant is entitled to an equitable adjustment.

The relevant contract clause, FAR 52.211-15, DEFENSE PRIORITY AND ALLOCATION REQUIREMENTS (SEP 1990), provides as follows:

This is a rated order certified for national defense use, and the Contractor shall follow all the requirements of the Defense Priorities and Allocations System regulation (15 CFR Part 700).

(R4, tab 1 at 20)

Insofar as pertinent, the Defense Priorities and Allocations System regulation, 15 C.F.R. § 700.50 (2001), provides as follows:

700.50 General provisions.

(a) The DPAS is designed to be largely self-executing. However, it is anticipated that from time-to-time problems will occur. *In this event, a person should immediately contact the appropriate contract administration officer for guidance or assistance. If additional formal aid is needed, special priorities assistance should be sought from the Delegate Agency through the contract administration officer.* If the Delegate Agency is unable to resolve the problem or to authorize the use of a priority rating and believes additional assistance is warranted, the Delegate Agency may forward the request to the Department of Commerce for action. Special priorities assistance is a service provided to alleviate problems that do arise.

(b) Special priorities assistance can be provided for any reason in support of this regulation, such as assisting in obtaining timely deliveries of items needed to satisfy rated orders or authorizing the use of priority ratings on orders to obtain items not automatically ratable under this regulation.

(c) *A request for special priorities assistance or priority rating authority must be submitted on Form BXA-999 (OMB control number 0694-0057) to the local contract administration representative. Form BXA-999 may be obtained from the Delegate Agency representative or from the Department of Commerce. A sample Form BXA-999 is attached at Appendix I. [Emphasis added]*

(R4, tab 5)

We believe the foregoing places the general obligation upon the contractor to seek the government's assistance under the contract and the DPAS regulation. As we stated in *McQuiston Associates*, ASBCA No. 24676, 83-2 BCA ¶ 16,602 at 82,549, *aff'g* 83-1 BCA ¶ 16,187:

Here appellant did not comply with the requirements of the priorities system in place. As we stated in our decision (at 80,441):

“[D]elays in a ‘contractor’s performance caused by the operation of the Government's priorities system may be excusable and entitle the contractor to an extension of the delivery dates.’ *Prestex, Inc.*, ASBCA Nos. 21284, 21372, 21453, 21467, 23184, 81-1 BCA ¶ 14,882 at 73,609. However, the contractor must establish a causal connection between the operation of the priority system and its delay or failure to perform. *C.C.C. Construction Company, Inc.*, ASBCA No. 20586, 77-1 BCA ¶ 12,272; *Hogan Mechanical, Inc.*, ASBCA No. 21612, 78-1 BCA ¶ 13,164.

“In this case appellant, although familiar from past experience with the particulars of the operation of the priority system, made a calculated decision to postpone utilizing that system in favor of pressing other options that it considered more likely to obtain satisfactory performance. It was not

until several weeks after the contract delivery date had passed that appellant filed the request for priority assistance.

“This Board has previously held that such failure to make a timely request for Government assistance “precludes whatever entitlement the contractor may otherwise have had to assistance from the procuring activity in obtaining needed materials.” *Texoma Construction, Inc.*, ASBCA No. 20924, 77-1 BCA ¶ 12,449.”

Compare M.D. Funk, ASBCA No. 20287, 76-2 BCA ¶ 12,120 at 58,221, *aff’d on motion for reconsideration*, 77-1 BCA ¶ 12,241 (contractor entitled to adjustment pursuant to the Suspension of Work clause due to government’s unreasonable delay in acting upon appellant’s request for assistance to obtain controlled material).

The record in this appeal shows that appellant failed to seek assistance from the contracting officer under the DPAS regulation. Accordingly, the record provides no basis to conclude that any contracting officer action or inaction with respect to this matter was wrongful so as to support appellant’s claim for equitable adjustment.

We have reconsidered our decision in view of appellant’s motion, but for reasons stated we conclude that appellant has not shown that our decision denying its appeal was erroneous as a matter of fact or law. The decision is affirmed.

Dated: 6 June 2005

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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. 54269, Appeal of Paranetics Technology, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals