

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Water Reclaim Systems, Inc. ) ASBCA No. 55816  
 )  
Under Contract No. W913TY-05-P-8151 )

APPEARANCE FOR THE APPELLANT: Mr. Bill Morgan  
CEO/President

APPEARANCES FOR THE GOVERNMENT: COL Anthony M. Helm, JA  
Chief Trial Attorney  
CPT Charles D. Halverson, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAUL

Appellant Water Reclaim Systems, Inc. (WRS) has filed a timely appeal from the contracting officer's (CO) denial of its claim in the amount of \$7,405 due to alleged government-caused delays with respect to the delivery and setup of two wastewater treatment systems. Respondent has filed a summary judgment motion. Alleging there are no disputed facts, respondent argues that it is entitled to judgment as a matter of law. WRS disputes these allegations and contends that there is a factual dispute as to whether respondent unreasonably delayed performance and, therefore, increased its costs. We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 17 August 2005, the Joint Contracting Command – Iraq/Afghanistan awarded Contract No. W913TY-05-P-8151 for the purchase, delivery and setup of a modular wastewater treatment system at Jalalabad Airfield, Afghanistan. The parties subsequently modified the contract to provide for the delivery and setup of a second system. (R4, tabs 1-2)

2. The contract incorporated by reference several Federal Acquisition Regulation (FAR) clauses including FAR 52.247-34, "F.O.B. DESTINATION (Jun 1988)"<sup>1</sup> which stated:

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<sup>1</sup> We note the date reference of June 1988 appears to be in error. For purposes of the quoted material, there is no difference between the two versions reviewed by the Board (April 1984 and January 1991).

(a) The term "f.o.b. destination," as used in this clause, means --

(1) Free of expense to the Government, on board the carrier's conveyance, at a specified delivery point where the consignee's facility (plant, warehouse, store, lot, or other location to which shipment can be made) is located; and

(2) Supplies shall be delivered to the destination consignee's wharf (if destination is a port city and supplies are for export), warehouse unloading platform, or receiving dock, at the expense of the Contractor. The Government shall not be liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery (or "constructive placement" as defined in carrier tariffs) of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual capacity....

(b) The Contractor shall --

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements;

(2) Prepare and distribute commercial bills of lading;

(3) Deliver the shipment in good order and condition to the point of delivery specified in the contract;

(4) Be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract;

(5) Furnish a delivery schedule and designate the mode of delivering carrier; and

(6) Pay and bear all charges to the specified point of delivery.

(R4, tab 1 at 2)

3. In order to ship the systems to Afghanistan, WRS rented two shipping containers and subcontracted with Geo-Logistics (Geo) for transportation of the containers. To facilitate delivery to Afghanistan, which is a land-locked country, Geo shipped the containers through the port of Karachi, Pakistan. Geo's representative in Karachi was Mr. Khurram Hidayatallah. (Compl. and answer ¶¶ 1, 2, 3)

4. When the containers reached Karachi, they were held there pending a memorandum from the consignee that the goods were indeed government supplies bound for the airfield. It was necessary to send the memorandum to the Afghanistan Ministry of Foreign Affairs & Finance, as well as the Consulate General of the United States in Karachi (U.S. Consulate). From the record, it appears that once the memorandum was received by the U. S. Consulate, the Consulate could process the necessary transshipment clearance through Pakistan Customs so that the containers could continue by land to the airbase in Afghanistan as part of military and humanitarian relief. (Compl. and answer ¶¶ 4, 8; compl. exs. 2, 4, 7; amendment to compl. ex. 1; app. opp'n at 11, ex. 3)

5. After WRS contacted the government for assistance in obtaining the necessary paperwork, Capt Sheila P. Puana, USAF, the CO, responded by e-mail of 23 February 2006 to Mr. Bill Morgan, President of WRS. In the e-mail, Capt Puana sought some clarification, writing: “[T]he letter I need to write is going to the exact same address – Consulate General of the USA, Mr. Haider Iftikher in Shipping?...” (R4, tab 8 at 9; compl. ¶¶ 5, 6; compl. exs. 5, 8; answer ¶¶ 5, 6)

6. Apparently, WRS provided the clarification needed because it appears that Capt Puana dated the letter 28 February 2006 and sent a copy to WRS through e-mail (compl. exs. 6, 7, 8, 14). The letter was addressed to: “The Administrative Officer, Consulate General of the United States of America, Attn: Mr. Haider Iftikher – Shipping Dept., Abdullah Haroon Road, Karachi, Pakistan”; and also to: “Ministry of Foreign Affairs and Finance, Kabul, Afghanistan” (compl., ex. 14). However, the record does not contain any evidence that the letter was mailed at that time.

7. From the record, we find that the letter was not mailed to either of the parties to whom it was addressed until after 20 March 2006, at least 20 days after the letter was ready for mailing (compl. and answer ¶ 11; compl. ex. 10).

8. In an e-mail dated 19 March 2006, Capt. Puana wrote:

Mr. Morgan: I am the contracting office [sic] and I do not need a copy of this letter. What I need is for this shipment to get released from the PORT. Which I do not know how to do. I have been looking for guidance from you and let me tell you that I DO NOT appreciate the accusations you are

throwing at me. I do remember filling out that damn letter and I do remember asking you who to send it to. And I remember you giving me several names. And I have sent it to everyone you asked. But, apparently YOU have not given me the right name. Or there is something else I need to do that you are not telling me. Who do I need to send it to in the Consulate, for the last time? I do not know how many times I must ask you this. Just tell me who it is rather than continuing to tell me that I have not sent it to the right person. What is so hard for you to understand about that????? Trust me, I want nothing better than to send this letter off to the right person so we can get our shipment, which is now way overdue. So, why would I be dragging my feet or delaying anything?

Who else can I talk to about this because I am tired dealing with you? Mr. Dill, can you provide any information on how to get this shipment out of the port?

And I must again remind everyone involved that we did not ask for this to be shipped through Pakistan, and so now I expect your cooperation in helping us get it OUT of the port.

(compl., ex 9) Then, in what appears to be a later e-mail, Capt Puana wrote the following: “No one stated these had to be mailed by snail mail [sic]. I have sent many emails requesting confirmation that the letter I sent (via email) reached everyone it was supposed to.... Not once did anyone say that it had to be physically mailed. There is no zip code in either mailing address, so how am I supposed to mail this?” (Emphasis in original; compl., ex. 10) The government did not provide an affidavit from Capt Puana attesting to her knowledge of the facts.

9. There is no record evidence that the letter was sent by e-mail to either the U.S. Consulate or the Ministry of Foreign Affairs and Finance. Further, there is no evidence that an e-mail address was provided by WRS for either office.

10. It appears that the letter was sent to and received by the U.S. Consulate, and the Ministry of Foreign Affairs and Finance on, or shortly after, 20 March 2006. There is no evidence to the contrary. The systems arrived at the airfield on 7 April 2006 (R4, tab 11; compl. ¶ 11 and ex. 10, answer ¶ 11).

11. When the systems arrived at the airfield, site preparations had not yet been completed. Further, CO Puana was unwilling to “accept” the systems or pay WRS the

final amount owed on the contract, but instead insisted the contractor would be paid upon “acceptance” only after WRS commissioned the system. WRS found the CO’s position to be objectionable as this placed it in the position of holding the systems indefinitely while incurring truck rental fees, insurance premiums and delaying the government’s final payment even though site preparations were solely within the government’s control. On 17 May 2006, the chief of contracting finally sent notification to the Defense Finance and Accounting Service to pay WRS the remaining 20% owed on the contract. (R4, tabs 6, 7, 8 at 4-13, 9, 11)

12. By letter dated 21 December 2006, WRS submitted a claim in the amount of \$7,405. It explained that \$6,740 was additional rent incurred for the containers while they were held in port awaiting the CO’s letter needed to release them. The claim also included \$665 in detention charges for the delivery trucks at the destination, Jalalabad Airfield. (R4, tab 15)

13. By letter dated 12 January 2007, the CO denied the contractor’s claim in its entirety. He stated that in accordance with the contract, “[t]he Contractor shall . . . Pay and bear all charges to the specified point of delivery.” The final decision does not directly address the alleged government-caused delay in site preparation at the airfield. (R4, tab 16)

14. The Board received WRS’s timely notice of appeal on 5 March 2007.

### DECISION

The government has filed a motion for summary judgment based upon admissions made by WRS in its complaint and in its correspondence, thus asserting that there are no disputed material facts and that it is entitled to judgment as a matter of law. The overall thrust of the government’s argument is that while it admits the allegations of the complaint, the contract states that the contractor will be responsible for paying all charges to the point of delivery and that the CO’s response to the contractor’s request for the diplomatic letter was provided in a timely fashion.

WRS opposes the motion arguing that there are disputed issues of material fact. Specifically, appellant points out that there is no evidence that the CO sent the letter to U.S. Consulate or the Afghanistan Ministry of Foreign Affairs & Finance timely by e-mail despite her 19 March 2006 e-mail wherein she stated that she sent the letter to everyone WRS had requested (SOF ¶ 8). Further, appellant alleges that these government-caused delays are within the F.O.B. exception found in FAR 52.247-34.

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *E.g., Mings*

*Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). "Our task is not to resolve factual disputes, but to ascertain whether material disputes of fact - triable issues - are present." *John C. Grimberg Co., Inc.* ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969. We resolve all inferences in favor of appellant, as the party against which the motion is directed. *E.g.*, *JT Construction Co., Inc.*, ASBCA No. 54352, 06-1 BCA ¶ 33,182 at 164,464. A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The wastewater treatment systems were twice delayed during shipment. The first time was at the Port of Karachi. The fact that WRS did not obtain the diplomatic letter prior to the arrival of the equipment in port is not the fault of the government. However, once the goods arrived and WRS became aware of the necessary government documents, it was WRS's duty to notify the CO and seek assistance, which it did. Given the fact that the diplomatic letter was written on 28 February, but not mailed until 20 March, we are not prepared to state, as a matter of law, that this was a reasonable delay on the government's part. The record contains scant evidence of the events and actual correspondence that transpired between WRS and the government. We can surmise from the documents provided that there was additional correspondence between the parties that is missing from the record. However, from the little evidence that was provided, the CO's e-mail correspondence presents a less than cooperative stance in working with WRS to perform the contract. The same can be said of the government's duty to prepare the site prior to the equipment being delivered.

The case cited by the government wherein we held that a one-month delay in approving a complex drawing was reasonable, *R. J. Crowley, Inc.*, ASBCA No. 35769, 88-3 BCA ¶ 21,151, presents a different fact scenario than is presented here, and was decided on the totality of the circumstances and facts. The reasonableness of any delay is fact driven and must be addressed on a case-by-case basis.

We hold therefore, that there are at least two disputed issues of material fact. The first issue is whether the CO's delay in mailing the diplomatic letter for 20 days was reasonable in light of the fact that a physical address, not an electronic address was provided; and secondly, whether it was reasonable for the CO to interpret the contract to represent that the government could indefinitely postpone delivery simply by not accepting the equipment. On the basis of this incomplete record, we cannot agree that these were reasonable delays.

### CONCLUSION

The government's motion for summary judgment is denied.

Dated: 23 October 2008

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MICHAEL T. PAUL  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 55816, Appeal of Water Reclaim Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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