

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Dick Pacific/GHEMM, JV) ASBCA No. 55826
)
Under Contract No. DACA85-02-C-0004)

APPEARANCE FOR THE APPELLANT: Erik D. Eike, Esq.
Honolulu, HI

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Alaska

OPINION BY ADMINISTRATIVE JUDGE SCOTT

Appellant Dick Pacific/GHEMM, JV (DP/G), has appealed under the Contract Disputes Act, 41 U.S.C. §§ 601-613, from the contracting officer's (CO's) deemed denial of its claim for a time extension, compensation for alleged government-caused delays, disruptions and changes, and the release from potential liquidated damages, in connection with DP/G's contract with the U.S. Army Corps of Engineers, Alaska District (Corps), to construct the Bassett Hospital Replacement at Fort Wainwright, Alaska. Prior to any hearing or decision on the merits of its claim, DP/G moves that the Board direct the CO to release withheld liquidated damages. We deny the motion.¹

¹ This appeal has been consolidated for disposition with other of appellant's appeals under the same contract. In addition to the alleged facts presented in its motion, DP/G seeks to incorporate its statement of facts in its complaint in ASBCA No. 55829, which involves, *inter alia*, DP/G's claim for interest and penalties on funds allegedly wrongfully withheld. The government has moved to dismiss that appeal for failure to state a claim upon which relief can be granted and for lack of jurisdiction. We will decide that motion separately. Regardless, the additional facts alleged by appellant in ASBCA No. 55829 are not necessary to our resolution of the instant motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

The Corps awarded the subject contract to DP/G on 19 February 2002 (R4, tab 163 at 846). The contract includes the Federal Acquisition Regulation (FAR) 52.232-16, PROGRESS PAYMENTS (MAR 2000); 52.233-1, DISPUTES (DEC 1998); 52.242-14, SUSPENSION OF WORK (APR 1984); and 52.243-4, CHANGES (AUG 1987) clauses (supp. R4, tab 321 at 82-84, 98-99, 107-08 of 131).

The contract also includes the following FAR clauses:

52.211-13, TIME EXTENSIONS (SEP 2000), which provides in part that a change order granting a time extension “also may provide an equitable readjustment of liquidated damages under the new completion schedule” (supp. R4, tab 321 at 34 of 131);

52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997), which provides in part:

(e) Retainage.... [I]f satisfactory progress has not been made, the [CO] may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved. When the work is substantially complete, the [CO] may retain from previously withheld funds and future progress payments that amount the CO considers adequate for protection of the Government and shall release to the Contractor all the remaining withheld funds.

(Supp. R4, tab 321 at 80-82 of 131); and

52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984), which provides in part:

(a) If the Contractor refuses or fails to prosecute the work...with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may...terminate the right to proceed with the work.... The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor’s refusal or failure to complete the work within the specified

time, whether or not the Contractor's right to proceed with the work is terminated....

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if-

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include

....

(ii) acts of the Government in either its sovereign or contractual capacity,

....

...; and

(2) The Contractor...notifies the [CO] in writing of the causes of delay. The [CO] shall ascertain the facts and the extent of delay. If, in the judgment of the [CO], the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the [CO] shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(Supp. R4, tab 321 at 119-20 of 131)

The contract's Special Contract Requirement (SCR)-1, COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984) (FAR 52.211-10) clause provides that the contractor is to commence work within 10 calendar days after the date it receives the notice to proceed (NTP) and to complete work no later than 1,556 calendar days after receipt (supp. R4, tab 321 at 800-1).

The contract's SCR-3, LIQUIDATED DAMAGES – CONSTRUCTION (SEP 2000) (FAR 52.211-12) clause provides in part:

(a) If the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government in the amount of \$8,300.00 for each calendar day of delay until the work is completed or accepted.

(Supp. R4, tab 321 at 800-1)

DP/G received the NTP on 14 March 2002 and the original contract completion date was 17 June 2006 (R4, tab 129 at 645-47, tab 155 at 744). Two bilateral contract modifications, effective 20 July 2004 and 28 March 2005, respectively, resulted in an extension of the completion date to 14 July 2006, largely due to weather delays (R4, tabs 152, 155).

Over the course of the contract, the Corps assigned case numbers to track various change issues and delays alleged by DP/G (R4, *passim*; compl. and answer ¶ 73). By letters to the Administrative Contracting Officer (ACO) dated 1 April 2005, 29 June 2005, 21 February 2006, and 29 June 2006, DP/G sought, among other things, contract extensions of 16, 48 and 43 working days, and 34 calendar days, respectively, in connection with case Nos. 90, 55, 180, and the Corps' alleged inspection delays. The Corps admits in its answer to the complaint that it has never responded to these extension requests. (R4, tabs 13, 32, 60, 76; compl. and answer ¶¶ 235, 236, 238, 239)

Additionally, by letter to the ACO dated 6 January 2006, DP/G requested a 91-working day extension concerning case No. 174. The ACO responded on 11 January 2006 that the request was premature and unsubstantiated. (R4, tabs 38, 39)

In 2005 and early 2006 DP/G also requested other time extensions, in connection with case Nos. 57 (63 calendar days), 57A (22 calendar days), 52 (76 work days), 42 (6 work days), 58 (28 work days), 164 (38 work days), 206 (7 calendar days), and 225 (7 calendar days). The ACO denied each request by separate letters dated 28 June 2006. (R4, tabs 14-22, 25, 27, 28, 70, 72, 73)

By letter to DP/G dated 19 July 2006, the CO stated that the hospital was not substantially complete; the contract completion date had passed; and “[i]tems submitted by you that have time extension requests have been analyzed by the government and have not provided cause to extend the completion date” (gov’t resp., ex. 2). The CO noted that the Corps would determine whether a termination for default was warranted (*id.*). The contract was not terminated for default.

On 25 July 2006 DP/G sought a 66-calendar day extension in connection with case No. 247. The Corps admits in its answer to the complaint that it has never responded to this extension request. (R4, tab 10; compl. and answer ¶ 227)

By letter to the CO dated 2 August 2006, DP/G submitted a delay and impact analysis, said to justify 308 days of government-caused delay, and stated that costs would follow (R4, tab 8).

The government determined that the hospital was substantially complete as of the close of business on 2 October 2006 (gov't resp., ex. 4).

On 9 October 2006 DP/G submitted a certified claim to CO Claudette M. McDonald alleging delay and disruption costs of \$11,589,856 (later amended to \$11,570,486) and seeking a 308-calendar day extension and "release from all potential liquidated damages." DP/G requested a CO's decision within 60 days of the CO's receipt of its claim or a date by which a determination would be made. (R4, tab 2 at 12, 89; compl., ex. B at 66)

Payment estimate No. 70, covering the period 14 July 2006 through 2 November 2006, based upon an invoice received by the Corps on 23 October 2006, states that, among other withholdings, \$647,400 was "being withheld on Pay estimate # 55" for "Liquidated Damages (78 days)" (R4, tab 158 at 830-31).² DP/G's project manager Nickolas Florez states in his affidavit in support of appellant's motion that liquidated damages "were initially withheld on Payment Application 55" (Florez aff. ¶ 5). Although pay estimate No. 70 does not cite the contract's liquidated damages clause, SCR-3, ACO Jacqueline Fabrizzio asserts by affidavit that she signed the estimate and that the \$647,400 was withheld pursuant to that clause. The date she signed the estimate is not clear, but appellant has not disputed that she signed it. (R4, tab 158 at 830; gov't resp., ex. 10 (Fabrizzio aff.) ¶¶ 7-9) CO Donna West also asserts in her affidavit that the liquidated damages were withheld pursuant to SCR-3 (gov't resp., ex. 11, West aff. ¶ 7).

By letter to DP/G dated 20 November 2006, CO McDonald designated its claim as case No. 277 and requested more information (R4, tab 7). DP/G responded on

² The Corps withheld liquidated damages for 78 days even though it contends that the project was substantially complete on 2 October 2006, which was 80 days after the 14 July 2006 completion date specified in the contract. The Corps notes the discrepancy but does not explain it. (Gov't resp. at 7)

21 November 2006 that the Corps had only cursorily reviewed its request for time and had delayed in acting responsibly on its claim and, if the Corps had not done so, there would have been no need to retain liquidated damages. DP/G expressed its expectation that release of its retained funds was imminent. (Gov't resp., ex. 6) CO West replied by letter dated 8 December 2006, but did not address liquidated damages. She noted an anticipated final decision date of 9 February 2007, subject to extension upon receipt of any additional information from DP/G. (R4, tab 6) By letter of 20 December 2006, DP/G disputed any need for more information and alleged that the government had no justification for delaying in granting a time extension or in issuing a CO's decision (gov't resp., ex. 8). On 30 January 2007, CO West advised DP/G that she anticipated a final decision on its claim by 30 March 2007 (R4, tab 5).

By notice of appeal filed with the Board on 15 March 2007, DP/G stated that it was appealing: "the failure of the [CO] to render timely Final Decision on Appellant's submitted requests for time extension and entitlement to additional compensation for Government caused delays, disruptions and changes, as well as the wrongful withholding of liquidated damages, and other wrongful withholding of payments due and owing under [the contract], as more specifically set forth in [the complaint]."

DISCUSSION

Appellant asks the Board to direct the CO immediately to release all withheld liquidated damages. It alleges that the CO never made an affirmative determination concerning retainage for liquidated damages at the time they were withheld or within a reasonable time thereafter, contrary to FAR 32.103, Progress payments under construction contracts, which provides:

When satisfactory progress has not been achieved by a contractor during any period for which a progress payment is to be made, a percentage of the progress payment may be retained. Retainage should not be used as a substitute for good contract management, and the [CO] should not withhold funds without cause. Determinations to retain and the specific amount to be withheld shall be made by the [COs] on a case-by-case basis. Such decisions will be based on the [CO's] assessment of past performance and the likelihood that such performance will continue. The amount of retainage withheld shall not exceed 10 percent of the approved estimated amount in accordance with the terms of the contract and may be adjusted as the contract approaches

completion to recognize better than expected performance, the ability to rely on alternative safeguards, and other factors. Upon completion of all contract requirements, retained amounts shall be paid promptly.

Among other things,³ appellant notes that, in addition to its comprehensive delay and disruption extension request submitted in August 2006, and contained in its 9 October 2006 certified claim, it had five pending, unanswered, extension requests at the time the Corps withheld liquidated damages. Appellant contends that the continued withholding of liquidated damages, absent a timely CO's decision asserting the government's entitlement to liquidated damages and the amount, renders the "retainage" improper (app. mot. at 3-4) and penalizes DP/G without cause in the face of a legitimate formal request for a contract extension. Appellant states that, in order to invalidate any liquidated damages, it need only establish 78 days of concurrent government delay from among its extension requests, let alone compensable delay. It adds that the Corps is adequately protected by its performance bond.

The Corps characterizes appellant's motion as one for summary judgment which must be denied because, while the Corps has established a *prima facie* case for liquidated damages, it does not agree to appellant's alleged facts purporting to demonstrate that their assessment was unwarranted. The Corps contends, *inter alia*, that appellant's motion is not supported by evidence and that appellant has offered only speculative, conclusory statements; summary judgment is premature; discovery is required; the Corps did not withhold "retainage" under FAR 32.103 but assessed liquidated damages under SCR-3; and the assessment should be upheld. (Gov't resp. at 1, 6, 14)

Appellant replies that it is not seeking summary judgment on whether it is entitled to a time extension and additional compensation, or whether the Corps ultimately is entitled to liquidated damages. Rather, it alleges that the CO waived the Corps' right to withhold liquidated damages during the pendency of this appeal by, among other things, failing to make an affirmative determination of its entitlement to liquidated damages at the time they were withheld or at any time since, and failing to render timely decisions on appellant's extension requests. Appellant notes that there has not been any contract modification assessing or reflecting liquidated damages. It asserts that the Corps did not

³ For example, appellant contends that the Corps failed to provide schedule logic and duration changes allegedly required by SCR-20, CONTRACTOR-PREPARED NETWORK ANALYSIS SYSTEM (NAS), for over 55 unilateral modifications issued with NTPs. We consider this and other of appellant's contentions immaterial to our resolution of its motion.

assess liquidated damages but rather that the contemporaneous documentation and affidavits in support of the Corps' opposition to appellant's motion refer to the withholding of funds, such that FAR 32.103 applies. Appellant contends that the Corps cannot withhold "possible" liquidated damages (app. reply at 1) indefinitely without the CO's making an entitlement decision and that withholding them under these circumstances constitutes an unwarranted penalty. Appellant further alleges that there are no facts in dispute that are material to its motion.

Preliminarily, it is apparent, as stated on pay estimate No. 70, signed by the ACO, and in the COs' affidavits, that the Corps has set off the disputed funds as liquidated damages from appellant's progress payment request(s). Paragraph (e) of the contract's FAR 52.232-5, Payments Under Fixed-Price Construction Contracts clause and FAR 32.103, both quoted above, do not limit the Corps' right to set off such damages. *Johnson v. All-State Construction, Inc.*, 329 F.3d 848 (Fed. Cir. 2003).

Secondarily, appellant seeks the payment of money to it during the pendency of this appeal, prior to any merits determination. This would be tantamount to summary judgment in appellant's favor that the Corps' set off of liquidated damages was improper at the time it did so. Material facts in dispute preclude such a judgment. *Northrop Grumman Corp.*, ASBCA No. 52178 *et al.*, 01-1 BCA ¶ 31,374.⁴

⁴ Appellant's motion could also be described as one seeking deferment of the government's debt collection and set off rights, which we would not have jurisdiction to entertain. *Id.*; *Applied Ordnance Technology, Inc.*, ASBCA Nos. 51297, 51543, 98-2 BCA ¶ 30,023.

DECISION

Appellant's motion is denied.

Dated: 28 July 2008

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 55826, Appeal of Dick Pacific/GHEMM, JV, rendered in conformance with the Board's Charter.

Dated:

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