

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Robinson Quality Constructors) ASBCA No. 55784
)
Under Contract No. DAHA23-97-C-0005)

APPEARANCE FOR THE APPELLANT: D. Lynn Whitt, Esq.
Mountain Grove, MO

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT Marlin D. Paschal, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING

Appellant has moved for reconsideration of our decision in *Robinson Quality Constructors*, ASBCA No. 55784, 09-1 BCA ¶ 34,048. In that decision, we held that appellant’s claim was barred by the six-year statute of limitations, 41 U.S.C. § 605(a). The government has elected not to file a response because “[a]ppellant essentially repeats the same arguments” it raised before (ltr. dtd. 19 May 2009).

The general standards we apply in deciding a motion for reconsideration are whether the motion is based upon newly discovered evidence, mistakes in our findings of fact or errors of law. *Zulco International, Inc.*, ASBCA No. 55441, 08-1 BCA ¶ 33,799. Reconsideration is not intended to provide a party with the opportunity to reargue its position. *McDonnell Douglas Electronics Systems Co.*, ASBCA No. 45455, 99-1 BCA ¶ 30,132 at 149,056.

In our decision, we found that appellant’s Contract Progress Reports provided the best measure of progress of the project. *Robinson*, 09-1 BCA ¶ 34,048 at 168,388. We also found, based on its Contract Progress Reports which included change order work, appellant itself considered the project complete as of 1 June 1999. *Id.* at 168,388-89. We found that, as of 1 June 1999, appellant was cleaning up and completing punchlist items begun long before 1 June 1999, and was waiting for the government’s answer to a modification which was ultimately cancelled. *Id.* at 168,395-96. Appellant acknowledged it was “doing very little during that period.” *Id.* at 168,392. Based on these facts, we concluded that “all events which fixed the liability of the government would have been known before 1 June 1999, and all of the claims Robinson asserted in this appeal accrued on or before 1 June 1999.” *Id.* at 168,396.

In moving for reconsideration, appellant argues that we improperly applied the concept of “accrual” of the claim because “all events” in connection with the work mentioned above which fixed the alleged liability of the government were still “continuing,” “ongoing,” and “not resolved.” According to appellant, since these “ongoing activities” required it to “continue to support” the project, they constituted the “events that complete the accrual of the claim.” (Mot. at 1) Thus, appellant argues that its claim accrued later than 1 June 1999.

In support of its legal theory, appellant reargues that *Emerson Construction Co.*, ASBCA No. 55165, 06-2 BCA ¶ 33,382, is the “governing precedent” for this case. The requirements contract in *Emerson* provided for an equitable adjustment if the actual quantity ordered varied by 15% above or below the estimated quantity. As explained before, *Emerson* is distinguishable. Liability for an underrun in that case could not be fixed because the contract by its terms allowed the government to issue delivery orders “until the time period for issuing delivery orders expired.” *Id.* at 165,501.

Despite appellant’s arguments, we remain of the view that this case is controlled by *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,476. That case held that for a claim to accrue, the contractor “must have actually begun performance and incurred some extra costs for liability to be fixed,” and the completion of a change or of the contract was not necessary in order for liability to be fixed. In other words, as provided in FAR 33.201, accrual of a claim can commence without “all events” of that claim, including cumulative delay, reaching a point where a complete assessment of the government’s ultimate liability could be made.

For the reasons stated, the motion is denied.

Dated: 4 June 2009

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)
I concur

I concur

MARK N. STEMLER

EUNICE W. THOMAS

Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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. 55784, Appeal of Robinson Quality Constructors, rendered in conformance with the Board's Charter.

Dated:

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