

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Al Khudhairy Group) ASBCA Nos. 56131, 56374
)
Under Contract No. W912ER-05-C-0012)

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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTIONS FOR SUMMARY JUDGMENT

The captioned appeals arise from the contracting officer's (CO) termination for default of the captioned contract to construct a main supply road from the Kuwait border to central Iraq (ASBCA No. 56131), and denial of appellant's \$11,153,064.08 claim for the costs of 155 days of delay due to delayed bitumen supply between May and September 2006 and reduced bitumen supply in February and early March 2007 (ASBCA No. 56374). The Board has jurisdiction of the appeals under the Contract Disputes Act of 1978, 41 U.S.C. § 607.

Appellant moved for summary judgment in each of the two captioned appeals. With respect to ASBCA No. 56131, appellant asserts that at the time of termination it had substantially completed the contract and respondent had begun use of the road for its intended purpose, thereby invalidating its default termination. With respect to ASBCA No. 56374, appellant claimed \$11,153,064 for delays arising from alleged commercial impracticability in 2006 to obtain bitumen required to produce asphalt, and from reduced bitumen supplied by the government in 2007. Respondent opposed both motions urging that appellant is not entitled to judgment as a matter of law and there are disputed material facts. Appellant replied thereto. We deny the motions.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 12 August 2005 the U.S. Army Corps of Engineers (USACE) awarded Contract No. W912ER-05-C-0012 (the contract) to Al Khudhairy Group (KGCC) to design and construct a Major Supply Route (MSR), called Aspen Road, 96 kilometers in length from central Iraq to the Kuwait border. The work consisted of 11 contract line items (CLINs). The total firm fixed price was \$21,920,125. (ASBCA 56131 (56131), compl. and answer ¶¶ 1-3; R4, tab D-4 at 1059)

2. Aspen Road was intended to be the primary military route into Iraq from Kuwait (56131, app. mot., ex. 3). CLIN 0004 required construction of 57,875 linear meters of asphalt road at \$175.00 per linear meter, for a total price of \$10,128,125.00 (R4, tab D-4 at 1062).

3. The contract included, *inter alia*, the following FAR clauses: 52.236-11, USE AND POSSESSION PRIOR TO COMPLETION (APR 1984), which provided as follows:

(a) The Government shall have the right to take possession of or use any completed or partially completed part of the work. Before taking possession of or using any work, the [CO] shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that the Government intends to take possession of or use. However, failure of the [CO] to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. The Government's possession or use shall not be deemed an acceptance of any work under the contract.

52.246-12, INSPECTION OF CONSTRUCTION (AUG 1996), which provided in pertinent part:

(i) Unless otherwise specified in the contract, the Government shall accept, as promptly as practicable after completion and inspection, all work required by the contract or that portion of the work the [CO] determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee.

52.242-14, SUSPENSION OF WORK (APR 1984); 52.243-4, CHANGES (AUG 1987) and 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984). (R4, tab D-4 at 1303, 1307-08, 1310-11, 1317-18)

4. KGCC received the government's notice to proceed on 20 August 2005, establishing 17 May 2006 as the contract completion date (56131, gov't opp'n at 10; R4, tab C-1). On 9 December 2006 bilateral Modification No. A00001 extended the completion date by five days to 22 May 2006 due to inclement weather in the spring of 2006 (56131, app. mot., ex. 4).

5. Effective 30 December 2005, bilateral Modification No. P00002 increased the length of the road to 106 kilometers and the contract price from \$21,920,125 to \$30,797,634, with no change in the contract completion date (R4, tab D-6-b).

6. The Oil Products Distribution Co. of the Iraqi Ministry of Oil, Issue Nos. 363, 364 and 365, granted approval on 17 January 2006 to supply 5,000 tons of asphalt per month commencing in February (2006) to each of three firms: Al-Kadary, Al-Khudhairy Group and Al-Asad Engineering Services (56313, gov't opp'n, ex. 90, sub-ex. 3).

7. KGCC's 13 June 2006 letter advised CO Roderick Hill of the Iraqi Ministry of Oil's 23 May 2006 letter which notified its branch managers that it would terminate the supply of "asphalt at commercial price" to all private companies effective 24 May 2006, and it would supply asphalt exclusively to "governmental bodies" and "private sector factories authorized by Industrial Development." KGCC described the Ministry of Oil's notice as "a case of Force Majeure." (56313, gov't opp'n, ex. 90, sub-exs. 4, 5)

8. After failing to obtain bitumen from the Iraqi Oil Ministry in early June 2006, on 18 September 2006 USACE began to deliver bitumen to KGCC from Kuwait (R4, tabs C-42, C-49 at 227; 56131, gov't opp'n ex. 52 at 7). In unilateral Modification No. A00002 of 2 February 2007, USACE took a \$700,000.00 credit for 5,000 metric tons of bitumen at \$140/MT it had provided to KGCC, stating: "Bitumen has become virtually impossible to obtain within Iraq. KGCC company trucks are not permitted to cross the borders of neighboring countries to import bitumen and road construction cannot proceed without it." The government repeated the foregoing rationale in unilateral Modification No. A00003 on 31 March 2007, taking a \$140,000.00 credit for 1,400 MT of bitumen, and in unilateral Modification No. P00004 on 13 May 2007, taking a \$296,343.80 credit for 1,650.67 MT of bitumen and other government-furnished materials. The three credits totaled \$1,136,343.80, reducing the contract price to \$29,661,290.20. (R4, tabs D-5-b, D-5-c, D-6-d; 56131, gov't opp'n, ex. 90, sub-ex. 2)

9. On 15 April 2007 KGCC submitted a certified \$10,915,901.75 claim citing “Force Majeure” when the Iraqi Ministry of Oil did not supply 15,000 MT of bitumen allegedly ordered by KGCC (56131, gov’t opp’n, ex. G-90, sub-ex. 11).

10. KGCC paved the final 24-kilometers of Aspen Road on 18 April 2007 (56131, app. mot. at 4; R4, tab G at 2713).

11. At a 19 April 2007 meeting, the government asked KGCC why it had not completed the contract work pursuant to its most recent schedule update showing 19 April for contract completion. KGCC stated that paint striping, repairing paving and shoulder deficiencies and removal of excess stockpiles and filling of holes remained to be performed; paint striping would start 21 April 2007 and be completed within 10-14 days; and the remaining work would start 22 April 2007. (R4, tab C-68 at 536-37)

12. Respondent’s 27 April 2007 progress report on the contract stated, *inter alia* (56131, app. mot., ex. 12 at 2):

At least two US convoys/day are using the road; also using the road are Aussie patrols, and Danes. The contractor is aware that use of the road by the military implies that the road is finished, usable, and acceptable.

13. KGCC’s 3 May 2007 Payment Estimate No. 13 for Invoice No. 13 stated that 95 percent of the then \$29,957,634 contract amount had been earned through 8 April 2007 (56131, app. mot., ex. 1). USACE’s Gulf Region South (GRS) approved and paid KGCC’s Invoice No. 13 (56131, compl. and answer ¶ 42).

14. CO Roderick A. Hill terminated KGCC’s “right to proceed with work” on the contract for default by letter dated 14 May 2007. CO Hill cited KGCC’s “failure to make satisfactory progress on the remaining contract work items as agreed upon on 19 April 2007, in order to ensure timely completion” and failure to provide authoritative oversight, on-site presence, a competent on-site superintendent, paint striping equipment and materials, adequate quality control and a construction schedule for completion of all work and correction of deficiencies, as requested in the 19 April 2007 meeting. CO Hill advised that the terminated work might be repurchased against KGCC’s account, but did not assert a claim for the return of any payments which had been made to KGCC. According to the decision, the established contract completion date at that point was 15 May 2007. (56131, R4, tab B at 10-11)

15. From 14 October 2005 to 21 June 2007, respondent frequently complained about the non-compliance of KGCC’s work with contractual requirements and with its progress, including delays before March 2006 in placing sub-grade, compacting the base

course and erecting an asphalt plant (56131, app. reply br. at 2; gov't opp'n at 13, 15-20, 30-37, 42, 45, exs. 4, 15-17, 24-25, 53-58, 62, 64, 66, 71-75, 79).

16. At the time of termination the adjusted contract price was \$29,661,290.20 (SOF ¶ 8). Including Invoice No. 13, appellant was paid \$27,226,045.65 (91.78985% of \$29,661,290.20) (56131, app. ex. 1; gov't opp'n at 42).

17. The 14 May 2007 e-mail of GRS Project Engineer Natalie Sudman stated that there would be U.S. military traffic on Aspen Road "starting tomorrow" (15 May 2007) (56131, app. mot., ex. 10).

18. The 21 May 2007 note of Dries Coetzee (of Skychase Ltd.) contained six photos of vehicles in the desert and stated: "The Army started using the road just after midnight on 15 May 2007. Convoys of between 30 and 60 trucks...some past the camp with limited intervals of no traffic. Initially only convoys from the south were seen, but these convoys now run in both directions." (56131, app. mot., ex. 2)

19. The 12 June 2007 e-mail to GRS from Administrative Contracting Officer Thomas Eidson stated (56131, app. mot., ex. 13 at 4):

You may be interested in how the road is holding-up; basically we are experiencing three types of pavement problems on the road. 1) Damage to the pavement surface and pavement edge caused by vehicles turning sharply off of or onto the roadway. 2) Potholes developing in areas where the pavement surface was segregated and exposed aggregates have become loose. 3) Laminar displacement of the second 4 cm lift of asphalt along the road edge due to bond failure between the two lifts of asphalt. Picture attached. The problems do not impact the traffic at this time.

20. KGCC's 6 July 2007 estimated costs to correct the government's deficiency list items were \$58,374.05 for paving the road from station 00+000 to station 11+097 and \$340,000 for striping Aspen Road (56131, app. mot., ex. 8 at 1).

21. Richard L. Donovan, USACE Senior Geotechnical/Paving Materials Engineer, stated on 19 July 2007 that the MSR Aspen Road "traffic is a combination of northbound and southbound convoys consisting of M1070 tractors with M1000 loaded and unloaded trailers, M983 HEMTT with XM860A1 trailers, 5-axle reefer trucks, generic 5-axle trucks, and HMMWV" (56131, app. mot., ex. 11).

22. On 13 August 2007 KGCC timely appealed the CO's decision to terminate the contract for default, docketed as ASBCA No. 56131 (56131, app. mot. at 6).

23. On 27 September 2007 KGCC amended its bitumen delay claim to \$11,153,064.08 alleging 136 days delay from 5 May to 18 September 2006 and 19 days delay commencing 17 February 2007 "as a result of a holiday celebrated in Kuwait" (56131, gov't opp'n, ex. 90 at 5, 16, 27, sub-exs. 43, 44).

24. The CO's 26 February 2008 final decision denied KGCC's \$11,153,064.08 bitumen delay claim in its entirety. KGCC timely appealed that decision to the Board on 14 April 2008. (ASBCA 56374 (56374), Bd. corr. file)

DECISION

I. ASBCA No. 56131

Appellant contends that the evidence "proves" that the contract was substantially complete at termination because its Payment Estimate No. 13 indicated that 95 percent of the purchase price had been earned as of 8 April 2007 and Aspen Road was being used for its intended purpose (mot. at 1). It argues that "[u]se of a constructed facility for its intended purpose proves beneficial occupancy and substantial completion, and a contract may not be terminated for default after the work is substantially complete" (app. reply br. at 1).

The government argues that "[a]ppellant's focus on the amount of funds disbursed by the Government alone is misplaced" and whether there was substantial performance "is a question of fact that is to be resolved in large measure based upon the character and extent of the contractor's partial failure" (gov't opp'n at 46). It contends that the termination was valid because KGCC failed to make progress toward completion, poorly managed the project, and provided non-compliant work; there is an extensive list of factual disputes which demonstrates the project was not substantially complete; and these disputed facts are material and require discovery.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A material fact is one that may have an impact on the outcome of the appeal. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Appellant's legal argument—that the default termination was invalid because Aspen Road was in use for its intended purpose and thus was substantially completed when the contract was terminated for default—is mistaken. The substantial completion rules do not apply when a construction contractor is paid or credited for the work done on a 95% of

completion basis and the termination for default only affects the uncompleted work. *See Mark Smith Construction Co.*, ASBCA Nos. 25058, 25328, 81-2 BCA ¶ 15,306 at 75,792 (“In the instant case, appellant has been paid or credited for the work it performed on a percentage (95) of completion basis and the termination for default affected only the uncompleted or remaining work. The doctrine of substantial completion is not for application in this situation.”) Thus, the government validly may terminate for default that portion of the contract work which is incomplete or does not comply with the contract requirements.

Moreover, there are disputed issues of material fact relating to the extent of completion. (1) Respondent asserts that KGCC’s “anecdotal, self-serving statements” do not show that the entire 106-kilometer Aspen Road was suitable for its intended use, but only that a portion of the road was used “due to urgent military necessity” (56131, gov’t opp’n at 2 n.1, 39, 48). (2) The parties dispute whether 95% of the contract work was completed (as distinguished from 95% of the contract price paid, which the parties do not dispute) (56131, gov’t opp’n at 38, 46-47).

II. ASBCA No 56374

KGCC argues that bitumen was commercially impracticable to obtain in Iraq during 2006 and 2007, as shown by respondent’s justification for purchasing bitumen to provide as government-furnished material to KGCC in 2006-07 (app. mot. at 1-2, 5), and such commercial impracticability to obtain bitumen existed before the 22 May 2006 amended contract completion date (app. reply br. at 13-17). It asserts “[t]he law allows a contractor to recover the increased costs that it suffers as a result of the commercial impracticability of obtaining material required to perform the contract” (mot. at 1).

According to KGCC the Iraqi Ministry of Oil’s decision not to supply asphalt to private companies on 24 May 2006 was a “Force Majeure.” The delay in February-March 2007 was caused by a holiday celebrated in Kuwait, from where respondent delivered bitumen to KGCC in Iraq. (SOF ¶¶ 7-9, 23) Thus, the 2006 and 2007 delays were due, respectively, to an act of a foreign instrumentality and a foreign holiday at the source of bitumen supplied to KGCC. Hence, the legal issue is whether such delays, so caused, are compensable within the rule of commercial impracticability.

Among the legal authorities KGCC cited on this issue (56374, mot. at 9-11), in three cases the contractor was entitled to a price adjustment due to impossibility or commercial impracticability of satisfying government-specified requirements. In the leading case of *Foster Wheeler Corp. v. United States*, 513 F.2d 588, 598-99, 602 (Ct. Cl. 1975), the Navy bore the risk of impossibility of achieving the specifications for shock hardness as well as accessibility and maintenance of AGC-19 boilers. The court stated two criteria for determining the assumption of risk of impossibility: “(1) which party had

the greater expertise in the subject matter of the contract? and (2) which party took the initiative in drawing up specifications and promoting a particular method or design?” 513 F.2d at 598. It held that the Navy had greater expertise in the subject matter of the contract and it prescribed “extremely detailed performance specifications” for the boiler.

In *Whittaker Corp.*, ASBCA No. 14191 *et al.*, 79-1 BCA ¶ 13,805 at 67,696, we held that the contractor was entitled to an equitable adjustment under the Changes clause for its unsuccessful attempts to comply with impossible U.S. Navy performance specifications for the Mark 46 battery, where the government assumed the risk of impossibility due to its relatively greater knowledge of the specifications, citing the *Foster-Wheeler* criteria for commercial impracticability. In *Numax Electronics, Inc.*, ASBCA No. 29080, 90-1 BCA ¶ 22,280 at 111,918, we sustained the contractor’s equitable adjustment claim for attempting to comply with an impossible .629 dimension the U.S. Army specified for .45 caliber automatic pistol slides, due to its relatively greater knowledge of changes, deviations and waivers granted to other contractors but not disclosed to Numax. It is far from certain that *Foster-Wheeler*, *Whittaker* and *Numax* govern ASBCA No. 56374, since KGCC’s motion does not establish that the USACE had greater expertise in bitumen acquisition and the bitumen specifications are not in issue.

Additionally, the parties did not address the relevance of the fact that the delay may have been due to a sovereign action, rather than the act or inaction of the CO. *See Conner Bros. Construction Co. v. Geren*, 550 F.3d 1368, 1378, 1380 (Fed. Cir. 2008) (CO had no involvement in the order of the U.S. Army Ranger regimental commander on 11 September 2001, the day of the terrorist attack, to exclude the contractor from working on the Rangers compound at Fort Benning while the Rangers were deploying to Afghanistan; the order was a public and general sovereign act, not specifically directed at nullifying Conner’s contract rights). The record contains no evidence of any CO involvement in the Iraqi Ministry of Oil’s 24 May 2006 decision to stop providing asphalt to Iraqi contractors. The Kuwaiti holiday may have caused an excusable delay, but has not been shown to be government-responsible. Therefore, KGCC has not shown that it is entitled to judgment as a matter of law on its motion for summary judgment in ASBCA No. 56374. Additionally, the appeal record is not clear that the bitumen supply delay KGCC alleges in 2006 was excusable within the requirements in ¶ (b)(1) of the FAR 52.249-10 Default clause, namely, that an excusable delay must be beyond the control and without the fault or negligence of the contractor.

Moreover, there are disputed material facts. Respondent disputes: (1) Whether KGCC had a binding order or contract with the Iraqi Ministry of Oil to supply bitumen (56374, gov’t opp’n at 42-43; SOF ¶ 6). (2) Whether bitumen became scarce in Iraq before the amended 22 May 2006, contract completion date, since KGCC first notified respondent on 13 June 2006 that the Iraqi Ministry of Oil had reneged on its alleged bitumen supply to KGCC (gov’t opp’n at 40-43). (3) Why KGCC did not obtain bitumen

from the Iraqi Ministry of Oil before 24 May 2006 when it declined to supply asphalt to private companies. Respondent argues that KGCC's tardy performance from October 2005 through March 2006 in placing sub-grade, compacting base course and erecting an asphalt plant for paving Aspen Road, preceded the Ministry's decision not to supply asphalt to private companies on 24 May 2006, two days after the extended contract completion date (SOF ¶ 15; gov't opp'n at 12-13, 39-42). KGCC claims that it was prepared to pave on 5 May 2006 but for the lack of bitumen, but does not explain why it could not obtain bitumen before 24 May 2006 (56131, gov't opp'n, ex. 90 at 3-5).

CONCLUSION

For the foregoing reasons, appellant's motions for summary judgment are denied.

Dated: 5 August 2010

DAVID W. JAMES, JR.
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 Nos. 56131, 56374, Appeals of Al Khudhairy, rendered in conformance with the Board's Charter.

Dated:

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