

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
TEKKON Engineering Co., Ltd.) ASBCA No. 56831
)
Under Contract No. W91GY1-06-D-0002)

APPEARANCE FOR THE APPELLANT: D. Lee Toedter, Esq.
Orange Beach, AL

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Edward Ahn, JA
CPT Bridget E. Keenan, JA
CPT Joon K. Hong, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE GRANT
ON THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In this appeal, the government has moved for partial summary judgment with respect to part of a claim by TEKKON Engineering Co., Ltd. (TEKKON) for additional costs incurred in performing its contract to supply water treatment chemicals and cylinders of chlorine gas to various locations in Iraq. The Board granted an earlier government motion for partial summary judgment on other disputes related to this contract. *Tekkon Engineering Co.*, ASBCA No. 56831, 10-2 BCA ¶ 34,563. The current motion concerns two situations where TEKKON was denied entry into Iraq: access denial for a shipment of aluminum sulfate at Al Waleed on the Syria-Iraq border (Claim 1a), and access denial for a shipment of empty chlorine cylinders into Iraq from Jordan due to an Iraq embargo of such shipments (Claim 1d). We have jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109. For the reasons stated below, we grant the government's motion in part and deny it in part.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

The Contract

1. On 26 May 2006, the Joint Contracting Command-Iraq/Afghanistan (JCC-I/A) awarded Contract No. W91GY1-06-D-0002 to TEKKON for the supply and delivery of water treatment chemicals and cylinders of chlorine gas for the Iraqi Ministry of

Municipalities and Public Works to various locations in Iraq (R4, tab 1 at 1, 85). TEKKON fully performed this contract, which expired on 25 May 2008 at the end of the first option year (R4, tab 17 at 2).

2. TEKKON's contract was a firm fixed-price, indefinite-quantity indefinite-delivery contract, with a contract minimum of \$3 million and a maximum of \$19 million (Statement of Undisputed Material Facts (SUMF) ¶ 2). The contract required delivery of several different chemicals, including aluminum sulfate (contract line item (CLIN) 0004), a chemical commonly used in commercial water treatment facilities (R4, tab 1 at 4; gov't reply br., attach. 1 at 36, Request for Admission (RFA) No. 143). The aluminum sulfate was to be supplied on an f.o.b. destination basis to various locations in Iraq (R4, tab 1 at 4).

3. Although the contract specified a number of different delivery locations, the two relevant for this motion are: CLIN 0005AA to Erbil, Iraq, and CLIN 0005CE to Karkh Water Treatment Plant in Baghdad, Iraq. Both CLINs required supply/delivery on an f.o.b. destination basis, and the contractor was required to price the CLINs based on one truck trip to and from the designated location. TEKKON's price for these locations was \$750 per truck trip for Erbil and \$1,065 per truck trip for Karkh. (R4, tab 1 at 5, tab 12 at 2) Delivery was not required by any particular route or by any particular border point entry into Iraq (*id.*; SUMF ¶ 13).

4. The contract contained FAR clause 52.247-34, F.O.B. DESTINATION (NOV 1991) which addressed whether the government would be liable for specified charges. Specifically, this clause stated that:

The Government shall not be liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery...of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual capacity.

(R4, tab 1 at 95; SUMF ¶ 5)

5. The contract also outlined contractor responsibilities in the Statement of Work:

CONTRACTOR RESPONSIBILITIES:

- a. Obtain all necessary licenses, permits, authorizations and related coordination will be the responsibility of the contractor [sic].

- b. Truck crew individual security while on duty will be the responsibility of the contractor.

(R4, tab 1 at 84; SUMF ¶ 9) The contract also required the contractor to “obtain all available information...to satisfy themselves about the general and local conditions that may affect delivery and the cost of contract performance, to the extent that the information is reasonably obtainable” (R4, tab 1 at 83, ¶ 2f).

6. The contract also contained the FAR 52.229-6, TAXES—FOREIGN FIXED-PRICE CONTRACTS (JUN 2003) clause (R4, tab 1 at 107-08). This clause stated that, “[u]nless otherwise provided in this contract, the contract price includes all applicable taxes and duties, except taxes and duties that the Government of the United States and the government of the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States.” The clause also stated that the contractor “shall take all reasonable action to obtain exemption from or refund of any taxes or duties” paid that were otherwise agreed to have been exempt. The clause also stated that “[t]o the extent that this contract provides for furnishing supplies or performing services outside the United States and its outlying areas, this clause applies in lieu of any Federal, State, and local taxes clause of the contract.” FAR 52.229-6(a), (c), (i).

7. The contract also contained the DFARS 252.225-7013, DUTY-FREE ENTRY (JUN 2005) clause, incorporated by reference (R4, tab 1 at 96; gov’t reply br., attach. 2). The DFARS prescription for this clause states: “Do not use the clause for acquisition of supplies that will not enter the customs territory of the United States.” DFARS 225.1101(4). The clause defines “*Customs territory of the United States*” to mean “the 50 States, the District of Columbia, and Puerto Rico.” DFARS 252.225-7013(a)(1).

8. The government intended that all shipments by TEKKON under the contract were to be customs-exempt at border crossings using the Levy Exemption Form provided to TEKKON by the U.S. Government (gov’t reply br., attach. 1 at 31, RFA No. 119).

9. The contract also set forth ordering procedures, and stated that the contractor “shall incur costs under this contract only in the performance of Delivery Orders...issued in accordance with this ordering procedure. No other costs are authorized without the express prior written consent of the Contracting Officer” (CO) (R4, tab 1 at 84, ¶ 8(2)(a)). The contract also stated that only the JCC-I/A CO could cancel, add, or change anticipated services (R4, tab 1 at 84, ¶ 7).

10. The contract required the contractor to present all conditions affecting performance (“such as security issues or labor issues”) to JCC-I/A for “coordination and resolution” (R4, tab 1 at 83, ¶ 2e). The contract also stated that JCC-I/A would “designate

a Ministry of Water and Public Works Representative to serve as liaison between the Contractor and the Ministry of Water and Public Works” (*id.* at 84, ¶ 6).

Denial of Entry at Al Waleed (Syria/Iraq Border) (Claim 1a)

11. In late March 2007, a TEKKON shipment of 275 tons of aluminum sulfate from Latakia, Syria, headed for the Karkh water treatment plant in Baghdad, was held up at Al Waleed on the Syria-Iraq border by Iraqi officials, apparently because the officials considered the aluminum sulfate dangerous. TEKKON presented proper Levy Exemption Forms with this shipment. Mr. Zeki Albulak, TEKKON’s project manager for this contract, asked for help from Mr. Anmar Chapuk, a foreign national working at the time for CH2M Hill/Parsons JV, and involved in the administration of this contract. (SUMF ¶¶ 18, 19; app. supp. R4, tab 26 at 4; gov’t reply br. attach. 1 at 12, 14, RFA Nos. 37, 46; app. opp’n at attach. 2 at 1-2; R4, tab 56 at 2).

12. In response to this problem, the CO, Mr. Kenneth Nix, contacted a number of people, expressed great concern, and stated that, except for deliveries into Iraq from Turkey, all chlorine and aluminum sulfate shipments were to be “SHUT DOWN” until Iraq provided official “border and checkpoint crossing letters” to allow vendors access into the country. (App. supp. R4, tab 17 at 3-4)

13. A few days later, TEKKON notified the government that the drivers were being held in jail, and urgently asked for help in resolving the problem. The CO continued to work the issue with Iraq and US officials, hoping to resolve the matter expeditiously. The drivers were released from jail on 9 April 2010, whereupon Mr. Chapuk asked the CO for instructions about the shipment—whether the drivers should return to Syria or go ahead with delivery. (App. supp. R4, tab 26 at 2-3)

14. The CO responded, copying others including Mr. Albulak of TEKKON, again saying that he (the CO) would not allow any further deliveries until the Ministries of Iraq helped get the chemicals across the border (app. supp. R4, tab 26 at 1). Also on the same day, the CO wrote a letter to the Iraqi Customs Department, stressing that the shipment was part of the contract for the Ministry of Water Resources, and emphasizing that the trucks and their contents had to be allowed to pass to their point of delivery at Karkh (R4, tab 18).

15. On 2 May 2007, Mr. Chapuk instructed TEKKON to re-direct the aluminum sulfate to Erbil, Iraq, and on 12 May 2007, TEKKON successfully delivered 11 trucks with 220 tons of aluminum sulfate to Erbil. TEKKON had Levy Exemption Forms and an “access letter” from the Iraq Ministry of Municipalities (MoM), as well as visas for the drivers, to enable border crossing. (SUMF ¶¶ 25, 26; R4, tab 33 at 4; app. supp. R4, tab 17 at 1-2)

16. On 23 May 2007, TEKKON submitted invoice number TRF2-0051 under Delivery Order No. 0003 for \$98,550. This invoice covered CLIN 0004, 8,600 bags (25Kg) of aluminum sulfate, and CLIN 0005AA, “Delivery to Erbil,” with a total of eleven trips listed. The transportation part of this invoice totaled \$8,250, representing 11 trips to Erbil at the contract price of \$750 per trip. On 4 June 2007, the government paid this invoice in full. (Gov’t mot., attach. 2 at 3, attach. 3 at 2)

17. On 13 June 2007, TEKKON filed an unsigned claim with the government; Section 1 of this claim requested compensation for \$160,692 in base year costs, related to four events, two of which are the subject of this motion (R4, tab 20). The claim outlined six categories of costs incurred as a result of TEKKON being denied access at the Al Waleed border, despite having obtained and presented proper Levy Exemption Forms:

- \$27,560 Latakia, Syria—Karkh Water Treatment Plant transportation cost (not covered by government’s motion),
- \$6,500 for customs fees paid at the Al Waleed border gate,
- \$11,600 “Waiting Payment” (demurrage) for the trucks,
- \$5,000 for expenses for the eight drivers in prison,
- \$26,800 for transporting aluminum sulfate from Al Waleed to Erbil through Turkey, and
- \$9,332 for customs fees at the Syrian/Turkish border.

Approximately a year later, on 20 August 2008, TEKKON re-filed its claim (signed this time), and this litigation ensued. (R4, tab 56)

18. For purposes of the motion, the government agrees that TEKKON incurred four of these expense categories: both customs fees, demurrage, and expenses for the drivers in prison (SUMF ¶¶ 33, 34, 35, 37). For the fifth category, transportation of aluminum sulfate from Al Waleed to Erbil via Turkey, the government asserts that it already paid TEKKON the fixed-price contract rate of \$8,250 for delivery to that location, and that TEKKON is not entitled to any more (gov’t mot. at 15-16; gov’t reply br. at 2-7).

Embargo of Cylinders from Jordan into Iraq (Claim 1d)

19. The second border access problem, Iraq’s embargo of chlorine cylinders from Jordan, led to TEKKON’s claim for \$48,000, representing costs to transport 183 empty TEKKON chlorine cylinders from Jordan to Turkey and then into Iraq. TEKKON’s complaint reiterates that the “incident resulted from an embargo on container shipments into Iraq from Jordan and required longer and more costly shipment into Iraq via a Syria-Turkey-Iraq routing.” (Compl. at 5-6)

21. The \$48,000 transportation claim was based on “12 Trucks by \$4000 per Truck including customs fees,” for shipment of 183 empty chlorine cylinders from Amman to Erbil. Mr. Albulak explains that the transportation costs were not listed on a spreadsheet of costs invoiced to the government, which listed delivery CLINs (all under CLIN 0005) “because there was no CLIN No. for this shipment.” (R4, tab 56 at 2; app. opp’n, attach. 2, ¶¶ 22-26, attachs. 5, 6 at 16-17)

22. For purposes of the motion, the government assumes the facts related to this portion of the claim are correct, but asserts that, as a matter of law, the government is not liable for the claimed costs (gov’t reply br. at 10-11).

DECISION

Summary judgment may be granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The movant has the burden to establish the absence of disputed material facts; once done, the non-moving party must set forth specific facts, not conclusory statements or bare assertions, to defeat the motion. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). We draw all reasonable inferences in favor of the non-moving party. *Mingus*, 812 F.2d at 1391.

Denial of Entry at Al Waleed Border (Claim 1a)

Concerning denial of entry into Iraq at the Al Waleed border, for purposes of the motion, the government does not contest the facts recited here, except to state that TEKKON was already paid for transporting the aluminum sulfate to Erbil. Rather, the government asserts that the problems were caused by the government of Iraq, that the contract effectively assigned responsibility for customs clearance to TEKKON, and that summary judgment is proper. TEKKON opposes the motion, asserting that the government omitted key facts concerning the government’s role and responsibilities in contract administration and the shipping and delivery process.

As to the customs fees at Al Waleed, the government’s motion is denied. It is not clear whether the aluminum sulfate was in fact subject to such fees, as shipments were intended to be customs-exempt at border crossings, and TEKKON obtained and presented proper Levy Exemption Forms (SOF ¶¶ 8, 11) Additionally, neither party has addressed the Duty-Free Entry clause to the Board’s satisfaction, including why it was in the contract to begin with when the DFARS states it should not be used in contracts not involving product shipment into the customs territories of the United States (SOF ¶ 7). Finally, neither party has addressed whether the fees would be reimbursable given the existence of

the Foreign Taxes clause (SOF ¶ 6), including whether an applicable international agreement exists, and whether TEKKON sought exemptions or refunds as required by that clause. *See Encorp.*, ASBCA No. 51293, 01-1 BCA ¶ 31,165 at 153,937 (contractor claim denied, in part due to contractor having “shirked its duties under the ‘Foreign Taxes’ clause” to timely seek refund of customs duties).

Concerning the demurrage charges and the expenses of the drivers in prison, the government’s motion is granted on both elements. The contract required delivery f.o.b. destination, and clearly stated that the government was not liable for any delivery, storage, demurrage, accessorial or other charges before delivery unless those charges were caused by an act or order of the U.S. government acting in its contractual capacity (SOF ¶ 4). TEKKON provided proper Levy Exemption Forms (SOF ¶ 11); access denial was the result of actions taken by the Iraqi government, not the U.S. government acting in its contractual capacity. Absent a showing that a U.S. government act or order caused the demurrage charges or the expenses of the drivers in prison, not present here, this clause makes TEKKON responsible for these costs.

Concerning the costs related to re-routing of the aluminum sulfate to Erbil, the government’s motion is denied, as it is not clear whether or not the re-routing was directed by the CO or other authorized government official (SOF ¶ 9). TEKKON was specifically told to re-route the shipment by Mr. Chapuk, who worked closely with the CO on this shipment problem. Further, when the shipment was held up at Al Waleed, the CO twice said that he would allow no further deliveries to Iraq except via Turkey. (SOF ¶¶ 12-15) Drawing all reasonable inferences in favor of TEKKON that re-routing was directed by the CO, the government may be responsible for increased costs, and thus we must deny this part of the government’s motion. We also cannot resolve on summary judgment the portion of the motion related to TEKKON’s claim for \$9,332 customs fees at the Syrian-Turkish border. This part of the claim is linked to whether the re-routing was authorized, and how Turkish customs fees were to be handled under the contract.

Because the record is undeveloped on these points, we conclude that the portion of the motion related to customs fees at Al Waleed and re-shipment to Erbil, including customs fees en route, is inappropriate for resolution on summary judgment. *Kaman Precision Products, Inc.*, ASBCA Nos. 56305, 56313, 10-2 BCA ¶ 34,529 at 170,286 (summary judgment may be denied, even on legal questions of contract interpretation, when the Board has “no confidence that the record has been sufficiently developed and analyzed”); *Advanced Technologies & Testing Laboratories, Inc.*, ASBCA No. 55805, 08-2 BCA ¶ 33,950 at 167,976 (summary judgment should be denied where the record relating to the issues presented is not adequately developed). Consequently, the government’s motion concerning the portion of TEKKON’s Claim 1a for \$26,800 and \$9,332 is denied.

Embargo of Cylinders from Jordan into Iraq (Claim 1d)

The second border access problem leading to TEKKON's claim for increased performance costs was the alleged embargo by Iraq precluding shipment of TEKKON's empty cylinders into Iraq directly from Jordan (SOF ¶ 19). Despite lack of record evidence about the embargo, neither party, for purposes of the motion, disputes the fact or the consequences of the embargo, or that the shipment was connected to contract performance, or presents any disputes of material fact to prevent addressing this issue on summary judgment. Thus, we can conclude, for purposes of the motion, that Iraq did impose such an embargo, leading to the claimed transportation costs, and can address, as a matter of law, whether the government is liable for these costs.

We conclude that the government is not liable for these transportation costs. Iraq's embargo is a third party action for which the U.S. government is not contractually responsible. TEKKON's only defense to the government's motion is that the "breakdown" of the duty-free entry process "precipitated" this portion of the claim, and that the government breached its duty to facilitate duty-free entry of import products (app. opp'n at 51). Even if true, however, this is irrelevant to a complete country import ban which bars any shipments at all, regardless of duty payment or exemption. TEKKON has not pointed to any facts, contract requirement, or case law that would make the U.S. government liable in its contractual capacity for contractor transportation costs resulting from an embargo imposed by Iraq. *See Pure Gold, Inc.*, 739 F.2d at 626-27 (bare assertions or conclusory statements by the non-moving party are not adequate to defeat a motion for summary judgment).

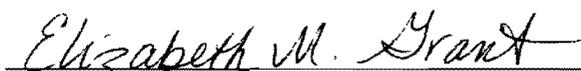
TEKKON's contract was a firm fixed-price contract; as such, without a clause stating otherwise, increased costs of performance are a risk assigned by contract to the contractor. TEKKON admits that there was no CLIN for this shipment (SOF ¶ 21), thus, these transportation costs must be absorbed by TEKKON. *Chevron, U.S.A., Inc.*, ASBCA No. 32323, 90-1 BCA ¶ 22,602 at 113,426 ("the risk of increased performance costs in a firm fixed-price contract, absent a clause stating otherwise, are on the contractor"); *Barnes Electric Co.*, ASBCA No. 48300, 96-2 BCA ¶ 28,528 at 142,461 (appellant bore the risk, in its fixed-price contract, of increases in transportation costs).

We conclude that, given the third party action that caused the problem (the embargo) and fixed-price nature of the contract, TEKKON was responsible for costs of transporting its own empty cylinders into Iraq. Consequently, we grant the government's motion for summary judgment on TEKKON's Claim 1d for \$48,000.

CONCLUSION

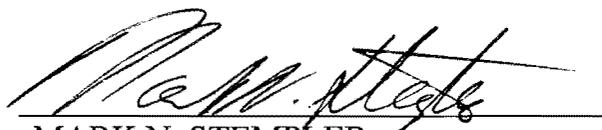
The government's motion for partial summary judgment is denied as to the portions of TEKKON's Claim 1a for customs fees at Al Waleed (\$6,500), customs fees at the Syrian/Turkish border (\$9,332), and re-shipment costs from Al Waleed to Erbil (\$26,800). The government's motion is granted as to the portions of TEKKON's Claim 1a for demurrage fees (\$11,600) and the expenses for the drivers in prison (\$5,000); the appeal as to these parts of TEKKON's claim is hereby denied. The government's motion is also granted as to TEKKON's Claim 1d for transportation costs resulting from the Iraq embargo (\$48,000), and the appeal as to this claim is hereby denied.

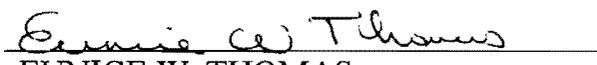
Dated: 1 November 2011


ELIZABETH M. GRANT
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. 56831, Appeal of TEKKON Engineering Co., Ltd., rendered in conformance with the Board's Charter.

Dated:

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