

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Red Sea Engineers & Constructors ) ASBCA No. 57448  
)  
Under Contract No. W91B4M-09-C-7340 )

APPEARANCES FOR THE APPELLANT: R. Dale Holmes, Esq.  
Louisville, KY

Terence J. Kelley, Esq.  
New Bern, NC

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
CPT Joon K. Hong, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN  
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Red Sea Engineers & Constructors (Red Sea) appeals the termination for default of the captioned contract and moves for summary judgment on the ground that the government breached the payment provisions of the contract, terminated the contract on the basis of an incorrect contract completion date, and otherwise impeded and delayed its performance of the work. On the record before us on the motion, we find no breach as to the government's rejection of one invoice, no error by the government on the contract completion dates and genuine issues of material facts on the remaining rejected invoices and other alleged grounds for summary judgment overturning the termination. The motion is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 28 September 2009, the government awarded Red Sea the captioned contract (hereinafter "Contract 7340") for design and construction of 60 pre-engineered, pre-manufactured buildings (PEBs) for billeting and related purposes at Camp Phoenix, Afghanistan, and five such buildings at Camp Alamo, Afghanistan. The work was to be performed in accordance with a Statement of Work (SOW) dated 20 July 2009 at Attachment 1 to the contract. (R4, tab 1 at 1, 3-23)

2. The SOW required, among other things, completion of the work within 270 days of receipt of Notice to Proceed (NTP) at Camp Phoenix, and within 150 days of

receipt of NTP at Camp Alamo. The SOW further required that “Delivery of individual PEB’s shall be in accordance with specified contract delivery dates....” (R4, tab 1, attach. 1 at 2) The specified contract delivery dates and firm-fixed contract prices for the 65 buildings were set forth in 37 Contract Line Item Numbers (CLINs).<sup>1</sup> At award, the total firm-fixed contract price for the 65 buildings (*i.e.*, the sum of the prices of the first 37 CLINs) was \$12,539,657.22. (R4, tab 1 at 3-23, 63-66)

3. The FAR 52.211-10, COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984) clause of the contract (hereinafter “the Commencement of Work clause”) stated:

The Contractor shall be required to (a) commence work under this contract within seven (7) calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) *complete the entire work ready for use not later than the required calendar days specified for each CLIN, as listed in Section F, (DELIVERY DATE)*. The time stated for completion shall include final cleanup of the premises. [Emphasis added]

(R4, tab 1 at 66)

4. The contract did not include a requirement for a payment bond, but it did include the DFARS 252.222-7002, COMPLIANCE WITH LOCAL LABOR LAWS (OVERSEAS) (JUN 1997) clause (hereinafter “the Compliance with Local Labor Laws clause”). This clause stated in pertinent part:

(a) The Contractor shall comply with all –

(1) Local laws, regulations, and labor union agreements governing work hours; and

(2) Labor regulations including collective bargaining agreements, workers’ compensation, working conditions, fringe benefits, and labor standards or labor contract matters.

(R4, tab 1 at 80)

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<sup>1</sup> Twenty-eight CLINs were for two buildings each. Nine CLINs were for one building each. One CLIN (0038) was a cost reimbursement item that is not relevant to the dispute in this appeal. (R4, tab 1 at 3-73)

5. Contract 7340 also included, among other general provisions, the FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (SEP 2002) clause (hereinafter “the Payments clause”), the FAR 52.232-27, PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (OCT 2008) clause (hereinafter “the Prompt Payment clause”), and the FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1994) clause (R4, tab 1 at 79).

6. Red Sea received the NTP for the Camp Phoenix work on 10 October 2009 and the NTP for the Camp Alamo work on 6 November 2009 (R4, tabs 116, 117).

7. Effective 4 March 2010, bilateral Modification No. P00002 required Red Sea to: “Add electrical and HVAC work for buildings A-G, Northern Expansion area in accordance with revised SOW dated 20 Jan 10.” For the added electrical and HVAC work, Modification No. P00002 increased the CLIN prices and extended the CLIN delivery dates of the affected buildings. The CLIN price increases increased the total fixed-price of the contract to \$13,656,071.51. (R4, tab 16) The revised SOW included among other provisions the following:

4.1. Period of Performance: Upon receipt of Notice to Proceed, Contractor shall have 573 calendar days at Camp Phoenix and 150 calendar days (concurrent) at Camp Alamo to complete all requirements of this project.

*Delivery of individual PEB's shall be in accordance with specified delivery dates. [Emphasis added]*

(R4, tab 12 at 3)<sup>2</sup>

8. For purposes of this motion, we are primarily concerned with 14 buildings at Camp Phoenix (CLINs 0001-0008) and 5 buildings at Camp Alamo (CLINs 0035-0037). The CLIN prices and delivery dates for these 19 buildings, including the changes in Modification No. P00002, were as follows:

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<sup>2</sup> The 573 calendar days for performance of the Camp Phoenix work resulted in a required completion date of 9 May 2011 for that work.

CLINs	Bldgs	Contract Price <sup>3</sup>	Contract Delivery Dates <sup>4</sup>
0001	1-2	431,294.35	07 May 2010
0002	3-4	431,294.35	20 May 2010
0003	5-6	431,294.35	30 May 2010
0004	7-8	431,294.35	04 Jun 2010
0005	9-10	442,240.18	11 Jun 2010
0006	11	242,498.02	18 Jun 2010
0007	12	257,095.55	18 Jun 2010
0008	13-14	453,186.02	25 Jun 2010
0035	9A-10A	372,000.20	05 Apr 2010
0036	6A-7A	372,000.20	15 Jan 2010
0037	8A	<u>210,125.90</u>	15 Jan 2010
Total		\$4,074,323.47	

(R4, tab 1 at 22-23, 66, tab 16 at 2-6)

9. On 30 March 2010, the contracting officer issued a stop work order applicable to “all construction on the PEB Buildings in the Northern Expansion Area of Camp Phoenix, in which contractor personnel come within 12 feet of any overhead power lines” (R4, tab 21). The contracting officer withdrew this order on 6 June 2010 (R4, tab 44). Red Sea contends that this order prevented Red Sea from installing roofs and performing interior finish work on 6 of the 7 buildings under construction at Camp Phoenix (app. mot. at 4). However, considering the contemporaneous documentation by the parties, there is a genuine issue of material fact as to the scope and impact of that stop work order on the progress of the work (R4, tab 43 at 2, tab 45 at 2).

10. Between 18 October 2009 and 19 April 2010, Red Sea submitted seven progress payment invoices to the government in the total amount of \$4,129,995.96. All seven of these invoices were submitted on the DD Form 250 Material Inspection and Receiving Report signed by the authorized government representative verifying that the claimed work had been accepted and conformed to the contract. (R4, tabs 2, 3, 7, 10, 13, 20, 23) All seven were paid in full by the government (R4, tabs 5, 6, 8, 11, 18, 29, 31).

11. On 14 May 2010, the government by mistake made a duplicate payment of Invoice No. 7 by electronic funds transfer to Red Sea’s bank account (R4, tab 177 at 3;

<sup>3</sup> Contract prices for the Camp Phoenix CLINs 0001-0008 are those set forth in Modification No. P00002 (R4, tab 16 at 2). The contract prices for the Camp Alamo CLINs 0035-0037 are those in the contract at award (R4, tab 1 at 22-23).

<sup>4</sup> The contract delivery dates for the Camp Phoenix CLINs 0001-0008 are those set forth in Modification No. P00002 (R4, tab 16 at 3-6). The contract delivery dates for the Camp Alamo CLINs 0035-0037 are the dates of the number of days after receipt of NTP specified in the contract at award (R4, tab 1 at 66).

compl. and answer ¶¶ 16, 17). Invoice No. 7 was in the amount of \$925,529.82 for work performed on CLINs 0001-0008 and 0036 (R4, tab 23). On 20 September 2011, the Board requested Red Sea to provide the current status of the overpayment. Red Sea replied that: “The current status is that Red Sea has not had funds to make repayment to DFAS, but plans to arrange repayment through any settlement or verdict in its favor in this appeal.” (Bd. ex. 1)

12. On 24 May 2010, Red Sea submitted its progress payment Invoice No. 8 in the amount of \$619,406.01 for work performed on CLINs 0001-0008 and 0036-0037 in the period 20 April-23 May 2010. The invoice DD Form 250 and Statement of Values (SOV) had printed signature blocks for “MARK L. RODWELL” as the authorized government representative for accepting the claimed work as conforming to the contract. These signature blocks were neither signed nor initialed, but LTC Rodwell e-mailed his approval of the SOV to the contracting officer on 23 May 2010. (R4, tab 112; app. supp. R4, tabs 1000, 1006)

13. As of 24 May 2010, the total contract value (prices), the total claimed earned value, the indicated percent completion (total earned value/total contract value) on progress payment Invoices Nos. 1 through 8 for CLINs 0001-0008 and 0035-0037 were as follows:

CLINs	Total Contract Value (Price)	Total Earned Value Invoices Nos. 1-8	Percent Complete
0001	\$431,294.35	\$380,450.04	88
0002	431,294.35	381,513.43	84
0003	431,294.35	314,663.43	73
0004	431,294.35	313,277.87	73
0005	442,240.18	371,036.27	84
0006	242,498.02	119,268.17	49
0007	257,095.55	121,813.25	47
0008	453,186.02	309,092.83	68
0035	372,000.20	79,012.91	21
0036	372,000.20	285,693.93	77
0037	<u>210,125.90</u>	<u>146,182.21</u>	<u>70</u>
Totals	\$4,074,323.47	\$2,822,004.30	69

(SOF ¶ 8; R4, tabs 2, 3, 7, 10, 13, 20, 23; app. supp. R4, tab 1000)

14. By e-mail dated 14 June 2010, the contracting officer questioned Invoice No. 8 and subsequently refused payment. The stated ground for questioning the invoice was that a Red Sea SOV as of 12 June 2010 showed a total earned value of \$5,576,024.30 that “exceeds the total contract value of the Phase I on Camp Phoenix and Camp

Alamo.”<sup>5</sup> (R4, tab 50 at 1) On 19 June 2010, in response to a request by Red Sea for payment of Invoice No. 8, the contracting officer stated: “We have paid you for 80% of the work on these two sites thus far. Nothing has been shown to my office that you have exceeded this. Until we have been shown you have achieved more than that, no more invoices will be processed.” (App. supp. R4, tab 1004)

15. The contracting officer’s conclusion that the progress payments for the “Phase I” CLINs had exceeded their total contract value was wrong. The progress payment earned values in the 12 June 2010 SOV included \$2,431,662.89 for mobilization and design earned value that was allocable to all 37 building CLINs and not just those in “Phase I” (R4, tab 50 at 2). The total claimed earned value of CLINs 0001-0008 and 0035-0036 on Invoices Nos. 1-8 (including their allocable share of the mobilization and design earned values) was \$2,822,004.30 and did not exceed either in total or on an individual CLIN basis their total contract values. The percentage of completion of CLINs 0001-0008 and 0035-0037 as a whole claimed on Invoices Nos. 1-8 was 69 percent, not 80 percent. (SOF ¶ 13)

16. While the contracting officer’s stated reason for not paying Invoice No. 8 was wrong, the amount due Red Sea on that invoice (\$619,406.01) was more than offset by the amount of the 14 May 2011 duplicate payment of Invoice No. 7 (\$925,529.82) for CLINs 0001-0008 and 0036 that was retained by Red Sea and is still retained by Red Sea to this day (SOF ¶ 11).

17. On 6 July 2010, at a weekly construction coordination meeting, the government reported that it had been informed that Red Sea had not paid some of its general workers and electricians for the “last 7 weeks.” The meeting minutes further state that the government had visited the site, confirmed the report from the workers, and instructed Red Sea at the meeting “to overcome these issues.” (R4, tab 164 at 9) The last seven weeks before the 6 July 2010 meeting was the period 16 May – 3 July 2010.

18. By e-mail dated 17 July 2010, Red Sea told the contracting officer, among other things, that “Red Sea is having cash flow problems” and requested the status of its Invoice No. 8 (R4, tab 66 at 2). By return e-mail of the same date, the contracting officer replied in relevant part as follows:

It is the government’s position at this time that no further invoices be paid against this project until Red Sea is able to show where previous payments have gone. There are serious concerns with Red Sea’s cash flow problems based on

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<sup>5</sup> The “Phase I” referred to by the contracting officer included the buildings being erected under CLINs 0001-0008 at Camp Phoenix and under CLINs 0035-0037 at Camp Alamo.

payments received to date based on supply issues as well as workers not being paid. To date, 79.5% of this contract has been paid out without 79.5% of project work to show for it. Also, a certain portion must be retained for assessment of liquidated damages which have been accruing on this [contract] since the scheduled completion date of 21 May 2010 for the 7 PEBs on Camp Phoenix and 23 April 2010 for the 3 PEBs on Camp Alamo.

Until Red Sea can provide documentation of where funding has gone, as it does not appear to have been used as a part of this contract, the USG's position will stand firm with no further payments being certified.

(R4, tab 66)

19. The weekly construction coordination meeting minutes over the six weeks following the 6 July 2010 meeting all noted that the non-payment of workers by Red Sea was a continuing problem. The scope of the problem and Red Sea's response to the government's direction to resolve the problem was indicated in the meeting minutes as follows:

<u>Meeting Date</u>	<u>Comment on Labor Payment Problem</u>
13 Jul 2010	"RS has not paid some of the general workers and Electricians for the last 7 weeks. Client requested RS to resolve the issue immediately"
27 Jul 2010	"RS has not paid some of the general workers and Electricians for the last 7 weeks-RS stated that they have paid workers from 2 to 3 weeks and will pay remaining in coming week."
03 Aug 2010	"Client asked RS to pay their worker without any further delay. RS is behind from Paying to their workers from last 8 weeks"
10 Aug 2010	"RS has paid [their] worker for 4 weeks on 07 August but still behind on paying for 6 weeks"
17 Aug 2010	"RS has paid [their] worker for 4 weeks on <u>07 August</u> but still behind on paying for <u>6 weeks</u> . RS stated that they will pay their workers next week."

24 Aug 2010

“Client express concern on not paying the workers from last 8 weeks. RS has to come up with Paying schedule to their workers.”

(R4, tab 165 at 2, tab 166 at 6, tab 168 at 6, tab 169 at 5, tab 170 at 6, tab 171 at 6)

20. The Labour Law of the Islamic Republic of Afghanistan includes, among other provisions, the following:

**Time to Pay the Salary**

**Article Sixty Four:**

- (1) The employee’s salary is paid on the basis of the time of work, monthly, in fifteen days or weekly (hour based payment)....

.....

**Payment of Worker’s Salary**

**Article Seventy Three:**

- (1) The salary is paid to the worker or to the person introduced by him/her in writing.
- (2) The salary is paid during the month. The salary payment cannot be delayed without the agreement of the employee.

*Official Gazette Labour Law, Islamic Republic of Afghanistan, Ministry of Justice (Feb. 4, 2007) at 38, 41. (Bd. ex. 2)*

21. On 29 August 2010, the contracting officer issued a show cause notice to Red Sea stating in pertinent part:

1. At 0800 hours on 29 Aug 2010, this office was notified that approximately 125 workers went on strike on the above referenced project for failure by Red Sea to timely pay its workers their wages. Since Red Sea has failed to pay its workers their due wages in a timely manner and is thereby seriously endangering the performance of this contract, the Government is considering terminating the contract under the provisions for default of this contract.

2. The Government has documentation on file of initially addressing this issue during the weekly status meeting on 6 July with some laborers and electrical workers not being paid back as far as 7 weeks. This has continually been addressed at each weekly meeting since then without resolution.
3. Since you have failed to perform under the subject contract within the time required by its terms, and since you have failed to cure the conditions endangering performance under [Contract 7340], the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to the Contracting Officer...within 10 days after receipt of this notice.

(R4, tab 99)

22. By letter dated 9 September 2010, Red Sea replied to the show cause notice. Red Sea stated that the delay in the work was caused by (i) the government's failure to meet its payment obligations, (ii) weather and security (base access) delays, (iii) a stop work order for work within 12 feet of an overhead power line, (iv) the government's failure to timely provide customs clearance documents, and (v) the government's "arbitrary" rejection of a licensed electrician. (R4, tab 107 at 1-4) There are genuine issues of material fact as to scope and impact on the work of these alleged causes of delay.

23. On 15 September 2010, Red Sea submitted its progress payment Invoices Nos. 9, 10 and 11 to the government (R4, tab 112).<sup>6</sup> These invoices were for work

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<sup>6</sup> Red Sea implies in its reply brief and its president implies in his Supplemental Affidavit received by the Board on 19 October 2011, that Invoices Nos. 9 and 10 dated respectively 22 June and 25 July 2010 were submitted for payment on or about the dates on the invoices (app reply br. at 2-3; affidavit at 1-2). These contentions are expressly contradicted by Red Sea's letter to the government dated 25 September 2010, signed by its president, which stated that all three Invoices Nos. 9, 10 and 11 were submitted to the government for payment on 15 September 2010 (R4, tab 112).

allegedly performed between 24 May and 14 September 2010 with a claimed total earned value of \$1,290,979.69. The invoices' DD Forms 250 and SOVs had printed signature blocks for "MARK L. RODWELL" as the authorized government representative for accepting the work. These signature blocks, however, were not signed or initialed and, unlike Invoice No. 8, the record contains no credible evidence that the work claimed on Invoices Nos. 9-11 was accepted by an authorized government representative as conforming to the contract. (R4, tabs 52, 75, 109) On 16 September 2010, the contracting officer formally rejected Invoices Nos. 9-11 (*id.*).

24. By unilateral Modification No. P00003 dated 22 September 2010, and letter of the same date, the contracting officer terminated Contract 7340 for default. The stated basis for the termination was Red Sea's alleged failure to comply with the terms and conditions of the contract, failure to complete the work within the required time and failure to show in its response to the show cause notice that these failures were excusable or otherwise beyond its control. (R4, tabs 110, 111) Red Sea timely appealed the termination on 6 December 2010.

25. Following the termination, technical inspections of the state of completion of the buildings were performed by the Army Engineers and a private contractor (Fluor). The percentages of completion estimated in the engineer and Fluor inspection reports dated 30 September and 8 October 2011 respectively were as follows:

Bldg (CLINs)	Engineer Estimate (%)	Fluor Estimate (%)
0001	90	65
0002	81	51
0003	81	40
0004	76	
0005	76	
0006 & 0007	55	
0008	66	
0035	74 <sup>7</sup>	
0036	74	
0037	74	

(R4, tab 114 at 3, tabs 174, 175)

26. With the one exception of CLIN 0035, if the earned values claimed by Red Sea in its Invoices Nos. 9-11 for CLINs 0001-0008 and 0035-0037 are added to the earned values for those CLINs in Invoices Nos. 1-8, all of the claimed earned values as a

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<sup>7</sup> The buildings inspected by the Army Engineers at Camp Alamo are not identifiable in the report to particular CLINs. The average percentage completion of the inspected buildings was 74 percent. (R4, tab 175)

percentage of the total contract values substantially exceed the percentages of completion estimated by the Army Engineers and by Fluor, and four of the CLINs have a total claimed earned value exceeding the total contract value of the CLIN as indicated below:

CLINs	Total Contract Value	Claimed Earned Value Invoices Nos. 1-11	Claimed Earned % of Contract Value
0001	\$431,294.35	\$509,524.02	118
0002	431,294.35	457,989.94	106
0003	431,294.35	380,683.88	88
0004	431,294.35	350,163.94	81
0005	442,240.18	406,524.43	92
0006	242,498.02	199,692.70	82
0007	257,095.55	202,237.78	79
0008	453,186.02	403,450.11	89
0035	372,000.20	153,130.10	41
0036	372,000.20	427,370.69	115
0037	210,125.90	363,087.47	173

(SOF ¶ 8; R4, tabs 2, 3, 7, 10, 13, 20, 23, 52, 75, 109; app. supp. R4, tab 1000)

### DECISION

Red Sea moves for summary judgment on the grounds that (i) the government breached the payment provisions of the contract, (ii) the contract was not in default when terminated because the completion date had been extended by Modification No. P00002 to 9 May 2011, and (iii) the government breached the implied covenant of good faith and fair dealing by threatening termination when a stop work order was in effect and by “interference with Red Sea’s business operations through attempts to destroy employment relationships, spreading false statements about payment, and attempts to direct violence to the owner of the company” (app. mot. at 9-10). For summary judgment to be granted, Red Sea as the moving party must show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). Red Sea has failed to make that showing here.

With respect to the government’s non-payment of progress payment Invoices Nos. 8-11, there is no genuine issue of material fact that (i) the claimed earned amount on Invoice No. 8 was verified and accepted by the authorized government representative as conforming to the contract, and (ii) the contracting officer refused payment on the erroneous belief that the claimed earned amount exceeded the total contract value of the invoiced work (SOF ¶¶ 12-15). There is, however, also no genuine issue of material fact that at the time Invoice No. 8 in the amount of \$619,401.01 was submitted to the government, Red Sea was and to the date of this decision is still retaining an erroneous

duplicate payment by the government of Invoice No. 7 in the amount of \$925,529.82. Although not the overpayment of earned value computed by the contracting officer, Red Sea's retention of the duplicate payment of Invoice No. 7 amounted to an overpayment of earned value on CLINs 0001-0008 and 0036. (SOF ¶¶ 11, 16) Under its common law right of set-off, the government was entitled to retain amounts due Red Sea if Red Sea was retaining an equivalent or greater amount due the government. *Johnson v. All-State Construction, Inc.*, 329 F.3d 848 (Fed. Cir. 2003). The government's refusal to pay Invoice No. 8 in these circumstances was not a breach of contract, and does not excuse Red Sea's failure to complete the work at the specified times.

With respect to Red Sea's entitlement to payment of its progress payment Invoices Nos. 9-11, there are genuine issues of material fact. There is no evidence of any verification by an authorized government representative that the amounts claimed on those invoices were for work accepted and conforming to the contract (SOF ¶ 23). Moreover, even if there were a *prima facie* verification by an authorized government representative, there are otherwise genuine issues of material fact as to the accuracy of those invoices. The claimed earned values in Invoices Nos. 9-11 result in claimed percentages of completion for CLINs 0001-0008 and 0036-0037 in excess of the estimated percentages of completion in the post-termination technical inspections of the buildings, and the total claimed earned values for four of the CLINs appear to exceed their individual total contract values. (SOF ¶¶ 25, 26) We also note that these invoices were not submitted to the government for payment until 15 September 2010 (SOF ¶ 23). If the invoices were otherwise in order, payment was due on 29 September 2011. FAR 52.232-27(a)(1)A The contract was terminated on 22 September 2010 before payment was due (SOF ¶ 24).

We find no merit in Red Sea's argument that the default termination was premature because the contract completion date for the Camp Phoenix CLINs had been extended to 9 May 2011 by Modification No. P00002. Paragraph 4.1 of the 20 January 2010 SOW, incorporated into the contract by Modification No. P00002, provided, among other things that the contractor would be allowed 573 calendar days from NTP at Camp Phoenix and 150 calendar days (concurrent) at Camp Alamo to "complete all requirements of this project." However, paragraph 4.1 also provided that: "Delivery of individual PEB's shall be in accordance with specified delivery dates" (SOF ¶ 7), and the Commencement of Work clause of the contract stated in pertinent part: "The Contractor shall be required to... complete the entire work ready for use not later than the required calendar days *specified for each CLIN*, as listed in Section F, (DELIVERY DATE)" (SOF ¶ 3) (emphasis added). Reading these provisions as a whole and according reasonable meaning to all of the contract terms, the 573 day and 150 day completion dates in paragraph 4.1 of the 20 January 2010 SOW are the contract completion dates for the complete project respectively at Camps Phoenix and Alamo, and do not supersede or negate the individual building CLIN delivery dates specified in Section F of the contract

schedule at award and in Section F of Modification No. P00002. See *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997).

When Contract 7340 was terminated on 22 September 2010, the individual building CLIN delivery dates in effect for CLINs 0001-0008 and 0035-0037 began with 15 January 2010 for CLINs 0036 and 0037 and ended with 25 June 2010 for CLIN 0008 (SOF ¶ 8). At termination, three months after the last of the specified delivery dates for these specific CLINs, no CLIN had been completed (SOF ¶ 25). Red Sea argues that its failure to meet the CLIN delivery dates was caused, first and foremost by the government's failure to pay its Invoices Nos. 8-11. We have found above that Invoice No. 8 was subject to set off against Red Sea's retention of the duplicate payment of Invoice No. 7, and that there are genuine issues of material facts as to the government's liability for any of the amounts claimed on Invoices Nos. 9-11. There are also genuine issues of material facts with respect to the scope and impact of the 31 March 2010 stop work order on the progress of the work (SOF ¶ 9), and the alleged government "interference with Red Sea's business operations through attempts to destroy employment relationships, spreading false statements about payment, and attempts to direct violence to the owner of the company." With respect to the latter allegation, the record before us on the motion indicates that Red Sea's "employment relationships" were self-destructing as a result of its failing to pay its workers in full the amounts due them when due beginning in the week of 16 May 2010 and continuing thereafter (SOF ¶¶ 17, 19-21).

Appellant's motion for summary judgment is denied.

Dated: 9 November 2011



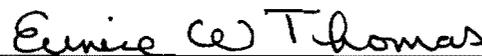
MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



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. 57448, Appeal of Red Sea Engineers & Constructors, rendered in conformance with the Board's Charter.

Dated:

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