

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
ABB AB ) ASBCA No. 57509  
 )  
Under Contract No. W91GXY-06-C-0025 )

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APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
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MAJ Mark Ries, JA  
CPT Tudo Pham, JA  
Brian Bentley, Esq.  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE TUNKS  
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

ABB AB (ABB or appellant) and the Joint Contracting Command-Iraq (JCC-I or government) have filed motions for partial summary judgment, each contending that it is entitled to judgment as a matter of law. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. On 28 May 2005 the JCC-I issued request for proposals (RFP) No. W914NS-05-R-2038 for all services necessary to carry out the engineering, procurement, supply, erection and commissioning of the electrical equipment necessary for the expansion/rehabilitation work for Mosul 400kV Substation, PIF GBAZN-068 (app. supp. R4, tab 31). The RFP required the contractor to provide security for the project and submit a detailed security plan (*id.*, line item No. 0007 at 5, 27-28 of 216). The RFP included FAR 52.243-4, CHANGES (AUG 1987) (*id.* at 85-86 of 216).

2. ABB contracted with Shams Al-Sabah (SAS), a wholly owned Iraqi company, to provide security (R4, tab 27 at 9-10 of 57).

3. On 4 August 2005, the government amended the RFP to include a War Risks clause. The clause provided, in part, as follows:

### 1.3 WAR RISKS-IRAQ AND THE MIDDLE EAST.

(a) Notwithstanding any other provisions of this contract...and except as set forth in paragraph (d) below:

(b) (1) The Government assumes the risk of loss, damage or destruction of:

(i) Completed or partially completed work...;

(ii) Material, equipment, and/or installations,

which are being used or were acquired for use...in the performance of this contract and which are:

(A) located on the site of the work...; or

(B) are lost or damaged...while being transported [to the site] or to a point for delivery to the Government; or

(2) Additional costs of performance of services; however,

(3) Such loss, damage, destruction or additional costs of performance of services...must be the direct result of acts of war or attacks by an enemy or hostile entity against the United States or friendly nations, including, but not limited to:

(i) criminal activity;

(ii) civil commotion;

(iii) riot;

(iv) sabotage;

(v) insurrection;

(vi) rebellion;

(vii) terrorism; or

(viii) hostile or warlike action, including action in hindering, combating, or defending against an actual, impending or expected attack by any government or sovereign power (de jure or de facto), by any authority using military, naval, or air forces, or by any criminal, insurrectionist, rebel, or terrorist organization or entity.

(c) The direct cause of the loss, damage, destruction or additional costs of performance of services...

(1) Must not be due...to a negligent act (or acts) or an omission to act on the part of the Contractor;

(2) The Contractor must have exercised due care... ; and

(3) The Contractor was unable to obtain insurance...or the [CO] had previously agreed that the cost of obtaining such insurance was not economically feasible....

(d) When such loss, damage, destruction or additional costs of performance of services...allegedly occurs:

(1) The Contractor shall promptly notify the [CO]...;

(2) The Contractor shall promptly take all reasonable steps to protect work, material, equipment, and/or installations or performance of services from further loss...;

....

(5) Subject to the availability of funds, the [CO] shall issue a suitable adjustment to the contract, if appropriate. However, *no profit shall be paid* for any adjustment due to loss, damage, destruction or additional costs of work, material, equipment, and/or installations or performance of services.

....

(g) (1) In event [war-related activities disrupt] the supply or movement of materials, supplies and/or personnel to, from or through Middle East countries [causing] an increase in the time required to perform or the cost of performance of this contract: subject to the availability of funds, an adjustment may be made to the contract;

....

(3)... Overhead or profit will not be allowed in any price adjustment made pursuant to this paragraph.

....

(i) Failure to agree to [an] adjustment...shall constitute a dispute within the meaning of the Disputes Clause....

(App. supp. R4, tab 32, amend. 0006)

4. Subsequent to the addition of the War Risks clause, ABB submitted a revised proposal and a revised security plan (R4, tab 27 at 11-12 of 57).

5. The JCC-I awarded Contract No. W91GXY-06-C-0025 to ABB on 22 October 2005 (R4, tab 1).

6. On 9 December 2005, the parties entered into bilateral Modification No. P00002, which added the following clause to the contract:

5. Security Baseline: The security baseline is the security level at the time of the proposal by the contractor. The change in security level will be assessed by the Contracting Officer. Discrepancies between the Contracting Officers assessment and the contractor's assessment will be adjudicated based on an U.S. Government official security report.

(R4, tab 8)

7. The notice to proceed was issued on 17 November 2005 (app. supp. R4, tab 43 at 1 of 9).

8. Work at the site was scheduled to begin in June 2006 with plant and materials to be delivered in October 2006 (R4, tab 27 at 14, 21 of 57).

9. On its weekly report for 25 February - 3 March 2006, ABB stated as follows:

[T]he general security situation in Iraq is growing more difficult. There has been and are still curfews in several areas and our site manager has been forced to move to Amman [Jordan] in order to be able to continue working since he is not able to leave his residence in Baghdad.

(R4, tab 27 at 13 of 57)

10. On 14 April 2006, the Procuring Contracting Officer (PCO) advised ABB that one of its team members had been shot and killed and that three project mechanical engineers had been assassinated along the same stretch of road. In addition, he reported incidents of kidnapping and hijacking of trucks en route to Mosul. ABB was advised to take the threats very seriously. (R4, tab 27 at 15-16 of 57)

11. On 15 April 2006, SAS requested ABB to take over responsibility for security at the beginning of August 2006 because “the security situation in Iraq is getting worst [sic] day by day” (R4, tab 27 at 16 of 57).

12. On 30 May 2006, Control Risks (CR), a company hired by the JCC-I to assess the threat level, described the situation as follows:

**The Mosul/Tal Afar** area remains the centre of AIF [Anti Iraq Force] activities in the north with the favored form of attack being SAFs [Small Arms Fire] and IEDs [Improvised Explosive Devices] closely followed by a slight increase in IDF [Indirect Fire] attacks. Many of the SAF attacks are in the form of drive by shootings (DBS) and are rarely effective. During April there have been almost twice as many IED discoveries as actual detonations. IDF attacks have averaged one per day, VB/CIED [Vehicle Based Counter-Improvised Explosive Device] attacks have increased.... It is assessed that the “spike” in incidents has been due to insurgents trying to gain a foothold after recent successful military operations that caused a migration from the north central region to the north. On 28 April a new tactic was adopted by AIF when they attacked a MNFI element with a suicide VBIED [Vehicle Borne Improvised Explosive Device]. Firstly, they initiated the attack with SAF, the MNFI pursued the vehicle in which the IED was contained; the driver of the vehicle then detonated the device on his pursuers.

(R4, tab 13 at 12)

13. CR included the following threat analysis for convoys in its May 2006 report:

Route Sante Fe: Mosul-Tal afar/Syrian Border—**High Threat**  
Route Tampa North: Mosul-Turkish Border via Duhok—**Out of Bounds**  
Route Tampa South: Mosul-Bayji—**High Threat**  
Route Santa Fe east: Mosul-Erbil—**Medium Threat**  
Route Minneapolis: Kirkuk-Mosul—**Medium Threat**

(R4, tab 13 at 14-15)

14. SAS began performing some minor civil works at the site in June 2006 (R4, tab 27 at 13 of 19).

15. Hart Security Limited took over security on 29 August 2006 (R4, tab 17 at 5 of 9).

16. The Security Incident Reports for 24 August 2006 through 30 January 2007 reported numerous war-related events and one instance of intimidation (R4, tab 19).

17. ABB alleges that the threat level increased significantly between bid stage (9 August 2005) and construction stage (5 June 2006):

<u>THREAT</u>	<u>Comparative Threat Level</u>	
	<u>Bid Stage</u>	<u>Construction Stage</u>
Insurgent Activity	Medium	Overall High
RPG	Low	Very High
Kidnapping/Hijacking	Low	High
Small Arms Fire	Medium	Increased
Mortar Attacks	Medium	High
Suicide Bombing	Low	High
VBIED	Low	High
Theft	Medium	High

(R4, tab 27 at 23 of 57)

18. On 27 September 2007, ABB submitted a request for an equitable adjustment under the War Risks clause and/or the Changes clause as measured by Modification No. P00002 for increased security costs (R4, tabs 17, 18). According to ABB, the number of weekly attacks during the time ABB was preparing and submitting its proposal increased from approximately 450 to nearly 800 in August 2006. ABB also alleged that attacks on convoys increased from 38 per month to a high of 103 in September 2006. As a result, ABB alleges that it incurred increased costs in the amount of \$2,171,837. (R4, tab 17 at 7 of 9) The request was not certified.

19. On 26 June 2007, the Contracting Officer (CO) responded, in part, to ABB's request for an equitable adjustment as follows:

2. Your...claim asserts that the security level experienced at the work site throughout performance of the subject contract increased over time. I disagree with that assertion.... The data in [the U.S. Government official security report] indicates that the security level remained constant at the work site between August 2005 and February 2007. Although [the] area surrounding the project work site to include a 10Km radius saw a 275% increase in activity during the February

2007 time period over the 2005 sample, I do not believe this entitles ABB to any equitable adjustment....

3. Furthermore, I noted [that]...between August 2005 and February 2007, ABB experienced three minor security incidents which included one mortar attack which landed near a convoy, one road block which caused a convoy to turn around, and one minor drive-by small arms fire shooting incident external to the substation perimeter; [and] all of the ABB daily reports stated "None" in the area entitled "Did anything occur today that would lead to a claim or change order?"

(R4, tab 22)

20. On 9 July 2009, ABB submitted a certified claim in the amount of \$3,034,860.08 to the CO, on behalf of itself and SAS, requesting a final decision under the War Risks clause or Modification No. P00002. In support of its claim, ABB alleged that there was a significant deterioration in the security climate over the course of the contract and that violence and acts of war had increased, substantially increasing its security costs. (App. supp. R4, tab 38)

21. ABB appealed the deemed denial of its claim to this Board. We docketed the appeal as ASBCA No. 57509 on 31 January 2011.

### DECISION

ABB moves for partial summary judgment, alleging that it is entitled to judgment on Counts I and II of its complaint as a matter of law. Count I is a claim for \$2,382,791.77 under the War Risks clause inclusive of overhead and profit. Count II is a claim in the same amount for an equitable adjustment under the Changes clause for changes in the security climate as measured by Modification No. P00002. Count III is ABB's claim on behalf of SAS. Count III is not part of ABB's motion. ABB's motion does not address quantum.

The JCC-I opposes ABB's motion upon the ground that there are genuine issues of material fact. It cross moves for partial summary judgment, alleging that (1) ABB is not entitled to an equitable adjustment under the Changes clause because the changes to the security climate were not the result of any action or inaction on the part of JCC-1, and the withdrawal of multi-national forces was a sovereign act, and therefore, the government is entitled to summary judgment as to Count II and Count III, to the extent it is based on the Changes clause; (2) ABB may not, in any event, recover profit on any increased costs,

and overhead on costs for the supply or movement of materials, supplies and/or personnel under the War Risks clause; and (3) ABB cannot recover on Count III to the extent it claims compensation for the injuries and death of two SAS employees because SAS failed to obtain required workmen's compensation insurance.

The fact that both parties have moved for summary judgment does not mean that we must grant judgment as a matter of law for one side or the other. We evaluate each party's motion on its own merits, taking care to draw all justifiable inferences against the party whose motion is under consideration. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). Our task is not to evaluate or weigh competing evidence but to determine whether there are triable issues of disputed material fact. *Lockheed Martin NESS-Akron*, ASBCA No. 54193, 04-2 BCA ¶ 32,728 at 161,896.

On this record, we see at least three issues of disputed material fact: (1) whether the additional costs incurred by ABB were the direct result of acts of war; (2) whether ABB has satisfied the requirements of paragraph (c) of the War Risks clause, such as prompt notice; and (3) whether there was an increase in the security level over the course of the contract which qualifies ABB to an equitable adjustment. As it stands now, the JCC-I disputes all three of these assertions. In our view, these are issues that may only be resolved at a hearing. There are also disputed issues of material fact as to the availability of workmen's compensation insurance under the circumstances here and related issues. With respect to the recoverability of profit and overhead, we agree with ABB that it would be premature to reach this quantum issue at this time.

#### CONCLUSION

The parties' motions for partial summary judgment are denied on the basis of disputed issues of material fact and, in the case of the profit and overhead issue, on the basis that it is premature.

Dated: 12 April 2012

  
ELIZABETH A. TUNKS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

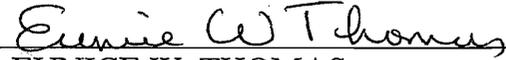
(Signatures continued)

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. 57509, Appeal of ABB AB, rendered in conformance with the Board's Charter.

Dated:

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