

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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ECC International LLC) ASBCA Nos. 60165, 60282
)
Under Contract No. W912DQ-11-C-4015)

APPEARANCE FOR THE APPELLANT: R. Dale Holmes, Esq.
Cohen Seglias Pallas Greenhall & Furman PC
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
Sara L. Hinkle, Esq.
Matthew Tilghman, Esq.
Engineer Trial Attorneys
U.S. Army Engineer District, Middle East
Winchester, VA

OPINION BY ADMINISTRATIVE JUDGE MCILMAIL ON THE
PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

The parties cross-move for summary judgment on several issues regarding the construction of a facility in Afghanistan: (1) whether the contract's 365-day performance period is a warranty that the contract could be completed within that time (gov't mot. at 16-21; app. cross-mot. at 52-85); (2) whether the government withheld superior knowledge (gov't mot. at 21-22; app. cross-mot. at 111-18); (3) whether the government breached the duty of good faith and fair dealing (gov't mot. at 23-24; app. cross-mot. at 86-110); and (4) whether the contract was commercially impossible or impracticable (gov't mot. at 13-16; app. cross-mot. at 119-25).

DECISION

Summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Avant Assessment, LLC*, ASBCA No. 58867, 15-1 BCA ¶ 36,067 at 176,127 (citing FED. R. CIV. P. 56(a)). When considering a motion for summary judgment, the Board's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Raytheon Co., Space & Airborne Sys.*, ASBCA No. 57801 *et al.*, 15-1 BCA ¶ 36,024 at 175,948.

We conclude that, on these motions (consisting of over 200 pages of briefing proposing 343 facts (of which only about a third are the subject of unqualified concurrence)), only one of the issues addressed is amenable to summary judgment: whether the contract's 365-day performance period is a warranty that the work could have been completed within that period. The answer is no. It is undisputed that on May 17, 2011, the government awarded the contract to appellant for \$29,842,615.36, with a performance period of 365 days commencing from the July 5, 2011 issuance of the Notice to Proceed (gov't mot. at 10 ¶ 16; app. cross-mot. at 3 ¶ 16). A due date specified in a contract is not a warranty by the government that the contract can be performed within the prescribed due date; to the contrary, it is the contractor, presumably aware of the performance requirements and its own capabilities, that assumes the risk of performing by the specified due date. *See Finast Metal Prod., Inc.*, ASBCA No. 19860, 85-1 BCA ¶ 17,873 at 89,521 (citing *Am. Ship Bldg. Co. v. United States*, 654 F.2d 75 (Ct. Cl. 1981)). Appellant does not persuade us to depart from that long-standing rule. Consequently, we enter summary judgment that the contract's 365-day performance period is not a warranty that the contract work could be completed within that period.

Otherwise, we conclude that fact-finding either after a hearing or pursuant to Rule 11 proceedings will be required to resolve the issues presented. *Cf. GSC Constr., Inc.*, ASBCA Nos. 59402, 59601, 16-1 BCA ¶ 36,396 at 177,435 (denying summary judgment because of the need for "further development of the record, presumably during a hearing on the merits"). For example, regarding whether the government breached the duty of good faith and fair dealing, determinations of the reasonableness of a party's acts and conduct are not ordinarily amenable to summary judgment, *see THINKQ, Inc.*, ASBCA No. 57732, 13 BCA ¶ 35,221 at 172,826-27 (citing *BearingPoint, Inc.*, ASBCA No. 55354, 08-2 BCA ¶ 33,890 at 167,733), and we see nothing out of the ordinary here. For another example, on whether the government withheld superior knowledge, neither party has demonstrated that there is no genuine dispute regarding whether the allegedly withheld knowledge was vital, which is an element of the superior knowledge doctrine. *See Am. Ship Bldg.*, 654 F.2d at 79.

For another, regarding whether the contract was impossible or impracticable, commercial impracticability is a subset of the doctrine of legal impossibility, which excuses performance when costs become excessive and unreasonable due to an unforeseen supervening event not contemplated by the contracting parties. *Spindler Constr. Corp.*, ASBCA No. 55007, 06-2 BCA ¶ 33,376 at 165,462. A contract is commercially impracticable when performance would cause extreme and unreasonable difficulty, expense, injury, or loss to one of the parties. *Raytheon Co. v. White*, 305 F.3d 1354, 1367 (Fed. Cir. 2002). Neither party quantifies, identifies, or puts into any contractual context the alleged "difficulty, expense, injury, or loss" that appellant says constitutes the commercial impracticability it encountered (gov't mot. at 13-16; app. cross-mot. at 119-25). *Cf. Nedlog Co.*, ASBCA No. 26034, 82-1 BCA ¶ 15,519

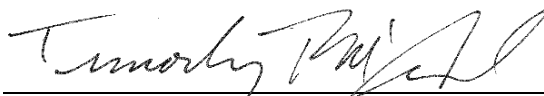
at 76,986 (“A loss of \$19,439.48 on a contract of approximately \$149,000 does not equate to commercial . . . impracticability.”).

For at least these reasons, we deny the remainder of the parties’ cross-motions. Accordingly, we find it unnecessary, at this stage, to address any of the parties’ other arguments, including whether the Board possesses jurisdiction to entertain whether appellant has waived these claims as a result of a January 15, 2015 agreement (gov’t mot. at 11-12 ¶ 19 (citing R4, tab 91); app. cross-mot. at 125-26).

CONCLUSION

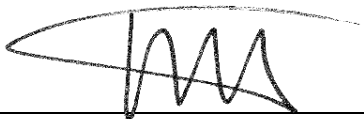
The government’s motion for summary judgment that the contract’s 365-day performance period is not a warranty that the contract could be completed within that time is granted. Otherwise, the parties’ cross-motions for summary judgment are denied.

Dated: June 2, 2020



TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
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. 60165, 60282, Appeals of ECC International LLC, rendered in conformance with the Board's Charter.

Dated: June 2, 2020



PAULLA GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals