ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeals of - | ) | |
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| KEAR Civil Corporation | ) | ASBCA Nos. 62003, 62118 |
| | ) | |
| Under Contract No. N62473-15-D-2421 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL

Appellant, KEAR Civil Corporation (KCC), has moved for summary judgment on all four counts of its consolidated complaint, in which it requests that the Board overturn the Navy's termination of the contract for default, award KCC additional money, and declare that the Navy's evaluation of KCC's performance was erroneous. Because there are disputed material facts, the Board denies the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

The following facts are undisputed or uncontroverted, except where noted.

1. The Navy awarded KCC the above-captioned contract on September 30, 2016, in the amount of $2,097,060. It was a design-build, firm fixed-price construction contract that included the conversion of four underground storage tanks to above ground storage tanks and the modification of one above-ground tank at the Salt Wells Propulsion Lab, Naval Air Weapons Station, China Lake, California. (Appellant's statement of undisputed material facts (ASUMF) ¶ 1; Navy statement of genuine issues of material fact (NSGIMF) ¶ 1; R4, tab 2 at 80)[1]

2. The contract provided for the completion of work within 380 days of award with liquidated damages of $1,264 per day for late completion. The initial completion date was October 16, 2017. Modification No. 02 (Mod. 02) dated July 23, 2018,

[1] Rule 4 citations are to the .pdf page number in the electronic file.

extended the completion date to January 12, 2018. (ASUMF ¶¶ 8, 54; NSGIMF ¶¶ 8, 54; R4, tab 12 at 14; tab 13 at 6-7)

3. On December 19, 2018, the contracting officer (CO) terminated the contract for default. The CO cited a variety of reasons for the termination, including:

a. KCC's failure to remove foreign made materials after being notified of Buy American Act violations;

b. A pattern of safety violations that continued after the Navy suspended work due to safety violations;

c. KCC's refusal to remove its site safety health officer and quality control manager;

d. Failure to provide daily quality control reports;

e. Inconsistent records that made it impossible for the government to tell if workers were properly paid and supervised; and

f. Failure to complete the project on time in that KCC was more than 11 months past the contract completion date and had completed work on only one of five tanks.

(R4, tab 22)

4. On February 22, 2019, KCC submitted a claim seeking 533 days of delay, $1,134,215, and withdrawal of an unsatisfactory Contractor Performance Assessment Report System (CPARS) rating. It also requested that the CO reconsider the termination for default. (R4, tab 136 at 9, 23)

5. On March 19, 2019, KCC filed a timely appeal of the default termination that the Board docketed as No. 62003.

6. On June 6, 2019, the CO denied the February 22, 2019 claim in its entirety (R4, tab 138). KCC filed a timely appeal on July 1, 2019, that the Board docketed as No. 62118.

7. More than two years after the filing of the initial appeal, on March 25, 2021, the Navy issued unilateral Mod. 07 that added 301 days and $419,262.58 to the contract. The modification stated that the Navy had hired an expert in delay analysis who opined that KCC was entitled to 163 days of non-compensable delay and 138 days of compensable delay. (R4, tab 261 at 1-3)

8. As an explanation for why it issued this modification so long after termination, the Navy states, among other things, that the 163 days of non-compensable delay recognized in Mod. 07 is time that KCC never requested (gov't opp. ex. 74 (statement of Jessica Garrett) ¶ 12). KCC does not dispute this in its reply.

9. Mod. 07 stated that the Navy had rejected Invoice 009 submitted on October 1, 2018, and had deducted these amounts from the contract in anticipation of assessing liquidated damages. The modification stated that the Navy had added this amount back onto the contract and that if KCC re-submitted the invoice the Navy would pay it. (Gov't opp. ex. 74 (Garrett Statement) ¶¶ 10, 14; R4, tab 261 at 2)

10. Mod. 07 changed the contract completion date from January 12, 2018 to November 9, 2018 (R4, tab 261 at 3). Thus, when the CO terminated the contract on December 19, 2018, instead of being approximately 11 months past the contract completion date, KCC was 40 days past due.

## DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). 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. *Id.* at 249. When considering a summary judgment motion, "all evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party." *Dairyland Power Co-op. v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994).

KCC's consolidated complaint contains four counts: 1) breach of the duty of good faith and fair dealing; 2) breach of contract; 3) wrongful termination for default; and 4) CPARS evaluation and rating. KCC states in its memorandum of law that the focus of its motion is Count III, the default termination, but, in its view, many of the issues that apply to Count III also apply to the other counts as well (app. br. at 7-8; app. reply at 1).

While KCC has raised a considerable number of issues, in the interest of moving these appeals forward, the Board will confine itself to the following conclusions that compel denial of KCC's motion.

### I. Disputed Material Facts

The first issue raised in the argument section of KCC's brief is an alleged Navy non-responsiveness to change order requests, requests for time extensions, and key

correspondence (app. br. at 10, 13). KCC contends that the Navy exhibited "blatant disregard for sound contract administration practices" (*id.* at 11-12) and that this "gross lack of responsiveness materially impacted KCC" (*id.* at 13). KCC cites numerous project documents to which the Navy allegedly never responded, or for which its response was "extremely delayed": ASUMF ¶¶ 99(a)-99(r) (serial letters); ASUMF ¶¶ 100(a)-100(u) (submittals); ASUMF ¶¶ 101(a)-101(d) (requests for information); and ¶¶ 102(a)-102(ff) (emails).

While KCC does discuss a few of these documents in its brief, KCC emphasizes quantity instead of explaining why the Navy had a duty to respond to each document and how the lack of a response caused a delay. The Navy has a variety of responses to these allegations, including:

1) The Navy did respond in a reasonable amount of time to KCC's letter or other document (NSGIMF ¶¶ 99(i), (m), (q), (r); 102(a), (d), (f), (k), (l), (o), (p), (q)-(t), (x), (y), (bb)-(dd)), or that it responded but KCC disagreed with the response (*id.* ¶¶ 101(b), (d));

2) The Navy did respond, but it may have been during a meeting or conference call (NSGIMF ¶¶ 99(a), (e), (j), (l); 102(c), (e)-(j)), or through another document such as a response to a request for information (RFI) (¶ 99(b), (f), (g);, ¶ 102(s));

3) The document in question did not need to be submitted for approval, or no response was required (¶¶ 99(c)-(d); 100(f)-(u));

4) The Navy did not receive the document (NSGIMF ¶ 102(b)); and

5) KCC has cherry picked the record; a full review of the record will demonstrate that the Navy cooperated with KCC and generally responded to KCC in a timely manner (gov't opp. at 12).

A few examples will suffice to illustrate the gap between the competing versions of the facts. In ASUMF ¶ 99i, KCC alleges that the Navy failed to respond to serial letter 15 dated February 8, 2018, concerning the flushing of tanks and pipes by the Navy. This letter, among other things, requests that the Navy inform KCC when it has completed the flushing. In ex. 27 to its response, the Navy has provided the Board with an email chain that includes an email from KCC on February 8, 2018 that appears to attach serial letter 15. The email states: "[t]he subject letter is attached for your review. Can you please send us documentation once the Government is complete with its flushing at Site 1?" The Navy responded to this email four days later on February 12, 2018, when it stated: "Site 1 is flushed as stated in RFI 013." Making all reasonable inferences in favor of the Navy as the non-moving party, there is sufficient evidence to conclude that the Navy did respond to serial letter 15.

In ASUMF ¶ 102l, KCC states that the Navy failed to respond to an April 19, 2018 email concerning material delivered off site, but KCC does not attach a copy of the email. The Navy states in its response that in this email KCC asked whether it would be paid for materials stored off site. The Navy has provided the Board with a May 1, 2018, letter in which it informed KCC that if KCC met certain specified conditions, the Navy would pay 80% for materials stored off site (gov't opp. ex. 50 at 2). Making all reasonable inferences in favor of the Navy as the non-moving party, there is sufficient evidence to conclude that the Navy did respond to the April 19, 2018 email.

In ASUMF ¶ 102o, KCC states that the Navy did not respond to an email dated July 3, 2018 but does not attach a copy of the email or explain what it was about. In its response, the Navy has provided us with what it represents is a copy of this email and the Navy's response later that same day. Both emails relate to pay application no. 1, or a contractor performance statement submitted in support of that application (gov't opp. ex. 53). Making all reasonable inferences in favor of the Navy as the non-moving party, there is sufficient evidence to conclude that the Navy did respond to the July 3, 2018 email.

In a separate alleged delay, KCC contends that it bid the project based on a 5-day work week, but post-award the Navy informed KCC that it would follow a "flex-Friday" schedule such that the project site would not be available every other Friday (ASUMF ¶¶ 36-40). This would have had the obvious effect of reducing available workdays by 10%. The Navy responds by agreeing that it did follow a flex-Friday schedule but that there was a process by which KCC could have requested access to the site on flex-Fridays. The Navy cites an RFI response and meeting minutes to document that this was communicated to KCC. According to the Navy, KCC simply failed to request access. The Navy cites deposition testimony from its construction manager that if KCC had made the request, the Navy would have provided KCC access to the site. (NSGIMF ¶¶ 37-38; app. supp. R4, tabs 56, 58; gov't opp. ex. 11 at 3-4)

KCC does not address flex-Fridays in its reply brief. After reviewing KCC's allegations, and the Navy's response, the Board concludes that there are disputed material facts as to which party is at fault for KCC not working on flex-Fridays.

Overall, the Board counts 71 instances in which the Navy states that there is a genuine issue of material fact (there are other facts that the Navy disputes, but it states that these are immaterial facts).

Undeterred, KCC presses on in its reply brief, but it does not challenge the Navy's version of the facts. KCC continues to focus on Count III of the complaint, stating that this "will assist the Board in not having to scour through the Navy's

recitation about its assertions of issues of material fact. . .” (app. reply at 2). KCC characterizes the Navy’s “alleged issues of material fact” as “an absurd argument. . .” (*id*. at 10). The Board disagrees with KCC. On summary judgment, it is not absurd for the non-moving to identify material facts in dispute and the Board must scrutinize the materials facts that are purported to be in dispute. The Board may only grant summary judgment if there is no genuine issue as to any material fact. *Lanclos v. United States*, 40 F.4th 1352, 1355 (Fed. Cir. 2022).

In lieu of a response to the Navy’s disputed facts, KCC focuses upon Mod. 07. In KCC’s reply brief, the Board counts 82 references to “Modification 07,” which we address next.

2. Modification 07

It would be difficult to overstate the importance KCC places upon Mod. 07. KCC contends that “Modification 07 was a ‘game changer’ in construction industry parlance and contained admissions by a Party Opponent against the Government’s interest from which adverse inferences are to be drawn” (app. reply at 13). But, as stated above, on summary judgment the Board draws reasonable factual inferences in favor of the non-moving party, not the moving party.

This is not to diminish or prejudge KCC’s evidence. But in the final decision, the CO did state that he took into account all 312 days of time that KCC had requested by that point in time, and that even if the Navy had granted all of that time, KCC would still have been beyond the completion date (R4, tab 22 at 2). As things stand after the issuance of Mod. 07, KCC was 40 days past the adjusted completion date when the CO terminated the contract and it had completed work at only one of five sites. If these facts are correct and KCC cannot show additional days of excusable delay, it would mean that KCC was in default on the date of termination.

While it is not uncommon for a contractor in litigation to prove that it was entitled to additional time, for the contractor to succeed it must do more than demonstrate entitlement to a fraction of the delay period. This is illustrated by the decision of the Court of Appeals for the Federal Circuit in *Empire Energy Mgmt. Sys., Inc. v. Roche*, 362 F.3d 1343 (Fed. Cir. 2004). In the underlying decision that was the subject of that appeal, the Board held that a September 1, 1993 termination was justified even though the contractor had proven entitlement to 53 days, which would have extended the completion date to September 12, 1993, or past the date of termination. The Board upheld the termination because the contractor would not have been able to complete the project by September 12, 1993. The Board found that the contractor would have required an additional 154 days to complete the project; thus 53 days of excusable delay was not enough. *Id.* at 1349-51 (citing *Empire Energy Mgmt. Sys., Inc.*, ASBCA No. 46741, 03-1 BCA ¶ 32,079 at 158,552). In affirming our

decision, the Federal Circuit considered contentions by the contractor that would have increased the number of excusable delay days to 106. But the court held that even if the contractor had proven 106 days, it would not have met its burden because it was still short of the required 154 days. *Id.* at 1351- 52.

In these appeals, Mod. 07 extended the completion date by 301 days. On the basis of this calculation KCC would still have been 40 days past the completion date with only one of five sites completed (according to the CO) at the time of termination. Thus, while the Board can understand why KCC considers Mod. 07 and the 301-day extension to be a dramatic development, in one sense it is less meaningful than the delays proved by the contractor in *Empire Energy*, because those delays at least extended the completion date beyond the date of termination. *Empire Energy*, 362 F.3d at 1349-51.

Because of all the disputed facts, there are many issues to be resolved. How much time KCC is actually entitled to, and how much additional time it would have taken KCC to complete the project, can only be determined after an evidentiary hearing. But based on the record developed to date, the Board cannot conclude that KCC is entitled to judgment as a matter of law that it was not in default for failure to complete the project on time.

3. Other Reasons for Default

KCC's failure to complete the project on time was only one of many reasons that the CO cited in the termination for default (SOF ¶ 3). The other grounds for termination included safety violations and Buy America Act violations. While many default terminations are based on either a failure to complete on time or a failure to make progress, the government may terminate for violations of other contract terms. *E.g.*, *Emiabata v. United States*, 792 Fed. Appx. 931 (Fed. Cir. 2019) (failure to provide insurance certificates and driving record); *Allen Eng'g Contractor Inc. v. United States*, 611 Fed. App'x 701 (Fed. Cir. 2015) (failure to maintain performance and payment bonds); *Kelso v. Kirk Bros. Mech. Contractors, Inc.*, 16 F.3d 1173 (Fed. Cir. 1994) (failure to maintain pay records); *H&R Machinists Co.*, ASBCA No. 38440, 91-1 BCA ¶ 23,373 (Buy American Act violations).

As the Navy observes in its brief, KCC failed to address the other grounds for default in its motion (gov't opp. at 5). In its reply, KCC contends that the CO's alleged failure to correctly analyze the schedule and the subsequent issuance of Mod. 07 "render the T4D wrongful to a degree that renders the non-schedule issues immaterial – or an impossibility . . ." (app. reply at 18). KCC does not cite any precedent that supports this contention.

The Board disagrees with KCC's novel statement of the law. When the government cites multiple grounds for terminating a contract for default, the government's case does not collapse like a house of cards simply because the contractor prevailed on one ground. As the Federal Circuit has explained, "[o]ur decisions have consistently approved default terminations where the contracting officer's ground for termination was not sustainable if there was another existing ground for a default termination, regardless of whether that ground was known to the contracting officer at the time of the termination." *Empire Energy*, 362 F.3d at 1357.

Accordingly, each basis for default cited by the CO in the final decision must be evaluated on its own merits. Thus, KCC's complete failure to address these independent bases for the default termination provides further support for denying this motion.

CONCLUSION

KCC's motion for summary judgment is denied.

Dated: January 25, 2023

MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

J. REID PROUTY
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. 62003, 62118, Appeals of KEAR Civil Corporation, rendered in conformance with the Board's Charter.

Dated: January 27, 2023

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