ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
McKenzie Engineering Company	)	ASBCA No. 53374
	)	
Under Contract No. DACA25-96-C-0044	)	

APPEARANCES FOR THE APPELLANT: Charles F. Merz, Esq.
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OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON RESPONDENT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Respondent has filed two motions for partial summary judgment in this construction case. In the first motion, respondent contends that there is no triable issue regarding appellant's acceleration claim. In the second motion, respondent argues that there is no triable issue regarding appellant's cardinal change claim. We deny both motions.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. By date of 18 September 1996, respondent awarded Contract No. DACA25-96-C-0044 to appellant to perform concrete work both upstream and downstream of a spillway and powerhouse known as Building No. 160 at the Rock Island Arsenal in Rock Island, Illinois (R4, tab C at 1; compl., ¶ 4; answer, ¶ 4).

2. The contract contained various standard clauses, including FAR 52.211-10 COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK (APR 1984); FAR 52.211-12 LIQUIDATED DAMAGES – CONSTRUCTION (APR 1984); and FAR 52.243-4 CHANGES (AUG 1987) (R4, tab C at 00700-101, 00800-1).

3. The Commencement, Prosecution and Completion of Work clause specified a performance period of 180 days from receipt of notice to proceed, and paragraph 1.4 of section 00800, EXCLUSION OF PERIODS IN COMPUTING COMPLETION SCHEDULES, provided

that "[n]o work will be required during the period between 15 November and 15 May inclusive, and such period has not been considered in computing the time allowed for completion." (*Id*. at 00800-1) It is undisputed that the original contract completion date was 25 October 1997 (compl., ¶ 5; answer, ¶ 5).

4. Appellant acknowledged receipt of notice to proceed on 28 October 1996 (R4, tab B-2).

5. It is undisputed that a significant flood affected the job site in the Spring of 1997 (R4, tab B, Findings of Fact, ¶ 9; Appellant's Response to the Government's Motion for Partial Summary Judgment (Opposition) at 3).

6. By letter to the administrative contracting officer dated 14 May 1997, appellant requested a two-week extension of time due to high river flow levels and the predicted time necessary before the river slowed sufficiently to permit appellant to place its marine equipment on the downstream end of the job site (Motion for Partial Summary Judgment (First mot.), attach. C).

7. It is undisputed that, during performance, appellant sought to use a clamshell bucket for underwater excavation, and that respondent declined to obtain for appellant a Clean Water Act regulatory permit allowing the use of such a device. The contracting officer admitted, in her decision on appellant's claim (*see* finding 14), that respondent's action "likely resulted in . . . inefficiency to your performance . . . , and likely increases in the time and cost of your performance." (McKenzie affidavit, ¶¶ 7, 8; R4, tab B at 6)

8. By bilateral Modification No. P00002 dated 1 October 1997, the parties agreed to certain changed work, to increase the contract amount and to extend the performance period "by six calendar days to and including 27 October, 1997" (R4, tab B-7 at 2). Thereafter, between December 1997 and June 1999, respondent issued nine unilateral, and the parties entered into one bilateral, modification, including Modification No. P00004 (*see* finding 12), incorporating various changes into the contract (R4, tabs B-8, B-9, B-11, B-17, B-34-39).

9. By letter to the administrative contracting officer dated 27 October 1997, appellant requested a time extension "for the remaining working time left in this year – up through November 15, 1997" because, *inter alia*, "high river stages in this 1997 working season greatly delayed the planned work on this contract" (R4, tab B-9 at 5).

10. By letter to the administrative contracting officer dated 4 November 1997, appellant asserted that it had incurred additional costs resulting from inefficiencies experienced during the working season (First mot., attach. D).

11. It is undisputed that drawings provided with the specifications were inaccurate (compl., ¶ 11; answer, ¶ 11).

12. By bilateral Modification No. P00004 dated 3 February 1998, the parties agreed to change paragraph 1.4 (*see* finding 3) to provide that "[n]o work will be required during the period between 15 November and 15 May inclusive and no work will be required during the period between 15 November 1996 and 22 June 1997 inclusive and such periods have not been considered in computing the time for completion." The parties also agreed that "because of this modification the contract completion date is extended from 31 October 1997 to 7 June 1998." (R4, tab B-9 at 2) It is undisputed that the modification was initiated by appellant's 27 October 1997 request (*see* finding 9).

13. It is undisputed that the contract was substantially complete on 23 February 1998 (R4, tab B-10).

14. By letter to the administrative contracting officer dated 1 September 1998, appellant submitted a certified claim for $1,003,772.26 (R4, tab B-19A). Thereafter, by decision dated 29 March 2001, the contracting officer denied the claim in part (R4, tab B). Appellant subsequently brought this timely appeal.

15. Respondent has not supported its motion with an affidavit. Appellant has tendered the affidavit of its owner, Robert McKenzie. He attested that respondent held:

> the contract completion date of October 27, 1997 and the daily non-completion penalty over [appellant's] head. No work time (penalty) relief was timely given for either the flood delays or the directive prohibiting the use of the clamshell . . . . Without getting anything more than verbal "maybes" from [respondent, appellant] finally wrote [respondent] in October requesting a contract time extension.
>
> Aware that no legal relief (in writing) was going to be given, and recognizing that liquidated damages were established in the contract, [appellant] had little or no choice but to prosecute work into the exclusion period (November 15-May 15). Working in that period took longer, was risky weather wise, and was clearly inefficient and costly to [appellant]. Since [appellant] was still without a time extension for the delay caused by the events stated above, working in the exclusionary period was required . . . .
>
> It was not until early (winter time) 1998, approximately eight months from the point when [appellant] first ran into an

> obvious excusable delay that it received a contract time extension.

(McKenzie aff., ¶¶ 10-12)

DECISION

A. *First Motion*

In its first motion for partial summary judgment, respondent focuses on paragraph six of the complaint, in which appellant alleges that, "[d]ue to abnormally high water in May, 1997 [appellant] was unable to mobilize to the work site until June 23, 1997. Although [appellant] requested an extension of time for completion of the project, the request for extension was not granted until February, 1998." (Compl., ¶ 6; *see* finding 12) Respondent asserts that all that is alleged is "a mere failure to grant a claimed extension at the time submitted," not a refusal to tell appellant until the end of the project what delays were excusable (First mot. at 4-5). For its part, appellant contends that it will prove at trial that "the Government held the established contract completion date and consequent time extension over McKenzie in an effort to get [appellant] to expedite the work." (Opposition at 6-7) Appellant urges that the flooding (*see* finding 5), the clamshell bucket prohibition (*see* finding 7), and defective specifications (*see* finding 11) all constituted excusable delay (*id*. at 7-9).

We deny the motion. We apply the familiar standard that summary judgment is only appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law, *e.g.*, *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987), mindful that our task is not to decide issues of fact, but solely to ascertain whether there are triable issues, *e.g.*, *General Dynamics Corp*., ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851 at 109,931-32.

Regardless of how we might decide the issue with a fuller record, applying summary judgment standards to the present record, we conclude that there are triable issues regarding whether the intervals between appellant's requests for time extensions and the modifications granting those requests were reasonable. The traditional elements of an acceleration may be summarized as "(1) excusable delay; (2) respondent's knowledge of such delay; (3) statements or acts that can be construed as an acceleration order; (4) notice that the order constitutes a constructive change; and (5) additional costs." *DANAC, Inc.*, ASBCA No. 33394, 97-2 BCA ¶ 29,184 at 145,152. With respect to the third element, while a "mere failure to grant an extension at the time [requested] will not constitute a constructive order to accelerate," *Norair Engineering Corp. v. United States*, 666 F.2d 546, 549 n.13 (Ct. Cl. 1981), a "failure or refusal to grant [a contractor's] requested extension within a reasonable time," *Fermont Div., Dynamics Corporation of America*, ASCBA No. 15806, 75-1 BCA ¶ 11,139 at 52,999-53,000, *aff'd*, 216 Ct. Cl. 448 (1978)

may be treated as the equivalent of such an order. *Cf. Olin Mathieson Chemical Corp*., ASBCA No. 7605, 1963 BCA ¶ 3983 at 19,693, *aff'd*, 179 Ct. Cl. 368 (1967) (declining to find on constructive acceleration claim "that 3-4 months was an unreasonable interval within which to respond to appellant's requests" for time extensions).

We read paragraph six of the complaint to allege, albeit elliptically, that respondent took an unreasonable amount of time to approve extension requests (*see* compl., ¶ 6; *see also* findings 8, 9, 12). In his affidavit, Mr. McKenzie makes the point more explicitly, stating that "[i]t was not until early (winter time) 1998, approximately eight months from the point when [appellant] first ran into an obvious excusable delay that it received a contract time extension" (finding 15). Mr. McKenzie also states that appellant was forced to work during the exclusionary period inasmuch as it had not been granted a time extension (*id*.). Respondent has failed to controvert these and other statement in Mr. McKenzie's affidavit, which go to the reasonableness of delayed granting of extensions. This consideration precludes summary judgment. The determination of the reasonableness of respondent's actions under all the circumstances is generally not appropriate on summary judgment. *E.g*., *Coastal Government Services, Inc.*, ASBCA No. 50283, 99-1 BCA ¶ 30,348 at 150,088 (determination of breach of the duty to cooperate allegations, which look to the reasonableness of Government conduct, inappropriate for summary judgment). For this reason, the motion must be denied.

B. *Second Motion*

In its second motion for partial summary judgment, respondent focuses upon paragraph 14 of the complaint. Appellant there alleges that "[a]s a consequential result of all of the changes, changed conditions [*see* finding 8], and interferences which occurred during . . . [appellant's] work, the project as performed by [appellant] differed materially from the project as bid by [appellant], thus constituting a cardinal change to the contract" (compl., ¶ 14). Respondent denied these allegations (answer, ¶ 14). While its present motion is styled as one for partial summary judgment, respondent urges us "to dismiss the claim stated in this paragraph, as it is patently clear from the pleadings that the changes to this contract, even when aggregated, do not rise to the level of a cardinal change." (Memorandum in Support of the Government's Second Motion for Partial Summary Judgment (Second mot.) at 1)

We deny the motion. While respondent asks for dismissal, we treat the motion as it is styled, *viz*., as one for partial summary judgment, inasmuch as it is based upon matters outside the pleadings. *See Giuliani Associates, Inc.*, ASBCA No. 51672, 00-1 BCA ¶ 30,780 at 152,008; FED. R. CIV. P. 12(b). We conclude that summary judgment is inappropriate, chiefly because paragraph 14 simply articulates a legal theory that falls within our breach of contract jurisdiction. It is familiar that:

> a cardinal change is a breach. It occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract.

Allied Materials & Equipment Co., Inc. v. United States, 569 F.2d 562, 563-64 (Ct. Cl. 1978). It is also familiar that breaches of contract are within our jurisdiction under the Contract Disputes Act, 41 U.S.C. § 601 *et seq*. *E.g., Malone v. United States*, 849 F.2d 1441, 1444 (Fed. Cir. 1988) (noting that the Act expanded boards' jurisdiction to include "breach of contract issues"). Hence, if the facts proven at trial establish what might otherwise be characterized as a cardinal change, we will treat it as a breach of contract and give relief accordingly. By contrast, if the evidence adduced establishes a claim that falls within the remedy-granting clauses of the contract, such as the Changes clause (*see* finding 2), then we can give relief under the contract. *E.g*., *Clearwater Constructors, Inc.*, ASBCA No. 45712, 96-2 BCA ¶ 28,495 at 142,294 (denying cardinal change claim for rock elevations as a separate claim because it was "redressable under the Differing Site Conditions and other remedy-granting clauses of the contract."). In any event, regardless of the legal rubric under which the changes might fall, we cannot agree with respondent's contention that, on the sparse record now before us, "it is patently clear . . . that the changes to the contract, even when aggregated, do not rise to the level of a cardinal change." (Second mot. at 1)

CONCLUSION

Respondent's first motion for partial summary judgment is denied. Respondent's second motion for partial summary judgment is denied.

Dated: 27 August 2002

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
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. 53374, Appeal of McKenzie Engineering Company, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals