ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Coronet Machinery Corp.	)	ASBCA Nos. 55645, 56899
	)	
Under Contract No. DAAD21-03-C-0005	)	

APPEARANCE FOR THE APPELLANT:	Alani Golanski, Esq. Weitz & Luxenberg, P.C. New York, NY
APPEARANCES FOR THE GOVERNMENT:	Craig S. Clarke, Esq. Army Chief Trial Attorney MAJ Carla T. Peters, JA CPT John Cho, JA Trial Attorneys

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

Pursuant to Board Rule 5, Coronet Machinery Corp. ("Coronet" or "appellant") moves for partial summary judgment on the issue of the government's liability for its unabsorbed home office overhead expenditures contending that there are no material facts in dispute on the liability issue and thus appellant is entitled to partial summary judgment as a matter of law. Additionally, appellant argues that there is no genuine dispute about the extent of the period of government-caused delay, during which appellant's production facility remained on standby. The government concedes liability with regard to whether appellant has established a *prima facie* case for entitlement under the relevant case law. However, the government disputes appellant's contentions about the extent of the period of government-caused delay during which appellant remained on standby and appellant's ability to obtain replacement work during the delay. For the reasons stated below, the motion is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 11 March 2003, Pine Bluff Arsenal ("government") awarded Contract No. DAAD21-03-C-0005 to appellant for the production of grenade bodies and pusher plates and associated delivery and testing of first article samples (R4, tab 1). By June the parties had agreed to separately deliver the pusher plates to the government for first article testing, as appellant had "received some of the material for the Pusher Plate and would like to proceed on that part only." (R4, tab 6) The Contracting Officer (CO)

issued Modification No. P00001, which set forth delivery dates for the production quantities of the pusher plates (R4, tab 12). Appellant's grenade bodies, however, failed first article testing twice before passing on 16 December 2003 (R4, tab 27).

2. Modification No. P00002 established the delivery dates for the grenade body assemblies (R4, tab 30). The government received a test sample of grenades from appellant sometime in January 2004, wherein it was discovered that the grenades could not be properly "crimped" on the production line without tearing the grenade bodies (R4, tab 31). The government added that appellant's sample grenades were within specification (R4, tab 31 at 2).

3. By letter dated 21 January 2004, the CO issued a notice to discontinue performance of the contract. The letter referenced FAR 52.242-17, GOVERNMENT DELAY OF WORK (APR 1984), a clause of the contract, which reads as follows:

> (a) If the performance of all or any part of the work of this contract is delayed or interrupted (1) by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract, or (2) by a failure of the Contracting Officer to act within the time specified in this contract, or within a reasonable time if not specified, an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption and the contract shall be modified in writing accordingly. Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption. However, no adjustment shall be made under this clause for any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an adjustment is provided or excluded under any other term or condition of this contract.

(R4, tab 32)

4. In response to appellant's concern regarding payments affected by the government delay, Modification No. P00003 added FAR 52.232-16, PROGRESS PAYMENTS (APR 2003) to the contract (R4, tab 40). Meanwhile, the record reflects that the parties were actively working to solve the production problems (R4, tabs 42-47).

5. By letter dated 19 April 2004 appellant conveyed the following:

> As you are aware, the drawing package called out aluminum alloy tubing 6061, temper as drawn. The Army has now determined that the drawing was defective and has asked Coronet to propose a price for an equitable adjustment to the contract to incorporate an annealing process for the aluminum alloy. The defective specification caused Coronet to fail two (2) First Article Tests, the scrapping of significant work in process, and delayed our production. The Army's directive of January 21, 2004 has further delayed our production (we do not agree that 52.242-17 is applicable to these delays).

(R4, tab 49) Accordingly, in addition to revising the unit and option prices per unit, appellant requested that the government immediately pay $37,038.18 to cover cost increases attributable to the change in material and "extraordinary and additional executive, administrative, manufacturing, and storage & handling expenses due to material issues" (*id*. at 2).

6. On 19 May 2004, the government issued bilateral Modification No. P00004, which partially exercised the option for additional quantities of grenade bodies and pusher plates and reimbursed appellant $34,498.18. Additionally, the modification added Line Item 0011 which stated:

> REIMBURSEMENT FOR DELAYING CONTRACTOR PERFORMANCE FFP
> THIS LINE ITEM COVERS ALL REIMBURSEMENT COST ASSOCIATED WITH GOVERNMENT DELAYING CONTRACTOR PERFORMANCE. COST INCLUDES BUT IS NOT LIMITED TO, LABOR HOURS SPENT FOR IN PROCESS PARTS TO BE SCRAPPED, ADDITIONAL SET UP AND BREAK DOWN COST OF MACHINERY, MATERIALS HANDLING AND STORAGE COST, ADDITIONAL TIME AND LABOR BY EXECUTIVE, ADMINISTRATIVE AND SUPERVISORY PERSONNEL. THE TOTAL DOLLAR AMOUNT TAKES INTO ACCOUNT THE DOLLAR VALUE OF SCRAP MATERIAL SOLD AS A RESULT OF THE REWORK EFFORT.

(R4, tab 53 at 4)

7. On 24 August 2004 appellant requested a second "Government Work Delay Notice" because after annealing the material as required by Modification No. P00004, appellant contended that the material was too soft to complete manufacturing of the contracted item (R4, tab 59). By letter dated 28 October 2004, the government issued the second stop work notice (R4, tab 67). The government later clarified, on 21 January 2005, that the stop work order "was only for line items associated with production of the grenade bodies, line items 0006 and 0008." It further advised that work had not stopped for the production of the line items for the pusher plates. (R4, tab 69)

8. Over the next several months the parties continued to work towards a viable solution to the production problems. On 18 March 2005, the government proposed changes to the specifications and requested that appellant provide revised pricing and delivery schedule information (R4, tab 71). Accordingly, the parties executed Modification No. P00006 on 28 June 2005, which incorporated the aforementioned changes into the contract (R4, tab 75).

9. By letter dated 2 August 2005 appellant submitted a "Request for Equitable Adjustment" (REA) to the government in the amount of $279,434.55 for unabsorbed overhead resulting from the contract delays. The REA covered unabsorbed overhead costs based on the "Eichleay Formula"[1] and 159 days of delay. The 159 days evidently represent workdays from 17 March 2004 to 28 October 2004. (R4, tab 76) On 19 September 2005 the government denied the request (R4, tab 83).

10. Production continued with the grenade bodies and appellant's first article test sample was approved on 22 November 2005 (R4, tab 86). However, on 6 December 2005, appellant expressed disagreement with the denial of its REA and requested that the parties seek to resolve the issue (R4, tab 87). The government responded, by letter dated 10 April 2006 reiterating that appellant's REA was without merit (R4, tab 92). By letter dated 12 June 2006, appellant filed a certified claim requesting $279,434.55 for "unabsorbed overhead relating to the Government's Work Stoppage under [the contract]" (R4, tab 95). The CO responded, by letter dated 4 August 2006, denying appellant's claim and directed appellant's attention to FAR 52.233-1, DISPUTES (R4, tab 96). Appellant contacted the contracting officer via email dated 8 August 2006 and stated, *inter alia*: "Again, we are not asking for equitable adjustment, instead we are looking to obtain unabsorbed overhead" (R4, tab 97). On 21 August 2006, the CO reiterated her denial of the claim and included the standard contracting officer's final decision appeal language found at FAR 33.211(a)(4)(v)

[1] The *Eichleay* formula is used to "equitably determine allocation of unabsorbed overhead to allow fair compensation of a contractor for government delay." *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1578 (Fed. Cir. 1994).

(R4, tab 101).

11. By letter dated 3 November 2006, appellant filed its notice of appeal with the Board. In its complaint, appellant requested recovery of unabsorbed overhead based upon two separate alleged delay day calculations. The first, labeled "Claim One" calculates unabsorbed overhead "through the full period of government-caused delay," which appellant contended was 930 delay days out of the total period of contract performance from 18 March 2003 to 11 May 2006 of 1151 days, and equated to $438,872.98
(compl. ¶ 91-94). Under "Claim Two" appellant stated: "Should the Board conclude that it is without jurisdiction to consider any amount beyond that submitted to the Contracting Officer...its home office overhead damages, being the unabsorbed overhead amount, is the sum of $279,434.55." (Compl. ¶ 100) In its answer to the complaint, the government denied appellant's contention that there were 930 delay days (answer ¶ 91).

12. Appellant filed a "Motion for Partial Summary Judgment" on the issue of the government's *Eichleay* liability for appellant's unabsorbed home office overhead, contending that there are no material issues in dispute regarding liability and "nor is there any genuine dispute about the extent of the period of Government-caused delay, during which Coronet necessarily remained on standby." The remaining issues of fact, appellant contends, "concern the computation of the quantum of damages to which Coronet is entitled." (App. mot. at 1) Appellant concludes in Paragraph 108 of its motion:

> For all of the reasons stated, Appellant respectfully submits that it is now entitled to partial summary judgment on the issue of the Government's *Eichleay* liability for unabsorbed home office overhead expenditures. There are no material facts in genuine dispute on the liability issue, and Coronet is entitled to partial summary judgment as a matter of law. [citations omitted]

Thus, appellant requested "a final factual submission of its accounting pursuant to the *Eichleay* formula...or a final hearing on damages before this Board."
(App. mot. at 28, ¶ 111)

13. The government responded as follows:

> The Government concedes that Appellant's motion has established the Government's liability under the Eichleay formula for Appellant's unabsorbed overhead expenditures. Specifically, the Government admits that (1) it caused disruption, suspension or delay in the performance of Appellant's contract and (2) that Appellant was on "standby"

> during the suspension, disruption or suspension period. Therefore, Appellant is entitled to partial summary judgment on the Government's liability as specifically alleged in Paragraph 108 of Coronet's Motion for Partial Summary Judgment.

(Gov't resp. at 1) However, the government asserted that there are genuine issues of material fact "about the extent of the period of Government-caused delay, during which Coronet necessarily remained on standby." The government stated further:

> The Government concedes that Appellant was on "standby" from January 21, 2004 until on or about May 19, 2004, during which a Government stop work order was in effect. (Rule 4, Tab 32). It also appears that Appellant was on "standby" from October 28, 2004 until on or about June 16, 2005, during which time a second Government stop work order was in effect. (Rule 4, Tab 67). Because this latter period of time falls outside of the period of delay alleged in Appellant's certified claim, it is not relevant here and the Board has no jurisdiction over that issue because it has not been presented to or addressed in the contracting officer's final decisions.

(Gov't resp. at 2)

14. After subsequent filings, the Board directed the parties to address the following:

> (1) whether appellant may recover for damages beyond the period covered by the stop work order; (2) whether the quantum may cover a delay period beyond that claimed by the contractor in its certified claim to the contracting officer; and (3) whether the government's concession as to entitlement encompasses and resolves the issue of the impracticability of the contractor to obtain sufficient replacement work during the delay period.

(Order 18 March 2009)

15. In its reply to the Board's 18 March 2009 order, the government answered the first two questions in the negative. Specifically, the government stated:

> It is also quite unfair for Appellant to expand its time period alleged for damages because Appellant limited its response to the Government's discovery request to accounting records for fiscal year 2004. (Rule 4, Tab 80, pg 1). As such this limitation restricted the Government's ability to fully access Appellant's accounting records and hindered the audit, as well as the Government's defense that Appellant did not sustain injury during the delay.

(Gov't reply at 7) The government, in an attempt to clarify its earlier concession, added that appellant "established a prima facie case for delay and disruption for the time period of March 17, 2004 thru October 28, 2004...." The government disputed "any time period outside of these dates because...all other dates deviate from Appellant's prior representations that 'it only requested relief for the year 2004.'" (Gov't reply at 3) The government further opined, without providing any specific evidence to support is position, that its concession does not resolve the issue of the impracticality of appellant obtaining sufficient replacement work during the delay period (*id*. at 8-10).

16. Appellant replied, contending that it may recover damages beyond the period covered by the stop work orders and the time period covered in its 12 June 2006 claim. Further, appellant averred that the government conceded all elements of entitlement, and the only remaining issues relate to quantum. As such, appellant concluded, the Board should "now permit Coronet to make its final factual submission quantifying Coronet's daily loss amount...pursuant to the *Eichleay* formula." (App. 8 April 2009 reply at 2, 9) Moreover, appellant believes that "summary judgment must be granted in full on the liability issue (including the issue of impracticability), because once the burden shifted the Government failed to meet its burden, or to proffer any evidence whatsoever." (App. 13 April 2009 reply at 3)

17. In order to preserve its position, by letter dated 13 April 2009, appellant submitted a claim to the contracting officer for all delay periods not expressly covered by the 12 June 2006 certified claim (11 March 2003 through 31 December 2003, and 1 January 2005 through 22 November 2005). On 5 August 2009, appellant filed a notice of appeal with the Board based upon the contracting officer's failure to issue a decision on its second claim. That protective appeal was docketed as ASBCA No. 56899, which has been consolidated with the instant appeal. By letter dated 31 August 2009, in its response to the government's comments on appellant's consolidation request, appellant added:

> [T]he Government in the ongoing appeal No 55645 has always been appraised [sic] of Coronet's complaint covering the full damages period, structured its discovery accordingly,

> and Coronet responded to the Government's requests. Now, mysteriously unsatisfied with its discovery and/or summary judgment motion practices [footnote omitted], the Government simultaneously concedes Coronet's entitlement to *Eichleay* damages (with only quantum to be decided) and seems befuddled by the meaning of its concession....

DECISION

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Catel, Inc.*, ASBCA No. 52224, 01-2 BCA ¶ 31,432 at 155,227. A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Before a tribunal can award *Eichleay* damages, it must ask the following:

> (1) was there a government-caused delay that was not concurrent with another delay caused by some other source; (2) did the contractor demonstrate that it incurred additional overhead (*i.e.*, was the original time frame for completion extended or did the contractor satisfy the *Interstate* three-part test); (3) did the government CO issue a suspension or other order expressly putting the contractor on standby; (4) if not, can the contractor prove there was a delay of indefinite duration during which it could not bill substantial amounts of work on the contract *and* at the end of which it was required to be able to return to work on the contract at full speed *immediately*; (5) can the government satisfy its burden of production showing that it was not impractical for the contractor to take on replacement work (*i.e.*, a new contract) and thereby mitigate its damages; and (6) if the government meets its burden of production, can the contractor satisfy its burden of persuasion that it was impractical for it to obtain sufficient replacement work. Only where the above exacting requirements can be satisfied will a contractor be entitled to Eichleay damages.

P.J. Dick Inc. v. Principi, 324 F.3d 1364, 1373 (Fed. Cir. 2003); *Satellite Elec. Co. v. Dalton*, 105 F.3d 1418, 1421 (Fed. Cir. 1997).

The government's entitlement concession is not what it appears to be. It is not a complete concession of all of the *P.J. Dick, Inc*. requirements that would entitle appellant to *Eichleay* damages. In its reply to the Board's questions, the government "conceded to questions 1-4, enumerated in *P.J. Dick, Inc*...." (Gov't reply at 9) Appellant construes this concession of steps 1-4 as a complete concession of entitlement by the government. We disagree. We must consider all six steps to determine if appellant is entitled to recover *Eichleay* damages. Appellant's motion would require us to jump ahead to the quantum recovery phase without allowing the government to conduct further discovery regarding whether appellant could have mitigated its damages during the claimed time period. We are unpersuaded by appellant's contention that the government has had an adequate opportunity to conduct discovery on the mitigation issue. The government has further maintained that it disputes the extent of the period of government-caused delay, during which appellant remained on standby (SOF ¶ 13). Thus, these issues are unresolved and material to the entitlement phase of the appeal.

Under summary judgment procedures "it is usually necessary for the nonmoving party to have an adequate opportunity for discovery, and summary judgment should not be granted where the nonmovant has been denied the chance to discover information essential to its opposition." *Environmental Chemical Corp*., ASBCA No. 54141, 05-1 BCA ¶ 32,938 at 163,178, quoting *Environmental Safety Consultants, Inc*., ASBCA No. 53485, 03-2 BCA ¶ 32,298. Accordingly, summary judgment is not appropriate at this time.

In light of appellant's protective claim and subsequent appeal filed on 5 August 2009, we need not decide at this time whether the quantum may cover a delay period beyond that claimed by the contractor in its initial claim to the contracting officer.

CONCLUSION

The motion is denied.

Dated: 13 November 2009

OWEN. C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continue)

I concur

MARK N. STEMPLER
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 Nos. 55645, 56899 Appeals of Coronet Machinery Corp., rendered in conformance with the Board's Charter.

Dated:

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