

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
American AquaSource, Inc. ) ASBCA No. 56677  
 )  
Under Contract No. W91GDW-08-D-4010 )

APPEARANCES FOR THE APPELLANT: William J. Spriggs, Esq.  
Katherine A. Allen, Esq.  
Kathryn V. Flood, Esq.  
Buchanan Ingersoll & Rooney PC  
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
CPT Tудо Pham, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS  
ON APPELLANT’S MOTION FOR RECONSIDERATION

American AquaSource, Inc. (AAS) moves for reconsideration of our decision of 22 September 2010 denying its motion for summary judgment. The government opposes the motion. Familiarity with the underlying decision is presumed.

To prevail on a motion for reconsideration, the moving party must establish a compelling reason for modifying the original decision. In determining whether this standard has been met, we consider newly discovery evidence, mistakes in our fact-finding, and errors of law. *Zulco International, Inc.*, ASBCA No. 55441, 08-1 BCA ¶ 33,799 at 167,319; *L&C Europa Contracting Co.*, ASBCA No. 52617, 04-2 BCA ¶ 32,708 at 161,816; *Danac, Inc.*, ASBCA No. 33394, 98-1 BCA ¶ 29,454 at 146,219.

AAS argues that we did not consider FAR 49.402-3 in reaching our decision. FAR 49.402-3(c) requires the government to set a new delivery date if it has “taken any action that might be construed as a waiver of the contract delivery or performance date,” while reserving the government’s rights under the Default clause. AAS argues that the government “gave signals...that could well be construed as a waiver of the August 1, 2008 delivery date” (mot. at 3), alleging that the government failed to promptly terminate the contract, actively engaged in negotiations with AAS to set a new delivery date, and allowed AAS to survey the land set aside for the water bottling plant. AAS also asserts that the government knew it was paying its Iraqi construction contractor a retainer of \$5,000 per day.

We are not persuaded, drawing all reasonable inferences in favor of the government as the nonmovant, that the government's failure to terminate the contract for 49 days after passage of the delivery date could reasonably have been construed as a waiver in this case under FAR 49.402-3. As pointed out previously, what is a reasonable time for the government to terminate after default depends upon the circumstances of each case and the government is allowed more time where the contractor abandons performance or where performance is impossible or unlikely. *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969). AAS was required to deliver 1,040,000 cases of bottled water on 1 August 2008. According to its proposal, AAS planned to purchase bottled water from a third party for the first quarter of the contract (SOF ¶ 3). There is not one shred of evidence that AAS ordered or attempted to order any bottled water. In our view, this could be construed as tantamount to abandoning the contract. Thus, we reject the contention on summary judgment that the government was required to set a new delivery date due to the delay in terminating the contract.

We are also not persuaded that the government's willingness to negotiate was a circumstance indicating forbearance (mot. at 3). Our review of the record, including the documents cited by AAS, revealed that the parties were at odds over payment of AAS's delay costs. The government demanded that AAS "[c]onsent to a no-cost settlement for equitable adjustments [sic] requests and a signed release of claims" (SOF ¶¶ 13, 17). AAS adamantly opposed signing a release and took the position that the government was liable for its delay costs (SOF ¶ 18). The government's final e-mail to AAS before terminating the contract asserted that it did "not intend to modify the contract to grant [AAS] an extension without a release of claims" (SOF ¶ 17). In our view, these exchanges could not reasonably have been construed as a waiver.

AAS next argues that the government was required to set a new delivery date because it allowed AAS to survey the site on 26 August 2008. Apparently AAS "visited the land and conducted a survey of the job site the Government allocated for the Contract" (answer, part II, ¶ 41). On 29 August 2008, just three days after the visit, the government advised AAS that it did "not intend to modify the contract to grant [AAS] an extension without a release of claims" (SOF ¶ 17). On 14 September 2008, AAS demanded that the government pay \$1,585,580 in delay costs (SOF ¶ 18). On 19 September 2008, the government terminated the contract for default (SOF ¶ 19). Given the continuing stalemate over liability for the delay costs, AAS could not have reasonably construed the site visit to be a waiver of the delivery date. Accordingly, the government was not obliged to set a new delivery date for this reason.

AAS lastly argues that the government should have set a new delivery date because the government knew it was paying its Iraqi construction contractor a retainer of \$5,000 per day. Drawing all inferences in favor of the government as the nonmovant, AAS took the risk that it would be able to persuade the government to extend the delivery date without signing a release of claims. There is no evidence that the government

directed or encouraged AAS to keep the contractor on retainer. Thus, AAS must bear these costs.

Accordingly, AAS's motion for reconsideration is denied.

Dated: 28 October 2010

---

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

I concur

I concur

---

MARK N. STEMLER  
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. 56677, Appeal of American AquaSource, Inc., rendered in conformance with the Board's Charter.

Dated:

---

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