ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Kolin Construction, Tourism, Industry and Trading Co., Inc.	)	ASBCA Nos. 56941, 57066
	)	
Under Contract No. FA5685-06-C-0029	)	

APPEARANCES FOR THE APPELLANT:	Mark E. Hanson, Esq. W. Stephen Dale, Esq. Smith Pachter McWhorter, PLC Vienna, VA
APPEARANCES FOR THE GOVERNMENT:	Richard L. Hanson, Esq. Air Force Chief Trial Attorney W. Michael Rose, Esq. Lt Col John D. Douglas, USAF Capt John M. Page, USAF Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON GOVERNMENT'S MOTIONS FOR JUDGMENT ON THE PLEADINGS, OR ALTERNATIVELY FOR SUMMARY JUDGMENT

In these consolidated appeals, Kolin Construction, Tourism, Industry and Trading Co., Inc. (Kolin or appellant) seeks recovery for delays to its work under a contract for the renovation of housing units at Incirlik Air Base, Adana, Turkey. In ASBCA No. 56941, Kolin claims $1,060,600.01. In ASBCA No. 57066, Kolin presently seeks $1,956,555.32, adjusted from the original claimed amount of $2,907,319.75. The government has moved for judgment on the pleadings or alternatively for summary judgment in each appeal. Appellant has filed in opposition to the motions, and has also furnished a declaration from its project manager, Mr. Ayhan Oner. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. In 1980, the United States and the nation of Turkey (GOT) entered into an agreement for "Cooperation on Defense and Economy." The agreement included three supplementary agreements. The one pertinent here was entitled: "Supplementary Agreement Number 3 Between the Governments of the United States of America and of the Republic of Turkey on Installations" (S.A. No. 3). Article VI of S.A. No. 3 provided that "[f]or purposes of this Agreement, material, equipment, provisions, supplies, services, and civilian labor required by the Government of the United States shall be

procured in Turkey to the extent feasible." Article VII, Paragraph 4 of S.A. No. 3 provided that "[c]onstruction of new buildings and other property incorporated into the soil at the [Turkish] installations and demolition, removal, alteration and modernization which change the basic structure of existing buildings shall be subject to prior approval by appropriate Turkish authorities." (R4, tab 1 at 16-17) The above provisions found expression in the subject contract to the extent indicated below.

2. The Department of the Air Force (government) awarded Contract No. FA5685-06-C-0029 to Kolin on 29 September 2006 for the improvement of family housing at Incirlik Air Base, Adana, Turkey. Under the contract appellant was to design the renovation of housing units and then renovate 235 units at the base in successive phases of construction. (R4, tab 15 at 1-5, tab 16)

3. Contract Line Item (CLIN) 0001 was the line item for the design of the project. It was priced in the amount of $893,944.75. The renovation work, CLIN 0002, was priced at $16,947,141.55. (R4, tab 15 at 3-6)

4. The Statement of Work (SOW) provided in pertinent part, as follows:

> **2.2 Phasing Milestone Summary:** The contractor shall provide the Government a comprehensive Project Management Plan and associated Project Schedules that demonstrate the contractor's capability to meet the Tier 1 design and construction milestones below. Task completion time is expressed as the number of calendar days after the contractor receives the Government Notice to Proceed. The design phase of the project shall be accomplished after the Government issues the contractor Administrative Notice to Proceed (ANTP) and the construction phase shall begin when the Construction Notice to Proceed (CNTP) is issued.
>
> ....
>
> **2.3 Planning Requirements and Considerations:** ... This is a design-build contract and the contractor is responsible for producing a final design that meets or exceeds all specifications, standards, building codes, and construction criteria required by the U.S. Government and the Government of Turkey. *Both Governments shall review and approve the contractor's design and the construction materials proposed for quality and adequacy.…*

(R4, tab 2, attach. 1 at 70-72) (Emphasis added)

5. Insofar as pertinent, Section H-1 of the contract stated the following:

> **Material Approval**
> (39 CONS/LGCA)
> *This contract may require Turkish General Staff (TGS) material approval.* The contractor shall submit completed Material Lists to the Contracting Officer within 30 days after contract award. Notice to Proceed shall be issued within 30 days after receipt of TGS approval. *Receipt of TGS approval may take up to 9 months or longer. If a Notice to Proceed is not issued within 9 months of the date of submitting the Material Lists to Contracting Office, then after the notice to proceed is issued, the contractor may claim an economic price adjustment covering the increased price between the end of the ninth month and the actual date of issuance of notice to proceed.*
> Economic price adjustments are not claimable for any price increases within the first 9 months after the contract award, if notice to proceed is not issued during the first ninth [sic] month period.

(R4, tab 15 at 11) (Emphasis added)

6. The contract also included FAR 52.242-14, SUSPENSION OF WORK (APR 1984); FAR 52.242-17, GOVERNMENT DELAY OF WORK (APR 1984); FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); and FAR 52.243-4, CHANGES (AUG 1987) (R4, tab 15 at 6, 12, 20).

7. By memorandum to Kolin dated 17 October 2006, the contracting officer (CO) advised that in accordance with US/GOT agreements, approval of the material list was required by the Turkish General Staff (TGS), that the notice to proceed (NTP) would not be issued until the material list was approved, and that in the event that the NTP was not issued within nine months from the date of the submission of the list, the contractor could claim a price adjustment for increases between the end of the ninth month and the actual date of issuance of the NTP, as per the contract above. The CO also requested that appellant provide the list to the government in 6 sets if appellant did not propose importation of products and in 14 sets if appellant did propose importation of products. The material list was to be provided no later than 20 January 2007. (R4, tab 17)

8. By separate memorandum dated 17 October 2006, the CO issued to appellant a limited (administrative) notice to proceed "with all material submissions for Host Nation Approval (HNA) and required paperwork through TuAF [Turkish Air Force]." The CO also stated that separate notices to proceed would be issued for the design phase (CLIN 0001) and the construction phase (CLIN 0002) of the project. (R4, tab 18)

9. On 31 October 2006, the CO issued to Kolin a notice to proceed with performance required by CLIN 0001 – Design, to be completed no later than 235 calendar days after receipt of the notice to proceed (R4, tab 19).

10. On 7 May 2007, appellant sent to the government its material list as well as drawings, specifications, calculations and contract documents (100%). The material list was specifically identified as "6 set (without importation)." (R4, tab 22) The material list contained three parts: List 1, "Permanent Import Items"; List II, "Temporary Import Items"; and List III, "Material and Equipments [sic] to be Purchased from Local Sources." As far as we can tell, there were no imports identified on any portion of this list.

11. The record is not clear whether the government approved or rejected the material list in whole or in part before forwarding it to the TGS for approval. It appears that Kolin and the government did have meetings regarding the proposed material for the project, at which the parties discussed whether certain items proposed by appellant to be purchased locally met the specifications. It appears that the government was of the view that some of these items did not meet the specifications and should be imported. According to the declaration of appellant's project manager, Mr. Oner, the government directed Kolin to procure certain imported items (56941, app. opp'n, attach. 1, decl. ¶ 4 (Oner decl.)).

12. In a memorandum dated 11 May 2007, the CO issued a limited administrative notice to proceed with all material submittals for CLIN 0002 of the contract. The government said it expected the first submission within 5 calendar days, and noted that a separate notice to proceed would be issued for the contract's construction phase. (R4, tab 21)

13. On 11 July 2007, the parties entered into Modification No. P00001. The purpose of the modification was stated on page 3 of 4 ("Modification Text") as follows: "The purpose of this modification is to delete two each Proto-Type MFH Units from the contract Specifications since the government no longer requires these 2 Proto-Type Military Family Housing (MFH) Units to be constructed. " (R4, tab 23 at 3 of 4) The total amount for CLIN 0002 was reduced in the amount of $103,227.63 (*id*. ¶ B). The modification also changed the delivery date for CLIN 0001 from 235 days "ADC" (presumably "after date of contract") to 29 June 2007, and changed the delivery date for CLIN 0002 from 681 days ADC to 27 June 2009 (*id*. at 2 of 4, § F). The modification noted that the delivery date of 27 June 2009 for CLIN 0002 was an estimate based upon Kolin's revised design schedule, and the actual construction completion date would be determined when the construction notice to proceed was issued (*id*. at 3 of 4, § D).

14. Modification No. P00001 also included a release of claims in the following language:

> In consideration of this modification agreed to herein as complete equitable adjustment for all work associated with this agreement, the contractor hereby released [sic] the Government from any and all liability under this contract for further equitable adjustment attributable to such facts or circumstances giving rise to the modification. This release of claims for this modification agreed to be full and complete with the following exception (list below or state none).

No exception was listed. (R4, tab 23 at 4 of 4)

15. In July 2007 the parties also entered into Modification No. P00002. Insofar as pertinent, Block 14 on page 1 of 3 stated as follows: "The purpose of this modification is to incorporate VECPs #1-4 into the contract. See Summary of Changes for additional information." (R4, tab 24) The total contract price was reduced in the amount of $67,573.11 (*id*. at 2 of 3, § B). The modification also repeated the changes in delivery dates for CLIN 0001 and CLIN 0002 that were set out in Modification No. P00001. The modification at 3 of 3 under Section C also included the same release language set out in P00001 and no exception was listed.

16. In a communication to the United States Embassy dated 27 August 2007, the GOT advised that it had approved the material list and drawings for the project. The approved material list contained three parts: List 1, "Permanent Import Items"; List II, "Temporary Import Items"; and List III, "Material and Equipments [sic] to be Purchased from Local Sources." As far as we can tell, the approved list was identical in all material respects to the one submitted by appellant on 7 May 2007 that contained no imports. (R4, tab 25) The government advised Kolin by email dated 30 August 2007 that the material list had been approved (R4, tab 26).

17. The CO issued to appellant the construction notice to proceed (CNTP) on 6 September 2007. Kolin was to complete the work no later than 681 calendar days after receiving the CNTP. (R4, tab 27)

18. In September 2007 appellant began construction work, and attempted to install the imported items directed and/or approved by the government that appellant had ordered. The Turkish Air Force (TAF) did not allow appellant to use these materials or to bring them on the site (Oner decl. ¶¶ 7, 8). By memorandum dated 4 September 2007, the government advised its Air Force contractors that the TAF had established a "new policy" regarding the use of imported materials at Incirlik Air Base—imported materials were being held and not allowed on the base. The record is not clear on the extent to which, if at all, this new policy deviated from previous TAF policy or from the US/GOT

agreement under S.A. No. 3. The government stated that it did not control access to the base, that it was discussing the matter with the Turkish General Staff and that the United States government should not be held liable for cost increases based on items held by the TAF. (R4, tab 28)

19. By letter to the CO dated 26 September 2007, Kolin responded to the government's 24 September 2007 memorandum. Appellant stated that it had already purchased certain imported materials based upon the approval of the United States government and needed them presently for the construction. Kolin advised that it could not proceed with any work except demolition, and that work on Phase 1 and on other phases would be delayed until Kolin received approval from the GOT to use the imported materials approved by the government. Appellant also requested direction on whether to continue purchasing imported materials. (R4, tab 31)

20. In the weekly meeting on 27 September 2007, the parties discussed this matter. According to appellant, appellant requested permission to cease further importation of the materials approved by the government, but the CO directed appellant to continue importation (Oner decl. ¶¶ 9, 10). According to the government's notes of the meeting, appellant "was ensured [sic] by contracting that they will not experience a loss for ordered items not allowed on base. Appellant was instructed to continue ordering items on the TAF approved material list." (R4, tab 33) Appellant also sent a letter to the CO the same day, reiterating that its work was dependent upon the imported materials and that its work schedule would be affected from 29 September 2007. Appellant reserved its rights to compensation. (R4, tab 32)

21. At the weekly meeting of 1 November 2007, it was noted that the TAF had directed Kolin to remove imported EMT (apparently a type of electric tubing or conduit) from the lay-down area, and also inquired about the EMT already installed, stating that the existing lines may have to be removed (R4, tab 35). Appellant proposed to the government that appellant be permitted to use Turkish PVC conduit instead of the imported EMT; the government rejected this proposal (Oner decl. ¶¶ 14, 15).

22. At the meeting of 16 November 2007 the government directed Kolin to "re-submit the entire material list for TGS approval ASAP. ...All items not produced in turkey [sic] need to be moved to list one with a justification and specs" (R4, tab 36 at 2, ¶ 3(1)). This direction was reiterated at a meeting on 20 November 2007, the government noting that equivalents or a substitute will not be allowed on water heaters, HVAC units and other items so "strong justifications must be made" (R4, tab 37 at 2, ¶ 6). Action Item No. 3 for the meeting stated as follows: "Material lists for future projects will be more closely scrutinized to use materials produced and procured in Turkey" (*id*. at 2). By memorandum to all "LGCA Contractors" dated 10 December 2007, the government confirmed these revised procedures for submission of material lists and related matters (R4, tab 42).

23. Kolin furnished the revised material list to the government on 29 November 2007 (R4, tab 38), and the government forwarded the list to the Turkish Ministry of Foreign Affairs on or about 5 December 2007. Insofar as pertinent, the government's cover letter to the Turkish Ministry stated as follows:

> This revised List 1 is been submitted [sic] in accordance with instructions from the Ministry of Foreign Affairs after bilateral negotiations involving the interpretation of the 2002 Construction Circular in regards to importations.

(R4, tab 39 at 4) The record does not contain this 2002 Construction Circular.

24. By letter to the government dated 18 December 2007, appellant stated that it did not agree with the government's position in its 24 September memorandum that the United States should not be liable for increased costs because construction items were held by the TAF. Appellant also disagreed with the government's position that work had not been suspended under FAR 52.242-14. Kolin stated that its work had been disrupted since 30 October 2007. Finally, appellant stated that once the disruption ended, it would submit a request for equitable adjustment for losses incurred. (R4, tab 43)

25. By email to appellant dated 29 January 2008, the government advised that the TAF had approved use of import items under Kolin's contract (R4, tab 45). The notes of the 31 January 2008 weekly meeting stated that the material list had been approved, construction would continue and appellant would be at full capacity after remobilization of its work force by the middle of the next week (R4, tab 46, ¶ 3(i) at 2).

26. On 14 February 2008, appellant provided the government with back-up information to support its request for time extension that was apparently made at a meeting on 12 February 2008 (R4, tab 47).

27. On 15 February 2008, the government issued a CNTP for Phase 3 of the contract (R4, tab 48). By letter to the government dated 25 February 2008, appellant contended that the work was suspended from 20 February 2008 to 26 February 2008 due to a security investigation (R4, tab 51). By email to the government dated 4 March 2008, appellant stated that work had been delayed while it waited for a digging permit (R4, tab 52).

28. By three memoranda to appellant dated 19 March 2008, 7 April 2008 and 7 April 2008, the CO agreed to grant appellant a time extension of 133 days for Phase 1, 99 days for Phase 2 and 73 days for Phase 3 (R4, tabs 55, 57, 58).

29. On 21 April 2008, Kolin submitted what it described as a disruption claim to the government. Appellant sought a total of $1,060,600.01 based upon work disruption and delay caused by the importation controversy. It did not provide a claim certification

as required by the CDA. (R4, tab 61) The government rejected the submission because it lacked a CDA certification, and also stated that the claimed delays were outside the control of the government (R4, tab 65).

30. On 24 April 2008, the government issued a suspension of work for Phase 2 and Phase 3 based upon safety violations, failure to follow the quality control plan, the execution of work without approved shop drawings and for punch list items not properly corrected. The suspension was lifted on 1 May 2008. (R4, tab 66)

31. On 5 May 2008, appellant resubmitted its disruption claim for $1,060,600.01 and included a CDA certification. Appellant claimed costs of idle equipment and crew in the amount of $657,316.94, additional indirect costs in the amount of $207,343.48, and lost profit in the amount of $195,939.59. (R4, tab 67 at 5, 6)

32. Based upon its 5 May 2008 claim, Kolin also requested additional time extensions by letter dated 7 May 2008. Appellant proposed new start and finish dates for each phase of the project. (R4, tab 68) Appellant restated its request for time extension by letter dated on 16 June 2008 (R4, tab 74).

33. The CO issued a decision (COFD) dated 11 September 2008 on appellant's claim for time extensions. In addition to the time previously granted (SOF ¶ 28), the government granted appellant 26 days for Phase 1; 31 days for Phase 2; and 16 days for Phase 3. The decision stated new start and completion dates for each phase of the project. (R4, tab 86 at 2)

34. Kolin responded to the COFD on 14 October 2008. Appellant requested a re-evaluation of various start and completion dates. Appellant stated it would await the CO's re-evaluation before appealing to the Board. (R4, tab 89 at 6)

35. By memorandum to appellant dated 2 December 2008, the CO "recommended" new start and completion dates that she said met or exceeded Kolin's request (R4, tab 98). It is unclear whether this memorandum served to modify or withdraw the COFD. Appellant agreed with the new dates set forth by the CO, agreed to sign a contract modification that would incorporate these dates and also agreed not to appeal to the Board (R4, tab 99).

36. On 29 December 2008, appellant submitted additional information to the government regarding its 5 May 2008 monetary claim. The total amount of the claim, as revised, was $1,060,676.85 and appellant included a new CDA certification. (R4, tab 101)

37. In February 2009, the parties entered into Modification No. P00006. On page 2, the purpose of the modification was stated as follows: "The purpose of this modification is to extend the period of performance of construction portion of this

contract at no cost to the Government or to the Contractor as a result of decision [sic] previously made and set forth in the CO's letters, dated 19 March 08, 7 Apr 08, and 11 Sep 08." On page 3, the modification included a release in the following language:

> In consideration of the modification agreed to herein as complete equitable adjustment for all extensions approved with this agreement, the contractor hereby releases the Government from any and all liability under this contract for further equitable adjustment attributable to such facts or circumstances giving rise to the modification. This release of claims for this modification agreed to be full and complete without any exceptions. The contractor hereby releases the United States Government from any and all claims arising from this modification.

However, in Block 14 on page 1 of the modification, Kolin added and signed the following notation:

> We had mentioned our disagreement with modification 6 with our letter K-C0601-A-0208 dated 14 October 2008. Our disagreements were evaluated by CO and replied by a letter having an offer for a solution in dated 02 Dec. 2008 which was acceptable by us. Actually this offer of CO has become the basis for Modification no. 7. We hereby declaring that we are signing modification 6 <u>not because we agree with it</u> but because of the e-mail message of CO sent: Wednesday Feb. 11, 2009 5:59 PM Subject: Modification P00007 changed and saying ''<u>No further action on mod P00007, until mod. P00006 is completed.</u>"

(R4, tab 110) (Emphasis in original)

38. Bilateral contract Modification No. P00007 added work, deleted work and extended Phase 1 by an additional 61 days, Phase 2 by an additional 61 days and Phase 3 by an additional 76 days (R4, tab 111 at 3 of 8, ¶ 1). The contract price was also increased in the amount of $105,662.90 (*id*. at 4 of 8, ¶ 4). This modification also contained release language similar to that above, but appellant lined out the release and replaced it with the following:

> [N]ot acceptable by contractor[;] the paragraph shall be as below:
>
> Release of claims: With this modification, the contractor has been given in total for all time extension requests until 2nd Dec. 2008 and the contractor hereby

> releases the Government from any further time extension request for this period.

(R4, tab 111, at 4 of 8 bottom of page)

39. By letter to the CO dated 13 March 2009, Kolin requested "initiation of discussions" for an equitable adjustment based upon Modification Nos. P00006, P00007 and proposed P00008, and also regarding a request for an overall time extension of the contract from 819 days to 1212 days (R4, tab 113 at 1). An equitable adjustment amount was not quantified in this letter.

40. Modification No. P00008, entered into by the parties in March 2009, added work, deleted work and granted a 37-day time extension for weather delays and an 8-day time extension for COMM manholes in Phase 4 (R4, tab 114 at 3 of 7, ¶ 1). The total contract price was increased in the amount of $7,428.13 (*id*. at 2 of 7, bottom of page). The modification contained release language similar to that provided in earlier modifications, ending with the following. "This release of claims for this modification agreed to be full and complete (except for _____)." After the words "except for," Kolin added: "Equitable adjustment request of Contractor's increased costs due to change in contract completion date and extended execution period (Kolin letter dated 13 March 2009 ref. no. K-C0601-A-0250). Kolin is keeping all of his rights reserved and not releasing Government from his claims related above mentioned subject." (*Id*. at 3 of 7, bottom of page)

41. Bilateral Modification No. P00010 added work, deleted work and granted appellant a time extension in the amount of 15 days for Phase 5 due to delayed and changed work (R4, tab 121 at 3 of 11, ¶ 1). The total contract price was decreased in the amount of $1,843.45 (*id*., ¶ 2). The Modification included the following release language similar to that provided in earlier modifications, ending with: "This release of claims for this modification agreed to be full and complete (except for _____)." After the "except for" Kolin added: "Equitable adjustment request of Contractor's increased costs due to change in contract completion date and extended execution period (Kolin letter dated 13 March 2009 ref. no. K-C0601-A-02[5]0). Kolin is keeping all of his rights reserved and not releasing Government from his claims related above mentioned subject." (*Id*., *see* under ¶ 2)

42. By COFD dated 16 June 2009, the CO denied appellant's 5 May 2008 monetary claim. The decision stated, *inter alia*, that the delay asserted by appellant was caused by import restrictions imposed by the GOT and not by the United States, and that the delays were excusable but not compensable. (R4, tab 122)

43. By separate COFD dated 16 June 2009, the CO denied appellant's request dated 13 March 2009 (SOF ¶ 39). The CO stated, *inter alia*, that the time extensions granted by the government did not warrant any contract price increases. The CO did not

rely upon any of the releases in the above modifications as a bar to appellant's request. (R4, tab 124)

44. On 14 September 2009, Kolin filed a notice of appeal from the CO's denial of its 5 May 2008 claim and from the denial of its 13 March 2009 "request." The appeal from the denial of the 5 May 2008 claim was docketed as ASBCA No. 56941. The appeal from the denial of the 13 March 2009 request was docketed as ASBCA No. 56943.[1] Kolin also appealed the 16 June 2009 CO denial of a currency exchange rate claim (R4, tab 123) that was docketed as ASBCA No. 56942. This appeal was later withdrawn by Kolin and dismissed by the Board.

45. In November 2009, the parties executed another contract modification. Block 2, Standard Form 30, does not contain the number of this modification but we presume for present purposes that it was the next numbered modification, P00011. Modification No. P00011 added work, deleted work and granted a time extension in the amount of 7 days for Phase 6, but decreased the performance period in Phase 7 by 7 days due to the early turnover of Phase 7 clusters. The total contract price was also increased in the amount of $13,869.90. (R4, tab 129 at 3 of 9, ¶¶ 2, 3, 4) This modification also contained release language similar to that found in earlier modifications, ending with: "This release of claims for this modification agreed to be full and complete (except for _____)." After the "except for" language Kolin added: "Equitable adjustment request of Contractor's increased costs due to change in contract completion date and extended execution period (Kolin letter dated 13 March 2009 ref. no. K-C0601-A-0250). Kolin is keeping all of his rights reserved and not releasing Government from his claims related above mentioned subject." (*Id*., *see* under ¶ 4)

46. On 1 December 2009, appellant submitted a certified claim for equitable adjustment to the CO as a restatement of matters identified in its 13 March 2009 request. Kolin asserted the following causes of delay: delay due to the late issuance of the ANTP, design period delays and the late approval of the design and material list by GOT; and delay due to Modification Nos. P00006, P00007, P00008, P00010, and P00011. (R4, tab 133 at 2) Appellant sought an equitable adjustment in the amount of $2,907,319.75 and a time extension of 446 days (*id*. at 1, 3).

47. By COFD dated 11 December 2009, the CO denied appellant's claim. The CO addressed the claim on the merits and did not rely on any releases to bar appellant's claim. (R4, tab 135) Kolin filed a notice of appeal from this COFD which was docketed as ASBCA No. 57066.

[1] It appears that appellant's 13 March 2009 request did not meet the requirements of a claim, and the Board dismissed ASBCA No. 56943.

Appellant's Second Amended Complaint

48. In its second amended complaint relating to ASBCA No. 56941, appellant alleged as follows: that appellant submitted a material list to the government for the review and approval of the GOT/TAF; that said list contained only local items from Turkey and the GOT/TAF approved this list (¶ 36); that the government directed appellant to import certain items that were not on this list (¶¶ 34, 35); that the government's actions were without regard to appellant's list as approved by the GOT/TAF (¶ 37); that appellant thereafter attempted to bring to the site and to install the imported items approved by the government (¶ 38); that the GOT/TAF subsequently directed appellant to remove the imported items from the site and prohibited Kolin from using such material and bringing it on the site (¶ 39); that the appellant provided the government with prompt notice of cost and time impact to the job regarding this matter (¶ 40); that the CO orally directed appellant to continue to import items and warranted payment for these items (¶ 42); that appellant proposed to the government that it be allowed to use only Turkish products (¶ 46); that the government denied this request and directed appellant to continue to purchase imported items (¶ 47); that the government knew or should have known that its direction to appellant would conflict with the relevant US/GOT agreements and disrupt and delay appellant's work (¶ 51); that the government's actions constituted a disregard of the relevant US/GOT agreements (¶ 52); that the subject conflict was a conflict that the government itself had created (¶ 54); that pending the Turkish hold on imported items, appellant requested that the government suspend the work but the government refused to do so (¶ 55); that the government directed appellant to submit another material list to the government for the review and approval of the GOT/TAF, now including imported materials, and that appellant provided this list (¶¶ 56, 57); that the government advised appellant in late January 2008 that the GOT/TAF had approved the new list (¶ 59); and that the above actions and inactions of the government caused Kolin to incur additional costs due to the delay and disruption of its work for which the government is responsible under the Changes, Government Delay of Work and/or Suspension of Work clauses (¶ 63). Appellant's second amended complaint relating to ASBCA No. 57066 incorporated by reference the allegations above and alleged excusable and compensable delay due to government changes to the design period and due to contract modifications (¶¶ 65-70). The government's consolidated answer denies, in whole or in part, most of these allegations (*e.g.*, ¶¶ 34, 35, 37, 45, 46, 47, 49, 50, 54, 56, 57, 58, 59, 65-70).

DECISION

ASBCA No. 56941

1. Motion for Judgment on the Pleadings

As we stated in *UniTech Services Group, Inc.*, ASBCA No. 56482, 10-1 BCA ¶ 34,362 at 169,695:

> We apply the same standard to a motion for judgment on the pleadings as to one to dismiss for failure to state a claim pursuant to Rule 12(b)(6). In reviewing the motion:
>
> > We must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff. [Citation omitted] To state a claim, the complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1966, 167 L.Ed.2d 929 (2007). The factual allegations must be enough to raise a right to relief above the speculative level. *Id.* at 1965. This does not require the plaintiff to set out in detail the facts upon which the claim is based, but enough facts to state a claim to relief that is plausible on its face. *Id.* at 1974.
>
> *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009).

"It is, of course, settled that absent fault or negligence or an unqualified warranty on the part of its representatives, the Government is not liable for damages resulting from the action of third parties (citations omitted)." *Oman-Fischbach Int'l v. Pirie*, 276 F.3d 1380, 1385 (Fed. Cir. 2002). However, appellant's complaint alleges actions and inactions of fault or negligence on behalf of the government, and for purposes of this motion we must presume them to be true. We also note that the contract itself suggests that the government may be liable to pay a price adjustment attributable to GOT material list approval delay and a resultant delay in the issuance of the NTP (SOF ¶ 5). Applying the above legal standard, we believe that appellant has alleged facts that provide a basis for relief that is plausible on its face and above the speculative level. Accordingly, we must deny the government's motion for judgment on the pleadings.

2. Motion for Summary Judgment

Summary judgment is properly granted only 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 (Fed. Cir. 1987). In determining whether there are issues of material fact, any significant doubts are resolved in favor of the party opposing the motion. *Id.* The non-moving party must, however, do more than rely on conclusory statements and bare assertions. It must set out specific facts showing the existence of a genuine issue of material fact. *Mingus*, 812 F.2d at 1390-91.

The government appears to argue that there cannot be an issue of material fact on this record because it is undisputed that the GOT imposed and enforced the import restrictions (gov't mot. at 2-3, 9-10). While it is undisputed that the GOT imposed and enforced the import restrictions, these facts are not dispositive of appellant's claim. Appellant's claim—supported by the Oner declaration—is that the government's wrongful actions or inactions with respect to the material list led the GOT to impose the restrictions that caused the ensuing performance delays under this contract. "The determination of delay causation is a question of fact." *International Fidelity Insurance Co.*, ASBCA No. 44256, 98-1 BCA ¶ 29,564 at 146,551. The record shows that the parties dispute the facts relating to delay causation. Hence, there are genuine, material facts in dispute that preclude the grant of summary judgment.

The government relies heavily on our decision in *Proje-Insaat Limited Sirketi*, ASBCA Nos. 16140, 16141, 72-1 BCA ¶ 9191, in which the Board denied a contractor claim for increased costs based on Turkish import restrictions. *Proje-Insaat* is factually distinguishable. In *Proje-Insaat* there was no contractor claim that the United States government was responsible for the delays. However this is the essence of appellant's claim here.

The government alternatively contends that even if it was responsible in part for performance delays, these delays were concurrent or intertwined with the undisputed delay caused by the actions of the GOT/TAF so that appellant may not recover as a matter of law (gov't mot. at 12-13). However as we understand appellant's claim, the GOT/TAF is not an independent or separate cause of delay that may be applied concurrently against any government delay. Rather, appellant asserts—supported by the Oner declaration—that the Turkish hold on imported product was in fact caused by the government. Appellant asserts that but for the government's wrongful actions and/or inactions there would not have been any hold on appellant's materials in the first instance and there would not have been any delay to appellant's work. However, given that the parties dispute these alleged government actions and/or inactions and their nature and effect, we must conclude that there are genuine, material disputed facts on this record and the government has not shown it is entitled to summary judgment.

ASBCA No. 57066

1. Motion for Judgment on the Pleadings

Appellant's complaint under ASBCA No. 57066, *inter alia,* incorporates the allegations asserted with respect to ASBCA No. 56941. Insofar as we have concluded above that those allegations are sufficient to defeat the government's motion for judgment on the pleadings in ASBCA No. 56941, we likewise so hold under this appeal. Appellant's second amended complaint also asserts entitlement to time-related costs based upon the government's issuance of contract modifications that changed the work and extended the completion date of the project. Applying the appropriate legal standard and drawing all reasonable fact inferences in favor of appellant, we believe that appellant has alleged facts in its complaint that provide a basis for relief that is plausible and is above the speculative level. Accordingly, we must deny the government's motion for judgment on the pleadings under ASBCA No. 57066.

2. Motion for Summary Judgment

The government contends that it is entitled to summary judgment because appellant has failed to adduce any support in the record for its allegations of compensable delay and disruption. We do not agree. Drawing all reasonable inferences in favor of the appellant, the record shows that the government changed and impacted appellant's work through a number of bilateral contract modifications. Whether appellant's additional performance costs were caused by these bilateral contract modifications or by other factors for which the government was not responsible present material factual issues of causation that cannot be addressed under the government's motion.

The government also contends that appellant's execution of an unconditional release under Modification No. P00001 bars any further claim by appellant relating to delays associated with the performance of the design, CLIN 0001. In order to address this question, we must review the language of the release and the modification to determine whether the claim is barred. *Bell BCI Co. v. United States*, 570 F.3d 1337 (Fed. Cir. 2009); *Dureiko v. United States*, 209 F.3d 1345 (Fed. Cir. 2000). Release is an affirmative defense, FED. R. CIV. P. 8(c)(1), and the government has the burden of proof on this issue.

The "release of claims" language under Modification No. P00001 states that it released the government from any and all liability attributable to such facts or circumstances "giving rise to the modification." The modification states that the purpose of the modification was to delete the proto-type housing units, but it also contains a change in the date for design delivery. This raises the question whether the facts or circumstances "giving rise to the modification" relate solely to the deletion of the proto-type housing units–stated as the "purpose" of the modification–or whether the release language refers more broadly to any and all matters agreed to under the

modification, including the agreed upon date change for the design. Because of this ambiguity we believe that evidence of the intent of the parties will aid the Board to arrive at an appropriate interpretation of the release language.

We also note that the CO denied appellant's 13 March 2009 request without mentioning any of the releases (SOF ¶ 43) and denied appellant's 1 December 2009 claim without mentioning the releases (SOF ¶¶ 46, 47). Such actions may manifest "an intent that the parties never construed the release as an abandonment of plaintiff's earlier claim." *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir. 1993).

Based upon the foregoing and drawing all reasonable inferences in favor of appellant, we are of the view that the government has not shown it is entitled to judgment as a matter of law on its affirmative defense of release.

The government also contends that appellant's complaint fails to allege entitlement to delay costs attributable to the government's late issuance of the NTP for the design work, and thus appellant has abandoned this claim as a matter of law (gov't mot. at 15). We do not agree. Drawing all reasonable inferences in appellant's favor, we note that appellant's second amended complaint alleges government responsibility for changes to the design period (SOF ¶ 48). The government has not shown that appellant has abandoned this claim.

We have considered all of the government's contentions but they do not show that the government is entitled to summary judgment as a matter of law.

CONCLUSION

For the reasons set out above, the government's motions in ASBCA No. 56941 and ASBCA No. 57066 are denied.

Dated: 20 January 2011

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 56941, 57066, Appeals of Kolin Construction, Tourism, Industry and Trading Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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