ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Weigel Hochdrucktechnik GmbH & Co. KG	)	ASBCA No. 57207
	)	
	)	
Under Contract No. FA5575-09-C-0002	)	

APPEARANCE FOR THE APPELLANT: Mr. Bernd Weigel
Chief Executive Officer

APPEARANCES FOR THE GOVERNMENT: Alan R. Caramella, Esq.
Acting Air Force Chief Trial Attorney
Christopher S. Cole, Esq.
Maj John C. Degnan, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE MELNICK

This appeal involves a contract awarded to appellant, Weigel Hochdrucktechnik GmbH & Co. KG (Weigel), by the United States Air Force for the removal of rubber from a runway. Weigel, which is represented by its Chief Executive Officer (CEO), seeks additional compensation for work it was ordered by the government to perform, but that it claims was not required by the contract. The parties have chosen to proceed solely upon the record submitted, pursuant to Board Rule 11. Only entitlement is before us for decision. We partially sustain the appeal and partially deny it.

FINDINGS OF FACT

I. The Contract

1. Contract No. FA5575-09-C-0002 was awarded to Weigel on 30 March 2009 (R4, tab 1 at 1, 5). The contract was for removal of rubber from a runway at Moron Air Base, Spain. The contract's firm fixed-price was €57.899,30 or $73,243.90. (R4, tab 1 at 1, 3, 5) The contract was to be performed in accordance with accompanying specifications (R4, tab 1 at 3, 6, 24, tab 2). The contract also incorporated by reference FAR 52.243-4, CHANGES (JUNE 2007) (R4, tab 1 at 14).

2. The scope of work contained in the contract's specifications included the removal of rubber from the runway, tests, and general cleaning (R4, tab 2 at 3). Rubber was to be water blasted off the runway, with the specifications generally describing the

procedures to be followed (R4, tab 2 at 22-23). Prior to the start of work, the procedures were to be tested to ensure they provided for the removal of the correct amount of material. Test results were to be submitted to the government. (R4, tab 2 at 16) During performance, an aspiration system was to be employed to gather the wastewater fired onto the runway and that mixed with the removed material. The wastewater would be drawn into a tank, where a beater and flocculating agent would be employed to separate the residue from the water. Once the residue and water were separated, the water was to be poured into the base drainage system, while the residue was to be stored in containers for disposal at an authorized dump. (R4, tab 2 at 20-21, 23)

3. The specifications required the "equipment, tools, and machinery" to be in "satisfactory condition at all times" (R4, tab 2 at 19). They also reserved to the government "the right to reject the use of any equipment which the Contracting Officer [determined might] pose unnecessary risks to aircraft due to foreign object damage (FOD) potential, human health, or the environment as a result of its use, storage, or disposal" (R4, tab 2 at 22). The contractor was to "conserve and protect all existing facilities at the work site," and to "dispose of accumulated debris, waste materials and rubbish," in "contractor furnished containers" (R4, tab 2 at 9). The storage containers were to be in good condition and the storage of materials at the site was at the contractor's risk (R4, tab 2 at 8). The contractor was "solely responsible for any material dumped/spilled by trucks, vehicles and machinery or equipment on the access routes" and was "responsible for assuring that all access routes [were] kept clean and clear at all times." The specifications also provided that "[t]he Contractor shall be responsible for complying with all applicable environmental rules and regulations concerning handling, transportation and storage of materials and/or dangerous waste." (R4, tab 2 at 10) They added that "[c]urrent legislation regarding environmental, security and health matters; storage and transportation of products for constructional purposes shall be complied with." They also required compliance with Royal Decree 1630/1992 (modified by Royal Decree 1328/1995), dictating "dispositions for free circulation of constructional purpose products...." (R4, tab 2 at 15) Prior to receipt of proposals, the government held a site visit that was not attended by anyone from Weigel. On 24 August 2009, the government notified Weigel that it could proceed with performance of the contract on 2 September 2009. (R4, tab 19 at 1)

II. Water Treatment, Testing, and Discharge

4. In June, 2009, before beginning performance of the contract, Weigel proposed changing the procedures for separating residue from water. Weigel would pour the contaminated wastewater into containers and cover them with a special filter, which would be used to remove the residue. The filtered water would then be poured into the base's rain water collection system. The government responded that Weigel's proposed method would have to be confirmed with tests of the water, which would be Weigel's

responsibility. Weigel was told that this process could comply with the contract requirements, if used in conjunction with a flocculant, and if Weigel could provide supporting documentation or test results of its effectiveness. (R4, tab 19 at 2)

5. On 27 August 2009, the government informed Weigel that Spanish environmental regulations required that water be tested for solvents, TPHs, heavy metals, and particulates (app. supp. R4, tab 1). In a 31 August 2009 email exchange, the government explained that, before Weigel could pour filtered water into the drainage system, it would be necessary to have it tested. In response, Weigel stated that it was abandoning its proposed filtration method and returning to the contract's specified procedure requiring the use of flocculants to separate the water from residue, followed by the water's discharge into the base drainage system. (R4, tabs 9, 12) On 1 September 2009, the government replied that Weigel could not "pour the filtered water to storm drainage" until its engineers had taken a position about environmental testing (R4, tab 15).

6. Weigel entered the base to begin performance on 2 September 2009. On 3 September the government informed Weigel that it should perform the required first flocculation of contaminated water. Weigel responded that its truck did not have the auxiliary tank necessary to perform the flocculation. (R4, tab 21) A 3 September 2009 government email, acknowledged by the signatures of Weigel's project manager and the government's contract administrator, stated that Weigel again wished to depart from the contract's specifications for treating water and return to its filtration method. The email notified Weigel that the filtered water would have to be tested for suspended solids, hydrocarbons, DQO, and DBO before it could be discharged into the base storm drainage system. (R4, tabs 16, 21) The government provided Weigel with discharge limits imposed by Spanish Royal Decree 509/96 and the Guadalquivir River Hydrographic Confederation permit (app. supp. R4, tabs 2-4). A government project engineer, Miguel Trujillo, also told Weigel's project manager that all of the testing parameters were necessary (R4, tab 21). Weigel was advised that if its filtration method failed to provide adequate water test results, Weigel would be responsible for proposing another water treatment method that would be satisfactory (R4, tab 16).

7. On 4 September 2009, the testing laboratory took water samples and issued results for suspended solids that the government found unsatisfactory. On that date, Weigel also requested additional funding from the contracting officer due to increased costs allegedly resulting, at least partially, from the testing requirement. The contracting officer responded that Weigel was responsible for the required performance. On 7 September 2009 Weigel proposed a new filtration method, which it subsequently withdrew. On 9 September 2009, Weigel commenced using flocculants in its wastewater containers. On 11 September 2009, another water test returned an acceptable result for suspended solids. Weigel was informed by government project engineer, Antonio

Menendez, that the rest of the required testing was still necessary though, and that water tests were required for every container of wastewater. Weigel inquired of Mr. Menendez as to why Mr. Trujillo had previously told it that the only test required was of suspended solids. Mr. Menendez conferred with Mr. Trujillo, who explained that on 3 September he had told Weigel about all of the requirements. (R4, tab 21)

8. On 17 September 2009, water test results were received for DBO5, DQO, and hydrocarbons. The DBO5 and DQO tests were unsatisfactory to the government. (R4, tab 21) Mr. Menendez then informed Weigel that it could discharge some water into the base sewage treatment system, which it did (R4, tab 18 at 6, tab 21). However, based upon visual observations, the government ordered the discharge of water to be stopped before all of it was pumped out of the containers. The government's reason for imposing this requirement was to avoid requiring Weigel to incur additional testing charges. (R4, tab 18 at 6; compl. and answer, part III ¶ 10)

III. Containers

9. In its 31 August 2009 email exchange with Weigel, the government also asked whether Weigel had identified a company from which it could rent containers to hold wastewater. Weigel responded that it intended to use the company with which it contracted to remove debris, and that it was experiencing difficulties finding such a company. (R4, tabs 9, 12-13, 21) The government replied that work could not commence until containers were on the base (R4, tabs 10-11, 15, 21).

10. On 2 September 2009, when Weigel arrived on the base to commence performance, it did not have any containers. Weigel asked the government's inspector, Jesus Carmona, if he knew of a company from which it could rent waterproof containers. Mr. Carmona checked with Madrigal Company, and was told that waterproof containers would require five to seven days. Weigel then proposed using non-waterproof containers lined with plastic. Mr. Carmona and the government's engineer, Mr. Trujillo, replied that the containers must be waterproof because water could not be discharged into the base drainage system without being tested, and that Weigel was responsible for this requirement. Mr. Carmona did determine that non-waterproof containers could be made available the next day. (R4, tab 21)

11. On 3 September, Weigel leased eight non-waterproof containers (R4, tab 21). Weigel explained to Mr. Carmona that it was installing a plastic liner in the containers (R4, tabs 16, 21). Mr. Carmona commented that the liner was very thin given the expected water pressure (R4, tab 21). The 3 September 2009 email signed by Weigel's project manager acknowledged that Weigel was required to use watertight containers. However, because Weigel had been unable to obtain them it had proposed using non-waterproof containers with PVC liner installed in them. The email also

acknowledged that Mr. Carmona had informed Weigel that it was responsible in case of leaks and would have to make repairs. (R4, tabs 16, 21) Later that day, when Weigel poured wastewater from the project into one of the containers, it leaked. Mr. Carmona therefore ordered Weigel to stop pouring water into the container. (R4, tab 21)

12. Additional leaks were detected in Weigel's containers the next day, 4 September 2009. Mr. Carmona therefore informed Weigel that it could not proceed with the work until it had waterproof containers on base. On 7 September Weigel installed new plastic in a container and testing revealed no leaks. (R4, tab 21)

IV. Weigel's Claims

13. On 16 September 2009, Weigel sent a letter to the contract administrator notifying the government that Weigel had been ordered to provide additional services it considered beyond the scope of the contract. Among the matters described by Weigel were restrictions upon its water discharges, a daily requirement to prepare its containers in a certain manner and submit them for inspection, and inconsistent orders to have water analyzed. (R4, tab 17)

14. On 19 November 2009, Weigel submitted a claim for a total of €27.761,16. Weigel's claim included the cost of collecting water samples and performing tests, renting and preparing containers, dealing with water that was considered residue, and for delays in obtaining permission to discharge water. (R4, tab 18) Weigel's claim was denied in a final decision issued by the contracting officer on 23 February 2010 (R4, tab 19). Weigel filed a notice of appeal from that final decision on 4 May 2010.

DECISION

I. Legal Standard Applying to a Constructive Change

In the event the government demands work not required by the contract plans and specifications, "it is liable under the Changes clause for any delay or increased costs caused thereby." *Randall H. Sharpe,* ASBCA No. 22800, 79-1 BCA ¶ 13,869 at 68,052. "A constructive change occurs where a contractor performs work beyond the contract requirements without a formal change order, either by an informal change order or due to the fault of the Government." *Int'l Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007); *see also Ace Constructors, Inc. v. United States,* 499 F.3d 1357, 1361 (Fed. Cir. 2007) (characterizing a constructive change as a government alteration of the contract's terms "either expressly or implicitly, by requiring performance at variance with that set forth in the contract"). To recover for a change, the person ordering it must possess authority to do so. *Winter v. Cath-Dr/Balti Joint Venture,* 497 F.3d 1339, 1344 (Fed. Cir. 2007); *Northrop Grumman Systems Corp. Space Systems Div.,* ASBCA

No. 54774, 10-2 BCA ¶ 34,517 at 170,242. The contract's Changes clause requires an equitable adjustment for "any increased costs flowing directly and necessarily from that change." *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1348 (Fed. Cir. 2000). Though the contractor bears the burden of proving the elements of a change, *Die-Matic Tool Co.*, ASBCA No. 31185, 89-1 BCA ¶ 21,342 at 107,603, the determination as to whether a constructive change has occurred is driven by the contract's language. *Aydin Corp. v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995).

II. Water Testing and Discharge Claims

Weigel seeks the costs it incurred testing the water for contaminants. Specifically, Weigel claims that after it abandoned its alternative filtration method for separating residue from the water, and returned to the contract's required flocculation method, the government lacked any basis to continue to impose a testing requirement upon it, and to require that the water be below certain levels for specified contaminants, before Weigel could discharge the water. (R4, tab 18 at 4-5, 7; compl., part II ¶ 9, part III ¶¶ 5-6, 8-9; app. br. at 2, 3, 5, 10, 11, 14, 18 of 19) Weigel does not seek the testing expenses it incurred during the time that it departed from the contract's specifications and engaged in filtration (compl., part II ¶ 5).

The government does not contest that it ordered Weigel to test the water and meet certain contaminant limits. However, it responds that Weigel was responsible for the cost of testing and for achieving its specified contaminant levels because the contract specifications' scope of work included "tests." The government also relies upon the contract's requirement that Weigel comply with Spanish Royal Decree 1630/1992 (modified by Royal Decree 1328/1995), as well as all current environmental legislation. (R4, tab 2 at 3, 15; gov't br. at 20-23, 28) Additionally, the government relies upon the contracting officer's final decision, which cited Royal Decree 509/96 and the Guadalquivir River Hydrographic Confederation permit to mandate the requirements imposed upon Weigel (R4, tab 19).

The government's reliance upon the specifications' reference to "tests" is quickly addressed. As Weigel notes, the word "tests" does not dictate a laboratory water analysis (app. br. at 3 of 19). We agree that a vague reference by the scope of work to "tests" cannot support a suggestion that the government was free to order Weigel to perform whatever test it wished for the purpose of meeting whatever requirements it wished. Weigel argues that it interpreted the word to relate to tests of the efficiency of its rubber removal process. (App. br. at 3, 5 of 19) Indeed, the specifications followed that general reference to "tests" with the more particular dictate that the actual test to be conducted was of the material removal process, not the water to be discharged (finding 2). "[A] specific contract provision will control over a general contract provision." *Hometown Financial, Inc. v. United States,* 409 F.3d 1360, 1369 (Fed. Cir. 2005). Nowhere do the

specifications provide that the "tests" to be performed included levels of contaminants in the separated water Weigel discharged.

The government's additional reliance upon the contract's requirement for compliance with Spanish Royal Decree 1630/1992, as well as Royal Decree 509/96 and the Guadalquivir River Hydrographic Confederation permit, present the question whether Spanish law mandated that Weigel perform the testing required by the government. Pursuant to Board Rule 6(c), the determination of foreign law is a ruling upon a question of law, and we may consider any relevant material or source to determine it. Rule 6(c) follows Federal Rule of Civil Procedure 44.1, and "provides a considerable degree of discretion in determining the appropriate method for ascertaining what the foreign law is, whether it be by independent research or reliance on the parties." *Rosinka Joint Venture,* ASBCA No. 48143, 97-1 BCA ¶ 28,653 at 143,139, *aff'd,* 135 F.3d 775 (Fed. Cir. 1998) (table); *see also Merck & Co. v. International Trade Commission,* 774 F.2d 483, 488 (Fed. Cir. 1985) (concluding that, "in the federal courts foreign law is a question of law to be determined by expert evidence or any other relevant source").

Though the rules empower us to attempt on our own to determine foreign law, we are not obligated to do so. *Bel-Ray Co. v. Chemrite (Pty) Ltd.,* 181 F.3d 435, 440 (3rd Cir. 1999); *Carey v. Bahama Cruise Lines,* 864 F.2d 201, 205 (1st Cir. 1988); *Bigio v. Coca-Cola Co.,* 2010 WL 3377503, at *4 (S.D.N.Y. Aug. 23, 2010). Instead, we may require the party relying upon foreign law to demonstrate its application in a particular matter. *Abdille v. Ashcroft,* 242 F.3d 477, 490 (3rd Cir. 2001); *Bel-Ray,* 181 F.3d at 440; *Baker v. Booz Allen Hamilton, Inc.,* 358 Fed. Appx. 476, 481 (4th Cir. 2009), *cert. denied,* 131 S. Ct. 220 (2010); *Panam Mgmt. Group, Inc. v. Pena,* 2011 WL 3423338, at *4 (E.D.N.Y Aug. 4, 2011); *Bigio,* 2010 WL 3377503, at *4. Foreign law can be demonstrated through written or oral expert testimony and extracts from foreign legal materials. *Bigio,* 2010 WL 3377503, at *4; *Guardian Industries Corp. v. United States,* 65 Fed. Cl. 50, 53 (2005) (citing *Jinro America Inc. v. Secure Investments, Inc.,* 266 F.3d 993, 1000 (9th Cir. 2001)), *aff'd,* 477 F.3d 1368 (Fed. Cir. 2007).

Given that the government's testing order was only within the scope of Weigel's contractual obligations if it was required by Spanish law, it is the government's position here that is dependent upon foreign law, and it is therefore the government that should demonstrate its application here. It fails to do so. The government does not explain the meaning of Royal Decree 1630/1992. As best we can determine, it merely implements European Economic Community Directive 89/109/EEC to assure free commerce in building materials. We do not see how such a provision supports the government's water testing requirement.

With respect to Royal Decree 509/96, and the Guadalquivir River Hydrographic Confederation permit, the contracting officer's final decision explained the following:

The contractor had to prove that the quality of the clean water met the requirements established by the current environmental legislation in accordance with the specifications.

....

...The contractor is responsible for complying with required legislation – the inspector is not required to provide this information.

Final Governing Standards, FGS, chapter 4, dated November 04, establishes the effluent limit for each parameter for discharges to Spanish Continental Water Table unless more protective standards are established in their site-specific discharge authorization.

Guadalquivir River Hydrographic Confederation grants a permit discharge to Guadaira River based on the Royal Decree 509/96. This permit reduces the effluent limit established by above mentioned FGS for suspended solids, DBO5 and COD.

....

The contractor was advised/informed about the quality of the water to be poured into the drainage system and the environmental legislation to be met before he offered for this contract because it was indicated in the specifications.

....

When the contractor showed the test results of three parameters (DOB5, COD and Suspension solids), the three parameters far exceeded the limits approved by the Guadalquivir River Hydrographic Confederation. Civil Engineering indicated to the contractor that the Suspension Solid parameter has to be in accordance with the effluent limit approved by Guadalquivir River Hydrographic Confederation and, once the water reaches such suspension solid limit, the water can be poured to the sewage system instead of the

> drainage system because our Wastewater Treatment Plant can reduce the limit approved by Guadalquivir River Hydrographic Confederation regarding DOB5 and COD.

(R4, tab 19 at 7-11)

Weigel argues that it is not aware of the existence of the Final Governing Standards referred to by the final decision, or the Guadalquivir River Hydrographic Confederation permit, which is not in the record, and contends that Royal Decree 509/96 is inapplicable to the discharges at issue here, applying instead to "discharges from urban waste water treatment plants" (compl., part II ¶ 9, part III ¶¶ 6, 8; app. br. at 2, 10, 18 of 19). Although the government provided Weigel with discharge limits specified by that decree and permit (finding 6), the fact that the contracting officer believed those limits applied here does not make it so, and the government makes no effort to refute Weigel's contention that they do not apply. The government has not provided us with the actual permit or proffered evidence about the terms of the Royal Decree that we can examine to ascertain their contents and scope. Thus, the government has not demonstrated that Royal Decree 509/96 and the Guadalquivir River Hydrographic Confederation permit govern in this situation to limit Weigel's discharges.

Given that the government has failed to show that Spanish law imposed restrictions upon discharges in these circumstances, and therefore required Weigel to test the water before it was discharged, we are unaware of any contractual basis that the government possessed for imposing that requirement. The government is therefore liable under the Changes clause for any water testing costs it required Weigel to incur from 9 September 2009 onward, after Weigel abandoned its filtration method of separation and returned to the contract's specifications for using flocculants.

Weigel additionally claims that the government prohibited it from discharging all of the water in the containers based upon the government's visual judgment as to when the remaining water exceeded the contaminant limits imposed by the government. Weigel contends that this restriction increased the cost of disposing of the remaining residues in the containers, which included extra water. (R4, tab 18 at 6, 8; compl., part III ¶ 10; app. br. at 15, 18 of 19) The government concedes that this "visual method was used to avoid additional testing charges that Weigel would incur" (answer, part III ¶ 10). Given that the government has not demonstrated that Spanish law required Weigel to test the water, or meet any specific contaminant limits, the government's explanation fails to justify its restriction upon Weigel's discharges.[1] Accordingly, the government is also liable under

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[1] Even if Spanish environmental restrictions do limit the contaminants contained in discharged water to certain levels, and therefore required Weigel to retain remaining water that exceeded those levels, the government fails to explain how a

the Changes clause for any increased disposal costs incurred by Weigel resulting from the government's requirement that Weigel retain water in the containers.[2]

III. Container Claim

Weigel also contends that it should be compensated for the costs of following waterproofing procedures allegedly mandated by the government, and for obtaining government approval of its waterproofing methods. Additionally, Weigel claims that the government's unjustified demands required it to lease and prepare 16 containers. It contends that it should only have had to incur the cost for four, or even two. (R4, tab 18 at 5, 7-8; compl., part II ¶ 9, part III ¶ 7; app. br. at 7, 12, 19 of 19) Weigel has failed to prove entitlement to such compensation.

The contract's specifications required Weigel to provide storage containers that were in good condition, and permitted the government to reject the use of any equipment that it determined would pose an unnecessary risk to aircraft, human health, or the environment (finding 3). They also provided that the contaminated water used to remove rubber would be processed to remove the residue and then discharged into the base drainage system (finding 2). Given these circumstances, it was clear that the containers Weigel used to hold contaminated water could not leak. Indeed, the 3 September 2009 email signed by Weigel acknowledged its obligation to provide waterproof containers and that it would be responsible in case the non-waterproof containers it was using leaked (finding 11).

Weigel has failed to support its primary contention that the government mandated unnecessarily costly procedures upon it for waterproofing its containers. Upon its failure to obtain waterproof containers, it was Weigel that proposed lining conventional ones with PVC. In response, while approving that proposal, the government merely expressed reservations about the quality of the liner Weigel was using, and reminded Weigel of its responsibility to ensure that the containers did not leak. When the containers indeed did leak, the government ordered Weigel to cease using them until they were fixed. (Finding

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mere visual determination of the point at which water should be retained could ensure compliance with that law.

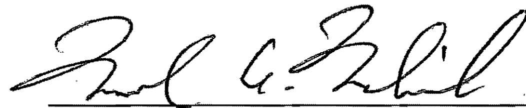
[2] The briefs do not discuss to any degree whether the government personnel who required Weigel to engage in testing and retain water in the containers possessed authority to make changes in the contract. Notably, the government's brief does not deny their authority. The evidence is inadequate for us to determine the authority of those who dealt with and communicated with Weigel. Nevertheless, the contracting officer's final decision demonstrates the knowledge and approval of those requirements necessary to amount to a ratification (R4 tab 19). *Winter v. Cath-Dr/Balti Joint Venture,* 497 F.3d at 1346-48.

10-12) Weigel has not produced any evidence that the government dictated to Weigel any specific methods for waterproofing the containers, much less procedures that were excessively expensive. Similarly, Weigel has not presented evidence that it leased 16 containers. Nor has Weigel shown that, but for government demands beyond its contractual rights, Weigel would have leased fewer containers than it did. Consequently, Weigel's claim relating to the waterproofing and leasing of containers is denied.

CONCLUSION

We sustain the appeal with respect to the government's requirement from 9 September 2009 onward to test the water to be discharged, and with respect to the government's requirement that Weigel retain water in the containers. The appeal is otherwise denied. The appeal is remanded to the parties to negotiate quantum consistent with this decision.

Dated: 15 March 2012



MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

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 No. 57207, Appeal of Weigel Hochdrucktechnik GmbH & Co. KG, rendered in conformance with the Board's Charter.

Dated:

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