

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
BYA International, LLC) ASBCA No. 57608
)
Under Contract No. W917PM-09-C-0052)

APPEARANCE FOR THE APPELLANT: R. Dale Holmes, Esq.
Louisville, KY

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
James D. Stephens, Esq.
Tania Wang, Esq.
Engineer Trial Attorneys
U.S. Army Engineer District, Middle East
Winchester, VA

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

BYA International, LLC (appellant) moved for partial summary judgment¹ contending that the government waived the contract completion date and engaged in an act of forbearance and thereby waived its right to terminate the contract for failure to complete the work by the required completion date. The government counters that the application of the waiver doctrine to a construction default is a heavily fact-dependent process that must be evaluated on a case-by-case basis. Moreover, the government contends that appellant failed to allege undisputed facts responsive to all of its bases for the termination of the subject contract. For the reasons stated below, we deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 9 June 2009, the U.S. Army Corps of Engineers, Afghanistan Engineer District, Kabul (Government or Corps) awarded a firm-fixed-price contract to BYA, Inc. (BYA or appellant) in the amount of \$26,842,787.00 for the design and construction of a new Afghanistan National Army, Corps Support Battalion and related support facilities

¹ Appellant's initial filing was styled as a motion for summary judgment. However, in its reply brief, appellant later clarified that it was seeking partial summary judgment on the issue of waiver with respect to the government's decision to terminate the contract for failure to complete the work by the required contract completion date, and not for the other reasons listed in the termination notice (app. reply br. at 1).

on Camp Gamberi, Jalalabad, Afghanistan. The contract required performance to begin within 7 days of the Notice to Proceed (NTP) and the work to be completed with 300 days after receiving such notice. (R4, tab 4)

2. Under the design phase of the contract, appellant was required to “develop and submit for formal review three submittals and the final design” (R4, tab 4 at 24). The contract reads in pertinent part:

2.2.1 The Design Phase will consist of three parts as follows:

a. Part 1 will be the basic services required to develop the first submittal which represents: 100% complete drawings and specifications for site preparation work, utility construction, paving, foundation, and structural diaphragm of all work and approximately 35% complete drawings and specifications of all other required construction documents....

After approval of the Part 1 drawings and specification submittal, the Government may issue a Clearance for Construction letter to commence with the Build Phase for all site and off-site utilities, clearing, grubbing, rough grading the site, demolition work, parking lot base course, foundation, and structural framing....

b. Part 2 shall include all design services required to complete the second design submittal: 100% complete drawings...and approximately 65% complete drawings and specifications of all other required construction documents. Part 2 design shall not begin until an approval of the Part 1 submittal is issued.

c. Part 3 shall include all design services required to complete the third design submittal (100%). Part 3 design shall not begin until an approval of the Part 2 submittal is issued.

(*Id.* at 24-25)

3. The contract also incorporated by reference FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984), which reads in pertinent part:

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure

its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed....

The contract also incorporated FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (SEP 2002) which required the government to “make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates of work accomplished...” The contract further contained FAR 52.211-12, LIQUIDATED DAMAGES—CONSTRUCTION (SEP 2000), which charged the contractor liquidated damages “in the amount of \$3,291.90 for every calendar day of delay until the work is completed or accepted” (*id.* at 39).

4. By letter dated 9 July 2009, the contracting officer (CO) issued the NTP. The CO informed appellant that the “contract duration period is 300 days beginning from 12 July 2009” (R4, tab 6). The contract completion date (CCD) was 7 September 2010², and was subsequently retroactively extended via Modification No. R00003 (dated 15 January 2011) through 26 September 2010 (R4, tab 4b). Accordingly, we find that the relevant CCD was 26 September 2010.

5. On 15 September 2009, appellant was given partial clearance to commence construction of guard towers and clearing and grubbing work at the site. The government indicated that this notice was not a full clearance for construction, as the submitted designs were not 100% approved as of the above date. (R4, tab 7)

6. By letter dated 20 March 2010 the CO notified BYA that the project appeared to have fallen dangerously behind schedule. Specifically, the CO stated, *inter alia*:

The current schedule submittal shows the project as running 50 days behind schedule. This information abstracted from the schedule can only be confirmed when you provide a truly [critical path method] compliant schedule by implementing the corrections listed in the attached analysis.

(R4, tab 11) Additionally, by letter dated 21 March 2010, the CO informed appellant that it did not have proper authorization for “Clearance for Construction” with regard to some phases of construction that had been initiated. The CO reserved the right to withhold

² It is not clear from the record how the parties arrived at a 7 September 2010 CCD, however it is undisputed (app. Statement of Undisp. Material Facts ¶¶ 4-5; gov’t SOF ¶ 1).

payment for work that did not meet the contractual requirements and reminded BYA to ensure that all phases of construction had the proper requests for authorization. (R4, tab 12)

7. Appellant resubmitted its 65% Design Re-submittal #2 dated 17 April 2010 and the government, by letter dated 16 May 2010 disapproved the design. The Corps noted numerous deficiencies stating: “the lack of design quality management on this and prior design submittals is unacceptable and must be corrected.” (R4, tabs 14, 15)

8. By letter dated 18 August 2010, the Corps disapproved appellant’s third 65% Design Re-submittal, citing project schedule and repetitive safety deficiencies. Specifically, the Corps noted that it had serious concerns with appellant’s failure to comply with several contract requirements, including:

To date your organization has failed to submit a 65% design submittal that complies with contract requirements. Your company has failed to properly address open review comments from previous design submittals and as a result there are 111 open/unresolved comments from previous submittals as well as 292 new comments on the 65% design re-submittal #3....

Your project schedule is not in compliance with contract requirements even after numerous monthly updates, reviews/comments by the Government. To date you do not have a schedule that meets contract requirements. Your August schedule update is currently in review. Additionally you are reminded that your contract completion date is 7 September 2010 and your company’s currently scheduled completion date is 1 December 2010. Liquidated damages in the amount of \$3,291.90 may be assessed starting 7 September 2010 in accordance with contract clause 52.211-12 Liquidated Damages – Construction.

(R4, tab 26) The Corps further afforded appellant the opportunity to take corrective action and present a detailed recovery plan by 26 August 2010. Failure to respond, the Corps stated, “may result in further administrative contract actions for failure to comply with contract requirements.” (*Id.*)

9. Appellant responded to the 18 August 2010 “Letter of Concern” by addressing several areas of concern, including the progress schedule. Appellant indicated that it would request numerous delay days to be added to the schedule as well as completing the

65% design submittal to be approved by the end of September 2010. Thus, appellant concluded that the project would be finished by mid-January 2011. (R4, tab 27)

10. By letter dated 24 August 2010, the Corps notified appellant that it was returning its pay request for the period "Aug – 10" because of its failure to submit a compliant 65% design submittal as well as its failure to have an acceptable project schedule that was in compliance with the contract completion date of 7 September 2010. The Corps stated that it would not authorize further progress payments until appellant's 65% design submittals were approved and appellant provided a project recovery schedule that complied with the contract requirements. (R4, tab 28)

11. By letter dated 5 September 2010, the Corps rejected appellant's recovery schedule as unrealistic (R4, tab 30). On 23 September 2010, the Corps sent a second letter of concern regarding the outstanding schedule issues. The Corps stated:

Gentlemen, your failure to complete this project in the timeframe specified by your contract is a very serious matter. Your contract completion date was 7 September 2010. This is your firms' second attempt to provide a project (recovery) schedule that complies with contract requirements. You have not demonstrated that you are able to execute the remaining work in a timely manner...If the Government terminates the Contractor's right to proceed, liquidated damages will continue to accrue until the work is completed.

(R4, tab 31 at 3) Meanwhile, appellant made several requests for the following: authorization for clearance construction dated 25 September 2010 (R4, tabs 32); and authorization for payment of stored materials dated 25 September 2010 (R4, tab 33). Both requests were denied citing appellant's non-compliance with the contract submittal and schedule requirements (R4, tabs 36, 37). Also, during this time, the government received complaints of nonpayment by several subcontractors (R4, tab 46).

12. By letter dated 7 October 2010, appellant responded to the 23 September 2010 letter of concern from the government. Appellant contended that the schedule delays were due in part to the government changing acceptable ratings in earlier submissions to unacceptable in subsequent submittals. Appellant referenced a revised project completion date of 7 June 2011. (R4, tab 42)

13. The government, by letter dated 13 October 2010 conditionally approved the schedule, provided appellant supply "a narrative on the plan which demonstrates how they will hold their currently forecast end date from beyond June 15, 2011" (R4, tab 44). We find that there is no evidence that the government, after the 26 September 2010 CCD passed, unconditionally approved a new CCD.

14. By letter dated 13 February 2011, the Corps advised appellant that its schedule was “not recommended for acceptance” as the proposed schedule was not deemed realistic. Specifically, the schedule showed three times the average monthly volume of work during the next four inclement weather months. (R4, tab 52) Appellant was further notified, by email dated 14 February 2011, that several subcontractors had not been paid for work done. The notice read in pertinent part:

I have received two separate messages below regarding non-payment of sub contractors [sic] who are demanding to speak with the USACE Contracting Officer. This has now elevated to a critical level, and could become hostile to other sub-contractors attempting to gain entry into the CSB, USACE Local National Engineers, and your staff members.

...Request you contact your leadership and resolve these payment issues with your sub contractors [sic] immediately before this gets further out of hand.

(R4, tab 53)

15. The Corps notified appellant, by letter dated 21 February 2011 that its payment request No. 18 would be denied on the basis that “You have submitted your schedule and a corrective schedule dated 19 February indicating a longer completion date than the government desires.” Further, the Corps noted that appellant had been paid at a 66% construction placement rate, while actual construction progress was estimated to be only 55% complete. The letter concluded that if appellant was able to recover its lost progress, the government would reconsider appellant’s payment request. (R4, tab 54)

16. Also, on 21 February 2011, the CO issued a Show Cause Notice listing five “failures” that endangered contract performance. Those failures were as follows:

(1) Failure to meet construction progress schedules, to diligently prosecute the work, and to complete the work required under the subject contract by the required completion date; (2) Failure to satisfactorily administer your Quality Control program and to remedy deficient work; (3) Failure to timely pay subcontractors; (4) Failure to effectively and efficiently manage the project [contract safety requirements]; and (5) Failure to provide and follow an acceptable Corrective Action Plan (recovery schedule) to complete your contract in a timely manner.

(R4, tab 56) The CO stated further that the government was considering taking adverse contractual action including terminating the contract for default. Appellant was given ten days to provide any facts in writing that would demonstrate that the failures arose out of causes beyond its control and without any fault or negligence of its own doing. Finally, the CO stated: "Any assistance rendered to you on this contract, or acceptance by the Government of delinquent goods or services thereunder, will be solely for the purpose of mitigating damages, and is not to be construed as a waiver of any rights the Government may have under subject contract." (*Id.* at 2)

17. Appellant responded, by letter dated 27 February 2011 alleging: (1) government-caused delays; (2) quality control issues were previously resolved; (3) non-payment of subcontractors was the result of legitimate disputes and it would settle those claims having merit; (4) following the restart of construction, the government did not raise any safety issues as of the date of the Show Cause Notice, and (5) appellant had abided by the last Action Plan submitted to the government. (R4, tab 60)

18. By letter dated 2 March 2011, the Corps informed appellant that its second schedule submission for the month of February was not approved citing, *inter alia*, "The schedule is technically not contract compliant with regards [sic] to the contract performance timeline" (R4, tab 62). On 7 March 2011, appellant provided further information in response to the 21 February 2011 Show Cause Notice, indicating that the contractor had not been overpaid and that it was handling the subcontractor payment issues (R4, tab 63).

19. By letter dated 8 March 2011, the CO terminated the contract for default, citing the same five failures from the Show Cause Notice as the basis for the decision (R4, tab 2).

20. On 26 April 2011, appellant filed a notice of appeal with the Board. The appeal was docketed as ASBCA No. 57608.

21. In support of its motion for partial summary judgment, appellant submitted the affidavit of Shawn Horton, BYA's project manager for the subject contract. Mr. Horton states in pertinent part:

6. I had multiple discussions with the Contracting Officer's Representative and the Program Manager, and the Administrative Contracting Officer for the Gamberi contract concerning the status of the Gamberi contract.

7. Corps representatives never informed me, either orally or in writing, of an intent to assess liquidated damages against

BYA due to its failure to complete the contract by the September 26, 2010 contract completion date.

8. I repeatedly requested a contract completion date from the Corps representatives, but none of them would provide me a required completion date.

9. Based upon the Corps refusal to provide me a required contract completion date, I prepared my own schedule in October 2010; my October 2010 schedule reflected a planned contract completion date of June 20, 2011.

DECISION

Appellant has filed a motion for partial summary judgment on the issue of waiver with regard to the CO's first reason for termination – failure to meet construction progress schedules, to diligently prosecute the work, and to complete the work by the required contract completion date. Appellant alleges that the government waited nearly six months past the contract completion date before terminating the contract for default and never established “a new required contract completion date to which it intended to hold BYA.” (App. mot. at 3) Primarily relying on *DeVito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969), appellant concludes that the government waived its right to terminate the contract.

The government counters that appellant's “undisputed material facts” were specifically challenged in its answer to the complaint in this appeal, the *DeVito* waiver has limited application to construction contracts, it did not waive the 26 September 2010 contract completion date, and appellant ultimately repudiated its own date it had sought to have the government accept as an alternate (gov't br. at 6-9). The government argues that it “acted on Appellant's continued assurances and numerous attempts to address the various deficiencies” and it should not “be penalized for giving Appellant the chance to demonstrate whether it could satisfy the conditions the Government had placed as a prerequisite to the establishment of a new [contract completion date]” (gov't br. at 8). The government further contends:

The unusual application of the waiver doctrine to a construction default is clearly a heavily fact-dependent process that must be evaluated on a case-by-case basis. Whether it applies to this instance will center on whether the Government's actions in administering a contract “manifests” that it considered the 26 September 2010 date unenforceable; a factual inquiry that is diametrically unsuitable for a motion of Summary Judgment.

(Gov't br. at 7) We agree.

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). There is a genuine issue of material fact if the evidence is such that a reasonable fact finder could find in favor of the nonmovant. We do not resolve factual disputes but determine whether there is a genuine issue of material fact. The moving party must show that there is no such issue while the nonmovant must counter with facts showing that there is one. *Kaman Precision Products, Inc.*, ASBCA Nos. 56304, 56313, 10-2 BCA ¶ 34,529 at 170,285.

We recently reviewed a similar matter with regard to the application of the *DeVito* waiver to construction contracts. In *AmerescoSolutions, Inc.*, ASBCA No. 56811, 10-2 BCA ¶ 34,606, we held that the *DeVito* waiver was not applicable to construction contracts where the contractor failed to demonstrate "unusual circumstances." Citing *Overhead Electric Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026, *aff'd*, 795 F.2d 1019 (Fed. Cir. 1986) (table), we determined that "unusual circumstances" were fact specific and related to the government's conduct with respect to the length of the forbearance period, the intent to assess liquidated damages, and whether the government treated the CCD as no longer of the essence. *AmerescoSolutions* at 170,550. In this matter, the issue relates in part to the reasonableness of the five and one-half month delay between the CCD and the termination decision (forbearance period). What constitutes a reasonable forbearance period is fact dependant and the record as of the date of this decision is not clear enough to support appellant's allegations that the government waived its right to terminate the contract. To contend, as appellant does, that a five and one-half month forbearance period is unreasonable on its face without further discovery and development of the record is not legally tenable. Accordingly, summary judgment is not appropriate.

CONCLUSION

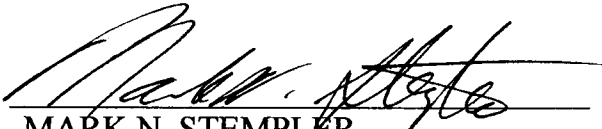
Appellant's motion is denied.

Dated: 29 November 2012



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

I concur



MARK N. STEPLER
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. 57608, Appeal of BYA International, LLC, rendered in conformance with the Board's Charter.

Dated:



JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals