ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Troy Eagle Group	)	ASBCA No. 56447
	)	
Under Contract No. W91GY0-07-C-0008	)	

APPEARANCE FOR THE APPELLANT: Sam Z. Gdanski, Esq.
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OPINION BY ADMINISTRATIVE JUDGE GRANT
ON THE GOVERMENT'S MOTION FOR SUMMARY JUDGMENT

Appellant Troy Eagle Group (TEG) claims delay and material restocking costs related to performance of its contract for up-armoring, upgrading, and painting certain vehicles for the Iraqi National Police under a contract awarded by the U.S. government. The government has moved for summary judgment, asserting that TEG is not entitled to any delay costs as a matter of law, based on several different theories. TEG opposes the motion, asserting disputes of fact preclude resolving the matter by summary judgment. We have jurisdiction under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101-7109. For the reasons stated below, the motion is denied in part and granted in part.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 12 January 2007, the Joint Contracting Command – Iraq/Afghanistan (JCC-I/A) awarded a contract to TEG, Contract No. W91GY0-07-C-0008, for up-armoring 850 Chevy trucks, both up-armoring and upgrading the suspensions of 473 trucks (Chevy and Dodge), and painting 1,145 trucks for the Iraqi National Police. These requirements were to provide greater vehicle safety and structural support, and to enable visual identification of police vehicles. The total fixed-price amount of the contract was

$5,798,180 and the period of performance was 240 days from contract award. (R4, tab 1 at 1-2, 18)[1]

2. The contract contained the standard commercial items clause, FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (SEP 2005). As it concerned termination for cause, the clause specified:

> (m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance....

(R4, tab 1 at 11)

3. Immediately after award, issues surfaced concerning the Statement of Work (SOW). TEG alleged that there were design problems concerning the up-armoring requirement, including missing drawings and pictures (app. opp'n, tab A, Declaration of Cem Ozturk (Ozturk decl.) ¶¶ 16, 18, 20, 21). On 4 February 2007, the contracting officer (CO) directed TEG not to take any action toward contract performance until the matter could be resolved (R4, tab 5). Also around this time, the CO expressed concern that TEG's issues with the design indicated TEG would not perform in accordance with the contract. TEG assured the government that it would perform, but continued to point to design flaws in the SOW. (R4, tabs 7, 8)

4. Formally capturing these issues, on 12 February 2007, the CO issued a Stop Work Order due to the continuing disagreements as to the SOW requirements (R4, tab 15). The CO also issued a show cause notice on 12 February 2007, notifying TEG that the government was considering terminating the contract for cause because recent discussions reflected that TEG would not perform as required by the contract (concerning up-armoring) at the required price, and giving TEG the opportunity to provide assurances to the contrary (R4, tab 16). The CO followed that up with a cure notice on 15 February 2007 again stating that the government was considering terminating the contract for cause based on recent discussions where TEG stated it would not perform without additional compensation, and giving TEG a chance to address this concern (R4, tab 17). TEG responded on 20 February 2007 with additional information, and reasserted its willingness and ability to perform (R4, tab 18).

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[1] The pages of the contract (R4, tab 1), and several other Rule 4 file documents are not numbered. In such cases, the Board has numbered each page sequentially in order to be able to cite to the document clearly.

5. On 5 March 2007, the parties entered into contract Modification No. P00001 (Mod. 1) to address the up-armoring design issue (R4, tab 3). Mod. 1 increased the contract price by $450,000 to $6,248,180, and stated that "[t]his increase in contract value is for the additional cost incurred by the contractor to adopt a method of up-armoring the doors of all vehicles to meet the U.S. Government's original intent." In addition, Mod. 1 extended the period of performance to 254 days after the original award date. Mod. 1 also stated that "[b]y signing this modification and completing Attachment 2 Troy Eagle Group relieves the U.S. Government of any additional cost (to include but not limited to material, labor, facilities and transportation) that are either directed or implied by this Firm Fixed Priced Contractual Agreement." Attachment 2 was a broad release of claims:

> Pursuant to the terms of Contract No. W91GY0-07-C-0008 and in consideration of the sum of Six Million, Two Hundred and Forty-Eight Thousand, One Hundred and Eight [sic] Dollars and Zero Cents ($6,248,180.00) which has been or is to be paid under said contract to Troy Eagle Group (hereinafter called Contractor) or its assignees, if any, the Contractor, upon payment of the said sum by the UNITED STATES OF AMERICA (hereinafter called the Government), does remise, release, and discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations, claims, and demands whatsoever arising out of or under this contract.

Both Mod. 1 and the release at Attachment 2 were signed by TEG. (R4, tab 3; gov't mot., encl. 2) TEG alleges that this modification was signed under duress because the CO threatened to terminate the contract for default if TEG did not sign (app. opp'n, Ozturk decl. ¶¶ 13, 28, tab B, Declaration of Nehir Yardimci ¶¶ 11, 25).

6. The contract was modified again on 10 June 2007 (effective 7 June 2007) by Modification No. P00002 (Mod. 2), to reflect more up-armoring design changes and to increase the contract price due to those changes. Specifically, the stated purpose of Mod. 2 was "to incorporate changes in the design in the up-armoring of each of the vehicles as reflected in the cost break out in Attachment 1." TEG submitted a cost proposal to reflect the additional costs for the three specific vehicle parts modified: gunner's seats, tailgate pieces, and interior supports. TEG broke out costs for each part into categories, covering material costs, labor, transportation and overhead, and profit. (R4, tab 19 at 3; Ozturk decl. ¶¶ 32-34) The government adopted TEG's price proposal for these changes, increasing the contract price by $1,096,422.20 to a total of $7,344,502.20. Mod. 2 was signed by both parties. It did not extend the period of

performance, and it did not contain a release of claims as was found in Mod. 1. (R4, tab 19)

7. After Mod. 2 was signed, TEG renewed performance, after having earlier received government approval of three sample up-armored vehicles (Ozturk decl. ¶ 37). TEG also requested and received an advance payment of $1,836,124.55 sometime around mid-June 2007 (R4, tabs 53, 54, 66).

8. Despite these developments, TEG encountered delays with the rest of performance. TEG bought and cut armor steel in Kuwait and shipped it to Baghdad (Ozturk decl. ¶ 39). In one case, TEG noted that it could not pick up its "steel truck from the convoy area due to blocked roads by the Iraqi Police Forces and the US Army" between 25 June 2007 and 7 July 2007 (app. opp'n, ex. 1, attach. 3). TEG had also encountered delays in receiving vehicles from the Iraqi police, in the March-September 2007 time frame. Specifically, TEG reported that the Iraqi police were not able to deliver vehicles due to "Security reasons and the Check point issues" between 10-14 March 2007 (app. opp'n, ex. 1, attach. 1). TEG also reported police delays in turning over vehicles "due to security reasons and the busy working schedule of the NP HQ [National Police Headquarters]" for 4-13 May 2007, 2-14 August 2007, and 13-20 September 2007 (app. opp'n, ex. 1, attachs. 2, 4, 5).

9. As of 23 September 2007, the date the contract was to have ended under Mod. 1, the government had received no vehicles, except for the three sample vehicles delivered in the spring (R4, tab 48 at 2). On that date, the government sent TEG a third modification (No. P00003 or Mod. 3) to extend the period of performance from 254 days after contract award to 414 days after the award date (5 March 2008) (R4, tab 23).

10. On 3 October 2007, TEG notified the government that it had no objection to the time extension set out in proposed Mod. 3, but did object to not receiving any money to compensate for "extended overhead." TEG refused to sign Mod. 3, stating that TEG incurred costs from delays that were not its fault, specifically: the government's modification process for Mods. 1 and 2; gate and border closures by the government of Iraq; late delivery of trucks; and, military convoy requirements. (R4, tabs 22, 26; Ozturk decl. ¶ 43) According to TEG, its facility was a specialty shop strictly for performance of this contract, and equipment and personnel could not be diverted to other projects (Ozturk decl. ¶ 46).

11. TEG continued performance in October, but in periodic status reports and in correspondence with the government, TEG again asserted that it was entitled to "extended overhead" and asked for a meeting with the CO (R4, tabs 33, 35, 36, 38). TEG did not receive any answer from the government in October.

12. By 14 November 2007, TEG had delivered 175 vehicles (the last of which was accepted by the government on 22 November 2007) (Ozturk decl. ¶ 45; R4, tab 48 at 3). TEG wrote the government again on 16 November 2007, again asserting that it incurred delay costs due to the contract modifications, road blockages, border restrictions and convoy requirements, and again asking for a meeting to resolve the issues so TEG could complete the contract. Specifically, TEG complained that it had had to "follow both countries Custom[s] Regulations and Border rules, furthermore Military Convoy Regulations." Because the "US [A]rmy lets only 20% of [all the] trucks to carry construction materials" to join convoys, TEG asserted it incurred delay costs waiting at the Kuwait border. (R4, tab 42 at 2) TEG stated that it was able to deliver more trucks after 14 November 2007, but could not officially move the vehicles without a valid extended contract (Ozturk decl. ¶ 45). TEG did not receive a response to its 16 November 2007 letter.

13. On 10 December 2007, TEG wrote again, saying they "eagerly want to complete this project," and again asking to meet. TEG said "we are willing to pay liquidated damages if we don't complete[] the project on time" (there was no liquidated damages clause in the contract), but stressed that, without a response, "we will have to discontinue the operation due to non-communication." (Gov't mot., encl. 3) The government did not respond in December or January.

14. On 14 February 2008, the government issued a Notice of Contract Conclusion to TEG. The letter stated that TEG had delivered only 175 out of 1,323 vehicles,[2] and that the government would not extend the period of performance and was closing out the contract and de-obligating the remaining funds. The letter concluded with the statement that all remaining items and services "are hereby considered cancelled and will not be accepted." The notice did not cite to any cancellation clause. The notice stated that it was a "final decision of the Contracting Officer" although it did not provide contractor appeal rights. (R4, tab 64) TEG did not appeal this decision.

15. On 24 February 2008, TEG submitted a request for an equitable adjustment (REA) of $6,475,720, and asked that, if the government denied the request, the REA be converted to a claim. TEG certified its REA/claim as required by the CDA. TEG claimed costs for material restocking ($2,169,720); "extended overhead" due to delays from 12 January 2007-14 March 2008 (one month past contract cancellation to effect the administrative closure of the contract) ($2,589,000); cost of inefficient production resulting from defective specifications, security issues, and the Iraqi police's failure to turn over trucks ($1,440,000); and cost of demobilization ($277,000). TEG again stated

[2] The letter states that only 175 of 1,185 vehicles were completed, but actually the contract required up-armoring and suspension upgrades for 1,323 vehicles (gov't mot. at 6; SOF ¶ 1).

that the time extension proposed by the government in Mod. 3 was acceptable (except for adding 30 days post-cancellation for closeout); the problem was the lack of payment for delay costs. (R4, tab 43)

16. The government responded by CO final decision on 17 June 2008, stating it was treating the REA as a claim as requested, and denied the claim, with two exceptions. First, the government concluded it owed TEG $721,593.77 for TEG's fees incurred for material restocking. Second, the government determined it owed TEG $302,085 for "Extended Overheads" for the 84-day period from 22 November 2007 when the last vehicle was accepted up to 14 February 2008 when the contract was cancelled, at a rate of $3,596.25 per day. The government stated that "[d]ue to the lack of government response after the last vehicle was accepted a reasonable number of days with overhead costs are allowable due to the specialized nature of the work that could not be diverted to other projects." The government also asserted that TEG had been overpaid under the contract and asserted its own claim of $812,446.78, composed of return of the advance payment of $1,836,125.55, minus the material restocking fees and overhead amounts already designated. (R4, tab 48 at 1, 3, 4)

17. On 30 June 2008, TEG appealed the CO's final decision to the Board; this appeal was docketed as ASBCA No. 56447.

18. On 4 March 2010, TEG revised the amount of its claim downward, to $2,382,711.97, a figure derived from a revised quantum calculation of $4,218,837.00 minus the advance payment already given TEG by the government of $1,836,125.55. The amount of $4,218,837.00 consists of $721,593.77 for material restocking fees, $1,766,843.75 for delays occurring periodically from 12 January 2007 to 20 September 2007 (design disputes, and failure of the Iraqi police to deliver vehicles for TEG to work on), and $1,730,400 for delay from 23 November 2007 to 14 March 2008 (failure of the government to respond to TEG communications). The delay costs consisted of penalties to a subcontractor for idle days, costs paid to a security company, and costs to compensate TEG for its overhead during the delay periods. (App. opp'n, ex. 1) TEG noted that the CO "placed considerable pressure on TEG and TEG made several financial concessions" in connection with Mods. 1 and 2, "with the hopes that the USG would be able to live up to their side of their obligations." TEG also stated that "[a]though P00001 contained a release of claims form, we do not believe it precluded a claim for overhead from January 12, 2007 until March 4, 2007." (App. opp'n, ex. 1)

19. On 5 May 2011, the government revised its overpayment claim to the full amount of the advance payment of $1,836,125.55, without any offsetting adjustment either for TEG's material restocking fees or for delay costs due to the government's lack of response after the last vehicle was accepted. On 29 July 2011, TEG appealed the

government's final decision as to the revised overpayment claim; this appeal was docketed as ASBCA No. 57719.

THE PARTIES' ARGUMENTS

The government argues that TEG is not entitled to any costs associated with the delays claimed, for five reasons: first, because certain delays were caused by sovereign acts of the United States; second, because Mods. 1 and 2 constitute an accord and satisfaction for delay costs; third, because Mod. 1 contained a release of claims; fourth, because the government is not responsible for delays caused by the Iraqi police in providing trucks; and fifth, because the government is not liable for costs after TEG allegedly anticipatorily repudiated the contract.[3]

TEG opposes the government's motion, alleging that there are "significant and numerous material facts in dispute" and that the "case is not ripe for a decision on summary judgment" (app. opp'n at 1-2). The government's reply states that nothing in TEG's opposition actually raises any dispute of material fact and that consequently its motion should be granted (gov't reply at 1). We address each of the five bases of the government's motion below, although not in the order raised by the government.

DECISION

Summary judgment may be granted only when there is no genuine issue 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). The movant has the burden to establish the absence of disputed material facts; once done, the non-moving party must set forth specific facts, not conclusory statements or bare allegations, to defeat the motion. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). Each of the government's five arguments, and TEG's response to them, are evaluated under this standard.

Mod. 1/Release, and Accord and Satisfaction

TEG claims delay costs arising from the design changes that were the subject of Mod. 1. The government argues that Mod. 1 bars TEG from recovering such delay costs because of the release of claims contained in that modification, and because the modification constitutes an accord and satisfaction (gov't mot. at 11-14). TEG counters that it signed the modification and release under the threat of default termination, which

[3] A sixth argument was withdrawn by the government by letter dated 25 January 2013. The government does not separately address the claim for material restocking fees.

invalidated the release (app. opp'n at 12). In view of our disposition below, we do not reach TEG's counter-argument.

Absent applicable exceptions, an unconditional release bars a contractor from recovering additional compensation based on events occurring before the release was executed. *Todd Pacific Shipyards Corp.,* ASBCA No. 55126, 08-2 BCA ¶ 33,891 at 167,759. TEG's specific release (Attachment 2 to Mod. 1) was broad in scope, covering "all liabilities, obligations, claims, and demands whatsoever arising out of or under this contract." However, the release was not unconditional. The release stated that "upon payment of the said sum" [of $6,248,180], TEG "does remise, release, and discharge the Government...." (SOF ¶ 5) Under the specific words of the release itself, therefore, TEG did not release any claims until full payment was made. Later, the government cancelled the contract and never made full payment of $6,248,180. Consequently, because the condition of full payment never occurred, this conditional release is not effective to bar TEG's current claim concerning delay costs related to Mod. 1.

The government also argues that no further claims related to Mod. 1 design changes can be made because TEG agreed to a new delivery date and that agreement to a new completion schedule precludes claims for both time extensions and delay costs based on causes that existed before the date of that agreement, citing *Sierra Blanca, Inc.,* ASBCA Nos. 30943 *et al.*, 91-2 BCA ¶ 23,990 (gov't mot. at 13). As we explained in *Cox & Palmer Construction Corp.*, ASBCA No. 43438 *et al.,* 93-3 BCA ¶ 26,005 at 129,274, in reviewing bilateral modifications involving time extensions, the Board recognizes that "the action of the contracting parties in agreeing to a new performance schedule eliminates from consideration the causes of delay occurring prior to the extension." But when the modification does not include a waiver or release of claims, "the failure to reserve a claim for delay costs is not fatal to a later claim when the circumstances do not indicate the parties' intention to include delay costs." *Id.* Unlike *Sierra Blanca* which involved the "Equitable Adjustments Waiver and Release of Claims" clause, the release here was only to take effect on full contract payment and thus, as noted above, is not a bar to a delay cost claim. The government does not point to any facts showing that the parties intended to include delay costs; consequently, we follow *Cox & Palmer* that the agreement to a new delivery schedule does not in and of itself preclude a later claim for such costs, and does not do so here.

Next, we look to whether Mod. 1 constitutes an accord and satisfaction of appellant's claim for delay costs. To prove its affirmative defense of accord and satisfaction, the government must show four elements: 1) proper subject matter; 2) competent parties; 3) a meeting of the minds of the parties; and, 4) consideration. *Holland v. United States*, 621 F.3d 1366, 1377, 1382 (Fed. Cir. 2010). The government must show mutual agreement as to a claim which is a bona fide dispute. *Wright Associates, Inc.,* ASBCA No. 33721, 87-3 BCA ¶ 20,056 at 101,535. Here, the purpose

of Mod. 1 was clearly stated as being to compensate TEG for the additional up-armoring costs. (SOF ¶ 5) Mod. 1 does not explicitly address delay costs, nor is there anything in the present record to show that the issue of delay costs was even mentioned between the parties before Mod. 1 was signed. On the other hand, Mod. 1 refers to "any additional cost (to include but not limited to...) that are either directed or implied" by the agreement, which is broader than the targeted language concerning up-armoring costs. To constitute accord and satisfaction, the intent of the mutual agreement must be clearly stated and known to the contractor. *Holland*, 621 F.3d at 1382; *Metric Constructors, Inc.*, ASBCA No. 46279, 94-1 BCA ¶ 26,532 at 132,058. Given the wording of Mod. 1 and the lack of evidence as to delay cost disputes at this time, and drawing all reasonable inferences in favor of TEG, the government has not shown, as a matter of law, that Mod. 1 constitutes an accord and satisfaction of TEG's delay costs.

Mod. 2/Accord and Satisfaction

As to TEG's claims flowing from design changes captured by Mod. 2, the government again argues that the agreement is an accord and satisfaction barring TEG claims for delay costs incurred up to the time that modification was signed (gov't mot. at 11-13). The government asserts that it and TEG reached a meeting of the minds as to the compensation required by TEG for costs resulting from design changes. Because TEG did not reserve any right to claim future damages, or damages related to delay or extended overhead, the government argues that these claims cannot now be raised. (Gov't mot. at 12-13) TEG argues that delay costs related to Mod. 2 design changes are compensable because they were not covered by the modification (app. opp'n at 6).

Mod. 2 does not constitute an accord and satisfaction as to delay costs from the design changes. In Mod. 2, the parties agreed to design changes related to up-armoring vehicles. TEG identified specific vehicle parts—gunner's seats, tailgate pieces, and interior supports—and specific price increases for each part. The price increases were for material, labor, transportation and overhead, and profit—the direct and indirect costs for design changes for each vehicle part modified. Mod. 2 adopted the price changes that TEG proposed, for the parts in question; that was the "accord and satisfaction." (SOF ¶ 6) As to delay damages, there was no accord and satisfaction. Nothing in the record points to delay costs relating to Mod. 2 design changes having been discussed between the parties before Mod. 2 was agreed to. Mod. 2 did not provide compensation for any other costs, such as delay costs, or the specific damages TEG complains of: payments to idle subcontractors; payments to its security company; and unabsorbed overhead. The agreement was not an "accord" about delay cost compensation, nor did it reflect "satisfaction" of any delay cost claim via some lesser delay cost compensation. Delay costs simply were not the subject of Mod. 2.

The government cites three cases for the proposition that TEG's claim is barred because Mod. 2 did not contain a reservation or a right for a claim for damages (gov't mot. at 12); however, these cases are all distinguishable. *C&H Commercial Contractors, Inc. v. United States,* 35 Fed. Cl. 246, 252-54 (1996), concerned modifications that themselves were broadly written, and that also contained broad release language with no claims reserved; that is not the case here. In *Merritt-Chapman & Scott Corp. v. United States,* 458 F.2d 42, 44 (Ct. Cl. 1972), the delay claim was barred because it *was* encompassed in the contractor's proposal for compensation, a proposal that was accepted by the government. This was also the situation in *Brock & Blevins Co. v. United States*, 343 F.2d 951 (Ct. Cl. 1965) (contractor's claim for delay damages was covered by the modification and thus barred). Here Mod. 2 captures an agreement about compensation for design changes to specific vehicle parts. It does not cover delay costs. Thus, the government's accord and satisfaction defense is denied as to TEG's delay costs incurred after the Mod. 1 release; TEG's claims in that regard are open and unresolved.

Sovereign Acts

Among other things, TEG seeks costs related to "security reasons" it encountered, specifically, small amounts of delay caused by gate and border closures, road blockages, and requirements for shipments to be made in military escorted convoys (SOF ¶¶ 8, 10, 12, 18). The government moves for summary judgment as to these costs, arguing that delays caused by the U.S. government acting in its sovereign capacity are not financially compensable under the sovereign acts doctrine (gov't mot. at 9-11).

Despite limited information on these points, we assume without deciding that, as TEG asserts, road blockages, border/gate restrictions, and convoy requirements were imposed by the Iraqi government and by the U.S. government. The issue then becomes whether TEG is entitled to financial compensation for any delay in its performance resulting from these events. As explained below, as a matter of law TEG cannot recover in such instances.

First, with regard to any road blockages or border/gate restrictions that may have been imposed by the U.S. government, TEG does not allege that such actions were targeted at TEG or were taken to achieve some sort of financial advantage in connection with this specific contract. Indeed, TEG appears to view the complained-of requirements as being in connection with general government regulations and operations (SOF ¶¶ 8, 10, 12). Such acts, being of a public and general nature, not targeted at a specific contractor, would constitute sovereign acts. *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1371 (Fed. Cir. 2008). Actions taken by the United States in its sovereign capacity shield the government from liability for financial claims resulting from those acts, although a contractor is allowed additional time to perform. *M.E.S., Inc.,* ASBCA No. 56149, 12-1 BCA ¶ 34,958 at 171,856 (no monetary compensation due for delays

resulting from a sovereign act). To the extent that TEG claims costs for such delays, the government's motion is granted. With regard to military convoys, assuming without deciding that convoy requirements were in fact imposed by the U.S. government for shipments entering Iraq, any resulting delay costs would not be compensable for the same reason.

Second, with regard to any road blockages or border/gate restrictions that may have been imposed by the government of Iraq, TEG has not pointed to any facts, contract requirement, or case law that would make the U.S. government liable in its contractual capacity, under this fixed priced contract, for delay costs resulting from security actions taken by the government of Iraq. *TEKKON Engineering Co.*, ASBCA No. 56831, 11-2 BCA ¶ 34,872 at 171,530 (contractor did not demonstrate that U.S. government was liable for additional transportation costs related to Iraqi embargo). To the extent that TEG claims costs for such delays, the government's motion is granted.

Failure of Iraqi Police to Provide Vehicles

TEG's revised claim also includes costs attributable to delays allegedly caused by the Iraqi police in making vehicles available, during several periods of time beginning in March 2007 and ending in September 2007 (SOF ¶¶ 8, 18). The government does not deny that the Iraqi police delayed in providing the vehicles that TEG was required to work on, but argues that TEG is responsible for any costs resulting from that failure. The government argues that the government did not guarantee that the police would provide timely delivery, and that this situation is similar to government-approved subcontractor cases, where the government is not liable for delays (or costs flowing from the delays) of the subcontractor even if the government specified which company to use. (Gov't mot. at 14-15)

The government's "subcontractor" theory is not persuasive. Nothing in this case factually resembles a government-approved subcontractor situation. The Iraqi police are not TEG's subcontractor; they are the customer and the party on whose behalf the government is contracting. The government's legal theory is not supported by the facts, either directly or by analogy, and does not present a basis in law for denying this portion of TEG's claim.

The government also argues that this part of the claim is barred by the sovereign acts doctrine discussed above (gov't reply br. at 8). However, this is only partly true. The record reflects that delays occurred in part because of security issues, but also in part because of the "busy working schedule" of the Iraqi police (SOF ¶ 8). If the security issues were those caused by sovereign acts of the United States, then, as discussed above, the government is correct that TEG could not recover delay costs. Similarly, if the security issues were those caused by the Iraqi government imposing border crossing or

gate restrictions, as discussed above, TEG has not pointed to anything in the contract to show the U.S. government would be liable for delay costs flowing from such actions. However, the sovereign acts defense would not apply to delays caused by Iraqi police's work schedule. Thus, the government's motion is denied as to delay costs resulting from the failure of the Iraqi police to deliver vehicles due to their work schedule.

Anticipatory Repudiation

TEG has claimed delay costs for the period 23 November 2007-14 March 2008, starting the day after the government's last acceptance of vehicles and ending 30 days after the contract cancellation. The government argues that TEG is not entitled to any delay costs from 14 November 2007 forward because TEG "anticipatorily repudiated" the contract by failing to perform after 14 November 2007 (gov't mot. at 15-17). TEG alleges that the government breached its implied duty to cooperate by not responding to TEG's letters, and that it is entitled to compensation for this reason and by viewing the government's lack of response as a constructive suspension of work (app. opp'n at 15, 18, ex. 1 at 3).

In order to demonstrate an anticipatory repudiation, the government must show that TEG "communicated an intent not to perform in a positive, definite, unconditional and unequivocal manner, either by (1) a definite and unequivocal statement by the contractor that it refused to perform or (2) actions which constitute actual abandonment of performance." *Production Service & Technology, Inc.*, ASBCA No. 53353, 02-2 BCA ¶ 32,026 at 158,293 (quoting *Jones Oil Co.*, ASBCA No. 42651 *et al.*, 98-1 BCA ¶ 29,691 at 147,150).

Here, the government has not shown that, as a matter of law, TEG anticipatorily repudiated the contract. From mid-November to mid-December, TEG at least twice spoke of its desire to complete the contract, and at least twice asked for meetings with the government. Although in December TEG said it would have to "discontinue the operation" if it did not hear from the government, this was in the same letter where TEG said it "eagerly" wanted to complete the project and would pay liquidated damages if necessary. (SOF ¶¶ 12, 13) This correspondence does not reflect an unequivocal statement of refusal to perform, especially since it is linked to the government's lack of response to TEG's communications.

As to abandonment of performance, first, it is not clear when TEG did actually stop performing. The government asserts that TEG stopped performing on 14 November 2007 with government acceptance of the last truck on 22 November 2007. However, TEG asserts they were able to deliver more trucks after that, if the contract issue could be cleared up. Also, as noted earlier, TEG referred in December to possibly having to discontinue operations in the future, suggesting some possible ongoing performance

(SOF ¶¶ 12, 13). Drawing all reasonable inferences in favor of TEG, none of this conclusively establishes when TEG's performance ceased or that, as a matter of law, TEG anticipatorily repudiated the contract.

CONCLUSION

For the reasons stated above, the government's motion is denied as to delay costs attributable to the design changes captured by Mods. 1 and 2, delay costs attributable to delays of the Iraqi police in providing vehicles due to their "busy working schedule," and delay costs claimed from 23 November 2007-14 March 2008 attributable to the government's silence in the face of TEG's communications.

The government's motion is granted as to TEG's costs flowing from actions of the U.S. government and the government of Iraq relating to gate/border closures and road blockages, and costs flowing from actions by the U.S. government relating to military convoys. This decision expresses no opinion as to TEG's material restocking fees, which were not addressed by either party during the briefing on the motion.

Dated: 4 March 2013

Elizabeth M. Grant

ELIZABETH M. GRANT
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

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. 56447, Appeal of Troy Eagle Group, rendered in conformance with the Board's Charter.

Dated:

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