

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
American AquaSource, Inc.) ASBCA Nos. 56677, 57275
)
Under Contract No. W91GDW-08-D-4010)

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OPINION BY ADMINISTRATIVE JUDGE TUNKS

ASBCA No. 56677 is an appeal from the termination for cause of a commercial items contract for failure to deliver purified bottled water to Logistics Staging Area (LSA) Adder, Talil, Iraq. American AquaSource, Inc. (AAS or appellant) requests that we convert the termination for cause to a termination for convenience, alleging that the government waived the delivery date. ASBCA No. 57275 is an appeal from the deemed denial of a claim arising from the government's alleged breach of its express and implied duties under the contract. The breach claim totals \$3,437,276. We have jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. Only entitlement is before us in ASBCA 57275.

FINDINGS OF FACT

The Request for Proposals

1. In 2007, Logistics Staging Area (LSA) Adder, Talil, Iraq (LSA Adder or base) set aside land for a water bottling facility (tr. 29-30). In preparation for the award of a contract for bottled water, the base compacted, graded, and placed gravel at the site in January/February 2008 at a cost of \$198,000 (R4, tab 6; tr. 24-25). No changes to the site were made after that time (tr. 25).
2. On 18 March 2008, the JCC-I/A (government) issued Request for Proposals (RFP) No. W91GDW-08-R-4019 for an indefinite quantity commercial items contract to

provide purified bottled water to LSA Adder, Talil, Iraq (R4, tab 2). The minimum dollar value for each task order was \$100,000 and the maximum dollar value was \$50,000,000. As modified by Amendment No. 0002 to the RFP, the minimum quantity for the initial delivery order was 1,040,000 cases and the maximum dollar value for all task orders was \$95,000,000. (R4, tab 2 at 2 of 56, tab 3 at 2 of 56) In addition to supplying bottled water, the contract required the successful offeror to set up a bottling plant on land to be provided by the government (R4, tab 4 at ¶ 11.2). The RFP contemplated a 12-month base year and two 12-month option years (R4, tab 1 at 14 of 37). The RFP also notified potential offerors that there would be a site visit on 22 March 2008 (R4, tab 2).

3. The SOW provided, in part, as follows:

2.0 PURIFIED WATER/EQUIPMENT CAPABILITIES:

....

2.3 ...The contractor is responsible for the set-up/assembly of the plant.... The plant must have the capability to be relocated to another location.

....

4.0 TIMELINE

4.1 All bottled water minimum inventories shall be in place no later than 1 August 2008.

4.2 The contractor shall produce purified bottled water in such amounts as to satisfy the minimum inventory levels as forecasted by the COR [Contracting Officer's Representative], unless directed otherwise by the Contracting Officer.

....

10.1 Contractor Employee Clearances. Contractor shall establish a local hire recruiting/vetting program [and] conduct interviews and review employment application information for candidates. A background check must be conducted for all Local National (LN) personnel hired by the contractor.... Third Country National (TCN) Contractor employees shall process through the Kuwaiti Processing Center. It is the

responsibility of the Contractor to obtain all required documentation for their employees to successfully process through th[e] deployment center....

....

10.2 Place of Performance. The Contractor shall perform services required in the Statement of Work at LSA Adder, Tallil [sic], Iraq.

NOTE This location is on a military installation in a combat zone. This is a desert region with high temperatures during the day, low temperatures at night; wind and blowing sand, decreased sanitization, limited resources to include supplies and materials, with austere and unimproved conditions in and around the supported military installation.

....

11.0 GOVERNMENT FURNISHED MATERIAL...

....

11.2 The Government will provide land within a secure military base for the purpose of setting up and operating the required production facility and water storage yard. The government will establish and maintain roadways into and out of each delivery depot that minimizes mud and dust conditions.

11.3 Base support, as available, to include billeting/quarters, messing facilities, AAFES Post/Base Exchange, banking, check cashing, currency exchange, commissary, theater, laundry, gymnasium, Morale Welfare and Recreation facilities and activities commensurate with that afforded Government employees and military personnel. All contractor personnel are to be provided living space comparable to that provided to military and DoD civilians. In the short term, that may be a tent with cots and shower and toilet facilities. As base improvements continue, contractors

will be moved along with the military personnel into living containers or hardstand buildings and assigned quarters based on grade.... No contractors in theater will be billeted off of a US secure facility.

(R4, tab 4 at 1, 3, 6, 7, 9 of 15)

4. The SOW did not require the government to improve the land for the bottling plant (R4, tabs 1, 2, 4).

The Site Visit

5. Major Joseph E. Mullins, the Contracting Officer's Representative (COR)/Brigade Engineer, and Captain Clifford F. Bermodes Jr., the contracting/ordering officer (CO), conducted the site visit on 22 March 2008 (R4, tab 8; tr. 11-16). Two to five contractors participated in the site visit (tr. 48, 60). Major Mullins walked the perimeter of the site with the participants "to show them...where the [bottling] plant w[ould] be constructed" (tr. 16-17).

6. Mr. William Maxwell Wyeth, IV, president of AAS, was its sole witness (tr. 102). In November/December 2007, he hired Tariq-Al-Waffa (Tariq), a Bagdad-based company, to be AAS's local point of contact (tr. 153). Mr. H. Lowry was the owner of Tariq and vice president of AAS, and his brother, Mr. P. Lowry, was the General Manager (R4, tabs 7 at 4, 16 at 1). Mr. Wyeth executed a power of attorney to the Lowry brothers, authorizing them to manage the contract (tr. 106; ex. A-11).

7. No one from AAS or Tariq participated in the site visit because Mr. Wyeth was of the opinion that the four-day window between 18 March and 22 March 2008 was too short to make the necessary travel arrangements (tr. 108-9).

8. Since so few contractors attended the site visit, Captain Bermodes posted a sketch of the site to the RFP on 31 March 2008 (supp. R4, tab 48 at GOV-133). The sketch was dated 12 May 2007 and contained a handwritten note indicating that it was not drawn to scale. The origin of the sketch is unknown. (R4, tab 14) The left side of the sketch depicted a "BUILDING AREA" and the right side depicted a "TRUCK LOADING AREA." The title of the sketch, which was located above the Building Area, was "C-1 WATER BOTTLING PLANT CONCEPTUAL PLAN." The sketch indicated that the building area was 215 by 131 meters and that the truck loading area was 215 by 75 meters, or 10.94 acres (app. br. at 6). The truck loading area was owned by one of the base's subordinate units and had been used for staging convoy operations since at least October 2007 (tr. 27).

9. AAS did not request clarification of any of the contract provisions or the sketch prior to award because it was "satisfied with the information [the government] had given us" (tr. 114). AAS' bid documents are not in evidence.

The Proposal

10. Captain Bermodes received AAS' proposal on 3 April 2008. The proposal provided, in part, as follows:

6.0 Schedule (Phase-in/Timeline)

Upon award...the Contractor will commence construction of its facility [and issue] purchase orders [for] laboratory equipment and test supplies.

6.1 Proposed Timeline

[The initial inventory of laydown goods from a 3rd party was scheduled for the week of 14 July 2008. AAS planned to have the laydown quantity ready for delivery to the government on 1 August 2008.]

....

14.0 Footprint (production & housing)

We are planning a 35,000 square foot facility with suitable prepped ground with canopy for inventory laydown.... We will arrange for a regional contractor to prep the ground and pour the concrete pad for the building according to conditions.

....

16.0 Contingency Plan

...In the first quarter of the contract, we are buying bottled water from a Centcom (sic) approved supplier in order to commission the plant in a timely fashion....

(R4, tab 7 at 9-10, 14, 15)

11. The proposal was incorporated into the contract at award (R4, tab 2 at 1).

Contract Award and Task Order No. 0001

12. The government awarded Contract No. W91GDW-08-D-4010 to AAS on 18 May 2008 at a price of \$2.97 per case (R4, tab 1). On the same day the contract was awarded, the government issued Task Order (TO) No. 0001, which obligated \$3,088,800 (1,040,000 cases of water) in satisfaction of the government's minimum obligation under the contract (R4, tab 8).

13. The contract incorporated FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (FEB 2007) by reference. The clause provides, in part, as follows:

(d)...The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

....

(f) Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers....

....

(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.... If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(R4, tab 1 at 24 of 56)

14. On 26 June 2008, Mr. Wyeth submitted Requests for Information (RFIs) to the government. In pertinent part, he requested the following information:

REAL PROPERTY AND GENERAL BASE FACILITIES

....

3. We anticipate a staff of approximately 33-35 people, with up to 4-5 people on temporary visits addressing specific areas. What is the housing situation?

[Answer] COB Adder is very limited on housing as we are experiencing a heavy population increase. Housing may temporarily be in tents, but there are contracts in place to get new living areas. If CHUs (Containerized Housing Units) are available, you will be issued one of those.

We plan on 26 Iraqi employees and the rest will be expats. How many housing units are being allocated for our use?

[Answer] Iraqis will have to live on Contractor Row outside of the main installation, and must be escorted each day. [T]he current...policy is that all Iraqi employees must be escorted anywhere they go and can only be on post from 0800 until 1600.

....

BASE ACCESS

....

3. Contractor badging: Since it is unknown how and how many contractor personnel will be working, when is it necessary to provide a list of their names?

[Answer] As soon as possible as it can take some time to get everyone through the system.

(Supp. R4, tab 51)

15. Contractor's Row was located within the secondary installation perimeter just outside the main entry point to the primary installation perimeter (tr. 12, 35). Both perimeters were secure (tr. 11-12). Only military personnel, DoD civilians, contractors, and expatriates were housed within the primary perimeter (tr. 32-33). Generally speaking, the government provided land for LNs and TCNs on Contractor's Row. Contractors were allowed to upgrade the land on Contractor's Row as they saw fit. (Tr. 44) LNs were required to have armed escorts and were only allowed on the base for eight to ten hours a day. TCNs had unarmed escorts. (Tr. 35; ex. A-4)

Land for the Bottling Plant

16. On or about 28 June 2008, AAS requested the government to provide the exact dimensions of the land for the bottling plant (R4, tab 11). MAJ Mullins measured the land, took a photograph, annotated the photograph with the dimensions, and emailed them to AAS (R4, tab 14 at 4). The dimensions on the photograph indicated that the land was 208 meters by 130 meters or approximately six acres.

17. Mr. H. Lowry interpreted these dimensions to mean that the government had reduced the quantity of land for the bottling plant from 11 acres to 6 acres, causing him to email Mr. Peter D. P. Vint, AAS' contract administrator, as follows:

...Clearly we cannot lock in anything to do with the plant construction or water lay down area – which includes purchasing the original water order – until this issue [the amount of land to be provided] is cleared up....

(R4, tabs 14 at 3, 31 at 6)

18. On 30 June 2008, Mr. Vint emailed Capt Bermodes as follows:

...Camp Adder has reduced the land for our project from the 11 acres previously agreed in writing^[1] by the parties, to 6 acres.... Please resolve this issue as soon as possible so that we may get started on construction.

(R4, tab 14 at 1-2)

¹ We have been unable to locate the agreement referenced by Mr. Vint.

Vetting, Badging, and Housing

19. Mr. Wyeth arrived in Iraq to plan the contract at the beginning of July 2008 and authorized Tariq to sign a contract with RaAli Trading & General Contracting Company (RaAli) to construct the bottling plant (tr. 161- 62). Tariq entered into a contract with RaAli effective 7 July 2008. The contract price was \$1,536,000. The contract did not include a clause for liquidated damages. Work was to begin within 14 days of the notice to proceed (NTP) and be completed 60 days later. (R4, tab 52) The record does not contain the NTP, but it appears that it was issued on or about 14 July 2008 (R4, tabs 29, 34 at 5).

20. On 7 July 2008, Mr. P. Lowry requested information about “escort rules on base.” In particular, he wanted to know whether an Iraqi engineer employed by AAS, who had a yellow NMF-I badge in the IZ (International Zone), could escort two unbadged Iraqi engineers employed by AAS onto the base and to the job site to conduct a site survey and whether they could be housed on base. Major Mullins replied that “they [would] all have to be screened and badged” if they did not have Iraqi-wide badges. (R4, tab 17)

21. The vetting process for Iraqi nationals could take two weeks or more to complete. Major Mullins described the process as follows:

[The vetting] start[s] ou[t] with a...submission of names and identification to the local installation and then there was a process that usually took two-plus weeks that went from the local security team up to Baghdad to go through the larger database to make sure, you know [that the individuals did not have] criminal backgrounds or [that they were not] wanted personnel or what not.

(Tr. 36)

22. AAS never submitted the names of its Iraqi construction workers for vetting (tr. 37-8, 168-9).

23. On 9 July 2008, Mr. P. Lowry emailed Major Mullins as follows:

At this time we are ready to proceed with construction....
Pat Lowry, our General Manager, will fly to Talil on Thursday, July 10, 2008 to meet with you and...conduct a site survey AND MEET WITH THE PERSONAL [sic] THAT YOU HAVE ASKED HIM TO MEET WITH. At this time we also require that you provide us THE facilities to house

our ex-pats (3) and Iraqi laborers (approximately 35). Please let us know specifically whether you are unable to comply with any of these requirements...as [that] will cause a delay and increased costs in performing the contract. [Emphasis in original]

(R4, tab 16)

24. On 10 July 2008, Major Mullins responded as follows:

[W]e are currently at capacity for living areas and most new people...have to share tent space until the new living areas arrive.... Again, based on all previous e-mails until last night, I did not know there was a requirement to house any Iraqis this weekend. We will work with Garrison on the housing, but I need an update of personnel requirements, which apparently has grown from 26 to 35 Iraqis[.]^[2] Finally, if these people are not badged Iraqi-wide, then they all have to be screened and badged, which again was mentioned in the RFIs that we answered several weeks ago....

(R4, tab 17)

25. On 10 July 2008 at 11:29 a.m., Mr. P. Lowry canceled the site visit and the start of construction (R4, tab 17). On 10 July 2008 at 11:51 a.m., Captain Bermodes notified AAS that space had been cleared on Contractor's Row for its Iraqi laborers (R4, tab 18).

26. Mr. P. Lowry visited the base on 11 July 2008 (R4, tab 20; tr. 77). During his visit, he was shown the land for the bottling plant which measured about six acres. According to Mr. Wyeth, the land was not level and had a large crown, making it unsuitable for construction of the bottling plant. (Tr. 125) Mr. P. Lowry did not testify.

27. On 12 July 2008, Mr. H. Lowry emailed Captain Gregory Santiago, the new CO, protesting the lack of housing for LNs (R4, tab 20).

² AAS advised the government that it planned to bring 26 LNs to the site on 26 June 2008 (finding 14).

28. On 14 July 2008, Mr. Vint emailed Captain Santiago as follows:

I am writing to follow up on...the stop work request by JCC-I/A [of 10 July 2008]. We wish to maintain full readiness to implement the contract as soon as JCC is ready. As you know, the contract called for deliveries of water and a payment to us of \$3 million in August. Because of the changed situation, we require that payment [be made at this time] to cover our actual expenses to date as well as projected costs to maintain readiness until the stop work is lifted....

(R4, tab 21)

29. On 16 July 2008, Mr. Vint emailed Captain Santiago:

[T]o reduce [our] costs, we are hoping that USG will find a way to construct...housing for our construction crews and permanent staff.... [W]e are working on a proposal to self-construct the necessary housing, at a cheaper price and much quicker than USG or one of its primary logistics contractors.... If JCC-I/A is able to justify it as an emergency procurement for the mission-critical water delivery, we could be up and running on construction almost immediately.

(R4, tab 23)

The Show Cause Notice

30. On 23 July 2008, the government directed AAS to show cause why the contract should not be terminated for cause, inviting it to present any facts bearing on the matter within 5 days of receipt of the notice (R4, tab 25).

31. Mr. Vint replied that the government caused the default alleging, among other things, that (1) the government “turned away” its Iraqi construction crew³; (2) the quantity and quality of the land provided for the bottling plant and billeting was inadequate and unsuitable; (3) sandstorms prevented AAS from getting to the site until 11 July 2008⁴; (4) the government failed to provide housing for its Iraqi construction crew; and (5) the government required AAS to hire Iraqi workers⁵ (R4, tab 26).

³ There is no evidence that AAS ever brought a construction crew to the site.

⁴ AAS withdrew this defense on page 6 of its reply brief.

⁵ The contract required only that AAS establish a local hire recruiting program/vetting program (R4, tab 4 at SOW ¶ 10.1).

32. On 30 July 2008, Mr. P. Lowry forwarded an email from RaAli to Captain Bermodes, which stated that RaAli was charging Tariq/AAS \$5,000 per day for the delay to the start of construction beginning on 15 July 2008 (R4, tab 29).

33. AAS failed to deliver any water on 1 August 2008 (tr. 80).

The "Negotiation"

34. On 1 August 2008, Captain Santiago advised AAS that the government would only provide six acres of land and that billeting and life support would only be provided "as available." He denied that the government had prevented AAS from starting work or that it had issued a stop work order. He offered AAS a chance to proceed with the work if AAS would agree to the following:

- Submit a new...timeline....
- Vetted American employees with CAC cards will move onto [the base] immediately and be given billeting....
- TCN and LN personnel will be located on land set aside on...Contractor Row.... [AAS] will be responsible for providing life support....
- Consent to a no-cost settlement for equitable adjustments [sic] requests and a signed release of claims letter provided by the Government.

The Government expects [AAS] to comply with the terms of [its contract] and the provisions listed above. If these requirements are not met the Government will terminate for cause the Task Order and IDIQ per FAR 52.212-4(m). This letter is not providing [AAS] an excusable delay, suspension or extension of work, rather it is an opportunity for [AAS] to comply with the terms of the Contract....

(R4, tab 30, ¶ 4)

35. Captain Santiago testified that his intention in issuing the 1 August 2008 letter "was to resolve the construction issue because [AAS could] still deliver bottled water, but [that] the big part of the contract was construction of the plant and we knew that they were behind on that" (tr. 87).

36. On 2 August 2008, Mr. Vint requested Captain Santiago to withdraw the government's request for a no-cost settlement and signed release of claims. He also "accept[ed]" the six acres of land offered by the government (R4, tab 31 n.2). At the hearing, Mr. Wyeth testified that AAS could have performed the contract with six acres of land and that it had always planned "to put a lay-down of water once [it was] able to secure the land on Adder" (tr. 121, 145).

37. On 5 August 2008, Mr. Vint submitted AAS' "final response" to the show cause notice. AAS offered to begin producing bottled water 75 days from the date on which the government provided suitable land for the bottling plant (leveled, graded, and covered with gravel) and land suitable for a "mancamp" for its expatriates and Iraqi workers (R4, tab 32). Mr. Vint did not address the contingency plan in AAS' proposal, which required AAS to purchase water from a CENTCOM-approved supplier for the first quarter of the contract (R4, tab 7 at ¶ 16.0).

38. On 18 August 2008, Major George F. Scheers, Jr., the new CO, advised AAS that, with the exception of the roadways into and out of the facility (SOW ¶ 11.2), the contract did not require the government to improve the land. In addition, Major Scheers pointed out that ¶ 14.0 of AAS' proposal indicated that AAS would arrange for a local contractor to prepare the ground and pour the pad for the bottling plant, leading him to conclude that AAS knew it was responsible for the sitework. As to SOW ¶ 11.3 (base support), he stated that the government was only obligated to provide housing "as available" and that no housing for LNs and TCNs was available. He also stated that the government had not contemplated providing life support for LNs and TCNs, but might be willing to furnish some living, shower, and toilet trailers if AAS would agree to modify SOW ¶ 11.3. The proposed modification stated that the government would provide 3.98 acres of unimproved land adjacent to Contractor's Row on which AAS could construct housing for its LNs and TCNs. Major Scheers also asked AAS if it was going to purchase water from a CENTCOM-approved source prior to setting up the bottling plant. He stated that bottled water was a critical resource and that the government might be willing to excuse the "delay" if AAS would deliver CENTCOM-approved water at the current price and agreed to modify SOW ¶ 11.3. (R4, tab 33)

39. Mr. Wyeth contacted several bottling companies. In particular, he tried to buy water from his old company, Oasis, who was the incumbent contractor (tr. 144-45). Oasis was unable to accommodate AAS' request. Although Mr. Wyeth attributed Oasis' refusal to the government, Major Scheers (now Lieutenant Colonel Scheers) testified that Oasis had a requirements contract with the government that did not permit it to sell water on the open market (tr. 96, 145). There were several bottling companies that might have provided water; AAS did not ask Lieutenant Colonel Scheers for help in obtaining water from any other source (tr. 97). The record does not reflect that AAS incurred any costs in connection with these efforts.

40. On 29 August 2008, Lieutenant Colonel Scheers wrote AAS that “[t]he government does not intend to modify the contract to grant you an extension without a release of claims...” (see R4, tab 30 at 2). Lieutenant Colonel Scheers again asked AAS if it intended to purchase water from a CENTCOM-approved source. In reply, Mr. Vint asked Lieutenant Colonel Scheers to find out if Oasis could extend its contract by two to three months. (R4, tab 43)

41. On 14 September 2008, AAS offered to complete the contract on the following terms: (1) the government must provide living space suitable for AAS to construct a mancamp for 38 Iraqi laborers and a minimum of 5 expatriates; living facilities must be comparable to those provided to other government contractors; (2) the land for the mancamp must be level, not below surface and subject to flooding, covered with gravel to allow access, and secure; (3) the 3.98 acres of land offered by the government for AAS’ Iraqi laborers had been previously used by another contractor and must be re-prepped, to include compacting and re-graveling; and (4) the land for the bottling plant must be leveled. AAS did not provide a specific date for completion of the bottling plant. However, it indicated that the concrete work for the plant would be completed within 60 days of completion of the mancamp, that the plant would be commissioned thirty days after erecting the bottling plant, and that the plant would begin bottling water within 15 days of commissioning. AAS indicated that it would begin work as soon as the government countersigned its proposal and paid it \$1,585,580. Among other things, amount requested included \$796,580 for liquidated damages and other delay damages and \$789,000 to construct a mancamp. (R4, tab 34 at 5) AAS did not offer to sign a release of claims.

The Termination

42. On 19 September 2008, Mr. Kenneth H. Dix, the JCC-I/A CO, terminated the contract for cause for failure to deliver minimum inventories of water (R4, tab 35).

43. On 23 September 2008, Mr. Vint requested Mr. Dix to withdraw the termination for cause, asserting that the government had waived the delivery date (R4, tab 37).

44. On 28 September 2008, the government de-obligated \$3,088,800, reducing the contract value to \$0 (R4, tab 40).

The Appeals

45. AAS timely appealed the CO’s final decision to this Board on 12 December 2008. We docketed the appeal as ASBCA No. 56677.

46. On 16 April 2010, AAS submitted a breach claim totaling \$3,437,276 to the CO and requested a final decision. AAS alleged that the government failed to provide the land promised for the bottling plant, failed to provide the housing promised for its Iraqi workers, and demanded that AAS agree to a no cost settlement and a release of claims as a condition for continuing the contract. AAS also argued that the government breached its implied duties to provide adequate specifications, to provide commercially practicable specifications, to cooperate and communicate with AAS, and to disclose vital information. (R4, tab 44) AAS appealed the deemed denial of that claim to the Board on 25 June 2010. We docketed the appeal as ASBCA No. 57275 and consolidated it with ASBCA No. 56677 for hearing.

AAS' Motion for Summary Judgment

47. On 4 May 2010, AAS moved for summary judgment in ASBCA 56677, alleging that the government waived the delivery date. We denied the motion on 22 September 2010, finding that under the unique facts and circumstances of this case, drawing all inferences in favor of the non movant, the government did not waive the delivery date. ASBCA No. 56677, 10-2 BCA ¶ 34,557. On reconsideration, we affirmed the denial. ASBCA No. 56677, 10-2 BCA ¶ 34,590.

DECISION

ASBCA No. 56677 - The Termination for Cause

It is undisputed that AAS failed to deliver any water on 1 August 2008. AAS' principal defense to the termination is that the government waived the delivery date. AAS argues that the 49-day delay between default and termination was unreasonable and that it relied on the government's delay to its detriment and continued to perform with the knowledge, consent, and encouragement of the government. As a result, AAS urges us to convert the termination for cause to one for the convenience of the government⁶. The government asserts that it did not waive the delivery date and that the contract was properly terminated for cause. AAS also argues that the government's alleged breach of contract precluded it from performing, an argument which we consider under ASBCA No. 57275, below.

The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor and continued performance under the contract, with the government's knowledge and implied

⁶ The principles governing terminations for default also apply to terminations for cause. *Genome-Communications*, ASBCA Nos. 57267, 57285, 11-1 BCA ¶ 34,699 at 170,889.

or express consent. *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969); *see also Ordnance Parts & Engineering Co.*, ASBCA No. 44327, 93-2 BCA ¶ 25,690 at 127,806 (reliance is an essential element of establishing waiver of the government's right to terminate).

To constitute reliance, activities performed by the contractor after the delivery date must amount to productive performance or tangible progress on the contract. *Norwood Precision Products, Textron, Inc.*, ASBCA Nos. 38095, 38196, 90-3 BCA ¶ 23,200 at 116,428; *ACL-FILCO Corporation*, ASBCA No. 26196, 83-1 BCA ¶ 16,151 at 80,290; *Prestex, Inc.* ASBCA Nos. 21284, 21372, 21467, 23184, 81-1 BCA ¶ 14,882 at 73,603. As evidence of detrimental reliance, AAS argues that it (1) conducted a site survey on 26 August 2008; (2) RaAli, its construction contractor, was seeking \$5,000 a day in liquidated damages; and (3) Mr. Wyeth attempted to purchase water from another source.

In our view, the site survey was not substantial enough to constitute reliance. *Precision Standard, Inc.*, ASBCA Nos. 41375, 44357, 96-2 BCA ¶ 28,461 at 142,155 (\$1,183.70 too small a sum to constitute reliance); *Phoenix E. Incorporated*, ASBCA No. 25872, 82-1 BCA ¶ 15,729 at 77,819 (completion and submission of final drawings, submission of a sample of panel trim, and selection of a manufacturer without performance of any work was insufficient to constitute reliance). We are also of the opinion that the possibility of being responsible for liquidated damages does not constitute productive performance or tangible progress on the contract. Mr. Wyeth's efforts to find a water company were minimal. Thus, his attempts clearly do not constitute productive performance or tangible progress on the contract.

AAS also argues that its acceptance of six acres of land for the bottling plant and submission of a proposal for a mancamp after the delivery date satisfy the requirement for detrimental reliance. However, the government always planned to give AAS six acres of land. Thus, this did not constitute either productive performance or tangible progress on the contract. AAS' proposal to construct a mancamp for \$789,000 was a request to perform additional work and did not constitute productive performance or tangible progress on the contract. Moreover, under paragraph (d) of FAR 52.212-4 of the contract AAS had a duty to proceed diligently with the work pending final resolution of any disputes that might arise. Rather than proceed with the work and file its claims later, AAS chose to argue with the government until the delivery date expired. As a result, we conclude that the government did not waive the delivery date.

ASBCA No. 57275 - Breach of Contract

AAS asserts that it is entitled to breach of contract damages of \$3,437,276, arguing that "it was the Army's breach of the Contract's state [sic] and implied terms and conditions which hindered AAS' performance" (app. br. at 5). It concludes that the Board should find "that the Army breached the contract, resulting in the conversion of the

subsequent Termination for Default into one for convenience, and entitling AAS to damages” (app. reply br. at 16).

AAS’ breach allegations fail because they were not the proximate cause of the default. Although the contract established a delivery date of 1 August 2008 for the water, it did not establish a delivery date for completion of the bottling plant. Section 16.0 of AAS’ 3 April 2008 proposal, which was incorporated into the contract at award, stated that AAS would buy water from a CENTCOM-approved source for the first quarter of the contract, which would have allowed AAS to meet the delivery date. Thus, the proximate cause of the default was AAS’ failure or inability to purchase water from a third party in time to meet the 1 August 2008 delivery date.

Furthermore, AAS’ breach allegations lack merit. At the hearing, Mr. Wyeth admitted that AAS could have performed the contract with six acres of land (finding 36). The government did not breach the housing provisions of the contract because AAS never began processing its Iraqi workers to enter the base (findings 20, 21, 22). With respect to the other breach allegations, there is no proof that the specifications were defective or that the government failed to cooperate and/or disclose vital information to AAS.

The appeals are denied.

Dated: 8 January 2013



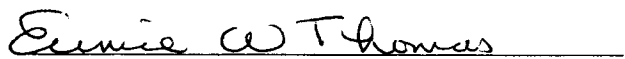
ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

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 Nos. 56677, 57275, Appeals of American AquaSource, Inc., rendered in conformance with the Board's Charter.

Dated:

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