ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Raytheon Company	)	ASBCA No. 61859
	)	
Under Contract No. W56HZV-11-C-0130	)	

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MAJ Abraham L. Young, JA
Frank A. March, Esq.
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OPINION BY ADMINISTRATIVE JUDGE MELNICK PARTIALLY GRANTING AND PARTIALLY DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT

This appeal concerns a government claim that Raytheon Company (Raytheon) breached a contract to deliver thermal sights to the United States Army. The government claims the sights were of insufficient quality and delivered late. Raytheon requests summary judgment, observing the government accepted the sights and did not revoke acceptance because of latent defects. Additionally, Raytheon maintains the government elected to forego a material breach claim for late delivery of the majority of the sights and has also waived that portion of its claim. Furthermore, Raytheon argues the government cannot prove that 15 of the sights were delivered late. We grant summary judgment for Raytheon on the quality issue and the alleged late delivery of the 15 sights. We deny summary judgment on the government's claim that the remainder of the sights were late.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The following facts have not been shown to be in dispute.

2. In November of 2009, the United States Army Contracting Command—(Warren) (Army or government) purchased light armored vehicles from the Canadian Commercial Corporation that were built by General Dynamics Land Systems-Canada (General Dynamics). The government intended to resell them to the Saudi Arabian

military. (R4, tabs 145-46) As part of the arrangement, the government was to furnish General Dynamics with Improved Thermal Sight Systems (sights) manufactured by Raytheon (R4, tab 145 at 1220; app. prop. finding ¶ 4). The sights are mounted on the vehicles and used to target their weapons (app. mot., ex. 1).

3. The government did not yet have a contract with Raytheon for the purchase of the sights at the time it contracted for the vehicles so it set about to procure them. During that process, Raytheon proposed a two-year warranty. Items failing to comply with the warranty would be repaired or replaced. (App. mot., ex. 2 at 5; app. prop. finding ¶ 11) Initially, the government indicated interest in a shorter version of the warranty, which Raytheon priced for it, but it ultimately declined to purchase one (app. mot., ex. 6; app. prop. findings ¶¶ 10-13).

4. On December 27, 2010, the Army awarded the contract referenced above to Raytheon for the purchase of the sights (R4, tab 1). Among the clauses incorporated were FAR 52.243-1, CHANGES—FIXED PRICE (AUG 1987); FAR 52.246-2, INSPECTION OF SUPPLIES—FIXED PRICE (AUG 1996); FAR 52.246-15, CERTIFICATE OF CONFORMANCE (APR 1984); and FAR 52.246-24, LIMITATION OF LIABILITY-HIGH VALUE ITEMS (FEB 1997) (R4, tab 1 at 75, 94). Instead of a warranty, the parties included a less expensive Product Quality Deficiency Report (PQDR) clause (R4, tab 1 at 77; app. mot., exs. 6-7 ¶¶ 7-8; app. prop. finding ¶ 15). In the event the government reported a component failure to Raytheon, the PQDR clause required Raytheon to investigate and conduct any failure analysis. Raytheon was then to report back to the government outlining the results of those activities and propose corrective action. Unlike the Raytheon warranty that was declined by the government, the PQDR clause did not require Raytheon to perform any repair work or component replacement at its own expense. (R4, tab 1 at 77)

5. The contract originally required delivery of 300 sights between February 28, 2012 and April 30, 2013 (R4, tab 1 at 20-21, 29-30, 36; app. prop. finding ¶ 18). However, General Dynamics needed the first units earlier. Accordingly, the government proposed an incentive fee and the parties modified the contract to establish a schedule for expedited delivery of 146 sights, including 15 for delivery by August 31, 2012. (R4, tab 1 at 5-6, 84; app. prop. findings ¶¶ 19-21) Raytheon delivered those 15 between July 20 and 30, 2012. The contracting officer (CO) acknowledged delivery and Raytheon's entitlement to the incentive fee. (App. mot., ex. 13).

6. On September 12, 2012, Raytheon informed the government that it had encountered technical difficulties, prompting it to request a schedule extension for the undelivered sights. As consideration, Raytheon offered a software enhancement that would improve the sight's synchronization with the vehicle's turret. (R4, tab 36; app. mot., ex. 15; app. prop. findings ¶¶ 24, 26, 28, 30) The CO responded that he believed the government already owned that software (app. mot., ex. 15). In November,

Raytheon offered a second software update as consideration (R4, tab 41 at 26; app. prop. findings ¶¶ 36-40).

7. On January 30, 2013, Raytheon again raised schedule relief with the government and requested it identify acceptable consideration. The CO stated that Raytheon should provide spare materials. Raytheon responded that it lacked some of the requested parts and suggested substitutes. (App. mot., ex. 7 ¶¶ 10, 17-18; app. prop. findings ¶¶ 43-46) On April 12, 2013, Raytheon offered in writing to provide certain spare parts in consideration for a schedule extension (R4, tab 6; app. prop. finding ¶ 47).[1]

8. On July 10, 2013, the government inspected and accepted the last of the sights required by the contract (app. prop. finding ¶ 57). After acceptance, Raytheon performed PQDR analyses for the government (app. mot., ex. 7 ¶ 20).

9. On September 11, 2013, Raytheon provided the government with an updated schedule and list of items offered in consideration for the extension (App. mot., ex. 19 at 4-5; app. prop. finding ¶ 51). On November 21, Raytheon re-sent the list to the CO. Expressing his understanding, the CO referred Raytheon to a colleague (app. mot., ex. 19 at 1; app prop. finding ¶¶ 51-53). Raytheon eventually decided the issue was "overcome by events" (app. prop. finding ¶ 55).

10. Nearly four years later, on December 20, 2017, the CO sent a letter to Raytheon seeking "equitable compensation" as a result of its late delivery of 133 sights. The CO also vaguely complained about "multiple quality issues" observed as early as March 2012. (App. mot., ex. 22; app. prop. finding ¶ 58) After Raytheon denied liability, a CO letter dated July 26, 2018 reduced the number of sights she claimed were late under the original schedule to 132. But she added an allegation that the 15 sights due for expedited delivery on August 31, 2012 were also late. (App. mot., exs. 23-24).

11. On August 10, 2018, the CO issued a final decision demanding $6,321,685.21 as damages for breach of contract premised upon the government's prior allegations. The decision elaborated more about the "quality issues" portion, referring to 73 PQDRs issued by General Dynamics to the government between February 25, 2012 and October 13, 2015. (R4, tab 143) Raytheon has appealed. Because the appeal is from a government claim, the Board ordered it to file a complaint. The complaint essentially repeats the final decision. After a period of discovery Raytheon requested summary judgment.

[1] The letter gives 2012 as the year but we conclude it meant 2013.

DECISION

Summary judgment should be granted if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Though we must draw all justifiable inferences in the non-movant's favor, a non-movant seeking to defeat the suggestion that there are no genuine issues of material fact "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)). Furthermore, after an opportunity for discovery, summary judgment must be entered upon motion against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Summary judgment may be used "to isolate and dispose of factually unsupported claims or defenses." *Celotex*, 477 U.S. at 323-24. Thus, it may be entered upon individual portions of the appeal. *See* FED. R. CIV. P. 56(a).

In general, "[a] breach of contract claim requires two components: (1) an obligation or duty arising out of the contract and (2) factual allegations sufficient to support the conclusion that there has been a breach of the identified contractual duty." *Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014). As noted, the government alleges the sights suffered from quality issues and that Raytheon delivered them after the contract's deadlines without the government's consent. A subpart of this latter allegation includes the government's demand for recovery of the incentive fee it paid for the 15 expedited units due by August 31, 2012, claiming they too were actually delivered late.

I. The Government's Quality Claim

The government's quality claim summarily identifies a list of flaws in the sights reported by General Dynamics' PQDRs. Examples are damaged holes and threads, incorrect packaging and missing inventory, surface abrasions to exterior coating, failed synchronization, missing hardware, transistor failures, power and weld problems, scratches and chips. There are many others. (Compl. ¶ 46) Raytheon observes that the government inspected and accepted all of the sights. It emphasizes that the government declined to include a warranty in the contract, leaving the government with limited recourse after acceptance for defects. According to Raytheon, the government's acceptance of the sights is conclusive in the absence of latent defects, fraud, gross mistakes amounting to fraud, or as otherwise contractually provided. Raytheon says the government never alleged any of these exceptions existed.

The government responds that General Dynamics' PQDRs say all the defects were discovered upon installation of the sights on the vehicles, demonstrating their

latency and nullifying the conclusiveness of the government's acceptance. The government relies upon a declaration from the CO who issued its final decision opining that shipment of the sights back to Raytheon constitutes a revocation of the government's acceptance (gov't mot., ex. G-1 ¶ 4).[2]

We agree with Raytheon that the government's acceptance of the sights is conclusive. In the absence of a warranty, our inquiry turns on the Inspection of Supplies clause. Among other things, it entitles the government to inspect all supplies required by the contract before acceptance. FAR 52.246-2(c). The government has the right to reject or require correction of nonconforming supplies. FAR 52.246-2(f). But, "[a]cceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract." FAR 52.246-2(k). The government bears the burden to prove facts nullifying the conclusiveness of acceptance. *See Sharpe*, ASBCA No. 22800, 79-1 BCA ¶ 13,869.

According to the CO's declaration, after latent defects were discovered on the sights they were documented on PQDR forms and the sights were shipped back to Raytheon. She concludes that these acts constitute revocations of acceptance (gov't mot., ex. G-1 ¶ 4). But the declaration suffers from multiple problems. First, the declarant states that she has only been the CO since February of 2018 (*id.* ¶ 2). That period is after all the relevant events in this appeal except the last demand letter and the final decision (SOF ¶ 10). She does not testify that she possesses any first-hand knowledge of any of the pertinent facts, including the context of the shipments back to Raytheon or any associated communications characterizing their purpose. An affidavit or declaration used to support or oppose a motion for summary judgment must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. FED. R. CIV. P. 56(c)(4). The CO's declaration fails that test. *See Kamran Zaland Supplies and Servs.*, ASBCA No. 61339, 19-1 BCA ¶ 37,475 at 182,050.

Even if we were to ignore the declaration's lack of foundation, it is still otherwise inadequate to support a finding that acceptance was revoked. The CO's assertion that shipment of the sights back to Raytheon equates to revocation is merely conclusory and therefore insufficient. *See SRI Int'l v. Matsushita Elec. Corp. of Am.*,

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[2] Raytheon's reply suggests we lack jurisdiction to address the government's latency and revocation allegations because they are not among the operative facts discussed by the government's final decision. However, Raytheon's motion contends the government's acceptance of the sights is conclusive, which would only be correct if it was never properly revoked. We may consider matters potentially relevant to the claim's validity and which do not change its nature. *See Dawson-Alamo1 JV, LLC*, ASBCA No. 60590, 19-1 BCA ¶ 37,357 at 181,645.

775 F.2d 1107, 1116 (Fed. Cir. 1985) (explaining that the party opposing summary judgment may not rest upon conclusory statements); *Kamran Zaland Supplies and Servs.*, 19-1 BCA ¶ 37,475 at 182,050. Anyway, the facts she actually describes show the government employing the PQDR process, where sights were shipped back to Raytheon with PQDRs (gov't mot., ex. G-1 ¶ 4). Without revoking acceptance, the PQDR clause permits the government to require an examination by Raytheon of the identified components and issue a report recommending possible corrective action (R4, tab 1 at 77). But that is all it demands. It does not mandate repair or replacement at Raytheon's expense. The government's invocation of the clause is not dependent upon a latent defect and does not constitute revocation of acceptance. Indeed, the government does not identify any PQDRs (which it claims were issued by General Dynamics, not the government) that declare revocation of acceptance by the government or expressly pronounce the flaws to be latent defects that fail to conform to an identified contractual requirement.

Furthermore, the government has not presented any other evidence that it ever communicated to Raytheon that it revoked acceptance due to latent defects. Thus, the government's December 20, 2017 letter to Raytheon, declaring breach of contract and seeking "equitable compensation" for "quality issues" discovered as early as March 2012, does not allege that they were latent defects and does not state that acceptance was ever revoked (app. mot., ex. 22). Nor does the government's July 26, 2018 letter (app. mot., ex. 24). For that matter, the CO's final decision does not allege that the government ever revoked acceptance of the sights (R4, tab 143). Even if we were to construe any of these letters to be a belated and inartful attempt to revoke acceptance, it has not come within a reasonable time after General Dynamics allegedly discovered the defects between 2012 and 2015 (SOF ¶ 11; compl. ¶ 46). "Revocation of acceptance must be done within a reasonable time after the latent defect . . . is discovered, or could have been discovered with ordinary diligence." *Bender GmbH*, ASBCA 52266, 04-1 BCA ¶ 32,474 at 160,615, *aff'd*, 126 F. App'x 948 (Fed. Cir. 2005); *see also Bar Ray Prods., Inc. v. United States*, 162 Ct. Cl. 836, 837-38 (1963); *Ordnance Parts & Eng'g Co.*, ASBCA No. 40293, 90-3 BCA ¶ 23,141; *Perkin-Elmer Corp. v. United States*, 47 Fed. Cl. 672, 674-77 (2000).[3] The government proffers no excuse for the delay.

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[3] The government's citation to the contract's Certificate of Conformance clause is groundless. Under appropriate circumstances, that clause permits shipment of supplies with a certificate executed by the contractor that they conform to the contract's requirements. The government's right to inspect is not prejudiced by the shipment and it retains the right to reject defective supplies within a reasonable time after delivery. FAR 52.246-15. Remarkably, the government relies upon this clause despite the fact that there are no such certificates in the record. Even if they existed they would be irrelevant. The issue here is not whether the government timely rejected the sights. It is whether the

The government has failed to make a showing sufficient to establish that it timely revoked its acceptance of the sights due to latent defects.[4] Its acceptance is therefore conclusive. Raytheon is entitled to summary judgment upon this portion of the government's claim. [5]

II. The Government's Late Delivery Allegation

The other component of the government's breach claim alleges that Raytheon delivered the sights after the contractual deadline and without the government's consent. This allegation breaks down into the 132 sights due under the contract's original schedule and the 15 due under its expedited schedule.

A. The 132 Sights Due Under the Original Schedule

Addressing the 132 sights first, Raytheon does not dispute that its delivery deviated from the contract's original schedule. But it maintains that the government's breach claim is too late. Raytheon argues that, after encountering a breach, the government could not continue to receive defective performance from Raytheon, run up damages, and then declare the breach at a later time. It also contends the government waived its claim.

1. Material vs Partial Breach

"When one party commits a material breach of contract, the other party has a choice between two inconsistent rights—[it] can either elect to allege a total breach,

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government timely revoked its acceptance under the Inspections clause because of latent defects. *See Peters Mach. Co.*, ASBCA No. 21857, 79-1 BCA ¶ 13,649 (observing that when Certificates of Conformance are used the government's rights remain limited by the Inspections Clause).

[4] The government contends through the CO's declaration that it requires more discovery to probe Raytheon's knowledge of the sights' quality and the reasons they were allegedly defective (gov't mot., ex. G-1 ¶¶ 7, 9-10). The government has not explained why it needs this discovery of Raytheon to present competent evidence that it revoked acceptance due to latent defects. *See* FED. R. CIV. P. 56(d); *see also Brubaker Amusement Co. v. United States*, 304 F.3d 1349, 1361 (Fed. Cir. 2002); *Moore USA, Inc. v. Standard Register Co.*, 229 F.3d 1091, 1116 (Fed. Cir. 2000); *Expresser Transp. Corp.*, ASBCA No. 61464, 19-1 BCA ¶ 37,220 at 181,196-97. The request is denied.

[5] Having found acceptance conclusive, we decline to address Raytheon' alternative contention that the government self-insured against defects under the contract's High Value Items clause.

terminate the contract and bring an action or, instead, elect to keep the contract in force, declare the default only a partial breach, and recover those damages caused by that partial breach." 13 *Williston on Contracts* § 39:32, *quoted in Scott Timber Co. v. United States*, 692 F.3d 1365, 1378 (Fed. Cir. 2012). Relying upon this principle, Raytheon claims the government failed to timely elect to declare a breach when Raytheon delayed delivery of the sights. Instead, the government opted to accept the last of them in July 2013 (SOF ¶ 8).

Raytheon is only partly correct and not enough to prevail here. Generally it is true that if the non-breaching party permits the other party to continue to perform after the breach, the non-breaching party is precluded from rescinding or declaring a material breach. *Scott Timber*, 692 F.3d at 1378-79 (quoting 13 *Williston* § 40:1). Thus, it is too late for the government to declare the contract to be at an end due to a material or total breach and seek damages based upon the loss of the balance of Raytheon's performance. This is the extent of the holding in the primary case relied upon by Raytheon, *Ling-Temco-Vought, Inc. v. United States*, 475 F.2d 630, 636-38 (Ct. Cl. 1973). But the government is not demanding such damages. Though the government accuses Raytheon of committing a material breach, it merely seeks the costs it claims to have incurred because of the delayed delivery. These damages are more consistent with a claim for partial breach of contract. A non-breaching party who accepts delayed performance may still claim damages for partial breach because of the delay. *Scott Timber*, 692 F.3d at 1378 (citing RESTATEMENT (SECOND) OF CONTRACTS § 246 cmt. b, illus. 2), 1379 (quoting *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1280 (Fed. Cir. 2008)). Nothing about the election principle bars the government from pursuing these partial breach damages.[6]

[6] In passing, Raytheon also argues that the government's complaint about its deviation from the contract's terms must solely be considered under the Changes clause and not as a breach. Under appropriate circumstances the Changes clause mandates an equitable adjustment when the contractor's costs have changed. FAR 52.243-1. Though normally applied to contractor claims, it may also be used by the government to decrease the contract price when the contractor has saved costs through its authorized or unauthorized actions. *Varo, Inc.*, ASBCA No. 16087, 73-2 BCA ¶ 10,206, *rev'd on other grounds*, 548 F.2d 953 (Ct. Cl. 1977); *see also* John C. Cibinic, Jr. *et al.*, *Administration of Government Contracts*, 429-30 (4th ed. 2006). However, Raytheon has not cited any case law holding the Changes clause is the government's exclusive source of recourse to recover its own costs as compensatory damages due to untimely delivery of purchased items.

2. Waiver

Raytheon also suggests that the government has waived any claim arising from Raytheon's late delivery of the sights by accepting them without objection and ignoring Raytheon's offers of consideration for an extension. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. *Massie v. United States*, 166 F.3d 1184, 1190 n.** (Fed. Cir. 1999) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled on other grounds, Edwards v. Ariz.*, 451 U.S. 477 (1981)). It is separate from an election. 13 *Williston* § 39:32 (explaining that an election is not a waiver but a choice between inconsistent rights; the two should not be confused). Generally speaking, a party may waive its right to insist upon strict contractual performance through the manifestation of an intent to do so or by inducing the non-waiving party to rely upon an apparent waiver to its detriment. 13 *Williston* § 39:27. The rationale is to prevent the waiving party from lulling the other party into believing that strict compliance is not required but then sue about it later. *Id.* § 39:15.

Raytheon primarily argues that *American West Construction, LLC*, ASBCA No. 61094, 18-1 BCA ¶ 36,935, supports finding a waiver here. There, the government waived its right to the construction of temporary bridges to reach a construction site. The Board found the bridge requirement was "dead" given the government's failure to object to an alternative plan and its consent to pay progress payments for the alternative's costs. 18-1 BCA ¶ 36,935 at 174,948-49 (citing *Gresham & Co. v. United States*, 470 F.2d 542, 554 (Ct. Cl. 1972)).

Raytheon has not demonstrated that the government intentionally waived the original delivery schedule. Raytheon's own evidence shows that the parties engaged in a dialog that acknowledged the delivery deadline was obligatory and required the government's consent to alter it. Raytheon offered consideration to the government for a schedule extension multiple times. The CO responded with comments, counterproposals, directions to confer with other government personnel, and his own reminder after the sights were delivered that consideration was still necessary for Raytheon to avoid contract delinquency (SOF ¶¶ 6-7, 9; app. mot., ex. 7 ¶¶ 9, 13; app. prop finding ¶¶ 40, 54). We cannot conclude from this record that, either during the contract's delivery time frame or after, the government manifested that the contract's original schedule was "dead." Also, Raytheon has not supported its suggestion that, after it delivered the sights late, the government was required to continually complain to Raytheon about their untimeliness to avoid waiver. Indeed, there is authority to the contrary. *See Williston* § 39:19 (conduct occurring after the deadline for performance has elapsed is not a waiver because it could not cause the detrimental reliance required to justify nonperformance). Raytheon's motion for summary judgment on this portion of the government's claim is denied.

B. The 15 Expedited Sights

The other batch of sights the government claims were late are the 15 expedited for delivery by August 31, 2012. Accordingly, the government seeks the return of mistakenly paid expedited fees. Raytheon's proposed findings of fact represent that it delivered those 15 sights between July 20 and 30, 2012 and that the assigned CO at that time acknowledged Raytheon had satisfied the expedited schedule and was entitled to a fee (app. prop. finding ¶ 23). The government's responsive statement of genuine issues does not deny the sights were delivered as described by Raytheon (gov't stmt. gen. issues ¶ 23). Furthermore, Raytheon's evidence supports its assertion (app. mot., ex. 13). Nevertheless, the government's brief argues that the CO's final decision alleging late delivery establishes a genuine issue regarding this fact. As previously observed, that CO explained in her declaration that she was only assigned to this matter in February of 2018. She has not represented that she has any first-hand knowledge as to when the sights were delivered (gov't mot., ex. G-1 ¶ 2). The government cites no other evidence to support its allegation. Accordingly, the government has failed to present any competent evidence that would establish that the sights were delivered late. Raytheon is entitled to summary judgment upon this matter.

CONCLUSION

Raytheon's motion for summary judgment is granted upon the quality component of the government's breach claim and upon the government's claim for return of the fee for the 15 expedited sights. Raytheon's motion for summary judgment is denied regarding the alleged late delivery of 132 sights under the original schedule.

Dated: June 8, 2020

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

(Signatures continued)

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

OWEN C. WILSON
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. 61859, Appeal of Raytheon Company, rendered in conformance with the Board's Charter.

Dated: June 9, 2020

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals