

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

MOTION FOR SUMMARY RELIEF DENIED: July 31, 2001

GSBCA 15167-TD

ABLE PRODUCTS COMPANY,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Thomas J. Kelleher, Jr. and Reginald M. Jones of Smith, Currie & Hancock, Atlanta, GA, counsel for Appellant.

David H. Brunjes, Office of the Legal Counsel, Federal Law Enforcement Training Center, Department of the Treasury, Glynco, GA, counsel for Respondent.

Before Board Judges **BORWICK**, **NEILL**, and **HYATT**.

HYATT, Board Judge.

Appellant, Able Products Company (APC), a contractor under Government contract number TFTC 98-4, seeks compensation for extended overhead in the amount of \$84,006, plus interest, pursuant to the Contract Disputes Act of 1978. Respondent, the Department of the Treasury, Federal Law Enforcement Training Center (FLETC), has filed a motion for summary relief, asserting that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. For the reasons stated below, we deny the motion.

Background

APC and FLETC entered into a contract on March 6, 1998, for the renovation of the heating, ventilating, and air conditioning (HVAC) and lighting systems in FLETC's Classroom Building 210, in Glynco, Georgia. Appeal File, Exhibit 2. On April 19, 1999, an APC employee discovered asbestos while performing demolition work in classroom

building 210. APC promptly notified FLETC. Two days later, on April 21, after testing confirmed that the asbestos was friable, FLETC ordered APC to suspend performance of all work in the building. *Id.*, Exhibits 61-63. FLETC subsequently allowed APC to return to the work area, with the exception of the east side of corridor E, on April 27, 1999. *Id.*, Exhibit 57. Full access to building 210 was permitted approximately two weeks later when asbestos abatement in the area was completed.

The contract contained the following provision that is relevant to this dispute:

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of the performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

Appeal File, Exhibit 2 at 412 (SUSPENSION OF WORK (APR 1984)), 48 CFR 52.242-14 (1998).

Respondent supports its position that the suspension lasted only six days through the declaration of George Nies, an engineer at the FLETC with responsibility for administering various construction projects, including the lighting and HVAC renovation of building 210. Declaration of George Nies (Nies Declaration) (Jan. 11, 2001) ¶ 1. Mr. Nies states that the east side of corridor E was a minor portion of the entire work area, which encompassed a total of seven corridors. In his opinion, the restricted access should not have impeded reasonable progress with the contract work. *Id.* ¶ 3. In addition, respondent contends that the contract was modified to add the asbestos abatement work, payment for which included overhead and profit. Appeal File, Exhibit 23 at 13.

In contrast, APC asserts that the east side of corridor E lay on the critical path of construction and relies on the affidavit of Mark A. Wood, APC's project manager and superintendent for this contract. Affidavit of Mark A. Wood (Wood Affidavit) (Mar. 19,

2001) ¶¶ 2, 8. Mr. Wood avers that the April 27, 1999, notification that APC could return to work did not have the effect of permitting APC to resume its base contract work. First, FLETC's maintenance staff had started the HVAC system without consulting with APC and had pumped potentially polluted air into the building. Second, the restricted part of the building, the east side of corridor E, contained work that was critical in order to complete the contract work in logical sequence and that APC was unable to access materials stored on site prior to the discovery of friable asbestos. Id. ¶ 8. Mr. Wood submitted daily reports to George Nies expressly advising that APC was unable to proceed with base contract work because of the restricted access. Id. ¶ 10. In Mr. Wood's opinion, APC was unable to effectively resume base contract work until May 17, 1999, when full access to the building was granted. Id. ¶ 8.

To rebut FLETC's point that respondent awarded the asbestos removal work to APC, appellant asserts that this award was not substitute work because it was completely subcontracted out; the APC workers assigned to complete the HVAC work were not qualified to perform asbestos removal and were forced to stand by until they could resume their duties with respect to HVAC work. Wood Affidavit ¶ 8. Mr. Wood added that because of the lack of base bid contract work and the difficulty of retaining qualified workers, APC was forced to have its employees either stand by or perform minor tasks. Id.

Discussion

Respondent has moved for summary relief, contending that there are no disputed material facts and that, since there was no unreasonable suspension of the work, the appeal is precluded as a matter of law. APC disagrees, asserting that there are genuine disputed facts as to the effective length of the delay, as to the extent to which the delay hampered the base contract work, and as to whether appellant was able to take on substitute work.

Applicable Law

Summary relief may be granted only when there is no genuine issue of material fact and the movant is clearly entitled to judgment as a matter of law; the moving party bears the burden of establishing the absence of any genuine issue of material fact. Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000); Mingus Constructors Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Armco Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986); Jo-Ja Construction, Ltd. v. General Services Administration, GSBCA 14786, 00-2 BCA ¶ 30,964, at 152,793. In considering motions for summary relief, all reasonable inferences are drawn in favor of the non-moving party. Parcel 49C Ltd. Partnership v. General Services Administration, GSBCA 15222, 00-2 BCA ¶ 31,073, at 153,405; Executive Construction, Inc. v. General Services Administration, GSBCA 15224, 00-2 BCA ¶ 30,997. Summary relief is properly denied when it appears that further development of the record is needed. HG Properties A, L.P. v. General Services Administration, GSBCA 15219, 01-1 BCA ¶ 31,376, at 154,922; Norman v. General Services Administration, GSBCA 15070, 01-1 BCA ¶ 31,351, at 154,819.

When the Government has delayed or suspended the contractor's work, the exclusive method for determining whether and to what extent the contractor can recover extended or unabsorbed home office overhead is the Eichleay formula.¹ See Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1580-81 (Fed. Cir. 1994). Recovery of unabsorbed or extended home office overhead, under the Eichleay formula, is appropriate when (1) a Government-imposed delay occurred; (2) the Government required the contractor to "stand by" during the delay; and (3) the contractor was unable to take on additional work while "standing by." Satellite Electric Co. v. Dalton, 105 F.3d 1418, 1421 (Fed. Cir. 1997); Mech-Con Corp. v. West, 61 F.3d 883, 886 (Fed. Cir. 1995); Maron Construction Co. v. General Services Administration, GSBCA 13625, 98-1 BCA ¶ 29,685, at 147,113. Once the contractor produces evidence showing that there was a Government-imposed delay, that it was forced to remain on "standby," and that the delay was "uncertain" as to its duration, the contractor has established a prima facie case for entitlement to Eichleay damages. The burden of producing evidence showing that the contractor did not suffer loss because it was able to reduce its overhead or take on additional work then shifts to the Government. Assuming the Government carries this burden, the contractor must then adduce evidence to show that the delay did in fact make it impractical to take on substitute work. West v. All State Boiler, Inc., 146 F.3d 1368, 1373-76 (Fed. Cir. 1998); Mech-Con Corp., 61 F.2d at 886. Uncertainty with

¹The Eichleay method refers to the decision in Eichleay Corp., ASBCA 5183, 60-2 BCA ¶ 2688, aff'd on reconsideration, 61-1 BCA ¶ 2894.

regard to the duration of the suspension, which causes the contractor's standby status during the suspension, is the critical factor that leads to unabsorbed overhead. West, 146 F.3d at 1053; accord Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999), cert. denied, 529 U.S. 1053 (2000).

The Motion

FLETC asserts that, as a matter of law, APC is not entitled to Eichleay damages as a result of the suspension of work. Although FLETC agrees with appellant that the suspension commenced on April 21, 1999, it contends that the delay lasted only until April 27, 1999, when FLETC notified APC that it could reenter the work area to continue HVAC work with the exception of the east side of corridor E. According to FLETC, the restricted area was a relatively minor portion of the area where work was to be performed. FLETC thus contends that the six-day delay was reasonable under the terms of the contract. Further, FLETC argues that APC received additional, replacement work when its contract was modified to include the abatement of the asbestos. This modification encompassed overhead and profit. In light of this, FLETC takes the position that the appeal must be denied as a matter of law.

APC opposes the motion, alleging that the existence of significant disputed material facts precludes summary disposition of this matter. First, APC avers that there is a material dispute with respect to whether the Government-imposed delay was reasonable in duration. While APC concedes that it was granted partial access to the building on April 27, it asserts that the restricted areas were critical to the contract work, and thus APC could not perform base contract work until it was able to gain full access to the east side of corridor E. Second, there is a dispute over whether the contractor was able to take on additional work while on "standby." APC contends that although it bid on and was awarded the contract for asbestos removal in building 210, this cannot be considered replacement work because the entire job was passed on to a subcontractor. APC still needed to retain its regular skilled employees to perform the base work under the contract, and these employees were not involved in the subcontractor's work. Additionally, these workers could not be employed on other jobs while awaiting full access to the building, but instead were assigned duties that did not fully utilize their actual skills. The Government disagrees, contending that the contract modification for asbestos abatement work constituted replacement work.

Based on the evidence and arguments advanced by the parties, we conclude that FLETC is not entitled to judgment as a matter of law. There is sufficient evidence to demonstrate that there are genuine factual disputes concerning both the reasonableness and the duration of the delay caused by the finding of the asbestos in building 210, as well as whether APC was able to take on replacement work. In particular, the nature of the continuing restrictions on access to part of the building, as well as the effect on APC's ability to perform, is squarely in dispute. These disputes preclude summary disposition of this appeal.

Decision

Respondent's motion for summary relief is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

EDWIN B. NEILL
Board Judge