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

MOTION FOR RELIEF FROM PREJUDICE DENIED: February 16, 2005

GSBCA 15502, 16055, 16551

TURNER CONSTRUCTION COMPANY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Patrick J. Greene, Jr. and Richard L. Abramson of Peckar & Abramson, P.C., River Edge, NJ, counsel for Appellant.

Thomas Y. Hawkins, Robert M. Notigan, Richard Hughes, and Amanda Wood, Office of General Counsel, General Services Administration, Washington, DC; and Michael DeChiara, Matthew S. Quinn, Christopher P. McCabe, Michael J. Vardaro, and Michelle Fiorito of Zetlin & DeChiara LLP, New York, NY, counsel for Respondent.

BORWICK, Board Judge.

Background

This appeal concerns a substantial claim by appellant concerning construction of the United States Courthouse and Federal Building, Islip, New York.

Respondent has filed a "Motion For Relief from Prejudice Caused by Appellant's Failure to Preserve Evidence." Respondent says that appellant has failed to preserve the following evidence in the case:

> (1) The critical path method (CPM) electronic scheduling updates past G139, which was issued about ten months before project completion;
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> (2) The electronic resource allocation control system (RACS) data from June 1996 through March 1997 and from July 1998 through the end of the project; and

(3) A three dimensional computer model, showing the rotunda structure, produced by a Turner subcontractor, LBL Skysystems (LBL).

See Respondent's Motion at 4-7.

As to the first item, respondent states that the final updated schedule (G139) produced by appellant in electronic form was dated October 8, 1999, and that the final hard copy of the schedule (G144) is dated March 8, 2000. Respondent's Exhibit 8. Respondent states that appellant has produced no schedules in any form for the time period that falls between G139 and G144 and none for the final six months of the project.

Appellant explains, based upon the affidavit of its project manager, that no electronic schedule updates existed beyond update G139, dated October 8, 1999, "because no later updates were submitted as part of the project record." Appellant's Opposition at 5; Appellant's Exhibit 2 (Affidavit of Douglas Renna (Renna Affidavit) (Feb. 9, 2005) ¶ 4). Mr. Renna explains that "schedule updates during the later portions of the project were done by hand for particular work areas, and reviewed and approved by the owner and its representative during project meetings and incorporated into the approved payment applications." Id. Mr. Renna further explains that no complete electronic updates were prepared after G139 because "the project was not being managed at that time on the basis of the Primavera schedule, it was not being fully updated and, unlike the official updates that were exchanged with GSA and its [Quality Control Manager], no procedure was in place to formally record such drafts electronically." Id. ¶ 5.

The second item is the RACS. RACS is a computer-based management tool used to evaluate the progress on the job. Respondent's Exhibit 6 (Deposition of Peter J. Davoren) at 33-34 (miniscript pages). RACS reflects the status of resource utilization, work duration, and work in place up to the data date, and the projected value to complete the project. RACS gives information to the specification section level. Respondent's Exhibit 8 (Affidavit of Richard W. Lamb (Lamb Affidavit) (Jan. 14, 2005) ¶ 6). Appellant states that no RACS data was created after June or July 1998, because appellant concluded that RACS was not an efficient management tool for the Islip project. Renna Affidavit ¶ 7. Mr. Renna explains that earlier electronic versions of RACS data through March 1997 would have been automatically overwritten in the normal course of business by later iterations of the RACS data and that hard copies of RACS data for early 1996 and 1997 do exist. Id. ¶ 8.

The third item is a computer model of the rotunda. Appellant acknowledges that LBL created a three-dimensional computer model of the rotunda during the project and that the model no longer exists. In 2000, the model was inadvertently deleted by LBL's information technology personnel in preparation for an office relocation in early 2001. Appellant's Opposition at 12-13; Appellant's Exhibit 1 (Affidavit of Ronald Brunet (Brunet Affidavit) (Feb. 8, 2005) ¶¶ 3-4. Respondent states that the model would confirm appellant's and LBL's admission in other evidence of an LBL design error in the exterior skylight ring of the rotunda. Respondent's Motion at 7. Appellant says that the model would have been beneficial to it in describing that portion of the claim concerning the rotunda, Brunet Affidavit ¶ 5, and that the model would not serve to prove or disprove anything regarding the top of the rotunda because the model did not evaluate the design at the top of the rotunda, where the skylight ring was located. Id.

The scheduling provisions of the contract involved in this case required that the project schedule "shall employ the Critical Path Method (CPM) using retained logic for the planning, scheduling and reporting of the work to be performed." Appeal File, Exhibit 2, § 01311, ¶ 1.02B.2. The schedule was to be produced "utilizing the most current version of Primavera Project Planner software system or fully transferrable to Primavera Project Planner." Id.

The contract also provided that when change modifications were indicated or delays experienced, the contractor "shall submit" to the contracting officer a "written time impact analysis illustrating the influence of each modification, delay or contractor request on the contract time." Appeal File, Exhibit 2, § 01311-15, ¶ I.1. The time impact analysis "shall demonstrate the time impact based on the date the modification is given to the Contractor or the date the delay occurred." Id. The event times used in the time impact analysis shall be those included in the latest project schedule update or as adjusted by mutual agreement. Id. Time impact analyses were due seven calendar days after receipt of a modification by the contracting officer or seven calendar days from the beginning of a delay from unforeseeable causes as set forth in the contract conditions. Id. § 01311-16, ¶ I.4.b, d. In cases in which the contractor did not submit a timely time impact analysis, it was "mutually agreed that the particular modification, delay or Contractor request does not require an extension of the contract time." Id. § 01311-16, ¶ I.5.

Discussion

Respondent argues that appellant and subcontractor LBL Skysystems "failed to safeguard and preserve evidence that is both discoverable and highly probative of the issues in this case." Respondent's Motion at 1. Respondent seeks an order of the Board that would grant respondent a presumption that the lost or destroyed information would have supported respondent's case and harmed appellant and an order imposing other adequate sanctions against appellant.

Appellant argues that respondent's motion, although uniquely named, is in fact a motion for sanctions for spoliation of evidence during discovery. Appellant's Opposition at 1. Appellant has accurately described respondent's motion, as the motion explicitly seeks sanctions for alleged failure to preserve evidence.

The test for spoliation is that evidence was destroyed in bad faith. Eaton Corp. v. Appliance Valves Corp., 790 F.2d 874, 878 (Fed. Cir. 1986). One court has applied a slightly more detailed test for spoliation, i.e., that it could be shown that the destroyed evidence was critical or controlling on an issue of liability and that the evidence was destroyed in bad faith when the parties have notice that the evidence is or may be relevant to litigation. Renda Marine v. United States, 58 Fed. Cl. 57, 60 (2003) (quoting Hardwick Bros. Co. v United States, 36 Fed. Cl. 347, 416 (1996)).[1]

[1] This is to be distinguished from the cases holding that a party's failure to produce any evidence on a point gives rise to a negative inference that no such evidence existed, or if it did exist and were produced would be unfavorable to the party. Input Output Computer Services Inc., GSBCA 7090, et al., 86-2 BCA ¶ 18,812; T. Brown Constructors, Inc., DOT

Respondent's motion for sanctions must fail. The allegedly missing items, the schedule updates and the post-June or July 1998 RACS data, were never created, not destroyed. The electronic RACS data for early 1996 through March 1997 were erased in the normal course of business, not negligently or intentionally deleted. If hard copies of the RACS data exist for that time period, however, the appellant is to provide the hard copies of that data to respondent.

While the rotunda computer model was destroyed, it is evident from the record before the Board on the motion that it was destroyed negligently, not in bad faith. In addition, the parties dispute the significance of the model as it relates to the alleged design error by LBL of the rotunda's skylight ring. It also appears that the Government has other evidence upon which to rely to seek to prove LBL's alleged design error of the skylight ring.

Moreover, based upon the record presented by the parties' papers on the motion, the Board observes that it is appellant who may be prejudiced by the allegedly missing scheduling update data. It is appellant's burden to establish the fundamental facts of causation, liability, and damage. Wilner v. United States, 24 F.3d 1397, 1401 (Fed. Cir. 1994)(en banc); Servidone Construction Corp. v. United States, 931 F.2d 860, 861 (Fed. Cir. 1991). As noted above, the construction contract for the Islip courthouse placed explicit and detailed scheduling requirements upon the contractor.

Recently, our appellate authority required a contract appeals board to analyze delays in accordance with the express scheduling provisions of the contract, rather than crediting "litigation arguments" of the parties as to the combined effects of delays. P.J. Dick., Inc. v. Principi, 324 F.3d 1364, 1369 (Fed. Cir. 2003). Boards have also rejected CPM analyses that did not reflect the dynamic nature of CPM scheduling and did not give appropriate credit for all of the delays alleged to have occurred. Galaxy Builders, Inc., ASBCA 50018, et al., 00-2 BCA ¶ 31,040.

Appellant's statements that it did not use Primavera during the later stages of the project, or provide schedule updates as required by the contract, raise questions as to whether appellant will be able to prove delay during the stages of the project for which update data is missing. Appellant says that it did use manual updates for certain work areas, but it is not clear whether the areas cover a significant percentage of the project and would be useful in a delay analysis for the project as a whole, particularly during the later stages of construction. It also remains to be seen whether the manual updates conform to the contract's CPM scheduling requirements for use of Primavera by being fully transferable to the Primavera environment, and, if not, what adverse effect that fact has on appellant's proof of delay.

Decision

Respondent's Motion for Relief from Prejudice is **DENIED**.

CAB 1986, 95-2 BCA ¶ 27,870, aff'd in part, rev'd in part sub nom., T. Brown Constructors v. Pena, 132 F.3d 724 (Fed. Cir. 1997); Tempo Inc., ASBCA 37589, et al., 95-2 BCA ¶ 27,618; aff'd. sub nom., Tempo Inc. v. West, 108 F.3d 1391 (Fed. Cir. 1997) (Table), cert. den., 522 U.S. (1997).

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ANTHONY S. BORWICK
Board Judge