

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR PARTIAL SUMMARY RELIEF DENIED: February 23, 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.

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

BORWICK, Board Judge.

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

Appellant moves for partial summary relief concerning the period under the contract for review of shop drawings. Appellant claims that respondent routinely failed to return shop drawing submittals within a reasonable time and within the time required by the contract. Appellant's Motion for Partial Summary Relief at 1. Appellant argues that the contract provided two weeks for review and approval of shop drawings. *Id.* at 2. Appellant's motion is premised on the existence of alleged undisputed facts.

Appellant, referencing selected items of correspondence between appellant and the design team (Government contractors and subcontractors retained to assist the Government in oversight of the project as well as the design itself), states that the design team originally agreed with appellant's contention that shop drawing submittals were required to be returned within two weeks. Appellant's Statement of Undisputed Facts ¶ 3. In particular, appellant

references marginal notes by a design team member on appellant's letter dated December 2, 1996, which supposedly confirmed the design team's position. Appellant's Exhibit 5.

Appellant states that respondent and its design team disavowed the original position and adopted a new position that the applicable turn-around time was a minimum of twenty-one days. Appellant's Statement of Undisputed Facts ¶ 4. This new position, in appellant's view, made it impossible for respondent to breach the contract by the time it took in delaying review of appellant's shop drawing submittals. Id. ¶ 5.

Respondent disputes these alleged undisputed facts. Respondent dismisses the significance of the correspondence referenced by appellant. Referring to Appellant's Exhibit 5, respondent states that other margin notes made by the design team employee and not mentioned by appellant strongly suggest that the design team expected a review period of at least fifteen working days or twenty-one calendar days. Respondent's Statement of Disputed Facts ¶ 3.

Respondent states that there is ample evidence in the record to establish that there was never an agreement on a two-week turn-around time for submittal review and that both parties even agreed to or anticipated a twenty-one-day turn-around period for submittal review. Respondent points to an August 6, 1996, letter from respondent's construction manager to appellant reminding appellant that it should schedule twenty-one days for submittal review. Respondent's Statement of Disputed Facts ¶ 3; Respondent's Exhibit 1. Respondent references a letter of January 7, 1997, from respondent's construction manager to appellant stating that appellant's assumed maximum turn-around time of fourteen days from the architectural/engineering team is unsupported. Respondent's Statement of Disputed Facts ¶ 3; Respondent's Exhibit 2. Respondent references a letter from appellant's project manager to GSA's construction manager that appellant planned and priced the project based on contract specification section 01300, which allowed for a twenty-one-day turn-around time for submittal review, and another letter from one of appellant's officials to a member of the design team that the turn-around time for shop drawing review was twenty-one days. See Respondent's Exhibits 9, 10. Respondent maintains that the review period for submittals established minimum time periods, in any event, not hard and fast maximum time periods. Respondent's Opposition at 3.

The contract contained the following relevant provisions:

ACTION ON SUBMITTALS

Contracting Officer's Action: Where action and return is required or requested the Contracting Officer will review each submittal, mark with Action and where possible mail within two weeks of receipt. Where submittals must be held for coordination, Contractor will be so advised.

Appeal File, Exhibit 2, § 01300, ¶ 1.05(A).

SHOP DRAWINGS, COORDINATION DRAWINGS, AND SCHEDULES

Unless otherwise provided in this contract, or otherwise directed by the

Contracting Officer, shop drawings, coordination drawings and schedules shall be submitted to the Contracting Officer, with a letter in triplicate, sufficiently in advance of construction requirements to permit no less than 10 working days for checking and appropriate action.

Id., Exhibit 1, Construction Contract Clauses (Fixed Price), Form 3506, cl. 29(f), at 010070.

Preliminary Network:

a. Proposed procurement activities to be accomplished during the first 120 days of the contract

2) The Government's review of shop drawings, samples, and requested substitutions shall be identified as network activities. The minimum duration for these activities shall be 21 calendar days for specified product submittals, 21 calendar days for the submittals of products required by performance specifications and other named manufacturers, and 45 calendar days for requested substitutions.

Id., Exhibit 2, § 01311, ¶ 1.02D at 01311-4.

Discussion

Board Rule 108(g)(1)¹ provides:

A motion for summary relief should be filed only when a party believes that, based upon uncontested material facts, it is entitled to relief in whole or in part as a matter of law.

This rule is modeled on Rule 56 of the Federal Rules of Civil Procedure, pertaining to summary judgment, and we rely on our precedent and case law construing Rule 56 in applying our rule. AT&T Communications v. General Services Administration, GSBCA 14732, 00-2 BCA ¶ 31,128.

We are obliged in ruling on motions for summary relief to draw all inferences in favor of the party opposing the motion; a motion for summary relief is proper only on those facts about which we "need not function as an arbiter among differing versions of every factual reality for which evidentiary support has been presented." Cable Electric Products, Inc. v. Genmark, Inc., 770 F.2d 1015, 1020 (Fed. Cir. 1985); Viacom, Inc. v. General Services Administration, GSBCA 15871, 04-2 BCA ¶ 32,639 at 161,506. All significant doubt over pertinent factual issues must be resolved in favor of the party opposing summary relief. Summary relief is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986); Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd., 732 F.2d 831, 835-36 (Fed. Cir. 1984); Viacom; Peter Johnson v. General Services

¹ 48 CFR 6101.8(g)(1) (2003).

Administration, GSBCA 15604, 01-2 BCA ¶ 31,599, 156,163-64. Our duty at the summary relief stage of proceedings is not to weigh the evidence but to determine the existence of material facts in dispute. Anderson v. Liberty Lobby, 497 U.S. 242, 249 (1986); Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990, 1003 (3d Cir. 1993) (district court's summary judgment reversed in suit challenging set-aside program as violative of Equal Protection Clause where defendant presented evidence of racial discrimination sufficient to defeat motion).

Material facts are in dispute in this case so that even partial summary relief would be inappropriate. The parties are in dispute concerning the existence of an agreement for the number of days for submittal review. Appellant says that respondent knew there was to be a fourteen-day period for submittal review, while respondent says that appellant acknowledged that there was to be a twenty-one-day period for submittal review. The parties dispute whether during the course of construction the parties assumed the submittal review period, be it fourteen or twenty-one days, established minimum or maximum durations for review.

The parties understandably do not address in their motion or response the significant additional issues present in this case that often arise in a claim for delay in shop drawing reviews by the Government. The Government is under an obligation to act promptly to review and approve plans and submittals. Idela Construction Co., ASBCA 45070, 01-2 BCA ¶ 31,437. Where, however, the Government's shop drawing review delays are caused by inadequacies in contractor submittals, a claim for delays due to alleged excessive Government review time will be denied. Koppers Co., ENG BCA 2960, 71-2 BCA ¶ 8935; see Environmental Data Consultants, Inc. v. General Services Administration, GSBCA 12951, 97-2 BCA ¶ 29,208 at 145,363 (pervasive inadequacy in contractor shop drawing justified review period in excess of two weeks). Even where there is found to have been a late return of submittals, where, as here, a contract requires that project delays be established through a critical path method (CPM) analysis, the contractor will have to establish through the CPM analysis that the late return delayed the critical path of the project. Galaxy Builders, Inc., ASBCA 50018, 00-2 BCA ¶ 31,040. The parties are to present evidence on these issues during the scheduled hearing on the merits.

Decision

Appellant's motion for partial summary relief is **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

CATHERINE B. HYATT
Board Judge

