ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Versar, Inc.	)	ASBCA Nos. 56857, 56950
	)	56962, 57386
Under Contract No. FA8903-04-D-8692	)	

APPEARANCES FOR THE APPELLANT:

David R. Johnson, Esq.
Bryan T. Bunting, Esq.
Erin N. Rankin, Esq.
Vinson & Elkins, LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT:

Alan R. Caramella, Esq.
Acting Air Force Chief Trial Attorney
Christopher M. McNulty, Esq.
Maj Sandra K. Whittington, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE SCOTT

Versar, Inc. appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, from the contracting officer's (CO's) denial of its $2,916,461.20 claim and from the government's $633,558.38 claim under a task order (TO) for heating, ventilation, air conditioning (HVAC) and other work at a Department of Defense (DoD) elementary school. The Board held entitlement and quantum hearings.

FINDINGS OF FACT

Worldwide Environmental Restoration and Construction (WERC) Contract

1. The Air Force issued the captioned negotiated indefinite-delivery, indefinite-quantity contract, effective 5 December 2003, to Versar, as a small business, for work at Air Force Center for Engineering and the Environment (AFCEE) customer sites (R4, tab 2 at 25-28, tab 735 at 9821; tr. 1/11, 2/59-60, 229). The contract incorporates or contains the following clauses, quoted or mentioned in pertinent part:[1]

[1] The clauses are contained or cited at R4, tab 2 at 36-37, 46, 49-53, 55, and 66.

rendered in accordance with the contract and she authorized payment of the $152,228, apparently without retainage. (R4, tab 255 at 3552, 3553)

48. Versar's submittal No. 38, signed by Mr. Franklin on 22 March 2007 and directed to CO Bryant, conveyed electrical operation and maintenance (O&M) manuals. It was identified as "new," with the previous submission number marked "N/A." Mr. Redmond signed it on 23 March 2007, recommended approval, and CO Bryant signed it as approved that day. (R4, tab 256; tr. 4/51-52)

49. COR Shrove visited the site in about early April 2007. In a 1 May 2007 email to CO Bryant, he reported dissatisfaction with site conditions, progress, scheduling, superintendence and staffing. He had met on-site with Gerardo Bernal, a Parsons engineer who replaced Mr. Redmond after 5 April 2007. Mr. Bernal and the school principal informed him that the project must be complete by 13 August 2007, when teachers would return. He concluded that staffing was insufficient and no phase was complete but reported that, if Versar performed as it projected, it could complete by then. Mr. Bernal found that Mr. Franklin was rarely present and the project was poorly supervised and inadequately staffed. Mr. Chaney had expressed that Mr. Franklin was the right man for the job but was managing from Oklahoma City and was not onsite enough. (R4, tab 332 at 4002, tab 801 at 10598, tab 804 at 10606; *see* ex. G-33 at 1361; tr. 8/175-78, 180-84, 9/112, 114-20, 240-43)

50. In a 13 April 2007 teleconference among COs Bryant and Brown, the COR, Suzanne Bilbrey, his boss (tr. 9/110), Glenn Carter, Versar's Director of Construction (tr. 4/84), and Messrs. Stiles and Franklin, Mr. Stiles expressed concern about a "possible yellow rating" and presented Versar's position on, *inter alia*, schedule, superintendence, and difficulty of communicating with the government (ex. G-57 at 1). Ms. Bilbrey opined that the rating could be green and would be yellow if problems were not corrected.

51. On 25 April 2007, Mr. Franklin asked Mr. Bernal to review proposed invoice No. 9. At the time Mr. Bernal considered that the government had taken a form of beneficial occupancy of five of the eight phases but that "we haven't really taken it over" (tr. 8/195). He found the invoice insufficiently supported to make a proper evaluation; sought a schedule of values and updated project schedule; and questioned the invoice as greatly exceeding work completed. (R4, tab 269 at 3630-31; tr. 8/193-97)

52. On 1 May 2007 CO Bryant notified Versar that it was not in compliance with the Superintendence and the Commencement, Prosecution and Completion of Work clauses and that it must submit a revised schedule and comply by 7 May 2007, or it could be subject to default (R4, tab 273).

53. On 7 May 2007 Versar submitted invoice No. 9 for $184,963, for 1-31 March 2007, and a 2 May 2007 progress report showing 80.87% completion. The COR undertook to review Versar's invoices because he believed it was well behind that completion percentage. (R4, tabs 277, 280 at 3677-78, tab 592 at 7352, tab 593 at 7360)

54. On 21 May 2007, regarding DDESS concerns about its expected early project completion, Brenda Johnson, a contract specialist and CO at some point, asked the COR to remind the customer that the performance period ended on 30 September 2007. She stated that cure notices would be sent to Versar and its surety to stress "the seriousness of Versar's negligence" with the hope that the surety would get more involved to get the project back on track and finished. On 22 May 2007, without prior warning to Versar, CO Bryant issued five cure notices. Each advised that the particular condition was endangering contract performance and that, unless cured within 10 days, the government might pursue all of its contract remedies, including under the Default clause. The notices alleged that Versar had not complied with: (1) contract schedule requirements and was to provide a progress schedule with pre/final inspection, all final submittals, and final acceptance no later than 30 September 2007; (2) the Performance of Work by the Contractor clause and was to provide a labor force commensurate with the TO's stated level of effort to ensure completion in the contract period; (3) the Warranty clause, apparently concerning equipment storage and protection and some re-painting; (4) the Protection clause, due to a worker's urinating on school grounds; and (5) the Health and Safety clause, pertaining to barrier maintenance to preclude student access to construction areas and to contractor avoidance of areas occupied by students and staff during school hours. (R4, tabs 287-91; *see* tab 303 at 3839; ex. G-152 at 2; tr. 2/21, 213-14, 6/52)

55. On 23 May 2007 Versar delivered a schedule dated 21 May 2007 to the CO, Ms. Johnson and the COR as of about March 2007, but the government sought a "beginning to end schedule" (R4, tab 810 at 10637). It disapproved progress report No. 9 and stated Versar's invoice would not be paid; it was to verify completion percentages and submit a revised invoice. At the meeting or thereabout, CO Bryant and the COR instructed that all job communications were to go through them, with the CO being the ultimate decision maker. (R4, tabs 294, 301, 313; tr. 2/23, 26-29, 122-23, 9/141-42)

56. On 1 June 2007 Brenda Chube, Versar's director of contracts, sent to CO Bryant and others an iteration of the 21 May 2007 schedule and cure notice responses as follows: (1) Versar's schedule showed completion by 30 September 2007 and it would try for beneficial occupancy by 13 August 2007; (2) within site and school activity confines, it was expanding its labor force; (3) all cited deficiencies had been cured; (4) the worker had been terminated immediately, prior to receipt of the cure notice; Versar was unaware of any damages, but would replace any damaged vegetation; and

government and (2) costs related to Hood Street operation. The CO stated the decision to relocate Pinckney "was made by DoDEA and outside of AFCEE's purview," but AFCEE understood it was because the school was not finished, with life safety code issues, and there was then no completion schedule. (R4, tab 531 at 6176) She acknowledged that AFCEE had not informed Versar about the relocation, but said the government was assessing relocation damages from 30 September 2007 through the 4 June 2008 BOD. On 25 August 2008 Versar notified the CO that the decision, which did not include its appeal rights, did not comply with FAR 33.211 (decision rules) and it would file a claim (R4, tab 533). On 17 November 2008 the CO stated she was reconsidering the decision and one would re-issue later (R4, tab 650).

114. On 3 November 2008 the CO received Versar's certified $2,916,461.20 CDA claim dated 29 October 2008, which also contested the government's claim. Versar noted that BOD was 26 days before TO completion and contended that the government's alleged damages had no connection to its performance. It claimed that it was on budget and schedule from 1 August 2006-31 March 2007 and the Air Force had not raised any concern over completion or quality. It alleged that: CO and COR changes in early 2007 caused delays thereafter; the Air Force stopped making timely payments and failed to notify it of invoice rejections; the new CO issued five inappropriate cure notices; contract extensions supported its entitlement thereto; the school was to be open during construction; the government elected to phase work, with inspection and acceptance to occur as phases were completed; and, in the December 2007 final inspection, the Air Force identified over 800 punch list items and contended for the first time that seismic restraints on the piping loop and on the FCUs were not properly installed. Versar stated that it also learned at that time that the Air Force had issued it a negative "Red" performance rating, which is not of record. [4] Versar incorporated its HVAC controls REA and alleged that the Air Force changed the contract when it required alteration of installed FCUs; doubled seismic restraints; and imposed multiple unreasonable inspection and acceptance requirements, and that it was estopped from ordering FCU and seismic restraint changes after its inspection and acceptance. Versar also alleged that the Air Force did not cooperate with it when it failed to state definitively the approval level required for FCU changes, and it violated its

---

[4] Regarding the Red rating, appellant's complaint alleged only that it had learned of it at the time of the December 2007 inspection, AFCEE had inappropriately assigned it and it had otherwise acted inconsistently with its duty of good faith and fair dealing. The complaint asked us to order rescission of the rating and for such other relief as the Board deemed proper. (Compl. ¶¶75, 109, 114) The government moved to dismiss ASBCA No. 56857 in part, alleging that we lacked jurisdiction to consider rating relief. We struck the rescission request but otherwise denied the motion, noting that the nature of any relief we could grant remained to be determined. *Versar, Inc.*, ASBCA No. 56857, 10-1 BCA ¶ 34,437.

28 September 2007 forbearance notice reserving the government's contractual rights and remedies, including under the Default clause, the CO extended the contract period to 30 November 2007, then to 15 January 2008. Versar requested further extensions and the CO ultimately extended the period to 30 June 2008. Each modification cited the Default clause as extension authority. (Findings 96, 97, 99, 103, 109)

The Default clause provides that, if the contractor refuses or fails to prosecute the work to insure completion within the contract period, the government may terminate its right to proceed. That right is not to be terminated nor the contractor charged with damages under the clause if the delay arises from causes beyond its control and without its fault or negligence, such as government actions in its contractual capacity. Upon the contractor's notification of delay, the CO is to ascertain the facts and extent of delay. If, in the CO's judgment, the findings of fact warrant it, the time for completing the work "shall" be extended and, subject to appeal under the Disputes clause, the CO's findings "shall be final and conclusive on the parties." (Finding 1) Appellant contends that the only basis for extension under the Default clause is when delay is not the contractor's fault; therefore, the extensions evidence that the project delays were compensable and excusable. However, prior to the extensions, the CO's forbearance notice made it clear that the government was not relinquishing its contract rights by extending the due date (finding 99) and no presumption of government responsibility for delay arises from the CO's mere grant of an extension. *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 857 (Fed. Cir. 2004).

It is obvious that appellant was responsible for several project delays, including, for example, through late and inadequate submittals; inadequate job supervision; and some faulty construction or installations (*e.g.*, findings 15, 17, 27, 30, 31, 49, 51-53, 55, 59, 72, 81-83, 89, 93, 98, 100, 102, 104, 105, 107, 108, 110). Regardless of any government-caused delays, appellant did not present any delay analysis that recognized and segregated concurrent or other contractor delays and showed how a particular alleged delay delayed project completion as a whole (finding 114). Without such an analysis and clear apportionment of delay and expense attributable to each party, appellant cannot recover monetary compensation on the delay portion of its claim. *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed. Cir. 1984); *Lovering-Johnson, Inc.*, ASBCA No. 53902, 06-1 BCA ¶ 33,126 at 164,173, *aff'd*, 221 Fed. Appx. 992 (Fed. Cir. 2007); *G. Bliudzius Contractors, Inc.*, ASBCA No. 42366 *et al.*, 93-3 BCA ¶ 26,074 at 129,593. Accordingly, we deny this portion of appellant's claim.

Performance Rating Portion of Claim

Appellant's claim makes only the briefest mention of its Red performance rating, which is not of record, and its complaint did not elaborate (finding 114 and n.4). The specifics of the Red rating, ratings process, categories and details are not before the Board

and appellant has not stated what the rating should be in its view. Bare or insufficient allegations cannot sustain a claim that the government issued an unjustified performance rating. *See Todd Construction v. United States*, 656 F.3d 1306 (Fed. Cir. 2011) (complaint alleging ratings procedural violations that did not allege prejudice by indicating substantial delays were excusable, thereby giving rise to plausible inference that ratings were arbitrary and capricious, was properly dismissed under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief can be granted).

Here, although appellant spent very little time directly on point at the hearing, we infer that it is contending that the performance rating was unjustified due to the government's alleged defective specifications, constructive changes, and breach of its duties of good faith and fair dealing and to cooperate. However, except in connection with the HVAC controls REA, we have concluded that appellant's allegations are not meritorious and that appellant was indeed responsible for performance problems, including, for example, late and deficient seismic submittals and some inferior workmanship that led to rework. Thus, appellant has not shown that its performance rating was arbitrary and capricious and we deny this portion of its claim.

Conclusion as to Appellant's Claim

In sum, appellant is entitled to PPA interest computed in accordance with our decision; $9,915.49 in mold removal costs and $2,557.57 in AHU-1 costs if not already paid; $59,536 for HVAC controls; the contract balance as determined by the parties; and CDA interest on the foregoing computed as of the CO's 3 November 2008 receipt of appellant's claim.

Government Claim

The government's claim is delay-based (*e.g.*, gov't br. at 86, ¶ 267, 89, ¶ 275, 105). To recover on its claim, the government, like the contractor, must show liability, causation and resulting injury. *Mitchell Enterprises, Inc.*, ASBCA No. 53202 *et al.*, 06-1 BCA ¶ 33,277 at 164,962, *modified on recon. on other grounds*, 06-2 BCA ¶ 33,296. Damages for contract breach are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty. RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (1981); *see Southwest Marine, Inc.*, ASBCA No. 54550, 11-2 BCA ¶ 34,871 at 171,525, *appeal docketed*, Case No. 12CV0526 IEG WMC (S.D. Cal. March 2, 2012).

The government seeks damages for contract breach from 30 September 2007 through the 4 June 2008 BOD (finding 120). It initially contended in briefing that appellant is liable because it had agreed to have the school ready for occupation by mid-August 2007 and did not do so (gov't br. at 105). In its reply the government

The government also claims extra MACTEC inspection services pursuant to a T&M contract modification No. 6 in the not-to-exceed amount of $156,345, effective 25 September 2007, which extended MACTEC's (Parsons'/PSC's) Pinckney services from 30 September to 31 December 2007. Costs are claimed from 30 September through 14 December 2007 in the full not-to-exceed $156,345 amount of the modification. The government did not provide any T&M figures or provide any invoices and no one from MACTEC testified. AFCEE did not specify the number of inspectors involved and it is not clear what amount the government paid MACTEC.

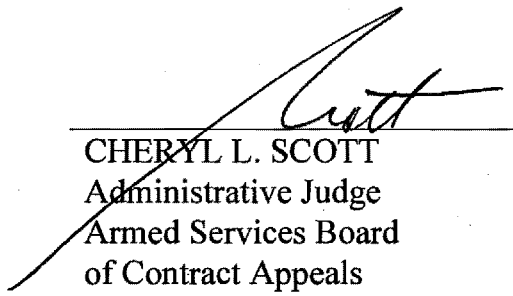
The government has not established damages with respect to the AFCEE portion of its claim with reasonable certainty and we deny it. (Finding 137)

In sum, we deny the government's claim.

DECISION

ASBCA No. 56857, appellant's appeal from the government's denial of its claims, is sustained to the extent stated and otherwise denied. ASBCA No. 57386 is denied to the extent stated and the remaining portion is dismissed as duplicative. ASBCA Nos. 56950 and 56962, appellant's appeals from the government's claim, are sustained.

Dated: 23 April 2012

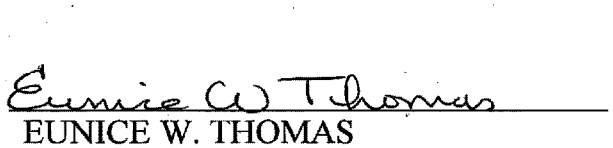


CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

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