UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF DENIED: April 21, 2014

CBCA 3213

SBBI, INC.,

Appellant,

v.

INTERNATIONAL BOUNDARY AND WATER COMMISSION,

Respondent.

John T. Flynn of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, Atlanta, GA, counsel for Appellant.

Luisa M. Alvarez and Rebecca A. Rizzuti, Office of the Legal Advisor, United States Section, International Boundary and Water Commission, United States and Mexico, El Paso, TX, counsel for Respondent.

Before Board Judges **SOMERS**, **STERN**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, SBBI, Inc., and respondent, International Boundary and Water Commission, have filed cross-motions for summary relief on the issue of entitlement in this appeal. We deny the motions, as issues of material fact remain in dispute.

Background

On December 30, 2009, appellant entered into contract number IBM10C0007 (the contract) with respondent for the "Rehabilitation of Lateral A to Donna Pump Levee and

Retamal Dike" (the project). The location of the work is adjacent to the Rio Grande River in Hidalgo County, Texas.

The contract reads in part:

> Scope of Work, Section 1.6. Use of the Right-of-Way
> Contractor operations shall be confined to the Project site and other areas permitted and identified by the construction drawings.
>
> Section H1:
>
> 52.236-4 Physical Data (Apr 1984)
> Data and information furnished or referred to below is for the contractor's information. The Government shall not be responsible for any interpretation or conclusion drawn from the data or information by the contractor. . . .
> Transportation facilities: Access to the project site is unrestricted.

Respondent issued a notice to proceed on January 20, 2010, and appellant began work on February 1, 2010. On July 7, 2010, respondent initiated water releases from the Falcon Dam into the Rio Grande. On July 9, 2010, respondent warned of significant increases in flows in the floodways. On July 13, 2010, respondent issued another press release informing of further floodwater releases into the Rio Grande.

On July 14, 2010, appellant notified respondent regarding the flood impacts of the water releases. Appellant's notice stated, "This email is to provide you with a heads up regarding the flooding of the Rio Grande and the impact on SBBI's Jobs. It appears that SBBI, Inc. is going to be completely under water on the riverside of the Lateral A Project."

As a result of the flood impacts of the water releases, on August 30, 2010, appellant submitted a certified claim (claim 01). On or about September 24, 2010, respondent issued modification M004 (M004) to settle claim 01. M004 extended the contract term by ninety-one days to perform flood management operations (claim 01 work). M004 provided: "Settle the claim certified on August 27, 2010. . . . The performance period (schedule) for the contract has been extended 91 calendar days for the period July 14, 2010 through October 13, 2010 due to the flood management operations." Thereafter, appellant began performing the claim 01 work on or about September 6, 2010.

On September 22, 2010, respondent again began water releases into the Rio Grande. Respondent sent the following to contractors:

> Contractors in the Lower Rio Grande Flood Control Projects need to begin monitoring (if not already so doing) the Rio Grande river flows and current weather conditions. Releases from various dams are on-going and will be contributing to the river flows. At this time, there is potential for the river to exceed the banks and rise into the floodplain.

On or about September 24, 2010, respondent released additional water into the Rio Grande from Falcon Dam.

As a result of the flood impacts of the second round of respondent's water releases, appellant submitted a second certified claim (the claim) to recover costs resulting from the reduced production and billings between October 16, 2010, and January 10, 2011. This is the claim that is the subject of this appeal. The claim was submitted on or about January 31, 2011.

Appellant was concurrently performing another contract (the second contract), for respondent. The second contract was also located along the Rio Grande River in Hidalgo County, Texas, and experienced the same flooding events as were experienced on the subject contract. Appellant alleges that it filed virtually identical certified claims for flooding associated with the second contract and respondent paid those claims, while denying the claim that is the subject of this appeal.

On September 18, 2012, appellant petitioned this Board to order the contracting officer to issue a final decision on the claim which is the subject of this appeal. Respondent's contracting officer issued a final decision on October 22, 2012, denying the claim in its entirety, and this appeal followed.

Appellant filed a motion for summary relief on the issue of entitlement. Respondent filed a cross-motion for summary relief.

In support of its motion for summary relief, appellant has submitted an affidavit from its quality control system manager, who is a licensed engineer. The affidavit states in part that respondent's release of water into the project site limited appellant's access to the site and appellant's performance of its work was restricted and therefore delayed.

In support of its cross-motion for summary relief, respondent has submitted an affidavit from the Commissioner of the United States Section of the International Boundary and Water Commission (USIBWC). The affidavit states, in part:

> As Commissioner, . . . , I am responsible for coordinating and managing flood control operations along the Rio Grande with my Mexican counterpart, Commissioner Roberto Salmon . . . .
>
> I recently have been advised the SBBI's worksite and borrow pits were located in the floodplain . . . .
>
> Neither Commissioner Salmon nor I ordered that SBBI's worksite be flooded. In fact, had we not operated the Diversion Dams the way we did, SBBI's worksite would have experienced more damage because the floodplain along the Rio Grande downstream . . . would have been inundated with even more water and the river levees would potentially have been overtopped.
>
> All of the water releases Commissioner Salmon and I authorized were designed to (1) prevent flood waters from overtopping flood control levee[s] which would have allowed the water to flood populated areas and destroy property, (2) divert an equitable amount of flood waters to Mexico and the United States in accordance with international agreements, and (3) maintain safe water levels at Amistad and Falcon Reservoirs (if water levels got too high, it would have resulted in uncontrolled spills from the dam that would have likely damaged the dams and resulted in catastrophic flooding and economic damages in both countries. In this regard, we achieved all goals while following applicable agreements and flood operation manuals.

Discussion

The parties have filed cross-motions for summary relief on the issue of entitlement. Summary relief is appropriate only where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. Any doubt on whether summary relief is appropriate is to be resolved against the moving party. The moving party shoulders the burden of proving that no genuine issue of material fact exists. *Power Wire Constructors v. Department of Energy*, CBCA 2057, 12-2 BCA ¶ 35,131; *Patrick C. Sullivan v. General Services Administration*, CBCA 936, 08-1 BCA ¶ 33,820.

The Parties' Positions

For the purposes of the motion, respondent states that it will "assume as a fact that Appellant was delayed solely by the Government's water releases from Falcon Dam Reservoir." Respondent's Response to Appellant's Motion for Summary Relief and

Respondent's Cross Motion for Summary Relief at 4. However, respondent maintains several theories why it is not liable to compensate appellant for its delay costs.

Respondent asserts that it did not cause the weather conditions that made it necessary to release the water onto the project site. Respondent also maintains that its releasing the water and flooding the project site was a sovereign act for which respondent is not liable. Respondent notes that the contract gave notice that the site was subject to flooding and contained a detailed flood protection plan for appellant to put in place. Respondent also characterizes its payment of claim 01 for the identical act of intentional release of water as a mistake. Respondent maintains that delays resulting from weather and sovereign acts are not compensable, and appellant is not entitled to the lost production costs that it seeks.[1]

Also, respondent asserts through affidavit testimony that its release of water in fact mitigated damage to the project site.

Appellant states that its claim is not for weather delay, but for delay caused by respondent's intentional release of water onto the project site. Similar claims resulting from prior releases of water by respondent were paid by respondent on this contract and other contracts as differing site conditions claims.[2] Appellant alleges that respondent had the discretion to release the water in a manner that appellant's project site would not be affected. Additionally, the flood protection plan in the contract is to protect the work from flooding. The fact that a flood protection plan exists does not give respondent the right to flood the project at no cost to appellant. Appellant also states that respondent treated appellant's claim 01 for respondent's intentional release of water onto the project site as a differing site condition and made payment on that basis. Finally, there was no allegation of weather delay or sovereign act immunity in the contracting officer's final decision denying claim 02.

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[1] The contracting officer did not assert any of these defenses in the final decision denying the claim. Rather, the final decision denies the claim on the bases of insufficiency of appellant's documentation and allegations of duplicate payment. However, for purposes of the motion, respondent has assumed that its releasing the water caused the delay which is the basis of appellant's claim.

[2] Respondent now asserts that these payments were a mistake. There is no evidence that respondent is attempting to recoup this payment, or set-off against other amounts owing. Appellant asserts respondent paid similar claims for other contractors on other contracts. Those contracts are not before us in this appeal.

Appellant counters respondent's sovereign act doctrine argument in several ways. First, appellant emphasizes that the contracting officer never asserted the sovereign act doctrine as a defense before issuing the final decision or in the final decision. Thereafter, respondent did not plead the sovereign act doctrine as an affirmative defense. Thus, appellant asserts that the defense has been waived.

Appellant also maintains that respondent's release of water onto the project site was not a sovereign act, because 1) respondent retained discretion in acting and could have acted in such a way that the project site would not have been flooded, and 2) the contracting agency performed the act that delayed appellant.

Appellant further maintains that even if respondent's release of water is considered a sovereign act, the contract contains language that is construed as a warranty of site access. Accordingly, a sovereign act would not immunize respondent from liability of breaching a warranty of site access.

Respondent counters appellant's assertion of a warranty of site access by questioning whether the language of the contract is clearly a warranty of site access. Respondent argues that the placement of the language in section H1 of the contract indicates that the language was intended as a reference to "transportation facilities" rather than the site itself.

Issues of Material Fact in Dispute

An issue of material fact remains in dispute as to appellant's allegation of a warranty of site access in the contract. Respondent denies that the language relied upon by appellant is a warranty of site access, arguing that the placement of the language indicates that it refers to transportation facilities. While the language states that "access to the project site is unrestricted," it does appear in a contract clause that disclaims liability for any interpretation by the contractor and references transportation facilities. There is no evidence as to why the language was placed in the clause where it appears. We cannot resolve the issue of the existence of a warranty of site access based upon the record at this time.

The parties' affidavits also raise issues of material fact that remain in dispute. Appellant's quality control manager avers in his affidavit that respondent retained discretion and could have acted in such a way that the release of water could have been accomplished without flooding the project site. However, even though respondent admits that its release of water caused delay to appellant's work, the Commissioner of the contracting agency alleges in his affidavit that had the water not been released, appellant's worksite would have experienced more damage. Thus, the unresolved issues are whether the agency could have acted in such a way as to avoid flooding the project site so that appellant would not have

been delayed, or whether the agency's actions were unavoidable, but served to mitigate the delay.

Accordingly, the record needs to be more fully developed on these issues of material fact which remain in dispute.

Decision

The cross motions are **DENIED.**

ALLAN H. GOODMAN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

JAMES L. STERN
Board Judge