

In the United States Court of Federal Claims

No. 00-573C

(Filed: April 8, 2004)

TLT CONSTRUCTION CORP.,

Plaintiff,

v.

UNITED STATES,

Defendant.

ERRATA

Please substitute the Procedural Background on the attached page 8 in the opinion filed March 31, 2004 in the above-entitled case. An addition to the text notes that plaintiff moved for summary judgment within its opposition to defendant's motion for summary judgment.

Judge Susan G. Braden

App. at 131. The CO responded in a letter dated May 22, 1997, reminding TLT that the 94 days authorized by the Notice to Proceed was 50% longer than TLT's bid of 60 days. *See* Def. App. at 132-33. The CO reminded TLT that the Notice to Proceed for Delivery Order No. 0001 was also discussed at the April 2, 1997 Pre-Bid Conference. *Id.* at 132. The CO further noted that the total duration of each delivery order is what was to be negotiated, not the duration of each individual item. *Id.* at 133. Since the first delivery order was established for only Bid Item No. 0001, for a single building, negotiating the order's total duration was not necessary. *Id.* The Government maintains that the standard FAR Performance Provision, 48 C.F.R. § 52.023-4703, incorporated into the Contract by reference, was applicable only to the award of multiple buildings in a delivery order. *Id.* at 307. Under those circumstances, negotiation would address the extent of construction overlap or concurrent construction and the availability of individual buildings from the start of construction. *Id.* at 307.

TLT completed all work on building H-4350 by the August 8, 1997 deadline. *Id.* at 402-03. TLT submitted a formal claim to the CO on November 30, 1998, seeking \$263,126.00 for acceleration costs allegedly incurred as a result of the Army's failure to negotiate the performance time for Delivery Order No. 0001. *Id.* at 134-42. TLT alleged that the Notice to Proceed provided to TLT at the April 2, 1997 pre-construction conference denied TLT its contractual right to negotiate the duration for that delivery order, including anticipated weather delays, mobilization time, and an opportunity to competitively seek subcontractors and vendors. *Id.* at 136.

PROCEDURAL BACKGROUND

On June 5, 2000, the CO issued a decision denying TLT's claim for \$88,914.00 incurred as a result of the Army's September 29, 1999 directive that TLT provide sod at "additional areas." *See* Def. App. at 109-15; *see also id.* at 90. The CO did not issue a final decision on TLT's Acceleration Claim. *See* Compl. at ¶¶ 13-16. On September 25, 2000, TLT filed a complaint for breach of contract in the United States Court of Federal Claims. The complaint included: Count 1: the "Sod Claim;" Count 2: the "Bond Claim;" and Count 3: the "Acceleration Claim." *See* Compl. ¶¶ 4-17.

On March 8, 2002, defendant ("the Government") filed a motion for summary judgment regarding all counts. *See* Def. Mot. S.J. at 1. In addition, the Government filed an appendix consisting of 422 pages of exhibits. *See* Def. App. at 1-422. On June 26, 2002, TLT filed an Opposition, in which it advised the court that the parties reached an accommodation and the Bond Claim is no longer at issue. *See* Pl. Opp. at 2; *see also supra* note 1. In its Opposition, TLT asked the court to enter summary judgment "against the moving party" on the Sod Claim. *See* Pl. Opp. at 4. "If our analysis reveals that there are no genuine issues of material fact, but that the law is on the side of the non-moving party, we may grant summary judgment in favor of the non-moving party even though it has made no formal cross-motion." *Orix Credit Alliance v. Steven C. Horten, et al.*, 965 F.Supp. 481, 484 (S.D.N.Y. 1997).

On August 15, 2003, the Honorable Lynn Bush transferred this case to the undersigned judge.