UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS OR FOR SUMMARY RELIEF DENIED: May 9, 2007

CBCA 162, 243

DAVID/RANDALL ASSOCIATES, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

William H. Platt II of Flamm, Boroff & Bacine, PC, Allentown, PA; and Henry J. Costa, Jr., of Flamm, Boroff & Bacine, PC, Blue Bell, PA, counsel for Appellant.

James E. Epstein, Office of the Regional Solicitor, Department of the Interior, Newton, MA, counsel for Respondent.

Before Board Judges **BORWICK**, **McCANN**, and **DRUMMOND**.

McCANN, Board Judge.

Issue

Do the undisputed facts demonstrate that appellant, David/Randall Associates, Inc. (Randall), anticipatorily repudiated the contract?

Undisputed Facts

On September 28, 2001, appellant entered into contract number C4860010302 with respondent, the National Park Service (NPS), to perform roofing and related work on six properties in the Valley Forge National Historical Park. Appeal File, Exhibit 1. Performance was to begin on January 22, 2002, and to be completed by December 31, 2002. The period of performance was extended, and late in 2003 the NPS suspended performance under the contract. *Id*., Exhibit 127.

Subsequently, on January 20, 2005, the NPS forwarded a copy of a Roofing Contract Performance Analysis done by an outside contractor which alleged many instances of unsatisfactory, defective, and incomplete work on the part of Randall. Appeal File, Exhibits 173, 183.

By letter dated February 9, 2005, the contracting officer, Susan D. Kurtz, wrote to Randall, stating in part:

> As you are well aware your firm's performance under the subject contract has been suspended for approximately 15 months. The National Park Service, with the issuance of this letter, respectfully requests that David/Randall Associates, Inc., advise this Office as to its intentions on fulfilling its outstanding obligations under the subject Contract.

Appeal File, Exhibit 184.

By letter dated February 15, 2005, Randall's attorney, Henry J. Costa, Jr., acknowledged receipt of the February 9, 2005, letter and stated:

> Currently, David/Randall Associates is reviewing your correspondence in order to prepare a detailed response thereto. I will be meeting with representatives of David/Randall on February 17, 2005 to discuss our client's response.

Appeal File, Exhibit 185. By e-mail and fax dated February 17, 2005, respondent's attorney, James E. Epstein of the Department of the Interior, acknowledged receipt of this letter. *Id*., Exhibit 186.

On February 23, 2005, Mr. Costa sent a letter to Mr. Epstein containing the following:

> David/Randall Associates has had an opportunity to review both its files, as well as the reports forwarded to David/Randall by representatives of the Park Service. Having completed its preliminary review it is David/Randall's belief that significant discrepancies exist between what is reported in the investigation performed by EYP and the facts as they developed during the course of the project.
>
> As a result, before David/Randall either repairs or attends a meeting with representatives of the Park Service, it is imperative that David/Randall be permitted to allow its roofing consultant to perform a detailed investigation. David/Randall is prepared to have its consultant perform a physical investigation of the site upon notice from the Park Service that full and complete access will be granted. Following that review, as well as its review of the project records, its consultant would be prepared to meet with the Park Service relative to the letter from Contracting Officer Kurtz.

Appellant's Exhibit E.[1]

By e-mail and fax of February 23, 2005, Mr. Epstein acknowledged receipt of the letter. Mr. Epstein stated:

> It was our thinking that surety's agreement to assist in getting behind completion at this stage would ultimately save them significant time, money and exposure. In that regard, again, in order to achieve this or some mutually agreed resolution, time is of the essence.

Appeal File, Exhibit 189.

On March 1, 2005, Mr. Costa e-mailed Mr. Epstein as follows:

> I have reviewed your letter of February 23, 2005 upon my return to the office on February 28. I object to some of the characterizations contained in your correspondence as I believe your letter mistates (sic) either David/Randall's position and/or its obligations pursuant to the contract. Of upmost (sic) concern is the fact that your client, despite having "suspended" this project in November, 2003, deems its recent contact of David/Randall Associates to be

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[1] Appellant's Exhibits refer to the exhibits submitted by Randall attached to its memorandum of law opposing NPS' motion for summary relief.

> of such urgency that it has imposed what we believe to be unreasonable deadlines in terms of response, and more importantly, investigation, into the issues raised. Note that it was little more than thirty days ago that Mr. Braccia of the Park Service initially contacted David/Randall Associates regarding what the Park Service believes is a continuing obligation on the part of Randall without affording Randall a reasonable opportunity to determine it (sic) legal and/or contractual rights.

Appellant's Exhibit G.

On March 2, 2005, Mr. Epstein e-mailed the surety claims manager of Randall's surety stating, "I am afraid that CO Kurtz will very shortly have to terminate DRA for default if we are to get this project corrected and completed as efficiently and economically as possible from this stage." Appellant's Exhibit H.

On March 11, 2005, Mr. Epstein e-mailed Mr. Costa, stating:

> [T]his confirms that the absolute "drop dead date" for a contractor and/or surety assisted commitment as set forth below and as specified in Contracting Officer Kurtz's February 9, 2005 letter (already 30 days ago from this date), is COB Friday, March 18, 2005 . . . .

Appellant's Exhibit I.

On March 18, 2005, Mr. Costa e-mailed Mr. Epstein indicating that Randall considered the consultant report flawed and stating in part:

> It is David/Randall's intention, upon satisfactory resolution of a number of outstanding issues, to complete performance of this suspended project. Those outstanding issues which require resolution include, inter alia, proper definition of the scope of remaining work, properly addressing the structural issues at the Stirling House which impede David/Randall Associates, negotiations of reasonable extensions of time as well as reasonable schedule for completion, and reimbursement of costs incurred by David/Randall as a result of the suspension (labor and material escalation, home office overhead, remobilization costs, etc.)

Appellant's Exhibit L.

On March 18, 2005, the contracting officer terminated the contract for default based upon anticipatory repudiation of the contract by Randall. In her termination letter, the contracting officer stated:

> United States Department of the Interior Deputy Regional Solicitor, James Epstein, received written electronic notice from your attorney, H.J. Costa, earlier this date, on your behalf, stating that David/Randall Associates, Inc., will not complete project performance unless there is first, as a precondition and in advance of initiation of such performance, "satisfactory resolution of a number of outstanding issues" including "payment of overdue sums to David/Randall as a result of the suspension." While the Government would dispute that there is entitlement by David/Randall Associates, such preconditions are not amenable to resolution in a timely basis such as to avoid a substantial increase in damages and loss were the Government required to wait. The Government has [an] obligation to mitigate damages. Moreover, such preconditions constitute an anticipatory breach of the contract. Accordingly, you are hereby notified that the above subject contract is terminated completely pursuant to the above referenced clause. (Clause 52.249-10 Default (Fixed Price Construction). The termination is effective today, March 18, 2005 . . . .

Appeal File, Exhibit 196.

Discussion

Summary relief may be granted when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); Fed. R. Civ. P. 56(c). Any doubt on whether summary judgment is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In so deciding, the evidence must be viewed in the light most favorable to the opponent of the motion and the doubts must be resolved in favor of the opponent. *Santee Modular Homes, Inc.*, AGBCA 95-220-1, 96-2 BCA ¶ 28,432, at 142,031. The moving party shoulders the burden of proving that no question of material fact exists. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

The Court of Appeals for the Federal Circuit set forth the standards for anticipatory repudiation in *United States v. DeKonty Corp.*, 922 F.2d 826 (Fed. Cir. 1991). Referring to long-established Supreme Court precedent, it stated:

> The Supreme Court set forth the standard for anticipatory breaches:

> When one party to [a] . . . contract absolutely refuses to perform his contract, and before the time arrives for performance distinctly and unqualifiedly communicates that refusal to the other party, that other party can, if he choose, treat that refusal as a breach and commence an action at once therefor.

Dingley v. Oler, 117 U.S. 490, 499-500, 6 S.Ct. 850, 853, 29 L.Ed. 984 (1886). *Dingley* further adopted the language of an earlier case which stated:

> [A] mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made . . . .

Id. at 503, 6 S.Ct. at 854 (quoting *In re Smoot*, 82 U.S. 36, 21 L.Ed. 107 (1872)).

922 F.2d at 827-28. The Federal Circuit in *DeKonty* went on to say that it had followed this precedent in *Cascade Pacific International v. United States*, 773 F.2d 287 (Fed. Cir. 1985). In *Cascade*, the Court held,

> When there is a "positive, definite, unconditional, and unequivocal manifestation of intent . . . on the part of the contractor of his intent not to render the promised performance when the time fixed therefor by the contract shall arrive, the contracting officer . . . may terminate the contract forthwith on the ground of anticipatory breach."

Id. at 293 (citations omitted).

In the instant case, the NPS asserts that Mr. Costa's e-mail message of March 18, 2005, is an anticipatory repudiation of the contract. In addition, the NPS asserts that contractors are required to continue performing a contract even when a dispute exists regarding the compensation to which the contractor is entitled. The NPS cites cases which, it alleges, so hold. *See, e.g.*, *Eriez Construction, Inc.*, VACAB 1273, 78-2 BCA ¶ 13,547; *Howell Tool and Fabricating, Inc.*, ASBCA 47939, 96-1 BCA ¶ 28,225. The NPS asserts that Randall has refused to perform.

The first issue that we must decide is whether there are facts in dispute. In this case, the facts relating to past performance are few, but past performance is not really the primary

issue. The parties agree that the contract was signed, performed for many months, and suspended by the NPS. On January 20, 2005, over a year after the suspension, the NPS sent a report to Randall citing many alleged deficiencies in performance. By letter of February 9, 2005, the NPS directed Randall to quickly submit a plan to complete the project and re-start work. Randall clearly began to comply with the NPS direction. However, the NPS was not satisfied with Randall's efforts and was considering terminating Randall as early as March 2, 2005. In any event, Randall was terminated for default on March 18, 2005, just hours after the NPS received Mr. Costa's e-mail message.

There may or may not be some facts that would lend support to the NPS' position that Randall should have been terminated for default, as the NPS was considering termination prior to receipt of the March 18, 2005, e-mail message. These facts, however, if they exist, have not been submitted or relied upon by the NPS in support of its motion. Accordingly, they are of no consequence here. The entirety of the NPS position is that Mr. Costa's e-mail message of March 18, 2005, is an anticipatory repudiation of the contract. Clearly it is not.

To begin, the NPS characterization of the e-mail message is incorrect. The message states in its final decision that Randall refused to perform unless certain conditions were met. That is not what Randall's attorney, Henry Costa, said. He said that "[i]t is David/Randall's intention, upon satisfactory resolution of a number of outstanding issues, to complete performance of this suspended project." There is a big difference between an absolute refusal to perform unless certain conditions are met, and a statement of intent to perform upon the "resolution" of certain issues. Here Randall was not issuing ultimatums; it was attempting to work with the NPS to resolve problems. In the e-mail message Randall was stating its willingness to perform and at the same time trying to get to a situation where it could reasonably begin performance after a considerable suspension period. The statements contained in the e-mail message were not clearly unreasonable.

The issues raised by Randall in the e-mail message were scope of work, structural issues, payment for past work, negotiations of reasonable extensions, etc. Typically, a contract defines the work to be performed by a contractor. Here, however, the scope of the work to be performed after the suspension has been put in issue. It is not clear that Randall knew how to properly proceed with the work. Viewing the facts in a light most favorable to Randall, we certainly cannot say that performance was sufficiently defined to enable it to proceed. Similar reasoning applies to the other outstanding issues that the e-mail message indicated "required resolution." Viewing the facts in a light most favorable to Randall, it appears that by sending the March 18 e-mail message Randall was simply trying to get issues resolved so that it could perform, not refusing to perform. Such an attempt on Randall's part is not in and of itself an absolute refusal to perform as is required for anticipatory

repudiation. As the Supreme Court said in *Dingley*, the refusal must be a "distinct and unequivocal absolute refusal to perform the promise." 117 U.S. at 503. That kind of refusal simply is not contained in that e-mail message. Accordingly, that e-mail message is not in and of itself an anticipatory repudiation of the contract.[2]

Decision

Respondent's **MOTION TO DISMISS OR FOR SUMMARY RELIEF** is **DENIED**.

R. ANTHONY McCANN
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

JEROME M. DRUMMOND
Board Judge

[2] Since there was no absolute refusal to perform, the NPS' argument that a contractor must continue performance after a dispute arises does not apply.