

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

2013 JUN -6 P 3: 15

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

_____)
 Nasa Construction and Trade, Inc.)
 INSAAT TAAH. ve TIC A.S.)
 Dig Ticaret V.D. : 629 045 63 06)
 Adnan Saygun Cad. Aydin Sk. No: D:14)
 Ulus-Besiktas/ Istanbul, Turkey)
)
 Plaintiff,)
)
 vs.)
)
 DynCorp International, LLC)
 3190 Fairview Park Drive, Suite 700)
 Falls Church, Virginia 22042)
)
 Defendant.)
)
 SERVE:)
 CT Corporation System)
 4701 Cox Road, Suite 301)
 Glen Allen, Virginia 23060)
 _____)

Case No. i:13cv 688
TSE/IDD

COMPLAINT

COMES NOW, Plaintiff, Nasa Construction Trade and Inc. (“Nasa”) by counsel, and for its Complaint against DynCorp International, LLC (“DynCorp”) alleges as follows:

Nature of Action

This is an action for damages arising from DynCorp’s breaches of its contracts with Nasa, and DynCorp’s failure to act in good faith following its settlement with the Government. DynCorp has wrongfully refused to pay for Nasa’s increased costs of performance resulting from changes, differing site conditions, disruptions and suspensions of work caused by DynCorp. Furthermore, DynCorp has wrongfully withheld payment of Nasa’s remaining contract balances

and outstanding invoices in further breach of the contracts between them despite having been paid nearly the entire contract balance and receiving a 948 day time extension from the Government. As a result of DynCorp's actions, Nasa has suffered damages in excess of \$5,800,000.

Parties

1. Plaintiff, Nasa Construction and Trade, Inc. is a foreign corporation with its principal place of business located in Istanbul, Turkey.

2. The Defendant, DynCorp International, LLC is a Virginia corporation with its principal place of business located in Falls Church, Virginia.

Jurisdiction and Venue

3. This Court has jurisdiction over this case under 28 U.S.C. § 1332 because complete diversity exists between the litigants and the amount in controversy exceeds \$75,000 in value, exclusive of interest and costs.

4. Venue is proper in this judicial district and division because the defendant resides in this judicial district, and the parties expressly agreed by contract that disputes between the parties would be heard in this judicial district.

Factual Background

Nasa Subcontracts with DynCorp

5. In 2008 and 2009, the United States Army Corps of Engineers ("USACE") awarded DynCorp five firm-fixed price contracts for the design and construction of facilities for the Afghan National Army in Kunduz, Jalalabad and Herat, Afghanistan (collectively referred to as the "Afghanistan Projects").

6. Upon Information and belief, DynCorp’s performance on the Afghanistan Projects was governed under the following prime contracts with the USACE: Contract No. W917PM-08-C-0033 for the Kunduz Phase I Project, W917PM-08-C-0070 for the Kunduz Phase II Project, W917PM-08-C-0009 for the Jalalabad Phase I Project, W917PM-08-C-0076 for the Jalalabad Phase II Project, and S-LMAQM-04-C-0030 for the Herat Project (hereinafter collectively referred to as the “Prime Contracts”).

7. Upon information and belief, the value of the Prime Contracts was in excess of \$72 million.

8. Following DynCorp’s execution of the Prime Contracts, DynCorp issued multiple Requests for Quotes (RFQs) for various construction scopes of work identified in the Prime Contracts. Following a compressed RFQ process and bid schedule in 2009 and 2010, DynCorp awarded NASA approximately twenty separate subcontracts for certain scopes of construction work related to the Afghanistan Projects (the “Subcontracts”). Nasa performed work under the following Subcontracts:

2009-KUN-NASA-VRF002	10-KUNPH2-005
2009-KUNII-NASA-VRP003	10-KUNPH2-004
2010-GSDS-KUN-NASA-FOC016	10-KUNPH2-0007
2010-GSDS-KUNII-NASA-FOC017	10-KUNPH2-0013
2010-GSDS-KUN-NASA-POL009	10-KUNDUZ-0042
2010-GSDS-KUNII-NASA-POL010	2009-JBADI-NASA-FOC006
2010-GSDS-KUNII-NASA-CSS008	2010-GSDS-J2-NASA-0001
2010-GSDS-KUNII-NASA-DPW012	
2010-GSDS-KUNII-NASA-PBW018	
2010-GSDS-KUNII-NASA-ARM014	
2010-GSDS-KUNII-NASA-LDF013	
2010-GSDS-KUN-NASA-DFC017	

9. The total value of the Subcontracts under which Nasa performed work for DynCorp was approximately \$15 million.

10. Pursuant to Section 30 of the Subcontracts' General Terms and Conditions, Nasa is entitled to an adjustment to the Subcontracts' price and schedule for changes to Nasa's scope of work that were directed or caused by DynCorp.

11. Further, the Subcontracts incorporate by reference the Federal Acquisition Regulations ("FAR") Section 52.236-2, which entitles a contractor to an equitable adjustment to the contract price in the event that the contractor encounters a differing site condition. A differing site condition is defined under the FAR as the following:

(1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) **unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.**

(emphasis added).

12. Additionally, the Subcontracts incorporate by reference FAR 52.242-14 that states a contractor shall be entitled to an adjustment in the contract price for owner-imposed suspensions of work. FAR 52.242-14(b) states, in relevant part:

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), **an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly.**

(emphasis added).

13. Finally, under Section 60 of the Subcontracts' General Terms and Conditions, the parties agreed that the venue for any disputes would be in the courts of the Commonwealth of Virginia or any federal court located in Virginia.

Project Status at the Start of Nasa's Performance

14. DynCorp self-performed and separately subcontracted portions of the design work. DynCorp awarded the remaining work to individual trade contractors whose work preceded or was concurrent with Nasa's performance.

15. At the time the Subcontracts were awarded in 2009 and 2010, DynCorp was already significantly behind schedule on the Afghanistan Projects. At DynCorp's insistence, and as a result of the status of the schedule, the Subcontracts were bid, negotiated and signed within days of DynCorp's issuance of RFQs for those scopes of work.

16. Given the compressed bid schedule, there was no opportunity for Nasa to perform a site investigation prior to the submission of its bids.

17. Additionally, the Subcontracts were negotiated and signed based on design drawings that were only 30-65 percent complete. Nasa understood that DynCorp would provide completed drawings.

18. From the outset, DynCorp's method of contracting and misadministration of the Subcontracts resulted in numerous changes and disruptions that impacted Nasa's performance. DynCorp's lack of cooperation and failure to retain qualified personnel, including project managers, engineers and inspectors, hindered Nasa's ability to perform its work as planned.

19. DynCorp never provided final issued for construction drawings. Nasa was forced to proceed without the benefit of a complete design, and instead was required to construct the

Projects with drawings that were only 65 percent complete. Nasa experienced changes to its work, as well as disruption and inefficiencies as a result.

20. Nasa expended significant costs to perform differently than planned and beyond that which could have been reasonably anticipated at the time of contract. DynCorp's disruption and interference caused Nasa to suffer impacts, resulting in increased labor costs, increased equipment costs, and increased overhead expenses.

21. Contemporaneously throughout the Project, Nasa notified DynCorp of DynCorp's failures and the effect of such failures on Nasa's performance.

**Late and Incomplete Drawings and Material Deliveries Resulted in
Changes to Nasa's Performance**

22. DynCorp's failure to provide complete and adequate drawings impacted Nasa's performance and disrupted and suspended many of Nasa's critical activities.

23. Drawings that DynCorp did ultimately provide were replete with errors, and in many instances, required Nasa to re-perform its work once corrected drawings were provided.

24. Late design changes directed by DynCorp caused further impacts to Nasa's performance.

25. Untimely and inadequate drawings pushed Nasa performance of critical concrete work into the winter months when it was more difficult and significantly more costly to cast concrete.

26. In addition to the untimely delivery of drawings, DynCorp repeatedly failed to deliver materials to the site that were necessary for Nasa to perform its Subcontract scopes of work.

27. Incomplete drawings and untimely deliveries by DynCorp was a persistent issue that impacted Nasa's performance on many of Nasa's Subcontract scopes of work.

28. Such issues were beyond Nasa's control, and caused Nasa to incur costs resulting from the impact of inadequate drawings and untimely deliveries.

**The Actual Site Conditions Differed From
That Which Could Have Been Reasonably Anticipated**

29. Nasa also experienced suspensions of its work associated with actual soil conditions that varied from that which could have been reasonably anticipated. In many cases, the soil could not be compacted without extraordinary efforts, which delayed Nasa's foundation work and other activities.

30. Compaction activities were impacted for months due to the actual condition of the soil. Given the short turnaround time from bid submission to award of the Subcontracts, Nasa was not afforded the opportunity to perform a site investigation to determine the actual condition of the soil.

31. DynCorp did not provide soil test results or borings for the site work.

32. Nasa anticipated that the soil would be capable of compaction and scheduled the duration of its compaction activities to be commensurate with the time to complete compaction activities for similar projects in the region. During the course of the Project, however, soil compaction took much longer than could have been reasonably anticipated.

33. The compaction issues were further exacerbated by the inconsistent results and over zealous rejections of Nasa's test results by DynCorp's on-site testing company. The testing laboratory unreasonably rejected the compaction test results achieved by Nasa, which further disrupted and suspended the foundation work.

34. Upon information and belief, DynCorp submitted a differing site condition claim to USACE based on the actual soil conditions at the Kunduz Project. USACE has acknowledged that the soil conditions experienced at the Kunduz Project constituted a differing site condition, and granted DynCorp a time extension based, in part, on DynCorp's differing site conditions claim.

**DynCorp's Failure to Assist Nasa through the
Customs Process Contributed to Suspensions of Work**

35. In many instances, Nasa was prevented from performing its contract work because trucks, loaded with Nasa's equipment and materials, were held up for months by Afghan customs. Trucks carrying material for the fiber optic cabling work performed were held up in customs for three months due to DynCorp's failure to timely expedite the customs process to allow the transportation of Nasa's materials to the site.

36. Pursuant to the Subcontracts, Nasa was exempt from payment of taxes and customs to the Islamic Republic of Afghanistan.

37. DynCorp was in the best position to facilitate the customs process with the Afghan government. Despite repeated requests from Nasa for DynCorp's assistance with the custom process, DynCorp refused to cooperate, and instead allowed dozens of Nasa's trucks to be held up in customs for months.

38. In order to mitigate the months of disruption caused by DynCorp's failures in connection with the customs process, Nasa paid the customs and other charges to release the trucks. DynCorp has never met its contractual obligations with regard to such processes or payments.

**The Poor and Untimely Performance of DynCorp's
Subcontractors Impacted Nasa's Performance**

39. While Nasa anticipated the presence of other subcontractors on the Projects, Nasa did not and could not have reasonably expected the level of disruption and interference to Nasa's work that DynCorp and its subcontractors ultimately caused.

40. Nasa was adversely impacted by (1) DynCorp's failure to properly coordinate and sequence the work performed by all of the subcontractors on the Projects; (2) DynCorp's failure to ensure that its other subcontractors removed their materials and debris from the areas in which Nasa had to work; and (3) DynCorp's failure to ensure that the work Nasa had completed was not damaged by the other subcontractors on the site.

41. Nasa had no control over the actions and performance of subcontractors that were retained by DynCorp and incurred significant costs as a result of their poor performance.

Withholding of Liquidated Damages and Payment of Outstanding Invoices

42. Nasa's performance was impacted by changes, suspensions and disruptions that are attributable to DynCorp.

43. DynCorp continues to withhold in excess of \$1.3 million in Nasa's Subcontract balance for delay liquidated damages. Such alleged delays were beyond Nasa's control; they were attributable to site conditions and DynCorp's poor performance and misadministration of the Subcontracts in fundamental breach of the Subcontracts.

44. DynCorp's withholdings are without regard for DynCorp's own issues and improperly presumes that Nasa was solely responsible for all of the Projects' delays.

45. Upon information and belief, in December 2011, DynCorp entered into a settlement agreement with USACE whereby USACE released DynCorp from all contractual liabilities and warranty obligations.

46. Upon information and belief, USACE paid DynCorp over \$70 million, nearly the entire value of the Prime Contracts, as part of the settlement.

47. Upon information and belief, USACE retroactively extended the Prime Contracts' duration by 948 days, absolving DynCorp from any liability for schedule delays. Upon information and belief, the time extension and settlement was based, in part, on USACE's finding that the soils encountered at the Kunduz Project constituted a differing site condition.

48. Upon information and belief, DynCorp was not liable to and did not pay USACE liquidated damages for delay.

49. Despite having been relieved of its obligation to pay delay liquidated damages to USACE and being paid its own contract balance by USACE, DynCorp continues to withhold \$1.3 million of Nasa's Subcontract balances as liquidated damages for delay.

50. DynCorp has likewise withheld payment of certain of Nasa's properly presented invoices in the amount of \$310,465 also on the basis of liquidated damages, which DynCorp never paid to USACE.

COUNT I
(Breach of Contract)

51. Nasa incorporates the preceding Paragraphs 1 through 50 of the Complaint as though fully set forth herein.

52. The Subcontracts are binding and enforceable agreements between DynCorp and Nasa.

53. Under the Subcontracts, DynCorp agreed to pay Nasa in exchange for the performance of defined scopes of work.

54. DynCorp interfered and prevented Nasa from completing its work in a timely and efficient manner.

55. Events beyond Nasa's control, including lack of adequate drawings, constantly evolving design changes, over zealous inspections, soil conditions that differed from that which could be reasonably anticipated and DynCorp's failure to cooperate and assist Nasa to obtain required customs exemptions, adversely impacted Nasa's performance.

56. Nasa provided timely notice of DynCorp's failures and the impact of such failures on Nasa's performance, and timely submitted its claims for additional compensation in accordance with the Subcontracts.

57. Despite Nasa's repeated requests, DynCorp has failed and refused to adjust the Subcontracts' sum and compensate Nasa for its additional costs in performing the changed work. Such refusal is a fundamental breach of the Subcontracts.

58. Because DynCorp was not required to pay delay liquidated damages to USACE and was paid nearly the entire value of the Prime Contracts by USACE, DynCorp did not experience monetary losses resulting from delays on the Project.

59. Although DynCorp was granted a 948 day time extension by the USACE, DynCorp continues to improperly withhold Nasa's Subcontract balances and payment on certain outstanding invoices purportedly on the basis of delay liquidated damages.

60. Nasa has diligently and faithfully performed all of its obligations under the Contract.

61. All conditions precedent to bringing this action, if any, have been satisfied, excused or waived.

62. As a direct and proximate result of DynCorp's acts, omissions, and breaches of contract, Nasa has sustained damages in the amount of at least \$5,800,000 plus interest.

WHEREFORE, Plaintiff Nasa Construction and Trade, Inc. respectfully requests this Court to enter judgment in its favor and against Defendant DynCorp International, LLC in an amount not less than \$5,800,000, plus interest, attorney's fees, punitive and exemplary damages, and such other and further relief as this Court deems proper and just.

COUNT II
(Breach of Covenant of Good Faith and Fair Dealing)

63. Nasa incorporates the preceding Paragraphs 1 through 62 of the Complaint as though fully set forth herein.

64. DynCorp had a duty to act in good faith in its performance of its obligations under the Subcontracts.

65. DynCorp interfered and prevented Nasa from completing its work in a timely and efficient manner.

66. Events beyond Nasa's control, including lack of adequate drawings, constantly evolving design changes, over zealous inspections, soil conditions that differed from that which could be reasonably anticipated, and DynCorp's failure to cooperate and assist Nasa to obtain required customs exemptions, adversely impacted Nasa's performance.

67. DynCorp was not liable for, nor did it pay USACE, liquidated damages for delay. Despite receiving a 948 day time extension, DynCorp continues to improperly withhold \$1.6

million of Nasa's Subcontract balances and outstanding invoices on the basis of delay liquidated damages.

68. DynCorp's actions during performance and subsequent improper withholding of payment of Nasa's Subcontract balances and outstanding invoices constituted bad faith.

69. Despite payment of its contract balance and grant of a 948 day time extension by the USACE, DynCorp has acted in bad faith as it continues to withhold monies from Nasa's Subcontract balances and refuses to recognize the disruptions to Nasa's work.

70. As a direct and proximate result of DynCorp's acts, omissions, and breaches of its obligation to act in good faith, Nasa has sustained damages in the amount of at least \$5,800,000 plus interest.

WHEREFORE, Plaintiff Nasa Construction and Trade, Inc. respectfully requests this Court to enter judgment in its favor and against Defendant DynCorp International, LLC in an amount not less than \$5,800,000, plus interest, attorney's fees, punitive and exemplary damages, and such other and further relief as this Court deems proper and just.

JURY DEMAND

Plaintiff Nasa Construction and Trade, Inc. demands a trial by jury on all counts.

Dated: June 6, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. Ewald', written over a horizontal line.

Shelly L. Ewald (VA Bar No. 31732)
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