UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION GRANTED IN PART: March 9, 2018

CBCA 5826

CTA I, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

John M. Manfredonia and James Petersen of Manfredonia Law Offices, LLC, Cresskill, NJ, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

CHADWICK, Board Judge.

ORDER

Just after Thanksgiving 2017, the Board adopted the discovery schedule proposed by the parties in this construction case. The schedule included three months of fact discovery, ending in February 2018. Expert discovery is scheduled to end on April 30, 2018. By March 30, 2018, the parties owe the Board a joint proposal of at least two dates and times for a telephonic conference to schedule prehearing filings and a hearing in May or June 2018. On the last day of fact discovery, February 28, 2018, the Department of Veterans Affairs (VA) moved to stay the case "until the project is complete" or, in the alternative, to extend fact discovery by two months, to April 30, 2018, and to adjust other dates in the schedule accordingly. The appellant, CTA I, LLC (CTA), objects. We deny VA's motion to stay and decline to amend the schedule except as noted below.

VA's Motion to Stay Until Project Completion

CTA is performing the subject contract to rebuild a dialysis center at a VA facility in Richmond, Virginia. CTA states that its current schedule shows completion in November 2018, more than three years late. In this appeal, filed in August 2017, CTA seeks about $2 million in delay, inefficiency, and other costs incurred from the date of the notice to proceed through September 30, 2016. CTA blames VA for mounting delays and plans to submit another claim for additional compensation once the project is finished.

VA's primary argument for staying the appeal until project completion is that CTA will not be able to prove at a hearing that VA "delayed project completion as a whole," *Versar, Inc.*, ASBCA 56857, et al., 12-1 BCA ¶ 35,025, at 172,128, unless and until we know the total amount of project delay. Even if this were correct, it would be CTA's problem, not VA's. CTA would be at risk of seeing its claim for delay costs through September 2016 denied for lack of proof, a result VA would presumably welcome. In any event, VA's categorical position is wrong. CTA is entitled to try to prove at this juncture that VA caused compensable delay to activities on the project critical path up to and including September 30, 2016, thereby delaying the future completion date. CTA need not wait until contract completion to litigate its delay claim for that completed, discrete period. Indeed, the very thing that defines work on the critical path is that the work has "no leeway and must be performed on schedule; *otherwise, the entire project will be delayed.*" *Haney v. United States*, 676 F.2d 584, 595 (Ct. Cl. 1982) (emphasis added); *see Wilner v. United States*, 24 F.3d 1397, 1399 n.5 (Fed. Cir. 1994) (en banc). CTA either can prove and quantify Government-caused impact to work on the as-built critical path prior to October 2016, or it cannot. We need not wait until CTA's performance has ended to find out.

The Suspension of Work clause in this contract specifically directs CTA to submit a claim for delay costs "in writing as soon as practicable after the termination of [a] suspension, delay, or interruption," not after contract performance. 48 CFR 52.242-12(c) (2013). That the contractor is still performing the contract is obviously not grounds for the contracting officer—or, later, the Board—to deny such a claim. *See Industrial Maintenance Services, Inc. v. Department of Veterans Affairs*, CBCA 5618, 17-1 BCA ¶ 36,850 (during contract performance, addressing claim for delay costs). Analogously, when a construction contract is terminated for default, the contractor, by definition, *did not complete* the work, yet may argue that the Government caused critical path delay that excused the contractor's nonperformance. *E.g.*, *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1015-17 (Fed. Cir. 2003); *Morganti National, Inc. v. United States*, 49 Fed. Cl. 110, 132 (2001), *aff'd*, 36 F. App'x 452 (Fed. Cir. 2002). Delay claims covering discrete periods of contract performance are often consolidated for litigation after a project is complete, but that is by no means a substantive legal requirement as VA implies.

VA also argues that "permitting the current appeal to proceed when Appellant has made clear that a second Claim is forthcoming will cause unnecessary duplication of discovery, witness preparation, and, potentially, more than one hearing." The Board aims "to secure the just, informal, expeditious, and inexpensive resolution of every case before [it]." Board Rule 1(d) (48 CFR 6101.1(d) (2016)). This appeal is the case before us. VA presents no facts to support its assertion that litigating a future appeal about a different period of contract performance would "duplicat[e]" the litigation of this appeal, as opposed to merely complementing or supplementing the parties' efforts here. We will not stay the appeal over the appellant's objection.

VA's Motion to Extend Discovery

Alternatively, VA requests two additional months of fact discovery. VA explains that it served written discovery requests in mid-January 2018 but received interrogatory responses fifteen days late, on February 28, the last scheduled day of fact discovery, and, as of that date, had not received CTA's document production, so the agency "cannot determine if it desires to take depositions." Having agreed last fall to a three-month discovery period, VA should have planned better. It should have served discovery requests in the first month, not the second, if it planned to review CTA's document production before scheduling depositions. Nonetheless, it will do the Board little good to have VA flying blind at the hearing. Expert discovery runs through April 30. Concurrently with expert discovery, VA may take up to three fact depositions. The schedule entered on November 28, 2017, otherwise remains in place, and the parties should anticipate a hearing in May or June 2018.

Decision

VA's motion is **GRANTED IN PART** as stated in the preceding paragraph and otherwise denied.

KYLE CHADWICK
Board Judge