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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By SD Depu

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TANADGUSIX CORPORATION, et al.,)

Plaintiffs,)

No. A02-0032 CV

vs.)

DIEDRE HUBER, et al.,)

Defendants.)

ORDER REGARDING
SUMMARY JUDGMENT MOTIONS

I. INTRODUCTION

Before the Court are Federal Defendants General Services Administration (GSA) and the Small Business Administration (SBA), joined by State Defendants James Jobkar, in his official capacity, and the State of Alaska, with a Motion to Dismiss or for Summary Judgment; and Plaintiffs Tanadgusix Corporation (TDX) and Bering Sea Eccotech, Inc. (BSE) with a Cross-Motion for Partial Summary Judgment.

In essence, GSA has determined that TDX's use of federal property, the vessel Ex-Competent (a dry dock with a declared value more than \$5 million), is not in accordance with the conditions

required by a "Vessel Conditional Transfer Document," applicable and GSA policy because the vessel is not being used in Alaska.¹ Therefore GSA argues that the conditional title of the Ex-Competent should revert back to the United States.

In an effort to retain possession of the Ex-Competent TDX and BSE suggest the Court order the United States to donate the Ex-Competent to TDX's wholly-owned subsidiary, BSE, through the instead of through GSA. More precisely, Plaintiffs would have the Court direct GSA to take back the Ex-Competent, then order GSA to transfer the Ex-Competent to the SBA, then order the SBA to donate it to BSE, thereby avoiding the requirement that the vessel be used in Alaska

Because the language of the "Vessel Conditional Transfer Document," applicable law, and GSA policy, are both clear and unambiguous (as agreed upon by both parties), and because this condition [vessel not to be used outside of the State of Alaska) was a material component of the transfer agreement, and because there are no genuine issues as to any material facts Defendants' Motions for Summary Judgment are hereby **GRANTED** and Plaintiffs' Cross-Motion for Partial Summary Judgment is **DENIED** as moot

Clerk's Docket No 18 Ex. 59 (emphasis added).

II. FACTS²

TDX obtained conditional title to the vessel Ex-Competent by way of a "Vessel Conditional Transfer Document," which was executed on or about January 19, 2001.³ All parties agree the "Vessel Conditional Transfer Document" "controls how and where TDX uses the Ex-Competent."⁴

On March 22, 2001, the Ex-Competent was officially transferred from GSA to the "Alaska State Agency for Surplus Property" "SASP") for subsequent transfer to TDX.⁵ On April 6, 2001, TDX took receipt of the Ex-Competent.⁶ The Ex-Competent was then transported to a commercial boatyard for rehabilitation

² While the parties have presented the Court with numerous facts and/or exhibits, the Court has chosen to focus on those facts which are most directly related to the primary issue; i.e., the interpretation of the "Vessel Conditional Transfer Document," dated January 19, 2001.

³ Clerk's Docket No. 18 at 8 and 30

⁴ Id. at 7

⁵ Id. at 9.

⁶ The pertinent language of the DD Form 1149, signed by Ron P. Philemonoff, Chairman and CEO of TDX, provides: "Transfer of Ex-Competent (AFDM-6) to State of Alaska Tanadgusix (TDX) Corporation as authorized by General Service Administration." Id. Ex. 40.

"before it could be feasibly and safely transported any long distances, without incurring significant liability."⁷

On July 20, 2001, Ron P Philemonoff, Chairman and CEO of TDX, requested GSA waive the "in Alaska" requirement of the "Vessel Conditional Transfer Document."⁸

Our Vessel Conditional Transfer Document contains conditions and restrictions, one of which No. (8) forbids removing it permanently for use outside the State [of Alaska]. Since it is not in Alaska presently or at the time of purchase, we have to ask whether, given prohibitive costs, and the potential for losing the vessel in an open ocean transport, we can feasibly use the vessel anywhere but where it presently resides in Hawaii. The Vessel Conditional Transfer document provides GSA with the authority in both No. (11) and No. (12), to waive and/or terminate "any of the provisions set forth in (4) and (6) through (10)." We would like the SASP or the GSA to consider such a waiver that would let us operate where we are presently, and relieving the burden of moving the vessel to Alaska, that No. (8) appears to require.⁹

In response, GSA indicated

Although Provision No. 12 does allow for a possible waiver of Provision No. 8, such authority is seldom used. In this particular case, because TDX is not located in Hawaii but Alaska, TDX's ability to ensure compliance with the property's terms and conditions would be severely hampered. Even if TDX could

Id. Ex 29 at 1

⁸ TA Ex 62 at 2

Id ([of Alaska in the original

provide adequate assurance in this regard, the use of the dry dock in Hawaii would alter significantly the dry dock's intended purpose and affected customer base, both factors weighing heavily in GSA's initial allocation decision.¹⁰

Whereupon, for the first time, TDX argued: "Although TDX has always intended to use the Ex-Competent to benefit Alaskans, it has never stated that this could only be accomplished by towing it to Alaska."¹¹

Unwilling to waive the express language of the "Vessel Conditional Transfer Document," on or about March 21, 2002, "GSA declared TDX to be officially in non-compliance with the federal donation program and in breach of the conditions of the conditional transfer document. ¹² GSA subsequently informed TDX that it would take "corrective action to resolve [the] noncompliance."¹³ TDX and BSE initiated this action with an eye toward maintaining title to the Ex-Competent

¹⁰ Id. Ex. 67 at 2

¹¹ Id. Ex. 82 at 3 (emphasis added).

¹² Clerk's Docket No. 35 at 3 & n.2.

¹³ Clerk's Docket No. 18 Ex. 117 at 1.

III. STANDARDS OF REVIEW

A. Dismissal

Rules 12(b) 1) & (6) of the Federal Rules of Civil Procedure provide:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, . . . (6) failure to state a claim upon which relief can be granted.¹⁴

Rule 12(b) further provides:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.¹⁵

The Court has looked beyond the face of the complaint in order to decide the issues presently before it. Therefore, the

¹⁴ Fed R. Civ. P. 12(b)(1 & (6) (2002)

¹⁵ Fed R. Civ. P. 12(b) (2002).

Rule 12(b)(6) motions are treated as Rule 56(b) motions for summary judgment.¹⁶

B. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.¹⁷ The moving party need not present evidence; it needs only point out the lack of any genuine dispute as to material fact.¹⁸ Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue trial.¹⁹ All evidence presented by the non-movant must be believed for purposes of summary judgment, and all justifiable inferences must be drawn in favor of the non-movant.²⁰ However, the nonmoving party may not rest upon mere allegations or denials, but

¹⁶ Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002) (ordinarily, a court may look only at the face of the complaint to decide a motion to dismiss).

¹⁷ Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

¹⁸ Id. at 323-325

¹⁹ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-9 1986

²⁰ Id. at 255

must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.²¹

IV. DISCUSSION

- A. Because There Are No Genuine Disputes As to Material Fact, With Regard to Any and/or All Claims Brought Against Federal Defendants, Federal Defendants' Motion for Summary Judgment is Granted.

On January 19, 2001, TDX and GSA (acting by and through the SASP) entered into a "Vessel Conditional Transfer Agreement."²² The document provides in relevant part

The Property hereinafter described is required in the furtherance of the Donee's program and that such Property will be used solely in connection with such programs and more specifically for all of the following purpose(s) and plan as set forth in the Donee's "Letter of Intent" dated January 19th, 2001 which Expression of interest is hereby incorporated herein and made a part hereof, and for no other purposes, does hereby deliver, sell, assign, and transfer all of its rights, title and interest in and to the following described vessel: "AFDM 6, Ex-Competent together with all appurtenances, and accessories attached thereto or installed therein, (all of which are hereinafter referred to as the Property) . . . ; SUBJECT, HOWEVER, to the following conditions and restrictions:

Id. at 248-9.

Clerk's Docket No 18 Ex. 30.

8. During the periods of restriction prescribed in (3) and (4) above, the Donee shall not sell, trade, lease, lend, bail, cannibalize, encumber, or otherwise dispose of the Property, or remove it permanently for use outside the State, without the prior approval of GSA.²³

Read in conjunction with the opening sentence of the "Vessel Conditional Transfer Document," i.e., "the United States of America (hereinafter) called the General Services Administration (GSA) acting by and through the State of Alaska, State agency for Surplus Property " and the applicable statutes, it is clear that additional references to "State," contained within the "Vessel Conditional Transfer Document," refer to the gaining State; in this case, the State of Alaska.²⁴ Accordingly, the Court concludes Provision No 8 of the "Vessel Conditional Transfer Document" prohibits the Ex-Competent from being used outside the State of Alaska. Indeed, Ron P. Philemonoff, Chairman and CEO of TDX, admits in his July 20, 2001, letter to Jim Jobkar of GSA that the "Vessel Conditional Transfer Document" forbids removing the Ex-Competent permanently for use outside of the State [of Alaska].²⁵ Therefore, in accordance with the clear and unambiguous language of the "Vessel Conditional Transfer Document," and without a waiver

Id. Ex. 30 at 1-2

Id. Ex. 30 at 1.

²⁵ Id. Ex. 62 at 2 ([of Alaska in the original

(which GSA has expressly denied), the Court concludes TDX is in noncompliance with the federal donation program and in breach of conditions of the conditional transfer document

Notwithstanding, Plaintiffs argue their "Letter of Intent," which is wholly incorporated by the "Vessel Conditional Transfer Document," contemplates use of the Ex-Competent in Hawaii Court disagrees

The "Letter of Intent" provides

This letter will serve to restate and reconfirm the interest of Tanadgusix Corporation in obtaining through the GSA Program, the AFDM-6, dry dock barge, known as the Ex-Competent. TDX is definitely interested in purchase of this vessel through the State, and is prepared and ready to act immediately on its plan to put the vessel into service. St. Paul, our home community, is reeling from a collapse in crab stocks and our corporation has been tasked with diversification of opportunity, business survival, and development of employment opportunities for our shareholders. The AFDM-6 will be used to enhance both business and employment opportunities for our shareholders, through operations as a platform for shipbuilding and ship services, and opportunities as a dry dock. Aleut shareholders and other Alaskans will be provided the opportunity to develop skills in welding, metalworking, shipbuilding and repair, as well as hazmat management.

The following information is provided in evidence of our readiness to move forward:

1. Letter of confirmation from Sause Bros. regarding the availability and readiness of an

insured ISM certified tug operator to remove the AFDM-6 within 7 days of notification.

2. Letter of reaffirmation of commitment from Marisco Limited, the shipyard owner, our partner in the State of Hawaii, where rehabilitation will take place. This rehabilitation, based upon our review of the audio gauge review of bottom thickness, would be necessary before the AFDM could be feasibly and safely transported any long distances, without incurring significant liability.

We have a viable plan of business for this capital asset, have funds available to pay for its purchase and removal, and will begin immediately the job of removing hazmat and other requirements, plus a few upgrades to the bottom, so that we can put the vessel into service for its intended purpose, namely operating as a dry dock. Based on our projections, this can be accomplished in approximately six to eight months.

TDX is supportive of the State's program of obtaining excess federal properties, as it gives small Alaska companies like ours the opportunity to improve ourselves economically with capital assets that would be out of reach in most cases. This is especially important since job opportunities on St. Paul are limited under current economic circumstances. To us it is a privilege that we have access to such a program, one that we believe many Alaskan communities could benefit from.

As mentioned in our prior letter to your office regarding this vessel, TDX and all of its affiliates, will abide by, and provide evidence of, full compliance of the terms and conditions of the "Vessel Conditional Transfer Document." TDX will be fully responsible for bring [sic] the vessel into service according to its corporate development program, and will

retain full control of the operations management of the vessel.²⁶

Even though the "Letter of Intent" does not explicitly state where the Ex-Competent would be put to use, it clearly implies that the Ex-Competent would be transported to Alaska following rehabilitation, i.e., "Hawaii, where rehabilitation will take place. This rehabilitation, would be necessary before the AFDM could be feasibly and safely transported any long distances." ²⁷ It most certainly does not state that the Ex-Competent would be put to use in Hawaii.²⁸

Nevertheless, Plaintiffs then argue that two letters, which were attached to the "Letter of Intent," should have put GSA on notice that the Ex-Competent would be put to use in Hawaii. Again, the Court disagrees.

Id. Ex. 29 (emphasis added)

²⁷ Id. (emphasis added). After reviewing the case file in some depth, the Court notes that the "Letter of Intent," as well as any and/or all other letters from TDX, up until July 20, 2001, were illusory at best. The Court was unable to uncover a single letter, note, etc., addressed to any government agency, by TDX, that explicitly described where the Ex-Competent would be put to use, prior to TDX's letter, dated July 20, 2001.

²⁸ Of some importance, the Court notes the "Letter of Intent" does not stand alone. Because it is wholly incorporated by the "Vessel Conditional Transfer Document," any and/or ambiguity contained within the "Letter of Intent" is cleared up by the express language contained within the "Vessel Conditional Transfer Document." In this case, Provision No. 8 of the "Vessel Conditional Transfer Document" provides that the Ex-Competent may not be used "outside the State [of Alaska]."

The first letter, dated January 18, 2001, and attached to "Letter of Intent," confirms towage of the Ex-Competent from the Pearl Harbor Inactive Shipyard. It is wholly irrelevant to the issue at hand, for it was understood that repairs were to be made in Hawaii before the vessel was transported to Alaska.

The second letter, dated January 18, 2001, and attached to the "Letter of Intent," reaffirms Marisco Limited's "commitment and interest in putting the [Ex-Competent] into service in Hawaii wherein the President of Marisco Limited makes clear: "We are indeed willing to work with TDX and the Small Business Administration to fulfill all requirements and obligations."²⁹

Two things are evident in the January 18, 2001, letter:

Marisco had an "interest" (nothing more) in putting the Ex-Competent into service in Hawaii; and (2) Marisco Limited contemplated an arrangement whereby TDX would receive the Ex-Competent by way of its 8(a) business (BSE) and/or through the SBA. However, because the transfer of the Ex-Competent to BSE, through the SBA, was not contemplated by GSA and never occurred, as evidenced by the fact that GSA was in the process of transferring the Ex-Competent to TDX, the Court concludes the language contained within Marisco's letter of January 18, 2001, is not relevant to the

Clerk's Docket No. 18 Ex 29 at 4

obligations assumed by TDX. This letter says nothing with regard to where TDX intended to put the Ex-Competent into service

Because TDX received the vessel directly from GSA, by way of the SASP, the Court concludes the January 18, 2001, letter indicates nothing more than Marisco's "interest" in putting the Ex-Competent into service at its Hawaii boatyard, following an anticipated but unrealized transfer to BSE from the SBA. It does not contemplate a transfer of the Ex-Competent from GSA to TDX. Indeed, the Court cannot find any evidence, within either the "Letter of Intent" and/or the "Vessel Conditional Transfer Agreement," which would indicate that the Ex-Competent would be utilized in Hawaii, subsequent to a GSA transfer to TDX.³⁰

Because the Court finds TDX's January 19, 2001, "Letter of Intent" failed to inform GSA and/or the SASP that the Ex-Competent would be put to use in Hawaii, and because TDX continues to operate the vessel in defiance of the "Vessel Conditional Transfer Agreement," ownership of the vessel must revert to the

Id. (emphasis added). Plaintiffs cite to the District Court, District of Hawaii's decision in Pacific Shipyards Int'l v. Tanadgusix Corp., no. 02-0088 (D. Haw. May 31, 2002), for the proposition that GSA approved use of the Ex-Competent in Hawaii. Id. at 1. However, quoting a letter attached to TDX's Letter of Intent, District Judge Ezra writes, "the letter from Marisco Limited . . . explicitly stated: This letter is to reaffirm our commitment and interest in putting the EX AFDM-6 Drydock into service in Hawaii." Id. Ex. 123 at 19 (internal quotations omitted) (emphasis added).

United States as originally contemplated by GSA and in accordance with the clear and unambiguous language of the "Vessel Conditional Transfer Agreement."

Even if the Court were to find TDX is authorized to make of the Ex-Competent in Hawaii, which it does not, the Ex-Competent would revert to the United States based upon a wholly independent basis, i.e. that TDX failed to maintain full control of the operations and management of the vessel.

The final paragraph of the "Letter of Intent," which letter was incorporated into the "Vessel Conditional Transfer Document," dictates, "TDX will be fully responsible for bring[ing] vessel into service according to its corporate development program, and will retain full control of the operations and management of the vessel."

In an initial letter of understanding entered into between TDX and Marisco Limited, dated October 24, 2000, the two stipulate:

TDX through its subsidiary, Bering Sea Eccotech, Inc. (BSE), will maintain ownership of the vessel for the required term in the purchase agreement, but agrees that the vessel will operate in Marisco's shipyard for the minimum period identified above, and that Marisco may operate and use the vessel for its

³¹ Id. Ex. 29 at 2 (emphasis added). The record reveals no government agency received a copy of this agreement until sometime after July 20, 2001.

intended purposes in the course of Marisco's normal business operations.³²

Because Marisco Limited obtained some, if not full control of the operations and management of the Ex Competent, as indicated above, the Court concludes TDX has violated an additional provision of the "Vessel Conditional Transfer Document." Consequently, the Ex-Competent must revert to the United States for this additional reason

With regard to Plaintiffs' claims against the SBA, the Court notes BSE asked the SBA to certify its eligibility to receive the Ex-Competent on February 27, 2001, more than a month after conditional title to the Ex-Competent passed to TDX. Therefore, even if BSE had been declared an eligible 8(a) participant by the SBA for the purposes of receiving the Ex-Competent, such a determination would not have allowed it to obtain ownership of the vessel because the Ex-Competent had already been transferred to TDX

Although Plaintiffs may have preferred to obtain the Ex-Competent through the SBA's regulations rather than GSA's regulations, they did not. They are bound by the contract they entered into. As stated above, material provisions in this

Clerk's Docket No. 18 Ex 21

contract were breached. Therefore, the SBA is entitled to summary judgment as a matter of law

B. Because There Are No Genuine Disputes As to Material Fact With Regard to Any and/or All Claims Brought Against State Defendants, State Defendants' Motion for Summary Judgment is Granted.

The SASP acts as a conduit through which surplus government property passes. It has no independent authority. It could not demand the SBA declare BSE eligible to receive the Ex-Competent; nor could it order GSA to waive any and/or all provisions in the "Vessel Conditional Transfer Document." Consequently, due to the lack of any and/or all genuine dispute(s) as to material fact, with regard to the SASP and/or any other State Defendant, State Defendants' Motion for Summary Judgment is hereby GRANTED.

The SASP may resubmit an appropriate invoice for the amount owed, if any, as a result of any services rendered for which it is entitled payment

V. CONCLUSION

For the reasons stated herein, both the Federal and State Motions for Summary Judgment are hereby GRANTED and Plaintiffs' Cross-Motion for Partial Summary Judgment is DENIED. Any and/or

all remaining claims not mentioned herein are hereby **DISMISSED** as moot.

ENTERED at Anchorage, Alaska, this 4th day of December 2002.


RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

M. VANDOR (AAG JUNEAO)
R. RABDALL (AUSA)
[REDACTED]

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UNITED STATES DISTRICT COURT
D. DISTRICT OF ALASKA
By RD Deputy

TANADGUSIX CORPORATION, et al.,
Plaintiff,

Case Number A02-0032 CV (RRB)

v.

DIEDRE HUBER, et al.,
Defendant.

JUDGMENT IN A CIVIL CASE

 JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

 X **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT defendants' summary judgment motions are granted.
Plaintiffs' take nothing and the action is dismissed on the merits

APPROVED:

Ralph R. Beistline
RALPH R. BEISTLINE
United States District Judge

December 5, 2002
Date

Michael D. Hall
Clerk

Patricia Demeter
(By) Deputy Clerk

A02-0032--CV (RRB)

M. VANDOR (AAG JUNEAU)

R. RANDALL (AUSA)

T. SCHLOSSER

06J 11460

MAILED ON 11/5/02

BY RD

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