

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Sach Sinha and Assoc., Inc. ) ASBCA No. 47594  
 )  
Under Contract No. N00164-92-C-0172 )

APPEARANCE FOR THE APPELLANT: Mr. Sach Sinha  
President

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.  
Navy Chief Trial Attorney  
D. Susan Spiegelman-Boyd, Esq.  
Trial Attorney  
Naval Surface Warfare Center  
Crane, IN

OPINION BY ADMINISTRATIVE JUDGE STEMLER

This is a timely appeal from a contracting officer's decision terminating the subject contract for default. The Contract Disputes Act (41 U.S.C §§ 601 *et seq.*) is applicable. Both parties have elected to waive a hearing and proceed on the record pursuant to Rule 11.

FINDINGS OF FACT

1. On 30 September 1992, the Naval Surface Warfare Center, Crane, Indiana awarded a firm-fixed price supply contract to Sach Sinha and Assoc., Inc. (SSA) in the total amount of \$641,617. The contract required SSA to produce and deliver MK26 Mod 17 Gun Mounts and MK16 Mod 8 Stand Assemblies. First articles of both the gun mount and the stand assembly were required to be delivered within 150 days after the award of the contract (or by 27 February 1993). Two hundred and ninety-nine production gun mounts and 199 production stand assemblies were required to be delivered in incremental deliveries commencing 270 days after the date of award (or by 27 June 1993). The contract contained, in relevant part, the following clauses: FAR 52.232-16, Progress Payments (AUG 1987, ALT I); 52.209-4, First Article Approval – Government Testing (SEP 1989, ALT I); 52.233-1, Disputes (APR 1984); 52.243-1, Changes – Fixed-Price (AUG 1987); and 52.249-8, Default (Fixed-Price Supply and Service) (APR 1984). (R4, tab 1)

2. On 23 November 1992, SSA wrote the Procuring Contracting Officer (PCO) stating that 14 drawings “do not have well defined datum structures” and suggested certain changes (R4, tab 7).

3. On 2 December 1992, the PCO’s technical advisor reviewed SSA’s letter and determined that many of the units had been procured in the past with the same drawings and that SSA’s comments related to “Geometric Dimensioning and Tolerancing” which is “not an exact science” and is “highly subject to interpretation and opinion.” He recommended that the contractor proceed to fabricate in accordance with the drawings and submit waivers/deviations if needed. (R4, tab 10) This analysis was relayed to SSA on the same day (R4, tab 11).

4. On 22 December 1992, bilateral modification No. P00001 was issued. It provided, at appellant’s request, that a gun mount be delivered to appellant as Government Furnished Equipment to be used as a sample (R4, tab 12).

5. On 26 February 1993, SSA wrote the PCO requesting an extension of 2 months in the delivery schedule for the first articles and production units due to its inquiry concerning the 14 drawings discussed *supra*. (R4, tab 14)

6. On 21 April 1993, the PCO wrote SSA requesting that SSA provide a delivery schedule (R4, tab 19).

7. On 27 April 1993, the cognizant Defense Contract Administration Services (DCAS) office wrote SSA regarding a 22 April inspection of SSA’s facility that it had conducted. DCAS reported that it found that SSA’s measuring equipment that was being used on the contract did not have proper documentation to support its calibration. DCAS stated that SSA’s inspection system did not meet the contract requirements of MIL-I-45208A and MIL-STD-45662 (R4, tab 20). SSA resolved this matter and its system was deemed acceptable on 7 September 1993 (attachment to complaint).

8. On 13 May 1993, SSA wrote the PCO and requested 6 waivers/deviations relating to the 14 drawing problems discussed *supra*. SSA stated that it would deliver the first articles 14 days after approval of the waivers/deviations. SSA informed the PCO that it intended to submit Engineering Change Proposals (ECPs) regarding the production units and that it could not supply a new schedule until the ECPs were approved (R4, tab 21).

9. On 18 May 1993, the PCO’s technical advisor reviewed SSA’s waiver/deviation requests and described them all as minor. He stated that two were the result of SSA’s subcontractors not following the drawings, one was the result of SSA removing too much material from a part before welding, one was unclear with the

information provided, and two were in fact design flaws. All the requests, with the exception of the one for which insufficient information had been provided, were recommended to be approved. (R4, tab 22)

10. SSA was informed of the approval of the five waivers/deviations in a telephone call of 15 June 1993 (R4, tab 26).

11. On 7 July 1993, SSA sent the PCO a fax setting forth its proposed delivery schedule. SSA requested that the new schedule provide for delivery of the first articles 300 days after the award of the contract (27 July 1993) and the production units 420 days after award (24 November 1993). (R4, tab 28)

12. On 9 July 1993, bilateral modification No. P00002 was issued. The modification provided for approval of the 5 deviation/waivers and the delivery schedule extension requested by SSA. SSA provided \$500 consideration for the modification and executed a release of any and all claims related to the circumstances of the modification (R4, tab 29).

13. On 16 July 1993, the ACO wrote the PCO warning him that SSA's financial condition was very weak and that to protect the Government's interests, the ACO was requiring a pre-payment audit for any progress payment requests submitted by SSA. The ACO reported that the first articles were 95% complete and that progress payments of \$199,349 had been made. (R4, tab 32)

14. On 29 July 1993, the Government received the first articles from SSA (R4, tab 38).

15. On 26 August 1993, bilateral modification No. P00004 was issued. It provided the Government with 40 days (in lieu of 30 days) to evaluate any first articles submitted by appellant. The delivery schedule for the production units was extended. The first incremental delivery of 99 gun mounts and 99 stand assemblies was now due on 4 December 1993 (R4, tab 37).

16. On 8 September 1993, the PCO wrote SSA, approving the first article for the stand assembly but disapproving the first article for the gun mount due to a "flatness problem" (R4, tab 38).

17. By letter dated 9 September 1993, SSA informed the PCO that it disagreed with the disapproval since it interpreted the specifications with respect to the "flatness" requirement to apply prior to the time the units were assembled and welded (R4, tab 39). This interpretation is contrary to good engineering practice and is illogical (declaration of James Fisher).

18. On 3 November 1993, the ACO and SSA met to discuss the current conditions at SSA. The ACO concluded: (a) that SSA had no assets in house available for production under the contract, (b) that all production had ceased and that SSA had no employees, and (c) that SSA had stated that it needed advance payments to proceed. The ACO told SSA that it would not receive any progress payments until it brought its accounting system into compliance with applicable regulations and Government personnel were given access to the facility to determine the percentage of physical completion. With respect to this meeting, the ACO told the PCO that the ACO believed that SSA was insolvent and incapable of performing. The ACO recommended that the PCO issue a cure notice. (R4, tab 40)

19. On 18 November 1993, the PCO informed SSA that its resubmitted first article (on 8 October 1993) again failed the tests related to the flatness requirement, but that the Government would relax the flatness requirement to accommodate SSA's manufacturing capabilities and the first article was conditionally approved (R4, tab 41).

20. On 24 November 1993, the Government issued unilateral modification No. P00005 which formally relaxed the flatness requirement and provided for initial production deliveries of 99 gun mounts and 99 stand assemblies to commence on 15 February 1994 (R4, tab 42).

21. On 2 December 1993, the PCO wrote SSA stating that information received from DCAS indicated that SSA was in danger of not performing the contract. Specifically, the PCO was concerned that: (a) SSA had an inadequate accounting system for progress payments, (b) SSA had no assets in house available for production, (c) SSA had laid off all its employees, and (d) SSA had no working capital to begin production. The PCO informed SSA that he considered these as conditions endangering the performance of the contract and requested written assurance from SSA of its plan to timely perform the contract (R4, tab 43).

22. On 9 December 1993, SSA wrote the ACO contending that its accounting system was adequate but conceding that its system could identify only direct costs and that overhead and G&A could not be determined from its system. SSA also stated that to perform it needed a \$50,000 advance payment and progress payments, including overhead and G&A (at a rate to be determined), all prepaid. (R4, tab 44)

23. On 10 December 1993, the ACO wrote SSA and stated that SSA would receive progress payments once the stipulated conditions were met and that in any event, only the PCO could approve advance payments (R4, tab 45).

24. On 10 December 1993, DCAS wrote SSA and stated that it had been trying to gain access to SSA's facility since 1 November without success and that in view of this, DCAS was placing SSA on the DLA Contractor Alert List (R4, tab 45).

25. On 14 December 1993, DCAS representatives visited SSA at 12:30 p.m. (having spoken to appellant's president at 10:00 a.m.) and found the doors locked, the lights out, mail piled up and no answer to their knocks (R4, tab 32).

26. On 21 December 1993, SSA responded to the PCO's 2 December letter seeking assurance. SSA stated that its accounting system could identify direct but not indirect costs, there were assets available for production (however, no details whatsoever were provided), confirmed that all employees had been laid off, and that its working capital situation "needs to be evaluated more carefully." SSA confirmed that progress payments were needed to complete the contract. (R4, tab 47)

27. On 27 December 1993, the PCO wrote SSA and stated that SSA's response to the Government's request for assurances was inadequate inasmuch as no details with respect to any plan to perform were given. The PCO informed SSA that progress payments could not be approved as long as its accounting system was inadequate, that repeated attempts to enter its facility to measure the physical progress of the contract had been unsuccessful, and that SSA had no employees. SSA was directed to contact DCAS to arrange an appointment to allow an inspection of the percentage of completion of the contract. SSA was informed that unless these matters were cured before 18 January 1994, the contract might be terminated for default. (R4, tab 50)

28. On 6 January 1994, the Defense Contract Audit Agency (DCAA) wrote the ACO to alert her that SSA could not financially perform its contracts. DCAA stated that it had been unable to review SSA's books and records although it had requested that it be allowed to do so. DCAA recounted that it arrived at appellant's facility on 2 December 1993 at a prearranged meeting only to find the facility locked and apparently abandoned. After contacting appellant's president, they were admitted. Appellant's president stated that he was the only employee and that SSA was delinquent in Federal and state payroll taxes. On 14 October 1993, the Defense Criminal Investigative Service had seized all of SSA's records. SSA was allowed access to the records to copy any it wished, but as of 27 December 1993, it had not done so (R4, tab 52).

29. On 12 January 1994, the ACO wrote SSA stating that DCAS had been attempting to gain access to SSA's facility since September 1993 in order to conduct a GFE property survey and that none of the required GFE reports had been filed by SSA. The ACO requested immediate corrective action (R4, tab 54).

30. On 19 January 1994, because of a 17 January 1994 earthquake in the area, DCAS made a site visit to SSA. DCAS found the building standing, with other neighboring businesses in operation. SSA's facility was locked, mail was stacked up and the facility appeared vacant. (R4, tab 58)

31. On 24 January 1994, the PCO wrote SSA stating that in response to SSA's telephone requests of 13 and 19 January for an extension in the period to reply to the PCO's 27 December 1993 letter due to the earthquake, the reply was now due on 1 February 1994. The PCO stated that the reply must have a detailed written plan to correct all deficiencies, addressing: (a) the lack of employees, (b) how SSA could meet the delivery schedule, (c) how it would bring its accounting system into compliance, and (d) how it planned to give the Government access to its facility. The PCO again directed SSA to contact the ACO to arrange for the Government to conduct a percentage of completion analysis (R4, tab 57).

33. On 27 January 1994, SSA responded to the PCO's 2 December 1993 letter. The letter provided the following schedule:

- a. completion of copying of its files: 4 February 1994
- b. accounting system updates: 18 February 1994
- c. hire engineers: 24 February 1994
- d. hire production workers: 6 March 1994
- e. Government inspection of physical completion: 9 March 1994
- f. new delivery schedule and plan for production submitted: 18 March 1994

No details of how any of these actions were to be accomplished was provided (R4, tab 59).

35. In mid-February 1994, the PCO executed a detailed and comprehensive Determination and Findings (D&F), reviewing the factors appropriate for consideration in deciding whether to terminate a contract for default. The D&F concluded that SSA had failed to make progress, that the failure was not excusable, and that it was in the best interest of the Government to terminate the contract for default. The D&F was also signed by the Government's technical representative, the contract specialist, the PCO's counsel and the office's Deputy for Small Business. (R4, tab 63)

36. On 17 February 1994, SSA wrote the PCO relating what progress it had made since 27 January. SSA stated that it had copied its records, that it had a production plan and would send it to the Government at an undetermined date, and that all vendors were

being contacted and asked to proceed with production. SSA also stated that it had considerable earthquake damage and would have to move due to this and also in order to shed an uncooperative DCAS office. SSA promised to inform the PCO when and where it would move when the decision was made (R4, tab 65).

37. On 18 February 1994, the contracting officer issued a decision terminating the contract for default. The grounds for the termination were:

- (a) failure to make progress
- (b) noncompliance with FAR 52.246-11 “Higher Level Contract Quality Requirement (APR 1984)
- (c) failure to maintain an adequate accounting system
- (d) failure to cure these deficiencies

(R4, tab 66)

38. On 18 February 1994, the PCO issued unilateral modification No. P00006. The modification demanded the return of the GFE and \$187,578<sup>1</sup> in unliquidated progress payments. (R4, tab 67) The record does not contain any contracting officer’s decisions concerning either the GFE or the unliquidated progress payments.

39. On 25 February 1994, SSA called the ACO and stated that DCAS had no basis to inform the PCO respecting the earthquake condition of SSA’s facility since it had not allowed DCAS into the facility. That same day DCAS representatives visited SSA and did enter the facility. The team detected no visual earthquake damage and other businesses in the complex were operating. Mail was stacked in the entry foyer in a pile approximately 1’ by 6’. The team saw no interior structural damage but did see some cracked plaster and some acoustical ceiling tiles that had fallen in the stairwell. Several bookcases and file cabinets had been tipped over. The building had not been condemned by local officials but appellant’s president stated that he “felt” the building was unsafe. Appellant’s president confirmed that no work had been performed in the building since 14 October 1993. The team reported with respect to the physical completion of the contract that “[t]here were absolutely no completed units nor any appearance of an assembly line ready for production.” (R4, tab 68; declaration of William Loesch)

40. On 2 March 1994, the PCO sent SSA a demand letter for the \$188,078 in unliquidated progress payments (R4, tab 71).

### POSITIONS OF THE PARTIES

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<sup>1</sup> This amount was updated to \$188,078 by letter dated 2 March 1994 (R4, tab 71).

Appellant contends in its brief that the termination for default should be overturned because:

- (a) the PCO erred in relying on the advice of the ACO who was “prejudiced, incompetant [sic] and vindictive”
- (b) the delivery dates in modification P00005 were not realistic
- (c) the Government was in a conspiracy with one of his employees to destroy his computer accounting system
- (d) its accounting system was adequate despite its inability to track indirect costs
- (e) the earthquake delayed performance

In the final paragraph of its brief, appellant states: “The termination of this contract was caused by the sheer bias, bad faith, incompetence and shortsightedness of the ACO . . .” (br. at p. 5)

We note that the record does not contain any credible support for any of the above contentions.

The Government contends that appellant failed to prosecute the contract work with such diligence as to ensure its completion within the contract’s delivery period.

### DECISION

The Default clause of the contract permits the Government to terminate the contract for default if the contractor fails to make progress so as to endanger performance of the contract. SSA was required to deliver 99 gun mounts and 99 stand assemblies on 15 February 1994 pursuant to the contract. It is clear beyond cavil that SSA was not making progress toward this end. It had all but abandoned the contract many months before. SSA alleges for the first time in its brief that the unilateral schedule set out in modification P00005 was unreasonable. It provides, however, no proof whatsoever, or even any explanation as to why it was unreasonable. We have no evidence that the delivery schedule in modification P00005 was unreasonable. On the other hand, we note that 15 February 1994 was consistent with the time period between first article approval and production deliveries used by the parties throughout the contract. We conclude the delivery dates in modification P00005 were not unreasonable.

There is also no proof or even explanation of how SSA concludes that its accounting system was adequate for the Government to pay progress payments when indirect costs could not even be identified from it. The Progress Payments clause of the contract grants the contracting officer the authority to reduce or suspend progress payments if he finds substantial evidence that the contractor has not maintained an adequate accounting system, fails to make progress, or endangers the contract by an unsatisfactory financial condition. The evidence is overwhelming that the ACO's decision to suspend progress payments was justified.

SSA provides no proof that its facility sustained anything but cosmetic damage from the earthquake. In any event, SSA does not even allege what damage it claims was incurred nor does it explain any impact on its performance. Moreover, the earthquake was on 17 January 1994, about 1 month prior to the first production delivery date and the evidence is undisputed that appellant's facility had not even been in operation since mid-October 1993.

Finally, as to appellant's allegations of conspiracy, prejudice, incompetence and vindictiveness, primarily concerning the ACO, we would feel constrained to comment that the evidence falls short of the "well-nigh irrefragable proof" needed to prove bad faith<sup>2</sup>, if there were any evidence at all.

#### CONCLUSION

The appeal is denied.

Dated: 19 January 2000

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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<sup>2</sup> *Kalvar Corp. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976), *cert. denied* 434 U.S. 830 (1977).

I concur

I concur

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CARROLL C. DICUS., JR.  
Administrative Judge  
Acting Vice Chairman  
Armed Services Board  
of Contract Appeals

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RICHARD SHACKLEFORD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 47594, Appeal of Sach Sinha and Assoc., Inc., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals