

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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D.E.W., Inc. and D. E. Wurzbach, A Joint Venture) ASBCA Nos. 50796 and 51190
)
Under Contract No. DACA63-86-C-0043)

APPEARANCE FOR THE APPELLANT: Carl Payne Tobey, Jr., Esq.
The Tobey Law Firm
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
William M. Brown, Esq.
Engineer Trial Attorney
U. S. Army Corps of Engineers
Fort Worth, TX

OPINION BY ADMINISTRATIVE JUDGE TUNKS ON
THE PARTIES' JOINT MOTION FOR RECONSIDERATION (ASBCA NO. 50796)
AND THE GOVERNMENT'S MOTION FOR RECONSIDERATION
(ASBCA NOS. 50796 AND 51190)

These appeals arise from the conversion of a default termination to a termination for convenience on the basis of impossibility. *D.E.W., Inc.*, ASBCA No. 35896, 94-3 BCA ¶ 27,182. Familiarity with this decision is presumed. As a result of this decision, appellant submitted a termination claim to the Government. The Government denied the claim and asserted an offset claim for costs allegedly resulting from appellant's gross disregard of its contractual obligations. After a hearing in December 1997, we awarded appellant \$122,771 in termination for convenience costs and denied the Government's offset claim. *D.E.W., Inc. and D. E. Wurzbach, A Joint Venture*, ASBCA Nos. 50796 and 51190, 00-2 BCA ¶____ (slip opinion dated 11 September 2000). In ASBCA No. 50796, the parties jointly request us to reconsider our award of a credit of \$1,758,065 to the Government for progress payments released to appellant's surety. The Government separately requests us to reconsider our denial of a credit of \$799,910 for six previously denied equitable adjustment claims in ASBCA No. 50796 and the denial of its offset claim in ASBCA No. 51190. Familiarity with this decision is also presumed.

I. Joint Motion for Reconsideration (ASBCA No. 50796)

Prior to termination, the Government withheld \$1,758,065 in progress payments to secure liquidated damages. After the termination, the Government, with D.E.W., Inc.'s (DEW's) consent, released the withheld progress payments to appellant's surety, Trinity Universal Insurance Company (Trinity). Trinity completed the contract pursuant to its performance bond. Initially, DEW and Trinity filed a combined termination claim. However, Trinity withdrew its portion of the claim shortly before the hearing. Subsequent to the hearing, the Government and Trinity settled Trinity's termination claim. As part of that agreement, the Government agreed to take a credit for the withheld progress payments against the costs due Trinity and to forego taking the credit against DEW's termination claim. (Settlement Agreement effective 13 August 1998). The parties have indicated that revising our decision to reflect this change will facilitate their use of the Judgment Fund. Accordingly, we grant the parties' joint motion for reconsideration. Appellant is awarded \$1,880,836 (\$122,771 + \$1,758,065) in termination costs plus interest from 16 August 1995 and our earlier decision in ASBCA No. 50796 is amended accordingly.

II. The Government's Motion for Reconsideration (ASBCA Nos. 50796 and 51190)

The Government argues that we erred in refusing to grant it a credit of \$799,910 for six previously denied equitable adjustment claims and that our decision to deny its offset claim was contrary to the evidence.

The Government first argues that *res judicata* and/or law of the case require us to grant it a credit of \$799,910.00 for six previously denied equitable adjustment claims. We have already considered and rejected this argument in our prior decision.

The Government next argues that we erred in finding it was not prejudiced by DEW's failure to notify the Government of the alignment problems. In support of this argument, the Government argues that prejudice "is not in any way pertinent to the standard set forth for determining a gross disregard of the contract specifications" in *Best Foam Fabricators, Inc. v. United States*, 38 Fed. Cl. 627 (1997). (Gov't mot. at 10) The Government misconstrues our decision. Our finding with regard to notice was not based on the "gross disregard" standard of *Best Foam*. We found that DEW failed to notify the Government of the misalignment problems as required by the AISC Code and the contract. That finding, standing alone, however, is not sufficient to prove entitlement. The Government, like any other claimant, must establish that it sustained damages in order to recover. We concluded that the Government had not demonstrated that it suffered any prejudice as a result of DEW's failure to notify the Government of the misalignment problems. The Government has not pointed to any evidence in the record

we failed to consider which would support a different result. Accordingly, we affirm our earlier decision denying the Government's offset claim.

The parties' joint motion for reconsideration is granted. The Government's motion for reconsideration is denied.

Dated: 31 October 2000

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
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 Nos. 50796, 51190, Appeals of D.E.W., Inc. and D. E. Wurzbach, A Joint Venture, rendered in conformance with the Board's Charter.

Dated:

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