

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Protech-Atlanta) ASBCA No. 51252
)
Under Contract No. N62470-89-C-2751)

APPEARANCE FOR THE APPELLANT: Kevin M. Cox, Esq.
Camardo Law Firm
Auburn, NY

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Alan R. Caramella, Esq.
Trial Attorney
Naval Facilities Engineering
Command
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE JAMES

The contractor appealed from the contracting officer's final decision terminating the captioned contract for default. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. After a hearing in Waukegan, IL, the parties submitted post-hearing briefs. We decide only the validity of the termination.

FINDINGS OF FACT

1. The Officer in Charge of Construction (OICC), Camp Lejeune, NC, awarded Contract No. N62470-89-C-2751 (the contract) to Protech-Atlanta (Protech) on 28 June 1996 in the total amount of \$225,000. The scheduled completion date was 9 April 1997. (Comp. & ans., ¶ 1^{*})
2. The contract incorporated by reference the FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause, and provided for \$200 liquidated damages for each day of delay if the contractor failed to perform the work within the time specified in the contract (R4, tab 1, § 00721, ¶ 1.46, § 00720, ¶ 1.5).
3. The contract required Protech to provide and to install 62 radio transmitters at 61 designated buildings (with two transmitters on Bldg. FC-100) at the Marine Corps Base,

* Citations are to the April-June 1998 pleadings.

Camp Lejeune, NC (ex. G-4, sheets E-1 to E-4). The contract included extending and connecting signaling and initiating circuits for fire alarm systems in such buildings (R4, tab 1 at § 01010, ¶ 1.2.1).

4. At the 61 designated buildings, Protech was required to install three conduits leading from each new radio alarm transmitter: one to a 120 volt power source, a second to the existing fire alarm control panel (FACP) in the building, and a third to the new antenna Protech was to install (ex. G-4 at sheet E-4; tr. 121).

5. The “Building Schedules” in the contract drawings listed the name of the manufacturer of each existing interior fire alarm system and depicted four “signal wiring diagrams” one of which was specified for each building (ex. G-4 at sheets E-1 to E-3).

6. Specification § 16723, entitled “Fire Alarm System, Radio Type,” ¶ 1.3, “General Requirements,” stated: “Equipment and devices shall be compatible and operable in all respects with existing fire alarm system and shall not impair reliability or operational functions of existing equipment” (R4, tab 1).

7. Specification § 16723, ¶ 3.2.1, required Protech to conduct field testing, *inter alia*, of the radio transmitter frequency, band width, and each alarm function, during installation of the radio transmitters and of wiring and system components. Upon testing, Protech was to correct any deficiency pertaining to the requirements of the contract prior to final functional and operational tests of the system. (R4, tab 1)

8. Specification § 16723, ¶ 3.2.2, required the alarm system to have been in service for at least 30 days prior to final inspection, and stated that the system was to be considered ready for such testing only after all necessary preliminary tests had been made, and all deficiencies found had been corrected to the satisfaction of the equipment manufacturer’s technical representative, and when deficiencies, defects or malfunctions developed during such tests, all further testing of the system was to be suspended until proper adjustments, corrections or revisions were made to assure proper performance of the system (R4, tab 1).

9. Prior to contract award, respondent’s electrical inspector, Tom Corbin, did not inspect the FACPs at Camp Lejeune or know whether they were operable (tr. 141).

10. The Assistant OICC’s 7 January 1997 letter to Protech stated that over 50% of the contract time had passed with no work completed, and “liquidated damages in the amount of \$200.00 per day for each calendar day of delay will be assessed” (R4, tab 4).

11. The “Contractor Production Reports” (CPRs) for the contract, signed by W. K. Brenner or Tony Toombs, and sometimes initialed by Mr. Corbin, show that Protech mobilized at the job site on 21 January 1997, worked until 7 April 1997, and did no site work thereafter (ex. G-1).

12. Between 10 February and 1 April 1997, Protech ordered 14 radio transmitters and 14 antennae from Seaboard Electronic Co., which received the first order, for six transmitters and antennae, on 20 February 1997 (ex. A-4). Protech's CPRs reported that it installed some or all conduit and wiring in 40 buildings from 13 February to 7 April 1997, and radio transmitters in 10 buildings from 27 February to 7 April 1997:

<u>Bldg. No.</u>	<u>Date Radio Transmitter Installed</u>
FC305	2-27-1997
FC306	" " "
FC309	" " "
FC310	3-1-1997
FC311	" " "
FC540	3-3-1997
FC400	3-29-1997
FC411	4-7-1997
FC412	" " "
FC413	" " "

(Ex. G-1)

13. An unidentified, unsigned, handwritten note dated "2-13-97" listed 15 "Bldgs with radios installed" and stated: (a) "dead" FACPs in buildings FC100, FC120, G640, and G650, (b) "alarms showing on FACPs" in buildings FC304 and FC305, and (c) FACPs in "trouble" in buildings FC415, FC416, and FC525 (ex. A-1). According to Protech's CPRs, it installed a radio transmitter in only one building with a FACP malfunction, No. FC305, on 27 February 1997; nine radio transmitters from 27 February to 7 April 1997 in other buildings having no FACP malfunctions; and conduit and wiring in the nine buildings with, and 31 buildings without, FACP malfunctions (ex. G-1).

14. Protech's 22 March 1997 CPR stated: "NEED TO SCHEDULE INSPECTION ON BLDGS FC115, 120, 304, 305, 306, 309, 310, 311, 540[,] 241" and its 27 March 1997 CPR stated: "HAD INSPECTION ON BLDGS FC115[,] 120, 304, 305, 306" (ex. G-1, Rpts. 46, 49). According to Mr. Brenner, Buildings FC120, FC304 and FC305 had malfunctioning FACPs (ex. A-2). The Board finds the foregoing "inspection" to be "field testing," not "final" inspection and testing, since it involved only 10 of the 61 buildings specified under the contract.

15. Messrs. Brenner and Toombs submitted affidavits in 1998 stating that: (a) each was an alarm technician who had worked on the installation of radio transmitters under the contract at Camp Lejeune, (b) during the installation of the radio transmitters each had

discovered the nine FACP malfunctions set forth on exhibit A-1, (c) each had notified Tom Corbin of the aforesaid FACP problems (neither stated when he gave such notice), and (d) each “was not instructed further regarding these problems. As such, [each] continued installing the radios per the Contract.” Messrs. Brenner and Toombs in their affidavits, and Mr. Brenner’s daily CPRs, did not state that defective FACPs delayed or prevented Protech from continuing the contract work. We find that appellant has not proved that they did so. (Exs. A-2, -3, G-1)

16. The Board assigns no probative weight to the date and the number of radios installed in Protech’s “2-13-97” field notes, because that date is inconsistent with the dates when Protech first purchased radio transmitters from Seaboard, and with the dates in its signed CPRs when Protech installed 10 radio transmitters on buildings (finding 12).

17. When questioned with respect to whether Messrs. Brenner and Toombs gave notice of malfunctioning FACPs to him, electrical inspector Corbin testified that he did not recall Mr. Toombs or receiving such notice in February 1997, but added:

I would have told him to move on. Put your transmitter in, go to the next building If I seen [sic] that the panel didn’t work I told the contractor to move on. So you know, what he’s saying here [in his affidavit] is probably right.

(Tr. 127-28) We find that Mr. Brenner or Mr. Toombs notified Mr. Corbin of malfunctioning FACPs before they left the jobsite in April 1997.

18. At some time in April 1997 either Mr. Brenner or Mr. Toombs advised Mr. Thomas Avello, Protech’s project manager, of nonfunctional FACPs (tr. 166-67, 176). According to Mr. Avello, Protech was unable to conduct certain tests and to install additional radio transmitters, due to such FACPs (tr. 164-66). Mr. Avello’s testimony is inconsistent with the affidavits of Messrs. Brenner and Toombs and with Protech’s daily CPRs which show that Protech continued to install radio transmitters, conduit and wiring, and to test the alarm system in various buildings, some of which had inoperative FACPs. Therefore, the Board assigns no probative weight to Mr. Avello’s testimony.

19. The 4 April 1997 letter of Protech’s attorney Andrew Moen to the Assistant Resident OICC (AROICC), Camp Lejeune, requested a no-cost, 90-day extension of the contract completion date to 9 July 1997 due to delay in performing a U. S. Postal Service contract in New Jersey and ensuing equipment unavailability, thefts of “equipment ear marked for this contract” and delays of the radio transmitter manufacturer (subcontractor) (R4, tab 6).

20. The AROICC’s 18 April 1997 letter to Protech stated that the contract completion date had passed, the contract had not been completed, and “Liquidated Damages

of \$200.00 per day are being assessed to your company until the final completion of this project,” and stated that “your company” had not replied to Government messages on contract completion (R4, tabs 7, 8). Mr. Moen’s 21 April 1997 letter chided the AROICC for ignoring Moen’s 4 April 1997 letter, protested assessment of liquidated damages, and repeated his 4 April 1997 requests (R4, tab 9).

21. Protech’s 13 May 1997 letter to the OICC proposed to produce transmitters within approximately 30 days from 19 May, to install the transmitters within 60 days from 19 June, and to complete the contract by 19 August 1997 (R4, tab 13). Respondent never agreed to Protech’s proposed dates.

22. The 17 July 1997 letter of Protech’s attorney Kevin Cox to the AROICC reiterated the Post Office contract delay and said that Protech had purchased and was ready to install 10 radios (R4, tab 14). In July 1997, Mr. Avello brought some test equipment to the contract site (tr. 168-69). The record contains no evidence that Protech installed any radio transmitters or other material at the contract site after 7 April 1997.

23. Contracting Officer (CO) Janice Gurganus’ 31 July 1997 letter to Protech stated that she was considering whether to terminate the contract for default and invited Protech to submit any information about causes beyond its control and without its fault or negligence to excuse such default (R4, tab 15).

24. Mr. Cox’s 7 August 1997 letter to the OICC reiterated that the Post Office contract delay had damaged Protech’s credit, Protech had purchased and was ready to install 10 radios, Protech had not abandoned the contract, and Protech had requested an extension of the completion date without Government response (R4, tab 16).

25. On about 5 September 1997, the ROICC and inspector Corbin inventoried what Protech had installed in 58 of the 61 buildings under the contract. They ascertained that Protech had installed 14 radio transmitters, 13 antennae, and some or all of the conduit and wiring in 43 buildings. Their inventory inexplicably omitted buildings BB260, BB265, and BB270. (Ex. G-2; tr. 43-45)

26. By memorandum of 8 September 1997, the CO described the status of contract performance and Protech’s excuses for non-performance, and recommended default termination to Termination Contracting Officer (TCO) David Lamoureux (ex. G-3).

27. By unilateral Modification No. P00001, dated 25 September 1997, TCO Lamoureux terminated the contract for default, stating that this was a contracting officer’s final decision with notice of Protech’s appeal rights (R4, tab 2).

28. Mr. Cox’s 1 October 1997 letter to the CO asked her to reconsider the default termination decision, repeated the Post Office contract delay and that Protech had 10

radios ready for immediate installation, offered \$5,000 consideration, and proposed to “accelerate [Protech’s] performance under the Contract so that it would be completed by the original Contract completion date” (R4, tab 17).

29. The CO’s 10 October 1997 letter to Mr. Cox stated that the termination for default would stand (R4, tab 18).

30. The 29 July 1998 takeover agreement with Protech’s surety relieved the surety for “damages excused” due to “potential inability to final test the transmitters due to the existing” FACPs (ex. A-11 at 3).

DECISION

Respondent has the burden of proving that its default termination of the contract was justified. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987).

The FAR 52.249-10 DEFAULT (FIXED PRICE CONSTRUCTION) (APR 1984) clause authorized respondent to terminate the contract if the contractor failed to complete the work within the time specified by the contract (finding 2). The contract’s scheduled completion date was 9 April 1997 (finding 1). The contract required Protech to install 62 radio transmitters, antennae, conduit and wiring in 61 designated buildings at Camp Lejeune (findings 3-4). By 7 April 1997, when it last performed work on the jobsite (finding 11), Protech had installed 14 radio transmitters, 13 antennae and some or all of the conduit and wiring in 43 buildings (finding 25). We conclude that respondent sustained its burden of proving that Protech did not complete contract performance by 9 April 1997.

Appellant has the burden of proving that its default was excusable. *See Zimcon Professionals*, ASBCA Nos. 49346, 51123, 00-1 BCA ¶ 30,839 at 152,212. Protech argues that its default was excusable on two grounds. First, respondent’s inoperable FACPs made it impossible to field test Protech’s radio transmitters during their installation and to perform final acceptance testing of the system. Second, respondent waived the 9 April 1997 completion date by failing to reject Protech’s proposed 90-day extension of the completion date to 9 July 1997 (finding 19) and Protech’s proposed 19 August 1997 completion date (finding 21). Protech tacitly abandoned its April-October 1997 arguments that the U. S. Postal Service contract delays, equipment thefts, and radio transmitter supplier delays excused its default (findings 19, 22, 24, 28).

It is undisputed that several of respondent’s pre-existing FACPs were inoperable or malfunctioning and that respondent relieved the surety in the takeover agreement from liability for inability to test transmitters due to existing FACPs (findings 13, 17, 30). Messrs. Brenner or Toombs notified inspector Corbin of inoperative FACPs at various buildings at Camp Lejeune some time before Protech left the jobsite (findings 15(c), 17).

However, after giving such notice, Protech continued to install radios per the contract (finding 15(d)), as corroborated by inspector Corbin (finding 17). Moreover, on 27 March 1997 Protech conducted field inspections on five buildings, three of which had inoperable or malfunctioning FACPs (finding 14). We found that appellant did not prove that defective FACPs delayed or prevented it from continuing the contract work. Since Protech did not perform the contract to the point of final inspection, its prospective inability to perform such inspection due to some inoperable FACPs was not the cause of its default and did not excuse it. We hold that Protech's first ground is untenable.

When the Government gives notice that the Government is assessing liquidated damages under a construction contract, as was done in this case (findings 10, 20), then such facts are not within the waiver of contract delivery or completion date rationale of *DeVito v. United States*, 413 F.2d 1147, 1153, 188 Ct. Cl. 979 (1969). See *Olson Plumbing & Heating Co. v. United States*, 602 F.2d 950, 955-56, 221 Ct. Cl. 197, 204-06 (1979) (default upheld when CO notified contractor of assessment of liquidated damages and contractor failed to resume performance after the completion date); cf. *La Grow Corp.*, ASBCA No. 42386, 91-2 BCA ¶ 23,945 at 119,914 (waiver of default found when construction contractor continued work, and CO agreed with contractor's proposed revised completion dates by virtue of paying the contractor's invoices, after passage of the original completion date). In this appeal, respondent did not agree to Protech's proposed revised completion date (finding 21).

The precedents appellant cites in its brief are not to the contrary. In *Sellick*, ASBCA No. 21869, 78-2 BCA ¶ 13,510 at 66,195, the Board upheld the default termination and rejected the application of *DeVito*, when the Government gave the contractor clear notice of assessment of liquidated damages after passage of the completion date. In *Nexus Const. Co., Inc.*, ASBCA No. 31070, 91-3 BCA ¶ 24,303 at 121,460, -63, the Board held that the Government had not waived the completion date, but overturned the default termination because the Government materially breached the contract by withholding \$106,600 in progress payments in a \$479,414 contract, facts not present in the instant appeal.

We deny the appeal.

Dated: 16 October 2001

DAVID W. JAMES, JR.
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 No. 51252, Appeal of Protech-Atlanta, rendered in conformance with the Board's Charter.

Dated:

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