

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Elter S.A.) ASBCA No. 52441
)
Under Contract No. N33191-96-C-0716)

APPEARANCES FOR THE APPELLANT: Mr. Dimitrios Messadakos,
President & Managing Director
Mr. Vassilios Messadakos
Vice President
Theodor Salichos, Esq.
Member of the Piraeus-Greece Bar

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
John S. McMunn, Esq.
Senior Trial Attorney
Naval Facilities Engineering
Command,
San Bruno, CA

OPINION BY ADMINISTRATIVE JUDGE HARTY

The subject contract is a fixed-price contract, without economic price adjustment provisions, payable in Greek drachmas, for multiple construction projects at Souda Bay, Crete, Greece, in support of the United States Navy. In March 1998, the Greek government devalued the drachma. The Navy subsequently extended an offer to Elter S.A. (Elter) to convert the unpaid portion of its contract to dollars from drachmas. The subsequent negotiations failed. This appeal¹ arises under the Contract Disputes Act from the “deemed denial” (41 U.S.C. § 605(c)(5)) of Elter’s subsequent claim for, among other things, the additional amount in dollars it would have received if the contract had been converted from drachmas to dollars. We are to decide entitlement only.

¹ This appeal is one of fourteen appeals lodged in connection with the contract and its multiple projects that were the subject of a hearing in Naples, Italy in April of 2000. The other appeals are ASBCA Nos. 52327, 52349, 52354, 52358, 52371, 52385, 52391, 52409, 52415, 52416, 52451, 52491 and 52492.

We deny the appeal because the evidence shows that the parties never agreed to change the contract's payment terms. Accordingly, since the contract was awarded on a fixed-price basis, Elter, as the payee party, bears the risk of currency fluctuation.

FINDINGS OF FACT²

The Department of the Navy, Engineering Field Activity Mediterranean Contracts Office, Souda Bay awarded Contract No. N33191-96-C-0716 to Elter on 28 September 1996 for multiple construction projects at the U.S. Naval Support Activity, Souda Bay, Crete, Greece at the firm-fixed-price of 567,000,000 Greek drachmas (52327 R4, tabs 1, 3; tr. 14). At the time of contract award in September of 1996, the value of the drachma to the dollar was almost 240 drachmas to one U.S. dollar (tr. 19). The contract incorporated provisions typical in overseas construction contracts, including FAR 52.233-1 DISPUTES (OCT 1995) - ALTERNATE I (DEC 1991), FAR 52.214-34 SUBMISSION OF OFFERS IN THE ENGLISH LANGUAGE (APR 1991), FAR 52.225-14 INCONSISTENCY BETWEEN ENGLISH VERSION AND TRANSLATION OF CONTRACT (AUG 1989) and a choice of law provision choosing U.S. substantive law in the event of a dispute. Paragraph 15, entitled "Correspondence in the English Language," of contract Section 01110 required the contractor to prepare all correspondence relating to the contract in English, while not ruling out the preparation of correspondence in the local language for a contractor's own record purposes, and provided that "[i]n case of dispute or claim, the English version will govern." (52327 R4, tab 6 at § 00711-15)

On 13 March 1998, the Greek government devalued the drachma by fourteen percent. The contract did not contain an economic price adjustment provision or otherwise provide for an adjustment in the event of currency fluctuation. The Navy was concerned that the drachma devaluation would have a negative impact on its contractors in Greece, particularly when performance required the purchase and import of materials from outside of Greece. The effect of the devaluation was to increase immediately the cost of imported materials by 14 percent. (Ex. G-2 at 1; tr. 14, 51)

Mr. Patrick Donnelly was the principal contracting officer in Souda Bay, Crete. Though not required to do so, he felt that his organization ought to see if there was a way to lessen the impact of devaluation on its major contractors. He was concerned about the possibility of schedule delays and that quality might suffer. (Tr. 68-69) During the weeks after the devaluation, Mr. Donnelly, Mr. Wayne Uhl, the project engineer, and Lieutenant M. R. Weller, also a contracting officer, but with contracting authority limited

² Some record citations in this opinion are to the Rule 4 file submitted in ASBCA No. 52327 and are identified as such.

to \$500,000, explored what could be done, in consultation with their headquarters in Naples and ultimately with the division headquarters in Norfolk, Virginia. The solution was to offer to convert the unpaid portion of the contracts to dollars in return for additional consideration. Once the approach had been approved, Mr. Donnelly felt that if he changed the methodology, he would have to go through the chain of review again. (Tr. 51-54, 64)

The opportunity to convert from drachmas to dollars was offered to five major Greek contractors, including Elter. At the time of the Government's offer to Elter, eight of the ten projects covered by the contract had already been paid for in drachmas (tr. 62). Elter was offered the same proposal for converting the contract from drachmas to dollars that was offered to and accepted by three other contractors. The only difference in the proposals was in the nature of the additional work offered as consideration. A fourth contractor declined the Government's offer. (Tr. 54-55, 65-66, 79, 163-64)

The Government orally presented its proposal to Mr. Paraskakis, Elter's site supervisor, on 23 April 1998 and then to Mr. Dimitrios Messadakos, Elter's president and managing director, on 27 April 1998 (tr. 57-58). By letter dated 27 April 1998, Mr. Dimitrios Messadakos informed the Government that appellant could not accept all of the items in the Government's plan. Mr. Messadakos also requested that the Government submit a "final and official proposal" that could be presented to Elter's board of directors and shareholders. (52441 R4, tab 5a at att. d; tr. 58)

By letter dated 28 April 1998, Lieutenant M. R. Weller provided appellant with written details of the Government's proposal to convert appellant's contract from drachmas to dollars. The letter stated, in pertinent part:

2. Proposal:

Convert the entire contract from drachma to [dollars]. The conversion will be based on the fixing drachma/[dollar] rate from the date of contract award plus 5%. This 5% is included as the cost of doing business, the government will assume some of the risk but the contractor is also required to assume a portion of the risk, and 5% is an equitable amount.

Future payments will be made in [dollars]. The previously invoiced amount will not be changed in any way.

...

3. As consideration, the contractor at no additional cost will:

- a. Provide and install a back-flow preventer that meets specifications within the P-140 General Purpose Building fire protection sprinkler system.
- b. Backfill, provide retaining walls, and provide railings necessary [at] the western stairway to P-140 General Purpose Building. Design of stairway will be finalized at the time that the drachma to USD modification is issued.
- c. Provide a 4 inch spare conduit under the NSA Entrance pavement and a water hose bib.

4. Additional agreements:

- a. The contractor assumes the cost of exchanging USD to drachma.
- b. All future proposals, negotiations and modifications will be accomplished in USD.
- c. The schedule of prices for unfinished projects will be resubmitted by the contractor, unchanged, except that all prices will be converted to USD using 240 x 1.05 or 252 drachmas/USD.
- d. The U.S. Government has no contract obligation if the USD devaluates.

(52441 R4, tab 5a at att. e)

By letter dated 5 May 1998, Elter presented a counterproposal. From Elter's perspective, from the time of award through the devaluation on 13 March, the drachma had lost roughly 35 percent of its value against dollar (tr. 23-24, 26). As part of its counterproposal, appellant asked the Government to convert previously invoiced payments, which had been made in drachmas, to dollars and refund \$553,807 to appellant. Elter also requested the Government accept 2 percent as Elter's portion of the contract risk, rather than the 5 percent proposed by the Government. It agreed to paragraphs 3 and 4 of the contracting officer's letter. (52441 R4, tab 5a at att. f; tr. 58-59)

Mr. Donnelly rejected appellant's counterproposal by letter dated 7 May 1998. The contracting officer said that the Government could not accept Elter's

proposal to convert prior payments to dollars and make a refund. There are no provisions in the contract which require such an adjustment. All payments made previous[ly] . . . are final and cannot be negotiated. Under the terms of our offer, future payments would be in U. S. dollars, but we can not make an adjustment to prior payments.

The letter concluded with the advice that “since you have not accepted the terms of our good faith offer to address the devaluation, we will proceed to pay the balance of the contract in drachma.” (52441 R4, tab 5a at att. g; tr. 62-64)

Mr. Uhl felt that the proposal was so beneficial to Elter that that there must have been some misunderstanding. He called Mr. Dimitrios Messadakos on 11 May to explain the Government’s position. Based on the conversation, he approached Mr. Donnelly and Lieutenant Weller and recommended that the issue be reopened. (Tr. 110-13)

By letter dated 12 May 1998, Mr. Uhl restated and explained the Government’s position. Mr. Donnelly reviewed Mr. Uhl’s letter before it was signed. It was his personal belief that the currency conversion would have been beneficial to Elter and agreed that there must have been some miscommunication. Since the exchange rate at the time the letter was written was approximately 311 drachmas to one U.S. dollar, he estimated that Elter would get at least 57 million drachmas more. (Tr. 66-67, 80)

The 12 May 1998 letter added additional consideration to the Government’s offer. The letter stated that if Elter wished to proceed, a drachma devaluation modification would “likely include a reasonable time extension for P-140 General Purpose building due to the changed work that will occur as a result.” The letter advised that “along with the time extension . . . discussed above, the drachma devaluation proposal remains as outlined” in the Government’s letter of 28 April 1998. Elter was invited to indicate whether it would like to proceed with a modification converting to U.S. dollars under the terms of the 28 April letter, including a time extension for building P-140, or whether it preferred to continue with payments in drachmas. (52441 R4, tab 5a at att. h)

By letter dated 18 May 1998, entitled, “ELTER’S OBJECTION TO ROICC’S SOUDA BAY REPLIES REGARDING THE GREEK DRACHMA DEPRECIATION/DEVALUATION . . .,” appellant responded to the Government’s 7 May 1998 and 12 May 1998 letters. The letter observed that the depreciation of the drachma against the dollar “caused a significant cost damage to Contractor’s original offered lump sum contract price, while granting savings to Government Contract progress payments.” Elter acknowledged that there was no provision in the contract “to allow contract adjustment due to devaluation[] of currencies,” while pointing out “[o]n the other hand Contract terms do not require a Contractor to perform work on a continuous cost damage . . .” On page 5 of the letter, Elter stated that “[b]ased on the ground of a fair judgment and . . . Contractor’s . . . right to claim for any legitimate cost damage of any nature that has occurred during Contract performance, we may accept ROICC’s Souda Bay Drachma Devaluation Proposal while considering the following” The letter then listed the following items:

- i. Not to prevent Contractor’s right to claim for a Contract equitable adjustment regarding a cost damage of any nature that

has occurred during work performance and is associated or not to any previous payment.

ii. To have the Contract converted from Drachma to USD. The conversion will be based on the fixing Drachma/USD rate from the date of Contract award plus 5%, applied to the left unpaid portion of the Contract current value.

$$\text{i.e. } (247.455.544 \text{ drx}) / (240 \times 1,05) = 981.966,44\text{USD}$$

iii. Acceptance by the Contractor of the proposed by ROICC Souda Bay plus 5% to the Drachma fixing rate at Contract award date as the cost of doing business etc., should be subject of 60 calendar days of time extension balancing the 3% difference from Contractor's proposed plus 2%, addressed to the under construction portion of contract work P-140 General Purpose Building and its associated charged [sic] work items as proposed in ROICC'S letter R4/98-088 of 12 May 1998.

iv. Item No. 3 - Additional work items at no additional cost as stated in paragraph (a) though [sic] (c) and No 4 - Additional agreements as stated in paragraph (a) through (d) of referenced Drachma Devaluation Proposal letter 0716/98-078 dated 28 April 1998, are both acceptable by the Contractor in their entirety.

(52441 R4, tab 5a at att. i)

Mr. George Kapsaskis, Elter's general manager, who read the 18 May 1998 letter in its Greek translation, testified through an interpreter that appellant fully accepted the Government's new proposal (tr. 19, 28, 34-37). On the other hand, Mr. Donnelly testified that he did not consider the 18 May 1998 letter to be a complete acceptance of the Government's proposal because Elter continued "to talk about losing money and . . . about wanting to make a claim." Nevertheless, because Elter had agreed to the additional consideration, he felt there was enough of a commitment on Elter's part to go forward with a modification. He proceeded to draft proposed modification 30, with the expectation that Elter would sign the modification. It was Mr. Donnelly's understanding that any agreement would be reflected in a bilateral modification, with the Government signing once the contractor had indicated its agreement by signing. (Tr. 66-68, 88-90, 106)

Proposed modification 30 was the most complex that Mr. Donnelly had ever prepared. In order to convert the unpaid portion of the contract from drachmas to dollars, he was required from an accounting perspective to convert the entire contract. Ten projects, 24 accounting lines and 4 rates of exchange were involved. Three of the projects were military construction projects; each with its own exchange rate which was applicable

to the project from inception to conclusion. The remaining projects were funded by the Navy operation and maintenance fund. These projects had a budget exchange rate that was set each fiscal year and changed each fiscal year. He had to go back to the beginning and determine what the drachma price was in dollars throughout the period of the performed contract for every project and add up the totals to determine what had been paid in dollars. For the unpaid portion, the task was easier since the 252 drachmas to one U.S. dollar rate applied to the unpaid work. The proposed modification was intended, if accepted to “constitute[] an accord and satisfaction” for the matters covered by it. (Tr. 70-73)

The Government presented the proposed modification during a meeting on 28 May 1998. Appellant’s representatives indicated that Mr. Dimitrios Messadakos wanted to come to Souda Bay to discuss the modification the following week. Mr. Donnelly testified that he spoke to Mr. Messadakos by telephone on 2 June 1998 and that Mr. Messadakos was still concerned about the paid portion of the contract and was not prepared to unequivocally accept the modification. He recalled telling Mr. Messadakos, when he asked about the modification, “It’s either as written or we can’t do the mod.” (Tr. 70)

Mr. Dimitrios Messadakos and Mr. Vassilios Messadakos met with the Government representatives on 3 June. During the meeting the parties discussed the modification and how the Government had converted it to dollars. According to Mr. Donnelly, Elter objected to the final dollar amount of the modification, specifically objecting to how the paid portion of the contract was converted. He testified that the Elter representatives also told him they would sign the modification, but also provide a letter qualifying the signature. To him it meant that Elter would not be accepting the terms of the modification. (Tr. 69-82) Mr. Vassilios Messadakos’s testimony at the hearing acknowledged that there were aspects of the proposal that caused them concern, but he felt they could have been resolved. He wanted “some clarification . . . so that . . . it was clear that we were going to proceed with the signature of the modification without giving away any rights, not only concerning the slip-through depreciation, and to claim for any damages we had from up [to] that point.” He explained that Elter had “incurred serious damages . . . and we didn’t want to give that right away. This was clear . . . to the Government.” He testified that the Government “stated that they understood it, they could not reserve it, it was not in their power or . . . in their interest.” (Tr. 40-43; see also 52441 R4, tab 5a at 1)

When it became apparent that Elter would not unequivocally accept the offer, the Government took a lunch break to discuss the matter. Based on discussions with Mr. Uhl and Lieutenant Weller, Mr. Donnelly concluded that it would not be appropriate to sign the modification because it was going to be qualified. He felt, as did his colleagues, that “Elter was going to submit a claim if we signed that modification and that we would not have resolved anything.” In their view, “this was our second or third attempt and . . . the parties failed to agree. So we would finish the contract in drachmas and not convert it to dollars.” (Tr. 81-82) This conclusion prompted the Government to remove the proposed modification from consideration. The contracting officer then prepared and presented a

letter dated 3 June 1998 to Elter withdrawing the Government's offer. The letter stated, in pertinent part:

At our meeting today, 3 June 1998, it was made clear to us that the proposed modification causes you concern. It was not our intention to make you sign a modification that you felt took away some of your rights under the contract. Accordingly, because the modification causes you such concern, our offer to convert the contract to dollars is hereby withdrawn. We will complete the contract in drachma.

(52441 R4, tab 5a at att. k; tr. 82-83)

By letter dated 20 August 1999, Elter submitted a certified claim to the Government seeking \$146,121.93 as the amount in dollars that it claims it would have received based on acceptance of proposed modification 30, plus interest expense and claim prosecution costs, for a total of \$170,168.71 (52441 R4, tab 5a). The claim was received on 23 August 1999 (Elter Notice of Appeal at 2). Elter's claim certification failed to include the fourth element of the statutory certification required for all claims exceeding \$100,000 submitted on or after 14 May 1994 – namely, “and that the certifier is duly authorized to certify the claim on behalf of the contractor.” 41 U.S.C. §605(c)(1); Federal Acquisition Regulation 33.207(c). This defect was corrected on 8 February 2001. 41 U.S.C. §605(c)(6).

By letter dated 27 October 1999, 65 days after the contracting officer received the claim, Elter appealed from the contracting officer's failure to issue a final decision on its claim. We docketed the appeal on 2 November 1999. There is no evidence in the record that within 60 days of receipt of the claim the contracting officer advised Elter in writing of either the defect in the certification or when a final decision would be issued. By letter dated 4 November 1999, the contracting officer, Engineering Field Activity Mediterranean, Naples, Italy, issued a final decision denying Elter's claim in its entirety (52441 R4, tab 6).

DECISION

This is a firm fixed-price contract providing for payment by the Government in drachmas. We found that the contract did not provide for any adjustments due to devaluation of the drachma. As was stated in *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680, 690 (Ct. Cl. 1975), “[i]t has long been recognized that in FFP [firm fixed-price] contract situations the payee party, absent a specific contrary contract provision, assumes the risk of currency valuation changes.” See also *Ernest A. Cost*, ASBCA No. 28811, 86-1 BCA ¶ 18,559 at 93,207; *Cobra, S.A.*, ASBCA No. 28146, 84-3 BCA ¶ 17,535 at 87,335.

Elter does not argue that the contract contained any provision for recovery in the event of a currency devaluation. Instead, it maintains that its 18 May 1998 letter was an acceptance of the Government's original proposal of 28 April 1998, that the 3 June 1998

meeting was scheduled to sign the prepared modification, and that the contracting officer then withdrew the Government's proposal. (App. reply br. at 7-8) Elter asserts that the Government's action was unfair and caused appellant to suffer financial losses which it would not otherwise have suffered (app. br. at 10).

Elter's counsel's characterization of events is not borne out by our findings. "Where notification is essential to acceptance by promise, the offeror is not bound by an acceptance in equivocal terms unless he reasonably understands it as an acceptance." RESTATEMENT (SECOND) OF CONTRACTS § 57 (1981). We cannot agree that Elter's 18 May 1998 letter was an acceptance of the Government's 28 April 1998 proposal. Despite the interpretation of the letter advanced at the hearing by Mr. Kapsaskis, we look to the English version of the letter, which is controlling in the event of a dispute. The subject of Elter's 18 May 1998 letter was "ELTER'S OBJECTION TO ROICC'S SOUDA BAY REPLIES REGARDING THE GREEK DRACHMA DEPRECIATION/ DEVALUATION . . ." With a subject focused on "objection" to the Government's replies on the devaluation issue, the body of the letter stated that Elter "may accept ROICC's Souda Bay Drachma Devaluation Proposal while considering the following" This is not the language of unequivocal acceptance; it is conditioned: Elter "may" accept and by implication reserves the right to raise further question.

Putting to one side the contracting officer's expectation that any agreement would be reflected in a bilateral modification, he, in fact, did not understand the letter to be an acceptance of the Government's offer, although it was enough to convince him to proceed with a draft modification. We believe his understanding of the letter was reasonable. Moreover, the subsequent discussions between the parties are at odds with an understanding that the 18 May letter was an acceptance of the Government's offer. Elter's representatives continued to raise questions about the Government's proposal in subsequent meetings. At the 3 June 1998 meeting, Elter still did not express an unequivocal acceptance of the Government's offer as Mr. Vassilios Messadakos's candid testimony makes clear.

Under the circumstances, we conclude that the parties did not reach an agreement to modify the contract. Moreover, there is no evidence that the contracting officer acted in other than good faith either in his conduct of the negotiations or in his unwillingness to proceed with the modification without an unequivocal acceptance of its terms by Elter.

The appeal is denied.

Dated: 27 February 2001

MARTIN J. HARTY
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. 52441, Appeal of Elter S.A., rendered in conformance with the Board's Charter.

Dated:

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