

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Dennis Berlin d/b/a Spectro Sort) ASBCA Nos. 53549, 53550
)
Under Contract No. F04606-93-D-0458)

APPEARANCE FOR THE APPELLANT: Mr. Dennis Berlin

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
LT COL Scott W. Singer, USAF
CAPT Sky W. Smith, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Mr. Dennis Berlin d/b/a Spectro Sort appeals the denial of two claims involving a requirements contract for power distribution panels (PDP). In a previous decision, we denied an appeal from the default termination of the contract. *See Dennis Berlin, d/b/a Spectro Sort and as Spectro Sort Manufacturing Company*, ASBCA Nos. 51919 *et al.*, 02-1 BCA ¶ 31,675, *reconsideration denied*, 02-2 BCA ¶ 31,875. Mr. Berlin has requested that the record in the prior appeals be incorporated in the record of the present appeals. We grant that request.

The claims in the present appeals are for (i) the alleged “correct” value of the manufacturing materials accepted by the Government after the termination (ASBCA No. 53549); and (ii) the alleged total incurred contract cost plus profit (ASBCA No. 53550) (compl.; notice of appeal, encls. 2, 3). The material value claim consists of the alleged costs of acquiring the material plus 20 percent profit on that cost (compl., ¶7). The Government moves for summary judgment on the profit element in ASBCA No. 53549, and on the entire claim in ASBCA No. 53550. The Government concedes for purposes of the motions only, that the facts alleged in the complaint are true (Gov’t mot. at 5).

I. ASBCA No. 53549

In this appeal, the motion challenges only the 20 percent profit added on to the cost of acquisition. The cost of acquisition itself presents genuine issues of material fact. With respect to the claimed profit, the Government argues that FAR 49.202 “prohibits anticipatory profits,” and that under *Upstate Building Services, Inc.*, ASBCA No. 11306, 67-1 BCA ¶ 6157, and *Jones Oil Company*, ASBCA Nos. 42651 *et al.*, 98-1 BCA

¶ 29,691, lost profit claims fail “automatically” when a termination for default is upheld (Gov’t mot. at 6).

The Government is correct to the extent that anticipated profit on unperformed work is not recoverable in a convenience termination, to which the cited FAR provision applies, nor is anticipated profit on either unperformed or unaccepted work recoverable in a default termination, to which the cited cases apply. The profit claimed by Mr. Berlin in his material value claim, however, is not anticipated profit on unperformed work or unaccepted work, but profit on the alleged incurred cost of the manufacturing materials accepted by the Government after the termination (compl. ¶ 7).

Paragraph (f) of the FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause of the contract provides that the parties “shall agree on the amount of payment” for the manufacturing materials accepted by the Government after the termination, and that if they fail to agree, the amount shall be determined under the FAR 52.233-1 DISPUTES (DEC 1991) clause of the contract. Our precedents applying the payment term in paragraph (f) hold that the “amount of payment,” absent agreement, should be the value of the material at the time accepted by the Government. That value is measured by the current price a buyer is willing to pay for the material in the market place. *See Meyer Labs, Inc.*, ASBCA No. 19525, 87-2 BCA ¶ 19,810 at 100,221-22 (value determined by the price negotiated by the Government for sale of the material to the procurement contractor).

Absent the direct evidence of current market price that was present in *Meyer Labs*, we have approximated the value of accepted manufacturing materials by adjusting the contractor’s cost of the materials by the indicated rate of loss on delivered end items, *see Ameco Electronic Corp.*, ASBCA No. 9778, 66-1 BCA ¶ 5614 at 26,241-42, or by applying the percentage of completion to the contract price and subtracting the price of delivered items, *see Uni-Systems, Inc.*, ASBCA No. 25066, 84-2 BCA ¶ 17,292 at 86,134-36, or by applying other pricing considerations to a percentage of completion calculation to arrive at a “jury verdict” valuation, *see Herlo Corporation*, ASBCA Nos. 19198 *et al.*, 77-2 BCA ¶ 12,820 at 62,412-14.

While profit (or loss) may be embedded in the percentage of completion and jury verdict methods of approximating the value of the materials, in no case have we applied a percentage profit as an add-on to the value so derived, or to the value determined on the basis of the contractor’s cost. The contractor’s cost of procuring or producing the materials represents the market price at the time procured or produced. That cost may be adjusted upwards, or downwards, by consideration of market factors applicable at the time the material is accepted by the Government. A fixed profit percentage, however, has no relationship to the market value of the material.

The motion for summary judgment is sustained as to the 20 percent profit add-on to the cost of the material.

II. ASBCA No. 53550

The total incurred contract cost plus profit claim is based on alleged Government breaches of the requirements and first article provisions of the contract, alleged Government breach of a 31 July 1997 agreement to buy the material, and alleged “numerous contract changes” during contract performance (compl. ¶ 15). The Government appears to argue that, since the default was upheld on appeal, Mr. Berlin has forfeited all claims except claims for the contract price for accepted end items and for the value of the accepted manufacturing materials. We do not agree

A properly defaulted contractor, may recover for changed work incorporated into end items delivered to and accepted by the Government. *See Harent, Inc.*, ASBCA No. 16206, 73-2 BCA ¶ 10,074 at 47,341-42; *Systems and Industry Optical*, ASBCA No. 21635, 79-2 BCA ¶ 13,966 at 68,562. A properly defaulted contractor may also recover for “wasted work” attempting to comply with impossible specifications, even though no end items were delivered and the Government otherwise received no benefit from the work. *See Laka Tool and Stamping Co., Inc. v. United States*, 639 F.2d 738 (Ct. Cl. 1980), *reh’g denied*, 650 F.2d 270, 272-73, *cert. denied*, 454 U.S. 1086 (1981); *Pyrotechnic Specialties, Inc.*, ASBCA Nos. 53469, 53493, 02-1 BCA ¶ 31,668 at 156,491-92.

The alleged breach of the requirements provisions of the contract as presently pleaded may be amenable, on proper motion, to summary disposition on the basis of paragraphs (a) and (b) of the FAR 52.216-21 Requirements clause of the contract. The alleged breach of the 31 July 1997 material purchase agreement also may be amenable, on proper motion, to summary disposition on the basis of the decision in *Dennis Berlin etc.*, *supra* 02-1 BCA at 156,536. There may also be proper grounds for summary disposition of the alleged breach of the First Article provisions and the alleged “numerous changes” during performance. However, none of these grounds have been asserted in the Government’s present motion.

The motion for summary judgment on the total incurred contract cost plus profit claim is denied.

Dated: 14 November 2002

MONROE E. FREEMAN, 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 Nos. 53549, 53550, Appeals of Dennis Berlin d/b/a Spectro Sort, rendered in conformance with the Board's Charter.

Dated:

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