

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
AST Anlagen-Und Sanierungstechnik GmbH) ASBCA Nos. 39576, 50802
)
Under Contract No. DAJA76-87-C-0467)

APPEARANCE FOR THE APPELLANT: Reed L. von Maur, Esq.
Attorney at Law
Glashuetten, Germany

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
CPT John T. Harryman, JA
Trial Attorney
Headquarters, U.S. Army Europe &
Seventh Army

OPINION BY ADMINISTRATIVE JUDGE PAUL

PROCEDURAL BACKGROUND

ASBCA No. 39576 is a timely appeal of a contracting officer's decision terminating appellant AST Anlagen-Und Sanierungstechnik GmbH's (AST) construction contract for default for alleged failure to make progress and for purported failure to pay its subcontractors. The Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, is applicable (CDA). This appeal has a long and tortuous procedural history. After the appeal was filed in 1989, the parties engaged in protracted discovery. AST subsequently filed a claim for unpaid invoices. In 1990, AST appealed from a deemed denial of this damages claim which the Board docketed as ASBCA No. 41305. This appeal was later consolidated with ASBCA No. 39576 as the lead appeal file.

The appeal from the default termination came up for hearing before Administrative Judge Joseph Reiter, since retired, in Heidelberg, Germany, in October 1991. As a result of the parties' apparent agreement to settle, Judge Reiter suspended the hearing and dismissed the appeal, subject to consummation, in December 1991. In May 1993, again, based upon the parties' representations that they were attempting to settle ASBCA No. 41305, Judge Reiter dismissed that appeal pursuant to Board Rule 30.

In April 1996, AST's attorney moved to reinstate ASBCA No. 41305 because the three-year period set forth in Board Rule 30 was about to lapse and the parties had still not settled the appeal. Within a matter of days, respondent's counsel moved to reinstate

ASBCA No. 39576, stating that the parties had been unable to consummate settlement of the default termination.¹ On 18 and 22 April 1996, respectively, the Board reinstated ASBCA Nos. 39576 and 41305.

The Board, once again, set ASBCA No. 39576 for hearing in June 1997. Prior to the hearing, appellant's counsel filed a motion to dismiss, arguing that the appeal had been settled in 1991. Concerned that witnesses were dying or would otherwise become unavailable and that evidence was growing stale, the Board held the motion in abeyance and proceeded with the hearing as scheduled. During the hearing, the presiding judge was approached by the parties' principals who stated to him that there was a real possibility of settling the appeal amicably. In response to these representations, the Board adjourned the hearing and allowed the parties to pursue settlement.

The negotiations were unsuccessful, and the hearing was completed in August 1997. The Board subsequently ordered the parties to brief the settlement issue. In addition to submitting posthearing briefs on this matter, the parties briefed a series of posthearing motions relating to evidence presented after the record was closed and to allegations of unethical conduct on the part of respondent's counsel. All of these motions have been decided.

With respect to the settlement issue, the Board issued a decision on 24 September 2003, 03-2 BCA ¶ 32,377, in which the majority held that ASBCA No. 39576 had not been settled in 1991. Both the presiding judge and another judge filed separate published dissents. Familiarity with that decision is presumed.

Turning to the merits, we sustain the appeal and convert the default termination into one for the convenience of the Government.

FINDINGS OF FACT

1. By letter dated 24 September 1987, the Army's contracting officer notified AST of the award of Contract No. DAJA76-87-C-0467 in the fixed-price amount of DM 2,621,360 for performance of extensive repair work on Building No. 1001 at the Hessen Homburg Kaserne (barracks) in Hanau, Germany (R4, tabs 1, 2).²

¹ About this time, the contracting officer filed a claim for reprourement damages. AST appealed the claim which the Board docketed as ASBCA No. 50802. This appeal was later consolidated with ASBCA No. 39576.

² Prior to commencing work on this contract, AST had successfully completed an extensive renovation contract for Building 1004, a virtually identical building in the same barracks compound (tr. 5/83-84).

2. As awarded, the contract either contained or referenced the following pertinent provisions of the Federal Acquisition Regulation (FAR): Clause 52.212-12, SUSPENSION OF WORK (APR 1984); Clause 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1986); Clause 52.236-15, SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984); Clause 52.244-1, SUBCONTRACTS UNDER FIXED-PRICE CONTRACTS (JAN 1986); Clause 52.246-12, INSPECTION OF CONSTRUCTION (APR 1984); Clause 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) – ALTERNATE I (APR 1984); and Clause 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab 1).³

3. The contract also contained a detailed set of specifications which divided the construction work into 16 different titles. Pursuant to the specifications, AST was required to demolish and replace the building's dormers. In addition, it had to replace the existing dormer windows, floors, doors, kitchen furniture, and electrical system (R4, tab 97b).

4. On 24 September 1987, the contracting officer issued a notice to proceed to AST which allowed it 200 days to complete the work (R4, tab 2). Accordingly, the completion date was 18 April 1988 (R4, tab 3). Shortly thereafter, a pre-construction conference was held. Mr. Waldmann was named as AST's site superintendent. At this conference, AST stated that it would perform 30 percent of the work with its own forces. The remainder of the project would be completed by subcontractors. (R4, tab 6)⁴

5. After contractual award, AST entered into a host of subcontracts, some of which are part of the evidentiary record (R4, tabs 239 to 243; exs. A-3,-6, -8). The subcontracts contain various payment periods; at least one of them did not list any such period. Mr. Werth, the subcontractor who executed the latter subcontract, testified that 30 days was a customary period for payment in Germany when a contract was silent on

³ As issued, the solicitation also contained the following provision:

**13. AVAILABILITY OF FUNDS FOR THIS
FISCAL YEAR**

Funds are not presently available for this acquisition. No contract award will be made until appropriated funds are made available from which payment for contract purposes can be made (AFARS 1-602-2 (93)).

(R4, tab 1) Funds were finally made available on 23 September 1987 (R4, tab 10).

⁴ Mr. Waldmann was later replaced by Mr. Sporis. Mr. Sporis was made available for testimony at the hearing; Mr. Waldmann was not (tr., *passim*).

this issue (tr. 2/15).⁵ Several of AST's witnesses described the procedures governing payment of subcontractors in terms similar to those set forth in the clause of the prime contract which delineated the manner in which progress payments were approved by the Army (tr. 2/15-17, 4/66-69; R4, tab 1). A subcontractor was required to determine the amount it deemed payable based upon the percentage of work performed. It would then prepare an invoice which had to be approved by both AST's site superintendent and its office manager. Only at that point would payment be made to the subcontractor.

6. While AST was engaged in executing its various subcontracts, problems developed almost immediately with respect to progress on the job site. Although the pre-construction conference was timely convened on 5 October 1987 (finding 4), it had to be postponed by the Army's contracting officer's representative (COR), Mr. Plowman, after he learned that Building 1001 was still occupied by U.S. troops and that, accordingly, AST could not commence work (R4, tab 6).⁶ On 15 October 1987, after investigating the circumstances surrounding this delay, Mr. Plowman informed Mr. Peter A. Holtham, the contracting officer (CO), that AST could not proceed with the construction work on Building 1001 (R4, tab 10).⁷ Accordingly, also on that date, Mr. Holtham verbally informed AST's Geschäftsführer (managing director), Mr. Tomo Matasic, "to suspend all preparatory work until clarification and final decision regarding further work on the project" (R4, tab 10).

7. On 26 October 1987, Mr. Holtham wrote to direct AST to suspend all work under the project pursuant to the SUSPENSION OF WORK clause, FAR 52.212-12 (APR 1984). The contracting officer specifically directed AST "not to incur any additional costs, place any new orders for supplies and/or services, or otherwise perform or attempt to perform any further portion of the project other than to secure the work site as the COR may direct" (R4, tab 8).

8. Mr. Matasic responded to Mr. Holtham in a letter of 29 October 1987. He stated that the suspension order had caused AST "considerable problems in regards to our internal planning program." Mr. Matasic added that a "great deal of preparation for the technical work is involved" and that the "entire planning needs to be re-organized, personnel included." Mr. Matasic then focused on the problems that AST's subcontractors would encounter as a result of the suspension. He asserted:

⁵ We refer to the transcript compiled in June as volumes 1 through 3; the transcript prepared in August is cited as volumes 4 through 7.

⁶ Mr. Plowman was not made available for testimony at the hearing (tr. *passim*).

⁷ Mr. Holtham died prior to the hearing. He was, therefore, unable either to corroborate his written statements through live testimony or to face cross-examination (tr., *passim*).

The sub-contractors have already been assigned, also material and appliances have been ordered. A cost account at this time is therefore not possible. The costs are depending on the cancellation in detail, in regards to materials and negotiations with the subcontractors.

(R4, tab 9)

9. What remained unstated in AST's letter was that, because it could not assess the Army for progress payments while the work was suspended, AST would either have to delay paying its subcontractors for materials already ordered or it would have to pay these expenses out of its own funds (R4, tab 1). This reasoning is corroborated by contemporaneous letters from two of the subcontractors who informed AST that they had already ordered materials and had initiated manufacture of various components. Both of the subcontractors threatened AST with substantial costs if cancellation orders were issued (R4, tabs 11, 12). Mr. Matasic apprised the contracting officer of these facts in a telephonic conversation of 2 November 1987 (R4, tab 10).

10. Progress on the job site was further hindered during this time period by another renovation contract, DAJA90-86-C-0723, which was to be executed between the Army and the Staatsbauamt, or the German State Construction Office, during the winter. Pursuant to this instrument, the contractor was to renovate the roof of Building 1001. However, because AST was also responsible for replacing various roof structures, it was required to co-ordinate its work with the other contractor. Mr. Holtham predicted that, because of winter weather, work on the Staatsbauamt contract could not commence until April 1988. (R4, tab 10) Based upon these factors, Mr. Holtham stated in a memorandum of 20 November 1987 that he might be required to terminate AST's contract for the convenience of the Government (R4, tab 10).

11. Despite these various difficulties, the contracting officer did not terminate the contract for convenience. Instead, Mr. Holtham approached Mr. Waldmann, AST's site superintendent, to inquire whether AST could commence at least a small portion of the work during calendar year 1987. The contracting officer was laboring under statutory constraints in formulating this proposal. As Mr. Holtham reasoned in his memorandum of 20 November 1987, AST had "to start work and perform a substantial amount within the same fiscal year for which funds were obligated (ref. Twix CINCUSAREUR, AEADE, DTG 301100Z Sep 85 this period is extended until 31 December of each year)." If it did not commence work by the end of December 1987, the funds would be lost. (Tr. 5/86-89; R4, tabs 10, 33)

12. Accordingly, on 15 December 1987, the contracting officer rescinded his suspension order and directed AST "to commence work on Building 1001 immediately" (R4, tab 14). AST complied with Mr. Holtham's directive. However, the building was

still occupied and, consequently, only minor demolition work could be performed in the building's roof area (R4, tab 23; tr. 5/88). By the end of January 1988, AST had completed all of the demolition work which it could accomplish (R4, tab 33; tr. 5/89-90).

13. By letter dated 12 February 1988, AST informed the contracting officer that it had temporarily suspended work. It explained that, because the building was still occupied, it could not make acceptable progress. It offered to resume work on 16 or 17 February 1988 if the building was completely vacated (R4, tab 15). By the end of March 1988, AST, once again, could not perform any further work as a result of the building's continued occupancy (ex. A-42; tr. 5/90). At that point in time, only approximately 7 percent of the original contract work had been performed (ex. A-27(a)).

14. On 29 February 1988, the contracting officer executed bilateral Modification No. P00001 which decreased the contractual amount by DM 38,374.59, or approximately 1.5 percent. Specification items were deleted because they were already included in the Staatsbauamt contract. Modification No. P00001 also established 26 June 1988 as the new completion date (R4, tab 16, 17, 33). AST was thus allowed 134 days to complete over 90 percent of the work.

15. On 21 July 1988, 10 months after contractual award, AST submitted its first partial invoice to the Army for a progress payment in the amount of DM 271,988.37. AST indicated on the invoice that it had completed 11.7 percent of the contractual effort. On the same day, Mr. Plowman, the COR, verified that AST had performed this work. On the next day, Mr. Daum, the Army's first inspector, also certified that "all amounts on this . . . invoice are correct" (R4, tab 34).⁸ The invoice was paid by the Army on 2 August 1988 (R4, tab 19).

16. In November 1988, more than three months after AST's first invoice had been paid, Mr. Holtham questioned its validity. However, Mr. Holtham did not attempt to recover any overpayment from AST. (R4, tab 34) On 10 November 1988, Mr. Holtham replaced Mr. Plowman as COR with Mr. Hall. He also replaced Mr. Daum as inspector with Mr. Ingram (R4, tabs 29, 30, 33).⁹ No explanation can be found in the record for these administrative actions.

17. On 11 July 1988, two weeks after the extended completion date set forth in Modification No. P00001, the Army finally vacated all of its troops from building 1001

⁸ Mr. Daum was not made available for testimony at the hearing (tr., *passim*).

⁹ Despite the Board's repeated requests, the Army did not make Mr. Ingram available for testimony during the hearing. After the record was closed, the Army moved under Board Rule 13 to submit an affidavit from Mr. Ingram. AST objected, and the Board declined to accept the document, noting that appellant had not been provided an opportunity to cross-examine the former inspector.

(R4, tab 23). However, the Staatsbauamt contractor was still doing exterior renovation and installing windows in building 1001 until 7 October 1988. Even at that point, the Staatsbauamt contractor still had to correct various deficiencies in its work (R4, tab 33; tr. 5/90). In a letter to Mr. Holtham of 29 September 1988, Mr. Plowman, who was still the COR, made, in pertinent part, the following statement:

It is not possible for this office to accurately say how much time the contractor is due as a result of the delay by the Staatsbauamt contract. A minimum extension would be 200 days after 11 July or a revised completion date of 27 Jan 89. A maximum extension would be 180 days from 7 Oct 88-13% = 157 days or a revised completion of 12 March 89.

(R4, tabs 23, 33)

18. On 7 November 1988, Mr. Holtham wrote a memorandum to record, which we cite in pertinent part:

With letter dated 20 October 1988, the contractor wrote a letter to the COR, Mr. Plowman, and referenced various meetings which had taken place concerning the Bldg. 1001 and the Staatsbauamt contract for the exterior and partial interior work on the same building.

With Modification P00001, a time extension had been granted until 26 June 1988. This revised completion date could not be adhered to because the Staatsbauamt contractor could not finish their work making it impossible and impractical for Fa. A.S.T. to do any further work under their contract.

Based on the finding of facts, I determined to extend the contract for a period of 274 days due to a Government-caused delay to a new performance completion date of 31 March 1989.

(R4, tab 28)

19. The parties formalized this extension through the issuance of bilateral Modification No. P00002 on 11 November 1988. The stated purpose of this agreement was “to re-establish a performance period due to a Government caused delay.” The modification also provided:

The above mentioned 274 days is comprised of 94 days from 26th June until 28 Sept 1988 to here no further work was possible due to the work by the Staatbauamt contractor and 22 days which represents appx 12% of the work accomplished by the Fa. [Firma or Firm] AST during the period between 07 Dec 1987 and 28 Sept 1988. This results in an actual attension [sic] of 158 days from 28 Sept 1988 to a new performance completion date of 31 March 1989.

There was “no change to the contract amount as a result of this modification. . . .” (R4, tab 31) The Army thus purportedly gave AST 274 days from 26 June 1988 to finish most of the contractual effort; however, the Army also acknowledged that AST could not perform any additional work prior to 28 September 1988 (R4, tabs 28, 31).

20. After the building finally became available in October 1988, Mr. Waldmann, AST’s site supervisor, concluded that the bathroom walls on the various floors could not be constructed as specified. Pursuant to the specifications, the bathroom walls were to be made of solid brick and masonry. Prior to constructing the walls, a single steel beam was to be installed in the basement as a support structure. Further, AST was to perform an approved stress analysis to confirm the strength of the beam. (R4, tab 97b at 23; tr. 5/93-96) However, upon performing its analysis, AST discovered that a single beam could not support all of the new walls. Mr. Waldmann informed the Army of this fact, but he received no response. Accordingly, AST arranged for a stress analysis of each floor to determine the single beam’s suitability. During a meeting held between the parties on 9 November 1988, AST agreed to provide the Army with the results of the analysis. Once completed, the analysis demonstrated that the single beam in the basement could not support all of the masonry and brick bathroom walls on the various floors of the building. This conclusion was confirmed by Mr. Raedler, an engineer who worked for the Army’s Directorate of Engineering and Housing (DEH) (R4, tab 26). Thereupon, the parties discussed the substitution of prefabricated walls in the bathrooms. The contracting officer assured AST that a modification incorporating the substitution would be prepared as soon as practicable; otherwise, work on the building would have to be suspended (ex. A-48).

21. On 1 December 1988, LTC George J. Captain, the commander of DEH, forwarded a memorandum to the contract administration office at Hanau, requesting that the contract be modified. He stated, in pertinent part:

2. This modification is required because of a design deficiency identified by the contractor’s ‘static’ submittal. The static showed that the weight of the proposed new masonry walls in the latrines would be too much for the

structural support. This modification will change the walls from masonry to metal stud, thereby reducing the load on the supporting structure.

3. This modification should result in a decrease in contract price. A minimum time extension should be negotiated with the contractor.

(R4, tab 37)

22. On 30 November 1988, the contracting officer issued unilateral Modification No. P00003 which amended the contractual specifications by substituting prefabricated walls for the originally specified masonry and brick walls. However, contrary to LTC Captain's recommendation, the contracting officer did not extend the completion date of 31 March 1989. The modification provided further that AST would "submit to the Contracting Officer a 'Proposal for Adjustment' under this Change Order within 30 days after receipt of the order." The modification also stated:

e) This Change Order will be definitized not later than 30 days after receipt of the above mentioned price proposal documentation.

f) The contractor is herewith directed to begin with the work, as described in the specifications, with immediate effect and proceed diligently.

(R4, tab 37)

23. Complying with the contracting officer's direction, AST commenced the new work specified in unilateral Modification No. P00003 (tr. 5/96). It also submitted a change order proposal for the work in a timely fashion (R4, tab 39). In early January 1989, the parties entered into negotiations regarding AST's proposal. Agreement was reached on a price of DM 165 per square meter for the work on the substituted walls. But the Army was encountering funding problems which led Mr. Holtham to conclude that, the added work notwithstanding, he could not commit additional funds to the project. As he stated:

This would have resulted in an increase of DM 21,859.00 and with being prior year funds would have resulted in a further delay which I wished to avoid and I decided, based on the fact that a further modification was in planning, to reduce the 440 sqm of item #7.20 [the new bathroom walls] to 215 5 sqm., which resulted in a total

decrease of DM 20.40. The difference of 225 sqm was to be added to the forthcoming modification. The contractor was in agreement with this arrangement.

(R4, tab 39) In other words, as a result of the Army's funding difficulties, AST was not to be paid for its work on the bathroom walls until the parties reached agreement on a proposed Modification No. P00005.

24. Accordingly, on 26 January 1989, the parties executed bilateral Modification No. P00004 which finalized Modification No. P00003, reduced the contractual amount by DM 20.40, and restated the existing completion date of 31 March 1989. The modification also specifically contemplated execution of a proposed Modification No. P00005 (R4, tab 39). In accordance with Modification No. P00004, AST completed installation of the entire 440 square meters of bathroom wall work (tr. 5/100).

25. Around this time period, AST began to make progress on the project. Accordingly, on 12 January 1989 - approximately 15 and one-half months after contractual award - AST submitted its second partial invoice in the amount of DM 105,663.63 (R4, tab 40). As of this date, AST had completed approximately 16.25 percent of the original contractual effort; it had also performed approximately 32.5 percent of the work specified under Modification No. P00003 (ex. A-29). On 27 January 1989, the Army made full progress payment on this invoice without noting any objections (R4, tab 40).

26. On 27 January 1989, AST submitted its third partial invoice in the amount of DM 95,642,10. As of this date, AST had completed approximately 20.4 percent of the originally contractual effort. The Army certified the invoice as correct; and a full progress payment was made without objections on 8 February 1989 (R4, tab 44; exs. A-29, -30).

27. On 10 February 1989, AST submitted its fourth partial invoice in the amount of DM 161,144,10. By this point in time, AST had completed approximately 27.3 percent of the original contractual effort; in addition, it had performed approximately 37 percent of the additional work specified in Modification Nos. 3 and 4 (R4, tab 46; ex. A-31). The Army certified that AST had performed this work; and it paid AST a full progress payment without objection on 22 February 1989 (R4, tab 46; ex. A-31).

28. Notwithstanding AST's relatively rapid progress on the job subsequent to the execution of Modification Nos. P00003 and P00004, the contracting officer forwarded a cure notice to AST on 3 February 1989. Mr. Holtham asserted that AST's job progress was insufficient. He also referred to an altercation between AST's site supervisor, Mr. Waldmann, and one of AST's subcontractors. The contracting officer also stated:

Furthermore, I am continually being informed by sub-contractors that they are not getting paid for the work that they have accomplished and are threatening to leave the job site because of their inability to pay their employees.

Mr. Holtham ordered AST to cure these deficiencies promptly under threat of a possible termination for default (R4, tabs 42, 43). On 24 February 1989, AST responded to the Army's cure notice. It disagreed with Mr. Holtham's analysis of its job progress. Mr. Matasic stated: "Furthermore, we are of the opinion that your office carries the fault that progress of the work perhaps doesn't correspond with the performance schedule." Finally, AST asserted:

We pay our sub-contractor [sic] punctual [sic] and sufficiently. All contentions referring to this matter, we consider unfound [sic] gossip. It is not your function to coordinate our sub-contractors. We appreciate if you could arrange with your inspector, problems that may arise in the future to be discussed only with the foreman of Firm AST.

The arrangements between your inspector and the sub-contractors of Firm AST are invalid. I hereby refer of [sic] my verbal protest during the past job site discussion. At that time, I, as managing director tried to cease the slander against Firm AST.

(R4, tab 48)

29. After receiving AST's response, Mr. Holtham forwarded a memorandum to Mr. Hall, the COR, on which he did not copy AST. He stated, in pertinent part:

In future, during any meeting or discussion with the contractor on contract matters, such as progress or proposed modifications, the sub-contractor personnel are NOT to be present. This will avoid the impression that the U.S. Government is attempting coordination of the sub-contractor. Furthermore, the inspector shall not discuss, on the job site, any work or changes with the sub-contractor personnel. His point of contact shall only be Mr. Waldmann or Mr. Matasic from Fa. [Firma] AST.

(R4, tab 49)

30. Unfortunately, Mr. Ingram, the Army's inspector, did not comply with the contracting officer's directive. Although the state of the record in this regard is poor, there is adequate evidence to support the conclusion that Mr. Ingram went so far as to hire AST's subcontractors and to divert them from the job site during working hours to perform renovation tasks on his own home. As a result of these actions, Mr. Ingram was disciplined by his superior, Mr. Hall (tr. 6/221; R4, tab 178). Mr. Hall also directed Mr. Ingram in a letter of counseling "to discontinue this personal relationship with subject contractor immediately" (R4, tab 178, ex. 10).

31. The evidentiary record relating to AST's payments to its subcontractors is also incomplete. Any analysis is further complicated by the Government-caused delays which hindered progress on the contract for a period of many months. Although AST itself did not receive its first progress payment until August 1988, the evidence that exists demonstrates that it paid various subcontractors' invoices out of its own funds up to that point (R4, tabs 19, 210, 247; ex. A-8). Moreover, in the time period between August 1988 and AST's receipt of its second progress payment on 27 January 1989, there is no record evidence demonstrating that any of AST's subcontractors were not paid on their invoices (R4, tabs 210, 239, 247; exs. A-3, -6). The same conclusion can be reached regarding payment of subcontractors' invoices during the remaining period between 27 January 1989 and the date of issuance of the cure notice by the contracting officer on 3 February 1989 (R4, tabs 210, 239, 244; exs. A-3, -6, -10).

32. Apparently satisfied with AST's response to his cure notice, Mr. Holtham took no further action in this regard and allowed AST to make further progress on the job. During this period, a problem arose regarding the interior painting specifications. As originally written, the specifications required AST to apply a new coat of paint to all of the walls and ceilings in the building (R4, tab 97b at 51-56). However, upon examining the walls in early 1989, representatives from the Army's DEH concluded that the plaster was not smooth enough to paint. Accordingly, unless another solution was found, the existing plaster would have to be removed and replaced (tr. 5/115-16). One of AST's subcontractors proposed a spray-on plaster to create an even surface; and this product was tested by DEH personnel. The tests were successful, and the spray-on plaster was endorsed by Herr Knoth, the chief of DEH's design section. (R4, tab 45; tr. 5/116)

33. On 25 April 1989, LTC Captain, DEH's director, forwarded a memorandum to the contracting officer in which he requested that the contract be modified to, *inter alia*, incorporate the spray-on plastering technique into the specifications. LTC Captain also stated, in pertinent part:

2. This modification is requested for differing site conditions and design deficiencies.

3. To complete this work, the contractor should need 30 days.

(R4, tab 55)

34. Accordingly, on 5 May 1989, the contracting officer issued unilateral Modification No. P00005 which amended the specifications as suggested by DEH to incorporate the spray-on plaster technique. The modification also stated:

A provisional revised completion date, by which the work described by title and Item # on page 1-2 of this modification and described in detail on the attached specification pages 1-16 **MUST BE COMPLETED**, is established as being 05 JUNE 1989. A final total contract completion date will be established upon finalization of this Change Order

Viewed in terms of its plain language, the unilateral modification thus provided that the added work under the specifications had to be completed by 5 June 1989 and that the parties would negotiate the “final total contract completion date” which, at this point in time, still stood at 31 March 1989 (R4, tab 55). In other words, as of 5 May 1989, a “final total contract completion date” for the project did not exist. In a memorandum to record of 6 May 1989, Mr. Holtham explained the urgency of the 5 June 1989 completion date for the plaster work. He stated that “to complete the basic contract requirements, it was essential that the plastering work be completed as soon as possible. . . .” Mr. Holtham added that he also considered “the fact that all the other work could only be accomplished after the plaster work had been completed.” (R4, tab 56)

35. The various Government–caused delays notwithstanding, AST somehow continued to make progress on the job during this period. Between 2 March 1989 and 11 April 1989, AST submitted three partial invoices for progress payments. All of these invoices were certified by the Army, and payment was made on an expedited basis (R4, tabs 46, 51, 52, 54; exs. A-31, -32, -33, -34). As of 11 April 1989, the date of the seventh partial invoice, AST had completed approximately 63.5 percent of the work under the original contract (ex. A-27(a)).

36. On 2 May 1989, AST submitted its eighth partial invoice for a progress payment in which it stated that 73 percent of the contractual effort had been completed (R4, tab 57). In a memorandum of 10 May 1989, Mr. Hall, the Army’s COR, returned the invoice without payment. He asserted:

The recent invoice showing 73% completed is being returned. Our estimate of work completed on subject project

is much less than indicated on your invoice. At most we feel that the maximum amount completed since the last invoice is two percent.

We recommend a reevaluation of the amount of work completed before resubmitting invoice. Also the invoice should include the totals for each line item in the contract.

(R4, tab 57)

37. The most likely explanation for AST's purported lack of progress at this time is the host of problems which were left unresolved by the contracting officer's unilateral issuance of Modification No. P00005 on 5 May 1989. For example, that modification purported to delete several specifications from the contract. In addition, with respect to all but two other items which were increased, the modification provided: "The remaining items in the attached specifications are NOT TO BE PERFORMED at the present time but may be included in a further modification to this contract if it is decided to be in the best interest of the U.S. Government to do so." (R4, tab 55; ex. G-4)

38. As a result of the various decreases set forth in unilateral Modification No. P00005, AST was not authorized to perform all of the necessary work on the base coat and the spray-on plaster for all of the newly installed walls. In fact, AST needed to apply base coat plaster on 24,425 square meters of walls, but unilateral modification P00005 authorized the use of base coat on only 5,800 square meters. Thus, AST would have been forced to stop the base coating after completing only one floor of the building (R4, tab 55; exs. A-58, G-4; tr. 5/118-120). Instead, after another period of delay, AST instructed its subcontractor under protest to proceed with the entire base coating and plastering job (ex. A-58; tr. 5/117-120).

39. A second problem resulting from the contracting officer's unilateral issuance of Modification No. P00005 related to changes in the electrical system. The modification added a new item under title 13 which provided for installation of fire alarms in the attic rather than in the "wet areas" as originally intended. The modified specifications noted that this added work was ordered "by the U.S. Fire Department." But this was one of the provisions which AST was not allowed to perform unless "included in a further modification to this contract. . . ." Unfortunately, AST could not complete other work on the building's lower floors until it received permission to proceed with this change to the specifications because the added electrical work necessitated the installation of new wiring from the basement to the attic (R4, tab 55; ex. G-4; tr. 4/136-139, 5/102). AST repeatedly informed the contracting officer that a modification was necessary to address this added work requirement (tr. 5/9-10, 103; R4, tabs 48, 63).

40. In a memorandum to the contracting officer of 10 May 1989, Mr. Hall reflected upon the various difficulties which had arisen during contractual performance. He stated, in pertinent part:

The recent requests for contract modifications have included large dollar amount changes, in some cases exceeding 125% of the original contract amount. The need for these changes result [sic] from one or more of the following:

Differing site conditions, user requested changes because of a change in mission, change in regulations, and design deficiency.

(R4, tab 58)

41. In a memorandum for record dated 27 May 1989, Mr. Holtham wrote, in pertinent part:

3. Due to deficient design specifications there have been four (4) modifications to this contract to date whereby the contract amount was reduced to a new total of DM 2,582,965,01 as of 26 Jan 89. At the present time there is a further modification in process with an estimated increase of DM 568,828.00 as against an IGE of DM 390,462.00. Clarification with Hanau MILCOM (DEH/EPS) and negotiations with contractor have to take place.

4. The above statement of facts is necessary in order to give a true picture of the situation and the contractor performance under the subject contract.

5. Although [sic] these has been and still is Government caused delay in the preparation and submittal of modification documentation the contractor has to be held responsible for approx. 80 days of delay in contract performance [sic] a consideration for this part of the delay will be taken with modification in process.

The reason for the contractor caused delay is that his sub-contractors are continually not performing. The sub-contractors inform me that they are not getting paid for work already performed. Mr. Matasic (owner of AST) disputes this

and states that the sub-contractor invoices are incorrect and therefore not paid in full.

At the present time and in connection with contract DAJA76-85-C-0419 (RCO-F-Mainz Kastel Branch Office) there is a case in process at USAREUR Office of the Judge Advocate for possible Suspension and/or Debarment of the Fa. AST. This proposed debarment is/was based on evidence (?) of the submittal of fraudulent, termination for convenience [sic] settlement, [sic] claim and with violations of the German Internal Revenue Service system which, after German criminal police investigation, led to court lawyers action in stopping all payment movement on Fa. AST Bank account transactions.

The result of the above was that Fa. AST were unable to make payment, in many cases to sub-contractor, and also unable to obtain the material necessary to accomplish the required work.

NOTE: The request for Suspension/Dabarment action was rejected by the USAREUR. Judge Advocation [sic] Col. Lancaster due to insufficient documentations and at the present time, as far as I know there is no Government case against the Fa. AST.

Based on but not limited to the above statement of facts I do not recommend the award of any contracts at the present time until a comprehensive Pre-Award / Andit [sic] of the Fa. AST has been made. The stadard [sic] of workmanship is generally acceptable and with one or two minor exceptions, which need to be and are corrected, is performed in accordance with specificatons and contract terms.

(R4, tab 59). Other than Mr. Holtham's allegations in this regard, there is no record evidence substantiating a delay claim "for approx. 80 days" against AST. Nor does the underlying record support the contracting officer's allegation that subcontractors were "not getting paid for work already performed" during this period (R4, tabs 210, 239, 242, 243; exs. A-3, -8). In fact, the more likely explanation for any perceived difficulties with subcontractors was that, because of the various delays for which the Army was admittedly responsible, the subcontractors were not able to make efficient progress on the job site.

42. On 6 June 1989, AST, once again, submitted its eighth partial invoice for a progress payment. It stated, in pertinent part:

Considering the fact that we have to pre-finance rather high quality and expensive materials, e.g. the switch cabinets for heating and ventilation systems, and we cannot be/paid by you because the materials are not connected yet, we request your approval for the security deduction of 5%.

We make efforts for uninterrupted work performance at the site, and despite of [sic] occurring problems we try to make the building available for utilization as soon as possible.

At the time when it forwarded its eighth partial invoice on 6 June 1989, AST estimated that it had completed 68 percent of the contractual effort (R4, tab 61). On 9 June 1989, Mr. Hall wrote, to the contracting officer, in pertinent part:

The Contractor's request to reduce retainage from 10 to 5 percent is difficult to agree with because of the slow progress, pending modifications, rumors of non-payment to subcontractors and the appearance of instability within the company. These are generally the reasons for having a retainage and even increasing rather than decreasing retainage.

(R4, tab 63) On 12 June 1989, Mr. Holtham forwarded a memorandum to Mr. Hall in which he refused to decrease the retainage. He instructed Mr. Hall to "return the invoice to the contractor and request a corrected invoice." (R4, tab 64) AST resubmitted the invoice, and it was certified by Mr. Hall. The Army made the progress payment on 20 June 1989, almost seven weeks after the invoice was initially submitted (R4, tab 66).

43. As of mid-July 1989, the Army still had not processed Modification No. P00006. Accordingly on 17 July 1989, AST forwarded a letter to the contracting officer in which it stated, in pertinent part:

Due to the delay in processing of the modification, work on the above-mentioned construction site could not be performed in the regular order.

In particular the electrical work was affected by the delay because the installation of the smoke detectors in the attic depends upon the entire installation.

Since the electrical installation was not in place it was neither possible to continue the plastering work nor the painting. Upon completion of the electrical work we will need an additional 60 days to finish the painting as well as to clean the building.

We assume that firm Werth, which is doing the electrical work, can complete its work in approx. 30 days after the modification has been signed.

This means that we need an extension of approx. 90 days upon signature of the modification.

In this connection we refer to our letters of 11 November 1988 and 24 February 1989 and to the construction conferences.

We will certainly make an effort to finish the project earlier, if the work schedule allows for it.

(R4, tab 68). Although he had not yet issued Modification No. P00006, the contracting officer, on 18 July 1989, forwarded a "BUSINESS CLEARANCE MEMORANDUM" to the Regional Contracting Office (RCO), Frankfurt, for proposed Modification No. P00007. Mr. Holtham stated, in part: "Due to basic design deficiencies and changed user requirements there are various decreases and within the scope increases necessary in order to accomplish the original intent of the contract" (R4, tab 70).

44. On 21 July 1989, AST submitted its ninth partial invoice for a progress payment in the amount of DM 325,147.59. Because it was unable to install the additional fire alarms in the attic with a resulting impact on the plaster work, AST demonstrated little progress. It estimated that it had completed 75.43 percent of the contractual effort as of 21 July 1989. (R4, tab 71) Although Mr. Hall certified the invoice, it was never paid (ex. A-36). On 12 July 1989, Mr. Matano Gracias, the deputy chief of the RCO, Frankfurt, and hence Mr. Holtham's superior, met with German tax authorities to discuss a garnishment request against AST. Mr. Gracias instructed the authorities to forward any garnishment order to him. Once Mr. Gracias received the order, he instructed the Army's finance office not to make payment to AST on its ninth partial invoice. The finance office complied with this directive. (Tr. 1/84-87) Subsequently, the German tax authorities stated that of the total amount of DM 325,147.59 owed to AST on the ninth partial invoice, the Army could release DM 143,000 directly to AST (R4, tab 79). However, Mr. Gracias refused to authorize payment of any additional amounts to AST (tr. 1/151). Mr. Gracias admitted in his testimony that declining to pay AST for work which it had performed would "definitely" cause it difficulties (tr. 1/87).

45. On 27 July 1989, the contracting officer issued unilateral Modification No. P00006 which purported to cancel unilateral Modification No. P00005 and to replace the specifications dated 18 April 1989 with a different set of specifications dated 1 June 1989. The modification also provided:

In order to complete the additional work described in the attached specifications the performance completion date is extended until 15 September 1989. Included in the period are a total of 168 days (from 31 March 1989 thru 15 Sept 1989) of which 70 days are a contractor caused delay which require a consideration that will be negotiated prior to finalization of this CHANGE ORDER^[10]

In addition, the modification required AST to submit a new proposal. It also provided:

This Change Order will be definitized no later than 30 days after receipt of all the above mentions . . . documentation. If proved necessary a revised performance completion date will be established upon finalization of this order. A ceiling price of DM 350,000.00, which may be revised, is under no circumstances to be exceeded is [sic] provisionally allocated for the additional work as defined in the specifications as referenced above.

(R4, tab 76; emphasis in original). There is no record evidence supporting the contracting officer's allegation that AST had delayed the contractual effort by 70 days. In fact, AST disputed this contention in a letter of 11 August 1989 acknowledging receipt of the change order. In so doing, AST reiterated that the "cause for the extension was the electrical work." (R4, tab 78)

46. The specifications which were attached to unilateral Modification No. P00006 were also deficient. Specifically, they did not provide for the increase in the application of the base coat under position 7.21 to the amount of 24,425 square meters. As previously requested by AST, this amount was necessary to cover all of the building's walls and ceilings prior to application of the spray-on plaster. AST had notified the contracting officer of this fact upon issuance of Modification No. P00005 and, with the

¹⁰ As he had in unilateral Modification No. P00005, the contracting officer referred only to added work under "the attached specifications" in determining a performance completion date. He was thus silent regarding a completion date for the remaining basic contractual effort. Even as of 22 August 1989, Mr. Ingram, the Army's inspector, stated in his report that a completion date for the project had not been established by the contracting officer. (R4, tab 129)

Army's knowledge, had proceeded to perform much of the work. (Ex. A-58; tr. 5/118-121) However, the enlarged scope of work was not included in unilateral P00006 (R4, tabs 65, 76).

47. Finally, if AST had adhered to the proviso in unilateral Modification No. P00006 that its work under that instrument could not exceed DM 350,000, it would have been required to cease most efforts at the job site. As demonstrated by the enclosure to AST's ninth partial invoice for a progress payment, as of 21 July 1989, it had already performed most of that work. (R4, tab 71; tr. 4/68-71) Yet, in order to make progress on the job, AST continued to perform this scope of work until 5 September 1989 when the termination for default was issued (tr. 4/71-72).

48. Prior to execution of unilateral Modification No. P00006 on 27 July 1989, Mr. Holtham had actually received virtually all of the information which he requested from AST in the nature of a proposal for Modification No. P00007 (R4, tab 80). In addition, on or before 24 July 1989, AST provided the contracting officer with further information (R4, tab 72; tr. 5/27-28). Having analyzed this data, Mr. Holtham made various recommendations in writing. He also stated in his memorandum that a "negotiation meeting has been arranged for 16 August 1989 at RCO-F Hanau Sub-office" (R4, tab 80 at 19).

49. In August, Mr. Holtham requested that AST provide him with a revised construction schedule. Because a number of contractual issues had not been resolved, AST informed the contracting officer, once again, that it would need 90 days after execution of proposed, bilateral Modification No. P00007 to complete the work. (R4, tab 68; tr. 5/28-29)

50. After the parties entered into negotiations during August 1989, the contracting officer prepared a 34-page draft of a proposed Modification No. P00007 which increased the contractual amount by DM 476,825 (R4, tab 80).

51. The proposed modification was not executed by either party (R4, tab 80). Instead, on 5 September 1989, the Army terminated the contract for default (R4, tab 83). When confronted by one of AST's representatives, Mr. Holtham stated that the termination "had not been initiated by him but by a higher agency" (tr. 5/43). That "higher agency" was likely Mr. Holtham's superior, Mr. Gracias. Despite testifying that he was not responsible for terminating contracts for default, Mr. Gracias had informed the German tax authorities in a meeting held on 12 July 1989 that he was going to conduct a review to determine "to what extent the ongoing contracts [of AST] can be terminated" (R4, tab 249; tr. 1/58-59). In addition, it was Mr. Gracias who ultimately determined that no payment whatsoever would be made to AST on its ninth partial invoice (finding 44). Finally, Mr. Gracias, as reported by Mr. Holtham, informed one of AST's subcontractors that "if he continued with the Fa. AST as subcontractor he could

stand the chance of not receiving future contracts” (R4, tab 80). It is in this context that the Army’s termination of AST must be viewed.

52. As stated by Mr. Holtham in his letter of 5 September 1989, the termination for default was “based upon the failure to diligently perform the work and the statements by a number of your subcontractors that they have stopped work at the job site and will not continue until they receive a written guarantee of payment of all future invoices, from a financially reliable third party, and is in accordance with my conversations with Mrs. Amersbach [sic] [AST’s representative] on 25, 28, and 31 August” (R4, tab 83).

53. A review of the Army’s own inspection reports does not confirm the contracting officer’s conclusion that the work was not being diligently performed and that the subcontractors had stopped work. The reports confirm that numerous workers were on the job site during the month of July and most of the month of August 1989 (R4, tab 129). The inspector’s daily report for 5 September 1989 – the date of the default termination – confirms that ten workers were on the job site that day (ex. A-42). And as late as 27 July 1989, the Army’s inspector’s report noted that “the subcontractors stated that their invoices had been paid” (R4, tab 129).

54. There is no evidence demonstrating that the contracting officer conducted a study under FAR 49.402-3(f) to determine how long it would have taken AST to complete the work.¹¹ As of 5 September 1989, AST had completed approximately 82 percent of the basic contractual effort and approximately 85 percent of the work under Modification Nos. 5 and 6 (ex. A-37).

55. AST filed an appeal of the contracting officer’s decision on 8 September 1989. The Board’s Recorder docketed the appeal as ASBCA No. 39576.

DECISION

It is axiomatic that the Government bears the burden of proof “on the issue of the correctness of its actions in terminating a contractor for default.” *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987). Moreover, it is well established that a default termination “is a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence.” *J.D. Hedin Construction Co., Inc. v. United States*, 187 Ct. Cl. 45, 408 F.2d 424, 431 (1969).

In the context of this appeal, the Board must apply these evidentiary standards initially to the issue of whether the contracting officer ever established a valid completion

¹¹ Failure by the Government to undertake such a study does not necessarily invalidate a termination for default. *Mindeco Corp.*, ASBCA No. 45207, 94-1 BCA ¶ 26,410 at 131,375.

date for the overall project. It is true that if a completion date is waived by the contracting officer, “the government can establish a new contract completion date, which will serve as a basis for default termination, either through a bilateral agreement with the contractor or by unilateral action.” If “the government opts to act unilaterally, the new date that it sets must be ‘both reasonable and specific from the standpoint of the performance capabilities of the contractor at the time the notice is given’” *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1019 (Fed. Cir. 2003), citing *DeVito v. United States*, 188 Ct. Cl. 909, 413 F.2d 1147, 1154-55 (1969). The “reasonableness of the action turns on what the government ‘knew or should have known’ at the time it imposed the new schedule.” *McDonnell Douglas*, 323 F.3d at 1019, citing *ITT Corp. v. United States*, 206 Ct. Cl. 37, 509 F.2d 541, 549-50 (1975).

Here, the parties bilaterally established a valid completion date of 31 March 1989 through the execution of Modification No. P00002 on 11 November 1988 (finding 19). The parties restated this completion date through the bilateral execution of Modification No. P00004 on 26 January 1989 (finding 24). However, the completion date expired without any action on the part of the government. See *McDonnell Douglas Corp.*, 323 F.3d at 1019. When he revisited this issue on 5 May 1989 through the unilateral execution of Modification No. P00005, the contracting officer did not establish a “final total contract completion date.” He merely stated a “provisional revised completion date” for the added work which was specifically referenced in the modification (finding 34). The contracting officer repeated this exercise when he unilaterally issued Modification No. P00006 on 27 July 1989. He stated that in “order to complete the additional work described in the attached specifications the performance completion period is extended until 15 September 1989.” Mr. Holtham did not refer to an overall completion date for the basic contractual effort (finding 45). Accordingly, the government cannot point to a valid completion date which can “serve a basis for default termination.” *McDonnell Douglas Corp.*, 323 F.3d at 1019.

Even if the government had satisfied its burden in this regard, the default termination could not withstand strict scrutiny. From the date of contractual award until the date of termination, AST’s attempts to complete the project were thwarted by a host of government–caused delays which were thoroughly documented by the contracting officer and his fellow governmental employees. Initially, AST’s efforts were stymied by the Army’s failure to vacate the building and by difficulties caused by the need to co-ordinate efforts with the Staatsbauamt contractor (findings 6, 7, 8, 10, 12, 13, 17, 18, 19). Once these matters were resolved, AST encountered an array of problems resulting from defective specifications, differing site conditions, and changes required by the “user agency.” As a consequence, the parties were required to negotiate and execute several modifications which led to substantial delays, all of which were the responsibility of the government (findings 20, 21, 22, 32, 33, 34, 38, 39, 40, 41, 43, 45, 46). Even as of the date of the default termination, various design deficiencies had not been resolved because the parties never executed Modification No. P00007 (findings 49, 51). Viewed in the

context of the underlying record, most of which was compiled by governmental employees, any failure on the part of AST to make rapid progress and any resulting dissatisfaction on the part of its subcontractors were the fault of the government, not of AST. On this basis, the default termination must be converted into one for the convenience of the government.

In its posthearing briefs, the Army raises several arguments, none of which is persuasive. For example, the Army contends that AST was unable to make progress because it could not pay its subcontractors (gov't br. at 45-47). Up to late July 1989, there is no record evidence demonstrating that AST had not paid its subcontractors.¹² Indeed, because of the various government-caused delays, AST was forced, on occasion, to pay its subcontractors out of its own funds rather than any monies derived from the underlying contract (findings 8, 9, 31, 41, 42). Finally, the Army's inspector noted in his daily report for 27 July 1989 that the "subcontractors stated that their invoices had been paid" (finding 53).

We also reject the Army's contentions regarding the credibility of AST's general manager, Mr. Matasic. It alleges that AST's case is tainted because Mr. Matasic was convicted of tax evasion by a German court and thus was not a credible witness (gov't br. at 56-57). We note initially that we are evaluating a government claim on which the government has the burden of proof. Moreover, the bulk of the evidence on which the Board has relied in invalidating the default termination was authored by governmental representatives. Mr. Matasic's testimony and writings have had little bearing on this decision. Thus, his credibility is not a significant issue.

We have carefully considered the Army's other arguments and reject them.

In view of this conclusion, the Army has not established an essential predicate to the assessment of excess procurement costs. Its contentions related to ASBCA No. 50802 must also fail.

Finally, the Board also rejects AST's contention that the Army demonstrated bad faith in terminating its contract for default (app. br. at 100-123). It is true that there is evidence tending to show bad faith on the part of Mr. Holtham's superior, Mr. Gracias (findings 44, 51). However, largely because of Mr. Holtham's death and his obvious inability to testify, the record is incomplete in this regard. Accordingly, AST cannot meet the standard of clear and convincing proof needed to overcome the presumption that Mr. Gracias acted conscientiously in the discharge of his duties. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002).

¹² Invoices submitted in August were likely not due until after the contract was terminated for default (finding 5).

CONCLUSION

The appeal in ASBCA No. 39576 is sustained. The termination for default is converted to one for convenience. The appeal in ASBCA No. 50802 (excess reprocurement costs) is also sustained.

Dated: 4 March 2004

MICHAEL T. PAUL
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. 39576, 50802, Appeals of AST Anlagen-Und Sanierungstechnik GmbH, rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals