

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Bath Iron Works Corporation) ASBCA No. 54544
)
Under Contract No. N00024-98-C-2306)

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OPINION BY ADMINISTRATIVE JUDGE JAMES ON
RESPONDENT'S MOTIONS FOR SUMMARY JUDGMENT
AND TO DISMISS ¶¶ 29 AND 30 OF THE
COMPLAINT FOR LACK OF JURISDICTION

This appeal arises from the contracting officer's (CO) 16 January 2004 final decision denying the certified \$1,341,129 claim of Bath Iron Works Corporation (BIW) under the captioned shipbuilding contract for reimbursement under its Insurance clause of the costs incurred for repair and replacement of fuel oil fill and transfer (FOFT) piping damaged during construction of the DDG 90 guided missile destroyer. The Board has jurisdiction of the appeal under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. § 607.

On 25 June 2004 respondent moved for summary judgment on ¶ 28 of the complaint, and to dismiss ¶¶ 29 and 30 of the complaint for lack of CDA jurisdiction. The cited paragraphs of the complaint alleged:

28. BIW respectfully requests that the Board find that the DDG 90 FOFT piping casualty falls within the coverage of the Insurance Clause, and that BIW is entitled to \$1,341,129, plus CDA interest

29. In the alternative and only if the Board determines that SOSB correctly interpreted the Insurance clause, BIW requests the Board to determine that the SOSB interpretation represents a departure from past practice, and that SOSB could not lawfully impose it retroactively on Contract –2306.

30. BIW further requests that the Board find and determine that the Navy’s specification of stainless steel for the FOFT piping is inherently defective, and a proximate cause of the casualty loss for which BIW is entitled to recovery under the Insurance clause in the amount of \$1,341,129, plus CDA interest

Appellant opposed the motions. The parties submitted further rebuttal and reply briefs.

STATEMENT OF FACTS (SOF)
FOR THE PURPOSES OF THE MOTIONS

The facts set forth in SOF ¶¶ 1-8 are not genuinely disputed. The additional facts set forth in SOF ¶¶ 9-14 pertain to the motions to dismiss ¶¶ 29 and 30 of the complaint for lack of CDA jurisdiction.

1. On 6 March 1998 the Naval Sea Systems Command (NAVSEA) awarded contract No. N00024-98-C-2306 (the contract) to BIW to construct, *inter alia*, a “DDG 51 Class Guided Missile Destroyer . . . DDG 90.” The contract was to be administered by the Supervisor of Shipbuilding Conversion & Repair, USN, at Bath, ME (SOSB) (R4, tab 1 at 2, 4).

2. The contract included the following relevant clauses: (a) H-2 NAVSEA 5252.228.9104 Additional Insurance Provisions (FT) (Jan 1990) (Deviation) (the H-2 Additional Insurance clause), which provided in pertinent part:

(b) Notwithstanding any provisions to the contrary in paragraph (a) of the requirement entitled “INSURANCE-PROPERTY LOSS OR DAMAGE-LIABILITY TO THIRD PERSONS”, the assumption by the Government of the risk of loss of or damage to the vessels and the materials and equipment therefor provided for by the aforesaid paragraph (a) . . . shall continue until the expiration of the guaranty periods of the vessels, or until completion of all work under this contract, whichever is later. The Government does not, however, assume the risk of loss of or damage to any equipment which results from a defect in a part thereof for which the Contractor is responsible

pursuant to the . . . “INSPECTION OF SUPPLIES-FIXED PRICE (FT) (JUL 19985) - ALTERNATE I (JUL 1985) (DEVIATION)” (FAR 52.246-2) requirements of this contract. The term “equipment” as used in the preceding sentence means the largest integrated unit (e.g., component, subassembly, or individual system, as the case may be) furnished by the same supplier who furnished the part causing the loss or damage.

and (b) H-11 “NAVSEA 5252.228-9105 Insurance-Property Loss or Damage-Liability to Third Persons (FT) (Jan 1990) (Modified) (Jul 1997)” (the H-11 Insurance clause), which provided in pertinent part:

(a) . . . The Government assumes the risks of loss of or damage to the vessels and such materials and equipment which would have been assumed [under specified insurance policies] . . . provided, further, that under the above identified policies or under this requirement the Government does not assume any risk with respect to, and will not pay for any costs of the Contractor for the inspection, repair, replacement, or renewal of any defects themselves in the vessel(s) or such materials and equipment due to (A) defective workmanship, or defective materials or equipment performed by or furnished by the Contractor or its subcontractors or (B) workmanship, or materials or equipment performed by or furnished by the Contractor or its subcontractors which do(es) not conform to the requirements of the contract, whether or not any such defect is latent or whether or not any such non-conformance is the result of negligence

. . . .

(e) In the event of any loss of or damage to any of the vessels or any of the materials or equipment therefor which may result in a claim against the Government under the insurance requirements of this contract, the Contractor promptly shall notify the [CO] of such loss or damages, and the [CO] may, without prejudice to any other right of the Government, either:

(i) Order the Contractor to proceed with replacement or repair in which event the Contractor shall effect such replacement or repair. The Contractor shall submit to the [CO] a request for reimbursement of the cost of such replacement or repair together with such supporting documentation as the [CO]

may reasonably require, and shall identify such request as being submitted under this insurance requirement. If the Government determines that the risk of such loss or damages is within the scope of the risks assumed by the Government under this requirement, the Government will reimburse the Contractor . . .

(R4, tab 1 at 190, 223, 225, 227)

3. The contract specifications § 095-505, required a hydrostatic pressure test of piping systems with “clean fresh water” (R4, tab 3 at 513).

4. Specifications § 541 FUEL SYSTEMS, ¶ 541b, stated that piping system and component requirements were in § 505, GENERAL REQUIREMENTS FOR PIPING SYSTEMS, and ¶ 541f stated: “Fuel systems shall be flushed with JP-5 or F-76 fuel . . . upon completion of system installation and hydrostatic test” (R4, tab 2 at 366, 397, tab 4 at 621).

5. Specifications § 505, ¶ 505g2, System Cleaning Requirements, stated:

Piping systems shall be cleaned, flushed, and maintained to the extent necessary to ensure satisfactory operation of the system and its components in service

. . . .

In addition . . . special cleaning requirements for particular systems (such as . . . fuel system) are contained in other sections of these specifications.

(R4, tab 4 at 709)

6. “The Contract required BIW to flush the FOFT piping of each DDG 51 Class vessel, at a point of BIW’s choosing following successful completion of hydrostatic testing, to remove any loose construction debris. By agreement with SOSB, embodied in Shipyard Departmental Operating Instruction (“DOI”) 10-014, August 19, 1998, BIW was to perform the flush using fresh water” (compl., ¶ 10). DOI No. 10-014, “Flushing and Cleaning Fuel Oil System Piping,” provided in pertinent part:

4.1 The Hull Test Manager or his designee shall:

4.1.1 Assure the O04s [sic] accomplish flushing in accordance with the requirements herein. . . .

....

5.10.1 The flushing requirements for the fill system shall be satisfied by flushing the piping with fresh water from each fill station to the fuel receiving tanks. . . .

(R4, tab 5 at 735-37, 739)

7. BIW's 23 May 2003 letter to SOSB stated that repair of leaks in the DDG 90 FOFT piping were "related to chemical (chloride) and potentially microbiologically-induced deterioration of the piping system materials" and was "covered" by the H-11 Insurance clause (R4, tab 13).

8. SOSB's 9 June 2003 Quality Deficiency Report (QDR) No. DDG-90-B-MS003-006 stated that on or about 6 September 2002 BIW's substitution of "brackish river water" for "fresh water" specified by the contract to flush the DDG 90's FOFT piping "without government approval result[ed] in considerable damage to the piping components and a considerable cost of repair/replacement. The shipbuilder is requested to perform a root cause [sic] analysis on deviating from technical requirements" BIW's 15 July response to that QDR stated:

An investigation has been done by interview of the responsible Supervisor, Tom Gerrish. Tom felt there was insufficient flow to accomplish this flush by use of the fresh water provided. He chose to use river water on his own, without approval. He felt it was reasonable as this piping can be, and sometimes is, exposed to straight sea/river water during ballasting operations. Additionally, the compensated fuel system can, by design, expose this piping to sea/river water, and it is designed and fabricated with corrosion resistant steel.

(R4, tab 14 at 872-73)

9. BIW's 27 June 2003 request for equitable adjustment, REA No. RD03-02/INS96, stated that in May 2003 BIW had analyzed DDG 90 pipe samples to determine the cause of the leaks, and found that pipe corrosion and leaks were:

caused by a combination of chloride crevice corrosion and Microbiological Influenced Corrosion (MIC). . . .

. . . the majority of which were found in the areas of welded joints (belled-end and sleeved joint fittings). . . .

....

... After the flush completion the System was drained, however due to the system design, some of the water used to flush the System remained in the horizontal and low points of the System for approximately 7 months. It has been determined that the high levels of chloride and microbiologic organisms in the water, combined with the length of time that water remained in the pipe and certain design features of the System itself, facilitated chloride crevice corrosion and the associated MIC.

....

Based on the analysis conducted, it has been determined that the piping system corrosion that was experienced on the DDG 90 resulted from a series of conditions, the effects of which when combined, created an environment that was conducive to the chloride crevice corrosion that caused the System leaks. . . . these conditions include; [sic] the use of river water for the System flush, the fact that water remained in the System low points after the System was drained, and several design features of the piping system itself that made it susceptible to the corrosion that was experienced.

(R4, tab 16 at 900-02)

10. BIW's 1 August 2003 memorandum to SOSB regarding REA RD03-02/INS stated that the damage incurred on the DDG 90 FOFT piping was caused by MIC, system design with low points in the piping making flush water removal almost impossible, construction of the DDG 90 on a level keel rather than on sloping ways and susceptibility of belled-end and sleeve joints using CRES 304L stainless steel welded with 308L filler. BIW cited "16 similar type weld joint and piping failures in 7 vessels of this class" and listed 10 insurance claims in which the SOSB allegedly recognized Insurance clause coverage in instances of negligent workmanship. (R4, tab 20 at 1057, 1059-64, 1099)

11. The SOSB CO's 14 August 2003 letter to BIW asserted that the DDG 90 FOFT piping damage came within the exception to the H-11 Insurance clause because the cause was not negligent workmanship, but rather was a "willful" and "deliberate" violation of the specified "fresh water" flushing procedure (R4, tab 21 at 1115-16).

12. BIW's 19 November 2003 letter to SOSB referred to BIW's 27 June and 1 August 2003 correspondence (SOFs 9-10), included a \$1,341,129 certified claim, stated

that the CO's 14 August 2003 views on the Insurance clause conflicted with the "long standing Government policy of self-insurance for casualties resulting from defective workmanship," and cited 11 prior SOSB insurance cases (R4, tab 22 at 1117-23, 1125).

13. The CO's 16 January 2004 final decision expressly referred to the documents cited in SOFs 7-12, and denied BIW's 19 November 2003 claim on the bases of the unauthorized decision of "the BIW supervisor" to deviate from the specified fresh water flush requirement and of BIW's analysis concluding that piping "leaks were due to corrosion caused by high levels of chloride and microbiologic organisms in the river water." The CO said that failure to use fresh water was not negligent and BIW's argument about the SOSB's prior "course of conduct" was mistaken. (R4, tab 24) BIW's 26 March 2004 timely appeal of the CO's foregoing final decision was docketed as ASBCA No. 54544.

DECISION

I.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *U. S. Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001).

Respondent's grounds for its summary judgment motion are:

(1) The H-11 Insurance clause provided for government assumption of the risk of damage to vessels, materials and equipment except for the inspection, replacement, repair or renewal of such materials and equipment due to either defective workmanship performed or furnished by the contractor or its subcontractors, or to workmanship not conforming to the contract requirements, whether or not such non-conformity is the result of negligence, and the H-2 Additional Insurance clause provided that the government did not assume the risk of damage to any equipment which results from a defect in a part thereof for which the contractor is responsible pursuant to the Inspection clause.

(2) The undisputed material fact that BIW's failure to use fresh water to flush the DDG 90 FOFT violated BIW's test procedure and contract specifications and "was *a cause* of the corrosion" that led to the damaged fuel pipes (emphasis added).

(3) Such cause is within the foregoing exception to the Navy's assumption of risk for the corrosion damage to the DDG 90 fuel pipes. (Mot. at 15-16)

BIW opposes summary judgment on the grounds that there are genuine issues of disputed material facts because "the corrosion casualty was the product of 6 separate causes working together, namely (1) the river water flush; (2) entry of river water into the piping

other than through the flush; (3) standing water (of any type) in the piping over a period of several months; (4) the Navy's design of a piping system without low-point drains that would permit removal of standing water; (5) the Navy's specification of stainless steel as piping material under conditions where water is present in normal use; and (6) the Navy's specification of belled and flange welded fittings, which leave internal crevices in piping in which water accumulates and corrosion is likely to take place" and submits affidavits in support of such assertions. BIW argues that respondent is not entitled to judgment as a matter of law because builders' risk insurance policy coverage exists where a casualty is the product of multiple causes, one of which is an excepted peril which is a contributory cause, citing *General American Transportation Corp. v. Sun Insurance Office*, 239 F. Supp. 844 (E.D. Tenn. 1965), or a concurrent proximate cause, citing *Mission National Insurance Co. v. Coachella Valley Water District*, 210 Cal. App. 3d 484 (1989). (Opp'n at 4-6, ex. 6; attach. A aff., ¶¶ 4-5)

BIW further opposes the motion on the grounds that there are material disputed facts or respondent is not entitled to judgment as a matter of law on mixed questions of fact and law because of the prior course of dealing of SOSB and BIW with respect to the scope of the Insurance clause's "defective workmanship" provision in DDG 51 class contracts, citing the CO's final decision at page 2, the complaint ¶ 29, and 11 instances of prior practice (opp'n at 7-14, exs. 8-18, attach. B aff.). BIW alternatively argues that it has been denied the opportunity to discover information essential to its opposition, and so decision on the motion should be deferred (opp'n at 15-16, attach. C aff.).

Respondent's 30 July 2004 rebuttal brief added the H-2 Additional Insurance clause argument that the river water flush of the FOFT piping violated the Inspection clause and such piping leaked and did not comply with specifications. To avoid BIW's argument of a genuine dispute of material facts of six causes of the corrosion casualty, respondent stated that "[f]or purposes of summary judgment the Board may take it that the six causes are proven individually or collectively." Regarding *General American* and *Mission National*, respondent argues that without corrosion and resulting leaks, no piping damage would have occurred. Respondent argues that BIW's past practice of interpreting Insurance clause provisions do not challenge respondent's positions because BIW failed to identify specific, pertinent, contract provisions. (Gov't br. at 4-7) BIW identified the Navy's post-1983 Insurance clause (app. br. at 10, 15, attach. B at ¶ 5). BIW responds that the H-2 Additional Insurance clause does not apply because BIW was not "the same supplier" of the FOFT piping, which is not "equipment," is not a "supply," and was "fully compliant" (not corroded, not leaking) prior to the casualty in question.

The present, incomplete appeal record does not enable us to decide as a matter of law that the key phrases in the H-11 Insurance clause are clear and unambiguous, as respondent argues, and whether: (a) SOSB accepted BIW's Insurance clause claims by a prior "course of conduct," as BIW argues, or such argument is mistaken, as the CO

determined, and (b) the “same supplier” and other terms in the H-2 Additional Insurance clause apply to BIW and the FOFT piping, as respondent argues.

Accordingly, we hold that respondent has not shown that it is entitled to judgment as a matter of law. We deny the motion for summary judgment.

II.

The CDA, 41 U.S.C. § 605(a), (c)(2), requires that a contractor submit a written claim, certified if required, to the CO. *See H. L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564 (Fed. Cir. 1995). A contractor claim cannot be raised properly for the first time in the pleadings before the Board. *See JWK International Corp.*, ASBCA No. 54075, 04-1 BCA ¶ 32,561 at 161,057. Respondent contends that BIW’s claim did not include interpretation of past practice or defective stainless steel specifications, such issues were not addressed in the CO’s final decision, and thus the Board lacks CDA jurisdiction to adjudicate the ¶¶ 29 and 30 issues.

BIW’s 1 August 2003 memo and 19 November 2003 claim to SOSB alleged instances of the SOSB’s past practice to allow similar insurance claims (SOFs 10, 12). Past practice was within BIW’s claim and was decided in the CO’s final decision (SOF 13). BIW’s 27 June 2003 and 1 August 2003 letters to SOSB alleged FOFT piping design defects in the specifications (SOFs 9-10), and BIW’s claim and the CO’s final decision referred to those letters (SOFs 12-13). Therefore, the allegedly defective specification design was within BIW’s claim. *Cf. Martin Marietta Corp.*, ASBCA No. 48223, 98-1 BCA ¶ 29,592 at 146,712, *recon. den.* 98-2 BCA ¶ 29,741 at 147,408 (Board had jurisdiction of claim element well known to parties for six years before CO’s final decision, which did not expressly mention such element, but whose calculations were intelligible only in context of such element), *appeal dismissed, Martin Marietta Corp. v. Peters*, 215 F.3d 1350 (Fed. Cir. 1999) (table). Accordingly, we deny respondent’s motions to dismiss ¶¶ 29 and 30 of BIW’s complaint.

Dated: 1 September 2004

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

JACK DELMAN
Administrative Judge
Acting 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. 54544, Appeal of Bath Iron Works Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals