

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Thomas & Sons Building Contractors, Inc.) ASBCA No. 53395
)
Under Contract No. F28609-96-C-0006)

APPEARANCE FOR THE APPELLANT: Mr. James H. Thomas
President

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Matthew H. Beutel, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Thomas & Sons Building Contractors, Inc. (T&S) stopped work on its construction contract before completion, filed for Chapter 11 bankruptcy, rejected the contract in its court-approved reorganization plan, and now appeals the resulting default termination. We deny the appeal.

FINDINGS OF FACT

1. The contract was awarded on 19 January 1996. It required T&S to remove underground oil water separators (OWS), underground storage tanks and related material at 18 locations at McGuire Air Force Base, New Jersey and to install new underground OWS tanks at 17 of those locations.¹ The contract price consisted of a fixed price line item of \$438,000 for the tank removal and replacement work and two estimated quantity unit price line items for removal and disposal of contaminated soil and sludge. (R4, tab 1 at 2, 6)

2. The contract required all work to be completed not later than 300 days after receipt of notice to proceed. (R4, tab 1 at 14) Notice to proceed was received by T&S on 27 February 1996 (R4, tab 56). This set the contract completion date at 23 December 1996.

¹ One of the specified 17 locations for both removal of the existing and installation of a new OWS tank was subsequently deleted by the government (R4, tab 1 at 42, 43).

3. The contract included among other provisions the FAR 52.233-1 DISPUTES (DEC 1991) ALTERNATE I (DEC 1991) clause, the FAR 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989) clause, and the FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause (R4, tab 1 at 16, 17).

4. The contract specifications at section 11301 required the new OWS tanks to be either double wall fiberglass reinforced plastic (FRP) tanks or double wall steel tanks with STIP-3 corrosion protection (R4, tab 54 at 4). Section 11301 also required that complete shop fabrication and field installation drawings for the new OWS tanks be approved by the government before tank fabrication was started (R4, tab 54 at 3).

5. T&S' first four submittals for the OWS tanks showed a steel inner wall and an FRP outer wall (R4, tab 408 at 10, 22, 25-31, 36). T&S did not provide a specification-compliant OWS tank shop drawing until 1 August 1997, and did not provide the field installation instructions until 4 September 1997. The government approved the OWS tank submittal on 12 September 1997. (R4, tab 408 at 39, 46)

6. While the delay in approval of the OWS tank submittal was entirely the fault of T&S, the contracting officer issued a revised notice to proceed on 18 September 1997. This notice was received by T&S on 24 September 1997 and set a new contract completion date of 21 July 1998. (R4, tab 161)

7. On or about 5 November 1997, T&S issued Purchase Order No. 39720 to McTighe Industries, Inc. (McTighe) for the new OWS tanks. The total purchase order price was \$188,879. (R4, tab 169) This was \$101,279 more than the \$87,600 that T&S apparently had included for procurement of the tanks in its contract price to the government.²

8. T&S began mobilization on site on 18 November 1997 (R4, tab 53). Paragraph 1.06, section 01020 of the contract specifications allowed T&S to have only three "active" work areas at any one time. Paragraph 1.06 further provided that "[a] work area is considered 'active' from the time any excavation has begun and will continue until final surface restoration and new separator start-up has been completed." (R4 tab 2 at 22) During the first two weeks of December 1997, T&S began draining and removing the existing OWS tanks at Buildings 2220, 1801 and 1811 (R4, tab 53).

9. By 29 December 1997, McTighe had shipped all of the new OWS tanks to T&S storage. On 31 December 1997 it invoiced T&S for the full amount of the purchase order. (R4, tab 226 at 2, tab 256) On 24 February 1998, T&S requested a progress

² T&S' Contract Progress Schedule allocated 20 percent of the fixed price work to procurement of the new tanks (R4, tab 49 at 1).

payment from the government in the amount of \$119,154.40. The government paid the requested amount, but T&S did not pay McTighe the \$87,600 included therein for the new OWS tanks. (R4, tabs 213 at 1-2; 256, 304, 357)³

10. In February 1998, T&S began the excavations for installation of the new OWS tanks at Buildings 1801, 1811 and 3350. In April 1998, the government allowed T&S to begin work on three additional areas (Buildings 1925, 1932 and 2415), notwithstanding that it had not yet completed the work at Buildings 2220, 1801, 1811 or 3350. (R4, tab 53)

11. Heavy rains and muddy site conditions hampered work on all building sites from the middle of January through the end of May 1998. The wet weather and resulting high water table required frequent rework of the excavations for the new OWS tanks. (R4, tab 53)⁴ In addition to the wet weather, progress on the installation of the new OWS tanks at Buildings 1801 and 2415 was impeded by lack of pipeline and sanitary sewer connection information on the contract drawings (R4, tab 253).

12. On 3 July 1998, T&S sent the contracting officer a description of the technical problems it was having at the six areas where it was installing new OWS tanks. Most of the problems involved the elevations of the existing influent and effluent pipes that were to be attached to the new OWS tanks, the manhole cover sizes providing access to the tanks, the location of the catch basins that were to be installed “up gradient” of the new OWS tanks, and the location of manholes on the effluent water lines running from the new OWS tanks to the base sanitary sewer system. (R4, tab 321; app. supp. R4, tab 14 at G-4 n.3)

13. T&S did not perform any substantial work on the contract after 8 August 1998 (R4, tab 53). On 9 August 1998, the status of completion in the seven areas where work had been performed was as follows:

³ The record includes the face of a T&S check dated 25 March 1998 and payable to McTighe in the amount of \$35,000. The check is not signed, and McTighe’s invoice of 30 April 1998 does not indicate any payment received. (R4, tabs 226, 256) On 29 June 1998, the government requested T&S to document why it had not paid McTighe (R4, tab 318). T&S did not respond.

⁴ Paragraph 3.02, section 02220 of the contract specifications required T&S to “at all times provide and maintain proper and satisfactory means and devices for the removal of all water entering the excavations, and shall remove all such water as fast as it may collect,” and to lower and maintain the ground water beneath excavations “at all times when work thereon is in progress,” (R4, tab 2 at 78-79)

a. Building 2220: This was the remove only site. The old OWS and storage tanks were removed and the excavations backfilled (R4, tab 53; tr. 4/21-23). The replacement of topsoil and reseeded, however, had not been performed. The topsoil and reseeded work was required by paragraphs 1.01 and 3.08 of specification section 02502. (R4, tab 2 at 95, 99, tab 295; app. supp. R4, tab 10 at 5) T&S has not shown any technical reasons why that work could not have been completed.

b. Building 1801: The old OWS and storage tanks were removed and the new OWS tank installed. A blockage in the sanitary sewer line to which the new OWS tank effluent line was connected, however, prevented successful testing and operation. Removal of the blockage was not part of the T&S contract work, nor was it included subsequently in the takeover surety's work. (R4 tab 36 at 8, tab 53)

c. Building 1811: The old OWS and storage tanks were removed and the new OWS tank was installed except for "backfill, put the tower on, and put the concrete cap on" (tr. 4/25). T&S alleges that the work at Building 1811 could not be completed because the government did not identify the electric power tie-in point for the tank overflow alarm (tr. 4/25).⁵ The contract drawings showed the tie-in point somewhere inside Building 1811. The new OWS tank was outside the building. (App. supp. R4, tab 14 at G-4) While the new OWS tank would not be fully operational without the alarm system, T&S has failed to show any technical reason why it could not complete the backfill, tower installation or concrete cap work that were outside the building.

d. Building 1932: All work at Building 1932 was completed and acceptable to the government except for connecting the pipes, final testing and closure (R4, tab 360 at 2). T&S alleges that : "The problem associated with Building 1931 [sic] was that the catch basin was not needed, and was above ground due to the shallow depth of the effluent line and tying in the floor drain." T&S further alleges that "[t]here was also no electrical connection designation for the power needed to monitor the [new OWS tank]." (App. br. at 9) The general note on the Building 1932 drawing requiring a catch basin "up gradient of oil/water separator" was obviously inapplicable to the arrangement shown on the drawing. Unlike other areas where the new OWS tanks were set in excavations outside the buildings, the new OWS at Building 1932 was installed beneath a concrete floor and the influent pipe was shown connected directly to a floor drain. (App. supp. R4, tab 14 at G-10) T&S has failed to show how the alleged catch basin problem or the absence of the electrical tie-in point for the alarm system prevented it from completing the pipe connections.

⁵ T&S also alleges that it required information as to the location of a manhole and catch basin for the new OWS tank installation (tr. 4/26-27). The applicable contract drawing shows to scale the location of both (app. supp. R4, tab 14 at G-4).

e. Building 1925: T&S' job superintendent testified that the only thing left at Building 1925 was "to put the cone around the manway . . . cast the concrete on top and set the manhole and put the [alarm system] in" (tr. 4/46-47). As in the other areas, the location of the electric power tie-in point for the overflow alarm system had not been provided by the government (app. supp. R4, tab 14 at G-7). T&S, however, has failed to show how the absence of that information or any other technical reason prevented it from putting the cone around the new OWS tank manway, casting the concrete on top and setting the manhole.

f. Building 2415: The old OWS tank was removed and the new OWS tank was placed on site but not installed (app. supp. R4, tab 14 at G-4). The new OWS tank was not installed because the existing manhole tie-in point for the effluent line from the new OWS tank to the storm sewer system was not correctly identified on the drawing and could not be identified on the ground (tr. 4/48-52).

g. Building 3350: The old OWS and storage tanks were removed and the new OWS tank was placed on site but not installed. It was not installed because the specified excavation for its installation could not be dewatered (tr. 4/54-55). After termination of the T&S contract, the Building 3350 installation was deleted from the project (app. supp. R4, tab 10 at 2, 5).

14. At a meeting with the government on 13 August 1998 and by letter dated 28 August 1998, T&S asserted the need for answers to various technical questions before it could complete the work. Answers were provided by the government at the meeting and in a subsequent letter dated 1 October 1998. (R4, tabs 345, 360)

15. On 31 August and 3 September 1998, T&S submitted invoices for work completed. As required by the Payments Under Fixed-Price Construction Contracts clause of the contract,⁶ T&S certified on the invoices that: "Payments to subcontractors and suppliers have been made from previous payments received under the contract," (R4, tab 357) By letter dated 10 September 1998, the government returned the invoices to T&S unpaid on the ground that McTighe, the supplier of the OWS tanks, had not been paid from the previous progress payments and that payment on the certification in the invoices would subject T&S to a charge of fraud (R4, tab 357). *See* finding 9.

16. By letter to the contracting officer dated 7 October 1998, T&S again alleged that technical problems had not been resolved and concluded with the following: "There are still outstanding issues. The number one issue is payment. There is no way Thomas and Sons can go forward until the payment issue is put to rest." (R4, tab 362)

⁶ *See* finding 3.

17. On 22 October 1998, T&S resubmitted its previously rejected 31 August and 3 September 1998 invoices with a statement that: “McTighe is a second tier sub” (R4, tab 52). The government rejected this resubmission for the same reason it rejected the initial submission – T&S’ failure to pay McTighe from previous progress payments (R4, tab 369). On 5 November 1998, T&S made a second resubmission of the same 31 August and 3 September 1998 invoices with the following statement: “As to McTighe . . . we do not have a contract with this firm. Our contract is with Lowy Sales, Inc. of New York City” (R4, tab 34). This statement and the statement in its 22 October 1998 letter that McTighe was “a second tier sub” were patently incorrect. *See* finding 7. Lowy Sales, Inc. was McTighe’s sales representative in New Jersey (R4, tab 226 at 2). We find no bad faith or abuse of discretion by the government in withholding payment of the invoices pending compliance by T&S with the required certifications.

18. On 2 November 1998, T&S filed for Chapter 7 Bankruptcy. Schedule F of the filing listed McTighe as an unsecured creditor for the amount of \$153,879. (R4, tab 370 at 1, 28) This was the amount of the purchase order issued to McTighe for the new OWS tanks (\$188,879) less the alleged \$35,000 payment. *See* findings 7, 9 n.3. In Schedule G of its Chapter 7 filing, T&S stated that it had no executory contracts (R4, tab 370 at 38).

19. On 17 November 1998 T&S converted its Chapter 7 filing to a Chapter 11 filing (R4, tab 6 at 1). In the Chapter 11 proceeding, T&S did not assume performance of the OWS contract, and its Third Modified Plan of Reorganization, as amended and confirmed by the Bankruptcy Court on 13 February 2001 stated at Article III, Section 3 that: “[A]ll executory contracts or unexpired leases of the Debtor not previously assumed or rejected under 11 U.S.C. §365 are hereby expressly rejected. Claims for damages resulting from such rejection shall be included in Class 1.” (R4, tab 45 at 7)

20. On 14 December 1998, the government issued unilateral Modification No. P00004 terminating the contract for default (R4, tab 15). On appeal, the purported termination was held by this Board to be null and void as a violation of the automatic stay of 11 U.S.C. § 362(a)(3). *Thomas & Sons Building Contractors*, ASBCA No. 51996 (decided 7 December 1999) (unpublished). (R4, tab 16) However, following the order confirming the Chapter 11 plan for T&S (*see* finding 19), the government on 27 February 2001 terminated the contract for default on the ground that T&S had expressly rejected the contract in its Chapter 11 plan (R4, tab 48). This appeal followed.

DECISION

T&S did not perform any substantial work on the contract after 8 August 1998. At that time it had performed substantial work on seven of the building areas which had

been released for work by the government, and had completed none. *See* finding 13. Two months after it stopped work, T&S told the contracting officer that “[t]he number one issue is payment” and that “[t]here is no way Thomas and Sons can go forward until the payment issue is put to rest.” *See* finding 16. The payment issue was the government’s refusal to pay T&S invoices that contained incorrect certifications. *See* findings 9, 15, 17. Less than one month later, T&S filed for bankruptcy. In the bankruptcy proceedings, T&S denied that it had any executory contracts. It did not expressly assume the incomplete (*i.e.*, executory) OWS contract, and its final court-approved reorganization plan expressly rejected all executory contracts not previously assumed or rejected. *See* findings 18, 19.

By these actions, T&S manifested a positive, definite, unconditional and unequivocal intent not to render the required performance under the OWS contract. That required performance included, among other things, the obligation under the Disputes – Alternate I clause of the contract to “proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract.” *See* finding 3. By stopping work and rejecting the contract in the bankruptcy proceedings, T&S gave the government the right to terminate the contract for default unless the default was beyond T&S’ control and without its fault or negligence, or was justified by a material breach of contract by the government. *See Graham International*, ASBCA No. 50360, 01-1 BCA ¶ 31,222 at 154,111.

T&S alleges that it stopped work because the government’s plans and specifications were defective and because the government failed to resolve “acute technical problems and errors” (app. br. at 7, 25). While some of the incomplete work in the seven building areas could not be completed for reasons beyond the control and without the fault or negligence of T&S, there was other incomplete work in those areas that could have been completed. There is no evidence of any physical or technical impediment to (i) placing the top soil and seeding at Building 2220 (*see* finding 13.a); (ii) completing the backfill, OWS tank tower installation and concrete cap at Building 1811 (*see* finding 13.c); (iii) completing the pipe connections at Building 1932 (*see* finding 13.d); or (iv) putting the cone around the OWS tank manway, casting the concrete on top, and setting the manhole at Building 1925 (*see* finding 13.f).

T&S alleges that the government entered into the OWS contract “with no intention to perform it and unjustly enriched itself and benefited by issuing an improper Termination for Default . . . in lieu of a Termination for Convenience” (app. br. at 18). There is not a scintilla of evidence supporting the allegation that the government did not intend to perform the contract. With respect to the “improper” termination for default on 14 December 1998, that termination was improper only because the automatic stay invoked by T&S filing for bankruptcy was in effect at the time. *See* finding 20. When

T&S' Chapter 11 reorganization plan was confirmed by the bankruptcy court, the stay was lifted and the government was entitled to proceed with the default termination. 11 U.S.C. § 362(c).

We have also found no bad faith or abuse of discretion by the government in withholding payment of T&S' 31 August and 3 September 1998 invoices. *See* finding 17. Pursuant to the Payments clause of the contract, correctly certified invoices must be provided "or payment shall not be made." FAR 52.232-5(c). *See* finding 3. Moreover, to the extent there were good faith disputes regarding technical problems or payments, T&S was obligated under the Disputes clause of the contract to proceed with the work that was possible to perform pending resolution of the disputes. FAR 52.233-1, Alternate I (i). *See* finding 3. It did not do so.

The appeal is denied.

Dated: 29 September 2005

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 No. 53395, Appeal of Thomas & Sons Building Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

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