

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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ACR Machine, Inc. ) ASBCA No. 54734  
)  
Under Contract No. DAAE07-03-C-N027 )

APPEARANCE FOR THE APPELLANT: Marc Lamer, Esq.  
Kostos and Lamer, P.C.  
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA  
Chief Trial Attorney  
MAJ Sunny S. Ahn, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN  
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

ACR Machine, Inc. (ACR) appeals the default termination of its supply contract after it failed to make the first four of five scheduled deliveries. Both parties move for summary judgment. We grant ACR's motion and sustain the appeal as to the first three deliveries and deny both motions as to the fourth and fifth.

STATEMENT OF FACTS (SOF)  
FOR PURPOSES OF THE MOTIONS

1. On 13 December 2002, the U.S. Army Tank-Automotive and Armaments Command (TACOM) awarded the captioned contract to ACR. The contract required ACR to manufacture and deliver 98 mechanical housings in accordance with government specifications and drawings. The contract included among other provisions the FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE CONTRACT) (APR 1984) clause. (R4, tab 1 at 1, 4, 16-17)

2. The contract delivery schedule as modified by bilateral Modification No. P00004 required five incremental deliveries on the dates and in the amounts as follows: 5 March 2004 (7), 16 April 2004 (20), 18 June 2004 (25), 9 July 2004 (20) and 13 August 2004 (26). (R4, tab 30)

3. ACR failed to make the required 5 March 2004 delivery. According to ACR's contract administrator, this default was caused by "continuing problems with the castings produced by [the casting subcontractor]." (Follet decl., ¶ 17)<sup>1</sup>

4. On 10 March 2004, the government industrial specialist monitoring ACR's performance (Mr. Nowicki) visited ACR's plant "to verify completion rates." On 11 March 2004, Mr. Nowicki requested a progress report from the casting supplier. (R4, tab 37 at 6-7)

5. On 24 March 2004, ACR told Mr. Nowicki that ACR could "possibly" meet the scheduled 16 April 2004 delivery date. Mr. Nowicki "stressed the importance of ACR meeting that date." (Follet decl., ¶ 27)

6. On 26 March 2004, ACR requested the government to provide enlarged versions of two drawings. The government replied on the same day with an offer to provide expandable electronic drawings. (R4, tabs 38, 39) Section L-12 of the contract solicitation stated that the contract technical data package ("TDP") was available only in electronic format (R4, tab 3 at 40).

7. During a visit to ACR on 7 April 2004, Mr. Nowicki told ACR that the government "urgently needed" the housings and that ACR should do "everything in its power to get them delivered" (Follet decl., ¶ 36).

8. ACR failed to make the required 16 April 2004 delivery. According to ACR's contract administrator, the reason for this default was "difficulty machining the turbine housing castings" (Follet decl., ¶ 38). On 22 April 2004, the government paid ACR's progress payment request No. 3 in the amount of \$89,441 (Follet decl., ¶¶ 35, 42).

9. On 27 May 2004, Mr. Nowicki reported to TACOM that "ACR is making progress and are about two weeks away from shipping their first group of items (3 or 4 pieces)" (R4, tab 42). On 4 June, the government paid ACR's progress payment request No. 4 in the amount of \$64,698 (Follet decl., ¶¶ 49, 58).

10. On 10 June 2004, the government answered an inquiry from ACR as to the location of a dimension (R4, tabs 41, 43).

11. ACR failed to make the required 18 June 2004 delivery. According to ACR's contract administrator, this default was caused by "difficulty machining the turbine housing castings." (Follet decl., ¶ 62)

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<sup>1</sup> The declaration under penalty of perjury by Mr. Edward Follet, ACR's contract administrator, is an attachment to ACR's Motion for Summary Judgment.

12. The government did not issue a show cause letter or otherwise indicate an intention to terminate the contract after the 5 March, the 16 April or the 18 June 2004 delivery defaults or prior to the 9 July 2004 delivery date.

13. ACR failed to make the required 9 July 2004 delivery. According to ACR's contract administrator, this default was caused by "difficulty machining the turbine housing castings." (Follett decl., ¶ 69)

14. On 16 July 2004, Mr. Nowicki visited ACR and stated, according to ACR, "that he had been requested by TACOM to have ACR provide the Government with a new 'realistic' delivery schedule" (Follett decl., ¶ 72). ACR replied with a schedule showing monthly deliveries over a 17-month period beginning in November 2004 (R4, tab 44). The TACOM contracting officer declares that he "did not request this revision and if Mr. Nowicki requested it, it was without my knowledge" (decl. at 1).<sup>2</sup>

15. On 19 July 2004, Mr. Nowicki forwarded the schedule to the TACOM contracting office with a message stating among other things that: "I will request engineering assistance . . . to provide you with a more realistic schedule to be used for negotiating a new delivery schedule with ACR Machine." (R4, tab 44)

16. There is no evidence that Mr. Nowicki's message to TACOM was also sent to ACR. ACR's contract administrator does not allege in his declaration, nor does the record on the motion otherwise show, that the government ever offered to negotiate a new schedule with ACR to replace the Modification No. P00004 schedule.

17. On 21 July 2004, a government engineer (Mr. Lee) visited ACR at the request of Mr. Nowicki. At the start of his visit, Mr. Lee told ACR that the government was considering terminating the contract for default. Mr. Lee requested ACR to give him the "new" production schedule. ACR gave him the 16 July 2004 schedule previously given to Mr. Nowicki. Mr. Lee then went through the plant to "assess exactly where ACR's performance stood and report to TACOM on the likelihood of ACR meeting the delivery schedule." (Follett decl., ¶¶ 74-76)

18. On 22 July 2004, ACR received a "show cause" letter from the contracting officer stating that the government was considering default termination for ACR's failure to deliver on time. The letter provided ACR an opportunity to present any facts bearing on the question, and concluded with a statement that: "it is not the intention of the

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<sup>2</sup> The TACOM contracting officer's declaration is an attachment to the government's 15 December 2005 Reply.

Government to condone any delinquency or to waive any rights the Government has under the contract.” (R4, tab 46; Follet decl., ¶ 77)

19. On 30 July 2004, the government received ACR’s reply to the show cause letter. The reply claimed no excusable cause of delay, and proposed a new 10-month delivery schedule beginning in November 2004, with consideration to the government of \$2,500. (R4, tab 49)

20. The government did not reply to ACR’s proposed revised schedule. By final decision dated 13 August 2004, the contracting officer terminated the contract for default for failure to deliver on time and failure to show excusable cause (R4, tab 51). At termination, no new delivery dates had been established for the 52 items in the first three defaulted deliveries under the Modification No. P00004 schedule.

21. After its second (16 April 2004) default and up to the time it was terminated, ACR continued working on the contract “because it believed that the Government was not insisting on strict compliance with the P00004 delivery schedule” and “still wanted the contract completed.” (Follet decl., ¶¶ 38, 62, 78, 86)

### DECISION

It is not disputed that ACR failed to make any of the four deliveries required by the contract up to the time it was terminated. ACR has offered no excusable cause for those defaults. ACR’s sole defense to the termination is the allegation that the government by its conduct waived the entire Modification No. P00004 delivery schedule and failed to set a new schedule prior to the termination, or, at a minimum, waived the first three delivery defaults. The government cross-moves for summary judgment upon the ground that it “did not waive all of its rights to terminate for default simply because it chose not to terminate ACR’s contract for one of the earlier delivery dates” (gov’t opp’n at 20).

“Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.” Where parties file cross-motions, the Board “must evaluate each party’s motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

The necessary elements of a government waiver of a contract delivery schedule are (i) a failure to terminate within a reasonable time of a default under circumstances indicating forbearance, and (ii) reliance by the contractor on the failure to terminate the contract and continued performance by the contractor with the government’s knowledge

and implied or express consent. *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969). Since the government has conceded that it waived the first three delivery dates (gov't reply br. at 7), and since it is not disputed that no new dates were set for those deliveries, the dispute on the motions is limited to whether there was also a waiver of the fourth and fifth delivery dates.

With respect to part (i) of the *DeVito* rule, ACR argues that the government's conduct from the time of the first delivery default on 5 March 2004 through Mr. Nowicki's 16 July 2004 visit "gave [ACR] the clear understanding that [the government] was not insisting on adherence to the requirements of the contractual delivery schedule (i.e., time was not 'of the essence')" (app. reply br. at 11).<sup>3</sup> The government argues that its waiver of the first three of the five delivery dates did not automatically waive the remaining two, citing *Novelty Products Co.*, ASBCA No. 21077, 78-1 BCA ¶ 12,989 at 63,344 (gov't opp'n at 20).

We agree with the government that its waiver of the first three dates did not automatically waive the remaining two. Each successive increment on the delivery schedule was a severable obligation for default of which the government was entitled to terminate the contract. *Flameco Engineering, Inc.*, ASBCA No. 39337, 92-1 BCA ¶ 24,518 at 122,343. That does not mean, however, that those waivers might not be a factor, in conjunction with government conduct after the fourth default, in reasonably indicating a government intention to continue the contract after the fourth default.

Mr. Follet's declaration states that on 16 July 2004, seven days after the fourth default, Mr. Nowicki visited the plant and told ACR that "he had been requested by TACOM to have ACR provide the government with a new 'realistic' delivery schedule." The TACOM contracting officer, however, declares that he "did not request this revision and if Mr. Nowicki requested it, it was without my knowledge." (SOF, ¶14). The request for a new delivery schedule was at least arguably an indication by the government of its intent to continue the contract, given that the government had previously agreed to an extension of the delivery schedule (Modification No. P00004) and there had been no reference to the possibility of a termination for default. *See S.T. Research Corp.*, ASBCA No. 39600, 92-2 BCA ¶ 24,838 at 123,926-27. Whether the request for the schedule was in fact represented by Mr. Nowicki as being from TACOM, and whether the request was in fact authorized by TACOM are genuine issues of material fact precluding summary judgment for either party as to the fourth and fifth deliveries.

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<sup>3</sup> The proper test, however, is not the subjective one of what ACR's "clear understanding" was, but an objective one of whether the government's actions were such "as to reasonably indicate an election by the government to continue the contract." *See Northrop Carolina, Inc. v. United States*, 22 CCF ¶ 80,535 at 85,754, 553 F.2d 105 (Ct. Cl. 1977).

ACR's motion is granted and the appeal is sustained as to the 52 items scheduled for delivery on 5 March, 16 April and 18 June 2004. *See E.O Manufacturing Company, Inc.*, ASBCA No. 52120, 01-2 BCA ¶ 31,587 at 156,084. As to the items in the fourth and fifth deliveries, both motions are denied.

Dated: 18 August 2006

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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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. 54734, Appeal of ACR Machine, Inc., rendered in conformance with the Board's Charter.

Dated:

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