

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Demusz Manufacturing Company, Inc.) ASBCA No. 55311
Under Contract No. F34601-03-C-0147)

APPEARANCE FOR THE APPELLANT: Michael J. Whelton, Esq.
East Hartford, CT

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
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OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT

Demusz Manufacturing Company, Inc. (Demusz) was awarded a contract to manufacture and deliver steel mating rings for the F110GE100 engines by the Air Force (the government). After extending the delivery date for the production units several times, the government terminated the contract for default. Demusz timely appealed. The government moves for summary judgment. Demusz opposes the motion.

UNDISPUTED FACTS

In moving for summary judgment, the government proposed certain facts which are not challenged by Demusz. For purpose of deciding the government’s motion, we set forth below, the facts which are not in dispute, although organized in a different fashion from the way the government proposed them, and with a few immaterial corrections.

1. On 13 February 2003, the government awarded Demusz a firm-fixed price contract to manufacture and deliver steel mating rings used on F110GE100 aircraft engines. The contract was in the amount of \$173,555.00. (Mot., ¶ 1)

2. The contract incorporated by reference FAR 52.209-4, FIRST ARTICLE APPROVAL – GOVERNMENT TESTING (SEP 1989) and FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) (mot., ¶¶ 4, 6). Under the default clause, the government is authorized to terminate the contract if the contractor fails to “(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension.” The default clause specifies various circumstances where the default may be excusable, including “[i]f the failure to perform is caused by the default of

a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either”

3. Under the contract, Demusz was required to deliver three first article samples by 31 July 2003. The production units, 103 of them, were to be delivered not later than 90 days from the date of acceptance by the government of the first articles. (Mot., ¶ 5; R4, tab 3)

4. The contract directed that Demusz purchase the steel necessary for production from one of the following forgers: Monroe Forge of Rochester, New York (Monroe Forge); Edgewater Steel, Ltd. of Oakmont, Pennsylvania; or Forged Metals, Inc. of Fontana, California (Forged Metals). There is no provision in the contract under which the government warranted proper forging of the steel to be purchased or timely delivery of the steel by the named forgers. (Mot., ¶ 7)

5. Demusz failed to deliver the first articles on 31 July 2003 (mot., ¶ 8). The parties entered into bilateral Modification No. P00001 on 25 September 2003. The modification extended the first article delivery date to 15 October 2003. It also shortened the delivery date for the 103 production units from 90 to 60 days following acceptance of the first articles by the government. (Mot., ¶ 9; R4, tab 4 at 3)

6. Demusz failed to deliver the first articles on 15 October 2003. The Administrative Contracting Officer (ACO) recommended extension of the delivery date for the first articles. The parties did not execute a contract modification to this effect. (Mot., ¶ 10)

7. Demusz delivered the first articles on 9 February 2004 (mot., ¶ 11). First article S/N DE21346 and S/N DE21347 were inspected dimensionally and S/N DE21361 was inspected for metallurgic characteristics. S/N DE21346 was found to be dimensionally acceptable. S/N DE21347 was dimensionally unacceptable. S/N DE21361 was found to have an average hardness of 24.5 on the Rockwell C hardness scale, and was, therefore unacceptable. The acceptable range was 26 to 34 on the Rockwell C hardness scale. One first article was destroyed during inspection and two were returned to Demusz. (Mot., ¶ 12)

8. On 14 and 25 May 2004, the parties executed bilateral Modification No. P00002. This modification established 15 July 2004 as the date for resubmission of the first articles. The delivery date for the production units remained as provided in bilateral Modification No. P00001: 60 days after acceptance of the first articles, or by 15 December 2004. Demusz agreed in the modification that “[f]ailure to meet the delivery schedule . . . above could result in termination of the contract for default.” (Mot., ¶¶ 12, 13; R4, tab 6)

9. Demusz contacted Forged Metals from whom it had purchased the steel for the mating rings. Forged Metals refused to replace the steel and avoided discussing the issue with Demusz. (Mot., ¶ 14) As of 24 September 2004, Demusz began a dialogue with Forged Metals. Forged Metals has refused to replace the unacceptably soft steel but has offered to provide replacements at an increased cost. Demusz has rejected the offer. Demusz and Forged Metals are still in negotiation over the increased cost. (Mot., ¶ 15; compl., ¶ 18)

10. Demusz resubmitted its first article samples on 19 October 2004 (compl., ¶ 15; mot., ¶ 16). The parties executed bilateral Modification No. P00003 pursuant to which the government “conditionally approve[d]” the first articles, and authorized delivery of the production units subject to correction of deficiencies. The modification established 31 March 2005 as the delivery date for the 103 production units, and provided that “[f]ailure to meet the extended delivery schedule could result in termination of the contract for default.” (Mot., ¶¶ 17, 18; R4, tab 8)

11. Demusz failed to deliver the production units on 31 March 2005 (mot., ¶ 19). On 14 June 2005, Demusz requested a waiver of the Rockwell hardness for the mating rings. The government denied the request on or about 7 July 2005. (Mot., ¶ 20)

12. By e-mail sent on 10 August 2005, Demusz advised that it would ship 16 mating rings by 30 September 2005 and the balance starting 28 October 2005. The e-mail stated that it had material for another contract that it could use for the contract. (Mot., ¶ 21; R4, tab 19) The government notified Demusz by e-mail on 26 August 2005 that “shipments must begin on or before 30 September,” and “[a]ny further delays could result in termination of the contract” (mot., ¶ 22; R4, tab 20). On 6 September 2005, the parties executed bilateral Modification No. A00003 which extended the delivery of 16 mating rings to 30 September 2005; 42 mating rings to 30 November 2005; and 43 mating rings to 30 December 2005 (mot., ¶ 23; R4, tab 22).

13. As of 5 October 2005, Demusz had not delivered the 16 mating rings due on 30 September 2005 (mot., ¶ 24). On 18 October 2005, the government notified Demusz that the Terminations Contracting Officer (TCO) would initiate termination of the contract (mot., ¶ 25; R4, tab 29). The TCO terminated Demusz’s contract for default by final decision issued on 28 October 2005 (mot., ¶¶ 26, 27; R4, tabs 30, 31). Demusz timely appealed.

14. After the government filed its answer to Demusz’s complaint, appellant filed a reply in which it asserted, with supporting documentation, that Edgewater, one of the three sources for the steel for use under the contract “had filed for bankruptcy, and ceased operations” as of 28 September 2001. Demusz’s reply asserted that the remaining two steel sources, Monroe Forge and Forged Metals were purchased and had become a part of Firth Rixson, Ltd. (Firth Rixson) “at the time the instant contract was awarded.” Demusz

says that “since both Monroe Forge and Forged Metals were part of Firth Rixson Ltd. at the time the instant contract was awarded, the Appellant was required by the respondent to use Firth Rixson Ltd. as its subcontractor as it was the only supplier approved by the Respondent.” The government has not disputed these assertions but has disagreed with Demusz’s legal conclusion that it “should not be held responsible for the misfeasance and nonfeasance of the supplier it was required to contract with, pursuant to the terms of the instant contract, as mandated by the Respondent.” (App. reply at 1, 2)

DECISION

In moving for summary judgment, the government contends that it “did not act in any manner to delay delivery of the steel,” and that, as a matter of law, Demusz was responsible for “the nonperformance of its subcontractor, Forged Metals.” Addressing Demusz’s reply to its answer, the government contends that, whether there were multiple suppliers, or as occurred in this case, the multiple sources became a sole-source, the government, as a matter of law, is not responsible for the failure of performance by that sole-source subcontractor. (Mot. at 10, 11)

In opposing the government’s motion, Demusz asserts that the government was aware of the problems that it faced in dealing with Firth Rixson, and that since the government knew there was no other supplier available to provide it with the requisite material to satisfy the contract, it was “reasonable for the Appellant to believe that the Respondent did warranty the performance of Firth Rixson, Ltd” (opp’n at 3-4). Demusz’s opposition also argues that if this does not persuade the Board of the existence of a “question of material fact,” then it claims that the “facts and circumstances relating to the issues of the volatility of the metals market, the sole source supplier and the nonperformance of its subcontractor made it impossible for it to perform its obligations under the terms of the instant contract” (opp’n at 4).

In support of its opposition, Demusz attached an affidavit from its president, Waldemar Demusz (Demusz aff.), which states, in part:

3. That, from late 2004 through 2005, there was a tremendous amount of volatility in the metals market which caused shortages in supply and delays in delivery.
4. That this volatility could not have been reasonably foreseen as that market had been stable for many years.
5. That I reasonably believed that when the Respondent agreed to extend the delivery date of the units relating to the instant contract on four separate occasions, over a

two-year period, the Respondent was, in fact, warranting the performance of Firth Rixson, Ltd.

6. Contrary to the Appellant's [sic] assertions, I could not have obtained the steel from one of the other specified subcontractors when the problems developed with Firth Rixson, Ltd. as no other supplier existed.
7. I was not negligent in not seeking to obtain steel from another specified subcontractor, when it became apparent that Firth Rixson, Ltd. would not timely deliver the steel, as none existed.
8. I finally received Firth Rixson's delivery of the material on September 21, 2005.
9. I needed a reasonable period of time to machine the material and it was impossible to do so prior to September 30, 2005.

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

To counter a motion for summary judgment, more than mere assertions of counsel are necessary. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). The nonmovant may not rest on its conclusory pleadings, but must set out, in affidavit or otherwise, what specific evidence could be offered at trial. Failing to do so may result in the motion being granted. Conclusory assertions do not raise a genuine issue of fact. *Id.* The party with the burden of proof must support its position with "more than a scintilla of evidence." *Walker v. American Motorists Insurance Co.*, 529 F.2d 1163, 1165 (5th Cir. 1976).

It is undisputed that the government extended the delivery date for the production units on four separate occasions resulting in a final delivery date of 30 September 2005 (facts, ¶¶ 3, 5, 8, 10, 12). It is undisputed that Demusz failed to deliver the 16 production units it agreed to deliver on 30 September 2005 pursuant to bilateral Modification

No. A00003 (facts, ¶ 13). At trial, it would be Demusz's burden to prove by a preponderance of the evidence that its failure to deliver was beyond the control and without the fault or negligence of itself and its subcontractor. *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996); *Culligan Water Conditioning*, ASBCA No. 29624, 85-3 BCA ¶ 18,405 at 92,334 citing *Riggs Engineering Co.*, ASBCA No. 26509, 82-2 BCA ¶ 15,955.

Sole-Source Supplier

As the government points out, it actually specified three sources for the steel. At the time the contract was awarded, one of the sources had ceased operation, and the other two had been purchased by Firth Rixson. (Gov't reply at 7 n.4) Assuming that the government did specify a sole source, as a matter of law, this does not excuse a contractor's failure to deliver timely. We set forth the applicable law in *Alabama Dry Dock & Shipbuilding Corp.*, ASBCA No. 39215, 90-2 BCA ¶ 22,855 at 114,811-12:

We consider the law clear that when the Government directs use of a sole source it represents only that the requirements of the contract can be met by use of the item and not that the item will be properly manufactured or delivered on time. *Cascade Electric Company*, ASBCA No. 28674, 84-1 BCA ¶ 17,210 at 85,682-83; *Environmental Tectonics Corporation, supra*; *Monaco Enterprises, Inc., supra*; *Ainslie Corp., supra*. Thus, even accepting the fact that Pacific Power was a sole source and there was no "or equal" available, the Government did not represent, or warrant that Pacific Power would either properly manufacture the inverter or timely deliver it.

This should dispose of one of Demusz's primary objections to summary judgment on the basis that the government somehow "did warranty the performance" of its subcontractor Firth Rixson because "there was no other supplier available to provide the Appellant with the requisite material needed to satisfy the terms of the instant contract" (opp'n at 3).

Steel Shortage

In *Eppco Metals Corp.*, ASBCA No. 38305, 90-1 BCA ¶ 22,349, the government awarded a contract for manufacture of Aluminum Drum Cases and required a First Article Test Report (FATR). Manufacture of the drum cases required forged aluminum rings. According to the contractor, in June 1988, it received only one quote from a supplier which possessed the special tooling necessary to produce the forged aluminum rings. The contractor alleged that it tried to find alternate suppliers but due to the

required special tooling and a national aluminum shortage, the rings could not be supplied to meet the FATR due date. The contractor requested a time extension “due to the aluminum shortage in the country.” The request was denied by the contracting officer (CO). The CO subsequently terminated the contract when the contractor failed to meet the FATR due date. The government moved for summary judgment, contending that the alleged national aluminum shortage would not excuse the contractor for either fault or negligence leading to the delay in delivery. In granting the government’s motion, we said that, even if there was an aluminum shortage, the delay was not without the contractor’s fault or negligence because its own moving papers showed that it first learned of the long delivery lead time from its supplier in June and it waited until September to order the necessary rings. In reaching our decision, we stated at 112,304:

. . . [T]he claimed shortage is not dispositive here. While unforeseeable raw material shortages may give rise to excusable delay, *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 428-30 (Ct. Cl. 1969), such shortages do not *per se* relieve a contractor of its performance obligations. We have long held that conditions in an industry are presumed to be “within the [contractor’s] knowledge and contemplation in accepting the contract.” *Arlington Sales Agency, Inc.*, ASBCA No. 3780, 58-1 BCA ¶ 1645 at 6104.

In countering the government’s motion for summary judgment, Demusz’s opposition asserts that “[a]ppellant claims that the facts and circumstances relating to the issues of the volatility of the metals market . . . made it impossible for it to perform its obligations under the terms of the instant contract” (opp’n at 4). This assertion is supported by an affidavit from Demusz’s president in which he states “[t]hat, from late 2004 through 2005, there was a tremendous amount of volatility in the metals market which caused shortages in supply and delays in delivery” (Demusz aff., ¶ 3). The affidavit has not provided any specific linkage between the alleged steel shortages and its subcontractor’s failure to deliver. This conclusory assertion does not meet the “more than a scintilla of evidence” test. In light of the requirement that the nonmovant’s affidavit must set out “what specific evidence could be offered at trial,” the assertion offered does not raise a genuine issue of material fact. *Pure Gold, supra*.

Demusz cites *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966) and argues that it may be able to prove at trial that performance was impossible. To support a case of impossibility of performance as formulated in that case, a contractor must prove: (1) a contingency – something unexpected – must have occurred; (2) the risk of the unexpected occurrence must not have been allocated either by agreement or by custom; and (3) occurrence of the contingency must have rendered performance commercially impracticable. *Id.* at 315. In opposing the government’s motion, Demusz provided no specific evidence other than its conclusory allegations that

there was a steel shortage, and that it was impossible to machine the material in time prior to 30 September 2005, the delivery date for the 16 production units it itself asked for and promised on 6 September 2005 (facts, ¶ 12). We note that the contract it entered into with the government was of the firm-fixed price variety under which the risk of price increases would have been assigned to Demusz. Finally, Demusz has provided not a scintilla of evidence in support of a case for commercial impracticability (a subset of the doctrine of legal impossibility). *See Spindler Construction Corp.*, ASBCA No. 55007, 06-2 BCA ¶ 33,376.

Nonperformance Of Subcontractor

As discussed, even assuming that the government specified a sole source, and even assuming there was a steel shortage, these factors in and of themselves would not, as a matter of law, automatically excuse a contractor for its failure to deliver on time. To be excusable, a contractor's failure must be beyond the control and without the fault or negligence of both the contractor and its subcontractor. In this case, Demusz's own moving papers admit that "the nonperformance of its subcontractor made it impossible for it to perform its obligations under the terms of the instant contract" (opp'n at 4; Demusz aff., ¶ 6). We note that in replying to the government's answer, Demusz referred to the "misfeasance and nonfeasance of the supplier" (facts, ¶ 13). In opposing the government's motion, it has not retracted that statement. Noticeably absent from Demusz's opposition is any support that Firth Rixson's failure to deliver was in any way caused by, or the result of, the alleged steel shortages. In opposing the government's motion, Demusz has failed to raise a genuine issue of fact that its failure to deliver on time was beyond the control and without the fault or negligence of its subcontractor.

Finally, Demusz contends that since the government was "aware of the problems that Appellant faced in dealing with Firth Rixson," and the government granted four extensions¹ of the delivery deadlines because of this awareness, it was therefore reasonable for Demusz to believe that "the Respondent did warranty the performance of Firth Rixson, Ltd" (opp'n at 3-4; Demusz aff., ¶ 5). Demusz provided not a scintilla of evidence that the problems Firth Rixson had was beyond its control and without its fault or negligence. Even assuming that the government was aware of the problems Demusz had with Firth Rixson, and that the government granted time extensions due to these problems, the risk of nonperformance on the part of a subcontractor did not shift to the government. Demusz's argument that somehow the government ended up guaranteeing the performance of Firth Rixson has no merit as a matter of law. *See Datametrics, Inc.*,

¹ Undisputed facts show that the first three time extensions were granted because Demusz failed to deliver the first article samples (Modification No. P00001); it failed to pass the first article samples (Modification No. P00002); and it had to correct the deficiencies in the conditionally accepted first article samples (Modification No. P00003) (facts, ¶¶ 5, 8, 10).

ASBCA No. 16086, 74-2 BCA ¶ 10,742 at 51,102-03 (“There is no provision in this contract by which the Government warranted the supplies from Litton and Zenith to be free of defects. Under this situation, therefore, appellant must look to its suppliers for relief and not to the Government.”).

CONCLUSION

Because Demusz has failed to oppose by more than a scintilla of the evidence that its failure to deliver 16 steel mating rings was excusable (*i.e.*, beyond the control and without the fault or negligence of its subcontractor), we hold that the government is entitled to summary judgment on the basis of the undisputed facts proffered. Accordingly, Demusz’s appeal is denied.

Dated: 18 December 2006

PETER D. TING
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. 55311, Appeal of Demusz Manufacturing Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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

