

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
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Commissioning Solutions Global, LLC ) ASBCA Nos. 57429, 57494  
 )  
Under Contract No. FA4626-09-P-0065 )

APPEARANCE FOR THE APPELLANT: Mr. Victor Ogunniyi  
President

APPEARANCES FOR THE GOVERNMENT: Alan R. Caramella, Esq.  
Air Force Chief Trial Attorney  
Amanda M. Page, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES

The captioned appeals arise from the contracting officer's (CO's) 13 August 2010 termination for cause of the captioned purchase order (ASBCA No. 57429) and 26 October 2010 decision demanding \$130,725.14 in unliquidated invoice payments to Commissioning Solutions Global, LLC (CSG) under that order (ASBCA No. 57494). The Board has jurisdiction of the appeals under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. The parties agreed to submit the appeals on the written record pursuant to Board Rule 11. The record includes the parties' Rule 4 documents and briefs. We decide the propriety of respondent's termination for cause and its monetary demand.

FINDINGS OF FACT

1. On 19 August 2009, the 341<sup>st</sup> Contracting Squadron (CS 341) at Malmstrom Air Force Base (MAFB), Montana, solicited a Request for Quotations (RFQ) for commercial items to replace 93 tube sheets in MAFB high temperature water generator No. 3, with a "Period of performance" of 1-30 June 2010. The RFQ stated: "A site visit is schedule[d] for **25 August at 10:00 AM**. Attendance is encouraged but not required." As amended, the RFQ required prices to be held firm until 15 January 2010. (R4, tab 1 at 1-2, 16 of 16) (Emphasis in original) CSG did not attend the 25 August 2009 site visit (R4, tab 2 at 1-2).

2. The RFQ attached a Statement of Work (SOW) that provided: "Tube sheets will be manufactured per manufacture specifications except minimum tube wall thickness will be modified from .109 to .120. Tube sheets will be rolled, welded and rolled again into headers per manufactured specifications. All tiles, insulation and sheeting will be replaced according

to manufactured specifications.” The SOW included The International Boiler Works Co., (IBW), drawing 83E-272-2, GENERAL ASSEMBLY, whose dimensions were illegible except in an enlarged view of one portion, and listed (but did not include) IBW reference drawings 83E-272 – GENERAL ASSEMBLY, 83D-288 – ANCHOR BOLT LOCATIONS and 84A-231-1 – ORIFICE & PLUG SCHEDULE. (R4, tab 1 at 7-13 of 16)

3. On 2 September 2009, Indeck Power Equip. (Indeck) quoted to CSG a \$130,750.20 net price “valid for the next **30 days**” for “TJW-VC-85 S/N 14891...93 Convector Tubes 1 ½"OD x 0.120"mwt SA-178A X 166 ft lg Drawing *83C-316-1*” (R4, tab 3 at 8, 10 of 13, italics added) (bold in original).

4. CSG submitted a proposal to CS 341 on 2 September 2009 stating that it “will subcontract the manufacturing of the 93 tubes to Indeck” and quoting a \$186,750.20 net price for “93 Convector Tubes 1 ½"OD x 0.120"mwt SA-178A X 166 ft lg Drawing 83C-316-1,” taxes and duty extra, valid for 30 days with payment terms of 25% with order, 55% prior shipment or offer to ship, 10% after shipment or offer to ship, and 10% after work completion (R4, tab 24 at 1-4).

5. Because both Indeck’s subcontract price quote to CSG, and CSG’s price quote to CS 341, cited drawing 83C-316-1, which was not specified by, or identified in, the SOW, we find that by 2 September 2009 CSG knew or had reason to know that Indeck had drawing 83C-316-1 to fabricate the 93 tubes.

6. On 14 September 2009, CSG revised its quoted payment terms to 70% at award and 30% on completion. Based on Indeck’s \$130,750.20 price for 93 tubes, CS 341’s CO Lisa Murphy agreed to CSG’s revised payment terms on 19 September 2009. (R4, tab 3 at 1, 4, 6, 10)

7. On 21 September 2009, CSG asked another company, Anderson Tube Co., to quote on 93 tubes. Anderson replied that it “was not able to see the length of the tubes required from the attached drawings” but would quote if CSG could “obtain the length of the tubes” (app. supp. R4, tab 24A). We find that not later than 21 September 2009 CSG knew or had reason to know that drawing 83E-272-2 was illegible.

8. CSG also contacted a different company, Munroe, Inc., for an estimate. On 30 September 2009, 12:34 PM, after reviewing the drawing CSG had sent, Munroe replied that to provide an estimate, Munroe needed CSG’s answers to questions about the scope of work, the tube footage, and the tube sheets. (App. supp. R4, tab 25A at 1-2)

9. On 30 September 2009, 3:43 PM, CSG asked CS 341 for “a clearer or scanned print of the drawing...to help in the fabrication / manufacturing process.” At 4:48 p.m., CS 341’s contract specialist Ted Schubert replied: “As far as the images, those are the clearest copies available from the heat plant.” (App. supp. R4, tab 26A)

10. On 30 September 2009 at about 9:53 PM, CS 341 notified CSG of the award of Purchase Order (PO) No. FA4626-09-P-0065 for the “FFP” [firm fixed-price] of \$186,750.20 to “Remove and Install Tubes, Brick and Metal Skin on Convector Serction [sic] of #3 High Temp Hot Water Generator at Central Heat Plant, Malmstrom AFB MT. Make: International Boiler Works, Model: TJW-VC-85, Serial #: 14891”<sup>1</sup> to be delivered by 30 June 2010. The PO incorporated by reference the RFQ’s SOW, including IBW drawing 83E-272-2. (R4, tab 5 at 1-4, 13 of 30; app. reply br. at 15, Block Plate 5)

11. The PO incorporated the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (MAR 2009) clause, which provided in pertinent part:

(f) *Excusable delays.* The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

....

(m) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by

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<sup>1</sup> PO Modification No. 02, 26 January 2010, corrected the generator serial number to 14892 (R4, tab 5 at 16-18).

law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(R4, tab 5 at 4 of 30)

12. On 6 October 2009, CSG advised CS 341 that it “should be able to complete fabrication and items ready to delivery in 12 weeks i.e. about end February, 2010.” CSG inquired about the closest airport to visit MAFB and, “[i]n view of not so legible print of the drawing,” asked to speak to the MAFB plant’s technical representative or asked “if he can highlight intended scope of work on the sketch or copied drawing of element.” (R4, tab 8 at 2-3)

13. Effective 24 November 2009, CSG subcontracted with Indeck for the 93 tubes at the price of \$130,750.20 to be completed “16 weeks ARO & first installment” payment (R4, tab 9 at 27 of 29).

14. Sometime before 9 December 2009, MAFB’s Heat Plant Foreman Joseph Beard told CSG’s Mejosh Thomas that the plant was in full operation (R4, tab 48). On 17 December 2009 Mr. Thomas arrived in Montana (R4, tab 8 at 4), saw that the MAFB “boiler was in operation and could not be opened” (R4, tab 13 at 8), and sent an email to MAFB stating, “this trip was very helpful. Thank you, Mr. Beard for providing all the drawing, pictures & other information.” (R4, tab 8 at 5, tab 14 at 14)

15. On 21 December 2009 CSG emailed CS 341 stating: “We found out that [IBW] has been purchased by Indeck Group.... Our research shows that only two companies has [sic] the drawings 1.) Indeck 2.) Midmountain Boiler & Steam[.] We would greatly appreciate if you could help us retrieve those drawings.” CS 341’s 22 December 2009 response to CSG stated: “The company is sending me what they are willing to give out after Christmas. They will not be giving blue prints on the tube layout. They are in the business of making the tubes themselves.” (R4, tab 25 at 1-2)

16. Sometime on or before 22 December 2009, CSG contacted Tulsa Fintube, Inc., asking about tube bending. Tulsa Fintube responded on 22 December 2009 that the drawings CSG provided “show very little detail and do not provide the dimensions needed to determine the center line radius of the bends, etc. Those dimensions may need to be established by physical measurements or possibly thru better/more detailed drawings.” (App. supp. R4, tab 32)

17. CSG also contacted another company, Industrial Contractors, Inc., who told Mr. Thomas on 5 January 2010 that to undertake tube installation it would need to make a site visit, get accurate measurements, clarify various requirements and get legible equipment drawings before proposing a price to CSG (app. supp. R4, tab 28).

18. Effective 13 January 2010, CSG and Indeck agreed to increase the subcontract price by \$3,036.80 to \$133,787.00 due to increased “material, labor and the exchange rate (Canada – US )” costs superseding the 24 November 2009 subcontract (R4, tab 9 at 22, 25-26). CSG submitted invoice CSG11 for \$130,725.14 to CS 341 on 15 January 2010 (R4, tab 9 at 1), which respondent paid on 4 March 2010 (R4, tab 26).

19. On 27 April 2010 CSG advised CO Murphy that Indeck had manufactured the 93 tubes which were deliverable to MAFB. However, CSG reported that there was a \$3,036.80 increase in Indeck’s cost, a \$4,000 freight cost to ship the tubes, significant additional installation costs based on quotes received (\$258,383 and \$299,898), and a \$5,264.78 “Penalties on Interest” charge. CSG requested a \$56,854.73 PO price increase or a change to a “cost reimbursable type” of PO. (R4, tab 11 at 3-11) This amounted to a 30.4% increase over the PO fixed price of \$186,750.20.

20. CSG’s 14 May 2010 email to CS 341 suggested three options:

1. Government considers our proposal and makes changes in the contract accordingly
2. Government terminates the contract and pay contractor to cover her exposures; Contractor to deliver the 93 tubes before end of May, 2010
3. Government terminates and arranges to get the manufactured tubes from Indeck to Montana.

(R4, tab 13 at 2)

21. On 15 May 2010 CSG advised CO Murphy that CSG “was forced to deal with [Indeck, owner of IBW] the initial manufacturer of the tubing who...will not release [the blueprints] to others.” CSG noted that “[t]he completed 93 tubes are ready for delivery” but, while waiting for government direction on what it intended to do about CSG’s 14 May options, reported that CSG had “stopped all work on this contract as of May 14, 2010... [and] may not be able to start this project on June 01, 2010 as earlier anticipated.” (R4, tab 13 at 8-9)

22. CO Carolyn Wood replied on 20 May 2010 stating that a commercial item contract cannot be cost reimbursement, and that the interest/penalty was “unallowable.” However, she said that she would consider the \$4,000 freight charge if CSG could prove that such cost was not included in its original proposal. She noted that the \$3,036.80 subcontract price increase was within CSG’s firm price, CSG’s site visit costs in December 2009 should have been included in its original cost proposal, and the \$56,025.05 balance “will be paid upon completion of the project, additional modifications to order notwithstanding.” (R4, tab 14 at 1-2)

23. CSG's 24 May 2010 letter to CS 341 requested either to add a "variation" to the PO price or terminate the PO not "on the basis of nonperformance...but rather on commercial dispute" (R4, tab 14 at 8).

24. By 4 June 2010, CSG had paid Indeck 25% of the subcontract price (R4, tab 15 at 4).

25. On 7 June 2010, CO Murphy issued a cure notice that gave CSG 10 days to cure its failure to proceed with PO performance, or risk default termination. CSG received the cure notice on 10 June 2010. (R4, tab 16 at 1-2)

26. On 17 June 2010, CSG replied that if the government reconsidered its rejection of the price increase, CSG would adjust its schedule to re-accommodate this project (R4, tab 16 at 4-5).

27. On 3 August 2010, CO Murphy sent CSG a final cure/show cause notice threatening default termination (R4, tab 18 at 3-4). In its 6 August 2010 reply, CSG refused to proceed without modification of the PO payment terms in its favor (R4, tab 18 at 9).

28. CO Murphy's first letter of 13 August 2010 to CSG terminated the PO for default and attached contract Modification No. P00003 so stating (R4, tab 5 at 22-24, tab 19). Neither the letter nor Mod. No. P00003 notified CSG of its appeal rights.

29. CO Murphy's second letter of 13 August 2010 to CSG demanded repayment of \$130,725.14, "the amount of unliquidated invoice payments made to you," stating that this was "not a final decision of the" CO (R4, tab 21 at 1-2). CO Murphy's subsequent 26 October 2010 decision demanded \$130,725.14, stated that it was a final decision, and notified CSG of its appeal rights (R4, tab 23).

30. On 10 November 2010, CSG appealed the termination to the ASBCA, which docketed the appeal as ASBCA No. 57429. On 21 January 2011, CSG appealed the CO's 26 October 2010 decision, which was docketed as ASBCA No. 57494.

### DECISION

As a preliminary matter, on 21 May 2013 respondent objected to the 17 "Block Plates" in CSG's 15 May 2013 reply brief. CSG replied on the same day, stating that it understood that discovery documents "are available with the Board." Block plates 1, 6, 9-10, 12 and 16 duplicate Rule 4 file documents. Respondent has not asserted that it will be prejudiced by receipt into the record of the other 11 block plates. Respondent's objection is overruled.

## I.

The government has the burden of proof of default under the standard construction contract Default clause. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). The principles that apply under the FAR clauses that govern terminations for default apply with equal force to the termination for cause provision of commercial item contracts. *See Genome-Communications*, ASBCA Nos. 57267, 57285, 11-1 BCA ¶ 34,699 at 170,889 (government has the burden to prove that its termination for cause was justified under the standards of FAR 52.212-4(m)); *ZIOS Corp.*, ASBCA No. 56626, 10-1 BCA ¶ 34,344 at 169,619 (same). The government has the burden of proof for its \$30,667.71 claim for repayment of the alleged unliquidated invoice payments. *Cf. Kamp Systems, Inc.*, ASBCA No. 54253, 08-2 BCA ¶ 33,980 at 168,072 (CO demand for repayment of overpaid progress payments was a government claim); *SRM Manufacturing Co.*, ASBCA Nos. 44750, 45729, 00-1 BCA ¶ 30,618 at 151,148 (same).

## II.

Respondent argues that by the 30 June 2009 PO completion date, CSG had installed no tubes at MAFB generator No. 3, and had made no progress to complete PO performance after its receipt of the CO's cure and show cause notices, and thus the CO's termination for cause was justified under FAR 52.212-4(m) (gov't br. at 15-18).

With regard to the government's termination for cause, the PO completion date was 30 June 2010 (finding 10). CSG's subcontractor Indeck had manufactured the 93 tubes and was prepared to deliver them to MAFB as early as 27 April 2010 (finding 19). Due to receipt of \$258,383 and \$299,898 quotes to install the 93 tubes in generator No. 3, and Indeck's price increases, freight costs and penalty charges, CSG refused to proceed with the installation work unless the CO agreed to a \$56,854.73 PO price increase or to change the PO to a cost reimbursement type (findings 19-21, 23, 26-27). CO Woods declined to agree to such price increase or PO type change (finding 22).

The fixed-price nature of the PO provisions supports the CO's refusal to increase the PO price. *See Naughton Energy, Inc.*, ASBCA No. 33044, 88-2 BCA ¶ 20,800 at 105,073 (contractor bears the risk of fluctuating marketplace prices in a fixed-price type contract); *Nedlog Co.*, ASBCA No. 26034, 82-1 BCA ¶ 15,519 at 76,986 (risk of greatly increased costs, unanticipated and unprovided for in the contract price, is on the contractor in a fixed-price contract). We hold that respondent sustained its burden of proving a *prima facie* case of termination for cause.

With regard to the government's unliquidated invoice payments claim, the government paid CSG's invoice of \$130,725.14 on 4 March 2010 (finding 18). Yet CSG

stopped all PO work (finding 21), and refused to install the generator tubes at MAFB generator No. 3 (finding 27). Thus, pursuant to the provisions of FAR 52.212-4(m), we hold that respondent sustained its burden of proof of entitlement to repayment of the \$130,725.14 invoice payment to CSG (finding 11).

### III.

A defaulted contractor has the “burden of proving that its nonperformance was excusable.” *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir.), *cert. denied*, 519 U.S. 992 (1996). FAR 52.212-4(f) provides that a commercial item contractor is liable for default “unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence” (finding 11).

CSG argues that respondent impliedly warranted that IBW drawing 83E-272-2 was “adequate, accurate, complete and suitable” for its intended purpose under the Spearin doctrine (*United States v. Spearin*, 248 U.S. 132, 136 (1918)) (app. reply br. at 9, 12); CSG “reasonably anticipated” that respondent would provide suitable specifications (*id.*); it was inconceivable that the government had no more legible drawings of the generator tubes than illegible drawing 83E-272-2 (app. br. at 5-6); respondent failed to disclose that there were no adequate drawings to execute the work (*id.*); from 30 September to 23 November 2009 CSG attempted unsuccessfully to obtain better tube drawings (*id.* at 7-8); CSG requested quotes from suppliers other than Indeck, but none were willing to manufacture the tubes from drawing 83E-272-2 (app. br. at 8-10); it unsuccessfully attempted to measure MAFB’s generator No. 3 tubes in December 2009 (*id.*); it could not fulfill its contract obligations without legible drawings (*id.* at 11-12); and thus such fulfillment was impossible or commercially impracticable (app. reply br. at 17).<sup>2</sup>

Respondent argues that any illegibility in drawing 83E-272-2 was patent and was known by CSG before it quoted its price to the government; CSG did not reasonably rely on drawing 83E-272-2 but rather on Indeck’s drawing 83C-316-1 to fabricate the 93 generator tubes, which fabrication was not impossible or commercially impracticable, since the tubes were complete and ready to ship to MAFB in the spring of 2010; the

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<sup>2</sup> The request for relief in CSG’s complaint in ASBCA No. 57429, repeated in its briefs, seeks an “equitable adjustment of the contract price pursuant to the government’s breach of its implied warranty of specifications” and “[b]reach of contract damages” (compl. at 8). Neither the complaint nor the appeal record identifies any CSG written claim for an equitable adjustment or breach damages, the CO’s decision thereon and the dollar amount thereof. We lack CDA jurisdiction of a claim first submitted in a party’s pleading before this Board. *See American General Trading & Contracting*, ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,639.

alleged PO price increase CSG might incur to install the generator tubes and related materials does not satisfy the legal criteria for commercial impracticability or senselessness; and completion of performance was not impossible, because the procurement contractor completed the PO (gov't br. at 20-22, 25-26).

By 2 September 2009 CSG knew or had reason to know that Indeck had drawing 83C-316-1 to fabricate the 93 tubes, since Indeck's quote to CSG and of CSG's quote to CS 341 cited drawing 83C-316-1 (findings 3-5). Not later than 21 September 2009 CSG knew or had reason to know drawing 83E-272-2 was illegible (finding 7). Before PO award, respondent told CSG that the RFQ drawings were "the clearest copies available from the [MAFB] heat plant" (finding 9). Thus, it was not reasonable for CGS to expect that respondent would or could provide more legible tube drawings to CSG. Moreover, the RFQ and resulting PO clearly provided that the 93 tubes were to be made in accordance with "manufactured specifications" (findings 2, 10). CSG and its prospective subcontractor Indeck based their price quotations not on illegible drawing 83E-272-2, but rather on IBW drawing 83C-316-1 (findings 3-4). Drawing 83C-316-1 was the "manufactured specification" and was adequate to manufacture the 93 tubes, which Indeck fabricated and was ready to deliver to MAFB by 27 April 2010 and thereafter (findings 20, 22), before the 1 June 2010 date to begin their installation (finding 1).

CSG cites no legal authority that the *Spearin* doctrine applies to a drawing known by both parties before contract award to be illegible. See *Travelers Casualty and Surety of America v. United States*, 74 Fed. Cl. 75, 89-90 (2006) ("The *Spearin* implied warranty doctrine has its limits.... [T]he contractor must fully comply with and follow the design specifications, although faulty, to enjoy the protections of the implied warranty."); *American Renovation and Construction Co.*, ASBCA No. 53723, 10-2 BCA ¶ 34,487 at 170,080 ("In order to prove the government breached its implied warranty under *Spearin*, ARC must first show that it substantially complied with the specifications."). Here, CSG and its subcontractor Indeck did not attempt to use illegible drawing 83E-272-2, using instead drawing 83C-316-1. CSG's alleged inability to manufacture tubes without legible drawings provided by the government is baseless.

With respect to the information needed to install the tubes in MAFB generator No. 3, CSG could have attended the 25 August 2009 scheduled site visit and measured the tubes for purposes of installing the replacements, but it did not do so (finding 1). CSG's argument that lack of legible drawings prevented it from installing Indeck's 93 tubes and completing the work is not persuasive. CSG refused to install the 93 tubes not for lack of an IBW drawing or for lack of opportunities to inspect and measure generator No. 3, but rather because it balked at the projected costs to complete the tube installation under the fixed-price PO (findings 19-20, 23, 26-27).

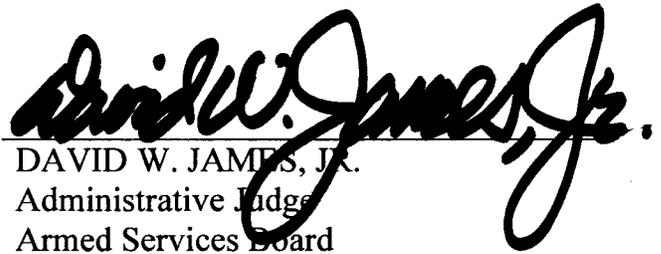
With respect to commercial impracticability, only a loss substantially greater than the 30.4% increase CSG alleged (finding 19), excuses a contractor's non-performance.

*E.g., Naughton Energy, 88-2 BCA ¶ 20,800 at 105,073 (59% cost increase, no commercial impracticability); Ace Service Corp., ASBCA No. 32052, 86-3 BCA ¶ 19,031 at 96,127, 96,129 (75.7% cost increase – \$22,305/\$29,465 – no commercial impracticability).*

We hold that CSG’s nonperformance was not beyond its reasonable control and without its fault or negligence and thus respondent’s termination for cause was valid. We further hold that the CO’s claim demanding that CSG repay \$130,725.14 was proper.

We deny the appeals.

Dated: 25 June 2013

  
DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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

I concur

  
ELIZABETH M. GRANT  
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 Nos. 57429, 57494, Appeals of Commissioning Solutions Global, LLC, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals