ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Supreme Foodservice GmbH	)	ASBCA Nos. 57884, 58666, 59636
	)	59811, 61361
Under Contract No. SPM300-05-D-3130	)	

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant, Supreme Foodservice GmbH (Supreme), has filed a motion for reconsideration of the Board's May 28, 2020, post-hearing decision. In its motion, Supreme argues: (1) that we imposed a requirement for proof of truck deliveries that was not contained in the contract; (2) that we treated Contract Disputes Act (CDA) interest as a contractual entitlement, rather than a statutory one; and (3) that we should have allowed an increase in its costs that reflected the rate of inflation. Although we find it helpful to make additional findings of fact to demonstrate why we ruled properly regarding the proof of deliver, we, nevertheless deny the motion.

SUPPLEMENTAL FINDINGS OF FACT

The Board makes the following supplemental findings of fact with respect to the 78 truck trips in the 290-trip sample for which Supreme failed to provide the Defense Contract Audit Agency (DCAA) a signed manifest (finding 111).

111A. The manifests were the only documents that Supreme provided to DCAA that contained trip level details and third party confirmation that Supreme had made a specific delivery. While Supreme produced to DCAA "product invoices," these documents did not prove whether the food had been delivered in one truck trip or more than one. (Tr. 8/125-26, 158-59) In other words, proof that Supreme delivered 1,000 pounds of ground beef to an Army base does not establish whether the ground beef came in 1, 2, or 5 trucks. If Supreme charged DLA for more truck trips than it actually performed[1], its costs would be inflated, which, in turn, would inflate the price per pound DLA would pay for Premium Outbound Transportation (POT).

111B. Supreme contends in its motion that the product invoices were sufficient to prove that deliveries had been made. It contends that it "provided a product invoice for **every trip in the sample**" (app. reconsideration mot. at 10 (Supreme's bold)). In support of these contentions, Supreme cites app. supp. R4 tabs 429 and 445. These tabs do not contain invoices, however; they are Excel spreadsheets created by DCAA during the audit. Among other things, these spreadsheets described the documents examined by DCAA and contained a succinct explanation for why DCAA found that the invoices did not prove the number of trips:

> 3) Truck Manifests - . . . . The truck manifest (proof of delivery) is prepared by Supreme and given to the truck driver for delivery. The truck manifest is signed by the customer upon delivery of the goods and is returned to the truck driver. The truck driver then returns the signed truck manifest to Supreme. The truck manifest is the only document with 3rd party verification that confirms the trip was made. The manifest includes the destination, DODAAC, Order/MRO #, Invoice #, Disposition Date, Driver's Name, Truck Number, Truck Size, Truck Type, Total Weight, Number of Pallets, and Description of Goods.
>
> 4) Product Invoices - . . . . The product invoice is prepared by Supreme and given to the truck driver upon delivery at completion of the order. The product invoice differs from the

[1] Supreme paid its subcontractor fixed round trip rates based on the type of vehicle and destination (app. supp. R4, tab 472).

> truck manifest because there is only one product invoice per order, but an order can take multiple trips to complete. A truck manifest is completed for each trip. The product invoice includes the invoice number, DODAAC, destination, PO number, contract number, order date, delivery date, order quantity, shipped quantity, stock number, description, net weight, unit price, and extended price.

(App. supp. R4, tab 445 at "Note" tab)

111C. The Board finds that app. supp. R4, tabs 429 and 445, do not prove that Supreme performed the 78 trips in question.

111D. The Board finds that Supreme's reliance upon these DCAA spreadsheets is misplaced and, in a similar vein, the Board observes that Supreme had the opportunity in its post-hearing briefs to direct the Board's attention to the product invoices that supposedly confirmed the missing 78 deliveries. Instead, rather than relying on the actual invoices as proof of the deliveries, Supreme largely relied on witness testimony that contended that the invoices proved the deliveries (app. PFF at ¶¶ 96-101). The lone product invoice it cited is illegible, and from the context of the emails to which it is an attachment, it appears to be an aviation invoice, not a truck invoice (app. PFF ¶ 96 (citing app. supp. R4 tab 1155 at 16). This invoice proves nothing.

111E. During the audit, DCAA asked Supreme about the missing manifests. Supreme stated that they could have been lost or destroyed or not returned to the driver by the receiving official, but it did not provide specific explanations for the missing 78 manifests (app. supp. R4, tab 495 at 1). DCAA concluded that the failure to maintain a complete set of manifests, or at least to document reasons why specific manifests were missing, was another example of Supreme's lack of proper internal controls. (Tr. 8/127-28)

111F. The manifests were also important because they provided third party confirmation of the type of truck used (tr. 8/130). For example, in the high dollar sample of truck trips, DCAA found that Supreme had overcharged DCAA in 7 of the 145 trips by alleging that it had used a 40-foot truck when it had really used a 20-footer. DCAA concluded that this was another example of inadequate internal controls. (Finding 111; R4, tab 102 at 68; tr. 8/130, 142-43)

111G. Supreme has not produced the missing manifests as evidence to the Board, nor has it provided the Board with satisfactory alternate evidence (signed product invoices or otherwise) demonstrating that the number of trips claimed actually happened.

DECISION

"Motions for reconsideration do not afford litigants the opportunity to take a 'second bite at the apple' or to advance arguments that properly should have been presented in an earlier proceeding." *Dixon v. Shinseki*, 741 F.3d 1367, 1378 (Fed. Cir. 2014). But if we made mistakes in our findings of fact or conclusions of law, or by failing to consider an appropriate matter, reconsideration may be appropriate. *Ford Lumber & Bldg. Supply, Inc.*, ASBCA No. 61618, 20-1 BCA ¶ 37,487 at 182,088.

I. Missing Truck Manifests

Our ultimate conclusion for trips missing a truck manifest has not changed, although we modify our reasoning somewhat.

It is undisputed that Supreme failed to produce signed manifests for 78 of 290 truck trips audited by DCAA. Supreme contends that it has alternative proof in the form of its product invoices. The Board is still waiting to see such documentation. Supreme has largely relied upon witness testimony opining that the product invoices are convincing proof that the trips occurred, rather than just citing the signed invoices (finding 111D).

In the Board's findings of fact, we stated:

> 145. With respect to trips missing a manifest, we agree with the government that without the contractually-required signature of a DoD receiving official (findings 26-27), Supreme cannot prove that the delivery actually took place. We acknowledge Supreme's contention that it had internal documents showing that the deliveries occurred but we agree with DCAA that internal documents created by Supreme or its subcontractor are not a sufficient substitute for the documents required by the contract (tr. 8/125-32, 173-74), in light of Supreme's fraud guilty plea (findings 203-213) and Mr. Epp's discovery of more than 1,500 truck trips in just the first year that did not occur (finding 73). We find that CO [Lourdes] Valentin demonstrated in her analysis of aviation costs that she was open-minded about accepting alternate documentation; we find that she acted reasonably in refusing to do so when Supreme failed to produce signed acceptance documents required by the contract.

Supreme takes issue with this finding, contending that we effectively held that the contract required it to create and maintain the manifests. The Board agrees that we should

have stated merely that the contract and precedent required Supreme to prove that it had performed the deliveries, for the reasons we set forth in the opinion (Bd. Op. at 49-51). The Board replaces finding 145 with the following:

> 145. With respect to trips missing a manifest, we agree with the government that Supreme has not proven that these deliveries actually took place. We agree with DCAA that the product invoices and other internal documents created by Supreme or its subcontractor do not constitute adequate proof (tr. 8/125-32, 173-74; findings 111A-111G), in light of Supreme's fraud guilty plea (findings 203-213), Mr. Epp's discovery of more than 1,500 truck trips in just the first year that did not occur (finding 73), and DCAA's findings that "at every level" Supreme lacked proper accounting controls (findings 88, 89, 111E, 111F). We find that CO Valentin demonstrated in her analysis of aviation costs that she was open-minded about accepting alternate documentation; we find that she acted reasonably in refusing to do so with respect to the 78 truck trips missing a manifest.

Supreme contends that the Board's decision is "inequitable" (app. reconsideration mot. at 13). It complains that it has been treated unfairly because the audit period covered only the first 30% of the food delivered by Supreme but the contracting officer projected the results for the remaining 70% of deliveries (*id.* at 14). This is a disingenuous argument because it faults the contracting officer and the Board for not relying upon evidence that Supreme has never offered.

Certainly, one would expect that after learning the importance DCAA placed on the manifests, Supreme would have been more careful about retaining them for the remainder of the contract and more scrupulous in documenting its costs. If, for example, Supreme could produce signed manifests for all of the claimed deliveries during that final 70%, this would have been important evidence to the Board and, we would expect, to DCAA and DLA. But Supreme refused to undergo an audit for this period (finding 186). Supreme also could have offered proof to the Board that its costs during the final 70% were higher than the POT rates established by CO Valentin, but it failed to do so (finding 190). Based on the overall circumstances, including the fraud convictions, the Board finds that this is a case that brings to mind the axiom that "[s]ilence is often evidence of the most persuasive character." *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923). The Board concludes from Supreme's silence with respect to its costs for the final 70% that, at the very least, it was paid adequately by DLA. The Board declines to relieve Supreme of the consequences of its decisions not to produce this evidence.

II. Interest

Supreme contends that the Board erred in holding that Supreme committed the first material breach and, as a result, lost its right to interest under the Contract Disputes Act (CDA), 41 U.S.C. § 7109(a)(1). Supreme contends that the Board erred because CDA interest is a statutory, not contractual, right (app. recon. mot. at 16-18).

As the Board explained, the dueling claims in these appeals required both parties to act simultaneously like a plaintiff and defendant on the same issue (establishment of POT rates). However, the Board viewed the government as the primary claimant because it set the stage for the litigation with the first claim and then recovered money from Supreme by withholding payments. Due to the Board's *de novo* review of the contracting officer's final decision, the Board could adjust the POT rates established by the contracting officer higher or lower. (Bd. Op. at 48-53) Supreme's claims concerning the POT rates were largely redundant then, except for one important element: they served to start the clock running on the payment of CDA interest (Bd. Op. at 54 (citing *Kellogg Brown & Root Services, Inc.*, ASBCA No. 56358, *et al.*, 17-1 BCA ¶ 36,779 at 179,247 (*aff'd Sec'y of Army v. Kellogg Brown & Root Services, Inc.*, 779 Fed. App'x. 716, 722 (Fed. Cir. 2019)))).

The Board held that Supreme committed a prior material breach when it committed and was subsequently convicted of fraud on this contract (Bd. Op. at 55-56, 60 (citing *Laguna Construction Co., Inc. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016))). The doctrine of prior material breach "can bar a contractor's breach claim against the government." *Id.* at 1369. While the Federal Circuit's decision in *Laguna* focused on the principal amount at issue – certain unpaid invoices – and did not discuss interest, the Board believes that the only possible reading of the Court's decision is that the contractor lost its right to payment for both the underlying amount and any interest that would otherwise have been due.

Thus, while the Board agrees with Supreme that CDA interest is a statutory right on a valid claim, that is irrelevant under the circumstances. Supreme's prior material breach through its commission of fraud bars its claim for interest. *Laguna*, 828 F.2d at 1369.

Finally, in Supreme's reply brief, it modifies its argument somewhat, contending that a contractor is entitled to interest on a failed government claim, so long as the contractor submits a certified claim for the withheld funds (app. reply at 15-17). The version of the CDA that has been in effect since January 3, 2011, seems to support this contention, providing that "[i]nterest on an amount found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the contracting

officer receives the contractor's claim . . . ." 41 U.S.C. § 7109(a)(1).[2] But again, this does not change anything. Even if Supreme could be entitled to interest on a failed government claim, the prerequisite to that recovery under section 7109(a) is Supreme's own claim. That claim is barred by its prior material breach and thus cannot be a vehicle through which Supreme recovers interest.

III. <u>Adjustment of the Later Contract Years for Inflation</u>

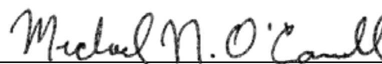
Supreme contends that the Board erred by not addressing Supreme's contention that it is entitled to an inflationary adjustment for the later contract years, including after December 2010 (app. recon. mot. at 18). The Board did address this, however. The record demonstrates, and we found, that everyone involved knew that POT rates would be based on Supreme's actual costs (findings 44, 52, 56, 65-68). Basing the rates on actual costs would reflect any increases in costs that occurred over time.

Supreme contends that it is "axiomatic" that discrete costs increase over time and that "fairness requires" that the Board take this into account in setting rates for the later years of performance (app. recon. mot. at 19). But Supreme had the opportunity to present its actual costs for the later years to DCAA, the contracting officer, and the Board, including any costs that had increased over time, but it chose not to do so. Supreme, a contractor that pled guilty to major fraud on this contract, asks the Board to assume it suffered inflated costs. The Board declines to do so.

<u>CONCLUSION</u>

Supreme's motion for reconsideration is denied.

Dated: October 13, 2020



MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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[2] The previous version of the statute, codified at 41 U.S.C. § 611, was similar. It provided "[i]nterest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim . . . ."

I concur

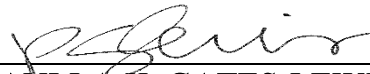
RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
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 Nos. 57884, 58666, 59636, 59811, 61361, Appeals of Supreme Foodservice GmbH, rendered in conformance with the Board's Charter.

Dated: October 13, 2020



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals