

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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TTF, L.L.C.) ASBCA No. 58452
)
Under Contract No. FA8103-07-C-0219)

APPEARANCE FOR THE APPELLANT: Mr. David W. Storey
President

APPEARANCES FOR THE GOVERNMENT: Col Jennifer L. Martin, USAF
Air Force Chief Trial Attorney
Capt Nicholas C. Frommelt, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES ON THE
GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This appeal arises from the contracting officer's (CO's) decision denying appellant TTF, L.L.C.'s (TTF) \$389,871.94 certified claim for government delay. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. Pursuant to Board Rule 11 the parties elected to submit the appeal on the record, which consists of respondent's Rule 4 file (119 tabs) and TTF's supplemental Rule 4 file (65 tabs).

On 20 September 2013, respondent moved for summary judgment asserting that there are no disputed material facts and as a matter of law the Board has determined that government delays before 7 September 2011 were released by contract Modification No. P00004, government delays after 7 September 2011 were concurrent with TTF's more serious delays, and thus TTF is not entitled to any government-caused contract delay. On 16 October 2013, TTF opposed the motion.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTION

1. On 19 September 2007, the Oklahoma City Air Logistics Center (OC-ALC), Tinker Air Force Base, awarded Contract No. FA8103-07-C-0219 (the contract) to TTF for two aircraft landing gear doors to be delivered by 31 December 2008 for the fixed-price of \$134,182.40. The contract incorporated by reference the FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause; required Item No. 0001, the doors, to comply with inspection standard "ISO 9001-2000"; specified inspection and acceptance of

Item No. 0001 at origin; and designated the Defense Contract Management Agency (DCMA), Dallas, to administer the contract. (R4, tab 1 at 1-2, 4, 12¹)

2. On 16 June 2011, TTF asked OC-ALC terminations contracting officer (TCO) Tom Lowber what were the applicable clad aluminum alloy 2024 hardness and conductivity values, and said that “production is on hold until an answer is received” (R4, tab 44).

3. On 7 and 12 July 2011 and 10 August 2011, DCMA issued six Corrective Action Reports (CARs), designated CARs 23-25 and 27-29, alleging “discrepancies” in TTF’s heat treating process and conductivity test requirements of the contract door ribs. Those CARs provoked lengthy correspondence between the parties. (R4, tabs 113-15, 116-18) In mid-August 2011 TTF told TCO Lowber that “TTF had completed all of the production items and was ready for paint” (R4, tab 97 at 592).

4. TTF’s 16 August 2011 letter to TCO Lowber requested that the contract “either be Terminated for Convenience or Inspection and Acceptance be changed from Origin to Destination” (R4, tab 51).

5. From 31 December 2008 to 7 September 2011, TTF sent several status reports to OC-ALC and to DCMA and repeatedly requested extensions of the contract delivery date. Contract Modification Nos. P00001, P00002 and P00004 cumulatively extended that date to 4 November 2011. (R4, tabs 2, 3, 5, 14-15, 32)

6. From 7 September through 25 October 2011, TTF repeatedly asserted that DCMA QAR John Dunlop’s delay in identifying the specified 2024 aluminum conductivity value and his suspicion of door rib contamination from “coated hangers in the heat treat chamber” lead to “irrelevant” CARs which delayed TTF’s performance (R4, tabs 61, 63, 67 at 468, tab 80 at 528). Respondent denied responsibility for TTF’s delays (R4, tabs 63, 80 at 529), and asserted that TTF had not ordered support forging part number 9-65105, and had no jig for door fabrication (R4, tabs 64, 71, 74).

7. TTF’s 18 October 2011 letters to TCO Lowber requested a contract delivery date extension to 4 January 2012 for alleged DCMA delay due to CARs 23 and 29 based on the QAR’s “suspicion” of part contamination (R4, tabs 75, 76 at 502).

8. From 22 October to 2 November 2011 TCO Lowber and TTF discussed Tinker AFB engineering support regarding TTF’s methods for parts production, and agreed to meet on 9 November 2011 to discuss heat treating aluminum sequencing and conductivity values (R4, tab 81 at 532, tab 82). By the 4 November 2011 contract delivery date, TTF had still not delivered the doors (R4, tab 13 at 108). At the

¹ Rule 4(a) pages are cited to their Bates numbers.

9 November 2011 meeting Tinker engineers asked TTF if the parts would all be delivered on schedule; Mr. Storey said that the parts could not be viewed because they were out for paint and the forged fitting was not available (R4, tab 90 at 570, tab 113 at 758).

9. From 12 July 2011 to 29 February 2012, TTF reported to DCMA that the discrepancies in CARs 23-25 and 27-29 would not affect contract production (R4, tab 113 at 721, 728, 731, 734-35, 744, 753 (CAR 23), tab 114 at 770, 774, 777, 784 (CAR 24), tab 115 at 792, 799, 801, 803-04, 807 (CAR 25), tab 116 at 820, 828, 830 (CAR 27), tab 117 at 839, 844, 846, 848-49 (CAR 28), tab 118 at 856, 866 (CAR 29).

10. TTF's 29 February 2012, final, corrective action reply to CAR 23 stated:

After investigation, it was determined that the TTF employee inadvertently used coat hangers during a sample proof run to validate a heat treating process.... TTF employee performing Heat Treating retrained not to use coat hangers (hooks) in the furnace, to eliminate misinterpretation of specifications. New hooks have been made out of unfinished steel, and are to be used for Heat Treating. Tests and cleaning performed on Heat Treated Items and Furnace to ensure no residue is present.... Inspected all parts that have been Heat Treated since DCMA's suspicion [of contamination].

(R4, tab 113 at 753)

11. By TTF's admissions, CARs 23-25 and 27-29 did not delay TTF's production; from 7 September through 4 November 2011 other alleged government delays to the contract performance were concurrent with TTF-responsible delays; and TTF points to, and the record provides, no facts to separate or distinguish the parties' respective responsibilities for such delays (gov't Statement of Undisputed Material Facts (SUMF) ¶ 18).

12. TTF's 16 August 2012 certified "Delay Claim" and "Loss of Income Claim" submitted to TCO Lowber under the contract alleged that OC-ALC was liable for 1,700 days at the (average) rate of \$229.34 per day of delay for a total amount of \$389,871.94, calculated by the Eichleay formula. TTF alleged that the 1,700-day delay arose from government delays with respect to quality manuals, data, inadequately trained DCMA inspectors, heat treating and heat treat specifications. (R4, tabs 9-11 at 67-90)

13. TCO Lowber's 7 November 2012 final decision denied TTF's claim in its entirety (R4, tab 12 at 104).

14. The parties did not agree to extend the contract delivery date beyond 4 November 2011. TCO Lowber issued unilateral contract Modification No. P00005 on 18 December 2012 to “Enact [sic] a Complete Termination for Default” (R4, tab 6 at 42-43).

DECISION

A tribunal shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering a motion for summary judgment, the evidence of the non-moving party is to be believed, and all justifiable inferences are to be drawn in his favor. *Liberty Lobby*, 477 U.S. at 255 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

I.

We address first whether there is a genuine issue as to any material fact. Our SOF ¶¶ 1-11 and 14 are abridged from movant’s SUMF ¶¶ 1-18, 21-22. We omitted SUMF ¶¶ 19-20, because that claim and TCO’s letter do not pertain to TTF’s 16 August 2012 claim in issue herein, which we addressed in SOF ¶¶ 12-13.

TTF says that it disputes the following statement in movant’s SUMF: “The parties did not agree to extend the contract delivery date beyond 4 November 2011” (*see* SOF ¶ 14). TTF asserts: “[T]he parties did bilaterally agree to extend the contract past 4 November 2011. However, Mr. Tom Lowber then retracted the bilateral agreement.” (App. opp’n at 2) TTF does not identify the date of the purported bilateral agreement or any evidence to substantiate its foregoing allegation, and none is apparent to the Board. Therefore, we conclude that there is no genuine issue as to any material fact.

II.

We turn to whether movant is entitled to judgment as a matter of law. Citing *In re C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et al.*, 04-1 BCA ¶ 32,568, movant contends that “[t]he *only* remedy available to a contractor following a proper default termination is either breach of contract damages for bad faith termination or a convenience termination settlement” (gov’t mot. at 7) (emphasis added). Movant claims that neither such remedy is available to TTF and so it is entitled to summary judgment. In *Hyperbarics* we stated: “The type of remedy available to the contractor following a default termination is either breach of contract damages for bad faith termination or a convenience termination settlement.” 04-1 BCA ¶ 32,568 at 161,149.

The *Hyperbarics* alternatives are not exhaustive. Notwithstanding the proper default termination of a contract, a contractor may recover the costs of its pre-termination wasted work of attempting to comply with impossible government specifications.

See Laka Tool and Stamping Co. v. United States, 650 F.2d 270 (Ct. Cl. 1981), *aff'g*, 639 F.2d 738 (1980), *cert. denied*, 454 U.S. 1086 (1981); *Dennis Berlin d/b/a Spectro Sort*, ASBCA Nos. 53549, 53550, 03-1 BCA ¶ 32,075 at 158,511 (though no end items were delivered and the government received no benefit from the work, a properly defaulted contractor may recover for its wasted work attempting to comply with impossible specifications). Based on the appeal record, we cannot determine whether any element of TTF's delay claim is within the *Laka* rule.

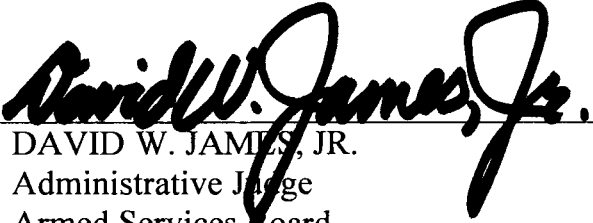
Movant further grounds its motion on two rulings in *TTF, LLC*, ASBCA No. 58498 (22 May 2013) in which the Board denied TTF's appeal of the CO's default termination of Contract No. FA8103-07-C-0219: (1) "By virtue of bilateral Modification No. P00004, which extended the contract's delivery date to 4 November 2011..., alleged delays before 7 September 2011 cannot excuse TTF's default." Slip op. at 5; (2) "From 7 September through 4 November 2011, CARs 23-25 and 27-29 were valid discrepancies..., which did not delay TTF's contract production..., and other alleged government delays to TTF's contract performance were concurrent with TTF's more serious delays due to lack of support forging part No. 9-65105 and failure to assemble the painted door components.... Thus, TTF is not entitled to any extension of the 4 November 2011 delivery date for excusable delays." *Id.* at 6. Movant concludes that it is undisputed that TTF was not entitled to any government-caused delays and so it is entitled to judgment as a matter of law. *Id.* at 9.

Movant is mistaken. The decision in *TTF, LLC*, ASBCA No. 58498 (2013), was rendered by a single judge pursuant to Board Rule 12.2 expedited procedures, which decision was not subject to appeal and cannot be given preclusive effect for purposes of TTF's present CDA claim. *See* 41 U.S.C. § 7106(b)(4), (5); *Bruce E. Zoeller*, ASBCA No. 56578, 10-1 BCA ¶ 34,330 at 169,570 (*res judicata* unavailable based on Rule 12.2 decision); *Packard Construction Corp.*, ASBCA No. 55383, 07-1 BCA ¶ 33,459 at 165,873-74 (issue preclusion unavailable based on Rule 12.2 decision).

CONCLUSION

For the foregoing reasons, we deny respondent's motion for summary judgment.

Dated: 19 December 2013


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

(Signatures continued)

I concur

I concur



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



MARK A. MELNICK
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 No. 58452, Appeal of TTF, L.L.C., rendered in conformance with the Board's Charter.

Dated:

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