ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Munson Hammerhead Boats	)	ASBCA No. 51377
	)	
Under Contract No. N41756-95-G-5356	)	

APPEARANCE FOR THE APPELLANT: Mr. James R. Caudill
President

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Jonathan H. Kosarin, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER

This is an appeal of the partial default termination of a contract to perform modifications to a boat. Respondent revoked acceptance on the ground of latent defects and contends that the partial default termination was warranted because appellant failed to take acceptable action to cure the defect. Appellant argues chiefly that it made good faith efforts to cure the defect and that, in any event, the defect fell under the warranty given by its subcontractor. Only the propriety of the default termination is before us. The parties have elected to submit the appeal under our Rule 11. We deny the appeal.

FINDINGS OF FACT

1. By date of 28 October 1994, respondent awarded Basic Ordering Agreement No. N41756-95-G-5356 (the BOA) to Hammerhead Corporation (also called Munson Hammerhead Boats) (appellant) (R4, tab 1 at 1). The BOA incorporated various standard clauses by reference, including: FAR 52.233-1 DISPUTES (MAR 1994), ALTERNATE I (DEC 1991); FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984); FAR 52.246-2 INSPECTION OF SUPPLIES - FIXED-PRICE (JUL 1985) and FAR 52.247-30 F.O.B. ORIGIN, CONTRACTOR'S FACILITY (APR 1984) (R4, tab 1 at 14, 29, 32). We find that the BOA contained no provision requiring Government inspection or test of the work in progress.

2. By date of 23 December 1994, respondent issued Delivery Order No. 0001 (the delivery order) to the BOA, requiring appellant to perform custom modifications on a 36-foot Munson dive boat, at a price of $63,878 (R4, tab 2 at 1, 3). The boat was to serve as a quick response medical evacuation platform for dive rescue and salvage operations

(R4, tab 21 at 1). The delivery order incorporated by reference all of the terms and conditions of the BOA. The delivery order specified that delivery of all items was required on or before 26 March 1995 and provided that all supplies and services were to be "delivered F.O.B. Origin at the contractor's facility." (R4, tab 2 at 2, 3, 4, 5)

3. The specifications required appellant to paint the boat and apply a deck covering on certain areas. The delivery order's specifications stated, in pertinent part:

> Painting - . . . . Unless otherwise specified, all exterior aluminum and mild [sic] steel parts shall be primed and painted with an AWLGRIP aluminum surface paint system including AWLGRIP 545 epoxy primer and AWLGRIP/Linear Polyester Urethane Top Coat. . . . Application of all coating systems shall be in strict compliance with the paint manufacturer's recommendations.
>
> Deck Covering - Grey Treadmaster "M" diamond pattern deck covering . . . shall be installed on all traffic areas. . . . The Treadmaster shall be secured with 3M contact adhesive, type 10. When Treadmaster is to be installed directly onto aluminum plating, Awlgrip epoxy primer shall be applied to the surface of the plating prior to installation of the Treadmaster. . . . All edges shall be firmly secured and shall show no signs of peeling.

(R4, tab 2, §§ 631, 634)

4. By date of 23 February 1995, the parties entered into bilateral modification 01 to the delivery order changing the delivery date to on or before 8 April 1995, and increased the price to $65,479 (R4, tab 3 at 1, 2). By date of 27 March 1995, the parties entered into bilateral modification 02 to the delivery order, increasing the price to $67,853 (R4, tab 4 at 1, 2).

5. By date of 7 April 1995, the parties entered into bilateral modification 03 to the delivery order changing the requirement for "3M contact adhesive, type 10" to a requirement for "West Systems 2 part epoxy" and increasing the price to $68,242 (R4, tab 7 at 2, 3).

6. By date of 7 April 1995, the contracting officer's technical representative (COTR), signed a Material Inspection and Receiving Report accepting the custom modifications to the boat performed by appellant under the delivery order, certifying that they "conform to contract" (R4, tab 1 at 9, tab 8). Appellant submitted an invoice for the

modifications in the amount of $68,242. The contracting officer thereafter signed the invoice, indicating that it was approved for payment, on 1 May 1995 (R4, tab 9).

7. In an internal Government memorandum dated 15 August 1996, the COTR reported that the "integrity of the paint system on the [boat] is suspect." The COTR noted that appellant had subcontracted the painting of the boat and application of Treadmaster deck covering to Padden Creek Marine (Padden Creek) in Bellingham, Washington. The COTR stated that the boat was surveyed on 22 July 1996 to check the hull welding integrity and that, "[a]s part of that survey, the condition of the top side paint system and deck covering were inspected." The COTR stated that inspection of areas of damage of the paint system "revealed that the paint system could be peeled off intact leaving a bright aluminum surface. The aluminum surface below the paint was very smooth with no notable profile." (R4, tab 10 at 2, 3)

8. In his memorandum, the COTR also stated that U.S. Paint Corporation inspected the boat and the COTR included a letter dated 1 August 1996 from an official of U.S. Paint Corporation stating:

> The boat is constructed of aluminum, and painted with U. S. Paint's 545 epoxy primer and AwlGrip topcoat. There are many areas on the boat, primarily on deck, where corrosion has begun to cause blisters in the paint finish. Upon initial inspection it appears that the aluminum was sanded with a dual action sander and sand paper in the 80 grit range. The 545 primer was applied over this surface, and then topcoat was applied over the 545 primer. I believe that the cause of the blistering is due to insufficient surface preparation. Specifically the surface was not abraded enough for the coating to adhere.
>
> U.S. Paint recommends grinding or sand blasting the aluminum surface in order to achieve a 3 to 4 mil profile. In order to achieve this profile with a grinder you must use 36 to 60 grit hard grinding discs. . . .

(R4, tab 10 at 7)

9. In his memorandum, the COTR also reported problems with the boat's Treadmaster deck covering. The COTR stated:

> During the survey it was also found that the Treadmaster deck covering was peeling and lifting up in

> numerous areas, approximately 5 square feet. The Treadmaster was applied with West System epoxy resin. . . . Small sections of Treadmaster were pulled off leaving a bright aluminum surface. The epoxy held firm to the Treadmaster. The aluminum surface was not primed and appeared very smooth with no notable profile.
>
> . . . Simpson Lawrence USA [manufacturer of Treadmaster] . . . was contacted to solicit their specific installation requirements for Treadmaster . . . . Simpson Lawrence USA specifically requires that "aluminum decks should be primed" before installing Treadmaster with epoxy. The [statement of work in the BOA] (SOW) . . . states that when "Treadmaster is to be applied directly onto aluminum plating, Awlgrip 545 epoxy primer shall be applied to the plating prior to installation of the Treadmaster". Again, no primer coat was installed by Padden Creek below the Treadmaster. . . . The Gougeon Brothers Inc. [maker of the epoxy] was also contacted regarding the proper application procedures for WEST SYSTEM epoxy. The Gougeon Brothers again require the surface to be sanded with 80 grit abrasives. They further require the aluminum surface to be wiped with an acid conditioner and then a stabilizer to prevent oxidation . . . . Based on the condition of the aluminum surface we found below the loose Treadmaster, it does not appear that these steps were followed.

(R4, tab 10 at 4-5)

10. By letter dated 29 August 1996, the contracting officer forwarded the COTR's memorandum, with enclosures, to appellant. The contracting officer opined that the problems outlined in the COTR's memorandum represented a latent defect and requested that appellant propose an appropriate settlement including, as a minimum, repair of the dive boat "such that it is in adherence to the original custom specifications" identified in the memorandum. The contracting officer further stated that "[f]ailure to remedy this situation may force the Government to consider rescinding the acceptance of the custom modifications in accordance with the inspection terms of your contract (see "Inspection" clause, FAR 52.246-1 [sic])." (R4, tab 10 at 1)

11. In late 1996, respondent retained an independent consultant to evaluate the paint. On 28 January 1997, Tracey McManus, an inspector certified by the National Association of Corrosion Engineers, examined the boat (R4, tab 21 at 1, tab 11). He

found a coating that "is best described as an adhesive delamination between the primer and the aluminum substrate." He found the cause to be that "the surface was not prepared in accordance with the surface profile required by the specifications and the coating manufacturer." (R4, tab 11 at 1)

12. By letter dated 7 March 1997, the contracting officer informed appellant that respondent had "surveyed the local marketplace for boat repair facilities capable of making the necessary repair to the . . . dive boat" and forwarded three price quotations from boat repair facilities in the Norfolk, Virginia area. The contracting officer requested appellant to provide a written response outlining appellant's plan for resolving the issue within thirty days. (R4, tab 13 at 1)

13. Appellant responded by letter dated 2 April 1997 and stated that it did "not have the capital to pay a subcontractor to repaint the . . . boat." Appellant also stated that it had been in contact with the original paint subcontractor "who has given a one year warranty and has indicated that they would like to solve this problem." (R4, tab 14)

14. By letter dated 21 August 1997, appellant informed respondent that its subcontractor, Padden Creek, was "willing to go to Virginia" and asked respondent "to provide lodging, sandblasting and a facility." (R4, tab 15) In a second letter to respondent dated 22 August 1997, appellant stated: "Padden Creek believes that they were misinformed by the paint company; they also accept responsibility for a poor paint job. It will cost them and us more to accomplish the job in Virginia but will save the Navy the cost of sending the boat back to Bellingham, Washington." (R4, tab 12)

15. By date of 26 September 1997, respondent faxed to appellant a Government memorandum stating that the boat would be made available to appellant at respondent's Shore Intermediate Maintenance Activity (SIMA), Little Creek, VA, during November and that it was imperative that appellant commit to a time period immediately, noting that a support request had to be submitted to SIMA 45 days ahead of planned work (R4, tab 16). Thereafter, by letter dated 9 October 1997, the contracting officer advised appellant that respondent "requires a firm commitment on your part by 9 October 1997 to reserve space at . . . SIMA . . . for the repainting." He advised that appellant's signature at the bottom of the letter would provide the requisite commitment. He asked appellant to provide "a formal written agreement that the Padden Creek painters will be ready to work on 17 November 1997" so that respondent could reserve the facility. (R4, tab 17) We find that appellant did not furnish the requested commitment or agreement. In his declaration, the contracting officer attested, and we further find, that "[d]ue to the fact that . . . SIMA . . . was closing at the end of 1997, no other dates were available once Appellant failed to timely commit to doing the work in November 1997" (Tatum decl., ¶ 6; *see also* R4, tabs 26 at 1, 27 at 2).

16. By letter to respondent dated 14 October 1997, appellant insisted that the job be done at Padden Creek's facility in Bellingham, WA, and requested that respondent make arrangements to send the boat there for the work to be done in November or December (R4, tab 18). In his declaration, the contracting officer attested, and we find, that "[t]he round trip cost of shipping the boat to Bellingham Washington would be $40,000" (Tatum decl., ¶ 11(i)).

17. By letter dated 20 October 1997, the contracting officer stated that "due to operational and cost constraints, shipping the diveboat to Bellingham, WA is an unacceptable solution." Citing the Inspection clause, he added that respondent "revokes acceptance of the painting and deck covering modifications to the 36' diveboat and requests an equitable adjustment in the amount of $31,876." He requested appellant to advise it within ten days when appellant would send payment and stated that if no response or payment was received within that time then respondent had the right to correct the unacceptable work and charge the cost to appellant. (R4, tab 19) The contracting officer later stated, and we find, that, by this time, respondent was no longer "confident that a satisfactory outcome would be achieved through any solution other than obtaining the repair work from another source." (R4, tab 26 at 2)

18. Appellant replied by letter dated 20 October 1997, insisting that "[t]his is a warranty issue," and that appellant's warranty was for the boat's hull only. Appellant continued that, "[i]f you will have the paint taken off the boat[,] Padden Creek is still willing to paint your boat as agreed." Appellant attached to its letter a warranty clause which we find was not included in the BOA. (R4, tab 20)

19. By show cause notice dated 8 December 1997, the contracting officer informed appellant that respondent was considering terminating the contract for default since appellant had "failed to take action to cure the defect which resulted in [respondent] revoking acceptance" (R4, tab 22).

20. Appellant responded by letter dated 8 December 1997, denying a latent defect and reiterating that the paint was covered by Padden Creek's warranty. Appellant stated, "Padden Creek is still willing to repaint the boat in Virginia if you will have the old paint removed and set the boat in a paint shed. They would also repaint the boat at their shop if you return the boat." (R4, tab 23)

21. By letter dated 21 January 1998, the contracting officer informed appellant that unless appellant notified respondent of its agreement to provide the requested adjustment of $31,876 by 29 January 1998, the contract would be terminated for default (R4, tab 26).

22. By letter dated 13 February 1998, and by unilateral modification 04 dated the same day, the contracting officer issued a final decision partially terminating the delivery order for default (R4, tabs 27, 28). In his declaration, the contracting officer attested, and we find, that he considered the factors in FAR 49.402-3(f) before making the termination decision (Tatum decl., ¶ 11). This timely appeal followed. By order dated 6 May 1998, we decided that only the propriety of the default termination was before us. In addition, by letter to the Board dated 25 August 1998, appellant sought forbearance "for our subcontractors paint failure." Both parties subsequently elected Rule 11 disposition.

DECISION

A. *Contentions of the Parties*

Respondent contends that the contracting officer properly revoked acceptance of the modifications to the dive boat because of a latent defect. Respondent also argues that the contracting officer properly demanded repayment of $31,876 after efforts to have appellant repair the defect proved fruitless and that, when appellant did not pay, the contracting officer was entitled to terminate the delivery order partially for default. (Respondent's Brief (Resp. br.) at 14-20) Appellant has not filed a brief. Instead, in its complaint and in several letters to the Board, it seemingly urges that it made good faith efforts to resolve the problem, which was redressable under either appellant's or Padden Creek's warranty, and that, even though the problem arose outside of the period covered by those warranties, it agreed to repaint, and to do so in Virginia rather than at Padden Creek's facility in Washington state, to maintain respondent's good will. (Complaint, ¶¶ 1-5; appellant's letter dated 25 August 1998)

B. *Latent Defect*

The threshold issue in this appeal is whether respondent has established a latent defect. In the familiar formulation, a latent defect is one "which cannot be discovered by observation or inspection made with ordinary care." *Wickham Contracting Co., Inc.*, ASBCA Nos. 32392, 32526, 88-2 BCA ¶ 20,559 at 103,936 (citing *Kaminer Construction Corp. v. United States*, 488 F.2d 980, 984 (Ct. Cl. 1973)). Inasmuch as the BOA contained no requirement for Government inspection or test of the work in progress, but did contain the standard Inspection clause (*see* finding 1) requiring appellant to maintain an inspection system, only visual observation of the completed work was required for the exercise of ordinary care by respondent in accepting the work. *E.g., Wickham Contracting*, *supra*, 88-2 BCA at 103,936.

We conclude that respondent has established by a preponderance of the evidence that the boat's paint system and its Treadmaster deck covering contained a latent defect. Appellant has admitted that the paint system was defective (findings 14, 22). The

evidence of what transpired at the time of acceptance is sparse, albeit uncontroverted. It consists of the COTR's certification that the modifications "conform to contract" (finding 6). In the absence of contrary evidence, we take this certification to mean that the COTR examined the modifications and saw no reason to conclude that they were not in compliance with the specifications. The evidence regarding the nature of the defects in the paint system warrants the conclusion that the problem was imperceptible by visual inspection at the time of acceptance. With respect to the paint system, so far as the record reveals, the problem did not come to light until the July 1996 welding survey, when it was noticed that "the paint system could be peeled off intact leaving a bright aluminum surface" (finding 7). The record contains evidence of further investigation by the paint manufacturer concluding that the paint system was applied with "insufficient surface preparation," that is, the boat's aluminum surface "was not abraded enough for the coating to adhere" (finding 8). There is also evidence from an independent consultant, who determined that "the surface was not prepared in accordance with the surface profile required by the specifications and the coating manufacturer" (finding 11).

With respect to the Treadmaster deck covering, the evidence also establishes that the defect lay in insufficient surface preparation that was not observable at the time of acceptance. The Treadmaster problem also came to light when respondent found during the July 1996 welding survey that sections were "peeling and lifting up in numerous areas" revealing an "aluminum surface [that] was not primed and appeared very smooth with no notable profile" (finding 9). The specifications required that a primer "shall be applied to the surface of the [boat's aluminum] plating prior to installation of the Treadmaster" (finding 3). There is also evidence that the Treadmaster manufacturer requires primer before installation of its product, and the [epoxy maker] requires sanding and chemical treatment before applying its product to aluminum (*id.*).

Inasmuch as there was a latent defect, paragraph (k) of the Inspection clause rendered respondent's acceptance not conclusive and entitled respondent to seek correction, as it did (finding 10).

C. *Termination for Default*

We recognize that "termination for default is a drastic sanction that should be imposed upon a contractor only for good cause in the presence of solid evidence." *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) quoting *J. D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl.1969). Respondent bears "the burden of proof with respect to the issue of whether termination for default was justified." *Id.* If the default is proven, the burden then "shifts to appellant to come forward with proof that its default was excused by circumstances beyond the control and without the fault or negligence of appellant or a subcontractor at any tier." *FDL Technologies, Inc.*, ASBCA No. 41515, 93-1 BCA ¶ 25,518 at 127,098. It is settled that,

upon discovery of latent defects, respondent is entitled to set aside its earlier acceptance and to terminate the contract. *E.g.*, *Cross Aero Corporation*, ASBCA No. 14801, 71-2 BCA ¶ 9075 at 42,086. Such "action may be taken within a reasonable time after the latent defects have become known." *Bar Ray Products, Inc. v. United States*, 162 Ct. Cl. 836, 838 (1963).

On this record, respondent was entitled to partially terminate the delivery order for default. Respondent took the action with reasonable diligence. The period from discovery of the defects to revocation of acceptance was almost entirely devoted to negotiations over repair arrangements (findings 10, 12-16). The period from revocation of acceptance to termination was four months, some of it consumed with conditions involving the prohibitive cost of shipping the boat back to Padden Creek, as well as warranty assertions by appellant (findings 16, 18, 20). The termination decision itself is well founded. Procedurally, it was preceded by consideration of the factors in FAR 49.402-3(f) (finding 22). On the merits, it only came after protracted efforts to induce appellant to honor its contract got nowhere (findings 10, 12-16, 19, 21) and after appellant had further called its own seriousness into question by attempting to have respondent remove the defective paint (findings 18, 20). Appellant has not offered any evidence of excuse.

CONCLUSION

The appeal is denied.

Dated: 10 October 2000

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMPLER
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. 51377, Appeal of Munson Hammerhead Boats, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals