ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Walashek Industrial & Marine, Inc.	)	ASBCA No. 52166
	)	
Under Contract No. N00024-94-H-8691	)	

APPEARANCE FOR THE APPELLANT: John T. Jozwick, Esq.
Paradise Valley, AZ

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
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Trial Attorney
Supervisor of Shipbuilding,
Conversion & Repair
Everett, WA

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION TO DISMISS
AND APPELLANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This appeal was taken from the alleged deemed denial of appellant's claim seeking $367,031.00 in additional costs allegedly incurred under a contract to perform naval ship repairs and alterations. Respondent has moved to dismiss the appeal as untimely on the ground that the appeal is taken not from the deemed denial of appellant's claim, but rather from a final decision issued seven months before this appeal was filed. Appellant has opposed respondent's motion and has moved for summary judgment, arguing that the appeal presents pure issues of contract interpretation resolvable on an undisputed factual record. The Government has opposed appellant's motion and submitted affidavits disputing some material facts. We deny both motions.

Statement of Facts (SOF) For Purposes of the Motions

1. This dispute arises in connection with Job Order No. 967M14 ("JO") issued by the Supervisor of Shipbuilding, Conversion and Repair, Everett, WA ("SUPSHIP") to Walashek Industrial & Marine, Inc. ("WIM") under Master Agreement No. N00024-94-H-8691 for performance of ship repairs at Naval Station Everett, Washington, for the fixed price of $880,940.00 (R4, tabs 1, 18). The JO required WIM, *inter alia*, to install passive countermeasures on the USS FORD (FFG 54) during a "restricted availability" period from 8 July 1996 to 4 October 1996 (R4, tab 1 at 12, tab 2).

2. JO § H-2, "NAVSEA 5252.233-9103 DOCUMENTATION OF REQUESTS FOR EQUITABLE ADJUSTMENT (MAY 1993)" (submitted to the Board by respondent on 16 December 1999) provided in ¶ (e): "The certification requirements as set forth in the clause . . . entitled 'CERTIFICATION OF CLAIMS AND REQUESTS FOR ADJUSTMENT OR RELIEF' (DFARS 252.233-7000) shall be complied with." The JO incorporated the FAR 52.233-1 "Disputes (Standard Clause and Alternate 1) (MAR 1994)" and DFARS 252.233-7000, "Certification of Claims and Requests for Adjustment or Relief (MAY 1994)" clauses, (R4, tab 1) which required WIM to submit the following certification for any claim or request for equitable adjustment exceeding $100,000:

> I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

The JO also incorporated by reference FAR 52.214-29, "Order of Precedence - Sealed Bidding (JAN 1986)," which provided:

> Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications.

(R4, tab 1 at ¶ I-1-19)

3. The JO required WIM to install passive countermeasures in accordance with a specification entitled "SHIP ALT FFG-7-224K, Passive Countermeasures." That specification required work to be performed in a specified sequence, the second step of which was "Surface Preparation." (R4, tab 2) The "Surface Preparation" provisions required:

> 3.2.3 Power tool clean to bare metal or bare GRP[1] the surfaces to receive the passive countermeasures. Accomplish the requirements of Surface Preparation Specification SSPC-SP-11 of [Reference] 2.aq.

[1] The term "GRP" is unexplained in the record.

> 3.2.4 Accomplish the requirements of [Standard Item] 009-32 of [Reference] 2.a, including Table 9, Line 1, Columns B and C for properly prepared surfaces. Accomplish the requirements of Section D of [Reference] 2.b.

(R4, tab 2 at 3)

4. "Reference 2.aq," identified in specification § 3.2.3, was entitled "Surface Preparation Specifications, Steel Structures Painting Council" (SSPC-SP-11) (R4, tab 2 at 2). SSPC-SP-11 set forth a detailed procedure for "power tool cleaning to produce a bare metal surface," as distinct from a procedure "requir[ing] only the removal of loosely adherent materials" (R4, tab 19 at 1).

5. "Reference 2.b," identified in specification § 3.2.4, was NAVSEA Drawing 472-5604600 Rev. F, entitled "Special Treatment Installation Procedures and Typical Details" (R4, tabs 2, 3 at 1). Section D of Reference 2.b, entitled "SURFACE PREPARATION," had four subsections, of which Subsection D.1, entitled "PAINT REMOVAL," set forth procedures for removal of existing coatings from surfaces to be treated. The introductory paragraph to Section D provided as follows:

> Smooth, clean surfaces are essential to the proper adhesion of materials. Therefore, surfaces to be treated shall be cleaned to near white metal and reprimed except for areas painted with epoxy based primers which are completely intact and less than 3 mils dry film thickness (DFT) with no corrosion or blistering. These areas may be cleaned and reprimed in accordance with sections D.1 and D.3.

Subsection D.1 provided:

> Existing paint shall be removed with abrasive blasting, where possible, to obtain a surface profile that will enhance primer adhesion. . . . Although these methods require the removal of all old paint, Navy Formula 105 (NF-150) primer film areas which are completely intact and less than 3 mils in dry film thickness (DFT), with no corrosion or blistering need not be removed and may be repainted. NF-150 is easily identified visually by its green color.

(R4, tab 3)

6. Columns B and C in Table 9, Line 1, of Standard Item 009-32, entitled "Cleaning and Painting Requirements," referenced in specification § 3.2.4 specified only the application of primer and finish paint, not surface preparation (R4, tab 20 at 23-24).

7. The record does not indicate that the parties had any preaward discussions regarding the extent to which existing surface coatings were to be removed. Shortly after the JO was awarded, WIM's representatives attended a Navy training class in surface preparation as required by specification ¶ 3.2.1. According to the affidavit of WIM's Project Manager, Ed Speakman, Navy trainers instructed WIM during that class that specification Reference 2.b was to be regarded as "the Bible" for surface preparation procedures. (AR4, tab 4, Speakman Affidavit ("Speakman Aff.") at ¶ 4)

8. Following such training, WIM performed surface preparation on the USS FORD pursuant to the procedure prescribed in Reference 2.b, Section D. Specifically, WIM removed existing coatings by blasting except in areas where there was an existing coating of NF-150 green epoxy primer that was less than 3 millimeters thick and showed no evidence of corrosion or blistering. Such areas were cleaned but otherwise left intact. (Speakman Aff. at ¶¶ 6-9)

9. On 26 July 1996, Mr. Eric Howard, a technical representative of "BBN Acoustic Technologies," used by the Navy, notified WIM that its surface preparation procedure leaving NF-150 epoxy primer in place was unacceptable, and the contract required removal of all existing surface coatings (Speakman Aff. at ¶ 9). WIM alleges that SUPSHIP Quality Assurance Representative, Mr. Joe Thompson, inspected the USS FORD's surfaces prepared by WIM on 29 July 1996, and pronounced WIM's work to be in compliance with the contract (Speakman Aff. at ¶ 10). Mr. Thompson specifically denies this allegation (Thompson Declaration, Gov. br., tab 1).

10. According to WIM, the Navy thereafter continued to vacillate regarding the acceptability of WIM's surface preparation procedure. At a 30 July 1996 meeting with WIM's representatives, SUPSHIP officials renewed the objections Howard had originally stated to WIM on 26 July 1996. Later that same day, however, SUPSHIP's John Sayers allegedly orally instructed WIM to continue employing the surface preparation procedure that left existing areas of N-150 primer in place. (Speakman Aff. at ¶¶ 12, 13)

11. On 6 August 1996, Mr. Don Price, the SUPSHIP Administrative Contracting Officer (ACO), verbally directed WIM to prepare surfaces by removing all existing coating, including N-150 primer (Speakman Aff. at ¶ 14). SUPSHIP followed up that verbal direction by issuing "Price Proposal Serial No. 3005" to WIM on or about 6 August 1996, which stated:

> TITLE: Passive Countermeasure Material, Ship Alt FFG-7-224K; accomplish
>
> SCOPE: EDITORIAL CHANGE
>
> 1. In subparagraph 3.2.3, line three, after the words "SSPC-SP-11 of 2.aq." add the following:

> Work item requirements supercede SECT D. of 2.b (SHT 11-17 for surface prep[a]ration).
>
> REASON: Clarification to surface prep

When issued, Price Proposal 3005 was unsigned and undated, and entries for a time extension and price necessary for completion of work were left blank. (AR4, tab 5) On or about 18 September 1996, WIM filled in those entries to propose an extension of the contract completion date until 14 October 1996 and a $278,345 price increase (R4, tab 7).

12. The ACO's 16 October 1996 letter to WIM replied to WIM's Price Proposal 3005 submission, denying any price increase. The ACO contended that the JO required complete removal of existing coatings, Price Proposal Serial No. 3005 was only "editorial" and was issued to eliminate a "superficial conflict" in the specifications, the specification provisions incorporating Reference 2.b were "general" in nature, and they were superseded by section 3.2.3's "specific" provision incorporating Reference 2.aq. (R4, tab 8)

13. Thereafter, WIM submitted an undated request for equitable adjustment to recover $445,896.00 in allegedly increased surface preparation costs (AR4, tab 7). The ACO responded by letter dated 12 September 1997, stating that WIM's request for equitable adjustment contained several deficiencies that precluded it from being evaluated as submitted, including the lack of a "certification required by the Contract Clause entitled 'Certification of Claims and Requests for Adjustment or Relief' " (R4, tab 9).

14. On or about 8 June 1998, WIM submitted to the ACO a revised request for equitable adjustment (R4, tab 11). WIM's letter stated that "[t]he appropriate certification for [r]equests under the amount of $500,000.00 has been executed and included herein." Such "certification" was signed by Mr. Michael Walashek, CEO, and stated:

> CERTIFICATION
>
> The undersigned, being aware of the provisions of 18 U.S.C. Section 1001, hereby represents and certifies that to the best of his knowledge and belief:
>
> 1) The contents of the foregoing proposal and its attachments have been thoroughly investigated by responsible company employees and officials for completeness and accuracy as to the facts, and that any judgmental statements and conclusions in the proposal and its attachments are clearly identified as such.

> 2) The proposal either directly or by specific reference sets forth the information to be furnished pursuant to this requirement to the full extent that such information is within custody of or available to the Contractor.
>
> 3) On the basis of the foregoing review, the Contractor is satisfied with respect to each item that the adjustment claimed is therefore reasonable and accurately represents the additional costs and/or time incurred or to be incurred by reason of the asserted Government act or omission.

(R4, tab 11 at 29)

15. WIM's 20 August 1998 letter to the ACO noted that 60 days had elapsed since his receipt of WIM's June 1998 submission, and "demand[ed]" the Navy's "formal response" thereto (R4, tab 13).

16. The ACO's 2 October 1998 letter denominated as a "final decision" denied WIM's June 1998 request *in toto* and duly advised WIM of its appeal rights (R4, tab 16).

17. WIIM's 30 November 1998 letter to the ACO responded to the ACO's 2 October 1998 final decision as follows:

> It is the contractor's belief that the Contracting Officer's Final Decision was rendered in error since no claim, certified in accordance with the Disputes Clause of the subject Contract or the Contract Disputes Acts [sic] of 1978, had been submitted to the government by WIM. It is the contractor's understanding that the Contracting Officer is to issue his final decision (COFD), at such time as he may complete his review of a claim certified in accordance with the Disputes clause of the subject Contract and the Disputes Act of 1978.
>
> WIM hereby notifies the Contracting Officer that it deems the matter of its REA to be in dispute and hereby submits its certified Claim for Equitable Adjustment for costs which it believes were incurred as a direct result of the government's directed change to the scope of work for Item 472-90-001. This Claim is submitted in accordance with the terms of the subject Contract and Job Order. An appropriate certification executed in accordance with the Disputes clause of the Contract and the Contract Disputes Act of 1978, is included herein.

> Since the government appears to have already reviewed the facts and details of the contractor's Claim it is hereby requested that the Contracting Officer expedite his formal response. However, should an expedited response not be forthcoming, the contractor hereby formally demands a Contracting Officer's Final Decision within the time frame and in accordance with the Contract Disputes Act of 1978.

WIM's 30 November 1998 letter included a copy of WIM's earlier claim and a signed certification that conformed to the requirements of the Contract Disputes Act. (AR4, tab 12)

18. The record contains no evidence that the Navy responded to WIM's November 1998 letter either orally or in writing. This appeal, which purports to challenge the Navy's "deemed denial" of WIM's November 1998 submission, was docketed on 3 May 1999. Respondent filed a Motion to Dismiss on 8 June 1999. On 9 July 1999 WIM filed a Motion for Summary Judgment. Neither party has had an opportunity to conduct discovery in the appeal.

DECISION

I. Motion to Dismiss

Under the Contract Disputes Act (CDA), contractors submitting monetary claims in excess of $l00,000 are required to certify that:

> the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.

41 U.S.C. § 605(c)(1). As amended in 1992, 41 U.S.C. § 605(c)(6) provides:

> The contracting officer shall have no obligation to render a final decision on any claim of more than $100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a

> decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.

Pub. L. No. 102-572 § 907(a)(1)(B), Oct. 29, 1992.

The primary issue raised by the motion to dismiss is whether appellant's June 1998 certification was correctable within CDA § 605(c)(6). Respondent argues that the June 1998 certification was technically defective and correctable, and so appellant's failure to appeal within 90 days after the 2 October 1998 final decision left the Board without jurisdiction to entertain this appeal. Appellant argues that its June 1998 certification was made with knowing and intentional disregard of the applicable certification requirements; thus it had a substantive defect that was not correctable under the CDA; and the Board has jurisdiction of the appeal from the CO's deemed denial of appellant's 30 November 1998 properly certified claim.

According to the Congress, to determine whether a certification is correctable, one must decide whether the defect is "technical" in nature, as in the following examples:

> certification with each document submitted as part of the claim when all claim documentation is not submitted simultaneously, missing certifications when two or more claims not requiring certification are deemed by the court or board to be a larger claim requiring certification, and certification by the wrong or incorrect representative of the contractor.

However, when the certification is made with intentional, reckless or negligent disregard of the applicable certification requirements, it is not correctable. (H.R. REP. No. l02-1006, 102d Cong., 2d Sess. 28, *reprinted in* 1992 U.S. CODE CONG. & ADMIN. NEWS at 3921, 3937).

Consistent with such Congressional guidance, the tribunals have distinguished certifications that are substantially compliant but with "technical defects," from cases when the required certification is entirely absent, *see Eurostyle*, Inc., ASBCA No. 45934, 94-1 BCA ¶ 26,458 at 131,654, or the certification language is intentionally or negligently defective. *See Production Corp.*, ASBCA No. 49122-812, 96-1 BCA ¶ 28,053 at 140,082, *recon. den.*, 96-1 BCA ¶ 28,181 (intentional, deliberate failure to use CDA language which contained "little that would identify them as certifications," was reckless and intentional disregard of the certification requirement, and not correctable); *Keydata Systems, Inc*., GSBCA No. 14281, 97-2 BCA ¶ 29,330 at 145,824 (certification that addressed only one prong and ignored the other three prongs of proper certification was negligent disregard for CDA requirement, and not correctable); *Sam Gray Enterprises, Inc. v. United States*, 32 Fed. Cl. 526, 529 (1995) (statement that included "I

acted in good faith" did not remotely resemble required CDA certification so as to permit correction). By contrast, in *James M. Ellett Const. Co., Inc. v. United States*, 93 F.3d 1537, 1545 (Fed. Cir. 1996) the Government conceded, and the court held, that the "Certificate" in the Standard Form 1436 termination proposal was not substantially deficient as a CDA certificate. The SF1436 stated:

> This is to certify that the undersigned . . . as an authorized representative of the Contractor, has examined this termination settlement proposal and that, to the best knowledge and belief of the undersigned: . . . The proposed settlement . . . and supporting schedules and explanations have been prepared from the books of account and records of the Contractor in accordance with recognized commercial accounting practices; they include only the charges allocable to the terminated portion of this contract; they have been prepared with knowledge that they will, or may, be used directly or indirectly as the basis of settlement of a termination settlement proposal or claim against . . . the United States; and the charges as stated are fair and reasonable.

WIM's June 1998 certification wholly omitted the first prong of the required CDA certification, "the claim is made in good faith." With respect to the second prong – "the supporting data are accurate and complete to the best of his knowledge and belief" – appellant says only that its claim has been "investigated" for accuracy and completeness, without divulging whether it *is* "accurate and complete." Only as to the third prong – the amount requested accurately reflects the adjustment for which the contractor believes the Government is liable -- is appellant's text fairly compliant: "the Contractor is satisfied . . . that the adjustment claimed is . . . reasonable and accurately represents the additional costs and/or time incurred or to be incurred by reason of the asserted Government act or omission." (SOF 14).[2]

The JO incorporated two standard clauses prescribing the correct certification language (SOF ¶ 2). The ACO's 12 September 1997 letter expressly referred appellant to these clauses, and stated that proper certification was a prerequisite for a decision on its claim (SOF ¶ 13). We hold that WIM's June 1998 certification reflected an intentional or negligent disregard of the applicable CDA certification requirements, and is not correctable under 41 U.S.C. § 605(c)(6). Therefore, by virtue of the deemed denial of appellant's properly certified November 1998 claim (SOF ¶¶ 17, 18), we have jurisdiction of this appeal.

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[2] In view of our conclusions above, we do not address the fourth prong.

Respondent argues that holding the June 1998 certification not correctable will allow contractors to evade statutory certification requirements. We disagree. Appellant eventually submitted a valid certification.

We deny the Navy's Motion to Dismiss.

II. Motion for Summary Judgment

Appellant moves for summary judgment on the grounds that: (1) the JO permitted it to leave all areas consisting of stable NF-130 primer intact, and (2) the SUPSHIP's "editorial change" requiring stripping of existing coatings to bare metal constituted a change to the contract. Respondent opposes the motion on grounds that there are disputes of fact on material issues, it has not had the opportunity to explore such facts in discovery, and appellant's interpretation is not sound as a matter of law.

Summary judgment is properly granted where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). When deciding motions for summary judgment, it is proper to consider whether the opponent has had a reasonable opportunity to conduct discovery on disputed issues of fact. *See Burnside-Ott Aviation Training Center*, ASBCA No. 43184, 94-1 BCA ¶ 26,590.

The current record does not support the validity of appellant's interpretation -- that the JO permitted it to leave all areas consisting of stable NF-130 primer intact -- as a matter of law. Two JO provisions addressed the extent of surface preparation to be conducted: ¶ 3.2.3 required appellant to "[p]ower tool clean to bare metal or bare GRP the surfaces to receive the passive countermeasures," and referred to reference 2.aq, which did not address or permit leaving any area of stable NF-150 primer intact (SOF ¶¶ 3, 4); whereas ¶ 3.2.4 referred to Reference 2.b, which permitted existing N-150 primer to remain if it were less than 3 mils dry thickness, with no corrosion or blistering (¶¶ 3, 5). We conclude that ¶¶ 3.2.3 and 3.2.4, in the context of their subtier specifications, are inconsistent.

The parties argue that the JO's "Order of Precedence" clause (SOF ¶ 2) resolves this ambiguity. Appellant argues that Reference 2.b, which permitted leaving of intact primer, is in the category of "other documents, exhibits and attachments," and thus takes precedence over specification ¶ 3.2.3, the last in order of precedence. Respondent argues that "specific" Reference 2.aq should trump "general" Reference 2.b. Neither argument is sound. Paragraphs 3.2.3 and 3.2.4 do not state that Reference 2aq is "specific" and Reference 2.b is "general." Both Reference 2.b and Reference 2.aq are identified only in the JO specification. (SOF ¶ 3) Therefore, both are equal in priority, so the "Order of Precedence" clause does not resolve their inconsistency.

Where a genuine ambiguity of this sort exists, a tribunal may examine extrinsic evidence to determine the parties' intent in devising the contract terms in dispute and how they interpreted them during the course of performance before they were disputed. *See Coastal Dry Dock & Repair Corp.*, ASBCA No. 31894, 87-1 BCA ¶ 19,618 at 99,236-38. Appellant, citing the Speakman affidavit, says that respondent allowed appellant to leave intact primer in place at the inception of contract performance, thus acquiescing in appellant's interpretation of the JO provisions (SOF ¶¶ 8, 10, 11). Mr. Thompson's affidavit denies those material facts (SOF ¶ 10). Accordingly, summary judgment is inappropriate, because material facts regarding the interpretation of critical contract provisions are genuinely disputed, and neither party has had any reasonable opportunity to discover such material facts.

CONCLUSION

The Government's Motion to Dismiss is denied. Appellant's Motion for Summary Judgment is denied. Within 20 days of receipt of this decision, the Government shall file its answer to appellant's complaint.

Dated: 6 January 2000

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

I concur

I concur

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

MICHAEL T. PAUL
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. 52166, Appeal of Walashek Industrial & Marine, Inc., rendered in conformance with the Board's Charter.

Dated:

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