ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Freedom NY, Inc.	)	ASBCA No. 43965
	)	
Under Contract No. DLA13H-85-C-0591	)	

APPEARANCES FOR THE APPELLANT: Gilbert J. Ginsburg, Esq.
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APPEARANCE FOR THE GOVERNMENT: Kathleen D. Hallam, Esq.
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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR RECONSIDERATION

On 11 October 2001, appellant timely moved for reconsideration of the Board's 28 August 2001 decision in the captioned appeal, reported at 01-2 BCA ¶ 31,585. In that decision we held that respondent's withholding and suspension of progress payments, interferences with Freedom NY's (FNY) prospective financers, and diversion of Contractor Furnished Materials (CFM) were breaches of contract that resulted in 246 days of delay compensable pursuant to the Government Delay of Work clause. We also held that respondent's delay in providing GFM components for 200 additional days entitled FNY to an equitable adjustment under the contract's Government Property clause.

FNY's post-hearing brief and appendix of "Quantum Charts" (QC) pointed to no contemporaneous 1985-87 evidence of the costs FNY incurred as a result of the foregoing Government conduct, but did allege that various amounts were incurred for material, labor, manufacturing overhead, G&A, and the like costs, citing FNY's January 1999 convenience termination settlement proposal (ex. FT-408) and a September 1999 DCAA audit report (ex. FT-413). Noting that both parties attached the 29 December 2000 termination settlement modification (No. A00004) to their briefs, the Board *sua sponte* re-opened the

appeal record, admitted that modification in evidence as Board Exhibit 1, used its agreed total costs of labor, manufacturing overhead and G&A to calculate average monthly costs, and allowed a total recovery of $5,907,654 for the 446 days of delay based upon the average monthly costs during the pertinent delay periods. This amount included profit of $384,816 as part of the equitable adjustment relating to the GFM.

FNY's motion for reconsideration submitted by its newly designated attorney argues that it should recover its entire contract cost overrun with profit thereon, lost prospective profit on the 107,538 terminated MREs and on the MRE-7 and later MRE contracts awarded to CINPAC, and other consequential damages. FNY does not question the Board's findings of fact and points to no evidence to support added compensation that we overlooked. This was not an oversight on counsel's part. There is no record evidence to support the additional damages FNY seeks to recover.

Appellant argues that the Board should: (1) find that the delays for which the Board found Government liability pursuant to the Government Delay of Work clause (which excludes recovery of profit) were also constructive changes, entitling appellant to an equitable adjustment (with profit); (2) include the entire cost overrun in damages awarded; (3) find that the Government's cumulative actions were a "cardinal change"; (4) find that breach damages were not speculative or remote; and (5) find entitlement to damages for MRE contracts awarded to other planned producers (mot. at 2). The Government responded, opposing the motion. Familiarity with the Board's 28 August 2001 decision is assumed.

With respect to appellant's first argument, the MRE-5 contract's "Changes" clause authorized changes, within the general scope of the contract, in the "drawings, designs, or specifications," the "method of shipment or packing," and the "place of delivery." (R4, tab 1; DAR F-100.32, General Provision No. 2) It did not address or provide an equitable adjustment for Government delays, so the exception in ¶ (a)(ii) of the DAR 7-104.77(f) GOVERNMENT DELAY OF WORK clause is not applicable. We are not persuaded that our holding denying profit on delays adjustable under the DAR 7-104.77(f) clause was in error. In none of the cases cited in the motion, or others known to the Board, did a tribunal allow profit or other breach damages for delay caused by wrongful withholding or suspension of progress payments notwithstanding the inclusion of the DAR 7-104.77(f) GOVERNMENT DELAY OF WORK clause.

FNY also argues that ACO Liebman's unauthorized withholdings, suspensions and interferences were breaches of contract and caused FNY's loss position, and thus he abused his discretion to use the "modified loss ratio" and to liquidate progress payments at 100% (app. br. at 7, fn. 2). In hindsight, such actions were held to be breaches; but it was not so obvious to the Government in 1985-86 that its conduct was a breach. We interpreted the DAR §§ E-524.5(b) and 7-104.35(b), ¶ (c), provisions prospectively as of the time those administrative actions were taken, as we believe their texts require. FNY cites no legal

authority to support its retrospective interpretation. Furthermore, although FNY originally argued that ACO Lieberman's actions were done in bad faith, we made no such finding, because the record did not contain "irrefragable proof" of his malice, specific intent to injure FNY, conspiracy to be rid of FNY, animus or designedly oppressive conduct. *See Kalver Corp., Inc. v. United States*, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977). FNY further contends that the Board should have given additional time for delayed "maple nut cake" in April 1986, which delay, it alleges, was a "ripple effect" from the January 1986 CFM diversion (app. br. at 8, fn.4). Such assertion is pure speculation, with no substantiating evidence.

Appellant's second argument is that the costs of its claim items cannot be segregated and discretely quantified, and so it is entitled to recover on a total cost or "would have cost" basis (mot. at 6). Key elements for total cost recovery – the discrete costs of breaches and changes cannot be segregated, and only Government actions caused appellant's cost overrun – as discussed in the motion are *ipse dixit*, with no citation to evidentiary support in the appeal record. Appellant's "Quantum Charts" attached to its post-hearing brief are not evidence. We reject this second argument.

Appellant's third argument is "cardinal change." Our findings of fact show that the parties originally contemplated performance of the MRE contract financed by both Government progress payments and by private financing. As actually performed, due chiefly to withheld, delayed and diminished Government progress payments and interferences with appellant's prospective private financers, appellant assembled MREs with equipment of lesser capacity that required greater time to complete the work, and incurred labor costs exceeding those that were originally bargained for. These facts do not establish that appellant performed duties "materially different from those originally bargained for" and "beyond the scope of the contract," as enunciated in *Air-A-Plane Corp. v. United States*, 408 F.2d 1030, 1033, 187 Ct. Cl. 269 (1969), and *Allied Materials & Equipment Co. v. United States*, 569 F.2d 562, 563-64, 215 Ct. Cl. 406 (1978).

With respect to appellant's fourth and fifth contentions, appellant cites *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000), to support recovery of amounts of unpaid debts to creditors, unrecovered investment costs, and lost profits on post-MRE-5 contracts. *Ace-Federal* does not govern this appeal, because the Court found that the Federal Supply Schedule (FSS) contract included the FAR 52.216-21 REQUIREMENTS clause and a Government promise to purchase only from FSS contractors. 226 F.3d at 1332. The terms of a FSS contract are not analogous to the terms of the IPP agreement in this appeal, which expressly did not require the Government to award any contract to appellant (finding 3). Moreover, after 23 March 1987 FNY no longer was an MRE "planned producer" (exs. FT-328, -370, -374, -377, -382).

We deny the motion for reconsideration.

Dated: 7 December 2001

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

I concur

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

I concur

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. 43965, Appeal of Freedom NY, Inc., rendered in conformance with the Board's Charter.

Dated:

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