ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
E.O. Manufacturing Company, Inc.	)	ASBCA No. 52120
	)	
Under Contract No. SPO440-96-C-5168	)	

APPEARANCE FOR THE APPELLANT: Mr. Peter LeMere
Vice President

APPEARANCE FOR THE GOVERNMENT: Donald S. Tracy, Esq.
Chief Trial Attorney
Defense Supply Center Richmond
(DLA)
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE KIENLEN
PURSUANT TO RULE 11

E.O. Manufacturing Company, Inc., appeals the termination for default of its contract with the Defense Supply Center Richmond. Only the propriety of the default termination is before us. The parties have submitted the appeal on the record under Board Rule 11. The only evidence submitted is that contained in the Rule 4 file. The Government submitted a brief. The appellant did not. We deny the appeal.

FINDINGS OF FACT

On 19 February 1996, the Defense Supply Center Richmond (DSCR) awarded to the appellant a contract for the manufacture of 45 "hoisting adapters," at a unit price of $5,256.95, F.O.B. at various destinations, for a total contract price of $236,562.75. Deliveries were scheduled in five increments, beginning on 16 October 1996 with ten units, and continuing with ten units on 15 December 1996, 13 February 1997, and 14 April 1997, and ending with the last five units on 13 June 1997. Among the standard contract clauses incorporated by reference were DISPUTES (MAR 1994), located at FAR 52.233-1, and DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984), located at FAR 52.249-8. (R4, tabs 1, 2) Progress payments were authorized by Modification No. P00001, dated 8 April 1996. The appellant received $62,702 in progress payments. (R4, tabs 5, 17)

After the appellant failed to make the first three deliveries, on 24 February 1997 the schedule was modified, at the appellant's request, to provide for incremental deliveries of 15 units each on 18 April, 20 June, and 22 August 1997. The Government accepted a price reduction of $1,125 as consideration for the change in the schedule. The Government issued contract Modification No. P00002 incorporating these changes. (R4 tab 6)

On 17 April 1997 the appellant notified the Government that it would not be able to meet the next day's scheduled delivery. Appellant asked that deliveries be rescheduled for 15 adapters each on 20 June, 22 August, and 31 October 1997; and, offered $1,125 in consideration. (R4, tab 10) The Government offered a counter proposal of 15 units on 20 June and 30 units on 22 August 1997. The appellant agreed to that schedule. (R4, tab 11) Although the parties agreed to this change in the schedule, a contract modification was not issued.

On 10 June 1997, in response to a Government inquiry, the appellant notified the Government that the June delivery date could not be met. Appellant did not propose a new delivery schedule, and did not offer any further consideration. (R4, tab 14)

On 22 July 1997, the appellant not having made any deliveries, the Government demanded that appellant provide "a firm revised delivery date" by the next day (R4, tab 15). The appellant responded that it could provide 10 units on 17 October 1997 and the remainder over a schedule that ended on 29 May 1998. The appellant stated that "[w]e are well aware that this contract is very delinquent. But the dates provided above are realistic ones." Appellant again offered an additional $1,125 as consideration for the new schedule. (R4, tab 16) The Government accepted the appellant's proposal and issued a contract modification (R4, tab 7).

As of 6 November 1997 the appellant had not made any deliveries. By a letter of that date the Government notified appellant that a termination for default was being considered. The appellant was given an opportunity to explain, or to show cause, why its failure to perform was not its fault. (R4, tab 18) On 14 November 1997 the appellant responded that it had experienced difficulties which "had a negative affect on our cash flow. Realizing that this [is] not an excuse for non-performance." The appellant offered assurances that it had completed 75 per cent of the work on 15 units, had already purchased many of the component items and had those parts in house for the entire contract, and asked for the opportunity to revise the delivery schedule. (R4, tab 19) By letter of 19 November 1997, appellant explained further that it had encountered difficulties on three contracts which had impacted some $145,000 in funds, as well as "consuming both time and manufacturing resources." The appellant again asked that it be given an opportunity to complete performance. It proposed deliveries "of a minimum of two units per month beginning in January [1998]." (R4, tab 20)

On 20 November 1997, based upon appellant's claim that 15 units were 75 percent complete, and considering that the Government had paid the appellant $62,702 in progress payments without any deliveries, the Government proposed delivery of 10-15 units within the next few weeks and the remainder delivered in increments of at least five units per month (R4, tab 21). The appellant responded that while the units were 75 percent complete, there was still "considerable work to be performed." The appellant committed to "shipment" of five units per month, beginning on the last business day of January 1998. (R4, tab 22)

On 2 December 1997, the Defense Contract Management Command (DCMC) Hartford recommended to DSCR that appellant's latest schedule slippage be allowed in the hope that the $62,702 in progress payments could be recouped. On or about that same day, DSCR spoke with appellant and agreed to accept appellant's revised schedule if it provided firm delivery dates and consideration in writing (R4, tab 24). On 10 December 1997 the appellant provided the written schedule, with nine monthly deliveries of five units each, beginning on 10 February and ending on 10 October 1998. The appellant also provided a price reduction of $1,125. (R4, tab 25) The Government accepted this proposal and issued a contract modification incorporating the new schedule (R4, tab 8).

DCMC Hartford visited appellant's plant on 6 February 1998 and reported to DSCR that components were at appellant's vendor, which was waiting to be paid, cash on delivery, before shipping them. Appellant was forecasting shipment of half the units by the end of March and the remainder by the end of April 1998. DCMC Hartford thought a more realistic delivery date was half by June and the other half by August 1998. (R4, tab 26) On 12 February 1998 DCMC Hartford inquired of the appellant as to its progress. At that time the appellant had two units completed and three more which were almost ready to ship. The appellant promised to ship the two finished units the following week, after they were packaged. (R4, tabs 27, 28)

The promised delivery did not occur. On 4 March 1998, the Government issued a second "show cause" letter, notifying the appellant that the Government was considering terminating the contract for default. The letter gave the appellant the opportunity to explain its default. The letter also warned the appellant that:

> Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

(R4, tab 29)

The appellant replied on 18 March 1998 that it "was ready to commence shipping on" the contract. It advised the Government that it was going to use a different packaging vendor and requested that the contract reflect the name and address of the new packaging vendor. (R4, tab 30) Two weeks passed and there were no deliveries. On 6 April 1998, the appellant again advised the Government that it was ready to ship using its new packaging vendor. The appellant proposed a revision in the delivery schedule to show the delivery of five units per month beginning on 15 April and ending on 15 December 1998; and, a decrease of $1,125 in the contract price, as consideration for the change in delivery schedule. (R4, tab 31)

The contracting officer prepared a modification accepting the appellant's proposed schedule, but did not process it before 15 April 1998. We find that the Government was considering, and was willing to accept, a 15 April delinquent delivery of those units due on 10 February 1998, and was considering accepting a new schedule for all deliveries if the 10 February delivery was made by 15 April 1998. The appellant made progress on the completion of those five units. However, the appellant did not make the delivery promised for 15 April 1998. There is no evidence appellant made progress on completion of any of the other units during this time frame. The Government did not issue the modification. We further find that the Government did not accept the new schedule when the appellant failed to make good on its promised delivery of the 10 February units by 15 April 1998. The Government requested a new delivery date, but received no response from the appellant. The appellant continued to work on those first five units. In late April the appellant delivered and the Government accepted four units. The Government took no action to reschedule the remaining undelivered unit, or to change the schedule for any of the other incremental deliveries. (R4, tabs 31, 36)

No other units were delivered, and the record does not show any further communication between the Government and the appellant, through the month of October 1998. By late October, DCMC Hartford had determined that the appellant was having financial difficulties and had made no visible progress since April. (R4, tab 32) On 4 November 1998, the Government issued its third "show cause" letter, advising appellant that the Government was considering terminating the contract for default. Again, this letter gave the appellant the opportunity to explain its default. The letter also warned the appellant that:

> Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of nitigating [sic] damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

(R4, tab 33)

On 10 November 1998, DCMC Hartford visited appellant's plant to determine the status of production. DCMC Hartford did not report whether or not any work had been performed, but DCMC Hartford estimated that the appellant could have one unit ready for packaging the week ending 20 November 1998, five more units could be ready for packaging in 30 days, and 11 more units could be ready for packaging within 45 to 60 days, measured from 10 November. The only noted impediment to this schedule was the insistence by the packaging vendor that it would not ship without being paid cash. (R4, tab 34) The appellant had not received the "show cause" letter of 4 November. A copy was provided to the appellant by DCMC Hartford during the 10 November visit. (R4, tab 38, ¶ 16)

In an undated letter which was faxed to the Government on 20 November 1998, the appellant responded to the "show cause" letter (R4, tabs 37, 38). The appellant explained that several of its personnel had suffered medical problems since the last set of adapters was assembled, but that the individual who did the machining had returned to work on 2 November 1998. The appellant further explained that:

> We currently have all of the hardware in house to build the balance of the contract. We have all of the rubber Blade Inserts for the entire contract as well. We have enough blade rack assemblies thru [sic] final assembly to complete the next 12 units.
>
> We have also re-established credit with a local material house and have them scheduled to deliver material every thirty days until the order is complete.

(R4, tab 37) The appellant promised, "At this point in time we are prepared to continue shipping at a rate of five units per month, beginning in December. . . . We can ship the next 6 units by December 22, 1998." We find that at the end of November 1998 the contractor had performed no work on the units since its late delivery of four units in April 1998.

On 2 December 1998, the Government's contract specialist received a telephone call from Peter LeMere, the appellant's vice-president, who said that they would need a couple more weeks for delivery (from 22 December), since they had not yet heard from the Government concerning the proposed new schedule. Mr. LeMere was advised that the Government was going to forbear termination until 23 December. He was also advised that he should not have halted production while waiting for the response, and that no additional time would be given. (R4, tabs 13, 35)

By letter of 7 December 1998, the contracting officer advised the appellant that, based on the appellant's representations that six units would be shipped by 22 December 1998, she "will forbear terminating this contract until December 23, 1998 pending delivery

as stated." The letter also advised the appellant that the remaining "delivery dates will be discussed upon delivery of the 6 units by December 22, 1998." (R4, tab 39)

On 22 December 1998, DCMC Hartford checked with the appellant and was told that deliveries were still about six weeks away. This represented no change in the status of production since late November 1998, meaning that no work had been performed since late April 1998. We find that as of 22 December 1998 the appellant had made no progress since its deliveries in late April 1998. (R4, tab 40)

On 23 December 1998 the procuring contracting officer recommended to the termination contracting officer that the contract be terminated for default. On 28 December 1998 the appellant was notified by fax that its contract was terminated for default. (R4, tabs 40, 41) Contract Modification No. P00005, formally confirming the termination for default, was signed by the Government on 11 January 1999 (R4, tab 9).

By letter mailed on 27 March 1999, the appellant timely appealed to this Board. In its notice of appeal, the appellant stated:

> This contract was terminated because we were not able to deliver product to [sic] the dates we committed to. This does not mean that we were not working this contract. In fact we have product manufactured far enough where we could supply 6 units within 45-60 days. This termination is the result of extreme financial hardship that this company has undergone for the last few years. This hardship had diminished our ability to procure material as we needed it and devote the proper amount of manhours.

In its complaint, appellant stated, "We are not appealing for [sic] any wrong treatment or improper actions taken by the contract administrators. Our appeal is to try to riemburse [sic] the government for the funds already paid to E.O. manufacturing as progress payments."

DECISION

The default clause gives the Government the right to terminate the contract for default in the event of a failure to make delivery. However, a default termination is a "drastic sanction," and should be imposed only on the basis of "good grounds and on solid evidence." *J.D. Hedin Construction Company, Inc. v. United States*, 187 Ct. Cl. 45, 57, 408 F.2d 424, 431 (1969); *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). The Government bears the burden of proof, by a preponderance of evidence, to establish that the default termination was justified. *Lisbon Contractors, Inc., supra*. If the default is proven, the burden shifts to appellant to come forward with evidence

that the default was caused or contributed to by circumstances beyond the control and without the fault or negligence of the appellant or a subcontractor. *FDL Technologies, Inc.*, ASBCA No. 41515, 93-1 BCA ¶ 25,518, at 127,098.

After the appellant's failure to deliver according to the original contract schedule, there were several schedule revisions proposed by the appellant and accepted by the Government. We found that the last schedule to which the parties agreed provided for incremental deliveries of five units each month beginning on 10 February 1998. The appellant failed to make timely delivery of the first five units, although four units were delivered late and accepted by the Government. The acceptance of those four units makes the question of default or waiver with respect to them academic. The appellant is entitled to be credited with the contract price for those units in accord with the delivery, acceptance, and payment terms of the contract, as well as subparagraph (f) of the Default clause.

As to the undelivered unit from the 10 February 1998 scheduled delivery, we hold that, following receipt of the appellant's reply to the 4 March 1998 show cause letter, the Government's willingness to wait and see if the contractor would make good on its promised delivery of 15 April 1998, its preparation of a contract modification which incorporated appellant's proposed new schedule, its request for another new schedule after the appellant's failure to deliver on 15 April, and its unreasonable inactivity thereafter, constituted forbearance under circumstances which would indicate to a reasonable supplier that late delivery was acceptable. We also hold that the appellant's production effort was in reliance on that forbearance. Thus, the Government's forbearance and the appellant's reliance constituted a waiver of the 10 February 1998 delivery schedule. *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969); *Artisan Electronics Corporation v. United States*, 499 F.2d 606, 610 (Ct. Cl. 1974).[*]

However, we have consistently held that the waiver of one incremental delivery date does not cause the waiver of subsequent delivery dates. *E.g., Lapp Insulator Company, Inc.*, ASBCA No. 13303, 70-1 BCA ¶ 8219, *aff'd on recon.*, 70-2 BCA ¶ 8471; *Novelty Products Company*, ASBCA No. 21077, 78-1 BCA ¶ 12,989 at 63,344; *Action Support Services Corporation*, ASBCA Nos. 46524, 46800, 00-1 BCA ¶ 30,701 at 151,684.

Because the Government waived the delivery of the undelivered unit from the 10 February 1998 schedule, and because the Government took no action to reestablish a schedule for that undelivered unit, there was no basis to terminate the delivery of that one unit for default. *Prestex, Inc.*, ASBCA Nos. 21284, *et al*. 81-1 BCA ¶ 14,882 at 73,604.

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[*] Reasonable Government delay in deciding to terminate does not constitute forbearance if it does not encourage performance. *E.g., H. N. Bailey & Associates v. United States*, 449 F.2d 376, 383-84 (Ct. Cl. 1971); *American Electronic Laboratories, Inc.*, ASBCA Nos. 17779, 18278, 74-1 BCA ¶ 10,499.

On the other hand, a default on one incremental delivery is sufficient to terminate for default, not only that incremental delivery, but all subsequent deliveries as well. *Artisan Electronics Corporation v. United States*, 205 Ct. Cl. 126, 499 F.2d 606 (1974). Thus, although we hold that the Government waived the late delivery of one unit scheduled for 10 February 1998, we reach a different result with respect to the remaining deliveries of 40 units.

Subsequent to the Government's acceptance of the four late units in April 1998, the Government took no action to inquire about deliveries until October 1998; and, did nothing to encourage production until its letter of 7 December 1998, in which it agreed to forbear termination until 23 December, while waiting for the promised delivery of six units on 22 December. Such forbearance, or "circumstances which would indicate to a reasonable supplier that late delivery is acceptable," is only part of the *DeVito* criteria for the existence of a waiver. *Artisan Electronics Corporation v. United States*, 499 F.2d 606, 610 (1974).

The appellant must also, in reliance on the Government's conduct, continue production, for "it is the contractor's reliance that counts rather than the Government's failure to have insisted upon strict adherence to the terms of the delivery schedule." *A.B.G. Instrument & Engineering, Inc. v. United States*, 593 F.2d 394, 404 (Ct. Cl. 1979). *See also Pelliccia v. United States*, 525 F.2d 1035, 1043 (Ct. Cl. 1975); *Doyle Shirt Manufacturing Corporation v. United States*, 462 F.2d 1150, 1155 (Ct. Cl. 1972).

Actual reliance must be demonstrated. It is not enough to merely argue that the appellant relied or could have relied. The appellant must demonstrate at least some actual reliance. *Prestex, Inc.*, ASBCA Nos. 21284, *et al*., 81-1 BCA ¶ 14,882; *see also*, Glenn T. Carberry and Philip M. Johnstone, WAIVER OF THE GOVERNMENT'S RIGHT TO TERMINATE FOR DEFAULT IN GOVERNMENT DEFENSE CONTRACTS, 17 PUB. CONT. L. J. 470, 486-89 (1988).

In this case, we found that the appellant expended no effort to produce units for delivery after its late delivery of four of the 10 February units in late April 1998. The appellant has failed to come forth with any evidence showing that it relied to its detriment on the Government's forbearance with respect to scheduled deliveries due on and after 10 March 1998. In the absence of such reliance the Government has carried its burden to establish that the appellant was in default and that there was no waiver of the delivery schedule within the meaning of *DeVito*.

CONCLUSION

We conclude that the Government waived the first incremental delivery due on 10 February 1998. As to the remaining incremental deliveries, the appellant did not rely on the Government's forbearance; and thus, there was no waiver with respect to the appellant's

default as to the remaining 40 units. *Prestex, Inc.*, ASBCA Nos. 21284, *et al.*, 81-1 BCA ¶ 14,882 at 73,602-04.

The appeal is sustained as to the one undelivered unit of the five units required to be delivered on 10 February 1998, but denied as to the 40 units not delivered on the remaining defaulted incremental delivery dates.

Dated: 11 September 2001

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 52120, Appeal of E.O. Manufacturing Company, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services

Board of Contract Appeals