ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Elter S.A.	)	ASBCA Nos. 52792, 53082
	)	
Under Contract No. N33191-96-C-0716	)	

APPEARANCES FOR THE APPELLANT: Mr. Dimitrios Messadakos
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OPINION BY ADMINISTRATIVE JUDGE MOED

These appeals relate to a firm, fixed-price contract for construction of multiple facilities at the Naval Support Activity (NSA), Souda Bay, Crete, Greece. At this juncture, only entitlement is to be decided.

ASBCA No. 52792

1. The solicitation for this contract was issued on 2 July 1996 with proposals due no later than 11:00 a.m. on 2 August 1996. In conformity with the terms of the solicitation, Elter submitted price offers in Greek drachmas (GRD) for the eight firm line items (Nos. 0001-0008) and the four line items which were subject to option exercise by the Government (Nos. 0001A, 0001B, 0009, 0010). On 28 September 1996, the contracting officer awarded the firm line items to Elter in the total amount of 567,000,000 GRD. Thereafter, on 30 September 1996 and 7 October 1996, the contracting officer exercised the Government's options for the remaining line items, increasing the total contract price to 987,000,000 GRD.

2. In a previous decision relating to other disputes under this contract, we found as fact that "[t]he contract did not contain an economic price adjustment provision or

otherwise provide for an adjustment in the event of currency fluctuation." *Elter S.A.*, ASBCA No. 52441, 01-1 BCA ¶ 31,327 at 154,739. We adopt that finding here.

3. As part of the process of preparing price offers for this contract, Elter studied the history of fluctuation of the Greek drachma against the U.S. dollar and other currencies during the previous two years. Elter had never previously made such a study as part of bid preparation. It did so here because of the large amount of U.S. and other foreign currency expenditures that would be required for contract performance. Many items required by the specifications were not manufactured in Greece and, thus, would have to be imported from other countries.

4. Equipment for the bowling center would be the most costly such purchase. Two firms, located in the United States were listed in § 1800, ¶ 2.1 of the specification as "approved" sources for that equipment. The next most costly item of imported material was the pre-engineered metal building housing the bowling center. One of the three sources identified in § 13121, ¶ 1.3.1 of the specifications as a source for this facility was Butler Manufacturing Co., Kansas City, MO. The estimated cost of equipment imported from the United States would amount to approximately 50 percent of the total estimated cost of the contract (tr. 26).

5. The study made by Elter showed that the drachma-dollar rate had fluctuated within a range of 230-250 GRD during 1994-1996. During July, 1996, when the price offer was being prepared, that rate was $1 U.S. = 240 GRD. Other currencies had fluctuated against the drachma within similar ranges. (Tr. 23-26) Based on that history and the scheduled performance periods of the various projects, none exceeding 365 days, Elter decided to protect against the risk of loss of value of the drachma against other currencies by including a contingency amount in the offered price equal to two percent of total estimated cost (tr. 28).

6. During performance, Elter found that the two percent allowance in the offered price for currency fluctuation was insufficient. As of 5 November 1997, the original contract completion date of the projects with the longest duration, the drachma had declined to 281.27 GRD against the U.S. dollar. By 13 March 1998, that rate had fallen still further to 323.16 GRD. (R4, tab 5A at 4-5) On that date, the Government of Greece decreed a 14 percent devaluation of the drachma (hereinafter the "official devaluation"). *Elter S.A.*, ASBCA No. 52441, 01-1 BCA ¶ 31,327 at 154,739.

7. On 16 March 2000, Elter submitted written claims to the contracting officer seeking price increases totaling 79,301,526 GRD (R4, tab 5A). The claims, which were duly certified pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, consisted of the following:

a. Claims totaling 26,152,995 GRD for additional drachma costs, incurred by Elter for materials and equipment imported from the United States and European countries as the result of the decline in the value of the drachma against other currencies during the interval between contract award (28 September 1996) until, but not including, the official devaluation of the drachma on 13 March 1998 (hereinafter the "measurement period").

b. A claim in the amount of 8,219,899 GRD for increases in the cost of locally manufactured products as the result of depreciation of the value of the drachma during the measurement period. Elter attributes these cost increases mostly to the higher cost of imported petroleum products and raw materials (tr. 37-38).

c. A claim in the amount of 7,928,632 GRD for increased cost of local materials during the measurement period due to inflation, as measured by the Annual Mean Cost Inflation Rate for New Building Construction (AMCIR) compiled by the Greek Government. The factor used in computing this claim is the 4.50 percent difference between the 7.40 percent annual rate of increase of the AMCIR which was used by Elter in computing its price offer and 11.90 percent annual rate of increase of the AMCIR actually experienced during the measurement period. Elter alleges, without any proof, that the 4.50 percent difference between the estimated and actual rates of increase is attributable entirely to the decline of the value of the drachma against other currencies during the measurement period. There is no provision in the contract for price adjustment for the effects of cost inflation in the general economy or any segment thereof.

d. A claim in the amount of 31,500,000 GRD for interest on bank loans taken out to finance the increased cash flow needs of the contract allegedly resulting from the depreciation of the value of the drachma during the measurement period.

e. Claims for interest at the annual rate of six percent on the total amount of the above claims and for costs of litigation in the amount of 5,500,000 GRD.

8. Elter contends that the U.S. Government has been unjustly enriched to the extent of 130,481,865 GRD as the result of the depreciation in the value of the drachma against the U.S. dollar during the measurement period in that it was able to pay for the contract work with a smaller expenditure of U.S. dollars than had been anticipated at the time of award.

9. Elter computes those savings for each progress payment under the contract during the measurement period according to the following steps. First, the drachma amount of the payment is converted into U.S. dollars at the exchange rate used by the contracting officer to account for expenditures of obligated appropriated funds. Second, the drachma amount of the payment is converted into U.S. dollars at the exchange rate prevailing on the date of payment. By reason of the depreciation in the value of the drachma during the measurement period, that U.S. dollar amount was always less than the amount generated in

the first step. The drachma amount of the alleged savings was computed by multiplying the difference between the two U.S. dollar amounts by the exchange rate prevailing on the date of payment. The total amount of such alleged savings for all progress payments during the measurement period was $461,536, or 130,481,865 GRD. There is no evidence in the record substantiating any savings by the Government in the purchase of drachmas for progress payments.

10. The contracting officer denied the claims submitted by Elter in a written decision pursuant to the CDA, dated 22 May 2000 (R4, tab 6). Elter then filed this timely appeal.

DECISION

In an earlier decision, we found that this was a fixed-price contract calling for payments in Greek drachmas with no provision for price adjustment for fluctuation of the value of the drachma against other currencies. On that basis, we interpreted the contract as placing, upon Elter, the entire risk of such fluctuation. *Elter S.A.*, ASBCA No. 52441, 01-1 BCA ¶ 31,327 at 154,742. In this appeal Elter alleges that during the measurement period, it incurred added performance costs, totaling 73,801,526 GRD, as the result of the unanticipated drop in the value of the drachma against other currencies.

Elter alleges the United States Government realized a windfall of 130,481,865 GRD from the decline of the value of the drachma by being able to purchase the drachmas needed for contract payments during the measurement period more cheaply than had been anticipated at the time of contract award. It is fact that the decline of the value of the drachma against other currencies caused increases in the cost to Elter, in drachmas, of materials and equipment imported for the contract from the United States and European countries. Elter argues, in effect, that it would be unconscionable for the Government to retain the portion of the alleged windfall which constitutes the increased costs of the same fluctuations, in the amount claimed here. On that basis it seeks payment of that amount.

Relief on the basis of unconscionability is not available, however, where the loss results solely from "an error of business judgment whereby a contractor has . . . consciously assumed the risks inherent in the application of his judgment." *Liebherr Crane Corp.*, ASBCA No. 24707, 85-3 BCA ¶ 18,353 at 92,071, *aff'd sub nom. Liebherr Crane Corp. v. United States*, 810 F.2d 1153 (Fed. Cir. 1987).

Elter made a business judgment of a type which has aptly been described as a "conscious gamble with known risks." *Liebherr Crane Corp.*, *supra* at 92,071. The contract specifications listed products, to be furnished and installed by the contractor, which had to be imported inasmuch as they were not manufactured in Greece. Firms located in the United States were listed as sources for the most costly imported items,

namely, the equipment for the bowling center and the pre-engineered metal building housing the bowling center. (Findings 3, 4)

As it prepared its offer for this contract, Elter had concerns about the cost risks associated with large dollar and other foreign currency expenditures for imported material under a contract with a price stated in drachmas. This led Elter to study the fluctuation of the U.S. dollar-drachma exchange rate during the two years prior to the solicitation (1994-1996). Based on that study, an amount equal to two percent of the total estimated cost of the contract was added to the offered price as provision for the contingency of decline of the value of the drachma against the U.S. dollar and other foreign currencies during the contract period (finding 5).

Elter's estimate of the amount needed for covering that risk turned out to be inadequate. The decline in the value of the drachma against the U.S. dollar was much steeper than the decline during the two year period studied by Elter (findings 5, 6). The general rule is that the contractor bears the risk of estimating errors in connection with offers for a fixed-price contract. *Penn-Field Industries, Inc.*, ASBCA No. 31105, 86-3 BCA ¶ 19,228. That rule requires denial of the present claim. In the absence of a price adjustment provision, Elter's erroneous estimate of expected currency fluctuation must be treated in the same manner as other errors in estimating costs for a fixed price contract. Elter's claim for the effects of cost inflation in the economy must also be denied. It is well established that under a fixed-price contract which contains no protection against unanticipated increases in the costs of performance, the contractor assumes the risk of such increases. *McGrail Equipment Co., Inc.*, ASBCA No. 20555, 76-1 BCA ¶ 11,723 at 55,870.

There is nothing unconscionable about allowing the Government to retain any financial benefit of a more favorable rate for exchanging U.S. dollars for drachmas. That was a bargained-for benefit of the parties' agreement that the price should be paid in drachmas.

That benefit would have belonged to Elter had the parties agreed that payment should be made in U.S. dollars instead of drachmas or had the dollar declined against the drachma. That was the effect of our holding in *G.P. Construction & Development Corp.*, ASBCA No. 28766, 86-2 BCA ¶ 18,838. That case involved a fixed-price contract for construction of facilities in the Philippines. The contract provided for payment of the price in U.S. dollars. We ruled that the Government was liable for an increase in the minimum wage payable, under the law of the Republic of the Philippines, by owners of property on which facilities were being constructed. Over the course of the contract, the value of the Philippine peso had decreased against the U.S. dollar with the result that the U.S. dollar "actually bought more pesos than [the contractor] was required to pay in increased minimum wages." *Supra* at 94,946. On that basis, the Government argued that the contractor had not incurred any added cost and, therefore, was not entitled to be paid an additional amount pursuant to the

above law. We rejected that argument as "legally untenable," holding that the rule barring adjustment of fixed prices for increased costs caused by currency fluctuations was applicable whether the fluctuations favored the Government or the contractor. We said that "the Government cannot legally claim a benefit . . . from fluctuations in currency which rebound [sic] to the contractor's benefit." *Supra* at 94,947.

For these reasons, Elter is not entitled to recover on these claims. The appeal is, accordingly, denied in all respects.

ASBCA No. 53082

11. The contract contains the FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) - ALTERNATE II (APR 1984) clause. Paragraph (a) of the clause provides in part as follows:

> If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.

12. FAR 49.402-3(e)(1) provides that a show cause notice may be issued "[i]f termination for default appears appropriate." On 13 July 1998, subsequent to the expiration of the completion date of 30 June 1998, set forth in the contract for Project P-140, the contracting officer issued a written show cause notice (R4, tab 5A), in the format set forth set forth in FAR 49.607(b), advising Elter as follows:

> Since you have failed to perform [this contract], the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision on this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to this office . . . within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. . . .

13. The show cause notice of 13 July 1998 (SCN-1) stated that it was "based on recent events related to Project P-140" including the circumstance that "[d]espite previous assurances by Elter that Project P-140 would be completed not later than 30 August 1998,

your updated schedule . . . now shows a completion date of 22 September 1998" (R4, tab 5A).

14. As shown on the face of the document, a copy of SCN-1 had been sent to Ergobank S.A. The bank had furnished the performance guarantee letter required by the PERFORMANCE GUARANTEE (JUN 1994) ALTERNATE I (JUN 1994) clause of the contract. In that letter, the bank undertook to:

> [G]uarantee fulfillment of [Elter's] obligations for the satisfactory, complete and timely performance of the work under Contract N33191-96-[C]-0716 in strict compliance with the terms, conditions and specifications of said contract entered into between the US Government and the Contractor (ELTER S.A.) . . . .

Elter S.A., ASBCA Nos. 52791 *et al*., slip op. at 14 (9 November 2001).

15. Elter responded to SCN-1 by letter dated 23 July 1998 (R4, tab 5J). The response, a copy of which was sent to the bank, alleged that the Government's failure to timely issue needed technical direction for resolving design issues related to the western stairway of the General Purpose Building (Project P-140) had caused serious delay, from 22 September 1997 until 17 July 1998, in several activities such as concrete work, back fill, stucco application, and painting.

16. In a previous decision, we made a finding, which we adopt here, that the Government's delay in resolving the western stairway design question did not delay the completion of the P-140 project. *Elter S.A.*, ASBCA Nos. 52791 *et al*., slip op. at 19 (9 November 2001). Completion of the project was delayed, however, by the Government's delay in approving Elter's fire protection sprinkler system submittal. The effect of that delay was resolved in bilateral contract Modification No. P00033, dated 6 August 1998, which extended the completion date for Project P-140 from 30 June 1998 to 14 August 1998 by reason thereof (R4, tab 2A).

17. In its response to SCN-1 (R4, tab 5J), Elter stated that it was "willing" to meet a completion date of 29 August 1998 for the P-140 project, as shown in an attached Critical Path Method (CPM) schedule. The letter listed the tasks for which additional workers and technicians would be employed. Elter also undertook to bring all remaining required material to the site within five working days and to "[p]rovide the maximum support . . . in equipment and tools purchasing in order to ensure project timely completion."

18. The contracting officer replied by letter of 29 July 1998 informing Elter that the Government "will not terminate the contract for default at this time [in view of] recent

increased production Elter has made on the P-140 project." He stated that "[w]e will continue to monitor Elter's progress against the CPM and the proposed 29 August 1998 completion date." (R4, tab 5J) The bank was not sent a copy of this letter and there is no indication that it was informed of the contents thereof by Elter.

19. By letter of 14 August 1998 (ASBCA No. 53002 R4, tab 5AC), however, the contracting officer wrote to Elter (copy not sent to the bank) as follows:

> I am very concerned that Elter will not complete the P-140 project by the end of August. My walk through of the site yesterday convinces me that you will not complete the project by the end of the month. . . . Please provide us with an updated progress schedule with a realistic completion date for P-140.

20. On 18 August 1998, the contracting officer sent a second show cause notice (SCN-2) to Elter (R4, tab 5B), with a copy to the bank. SCN-2 was in substantially the same form as SCN-1 (finding 12) except that the stated basis thereof was the following:

> This notice is issued based on the failure to make progress on Project P-140 in accordance with your progress schedule. It does not appear that you will finish the Project by the end of August as promised.

The contracting officer's forecast was confirmed by Elter, in a letter of 20 August 1998 to the Government, stating that the remaining work on the P-140 project "may be completed within a short time not exceeding 30 calendar days as of today" (R4, tab 5C).

21. SCN-1 and SCN-2 had been issued by the contracting officer at NSA Souda Bay. Elter's letter of 20 August 1998 was addressed to the contracting officer's superior, the Director of Contracts, Engineering Field Activity, Mediterranean, at Naples, Italy. The letter complained that SCN-1 and SCN-2 "unreasonably put[Elter] under default notices, creating uncertainties and harming [Elter's] cooperation with its guarantor banking organization (Ergobank S.A.)." (R4, tab 5C)

22. On 21 August 1998, the bank wrote to the contracting officer acknowledging receipt of copies of SCN-1 and SCN-2 and asking to be informed "about the exact situation that does prevail." The bank stated that Elter was an "excellent client" and had a reputation among the banks in Greece of being "absolutely reliable" with no previous instance of default termination. Such a termination would have "incalculable consequences on a company's reputation, credit ability [sic] and credit worthiness." At the end of the letter, however, the bank stated that after receiving SCN-1 and SCN-2, it had "reservations towards its future cooperation with ELTER S.A." (R4, tab 5E)

23. In his response, dated 24 August 1998 (R4, tab 5F), the contracting officer informed the bank that "[o]n 31 August 1998, we will walk the project site, consider Elter's reply to [SCN-2] and make a decision concerning [t]ermination." He noted, however, that:

> It seems clear to us that Elter will not finish by the end of August and their 20 August 1998 letter confirms this. Many items of work remain on both the interior and exterior of the P-140 building. . . . As I advised you in my 13 July 1998 letter, delay past 31 August 1998 is not acceptable to NSA Souda Bay.

In closing, the contracting officer affirmed to the bank that the Government "intend[ed] to enforce [its] right to collect the [p]erformance [g]uarantee if the contract is terminated for [d]efault."

24. Early in 1997, Elter had begun preparing an application for listing its shares on the Greek stock exchange. The preparations included compiling data and documents needed to satisfy various financial, legal, and tax requirements. On 28 August 1998, Elter was informed by Aegean Finance, its consultant in connection with the stock exchange listing application, that the bank was uneasy about the possibility of the default termination of this contract and would not "express a positive opinion [as] to ELTER'S public registration [on] the Greek Stock Exchange" (R4, tab 5J at 8).

25. Believing that the possibility of termination would be a "restraining issue for a successful public registration of ELTER S.A. to the Greek Stock Exchange," the consultant advised postponing the application until the termination issue had been resolved (R4, tab 5J at 7). Elter followed that advice and suspended the application. Approximately six months later, after completion of the P-140 project, the application was renewed by Elter. In connection with that action, Elter updated the information in the initial application, as required by the regulations of the stock exchange.

26. By letter dated 24 July 2000, Elter submitted a written claim, duly certified pursuant to the CDA, alleging that the issuance of SCN-1 constituted an "abusive use of his authority" by the contracting officer, serving to defame Elter to the bank by creating "doubts and disputes [concerning] ELTER'S professional and financial credit ability [sic]." According to Elter, the abuse of authority consisted of the contracting officer "rushing to issue [SCN-1]" after the failure to meet the 30 June 1998 required completion date for the P-140 project, rather than "first review[ing] all circumstance[s of] delayed contract work progress" such as the Government's delay in resolving the western stairway design question and its delay in approving the fire protection sprinkler system submittal. (R4, tab 5J at 9)

27. Elter's claim is for the following damages:

(a) The cost of updating Elter's application for listing on the stock exchange (finding 25) - 45,723,080 GRD.

(b) The loss of profits which allegedly would have been earned from trading of Elter shares on the Athens stock exchange in 1999 had it been able to complete the application for listing of the shares (tr. 125-26) - 300,000,000 GRD.

(c) Costs of preparing and pursuing the above claims - 5,000,000 GRD.

28. Prior to receipt of the letter of 24 July 2000 submitting the above claims, the contracting officer had no knowledge or notice of Elter's application for listing of its shares on the Athens stock exchange or the decision to withdraw or suspend that application (tr. 271-73).

29. The contracting officer denied the above claims in their entirety in a written decision, dated 4 October 2000, issued pursuant to the CDA. This timely appeal ensued.

DECISION

Elter contends that the contracting officer abused his authority in issuing SCN-1. Under FAR 49.402-3(e)(1), the issuance of a show cause notice is permitted "[i]f termination for default appears appropriate." SCN-1 stated that Elter had "failed to perform" this contract, citing, in particular, its submission of an updated schedule showing a completion date of 22 September 1998 for Project P-140 which was inconsistent with "previous assurances" by Elter that the project would be completed not later than 30 August 1998 (finding 13). That was a sufficient basis for issuing SCN-1 considering that Elter was afforded an opportunity to make a showing of the excusability of the alleged performance failure which would be considered before deciding whether to terminate the contract for default (finding 12).

Elter alleges that the transmittal of copies of SCN-1 and SCN-2 to the bank also was an abuse of the contracting officer's authority. The monetary claims asserted by Elter are for the harm to its reputation with the bank allegedly caused by that action (findings 14, 20). Elter's use of defamation, a tort term, to describe that harm does not automatically place the claim outside our jurisdiction. *Environmental Tectonics Corp.*, ASBCA No. 42540, 92-2 BCA ¶ 24,902 at 124,188 also involved claims based on the contracting officer furnishing copies of notices and correspondence to a surety without consent of the contractor. Inasmuch as these actions had "occurred during the course of, and in relation to, performance of a contract," we said that they "could equally be categorized as a breach of contract, thereby affording us subject-matter jurisdiction as to the ensuing claim."

Furnishing copies of SCN-1 and SCN-2 to the bank was not improper and did not constitute a breach of this contract. As indicated by its subsequent request to be informed

"about the exact situation that does prevail" (finding 22), the bank, as guarantor of contract performance, was desirous of receiving such information. The Government also had an obligation to consider the interests of the bank, as surety, when dealing with problems encountered during administration of the contract. *Argonaut Insurance Co. v. United States*, 434 F.2d 1362, 1368 (Ct. Cl. 1970). Furnishing copies of SCN-1 and SCN-2 to the bank was consistent with that duty. If it were kept informed of the status of the work, the bank would be in a better position to protect its interests by influencing Elter to timelier completion of the contract and better prepared to make good on its guarantee, if needed.

For these reasons, Elter is not entitled to recover on these claims. The appeal is accordingly denied in all respects.

Dated: 28 November 2001

PENIEL MOED
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

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 Nos. 52792 and 53082, Appeals of Elter S.A., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ

Recorder, Armed Services
Board of Contract Appeals