

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Pyrotechnic Specialties, Inc.) ASBCA Nos. 53469, 53493
)
Under Contract No. DAAA09-95-C-0100)

APPEARANCES FOR THE APPELLANT: Joseph A. Camardo, Jr., Esq.
Nancy M. Camardo, Esq.
Auburn, NY

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Robert W. Clark, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE ELMORE
ON THE GOVERNMENT'S MOTION TO DISMISS

The Government has filed a Motion To Dismiss without prejudice the above enumerated appeals averring "Appellant's appeals of the [Procuring] Contracting Officer's denial of a Request for Equitable Adjustment/claim" were premature. Appellant has filed a response in opposition to the Government's motion.

FINDINGS OF FACT
FOR PURPOSES OF THE MOTION

1. On 16 August 1995 Pyrotechnic Specialties, Inc. (PSI or appellant) was awarded Contract No. DAAA09-95-C-0100 (C-0100) to supply 2,572,000 M781 40MM practice cartridges at a total contract price of \$4,938,240.00. The contract incorporated by reference the following Federal Acquisition Regulation (FAR) clauses: 52.243-1 CHANGES - FIXED PRICE (AUG 1987); 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (APR 1984); 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). (R4, tab 1)

2. On 8 July 1998, the procuring contracting officer (PCO) terminated for default the unperformed balance of contract C-0100 due to PSI's failure to make timely delivery. On 16 and 23 July 1998, the PCO confirmed the termination for default and issued a modification incorporating it in the contract. (R4, tabs 72, 74)

3. On 7 October 1998, PSI appealed the default termination which this Board docketed as ASBCA No. 51791 (R4, tab 77; Board correspondence file).

4. On 4 April 2001 PSI, pursuant to the Changes clause of the contract, submitted to the PCO a Request for Equitable Adjustment (REA), dated 29 March 2001, in the amount of \$3,298,510.48 contending in pertinent part (R4, tab A):

The contract called for the manufacture and delivery of 2,572,000 M781 40MM Practice Cartridges, to be supplied for a price of \$1.92/unit, for a total contract price of \$4,938,240.00. The contract further required the submission of a First Article to be delivered on December 9, 1995, with production deliveries to commence March 9, 1996, and be completed by March 9, 1997. All units were to be manufactured pursuant to the highly detailed Technical Data Package (TDP) incorporated into the contract.

From the inception of this contract, PSI was ready, willing and capable of performing the contract pursuant to the incorporated TDP. However, PSI's attempts to perform this contract were thwarted by the Government's withholding of Superior Knowledge and the numerous defects in the incorporated TDP, which resulted in PSI being forced to engage in a massive and ultimately unsuccessful extra-contractual Research and Development (R&D) effort. Despite PSI's best efforts, they were unable to consistently meet the SD [sic] requirements which ultimately resulted in the issuance of a Termination for Default on July 23, 1998.

PSI alleges that its inability to meet the contract requirements were due solely to Government-caused problems and that any effort and cost expended as a result of these problems, constitute changes to the contract, for which PSI has the right to full compensation.

5. On 30 May 2001 the PCO issued a final decision denying PSI's 29 March 2001 REA in its entirety stating, in pertinent part (R4, tab B):

After thoroughly reviewing your REA dated March 29, 2001, it has been determined that the REA raises the same matters at issue in your ASBCA appeal of the Termination for Default issued by the Government to [PSI] dated July 16, 1998. As such, the REA presents a prayer for relief that has already been answered by the contract termination. Your REA is therefore denied for the reasons set forth in the Government's

Notice of Termination for Default of contract number
DAAA09-95-C-0100.

6. On 30 July 2001 the Board acknowledged receipt of, and assigned ASBCA No. 53469 to, PSI's 27 July 2001 "NOTICE OF APPEAL" wherein PSI stated that pursuant to the Disputes Clause it "hereby appeal[s] to the Armed Services Board of Contract Appeals the Final Decision of the Contracting Officer, dated May 30, 2001, denying in its entirety, the Request for Equitable Adjustment, filed by PSI on April 4, 2001" (Board correspondence file).

7. On 8 August 2001 the PCO issued a second final decision wherein he stated in pertinent part (R4, tab C):

Per [Joseph A. Camardo, Jr. letter dated July 27, 2001], the Contracting Officer's Final Decision was issued by the undersigned in response to a Request for Equitable Adjustment (REA). The REA submitted by PSI was considered to be a claim under the Contract Disputes Act of 1978, 41 U.S.C. 601-613 based on the following: (1) it was submitted in writing; (2) it included supporting data; (3) it was certified; (4) it requested a specific amount of monetary relief; (5) it was asserted as a "matter of right"; (6) it was implied that the contracting officer should render a Final Decision to the monetary request; and (7) the Contracting Officer believed the claim was made in good faith. Accordingly, the undersigned Contracting Officer properly rendered an appropriate Final Decision.

In response to Joseph A. Camardo, Jr. letter, reference c. above, which cites a conversion of the previously submitted REA into a "Claim for Equitable Adjustment under the Contract Disputes Act of 1978 and the Disputes Clause incorporated into contract DAAA09-95-C-0100", the Contracting Officer's Decision is hereby confirmed for the reasons set forth in the Government's Notice of Termination for Default of contract DAAA09-95-C-0100.

8. On 20 August 2001 the Board acknowledged receipt of, and assigned ASBCA No. 53493 to, PSI's 17 August 2001 "NOTICE OF APPEAL" wherein PSI stated that pursuant to the Disputes Clause it "hereby appeal[s] to the Armed Services Board of Contract Appeals the Final Decision issued by the Contracting Officer, dated August 8, 2001, denying in its entirety, the certified Claim for Equitable Adjustment, filed by PSI on July 27, 2001" (Board correspondence file).

POSITION OF THE PARTIES

The basic contention of the Government is that PSI's REA claim refers back to its contention the default termination was improper; that recovery of the REA is dependent on PSI prevailing in its appeal of the default termination; and, accordingly, the appeals from the PCO's denial of the REA, ASBCA Nos. 53469 and 53493, are premature and should be dismissed without prejudice (Gov't br. at 2-3).

PSI, opposing the Government's motion, contends the REA requests compensation for extra-contractual effort and cost expended as a result of numerous Government caused problems; that the REA stands independent of the default termination; that recovery under the REA claim is not contingent on PSI prevailing in its default termination appeal; and that the Government is attempting to improperly categorize the REA claim as a termination for convenience claim, subject to dismissal without prejudice, pending resolution of the default termination.

DECISION

The issue we are asked to address although seemingly simple, as presented by the parties, requires some analysis. The Government, relying on *Alphatech Systems, Inc.*, ASBCA Nos. 52510, 52511, 52831, 01-1 BCA ¶ 31,153, contends PSI's appeals of the final decisions denying its REA claim are premature and should be dismissed without prejudice pending resolution of PSI's appeal of its default termination. In *Alphatech Systems, supra*, appellant, following a termination for default, filed for bankruptcy, and, thereafter, appealed the CO's denial of its REA and a "deemed denial" of its termination settlement proposal. In *Alphatech* the Board granted the Government's motion to dismiss, but in reconciling its holding with a prior holding denying a motion to dismiss held (01-1 BCA at 153,882):

Where an appellant's claim raises a discrete controversy and is not dependent upon a termination for default being set aside, we have declined to dismiss an appeal as premature. *Peter Gross GmbH & Co. KG*, ASBCA No. 50326, 98-1 BCA ¶ 29,489. Such is not the present case. Appellant's claim for an equitable adjustment consists of a single paragraph referring the reader back to its termination settlement proposal The allegations supporting its request for an equitable adjustment, as set out in its complaint, are repeated verbatim in its allegations concerning its termination proposal. . . . Thus, recovery of its request for an equitable adjustment is dependent upon appellant prevailing in its appeal of the default termination. A decision on the equitable adjustment claim

would involve the default issues and could be construed as an improper circumvention of the automatic stay.

In *Peter Gross GmbH & Co. KG, supra*, at 146,334-35, the Board, relying on *Laka Tool & Stamping Co., Inc. v. United States*, 639 F.2d 738 (Ct. Cl. 1980), *aff'd on motions for rehearing*, 650 F.2d 270 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 1086 (1981), held:

[T]he Court allowed recovery on a claim for work performed in attempting to comply with impossible specifications while sustaining the default termination of the contract after appellant failed to perform under relaxed specifications. The Court held there are cases in which a contractor's failure to perform may constitute a complete defense to an earlier arising claim, but "a contractor's failure to perform is not a complete defense to an earlier arising claim against the Government in all cases." It specifically allowed recovery for excess costs in attempting to comply with impossible specifications.

In analyzing the Board's prior holdings we find the difference between the two was a determination the disputed REA in *Peter Gross, supra*, raised issues separate and apart from those dependent upon conversion of the termination for default to one for the convenience of the Government.

In reviewing PSI's REA claim we find it is based on an allegation the Government failed to disclose numerous defects in the TDP resulting in PSI incurring additional cost from having to engage in a "massive and unsuccessful extra contractual Research and Development effort." In analyzing PSI's REA we conclude that, like *Peter Gross*, it alleges entitlement to the extra cost incurred in attempting to comply with impossible to perform specifications. Accordingly, following our prior holding in *Peter Gross, supra*, we find that the possibility of sustaining PSI's default termination while also allowing recovery for the attempted compliance with alleged impossibility specifications exists and, accordingly, recovery of such costs is not dependent on the default termination being set aside and the appeals are not premature.

The Government's motion is denied.

Dated: 3 December 2001

ALLAN F. ELMORE
Administrative Judge

Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
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 Order of Dismissal of the Armed Services Board of Contract Appeals in ASBCA Nos. 53469, 53493, Appeals of Pyrotechnic Specialties, Inc., rendered in conformance with the Board's Charter.

Dated:

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