

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Beta Engineering, Inc.) ASBCA Nos. 53570, 53571
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Under Contract Nos. SPO560-00-C-F017)
SPO560-01-C-F039)

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OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT’S MOTION FOR RECONSIDERATION

Defense Supply Center Philadelphia (the Government) moves for reconsideration of the Board’s Rule 12.3 decision in *Beta Engineering, Inc.*, ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,879. In that decision, we held that the Government improperly terminated for default Purchase Order Nos. SPO560-00-C-F017 (the F017 contract) and SPO560-01-C-F039 (the F039 contract), and converted the default terminations into terminations for the convenience of the Government.

Waiver of Default in Delivery by the Government Under the F017 Contract

Referring to the “two-prong test” in *DeVito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969), the Government contends that Beta Engineering failed to prove that the Government waived its right to terminate the F017 contract for default once the delivery date had passed. In *DeVito*, 413 F.2d at 1154, the court set out two elements a contractor must prove to establish this waiver:

- (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2)
- reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government’s knowledge and implied or express consent.

With regard to the first element, the Government acknowledges that the first article test samples (FATS) for the F017 contract were due on 30 April 2001, and the contract was terminated for default on 15 August 2001. The Government contends that “[t]hree and one half months passed and [the] Board did not find that this length of time was unreasonable” (motion at 6-7). With respect to the forbearance component of the first element, the Government argues that “Appellant failed to produce any evidence that it construed this delay as a forbearance of the Government’s right to terminate for default” (motion at 7).

In *DeVito*, the court said that what is a reasonable time for the Government to terminate a contract after default depends on the circumstances of each case. The court said that where a contractor continues performance in reliance on the lack of termination and proceeds to incur obligations in efforts to perform, the time for the Government to terminate should not be as great as when the contractor abandons performance. In *DeVito*, the contracting officer (CO) was aware of the contractor’s efforts to catch up on delivery requirements by purchasing additional tooling and performing some of the machining itself. The court said that “[t]he 48-days’ period intervening between the default in delivery and the termination notice in this case cannot be considered in any sense to have been prompt, even allowing for the fact that the contracting officer was awaiting required approval from higher authority to terminate,” 413 F.2d at 1154. In *Kings Point Mfg. Co., Inc.*, ASBCA No. 27201, 85-2 BCA ¶ 18,043, the CO led the contractor to believe that if the first articles were delivered on the same or next day, they would be tested. We sustained an appeal from termination for default where only 22 days passed between the first article due date (15 April 1982) and the termination of the contract (7 May 1982).

In this case, after the delivery date (30 April 2001) of the FATS under the F017 contract had passed, the Government continued to encourage Beta Engineering to perform. Even after Beta Engineering’s F017 FATS were found to contain forging defects and to have been made from non-conforming 4140 steel, the Government let Beta Engineering proceed to preliminary inspection. Since Beta Engineering performed a dry-run inspection on 7 May 2001 (finding 31), costs were incurred. Quality Assurance Representative Seth E. Smith (QAR Smith) went to Beta Engineering on 16 and 17 May 2001 to witness the preliminary inspection. The Government went so far as to find an acceptable substitute for the specified 4150 steel and revised the contract drawings so that Beta Engineering’s ability to perform would not be impeded by the unavailability of 4150 steel. These circumstances, coupled with the fact that the Government did not terminate the F017 contract until 15 August 2001, 107 days after the delivery date for the F017 FATS, lead us to conclude that the Government failed to terminate within a reasonable time under circumstances indicating forbearance.

The Government also contends that Beta Engineering failed to prove that it met the second element of the *DeVito* test because it merely called a supplier and did not actually order the F017 FATS made from 4340 steel. It contends that the inquiry alone did not constitute continued performance. (Motion at 8) In our decision, we found that

“immediately upon receiving notification” “on or about 12 May 2001” that it could use 4340 steel, Beta Engineering made arrangements with “the forging house to obtain that material” (finding 25). At the hearing, Steve Austin testified that at the end of July or the beginning of August 2001, he had received parts made from 4340 steel (tr. 581). This testimony, given under oath, is sufficient to establish that Beta Engineering incurred costs and continued to perform in reliance on the Government’s forbearance. Moreover, ordering a new lot of F017 FATS was with the PCO’s knowledge and implied consent. The PCO’s telephone record of 18 May 2001 indicated that Steve Austin advised that Beta Engineering “can/will do the 5 samples [sic] parts in 3 weeks” (finding 43). With no objection from the PCO, Beta Engineering proceeded with his implied consent.

Waiver of Default in Delivery by the Government Under the F039 Contract

The Government also contends that the Board’s conclusion that “the parties mutually agreed to suspend the FATS submission date under the F039 contract pending resolution of the FATS under the F017 contract” (*see* 02-2 BCA at 157,505) was not supported by evidence in the record. It maintains that:

The Contracting Officer did not waive the contractual requirement for submission of first article samples during the pendency of that contract. Therefore, the contractual requirement under contract SPO560-01-C-F039 for submission of first article samples was in full force and effect at the time that the first article submissions under that contract were due.

(Motion at 15)

Waiver of first article testing must be distinguished from waiver of FATS delivery by the due date specified in the contract. It is true that the Government did not waive the first article “testing” requirement of the F039 contract. The Government did not do so because Beta Engineering had not passed the first article tests under the F017 contract at the time Beta Engineering accepted the F039 contract. It was the PCO’s intention to waive the first article testing under the F039 contract if Beta Engineering subsequently passed the F017 FATS. (Finding 18)

The FATS under the F039 contract were due on 6 May 2001 (finding 17). Since the F017 FATS had not been approved as of 6 May 2001, Beta Engineering was required to deliver the F039 FATS on that day. When Beta Engineering failed to do so, the Government could have terminated the F039 contract at once. The Government, however, did not terminate the F039 contract until 28 August 2001, 114 days later (finding 53).

Despite Beta Engineering's failure to deliver the F039 FATS on 6 May 2001, the Government took no action. Instead, the parties proceeded with the preliminary inspection of the F017 FATS on 16 and 17 May 2001. The Government also revised the contract drawing to allow the use of 4340 steel. We have found that in reliance on the Government's inaction to terminate the F017 contract, Beta Engineering ordered a new lot of FATS made out of 4340 steel and sought to submit a new lot F017 FATS on 18 May 2001 (finding 43). Under the circumstances, we conclude that Beta Engineering was justified in believing that the Government would not enforce the 6 May 2001 delivery date for the F039 FATS until resolution of the F017 FATS. Our conclusion that the parties mutually agreed to suspend the FATS submission date under the F039 contract pending resolution of the FATS under the F017 contract was based on these facts.

CONCLUSION

Because the Government waived the FATS delivery dates on both the F017 and the F039 contracts, and because it failed to establish new delivery dates, terminating the contracts on the basis of failure to deliver on the original FATS due dates was improper. Our original decision converting the default terminations into terminations for the convenience of the Government is affirmed. The Government's motion is denied.

Dated: 3 September 2002

PETER D. TING
Administrative Judge
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 Nos. 53570 and 53571, Appeals of Beta Engineering, Inc., rendered in conformance with the Board's Charter.

Dated:

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