

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
L & M Thomas Concrete Co., Inc.) ASBCA Nos. 49198, 49615
)
Under Contract No. F33601-95-C-W015)

APPEARANCES FOR THE APPELLANT: Charles W. Mahan, Esq.
Richard L. Carr, Jr., Esq.
Dunlevey, Mahan & Furry
Dayton, OH

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Mark E. Landers, Esq.
CAPT Catherine M. Fahling, USAF
CAPT Robert J. Preston II, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

L & M Thomas Concrete Co., Inc. (L&M) appeals a default termination and the denial of a monetary claim on a contract for airfield ramp and taxiway repairs at the Wright-Patterson Air Force Base, Ohio. We find the default termination proper, the monetary claim without merit, and deny the appeals.¹

FINDINGS OF FACT

1. L&M was awarded the contract on 28 October 1994 pursuant to the Small Business Administration (SBA) "8(a)" program. The amount of the contract was \$350,000. The specified work included, among other things, repairing concrete pads, resealing concrete joints, and sealing taxiway cracks at locations designated on the contract drawings. (R4 tab 1 at 3-5) Bilateral Modification No. P00001 set the period of performance at 1 April through 17 July 1995 (R4, tab 2). The contract included among other general provisions the FAR 52.212-12 SUSPENSION OF WORK (APR 1984) clause, the FAR 52.246-12 INSPECTION OF CONSTRUCTION (JUL 1986) clause, and the FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause (R4, tab 1).

¹ Judge Elmore, who presided at the hearing of these appeals, has retired.

2. L&M began the concrete pad repairs on 6 April 1995.² On 17 and 20 April 1995, the Government inspector and project engineer observed a number of deficiencies in this work. (R4, tabs 82, 84A; tr. 5/161-63) These deficiencies were cited in letters to L&M dated 20 and 25 April 1995 (R4, tabs 44, 46). L&M did not dispute the deficiencies (R4, tab 47). It removed and replaced the defective work cited in those letters, and completed all concrete pad repairs by 31 May 1995 (R4, tab 199).

3. The concrete pad repairs performed after 25 April 1995, however, were also deficient. In making those repairs, L&M used a cut-out bulkhead that was expressly prohibited by the partial depth repair detail on contract drawing C6 (R4, tab 6; tr. 5/142-44, 388-90, 9/31-32); it failed to provide a coarse aggregate percent crushed test report required by paragraph 1.05 B of specification section 02574 (R4, tabs 6, 64, 77; tr. 5/132-33, 148-49, 182, 186, 199-202); and it failed to meet the 7-day flexural strength requirement at paragraph 1.02 of specification section 02574 for repairs performed on 10 and 16 May 1995 (R4, tabs 6, 65, 67, 68; tr. 5/183-85). Notwithstanding these deficiencies, the Government inspector certified the concrete pad repair work as “satisfactorily completed . . . per contract specifications,” and the contracting officer approved payment in full for that line item of the contract on 15 June 1995 (R4, tabs 70, 72, 122).

4. The concrete joint resealing work consisted of (i) removing existing compression seals, (ii) cleaning the joint sealant reservoirs, and (iii) filling the reservoirs with a hot-poured jet fuel resistant (JFR) sealant to within 1/16th to 1/8 inch below the concrete pad surface (R4, tab 6 at 02581-1 *et seq.*; tab 7, dwg. C6). L&M’s subcontractor began applying the JFR sealant on Friday, 12 May 1995 (R4, tab 83). On the following Monday and Tuesday, 15 and 16 May 1995, the Government inspector and project engineer found both overfilling and underfilling of the sealant, uncured sandy sealant, and sand on top of the backer rod beneath the sealant (R4, tab 83; tr. 5/144-47).

5. Paragraph 3.01 G of specification section 02581 stated in relevant part: “[a]fter final cleaning and immediately prior to sealing, the joints shall be blown out with compressed air and left completely free of sand and water.” Paragraph 3.04 C of specification section 02581 stated in relevant part: “[s]ealant shall be inspected for proper rate of cure and set, bonding to concrete surfaces of joint wells . . . entrapped air and voids.

² At hearing, and in its brief, L&M moved to exclude all evidence of its performance of the concrete pad repairs because that work was accepted by the Government and the contract line item for the work was paid in full. We deny the motion. The deficiencies in L&M’s performance of this concrete pad work, whether corrected or not, remain relevant to the issue of whether it was maintaining an adequate inspection system and whether the Government had reasonable grounds for seeking adequate assurance of specification-compliant performance of the remaining contract work.

Sealants exhibiting any of these deficiencies will be rejected. . . . Sealant which is rejected shall be removed from the joint, wasted, and replaced in a manner satisfactory to the Contracting Officer.” (R4, tab 6)

6. On 22 May 1995, the contracting officer issued a Letter of Concern to L&M stating that the overfill, underfill, and uncured sandy sealant were unacceptable, and directed L&M to “remove and replace all unacceptable sealant” (R4, tab 58). L&M expressed no disagreement with this letter when it was issued. However, up to the time JFR sealant work was suspended on 6 June 1995, L&M had not replaced all of the unacceptable sealant cited in the 22 May 1995 letter. (Tr. 3/147, 4/21, 5/147, 9/65-66)

7. On 31 May 1995, the Government inspector found air bubbles in the JFR sealant ranging in size from “pinhole to 1/4 [inch] voids.” The project engineer also saw a “large number of small bubbles in areas and [a] large number of large bubbles sticking up above the pavement surface as much as 3/4 of an inch, half inch.” (R4, tab 83; tr. 5/158) The project engineer also found areas where there was a weak bond or no bond between the sealant and the concrete walls of the reservoir, indicating that the joint reservoir was not clean when the sealant was poured (tr. 5/158-60, 172-73, 293-94). Photographs taken on 13 June 1995 were identified at hearing by the project engineer as showing the deficiencies which he observed in the sealant installation (R4, tab 84A; tr. 5/161-71).

8. Paragraph 3.04 B of specification section 02581 stated in relevant part: “[e]vidences of bubbling, improper installation, failure to cure or set shall be cause to suspend operations until causes of deficiencies are determined and corrected” (R4, tab 6). L&M’s president was on site on 31 May 1995 and saw the bubbling in the sealant poured on that date, but did not stop the sealant work to resolve the bubbling problem as required by paragraph 3.04 B (tr. 9/81-84).

9. On 5 June 1995, the inspector again saw air bubbles “coming through newly installed sealant.” His daily report further stated: “I told [L&M’s president] that . . . the Government would not accept this type of material. I asked him if he had contacted the manufacturer about this problem, he said no but he would right away. I once again told him that this sealant was not conforming to specs and is rejected. Yet, at the time I left [the] job site, the crew was still applying sealant.” (R4, tab 83; tr. 5/150)

10. On 6 June 1995, the inspector again saw and reported that “[i]n those areas where they have sealed there are still air bubbles coming through.” The contract administrator, who was at the site at the time, directed L&M to stop applying the JFR sealant. (R4, tab 83) L&M’s president testified that he stopped the JFR sealant work on 6 June 1995 before being directed to do so by the contract administrator (tr. 3/322-23, 350). However, when directed by the contract administrator to stop, he did not tell her that he had already done so (tr. 9/151). We find that the JFR sealant work was stopped only when directed by the contract administrator.

11. Two contractors with experience in JFR sealant application testified that extensive bubbling was usually caused by moisture in the joints and concrete walls of the joints. One testified that the remedy was to wait for the joint to dry out. The second testified that an alternative remedy was to use hot air lances to dry the joint, and that he always included their use in his bids on JFR sealant jobs “because of the nature of the material and knowing how sensitive it is.” Hot air lances are a common tool in the sealant industry and have been used since at least 1986. (Tr. 5/8, 21-23, 36-37, 58-59, 7/137-39, 179-82, 244-45; ex. G-4 at 3, 4) L&M had no solution for the bubbling problem. It knew that the cause was moisture in the area where the sealant was applied, but it did not know at the time that hot air lances could be used to remedy moisture problems. (Tr. 3/116-17, 159-60)

12. Section 02594 of the contract specifications required routing the taxiway cracks and filling them with a non-JFR sealant from the bottom of the crack up to 1/8 inch below the pavement surface (R4, tab 6). L&M’s subcontractor for this work (Star City) wanted to repair the cracks by laying a band of sealant over the top of the crack. On 6 June 1995, the assigned project engineer and his supervisor told L&M to repair the cracks, including previously banded cracks where the sealant had failed, by routing and filling as specified in the contract. (Tr. 4/270-73, 5/173-77)

13. On 7 June 1995, Star City did not show up for work. The reason given by L&M’s site superintendent for Star City’s absence was that Star City did not want to rout the previously banded cracks “[b]ecause it would not be a good job.” With this information and on the recommendation of the supervisory project engineer and the contract administrator, the contracting officer suspended all work on site to determine “where we needed to go from there.” (R4, tabs 3, 83; tr. 4/24-26, 273-77)

14. Paragraph (b) of the Inspection of Construction clause required L&M to “maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements” (R4, tab 1). At hearing, L&M’s president testified that his quality control foreman was Mr. Shannon Burleigh (tr. 3/188, 8/92-93). Mr. Burleigh, however, is shown on L&M’s daily progress reports, weekly labor reports, and weekly certified payrolls as either a “cement mason” or as “labor.” (R4, tabs 198, 199; exs. A-2, -3)

15. There are no contractor inspection records or any other contemporaneous documentation indicating that Mr. Burleigh was performing quality control duties, or that L&M otherwise had any inspection system for the job. There is also no evidence that either Mr. Burleigh, L&M’s president, or any other L&M employee on the job had any experience or qualifications to exercise quality control over the JFR sealant work. (Tr. 3/186-90, 8/92-99, 9/14, 109-14) Considering the foregoing, and the deficiencies in L&M’s performance from the start of the work until its suspension, we find that L&M did

not have an adequate inspection system as required by paragraph (b) of the Inspection of Construction clause of the contract.

16. On 14 June 1995, the contracting officer issued a “cure notice.” After reciting in detail the deficiencies in L&M’s performance from the start of work up to the suspension, the cure notice at paragraph 8 told L&M that the contract might be terminated for default unless within ten days it provided to the Government: (i) a plan for fixing the JFR sealant bubbling problem; (ii) a plan for fixing the JFR bonding problem; (iii) a written quality control plan; (iv) a milestone chart for completing the work; and (v) the “coarse aggregate percent crushed test report” and other outstanding submittals. (R4, tab 69)

17. By letter dated 26 June 1995, L&M replied to the cure notice. The reply was argumentative and did not provide any of the five items requested in paragraph 8. With respect to the bubbling problem, L&M recognized that the cause was moisture in the areas where the sealant was applied, but it proposed no actions for eliminating the moisture. L&M did not address in any manner the bonding problem, and did not offer a written quality control plan, a milestone chart for completing the work, or the coarse aggregate percent crushed test report. (R4, tab 73)

18. On 2 August 1995, the termination contracting officer (TCO) terminated the contract for default (R4, tab 4). At the time the termination notice was issued, L&M had still not provided any of the five items requested in paragraph 8 of the cure notice (tr. 5/199-200, 6/175-79, 9/45-47). The termination notice cited all of the previously noted deficiencies in L&M’s performance and stated that under the provisions of paragraphs (b) and (g) of the Inspection of Construction clause of the contract L&M was in default. (R4, tab 4). That decision was appealed on 25 September 1995 (ASBCA No. 49198).

19. The decision to terminate was made by the TCO. She had not been involved in either the procurement or administration of L&M’s contract. She was brought in to make an independent assessment of the Government’s position as to termination. (Tr. 6/173) In making that assessment, she met with the contract administrator, the project engineer, the Government inspector and a legal advisor to evaluate L&M’s response to the cure notice (tr. 6/177-79). She made a site visit with the inspector “so that I could see for myself the area involved, the problems involved” (tr. 6/180). On her site visit, she personally saw the bubbling, lack of bonding, overfilling and underfilling of the JFR sealant (tr. 6/180-82). In addition to the site visit, the TCO read the contract files and the “questionable” areas in the inspector’s daily reports (tr. 6/182-83, 7/74). She discussed L&M’s excuses with the technical personnel and considered the seven factors listed in FAR 49.402-3(f) (tr. 6/183-85). There is no substantial evidence that the Government personnel she consulted provided incorrect, false, or materially misleading information or advice with the intent of having the contract terminated. The evidence shows that the project engineer was biased against the use of 8(a) contractors for airfield work (tr. 5/358-62). The deficiencies in L&M’s performance of the JFR sealant work, however, were personally seen by the TCO,

and L&M's lack of response to paragraph 8 of the cure notice was self-evident, and not a matter of biased interpretation by the project engineer. The TCO's final independent assessment was that continuing L&M on the job was not in the Government's best interest, and that default termination was fully justified (R4, tab 127; tr. 6/186-87).

20. On 11 August 1995, Mr. Shevik, an engineering consultant for the performance bond surety, inspected the work to determine "how much work still needed to be completed and how much work was deficient, [and] needed to be corrected" (R4, tab 88; tr. 1/124, 6/85-86, 196-97). With respect to the JFR sealant installed by L&M, Mr. Shevik confirmed the overfilling, underfilling, lack of bond, and bubbling. He recommended that all of L&M's JFR sealant work be removed and replaced. (R4, tab 190; tr. 1/146-47, 150-53, 155, 168-70, 173) At hearing he explained this recommendation as follows: "you have a number of areas sporadically throughout here that need to be replaced for one reason or another. And . . . rather than spend a lot of fees trying to isolate what should stay, what should come out . . . just take it all out and start it all over again" (tr. 1/158).

21. On 11 September 1995, the Government and the surety entered into a Tender Agreement in which the surety tendered to the Government a contractor who had agreed to complete the work, including replacement of all of L&M's JFR sealant work, for a firm fixed price of \$319,273.40. L&M was not a party to this agreement (R4, tab 94). The tendered contractor, DOT Construction Corp. (DOT), was awarded the reprourement contract by the Government on 29 September 1995 (R4, tabs 97, 98). DOT's president agreed with Mr. Shevik's recommendation to replace all of L&M's JFR sealant work. He testified that approximately 35 percent of the total JFR sealant installed by L&M was defective, that the defective areas were "scattered throughout the site," and that it was "more cost effective to just go down and take out the whole thing and replace it." (Tr. 7/127, 221-22, 256-58)

22. DOT began work on site on 10 October 1995 and completed the work on 11 December 1995 (R4, tabs 177-78). There were two instances of bubbling on the reprourement contract. In the first instance DOT stopped, removed the bubbled section, used hot air lances to dry out the joint, and resumed sealing. In the second instance, it stopped, removed the bubbled section, applied a skim coat of JFR to the backer rod to seal in any moisture coming from the rod, and resumed sealing without further bubbling. (Tr. 7/195-97)

23. Pursuant to the Tender Agreement, the surety paid the Government \$110,103.21 for the excess costs of reprourement (\$26,013.54) and liquidated delay damages (\$84,089.67) allegedly due the Government under the defaulted contract. The TCO made no demand on L&M for payment of any amount for excess costs of reprourement or liquidated delay damages. There is no contracting officer's decision claiming any amount from L&M for those purposes. L&M has not paid any amount for those purposes, nor has

the Government withheld any amount for any purpose from payments otherwise due L&M. (R4, tabs 70, 94, 96, 100; tr. 6/233, 245-46)

24. On or about 26 December 1995, the surety demanded reimbursement under its Indemnity Agreement with L&M for the \$110,103.21 paid to the Government (R4, tab 191). On 25 January 1996, L&M submitted a certified claim for that amount to the contracting officer. The stated basis of the claim was legal deficiencies in the Tender Agreement between the Government and the surety. (R4, tab 102) The claim was summarily denied as “without merit” in a final decision of the contracting officer dated 15 February 1996 (R4, tab 103). That decision was appealed on 21 February 1996 (ASBCA No. 49615). We previously held that we have jurisdiction of the appeal. 98-1 BCA ¶ 29,560.

DECISION

A. ASBCA No. 49198

From the start of work until its suspension on 7 June 1995, L&M failed to maintain an adequate inspection system for the work as required by paragraph (b) of the Inspection of Construction clause of the contract. *See Findings 14, 15.* When work was suspended, approximately 35 percent of the JFR sealant installed by L&M was deficient for overfilling, underfilling, bubbling and lack of bond. In installing the sealant, L&M had ignored the express requirement of the specifications to halt application when bubbling occurred and to determine the appropriate corrective action before resuming application. *See Findings 4-11, 21.*

L&M also had failed to remove and replace all of the unacceptable sealant cited in the contracting officer’s letter of 22 May 1995. Removal and replacement of the rejected sealant was expressly specified by the letter and by paragraph 3.04 C of specification section 02581. *See Findings 5, 6.* Paragraph (g) of the Inspection of Construction clause of the contract required the specified corrective action to be “promptly” performed. *See Finding 1 and FAR 52.246-12(g).*

The deficiencies in L&M’s performance at the time work was suspended may not have been sufficient by themselves to constitute a present failure to prosecute the work diligently. L&M arguably could have corrected those deficiencies in the 40 days remaining in the contract performance period established by Modification No. P00001. *See Finding 1.* Nevertheless, they did give the Government reasonable grounds for demanding adequate assurance of timely specification-compliant performance, if L&M were to resume work and allowing for the period of Government suspension. *See Restatement (Second) of Contracts § 251; Danzig v. AEC Corporation*, 224 F.3d 1333 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 995 (2001); *National Union Fire Insurance Co.*, ASBCA No. 34744, 90-1 BCA ¶ 22,266 at 111,855, *aff’d*, 907 F.2d 157 (1990) (table).

Adequate assurance of performance was in effect sought in the paragraph 8 requests of the cure notice, and particularly in the requests for L&M's plans to resolve the bubbling and bonding problems, for a quality control plan to assure it had an inspection system, and for a milestone completion schedule. L&M's response to the notice completely failed to provide these requested assurances, or any other assurance of timely specification-compliant performance if it were allowed to resume work. *See* Findings 16, 17.

We have considered the various arguments made by L&M that the termination was improper and find them without merit. Relying on input of others does not automatically mean that the TCO failed to exercise independent judgment, and the evidence otherwise shows that she made an independent judgment that default termination was fully justified. *See* Finding 19 and *Fraya, S.E.*, ASBCA No. 52222, 02-2 BCA ¶ 31,975 at 157,951. There is evidence that the project engineer was biased against the use of 8(a) contractors for airfield work. That bias, however, had no effect on the TCO's decision. *See* Finding 19. Moreover, the deficiencies in L&M's work are verified by other sources as to which no bias against 8(a) contractors in general, or L&M in particular, is shown. In this respect, we attach particular weight to the testimony of the surety's consultant because his economic interest, if any, would have been in favor of finding L&M's work compliant so as to reduce or eliminate his client's liability. *See* Finding 20.

Since the deficiencies in L&M's performance up to the time of the suspension of work gave the Government reasonable grounds to question its ability and willingness to complete performance in a timely and specification-compliant manner, and since L&M failed to provide the items requested in paragraph 8 of the cure notice or any other reasonable assurance of such performance, the termination for default was proper. *See Restatement (Second) of Contracts* § 251; *Danzig v. AEC Corporation, supra*; *Discount Co., Inc. v. United States*, 554 F.2d 435, 441 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 938 (1977); *National Union Fire Insurance Co., supra*.

The appeal in ASBCA No. 49198 is denied.

B. ASBCA No. 49615

L&M's claim for remission of liquidated delay damages and excess costs of procurement allegedly assessed against it in the total amount of \$110,103.21 is also without merit. There was no contracting officer's demand or decision claiming this amount from L&M, no payment of the claimed amount by L&M to the Government, and no withholding of this amount from payments otherwise due L&M under the contract. *See* Finding 23. Whether L&M is now liable to the surety for that amount under its indemnity agreement with the surety is a dispute between L&M and the surety. *See Fraya, S.E., supra* at 157,952. We conclude that there is no relief under the contract available to L&M in this appeal.

The appeal in ASBCA No. 49615 is denied.

Dated: 21 February 2003

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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 Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 49198, 49615, Appeals of L & M Thomas Concrete Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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