

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Bender GmbH) ASBCA No. 52052
)
Under Contract No. DAJA90-97-C-0005)

APPEARANCE FOR THE APPELLANT: Paul D. Reinsdorf, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT John T. Harryman, JA
Trial Attorney
Headquarters, U.S. Army
Europe and Seventh Army

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

Appellant, Bender GmbH (Bender), contracted to replace and repair a river retaining wall that was part of a United States Army waterworks near Baumholder, Germany. This timely appeal is from a contracting officer decision terminating the contract for default. The appeal is denied.

FINDINGS OF FACT

1. On 13 November 1996 the Government awarded fixed-price Contract No. DAJA90-97-C-0005 for repair of a retaining wall at Hoppstädten Waterworks to Bender, a German company located in Grünstadt, Germany, whose managing director was Dieter Bender (R4, tab 1 at B3; tr. 4/413). The contract was in the original amount of DM 218,606.20 and was to be completed 90 calendar days after receiving the award (11 February 1997) (R4, tab 1). However, in the notice to proceed issued 21 November 1996, the Government set the completion date as 19 February 1997 (R4, tabs 3, 5).

2. The contract incorporated FAR 52.243.4 CHANGES (AUG 1987), FAR 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989), and FAR 52.236-2 DIFFERING SITE CONDITION (APR 1984) which states in part:

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which

differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(R4, tab 1 at I-8)

3. The contract also incorporated clause FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) which states in part:

(d) Shop drawings means drawings, submitted to the Government by the Contractor, subcontractor, any lower tier subcontractor pursuant to a construction contract, showing in detail (1) the proposed fabrication and assembly of structural elements and (2) the installation (i.e., form, fit, and attachment details) of materials of equipment. . . .

(e) . . . The Contracting Officer will indicate an approval or disapproval of the shop drawings and if not approved as submitted shall indicate the Government's reasons therefor. Any work done before such approval shall be at the Contractor's risk. Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (f) below.

(f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves any such variation, the Contracting Officer shall issue an appropriate contract modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

4. The contract also incorporated clause FAR 52.242.14 SUSPENSION OF WORK (APR 1984) which states in part:

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the

work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

5. The contract also incorporated clause FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) which states in part:

(a) If the Contractor . . . fails to complete the work within [the time specified in the contract], the Government may, by written notice to the Contractor, terminate the right to proceed with the work . . .

(b) The Contractor's right to proceed shall not be terminated . . . under this clause, if --

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor . . .

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. . . .

(R4, tab 1 at I-13)

6. Also incorporated was FAR 52.236-7 PERMITS AND RESPONSIBILITIES (NOV 1991) which states:

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

(R4, tab 1 at I-9)

7. The United States Army maintains the Hoppstädten Waterworks to supply drinking water to the military community of Baumholder, Germany. The Waterworks is located on the Nahe River and consists of several buildings and two sludge drying pits. The buildings and drying pits are separated from the river by an approximately 80 meters long retaining wall which is an earthen embankment covered by paving stones. In the construction area the Nahe River was approximately 15 meters wide and one to two meters deep. Over time, the Nahe River had damaged the retaining wall. (Tr. 5/18-19, 24-27) There was a high risk that with more high waters, the retaining wall, foundation, and embankment would be washed away and the chemicals and pollutants in the sludge drying beds would be washed into the river and kill the fish (tr. 5/30).

8. The specifications required construction of a temporary retaining wall and construction trench to allow for the repair work on the existing retaining wall (R4, tab 1, specification items 01.01-01.02 at 13; tr. 3/281). The foundation of the existing retaining wall is referred to as the toe cut-off wall (tr. 5/29). As part of the repair of the retaining wall, the contract required demolition of the old toe cut-off wall and construction of a new toe cut-off wall in place of the old one (R4, tab 1, specification items 01.07, 03.01 at 15, 20).

9. The quantity specified for excavation of trenches for the replacement toe cut-off wall was 80 cubic meters and the "soil classes involved" were "3 thru 6" (R4, tab 1, specification item 01.03 at 14).

10. There are six classes of soil: class 2 is the softest; class 6 is loose rock; and class 7 is hardened rock which requires heavy equipment or a jack hammer to remove (tr. 3/225, 4/386).

11. Specification item 04.03 stated:

The working drawings and/or structural analysis shall be performed in the following extent and submitted in triplicate to the COR for approval:

- Performance of the structural analysis, together with calculations and drawings,
 - for the foundations (toe cut-off wall etc.)
 - for the sheeting
- Checking of the aforementioned analysis by an officially authorized professional engineer (structural analyst)
- Preparation of formboarding and reinforcement drawings of aforementioned structural parts.
- Incorporation of the comments of the government-recognized professional engineer into the analysis and working drawings.

(R4, tab 1 at 22)

12. The contract required that Bender keep the work site free of groundwater so the water would not collect (tr. 3/217).

13. Construction on German Rivers requires coordination and approval by the Germany Water Authority (tr. 5/19). Consistent with practice under German law, as stated above, the contract required an engineering structural, or statical, analysis (hereinafter sometimes statical) including the preparation of calculations and drawings which are reviewed by a second engineer (R4, tab 1, specification item 04.03 at 22; tr. 4/368-69). Bender hired Dieter Weigand, an independent engineer, to prepare the statical analysis for the contract (tr. 4/362-68; SR4, tabs 5, 6).

14. In bidding, Bender intended to drive metal sheets into the mud/clay bottom of the river to construct the temporary retaining wall. However while completing the statical, Mr. Weigand determined the original plan for constructing the temporary retaining wall would not work because, according to Mr. Weigand's report, he was informed during a site inspection in late December 1996 that "the whole river bed consists of rock." (SR4, tab 5 at 2; tr. 3/196)

15. The statical from Weigand also stated:

Since large areas of the embankment incl. foundation have moved, it must be feared that the existing paving cannot be secured during the exchange of the foundation and will slip into the river bed. I recommend for this reason that the existing foundations N O T be removed, but strengthened by new concrete foundations dug into the river bed, in order to secure the existing foundation stones in their present position. With this, the river cross-section may not be restricted significantly, according to information from Mr. Pies [the German local water official].

(SR4, tab 5 at 3; tr. 3/248)

16. The statical profiles or shop drawings showed the existing toe cut-off wall would not be removed and the new toe cut-off wall would be constructed partially in front of the old toe cut-off wall (tr. 4/372-74; SR4, tab 5). There is no evidence that the statical or shop drawings submitted to the contracting officer (CO) contained a written description of these variations sufficient to comply with paragraph (f) of the Specifications and Drawings for Construction clause of the contract (finding 3). However, had Bender constructed the toe cut-off wall as shown in its statical which was approved by the German Water Authority, there would have been no narrowing of the river (tr. 3/254).

17. On 25 February 1997 Bender provided the statical, or shop drawing, to the CO (SR4, tabs 142, 143; tr. 4/368-69, 5/20). The Government's application which submitted Mr. Weigand's report analysis and the Government's plans for the Waterworks for approval, was stamped received by German administrators on 20 March 1997 (R4, tabs 5, 10, 14, 16, 142; SR4, tab 8; tr. 3/194, 224, 5/19-20, 31).

18. On 10 March 1997 the parties entered into Modification No. P00001, effective 4 March 1997, which suspended the work based on delays caused by bad weather and the need to submit additional engineering data to the German authorities, and added 75 days to the performance time (R4, tab 11).

19. On 16 April 1997 the German Lower Water Authority approved the work to be done under the contract (tr. 3/223-24; SR4, tab 8). On 20 June 1997 the German Water Authority gave verbal approval of the construction work on the Nahe River (R4, tab 14).

20. On 27 June 1997 Bender requested a modification and stated: "We find it necessary to have a modification discussion in view of the changed requirement and the requested changes by the statical engineer" (R4, tab 15).

21. On 30 September 1997 the parties entered into Modification No. P00002 which extended the contract performance completion date to 30 January 1998, increased the contract price from DM 218,606.20 to DM 607,733.61, and revised specification item 01.04 to state that there would be “additional expenditures relating to drilling of soil of class 6 and 7.” The quantity was listed as 52 meters. (R4, tab 20, specification item, 01.04 at 16) Modification No. P00002 renumbered item 01.03 as 01.08 and listed 152 cubic meters to be excavated rather than 80 cubic meters. This item continued to state that the soil classes involved were “3 thru 6.” (R4, tab 20, specification item 01.08 at 17) The specifications also set out “requirement items” to be ordered by the contracting officer’s representative (COR). One of these was additional expenditures for drilling class 6 and 7 soil. The estimated quantity was 35 meters but the invoice would be based on actual measurement. (R4, tab 20, specification items 05.00, 05.05 at 26, 27) Modification P00002 also stated: “The parties hereto agree that the change in schedule and price constitute both the consideration and equitable adjustment due under any clause of the contract and the modification effected herein.” (R4, tab 20 at 2).

22. On 9 December 1997 Bender submitted an invoice stating that 20% of the contract work was completed (R4, tab 30).

23. In December 1997 Bender experienced problems with water entering the construction pit and began discussing those problems with the Government (R4, tabs 31, 32).

24. Bender requested a modification to the contract to deal with a differing site condition and to permit construction of a different type temporary retaining wall (R4, tabs 33-39).

25. On 10 March 1998 the Government asked Bender to specify whether it claimed a Type I or Type II differing site condition (R4, tab 40). Bender stated it encountered “crumbled” and “uneven” rock which caused water to seep below the sheeting, but did not specify which type of differing site condition it claimed (R4, tab 41). Bender refused to provide copies of the subcontractor’s billings for the work (tr. 4/436). Asked at hearing if the March 1998 billings from the subcontractor hired to drill in the riverbed were based on the type of soil involved, Mr. Bender testified:

I have to correct myself. The soil class was not particularly specified as soil class six. It was said – Soil class seven, it was soil class six or seven. So it was not any great difference between [sic] made between soil class six and soil class seven. It was just six and seven.

(Tr. 4/435)

26. On 18 March 1998 the Government denied Bender's claim based in part on the facts that: (1) the contract had already been modified because of the presence of rock in the riverbed; and (2) Bender's analysis required that the type sheeting could be used in running water and with uneven soil (R4, tab 45).

27. On 1 April 1998 the Government issued a cure notice which stated that Bender's failure to provide documents in accordance with specification item 04.03 and failure to comply with the structural analysis when installing I-beams in the riverbed, endangered performance of the contract. Bender was given ten days to cure these deficiencies. (R4, tab 50) Also on 1 April 1998 in no cost Modification No. P00003 the Government extended the contract performance period to 30 June 1998 due to weather conditions (R4, tab 52).

28. On 27 May 1998 the Government issued a show cause notice which stated the Government was considering terminating the contract for default because Bender had failed to remedy the conditions endangering performance set out in the 1 April 1998 cure notice (R4, tab 58).

29. On 9 July 1998 the parties entered into "no cost" Modification No. P00004 in which the Government agreed to end the pending termination for default proceedings and give Bender "a second chance" to perform the contract. A portion of Bender's revised static analysis dated 8 May 1998 was accepted but Bender was required to prove the workability of the revised analysis by completing at least 10 meters of retention wall within 30 days. In consideration of the Government's acceptance of a portion of the revised analysis, Bender waived any equitable adjustment claims it might have based on differing site conditions, stop work orders, and delays. The contract performance period was extended to 9 October 1998. (R4, tab 63)

30. During a job site visit on 14 July 1998, it was pointed out to Bender that an existing toe cut-off wall had to be demolished pursuant to the specification item 01.07 (R4, tab 65; tr. 3/202).

31. On 7 August 1998 Bender wrote that water from the Government's sludge basins was leaking into the construction area (R4, tab 77). Gerd Doerr, a Government engineer, determined that the sludge basins were not leaking (R4, tab 82). At the hearing Harriman Schmoeller, one of Bender's on-site employees testified that no water leaked into the construction area from the sludge basins (tr. 4/351-52), a point he had discussed at the work site with Eberhard Blug, the Government COR, while the problem was under discussion (tr. 3/217-219, 5/18). The water was collected groundwater which would not have occurred if Bender had protected the work area with sheet piling which is the standard remedy (tr. 3/217).

32. On 17 August 1998 Bender submitted partial invoice no. 3 which stated the contract was 38% complete (R4, tab 83; tr. 3/220).

33. After an exchange of correspondence, on 14 September 1998 Bender agreed that it would continue work (R4, tabs 92, 93, 95, 96).

34. At a meeting on 16 September 1998, Bender requested additional time until 31 December 1998 to complete the contract, based on Bender's assertion that it had encountered a differing site condition (class 7 soil) and that the Government had delayed responding to Bender's concerns regarding leaks from the sludge basins (R4, tab 151, ¶ c). Also on 16 September 1998 the Government issued a cure notice. The notice stated that the Government considered Bender's failure to make progress and to prosecute work so as to ensure completion by 9 October 1998 as conditions endangering performance of the contract. The conditions were to be cured within ten days. (R4, tab 99) On 23 September 1998 Bender rejected the cure notice reiterating the class 7 soil and sludge basin claims (R4, tab 100).

35. On 1 October 1998 Bender submitted partial invoice no. 4 showing 42% completion. During an inspection on 2 October 1998, the Government confirmed the percentage completed. (R4, tab 106; tr. 3/221)

36. Bender did not construct the toe cut-off wall as detailed in the statics (tr. 3/195).

37. On 2 October 1998 the CO requested information regarding Bender's claims (R4, tab 109). On the same day, the CO went to the work site to discuss whether Bender was in compliance with the contract requirement that the old toe cut-off wall be replaced. Bender had started to build the new toe cut-off wall in front of the old one which would decrease the width of the river one meter. The Government was concerned that this course of action would narrow the river, a situation which had not been, and might not be, approved by German authorities. The CO testified that Mr. Bender said that he would build the new foundation in front of the old one and get approval from German authorities later. The CO verbally issued a partial suspension of work order. (Tr. 3/203-10, 317-19; R4, tab 154 at 16, 17, 56-58) A written order suspending all foundation work was issued on 2 October 1998 (R4, tab 107).

38. Bender left the work site and did no "productive work" after 2 October 1998 (tr. 4/354, 451). At that time there was other contract work which Bender could have performed, although perhaps not completed, despite the partial suspension of work (tr. 3/19).

39. On 12 October 1998 Bender's representatives met with Thomas Pies, a local water official, at the work site. In a letter documenting the meeting, Mr. Pies stated that he

would not approve Bender's construction of the new foundation in front of the old one. Mr. Pies did not believe it was necessary because the old foundation was to be demolished and he was concerned that it would narrow the river. (R4, tab 113) Mr. Pies confirmed this view in a telephone conversation with the Government's contract administrator, Reinhold Möebus (R4, tab 114).

40. On 28 October 1998 the partial suspension of work was in effect and the Government was concerned that the water was rising and a flood was anticipated. The area was unprotected and flooding could wash away all the roads and portions of the retaining wall and thus damage the sludge drying pits and the building. Despite the Government's request, Bender did not protect the work site, and the Government obtained another contractor to do so. (Tr. 3/211-14, 298-99)

41. On 10 November 1998 Bender responded to the CO's 2 October 1998 request for information, but did not meaningfully address the questions raised by the CO (R4, tab 128).

42. The CO talked with Bender about a no-cost termination, which Bender refused (tr. 3/296). The Government investigated the excuses provided by Bender for its failure to make progress on the contract, and considered the impact of termination, the need to do so, and the alternatives to termination (tr. 3/297-99). The Government also considered that, at the end of October 1998, Bender had refused to protect the work site when the Nahe River began to rise (tr. 3/321-22; R4, tab 118).

43. On 9 November 1998 Bender submitted an invoice indicating that the contract was 66% complete as of 2 October 1998 (R4, tab 125; tr. 4/422). That invoice was not paid (Gov't br. at 2 ¶ 53).

44. The Government's contracting people were convinced that Bender could not have completed the contract by the 9 October 1998 completion date (tr. 3/221, 297, 328). At the hearing, Mr. Bender estimated that he could have completed the contract with a 20-day extension (tr. 4/422-23).

45. On 24 November 1998 the Government terminated the contract for default based on Bender's failure to perform the contract by the contract completion date (R4, tab 131). In the 45 days between the completion date and the termination, the CO talked with people involved with the contract, checked other sources of information, and consulted with attorneys to be certain the contract was not salvageable and default was appropriate (tr. 3/321-29). Between the partial suspension of work and the default termination, the CO made written inquiry to the German authorities whether the reduction in width of the Nahe River was permissible, and received the reply that they would not approve a decrease in width of the river bed (tr. 3/332; R4, tab 113). In deciding to terminate, the CO considered the factors set out in FAR 49.402 (tr. 3/325-29).

46. This timely appeal followed on 22 February 1999.

DECISION

Termination for default is a drastic sanction that should be imposed upon the contractor only for good cause in the presence of solid evidence. *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The Government has the burden of proving that the default termination was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). If the Government does so, it has the right to terminate for default and the contractor has the burden to come forward with evidence to show that its default was excusable or was caused by a material breach by the Government. *Lisbon, supra*, at 765.

The Government terminated the contract citing Bender's failure to complete the contract by the extended 9 October 1998 completion date, a fact which is undisputed (finding 45). Bender first argues that the Government's 2 October 1998 suspension of work caused Bender's abandonment of the contract and prevented completion. However, the suspension was partial and was issued because the contracting officer was concerned that the manner in which Bender was constructing the toe cut-off wall would narrow the river and not be approved by German officials (finding 37). The concern was well-founded because a local water official later confirmed that he would not approve the method Bender was using (finding 39, 45).

Bender also argues that water seepage in its construction pit and the presence of rock in the riverbed were differing site conditions that excuse its failure to complete. In Modification No. P00004, executed 9 July 1998, Bender waived any equitable adjustment claims it might have based on differing site conditions, stop work orders, and delays. The seepage into the construction pit was caused by collected groundwater for which Bender was responsible. Further on 9 July 1998 Bender was fully aware of the class 7 rock in the construction area. We know of no differing site conditions which excuse Bender's failure to complete the contract on time.

Accordingly, the appeal is denied.

Date: 24 June 2003

JEAN SCHEPERS
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 Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52052, Appeal of Bender GmbH, rendered in conformance with the Board's Charter.

Dated:

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