ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Spindler Construction Corporation	)	ASBCA No. 55007
	)	
Under Contract No. DACA05-02-C-0020	)	

APPEARANCES FOR THE APPELLANT: David W. Zimmerman, Esq.
Melissa A. Orien, Esq.
Holland & Hart LLP
Salt Lake City, UT

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Robert W. Scharf, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Sacramento

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Appellant, Spindler Construction Corporation (Spindler), seeks an equitable adjustment on behalf of its subcontractor Sanpete Steel Corporation (Sanpete Steel) for an increase of $199,008.29 in the cost of structural steel materials. At issue are the government's motion for summary judgment and appellant's opposition thereto and cross-motion for summary judgment. At the request of appellant, oral argument was held by telephone on 22 June 2006. We grant the government's motion and deny appellant's cross-motion.

FINDINGS OF FACT

On 27 September 2002, Spindler was awarded a Standard Form (SF) 1442 fixed-price contract, No. DACA05-02-C-0020, in the amount of $14,728,745.00 for the design and construction of a new aircraft depot maintenance hangar at Hill Air Force Base, UT. The contract performance period was 625 days and the specified work included structural steel framing. (R4, tab 4) The contract work was completed and accepted by the government on 28 January 2005 (R4, tab 2).

The contract contained the standard FAR 52.233-1, DISPUTES (DEC 1998) clause. It did not contain a price adjustment, or any other, clause addressing possible material cost increases. (R4, tabs 6 through 8)

On 5 February 2004, Spindler executed a fixed-price subcontract with Sanpete Steel to "[p]rovide all construction of Structural Steel Fabrication and Erection" (app. mot., ex. 4 at 1). The subcontract price for structural and miscellaneous steel fabrication was for "3,350,000 lbs @ $0.925," an "Estimated Fabrication Total" of $3,106,250.00, including surety bond expense of $7,500.00 (app. mot., ex. 4 at 11). Sanpete Steel's estimated cost of the pre-fabricated steel alone was $868,375.95; its actual cost was $1,067,384.24 (R4, tab 9, ex. 2 at 14 of 14). This is an increase of $199,008.29 or 23 percent in the cost of steel. It represents an increase of less than five percent to the cost of the total subcontract and less than two percent to the cost of the prime contract. The subcontract price for the installation/erection of "Structural Steel," "Joist," "Metal Deck," and "Misc." was $1,125,500.00. This is the price that C & L Erectors, L.C. bid to Sanpete Steel on 15 November 2003. (App. mot., exs. 3, 4 at 11)

Article 1 of the subcontract between Spindler and Sanpete Steel bound both parties to all the terms and conditions of Spindler's prime contract with the government. Article 3 further provided that Sanpete Steel "assumes toward [Spindler] all the obligations and responsibilities that [Spindler] assumes toward [the government]." Like the prime contract, the subcontract did not contain a price adjustment clause for material cost changes. (App. mot., ex. 4)

The affidavit of Mr. Gary M. Richards, president of Sanpete Steel, explains that the steel mill prices to the fabrication industry had fluctuated within a "generally predictable range" for many years, allowing the fabrication industry relative predictability in the cost of structural steel shapes and plate used in constructing buildings and bridges (app. mot., ex. 1, Richards aff., ¶¶ 12-14). This permitted the fabrication industry to provide lump sum pricing and take the "risk of normal fluctuations in the cost of structural steel shapes and plate from the mills" (*id*., ¶¶ 15-16). Such market stability was a basic assumption upon which Sanpete Steel subcontracted with Spindler to provide steel for the project (*id*., ¶ 18). There is no evidence that either Spindler or the government made such an assumption.

Mr. Richards' affidavit goes on to aver that, between November 2003, when Sanpete Steel obtained steel prices for its bid, and December 2004, when it completed performance of the subcontract, the price of steel became volatile and unpredictable due to a "global steel crisis," increasing the cost of steel by over 50 percent (Richards aff., ¶¶ 20-24, and ex. A).

By a letter dated 19 August 2004, Sanpete Steel submitted a claim to Spindler that was certified by Mr. Richards for recovery of the "unforeseen steel cost increases" it had incurred in performance of the subcontract. It explained that, between the time it had entered into the subcontract and the time it purchased the steel, there were "extensive unanticipated increases in the market price of steel" and that it had paid $199,008.29 more for steel than it had estimated. (R4, tab 9 at 2) It asserted that its performance was made "impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made" under Utah Code Ann. § 70A-2-615 (*id.* at 3; ex. 4). The legal analysis explained that the Utah Code was adopted verbatim from Section 2-615 of the UNIFORM COMMERCIAL CODE (UCC). It also cited the RESTATEMENT (SECOND) OF CONTRACTS § 261, Discharge by Supervening Impracticability, which it asserted was adopted in Utah in *Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856 (Utah 1978). (R4, tab 9 at 7-9) It asked Spindler to submit its claim to the contracting officer under the Contract Disputes Act (CDA) (*id.* at 4).

On 18 January 2005, Spindler sponsored Sanpete's Steel's claim by certifying and submitting it to the contracting officer (R4, tab 3). By a letter dated 9 March 2005, the contracting officer denied the claim, noting that state and common law did not apply and that she could "grant a request for relief only under the specific terms of the contract," and that absent an "economic price adjustment or similar clause[s]," in the contract, there was no legal basis for granting the relief requested (R4, tab 2 at 3).

A timely appeal from the final decision was docketed as ASBCA No. 55007. The complaint asserts that the "dramatic increase in steel prices" between February 2004 and December 2004 "was a supervening event that made Sanpete Steel's performance of the contract at the contract price commercially impracticable" (compl., ¶ 12). It seeks $199,008.29 for the increase in the cost of steel (*id.*, ¶ 22).

DISCUSSION

Summary judgment is appropriate when there is no genuine issue of material fact in dispute. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1378, 1390 (Fed. Cir. 1987). Where, as here, both parties have moved for summary judgment, "counsel are deemed to represent that all relevant facts are before the [Board] and a trial is unnecessary." *Aydin Corp. v. United States*, 669 F.2d 681, 689 (Ct. Cl. 1982). In such cases, we evaluate each party's motion on its own merits. *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999); *Mingus*, 812 F.2d at 1390.

The principal issue to be resolved on the pending cross-motions for summary judgment is whether Sanpete Steel's performance was commercially impracticable. The government's position is that a contract is not commercially impracticable merely

because costs are more expensive than originally contemplated. Appellant's position is that the "global steel crisis" rendered Sanpete Steel's performance impracticable.

As a general statement, commercial impracticability is a subset of the doctrine of legal impossibility that excuses performance when costs become excessive and unreasonable due to an unforeseen supervening event not contemplated by the contracting parties. *See Hercules, Inc. v. United States*, 24 F.3d 188, 204 (Fed. Cir. 1994). In *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2002), the court of appeals commented that in *United States v. Winstar Corp.*, 518 U.S. 839, 904 (1996), the Supreme Court, quoting the RESTATEMENT (SECOND) OF CONTRACTS § 261, had "reformulated the common law doctrine of impossibility." The court then stated that a contractor asserting commercial impracticability must show that: (1) a supervening event made performance impracticable; (2) the non-occurrence of the event was a basic assumption upon which the contract was based; (3) the occurrence of the event was not the contractor's fault; and (4) the contractor did not assume the risk of occurrence. *Seaboard Lumber*, 308 F.3d at 1294-95.

As to the first element, the supervening market fluctuation in the price of steel here did not make contract performance impracticable. *See Seaboard Lumber*, 308 F.3d at 1294; *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 409 (Ct. Cl. 1978). On the contrary, the 23 percent increase in the cost of steel represents less then a five percent cost overrun of the subcontract price. *See Raytheon Co. v. White*, 305 F.3d 1354, 1368 (Fed. Cir. 2002); *Gulf and Western Industries, Inc.*, ASBCA No. 21090, 87-2 BCA ¶ 19,881 at 100,575 (cost overruns of 57 percent and 70 percent, respectively, did not make performance commercially impracticable).

As to the second and fourth elements, the non-occurrence of increased costs was not a basic contract assumption because a fixed-price contract normally assigns the risk of price increases to the contractor. Spindler's contract with the government to design and build a new aircraft depot maintenance hangar was a fixed-price contract that insulated the government from the risk of cost increases. Spindler's subcontract with Sanpete Steel was also fixed-price. While Sanpete Steel assumed that the steel market would remain within a "generally predicable range," this was not a basic, or normal, assumption about the general risk of possible cost increases for a fixed-price contract. *Seaboard Lumber*, 308 F.3d at 1295, *citing Tangfeldt Wood Products, Inc. v. United States*, 733 F.2d 1574, 1577-78 (Fed. Cir. 1984). *See also Chevron, U.S.A., Inc.*, ASBCA No. 32323, 90-1 BCA ¶ 22,602 at 113,426; *AGH Industries, Inc.*, ASBCA Nos. 25848, 26535, 85-1 BCA ¶ 17,784 at 88,845 (contractor bears the general risk of performance and material price increases in a firm fixed-price contract without an economic price adjustment clause).

Moreover, there is no evidence that either Spindler or the government shared Sanpete Steel's assumption. Even if both did, however, market shifts do not usually change basic contract assumptions. *Seaboard Lumber*, 308 F.3d at 1295. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 261, comment b. We conclude that, while the "global steel crisis" is certainly not attributable to Spindler or Sanpete Steel, the undisputed facts do not establish the other elements of commercially impracticability.

The government's additional contention is that, under *Severin v. United States*, 99 S. Ct. 435 (1943), *cert. denied*, 322 U.S. 733 (1944), Spindler cannot sponsor Sanpete Steel's claim because it is not liable to Sanpete Steel for the increase in the cost of steel. Appellant responds that the facts here do not justify application of the doctrine.

We recently addressed the so-called "Severin doctrine" in *M.A. Mortenson Company*, ASBCA No. 53761, 06-1 BCA ¶ 33,180 at 164,439. We said:

> The Severin doctrine is grounded on principles of sovereign immunity and privity of contract. It precludes "pass-through" subcontractor claims against the government sponsored by the prime contractor if the prime is not liable for the subcontractor's costs or damages. The government bears the burden to prove that the doctrine applies. It must establish that an iron-clad release or contract provision immunizes the prime contractor completely from any and all liability to the subcontractor for the government action at issue. The Severin doctrine is construed narrowly. *E.R. Mitchell Construction Co. v. Danzig*, 175 F.3d 1369, 1370-71 (Fed. Cir. 1999); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1552, n.8 (Fed. Cir. 1983); *Cross Construction Co., Inc. v. United States*, 225 Ct. Cl. 616, 618 (1980); *Lockheed Martin Corp.*, ASBCA No. 53798, 03-2 BCA ¶ 32,279.

The government relies upon the lack of a price adjustment clause in the subcontract between Spindler and Sanpete Steel and the provisions of Articles 1 and 3 that bind Sanpete Steel to the terms of the prime contract. Construing the Severin doctrine narrowly, as we are required to do, we are not persuaded on the basis of the sparse record presented to us that the government has carried its burden of showing that Spindler is immunized completely from any and all liability to Sanpete Steel for the steel cost increases. The Severin doctrine is not a bar to Spindler's claim on behalf of Sanpete Steel.

CONCLUSION

Spindler's claim on behalf of Sanpete Steel is not barred by the Severin doctrine. The undisputed facts do not establish commercial impracticability. Accordingly, the government's motion for summary judgment is granted and appellant's cross-motion for summary judgment is denied.

Dated: 31 July 2006

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
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 No. 55007, Appeal of Spindler Construction Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals