

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
Smart Power Systems, Inc. ) ASBCA No. 56743  
Under Contract No. W15P7T-06-D-N210 )

APPEARANCE FOR THE APPELLANT: Lalit H. Gadhia, Esq.  
Baltimore, MD

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
LTC Steven P. Cullen, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES  
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This appeal arises from the contracting officer's (CO) default termination of the captioned supply contract for power supplies. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. In September 2009 the government moved for summary judgment on the basis that the pleadings and present record show that the appellant failed to make progress under the contract so as to endanger its performance and failed to cure such conditions, so the CO properly terminated the contract for default. Appellant responded to the motion, and the government stated its intent not to reply further.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 1 February 2006 the Army Communications-Electronics Life Cycle Management Command (CECOM) awarded Contract No. W15P7T-06-D-N210 (the contract) to Smart Power Systems, Inc. (SPS or appellant) for power supplies, PP-7815A. The contract was an indefinite delivery, indefinite quantity type contract that provided for issuance of delivery orders (DO). (R4, tab 1 at 1-2, § J, attach. 1 at 1; gov't mot. ¶ 1)

2. The contract included the FAR 52.209-3, FIRST ARTICLE APPROVAL—CONTRACTOR TESTING (SEP 1989) and ALT I (JAN 1997) clause and incorporated by reference the 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clause, which provides in pertinent part (R4, tab 1 at 21-22):

(a)(1) The Government may...by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—

....

(ii) Make progress, so as to endanger performance of this contract....

....

(2) The Government's right to terminate this contract under subdivision...(a)(1)(ii)...above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the [CO]) after receipt of the notice from the [CO] specifying the failure.

3. The contract required SPS to submit a First Article Test Plan (FATP) 75 days after the first DO was placed, to complete the first production lot of 25 power supplies 210 days after the first DO was placed, and to conduct first article testing (FAT) on five power supply units randomly selected from the first 25 production units. The first article test report (FATR) was due 30 days after the completion of the FAT on the five randomly selected units. (Gov't mot. ¶ 2; R4, tab 1 at 2-3, attach. 3 at 4) Respondent placed contract DO No. 1 on 2 February 2006 (gov't mot. ¶ 3), so the FATP was due by 18 April 2006.

4. SPS submitted a FATP to CECOM on 3 August 2006 and received detailed CECOM comments on its deficiencies. SPS resubmitted the FATP on 8 October 2006, 19 November 2006, 23 January 2007, 16 April 2007, 12 June 2007, 19 September 2007, 2 January 2008, 31 January 2008, 27 February 2008 and 10 March 2008, receiving detailed CECOM comments on the deficiencies of those revisions. (R4, tab 3; compl. and answer ¶ 5; gov't mot. ¶¶ 6, 9, 13-14, 18, 25-29, 31) CECOM approved SPS' FATP on 17 March 2008 (gov't mot. ¶ 32).

5. DO No. 1 was bilaterally modified three times to extend the dates for the FATP submission and FAT, and to specify a date certain for submission of the FATR. In each of those three modifications SPS released all claims related to the DO's delivery schedule. (R4, tabs 12, 26, 42; gov't mot. ¶¶ 12, 24, 34) The three modifications are tabulated below:

<u>Mod.</u>	<u>Date</u>	<u>FATP</u>	<u>FAT</u>	<u>FATR</u>
01	3/26/07	--	5/28/07	8/27/07
02	9/19/07	9/19/07	1/30/08	4/30/08
03	4/7/08	--	8/18/08	11/17/08

6. On 5 August 2008 SPS notified CO Johanna Hersch that it required an indefinite extension of time beyond 18 August 2008 to deliver power supplies for FAT (gov't mot. ¶ 39). CO Hersch's 8 August 2008 letter to SPS asked whether it would have 25 units for random selection of five FA units on 18 August 2008 (gov't mot. ¶ 40).

7. SPS' 12 August 2008 letter to CECOM contract specialist Kristina Lew advised that a prototype unit was nearly complete and requested extension of the FAT from 18 August 2008 to 28 November 2008 "[i]n order to build the 25 Units" and to submit a new revised delivery schedule (gov't mot. ¶ 41; R4, tab 52).

8. CO Hersch's 18 August 2008 cure notice to SPS stated that failure to complete the first article units by 18 August 2008 and the extension it requested on 12 August 2008 were considered conditions endangering contract performance, and requested SPS to provide adequate assurance within 10 days that FAT would be completed and the FATR delivered by 18 November 2008\* (gov't mot. ¶¶ 42-43; R4, tab 53).

9. To SPS' 22 August 2008 question whether CECOM would extend the FATR report date for an offer of consideration, Ms. Lew replied on 25 August 2008 that the government would not answer such question until it received SPS' response to the cure notice (gov't mot. ¶¶ 46-47; R4, tab 54 at 2).

10. SPS' 27 August 2008 letter to Ms. Lew in response to the CO's 18 August 2008 cure notice stated that it had completed its prototype unit; it needed to order circuit boards, mechanical enclosures, connectors, and to build the 25 production units for FAT; it planned to begin FAT in the first week of October 2008 and would "try our level best to finish the FAT Testing and FAT Report by the 17<sup>th</sup> Nov 2008 deadline"; and it requested to reduce the first production lot from 25 to five units for FAT (gov't mot. ¶ 48; compl. at 19-21).

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\* The record does not explain why the CO here and hereafter used a date of 18 November 2008 rather than 17 November 2008 as specified in Mod. 03. There was, however, no prejudice to SPS.

11. SPS' 13 November 2008 letter to Ms. Lew stated that it needed "an extension of at-least 12 Weeks" to accomplish FAT and to submit the FATR (gov't mot. ¶ 52; R4, tab 58).

12. After reviewing SPS' 27 August 2008 response to her cure notice and its 13 November 2008 request for at least 12 weeks extension to accomplish FAT and to deliver the FATR, the CO terminated the contract in total on 14 November 2008 on the ground that SPS failed to cure the conditions endangering performance and to provide adequate assurances that it would meet the 18 November 2008 FATR delivery date. The CO notified SPS that similar supplies might be reprocured against its account, but did not assert a claim for excess costs at that time. (Gov't mot. ¶ 53; R4, tab 59)

13. On 9 February 2009 SPS timely appealed from the termination and filed its complaint. The Board docketed the appeal as ASBCA No. 56743.

## DECISION

### I.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The government has the burden to prove that its default termination was justified. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987).

Default termination for progress failure is appropriate if a demonstrated lack of diligence indicated that the government could not be assured of timely completion. *See Discount Co. v. United States*, 554 F.2d 435, 441 (Ct. Cl. 1977). Additionally, paragraph (a)(2) of the Default clause requires the CO to provide the contractor a cure notice providing 10 days in which to cure specified performance failures.

The CO provided the required cure notice on 18 August 2008 (SOF ¶ 8). On 27 August 2008 SPS responded that it needed to order circuit boards, mechanical enclosures, and connectors required to build the 25 production units for FAT. It stated that it planned to begin FAT in the first week of October and would try to finish FATR by 17 November 2008. (SOF ¶ 10) Lack of the necessary parts is a factor to determine whether a contractor is making progress in contract performance. *See Universal Fiberglass Corp. v. United States*, 537 F.2d 393, 398 (Ct. Cl. 1976). On 13 November 2008 SPS told respondent that it needed an extension of at least 12 weeks to complete the FAT and to submit the FATR (SOF ¶ 11). On 14 November 2008, the CO terminated the contract for default.

Appellant has not disputed these facts. Respondent has shown that as of 14 November 2008, four days before the 18 November 2008 date referred to in the cure notice, appellant had failed to make progress so as to endanger performance of the contract and had not given respondent adequate assurances that it could meet that 18 November 2008 FATR date (SOF ¶¶ 8-11). We hold that respondent has met its burden of proving a *prima facie* case of default by appellant.

## II.

A defaulted contractor has the “burden of proving that...its nonperformance was excusable.” *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir.), *cert. denied*, 519 U.S. 992 (1996). Appellant “does not dispute the facts set forth in the Army’s Motion for Summary Judgment but asserts additional facts, undisputable, which the Army fails to note” (app. resp. at 2). Appellant asserts that the government’s refusal to meet with appellant and to provide any significant feedback on the nature of changes to be made to the FATP, from 3 August 2006 to 11 February 2008, led to delay in contract performance that was beyond its reasonable control and without its fault or negligence, and so respondent terminated the contract in bad faith without just cause (*id.* at 17-18). Appellant further argues that the motion is “premature because SPS was not provided...a reasonable amount of time within which to conduct discovery” (*id.* at 16-17). None of these arguments excuses its default or provides a basis for denying the motion.

Appellant denied respondent’s allegations in ¶¶ 4, 5, 7, 10, 11, 17, 21 and 37 of the motion in whole or in part (app. resp. at 3-4, 6-7, 10). Such denials conflict with its statement that it “does not dispute the facts set forth in the Army’s Motion” (*id.* at 2). Appellant’s response to motion ¶ 37 alleged facts relating to a government confirmation of its invoice breakdown occurring on 28-29 July 2008 that are immaterial to the motion. Appellant’s remaining denials allege government delays that occurred before the execution of Modification No. 03 to DO No. 1 on 7 April 2008, and thus were the subject of accord and satisfaction (SOF ¶ 5). Appellant proposed additional “Undisputed Findings of Fact” (*id.* at 14-16). The additional facts in ¶ 59 concerning the 28 July 2008 confirmation of invoiced costs are immaterial to the motion. The remaining additional facts occurred before 7 April 2008, and hence were the subject of accord and satisfaction.

Appellant argues that by refusing to meet with appellant and to provide any significant feedback on the nature of (unidentified) changes to be made to the FATP, respondent delayed contract performance from 3 August 2006 through 11 February 2008 and so it terminated the contract in bad faith. This argument fails because it is insufficient to raise a triable issue of fact to support a finding of a bad faith, and because the alleged delay was the subject of accord and satisfaction.

With respect to its discovery argument, appellant attached to its response to the motion a set of 17 interrogatories dated 17 December 2009 and states that the most important information it seeks to discover is whether respondent has repurchased the parts after the default termination (app. resp. at 16-17). Appellant's interrogatories numbered 1-5 consist of instructions and numbers 7-15 address facts that occurred before 7 April 2008, when Modification No. 03 to DO No. 1 was executed, and are immaterial for the reasons analyzed above. Interrogatories numbered 6, 16 and 17 inquire about the impact on the instant contract of the alleged closure of Monmouth Army Base; the detriment that respondent would incur by testing five of five production samples, rather than 25 samples; and the name and address of the reprocurement contractor or why the Army no longer needs the parts. These facts are immaterial to respondent's motion for summary judgment. Therefore, appellant's discovery contentions are baseless.

### CONCLUSION

Respondent is entitled to judgment as a matter of law. The government's motion for summary judgment is granted. The appeal is denied.

Dated: 24 November 2010

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DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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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. 56743, Appeal of Smart Power Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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