

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Steelform, Inc. ) ASBCA No. 57724  
 )  
Under Contract No. N00406-10-P-B004 )

APPEARANCE FOR THE APPELLANT: Bryan J. Gottfredson, Esq.  
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Scottsdale, AZ

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.  
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Assistant Counsel  
NAVSUP Fleet Logistics Center  
Puget Sound  
Bremerton, WA

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

This appeal arises from the contracting officer's (CO) termination for default of three of the six line items of the captioned contract to supply quantities of various sized containers to designated Navy activities. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109.

On 29 June 2012 respondent moved for summary judgment, submitting a 30-paragraph Statement of Undisputed Material Facts (SUMF) and a legal analysis. Appellant opposed that motion on 9 August 2012, stating that many of respondent's alleged facts "are, in fact, disputed or are incomplete" (app. opp'n at 2-3). Appellant submitted the affidavit of Mr. Frank Pavlich dated 9 August 2012 in support of the opposition.

Respondent replied to appellant's opposition on 29 August 2012. Respondent objected to consideration of Mr. Pavlich's affidavit on the ground that it was untimely. The parties initially had elected a Rule 11 proceeding and the Board established a Rule 11 schedule which required that supplements to the record be filed by 31 May 2012 and rebuttal evidence by 13 June 2012. When, however, the government subsequently elected to move for summary judgment, appellant was entitled to file an affidavit to support its opposition. Meanwhile the Rule 11 schedule was suspended. The objection is overruled.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 28 September 2010 the U.S. Navy Fleet and Industrial Supply Center, Puget Sound (FISC Puget), awarded Contract No. N00406-10-P-B004 (the contract) to Steelform, Inc. The contract was a commercial item purchase order to supply various sized metal containers for the firm fixed price of \$316,799.00. (R4, tab 2 at 2, 9-14<sup>1</sup>)

2. The contract included the following six contract line items (CLINs):

<u>ITEM NO</u>	<u>SUPPLIES/SERVICES</u>	<u>QUANTITY</u>
0001	STACKABLE BINS, BOEING TYPE CONTAINERS FFP 1.48 cubic yard	64
0002	BAY ROLL OFF RECYCLING CONTAINERS FFP 25.75 cubic yard	16
0003	REAR LOAD CARDBOARD CONTAINERS FFP	30
0004	29 CU YD RECT DROP BOX WITH LID FFP	5
0005	3 CU YD REAR LOAD CONTAINER FFP	125
0006	STACKABLE BINS, BOEING TYPE CONTAINERS FFP 1.48 cubic yard	16

(R4, tab 2 at 9-14) The CLINs which ultimately were terminated were CLINs 0002, 0004 and 0005.

3. As awarded, the contract required the contractor to deliver the six CLINs on or before 30 December 2010 (R4, tab 2 at 4).

4. The contract incorporated by reference the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (JUN 2010) clause, which provided in part:

(f) *Excusable delays.* The Contractor shall be liable for default unless nonperformance is caused by an occurrence

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<sup>1</sup> All citations to Rule 4 file page numbers are to Bates numbers.

beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

....

(m) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

The contract designated Mr. Bret Wood as FISC Puget's point of contact for contract administration and Mr. Danny Lewis as FISC Puget's point of contact for the CO. (R4, tab 2 at 4, 15) The contract did not require the contractor to submit a first article for any of the six CLINs.

5. It is undisputed that from October 2010 through January 2011 performance of the contract was delayed approximately 28 days by FISC Puget's two stop work orders and the parties' ensuing discussions about configuration changes to CLINs 0003/0005 containers, delivery of contractor drawings and revised CLIN delivery dates (R4, tabs 12, 16, 18 at 61, tabs 26, 27 at 81, tab 28 at 83, tab 29 at 85).

6. Effective 4 February 2011, bilateral Modification No. P00001 added "strong arms" to the CLINs 0003/0005 containers, increased the contract price by \$12,400.00 and

extended the delivery date for all CLINs from 30 December 2010 to 28 February 2011 (R4, tab 33 at 103-05, 110-11).<sup>2</sup>

7. It is undisputed that from 28 February to 6 April 2011 contract performance was delayed by FISC Puget's rejection of Steelform's CLINs 0003/0005 "first article" containers as "too large," its change of those 3-cubic yard containers to 2-cubic yards, its 9 March 2011 stop-work order for CLINs 0003/0005, its inquiries about delivery status updates and change price adjustments and its acceptance of Steelform's CLIN 0002 drawings (R4, tabs 36-42, 44-45, 47-54, 56-59, 61-63).

8. Effective 6 April 2011, bilateral Modification No. P00003 amended the CLINs 0003/0005 specifications to 2 cubic yard capacity, extended CLINs 0002 through 0005 delivery dates to "on or before 02 May 2011" and did not change the contract price (R4, tab 72). On 6 April 2011 FISC Puget lifted the CLINs 0003/0005 stop work order, 29 days after issuing it (R4, tab 74).

9. On 2 May 2011 Steelform emailed FISC Puget that all of the CLIN 0005 blue containers "should be delivered to you [later] this week" in three truckloads, and the green containers "will be right behind those" blue containers (R4, tab 90). Steelform did not provide any delivery information or projected timeline for CLINs 0002 and 0004. There is no government response to that email in the record, and the government did not request any information from Steelform as to delivery dates for CLINs 0002 and 0004. (SUMF ¶ 26 and app. opp'n response thereto).

10. On 5 May 2011, Steelform delivered four CLIN 0005 containers. It made no CLIN 0002 and 0004 deliveries and no other CLIN 0005 deliveries. FISC Puget's 11 May 2011 letter signed by CO Danny Lewis notified Steelform of the termination for cause of CLINs 0002, 0004 and 0005; stated that 4 of 125 containers under CLIN 0005 had been delivered but that Steelform had not provided notice of any excusable delay; concluded that Steelform's "failure to complete delivery on these [CLINs] by May 2, 2011 constitutes a default of performance"; and stated that this letter was a CO's final decision and advised Steelform of its appeal rights (R4, tab 92).

11. Steelform's 12 May 2011 email requested Mr. Lewis to reconsider his termination for cause due to prior FISC Puget delays, changes, a 45% steel price increase during the work suspensions, the non-standard nature of the containers, the 11 May 2011 payment for CLIN 0001 containers delivered in February 2011, and the availability of all the CLIN 0003/0005 containers for delivery. CO Lewis told Steelform that the government could not extend the CLINs delivery date further. (R4, tab 96) Steelform

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<sup>2</sup> Unilateral Modification No. P00002, 22 February 2011, made administrative changes immaterial to this dispute (R4, tab 35).

delivered and the government accepted CLINs 0001, 0003 and 0006 (app. opp'n at 3-5, ¶ 2).

12. Mr. Pavlich's affidavit included the following information about the status of its efforts on CLINs 0002, 0004 and 0005 at the time of the partial termination for cause and thereafter:

14. To date, the Government still has not provided us with the adequate information required for us to provide the Government with the product it desires to fill the CLIN 0002 order.

15. On May 11, 2011, the date of the government's partial "Termination for Cause," Steelform had a truck en route from Arizona to Washington to deliver a load pursuant to order CLIN 0005. Additionally, Steelform had ordered two trucks (to deliver CLIN 0005), but those trucks had been delayed due to the sudden rise in the cost of diesel fuel. The Government had already implicitly agreed that certain deliveries relating to CLIN 0002 would be acceptable if delivered by the end of May 2011 (R4 File, tab 90 and no response from the government). As it relates to CLIN 0005, four first article units had already been delivered to the Government on May 5, 2011. Having not heard from the Government that any additional modifications of CLIN 0005 were required, we were prepared to ship the remaining 121 units to the Government.

....

18. We had complied with CLIN 0003 and had produced four...articles of CLIN 0005 and had the remaining shipment ready to be delivered. The next and last orders to be delivered were the containers in CLIN 0002 and 0004. Steelform had already purchased the material to complete the CLIN 0002 containers and the process was nearly complete.

19. Just as in every instance with this project, Steelform would need to confirm with the Government that the CLIN 0002 and 0004 containers were built exactly to the Government's specifications prior to Steelform incurring the expense of shipping the containers to Everett, Washington.

20. Given the Government's conduct over the course of this project, it would have been imprudent and unreasonable to spend thousands of dollars in shipping costs to build and deliver all of the CLIN 0002 and 0004 containers only for the Government to then explain that it was rejecting the containers because they did not work for the Government's specific purpose even though that specific purpose was never communicated to Steelform.

Mr. Pavlich's affidavit did not identify any specific information it lacked to build the CLIN 0002 and 0004 containers. (App. opp'n, Pavlich aff.)

13. The 26 July 2011 letter of contracting officer Virginia Dashiell reissued the 11 May 2011 decision for partial termination for cause of contract CLINs 0002, 0004 and 0005, because the previous notice "was issued outside the extent of delegated authority" and again advised Steelform of its appeal rights (R4, tab 102). Mr. Pavlich's affidavit states that if Steelform had known the partial termination for cause was unauthorized, it would have completed the orders in a reasonable manner and delivered the containers by 26 July 2011 (app. opp'n, Pavlich aff. ¶¶ 16-17).

14. On 28 July 2011 contract specialist Bret Wood sent to Steelform unilateral Contract Modification No. P00005, issued by NAVSUP FLC Puget Sound and signed by CO Virginia A. Dashiell, to deobligate CLINs 0002, 0004 and 0005 funding due to the termination for cause (R4, tabs 103, 104).

15. On 2 August 2011 Steelform timely appealed respondent's 11 May 2011 final decision, which the Board docketed as ASBCA No. 57724.

## DECISION

### I.

A tribunal shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). A material fact is one that may have an impact on the outcome of the appeal. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A movant has the burden to show the absence of any genuinely disputed issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The government has the burden of proof that its partial default termination was justified. *See Nuclear Research Corp. v. United States*, 814 F.2d 647, 650 (Fed. Cir. 1987).

Steelform does not dispute that it failed to deliver the 16 CLIN 0002 containers, the 5 CLIN 0004 containers, and the 125 CLIN 0005 containers to the designated Navy

activities by 2 May 2011, the extended delivery date established by bilateral Modification No. P00003 effective 6 April 2011 (SOF ¶¶ 8, 11). While it appears that the 11 May 2011 termination was outside CO Lewis' delegated authority, the decision was subsequently reissued by CO Dashiell on 26 July 2011 (SOF ¶ 13).

## II.

Steelform asserts that there are genuine issues of disputed material fact with respect to whether, in light of the government's numerous delays, starts and stops and its failure to provide adequate information to Steelform to comply with the contract requirements, Steelform's late contract performance was excusable as a matter of law (app. opp'n at 15). As explained hereafter, such disputed facts are irrelevant and immaterial to the government's affirmative defense of accord and satisfaction based on the bilateral modifications.

Steelhead contends, and respondent does not dispute, that from October 2010 through 6 April 2011 respondent issued stop work orders with respect to some or all six of the CLINs, changed the configuration of the CLINs 0003/0005 containers and stopped work, which delayed contract performance (app. opp'n at 15). Such government actions and inactions do not provide Steelform a defense to the default termination because in bilateral contract Modification Nos. P00001 and P00003 the parties agreed to increase the contract price for CLINs 0003/0005 by \$12,400.00 and to extend the contract delivery date for CLINs 0002 through 0005 by 123 calendar days from 30 December 2010 to 2 May 2011 (SOF ¶¶ 6, 8). By virtue of those two modifications, all causes of delay arising before 6 April 2011, when Modification No. P00003 was agreed to, cannot excuse Steelform's failure to complete deliveries of CLINs 0002, 0004 and 0005 by 2 May 2011. *See Precision Dynamics, Inc.*, ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,892 (citing *RFI Shield-Rooms*, ASBCA No. 17374, 77-2 BCA ¶ 12,714 at 61,731) (The "action of the parties in agreeing upon a new delivery schedule eliminates from consideration the causes of delay occurring prior to such agreement.").

## III.

Steelform argues that the default termination of CLIN 0005 was invalid because the government "implicitly agreed that...deliveries [of] CLIN 0005 [containers] would be acceptable if delivered by the end of May 2011 (See [Steelform's 2 May 2011 email to the government] and no response from the Government)," Steelform was prepared to ship the remaining 121 containers, had a truck with 34 additional units "headed toward Washington" and "was prepared to ship the remaining containers in the ensuing days" (app. opp'n at 15-16, Pavlich aff. ¶ 15). For support, Steelform cites RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981): "Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:... (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept." Steelform adds that if the government had a

problem with Steelform 2 May 2012 email, “it should have responded the same day,” pointing to the parties’ course of dealing when respondent replied within 24 hours on configuration details and stop work orders (app. opp’n at 17-18; R4, tabs 7, 11, 45).

RESTATEMENT (SECOND) OF CONTRACTS § 69 comments a and d state:

a. *Acceptance by silence is exceptional.* Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance.... The exceptional cases where silence is acceptance [are] where the offeree silently takes offered benefits, and those where one party relies on the other party’s manifestation of intention that silence may operate as acceptance....

....

d.... *Prior conduct of the offeree....* a course of dealing between the parties may give the offeror reason to understand that silence will constitute acceptance...regardless of [the offeree’s] actual intent, unless both parties understand that no acceptance is intended. [Italics in original]

The parties’ relevant course of dealing on requests for delivery date extensions shows periods of (a) 18 days from 14 January 2011, when Steelform proposed “the end of February” 2011, and 4 February 2011, when the parties agreed to Modification No. P00001 (SOF ¶¶ 5-6; R4, tab 31 at 98-99) and (b) 20 days from 17 March 2011, when Steelform proposed to deliver CLINs 0002 and 0004 by the end of April 2011, to 6 April 2011, the effective date of Modification No. P00003 (SOF ¶¶ 7-8; R4, tabs 56, 72). Such course of dealings on delivery date extensions does not support Steelform’s argument that respondent had to notify Steelform in one day whether it accepted the 2 May 2011 extension date it offered. Rather, it manifested the parties’ mutual intent to accept Steelform’s proposals by written contract modifications, not by government silence. Therefore, Steelform’s implicit agreement argument is unsound. *See also Precision Dynamics*, 97-1 BCA ¶ 28,846 at 143,894 (government silence and inaction, by themselves, are not sufficient to constitute an election to permit continued performance).


Steelform also asserts that it lacked information to fulfill CLIN 0002 and 0004 requirements, but does not identify what that information was (SOF ¶ 10). This unsupported assertion is inadequate to defeat summary judgment.



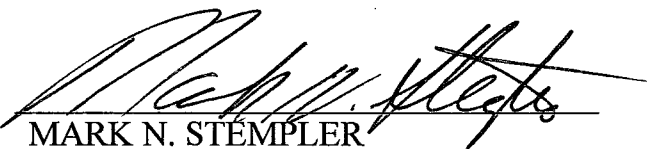
CONCLUSION

Accordingly, based on the foregoing analyses, we grant respondent's motion for summary judgment and deny the appeal.


Dated: 17 October 2012

  
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DAVID W. JAMES, JR.  
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. 57724, Appeal of Steelform, Inc., rendered in conformance with the Board's Charter.

Dated:

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