ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
TTF, L.L.C.	)	ASBCA No. 58452
	)	
Under Contract No. FA8103-07-C-0219	)	

APPEARANCE FOR THE APPELLANT: Mr. David W. Storey
President

APPEARANCES FOR THE GOVERNMENT: Lt Col James H. Kennedy III, USAF
Air Force Chief Trial Attorney
Joel B. Lofgren, Esq.
Capt Nicholas C. Frommelt, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the termination contracting officer's (TCO's) decision denying appellant TTF, L.L.C.'s (TTF's) $389,871.94 certified claim under the captioned contract for government delay. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. Pursuant to Board Rule 11, the parties elected to submit the appeal on the record, which includes the Rule 4 file, TTF's supplemental Rule 4 file, TTF's 21 exhibits and respondent's 14 exhibits. The Board is to decide entitlement only.

On 22 May 2013 the Board, in an expedited decision under Board Rule 12.2, upheld the TCO's 18 December 2012 default termination of the captioned contract and denied TTF's appeal. *TTF, L.L.C.*, ASBCA No. 58498 (unpublished).

The Board's 19 December 2013 decision in ASBCA No. 58452, 14-1 BCA ¶ 35,485, denied the government's motion for summary judgment on the basis that it was not entitled to judgment as a matter of law, because even when the CO has properly terminated a contract for default, a contractor may recover the costs of attempting to comply with impossible government specifications before the termination, citing *Laka Tool and Stamping Co. v. United States*, 639 F.2d 738 (Ct. Cl. 1980), *aff'd,* 650 F.2d 270 (1981), *cert. denied*, 454 U.S. 1086 (1981), but the record did not permit the Board to determine whether this appeal is within *Laka.* We rejected the government's arguments that our default termination appeal rulings – that due to the last bilateral contract Modification No. P00004, of 7 September 2011, all government delays before the 7 September 2011 Modification cannot be excused, and there were no non-concurrent excusable delays from 7 September to 4 November 2011

– are *res judicata* with respect to TTF's delay claim in ASBCA No. 58452, because the defense of *res judicata* may not be based upon a non-appealable, Rule 12.2 decision. *See TTF*, 14-1 BCA ¶ 35,485 at 173,966.

FINDINGS OF FACT

1. On 19 September 2007, the Oklahoma City Air Logistics Center (OC-ALC), Tinker Air Force Base, awarded Contract No. FA8103-07-C-0219 (the contract) to TTF for two aircraft landing gear doors, Boeing Co., Part No. 5-86308-3145S, to be delivered by 31 December 2008 for the fixed price of $134,182.40 (R4, tab 1 at 1-2).[1]

2. The contract incorporated, *inter alia*, the FAR 52.246-2, INSPECTION OF SUPPLIES—FIXED-PRICE (AUG 1996) clause (R4, tab 1 at 4), whose ¶ (b) required that TTF maintain "an inspection system acceptable to the Government...and...tender to the Government for acceptance only supplies that have been inspected in accordance with the inspection system and...found by the Contractor to be in conformity with contract requirements," and stated that the government "may perform reviews and evaluations as reasonably necessary to ascertain compliance with this paragraph" and was to conduct such reviews "in a manner that will not unduly delay the contract work," and had no FAR 52.209-3 or 52.209-4, First Article Approval clause.

3. The contract required item 0001, the doors, to comply with inspection standard ISO 9001-2000; specified inspection and acceptance of such item at origin; and designated the Defense Contract Management Agency (DCMA), Dallas, to administer the contract (R4, tab 1 at 1-2, 4).

4. The contract included an Engineering Data List (technical data package or TDP) of the 187 parts for the landing gear door, of which 22 parts were designated "MYL" (mylar "stable base drawings"), all of which parts were subject to 59 "Engineering Notes" (R4, tab 1 at 17-30). Engineering Note 4 provided in part: "HEAT TREAT ALUMINUM PER AMS [SAE Aerospace Material Specification] 2770 (ALUM PARTS)" (R4, tab 1 at 24).

5. AMS 2770G, ¶ 1.1, specifies requirements, *inter alia*, for 2024 aluminum alloy. Among its ¶ 2, "APPLICABLE DOCUMENTS," ¶ 2.1, is AMS 2658, "Hardness and Conductivity Inspection of Wrought Aluminum Alloy Parts" (R4, tab 119 at 869-70).

[1] Rule 4 pages are cited to their Bates numbers.

6. TTF did not deliver the doors by 31 December 2008, nor by the dates agreed upon in bilateral Modification Nos. P00001, P00002 and P00004, each of which reduced the contract price as consideration, and which cumulatively extended the delivery date by 1,038 days to 4 November 2011 (R4, tabs 2, 3, 5).

7. TTF's 16 June 2011 letter to TCO Tom Lowber stated:

> The Engineering Sheet calls out to Heat Treat aluminum to T42 per AMS2770. AMS2770 references AMS2658. AMS2658, page 5, for 2024 [aluminum] does not actually list T42 for applicable Hardness and Conductivity Values. Please advise if the values for T4 are acceptable or what values to use for T42 for Hardness and Conductivity.

TTF also stated that "production is on hold until an answer is received." (R4, tab 44)

8. TTF's 12 July 2011 letter to TCO Lowber stated that AMS 2658 required a conductivity reading from 28.5 to 35 for T4, but DCMA required 28.85 to 34.65, and sought advice whether such requirement was beyond contract obligations (R4, tab 46).

9. On 7 and 12 July and 10 August 2011, DCMA issued six Corrective Action Reports (CARs), Nos. 23-25 and 27-29, finding "discrepancies" in TTF's heat treating process and conductivity test requirements for the contract door ribs. Those CARs provoked lengthy correspondence between the parties. (R4, tabs 113-15, 116-18)

10. From 7 September through 25 October 2011 TTF repeatedly stated to the CO that DCMA's QAR John Dunlop was not qualified to read mylar drawings, inspect contract components for compliance with specified heat treating and conductivity requirements, and review TTF's production processes, and that the QAR's delay in identifying the specified 2024 aluminum conductivity value and his suspicion of door rib contamination from "coated hangers in the heat treat chamber" lead to "irrelevant" CARs which delayed TTF's performance (R4, tabs 60-61, 67 at 468, 472, tabs 73, 79, 80 at 528-29).

11. On or about 21 November 2011, Air Force structural engineer Michael T. Wolfe advised QAR Dunlop, who in turn advised TCO Lowber:

> T42 temper simply means that the material was heat treated to the T4 condition by the user, so any values from the table for T4 would apply to the T42 temper. There is no need to have the spec changed, and the values shown in

> the table for T4 can be used to evaluate the parts in question that are heat treated to T42.

(R4, tab 91 at 571-73)

12. From 12 July 2011 to 29 February 2012, TTF reported to DCMA that the discrepancies in CARs 23-25 and 27-29 would not affect contract production schedules (R4, tab 113 at 721, 728, 731, 734-35, 744, 753, tab 114 at 770, 774, 777, 784, tab 115 at 792, 799, 801, 803-04, 807, tab 116 at 820, 828, 830, tab 117 at 839, 844, 846, 848-49, tab 118 at 856, 866).

13. TTF's 29 February 2012, final, corrective action reply to CAR 23 stated:

> After investigation, it was determined that the TTF employee [inadvertently] used coat hangers during a sample proof run to validate a heat treating process.... TTF employee performing Heat Treating retrained not to use coat hangers (hooks) in the furnace.... New hooks have been made out of unfinished steel, and are to be used for Heat Treating.

(R4, tab 113 at 753)

14. We find that throughout TTF's foregoing communications with OC-ALC and DCMA from 16 June 2011 to 29 February 2012 in regard to the acceptability of TTF's inspection system and conformity of its component parts to the contract's heat treating and conductivity testing specification requirements, TTF never contended that any such specification was impossible to perform.

15. TTF's 19 December 2011 certified claim under the contract submitted to TCO Lowber alleged improper and unfair DCMA inspection actions, for which it requested a certified "Termination for Convenience in the sum certain amount of $112,713.21" (R4, tab 89 at 563-64, 568).

16. TTF's 23 April 2012 certified "Delay Claim" for $1,062,293.76 under the FAR 52.242-17, Government Delay of Work clause, and for $17,957,428.20 for loss of income due to a "false" PPIRS (Past Performance Information Retrieval System) score, DCMA delays, variances in TDP data, inadequately trained DCMA inspector who could not read mylars and heat treating delays due to the T2 vs. T42 heat treating interpretation issue (R4, tab 7 at 46-64).

17. On 16 August 2012, TTF withdrew its 23 April 2012 delay claim and submitted a revised and certified "Delay Claim" for $389,871.94 containing essentially the same claim allegations as in its 23 April 2012 claim (R4, tab 9 at 66-85, tab 10).

18. The TCO's 7 November 2012 final decision denied TTF's 16 August 2012 claim in its entirety (R4, tab 12), and his 18 December 2012, unilateral contract Modification No. P00005 terminated the contract for default (R4, tab 6 at 42-43). TTF timely appealed from those decisions. On 13 December 2012 we docketed the delay claim as ASBCA No. 58452 and the default termination as ASBCA No. 58498.

Parties' Contentions

TTF argues that notwithstanding the proper default termination of its contract, it may recover the cost of attempting to comply before such termination with "impossible government specifications" under *Laka Tool* (app. br. at 31).

Respondent argues that *Laka* does not apply, because the default termination of the contract was upheld and recovery would require the termination be set aside; the Board lacks jurisdiction to consider the *Laka* rule, because TTF's claim did not assert impossibility and recovery for impossibility is not based on the same or related operative facts asserted in its delay claim; TTF's appeal must be dismissed because no other remedy is available; TTF has not met its burden of proving the specifications are impossible; TTF's delay claim must be dismissed based on *res judicata*; TTF has not proven government delay, its extent, its proximate causality, and any harm TTF suffered; and TTF has failed to prove government bad faith (gov't br. at ii-iii).

DECISION

There are two exceptions to the general rule that when a default termination of a contract is upheld, a contractor's pre-termination claims are barred. *See Laka Tool*, 650 F.2d at 272. First, a properly defaulted contractor may recover for changed work incorporated into end items delivered to and accepted by the government. *See Dennis Berlin d/b/a Spectro Sort*, ASBCA Nos. 53549, 53550, 03-1 BCA ¶ 32,075 at 158,511. This exception does not apply to TTF because it delivered no doors to the government for acceptance (finding 6).

Second, a properly defaulted contractor may recover the expenses of work incurred in direct consequence of an action the government had no right to take, such as issuance of an impossible specification. *See Laka Tool,* 650 F.2d at 272; *The Wholesale Tire and Supply Co.*, ASBCA Nos. 42502, 43345, 92-2 BCA ¶ 24,960 at 124,383 (valid default termination did not bar claim for extra design and engineering efforts to correct government drawing discrepancies); *West Point Research, Inc.*, ASBCA No. 25511, 83-1 BCA ¶ 16,443 at 81,809 (valid default

termination did not bar contractor's delay cost claim because the CO did not approve, conditionally approve, or disapprove first articles within 90 days after their receipt as the contract's First Article Approval clause required and did not equitably adjust the contract for the delay caused by the government's belated disapproval of the contractor's two first article submissions, as that clause required).

West Point does not support TTF's contention here because its contract did not require a first article submission and government approval, conditional approval, or disapproval thereof within a specified time, and the contract delivery date was extended by 1,038 days by bilateral Modification Nos. P00001, P00002 and P00004, which reduced the contract price as consideration for such extensions (findings 2, 6).

Therefore, the dispositive issue on this appeal is whether TTF has met its burden of proof that any contract specification was impossible or commercially impracticable to perform. In its briefs TTF has interspersed the characterization "impossible" in its proposed findings of fact and arguments with respect to DCMA's communications and CARs regarding aluminum alloy heat treating and hardness testing requirements specified in the contract, but has not adduced or cited any evidence of impossibility. Our careful review of the appeal record shows that from 16 June through 21 November 2011, when TTF and the government debated the heat treatment and conductivity specifications for 2024 aluminum alloy door parts, in no instance did TTF allege or offer any evidence that any specified requirement was impossible or commercially impractical to perform (finding 14).

We are persuaded that TTF's current description of specifications AMS 2770 and AMS 2658 as "impossible" adds nothing to the original operative facts concerning government delays under the contract and therefore its argument of that legal theory is permissible under the claim that the TCO denied. The issue remains whether TTF's claim for compensable government delay, now described as the result of purportedly "impossible" government specifications, is valid.

TTF has not cited, and we are not aware of, an exception to the general rule that a default termination bars pre-termination claims, due to the alleged incompetency of DCMA inspectors to locate and interpret contract specifications AMS 2770 and AMS 2658. Furthermore, the time DCMA QARs Dunlop and Webber took to obtain OC-ALC engineering concurrence with TTF's interpretation of the specified T4/T42 heat treating requirements did not require any specification change (finding 11), or make those specifications impossible or commercially impractical to perform (finding 14) and DCMA's CARs 23-25 and 27-29 were not "irrelevant" but were valid (findings 12-13).

As analyzed above, we hold that TTF did not sustain its burden of proving that any contract requirements were "impossible" to perform. Accordingly, TTF's claim is barred by the valid default termination of the contract.

CONCLUSION

We deny the appeal.

Dated: 22 December 2014

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

RICHARD SHACKLEFORD
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. 58452, Appeal of TTF, L.L.C., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals