



BenJu Corp. v. Peters

178 F.3d 1312 (1999) | Cited 0 times | Federal Circuit | January 4, 1999

Opinion for the court filed by Circuit Judge RADER. Circuit Judge NEWMAN Dissents-in-part and concurs-in-part.

The Armed Services Board of Contract Appeals (Board) sustained the decision of the United States Air Force to terminate for default BenJu Corporation's (BenJu's) contract. The Board also denied BenJu's claim for an equitable adjustment to the contract and ordered BenJu to remit to the Government \$37,235 which the Government had erroneously paid BenJu, plus interest. Because substantial evidence supports the Board's decision, this court affirms.

I.

On August 31, 1990, Warner Robins Air Logistics Center (WR-ALC) awarded (on behalf of the United States Air Force) Contract No. F09603-90-C-1990 to BenJu. The contract required BenJu to supply to the Air Force portable floor cranes for maintenance of F-16 fighter jets. The Air Force agreed to pay BenJu \$2,255,185 for the cranes. Contract line item (CLIN) 0001AB required BenJu to deliver "first article test procedures" (FATP) to the Air Force forty-five days after contract award. The Air Force then had forty-five days to approve or disapprove BenJu's FATP. Delivery of acceptable FATP entitled BenJu to a payment of \$37,235.

The contract expressly incorporated Purchase Description PD88VRS68 (the PD), which described various performance specifications for the cranes. Paragraph 4.4.2 of the PD states that the "first article tests shall consist of all tests listed under [paragraph] 4.6, performed in order." Paragraph 4.6, entitled "Test Methods," requires in subparagraph 1 that the cranes be "inspected to determine compliance with the requirements of this purchase description." (Emphasis added.) The contract sets forth the "requirements" of the purchase description in paragraph 3 of the PD, "Requirements," which lists seventy detailed technical requirements. Thus, the contract required BenJu to produce FATP for each of seventy technical requirements.

The contract also incorporated data item description number DI-T-4901 (the DID), as authority for the first article test procedures. The DID requires contractors to prepare and submit a "step-by-step method to be followed for satisfying the particular requirements of the specification, purchase description or contract." The DID further requires that the contractor's recommended procedures "demonstrate confidence that the examination and test data to be generated will assure that the requirements of the applicable specification, purchase description or contract are met."



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On October 12, 1990, BenJu submitted FATP to the Government's contracting officer. In an apparent attempt to show compliance with the seventy technical specifications in paragraph 3 of the PD, BenJu submitted a checklist which merely recited verbatim the seventy subparagraphs along with spaces for "yes" or "no" answers corresponding to each subparagraph. BenJu did not submit any procedures for performing tests for any of the specifications in the checklist. The Air Force rejected this proposed FATP in a letter to BenJu on November 29, 1990, stating that "[t]ests and inspections cannot be verified by a simple yes/no response." In the letter, the Air Force also listed forty-seven specific deficiencies in BenJu's submission, some of which were related to BenJu's yes/no checklist and some of which were related to other technical problems.

BenJu then submitted a second set of FATP. Before the Air Force acted upon this second submission, the parties conducted a design review. BenJu's representatives insisted that the seventy technical specifications in PD paragraph 3 were not part of the FATP under the contract. However, the contracting officer directed BenJu to include in its FATP these paragraph 3 specifications. Shortly after the design review, on January 17, 1991, the Air Force rejected BenJu's second FATP submission. The Air Force listed thirty-seven deficiencies and reiterated that the contract requires compliance with PD paragraph 3.

BenJu submitted a third set of FATP on February 19, 1991. The third set included proposed procedures for the PD paragraph 3 specifications. The Air Force rejected the third set on April 5, 1991, citing four discrepancies. The Air Force sent BenJu a final cure notice giving BenJu ten days to submit acceptable test procedures. BenJu refused to correct its procedures and submit additional FATP. On August 1, 1991, the Air Force terminated the contract for default.

Before submitting its third set of FATP, BenJu submitted to the contracting officer a claim of \$37,235 for its FATP on January 21, 1991. Without waiting for the contracting officer to respond, BenJu also submitted an invoice in the same amount to the Defense Contract Administration Services Management Area (DCASMA). The contracting officer did not respond to the claim. The DCASMA, however, paid BenJu the \$37,235 on March 21, 1991.

BenJu also submitted an equitable adjustment claim to the contracting officer on June 28, 1991, demanding \$137,875.15 for delays caused by the Air Force's rejection of the FATP. Before the contracting officer issued a decision, BenJu appealed the deemed denial of its claim. The contracting officer denied BenJu's equitable adjustment claim on December 17, 1991.

On June 9, 1993, the contracting officer issued a decision ordering BenJu to return the \$37,235, which the Government paid in error.

BenJu appealed to the Board the Air Force's termination of the contract for default, the denial of its equitable adjustment claim, and the decision ordering return of the \$37,235. The Board consolidated the appeals. In a decision dated September 15, 1997, the Board sustained the termination for default,



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denied BenJu's equitable adjustment claim, and ordered BenJu to repay the \$37,235, plus interest. Appeals of Benju Corp., ASBCA Nos. 43648, 43841, 43954, 46220 (1997).

II.

This court must affirm the Board's decision unless it is "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith" or if it is "not supported by substantial evidence." Contract Disputes Act (CDA), 41 U.S.C. § 609(b) (1994). Accordingly, BenJu carries a "heavy burden in demonstrating that [the Board's] factual findings should be overturned." *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1429 (Fed. Cir. 1990). BenJu has not met this burden.

The contract and the PD required BenJu to develop and demonstrate specific procedures for testing whether the cranes met the Air Force specifications, including the seventy specifications listed in PD paragraph 3. BenJu did not fulfill this requirement, even though it received no fewer than four chances (the three submissions and the opportunity to cure) to do so. BenJu demonstrated in its first FATP submission that it knew the contract required testing for the seventy specifications in PD paragraph 3, by including the yes/no checklist corresponding to the specifications. The language of the contract along with the DID incorporated in the contract contemplated far more than simply affirming adherence to the specifications. The contract required BenJu to submit testing procedures, subject to approval by the Air Force. Indeed the contract specified that the Air Force would pay BenJu \$37,235 for the FATP. This court concurs with the Board's interpretation that the contract would not likely pay BenJu \$37,235 merely for claiming that the cranes complied with the specifications. Rather, this payment compensated the contractor for its time and effort in developing test procedures.

Furthermore, the Air Force, on numerous occasions, informed BenJu that it must develop such procedures. Instead of attempting to correct the deficiencies in its FATP, however, BenJu consumed excessive time and effort arguing with the contracting officer over specification details and accusing Air Force officials of rude and unreasonable conduct in rejecting the FATP. See BenJu, ASBCA Nos. 43648, 43841, 43954, 46220 at ¶¶22, 28-30, 38, 39-47, 53. Thus, this court sustains under the standard of review required by the Contract Disputes Act the Board's interpretation of the contract.

Even if the Air Force's interpretation of the contract and the FATP requirements was incorrect, BenJu still had a duty to go forward with performance as directed by the contracting officer, and then submit claims for an equitable adjustment following performance. See *Appeal of Eriez Construction, Inc.*, VACAB No. 1273, 78-2 BCA ¶ 13547 at 66363; S. Rep. No. 95-1118, 32 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5266. The Air Force specifically directed BenJu to submit testing procedures that complied with each of the seventy specifications listed in PD paragraph 3. BenJu did not satisfy this requirement in any of its three FATP submissions, and refused the Air Force's final notice to cure. For this reason as well, substantial evidence supports the Board's decision that the Air Force properly terminated the contract for default.



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BenJu's claim for an equitable adjustment likewise fails. As the Board found, BenJu itself caused the delays in contract performance. The Air Force properly rejected each of BenJu's FATP. BenJu argues that the Air Force should have supplied additional documentation, such as the "Support Equipment Recommendation Data" relating to the crane. See *Helene Curtis Ind., Inc. v. United States*, 312 F.2d 774, 778 (Ct. Cl. 1963) (where contract specification was misleading and the Government possessed knowledge critical to the contract's completion, unavailable to the contractor, the Government had a duty to supply such information). The information BenJu requested, however, was readily available from industry sources. Indeed BenJu actually obtained this information before submitting its second set of FATP. See BenJu, ASBCA Nos. 43648, 43841. Furthermore, BenJu did not show that an initial lack of information affected its costs or its ability to perform. See *id.* Thus, this court sustains the Board's decision denying BenJu an equitable adjustment.

Finally, BenJu seeks entitlement to the \$37,235 payment by DCAMSA. The \$37,235 payment under the contract, however, was specifically for the FATP. The FATP were subject to approval by the Air Force. The Air Force, despite giving BenJu four chances to submit acceptable FATP, did not approve BenJu's FATP. BenJu, therefore, is not entitled to the \$37,235.

BenJu submitted the invoice to DCAMSA before waiting for a ruling by the contracting officer on its payment claim. DCAMSA made the payment in error. BenJu should have known the payment was in error due to the Air Force's continued rejections of its FATP and, eventually, the termination of the contract. The Board sustained the contracting officer's decision that BenJu must return the payment. Substantial evidence supports the Board's decision. Accordingly, the Board's decision is affirmed.

NEWMAN, Circuit Judge, Concurring in part, Dissenting in part.

I respectfully Dissent. On this failed relationship fault is elusive, and I would not provide BenJu with its requested relief. However, neither would I grant the government's request for return of the \$37,235. Contrary to the panel majority's recitation, BenJu submitted a 240-page First Article Test Procedure document -- its third such submission -- that complied with all of the outstanding deficiencies that had been raised by the agency. Indeed, the ASBCA expressly found that this set of FATP included test procedures for the eighteen paragraphs specifically identified in the Government's second rejection. The agency then paid BenJu's outstanding claim for \$37,235, the contractual amount for the FATP. Although the agency thereafter raised four new objections, on the basis of which the contract was terminated, the agency made no allegation of error concerning this payment, at that time or for two years thereafter.

For contractor claims of \$50,000 or less, FAR 52.233-1(e) (1990) requires the contracting officer to render a decision within 60 days; this payment was made within 60 days. Despite the subsequent termination of the contract by the Air Force, no demand for return of this payment was made until two years after termination, while BenJu was pursuing this claim for breach. In light of all the circumstances, and particularly the absence of objection during any reasonable time frame, the Air



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Force has not established entitlement now to recover this payment.

