# In the United States Court of Federal Claims

Case No. 01-533C
(Filed: March 7, 2005)

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TRANS METRO CONSTRUCTION, INC., *
*Plaintiff,* *
*
v. *
*
THE UNITED STATES OF AMERICA, *
*Defendant.* *
*

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***Gerald C. Baker,*** Lanham, Maryland, for Plaintiff.

***Richard P. Schroeder,*** Department of Justice, Washington, D.C., for Defendant.

***John M. Bergen***, Law Clerk.

## OPINION

**BASKIR**, Judge.

This breach of contract case results from the denial of Plaintiff's claim before the contracting officer. Trans Metro requested an adjustment for additional work it performed to correct deficiencies in its installation of protective netting over a children's playground at Andrews Air Force Base, Maryland. The Government filed, in the alternative, a motion to dismiss for lack of subject matter jurisdiction and a motion for summary judgment. At the conclusion of oral arguments on these motions, held February 22, 2005, we **DENIED** the Defendant's motion to dismiss and **GRANTED** its motion for summary judgment. We memorialize these bench rulings in the Opinion that follows.

### Factual Background

This dispute concerns the specifications provided by the Government pursuant to Solicitation FA4416-98-T0576, a contract to install nylon netting over a children's play area at Andrews Air Force Base. With exceptions we discuss later, the basic facts are not in dispute. Plaintiff, Trans Metro Construction, Inc.,

first learned of the Air Force's project though word of mouth. Another company – a netting supplier that had been contacted directly by the base about the project – informed Trans Metro of the work. The comments appearing on a facsimile cover sheet prepared by the supplier for Trans Metro's President, Mr. Robert King, perhaps set the tone for what was a relatively informal and small-scale procurement: "Netting over playground? They want our bid – seems 'not too many people interested' – wonder why? If we can pull it off great – if not – such is life!" Pl. Resp., Tab D. The contract was a purchase order at the firm fixed price of $19,515. After examining the Government's specifications and visiting the site, Mr. King agreed to perform the contract at this price. Trans Metro submitted its bid on July 21, 1998, and was awarded the contract on August 17, 1998.

The contract specifications at issue were contained in a brief Performance of Work Statement (PWS); attached to the PWS was a Technical Exhibit which included a rudimentary sketch of the dimensions for the area to be covered. We have included these two documents as Appendix A and B. The net was to function as a barrier protecting the play area against golf balls entering from the adjacent golf course. Minimum requirements, such as the need for balls to roll off the netting, were clearly stated. *See* PWS at ¶ 1.1.4 ("Netting shall be installed pitched away from the building toward the golf course so that balls roll off.").

The contract incorporated the following Federal Acquisition Regulation (FAR) provision concerning acceptance inspections for fixed priced contracts:

> If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount.

FAR § 52.246-4 (e).

Plaintiff completed the work in mid-January 1999. The project did not pass the required inspection. The netting was loose and the poles were leaning, which caused the netting to droop low toward the ground. Smith Dep. Tr. 11-12. Although Plaintiff alleges that an ice storm was the immediate "cause" of the problem, Defendant makes no concessions concerning causation – in any event, our discussion will illustrate that the presence of this alleged storm is of no consequence to our decision. Consolidated Statement of Uncontroverted Facts (CSUF), ¶ 33.

Upon the Government's rejection, Trans Metro submitted a proposed solution, including a sketch of its plan. As the reader can see, because we have also appended this document, the sketch was far more detailed than the Technical Exhibit accompanying the PWS. App. C. The contracting officer approved Trans Metro's proposal and work on the project resumed. According to Plaintiff, this corrective work was "extra work" over and beyond what it had contracted to do, and cost an additional $24,253. The Government, however, contends that this was work that should have been performed in the first instance as part of the contract. On May 7, 1999, Plaintiff submitted a claim for an equitable adjustment, with an attached letter from an apparent subcontractor stating:

> It is our professional opinion that the job was not engineered correctly or the specification drawings of the site work did not reflect the detail needed to secure the poles and netting. After going over the job, we have now installed the appropriate anchors and back guys to secure the poles in order to support the guy wires and netting correctly.

Letter of M. Richard Carr, S.A. Carr. & Son, Inc. to Bob King (May 4, 1999); Def. App. at Tab 15. The contracting officer denied the claim in its entirety on the basis that the solicitation included no binding sketches or designs, and that "the performance risk was contractually placed on the contractor." Final Decision of the Contracting Officer, ¶ 3(a)-(b). (Sept. 22, 2000); Def. App at Tab 1.

## Discussion

As the contracting officer's decision suggests, Plaintiff's liability for the additional expenses it incurred turns on the nature of the Government's specifications. In particular, the issue presented here is whether the contractual requirements described in the PWS and associated drawing are such that they carry a warranty, making the Government responsible for the success or failure of the performance goals under the doctrine established in *United States v. Spearin*, 248 U.S. 132 (1918).

### A. Jurisdiction.

Before addressing this question, we shall dispose of the Government's jurisdictional challenge presented in its motion to dismiss. Defendant maintains that we need not reach the merits of this contractual dispute because

Trans Metro has failed to properly allege a claim of breach of contract. Instead, Trans Metro, in both its original and amended complaint, has asserted a single count invoking the equitable theory of unjust enrichment, an alternative cause of action, closely related to certain contract remedies. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 (Tentative Draft No. 3, Mar. 22, 2004) ("While it might be described as a 'restitutionary remedy for breach of an enforceable contract,'" a claim for disgorgement of profits obtained by a defendant's contractual breach states a separate cause of action for unjust enrichment, not breach of contract; disgorgement "seeks to recover the value of what the defendant has gained in consequence of breach, not the value of the plaintiff's contractual performance.").

Counsel conceded at oral argument that we have no jurisdiction over an unjust enrichment claim. *See Aetna Cas. & Sur. Co. v. United* States, 228 Ct. Cl. 146, 164 (1981) (Court has no jurisdiction over claim for unjust enrichment, insofar as the theory is based on contract implied in law; unjust enrichment proceeds "from a perception that a party ought to be bound rather than from a conclusion that a party has agreed to be bound.") (citations omitted). He argues, however, that Plaintiff's Complaint can be read broadly to allege a breach of contract. We note that the words "breach of contract" do appear in the caption of Trans Metro's Complaint. Furthermore, it is quite obvious that the Plaintiff contests the contracting officer's denial of its claim, a claim that centered around the scope of Trans Metro's contractual obligations. Under the liberal principles of notice pleading, we conclude that Plaintiff satisfactorily alleged a breach of contract. Accordingly, we DENY the Government's motion to dismiss for lack of subject matter jurisdiction.

**B. Summary Judgment.**

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. RCFC 56(c). A material fact is one that would affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). For the Government to meet its initial burden on summary judgment, it must demonstrate "an absence of evidence to support [Plaintiff's] case." *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). To set up a genuine issue, it is not enough to simply proffer a general denial of the facts alleged in support of the Government's summary judgment motion. Instead, Plaintiff "must proffer countering evidence sufficient to create a genuine factual dispute." *Id.* at 1562.

In opposing Defendant's motion in this case, Trans Metro attempts to establish a factual dispute by pointing to unknowns in regards to the cause of the failed project. First, there is the suggestion that the severity of the weather was a factor. But this contention is not developed beyond the deposition testimony. Inclement weather was explicitly contemplated by the parties, and certainly did not excuse Plaintiff's conformance to the specifications in the PWS. Second, Plaintiff points to the Government's subjective characterizations of the work, arguing that a reasonable fact finder could disagree with the Government's views. While no doubt true, this case does not involve the accuracy of the Government's rhetoric. Finally, Trans Metro argues that strict compliance with the PWS ultimately caused the conditions complained of. In other words, Plaintiff claims that the design proposed by the Air Force was insufficient to meet the demands of the project.

This last argument restates the ultimate issue. We must determine whether the specifications are subject to an implied warranty under the *Spearin* Doctrine. In other words, we must decide whether the Government dictated a design or simply presented performance standards and left it to the contractor to employ the particular design for achieving these standards.

**C. The *Spearin* Doctrine.**

Plaintiff and Defendant agree on the legal standard applicable to this dispute. The principle established by *United States v. Spearin* protects a contractor who relies upon defective Government specifications. This implied warranty of specifications, the *Spearin* Doctrine, is stated as follows:

> If Government furnishes specifications for the production or construction of an end product and proper application of those specifications does not result in a satisfactory end product, the contractor will be compensated for its efforts to produce the end product, notwithstanding the unsatisfactory results.

*PCL Constr. Services, Inc. v. United States*, 47 Fed. Cl. 745, 794 (2000) (citing *Spearin*, 248 U.S. at 136-37).

As we have suggested, this principle applies only to certain types of contract specifications. The warranty attaches to "design specifications," but does not apply to a contractor's compliance with "performance specifications." *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1582 (Fed. Cir. 1987); *Hardwick Bros. Co. II v. United States*, 36 Fed. Cl. 347 (1996). In other words,

the Government would have to compensate Trans Metro for a project that was lacking due to the Government's unsuitable design, whereas Plaintiff would be responsible for the unsatisfactory result of a project that was lacking because of deficiencies in its own performance.

The distinction between design specifications and performance specifications has been refined by a large body of case law. Among the early cases applying the *Spearin* Doctrine is the case of *J.L. Simmons Co. v. United States*, 188 Ct. Cl. 684, 412 F.2d 1360 (Ct. Cl. 1969). There, the Court of Claims instructed that an equitable adjustment should be allowed under the warranty principle if the contractors were "required to follow [specifications] as one would a road map." *J.L. Simmons Co.*, 412 F.2d at 1362. The Court of Appeals for the Federal Circuit offered the following differentiation:

> Design specifications explicitly state how the contract is to be performed and permit no deviations. Performance specifications, on the other hand, specify the results to be obtained, and leave it to the contractor to determine how to achieve those results.

*Stuyvesant Dredging*, 834 F.2d at 1582 (citations omitted). One measure of a design, *Spearin*-type specification is the level of detail provided. *See id.* ("Detailed design specifications contain an implied warranty that if they are followed, an acceptable result will be produced."); *but see Blake Constr. Co., Inc. v. United States*, 987 F.2d 743, 746 (Fed. Cir. 1993) ("[T]he mere fact that a specification cannot be followed precisely does not, in and of itself, indicate that it is 'performance' and not 'design.'"). An even more important measure is the degree of discretion permitted a contractor in following the directions provided in the specifications. In the most extreme design specification, the contractor is bound to accept and apply precise specifications; under those circumstances, it is clear the Government must accept what its requirements produce. Typically, however, there are limits on the amount of discretion which may be employed even with performance specifications.

The amount of discretion the specifications allowed Trans Metro and, consequently, whether the *Spearin* Doctrine applies, is a question of law. *Blake Constr.*, 987 F.2d at 746. Here, the PWS approved and accepted by Trans Metro "set forth an objective or standard to be achieved," necessitating Plaintiff to "exercise [its] ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection." *J.L. Simmons Co.*, 412 F.2d at 1362. The PWS, in less than two pages, provides only a paragraph on "General Information" and a five-paragraph

list of "Major Items of Work." Some of its phraseology clearly reflects a performance standard. *See e.g.*, PWS ¶ 1 ("The contractor shall provide all personnel, equipment, tools, materials, supervision and other items and services *necessary to install pole and cable suspended netting over playground area.*") (emphasis added). The contract is basic as to how the materials are employed, merely stating performance standards. The netting is to be "hung square and straight," and pitched so that balls roll off. *Id.* at ¶ 1.1.4. The cables shall be installed "to properly support netting for snow load." *Id.* at ¶ 1.1.3.

Brief though it is, the document also provides a level of unquestionable precision regarding materials to be employed, leaving little to the imagination or discretion of the contractor. In other words, in some respects the PWS contains performance specifications, but in other respects must be construed as having design specifications. For example, the Air Force required poles made from Yellow Pine or Douglas Fir, "gained, bored, and roofed before treatment," and "branded by manufacturer's mark and date of treatment, height and class of pole, wood species, preservation code, and retention." *Id.* at ¶ 1.1.2.1. In the same vein, the Government's netting specifications were very specific as to materials: "100% nylon, weatherproof, green in color, resists rust and mildew, remain flexible, have sewn end bindings, 3/4 inch maximum square mesh when stretched." *Id.* at ¶ 1.1.4.

The Doctrine accommodates such mixed circumstances. When government specifications include both design and performance specifications, the following analysis is appropriate:

> [I]t is helpful to identify the specific provisions at issue in light of contractor's allegations; determine if these provisions are "performance specifications" (for which contractor had discretion to determine how to perform) or "design specifications" (for which contractor had no such discretion); and then determine if the problems alleged by contra specifications, or by factors unrelated to whether the specification was impossible to perform (such as the way the contractor exercised its discretion under the performance specs, in terms of resources, scheduling or management.

*PCL Constr. Serv., Inc.*, 47 Fed. Cl. 745, 796 (2000) (quoting *Blake Constr. Co.*, 987 F.2d at 746).

Although very detailed in describing *some* of the equipment to be used in constructing the protective barrier, these provisions of the PWS are not

dispositive here. Rather, in this circumstance, we are particularly interested in what the specifications stated as regards the defect in original performance: the leaning poles and unsupported, sagging net. Therefore, we look to both the level of specificity and the amount of leeway permitted in those portions of the PWS that provide for the installation of the poles and suspension of the netting over the playground.

In this respect, there is precious little contained within the PWS. The specifications call for a fixed number of poles (ten) of a certain type of wood. They require the poles to be set in the ground five feet. However, this is a minimum depth, not a maximum. And the PWS is silent on how the poles are to be aligned or angled for the desired effect of supporting the netting, or even where they are to be placed. *See e.g.*, PWS ¶ 1.1.2 ("Exact location of poles shall be determined by the contractor.").

Similarly, the PWS does not dictate the manner in which the net is to be supported. It gives a result to be achieved and leaves it to Trans Metro – or as it turns out, to its subcontractor – to determine the particular way to achieve the standard. *See Id.* at ¶ 1.1.3 ("Contractor shall install 1/4" galvanized cable between poles *with all necessary hardware for netting suspension. Cables shall be installed to properly support netting for snow load.*") (emphasis added).

It was Trans Metro's duty to determine "all necessary hardware" to avoid the result occasioned by the ice storm. In fact, Plaintiff was instructed to conduct a site visit in order to verify the measurements and materials needed. *Id.* at ¶ 1 (General Information). Thus, Trans Metro was expected to supplement the designated materials to achieve the goal of suspending the net so that golf balls would roll off it. As the PWS provides at the outset:

> The following is a list of the major items of work to be performed by the contractor. *The list is general in nature and is not intended to be a complete listing of every minor operation to be performed*. All materials, products, and equipment incidental to each specific system or major item of work shall be provided as necessary to achieve complete and usable construction. Work shall be of high quality and shall conform to standards of workmanship of the craft and trade involved.

*Id.* at ¶ 1.1 (emphasis added).

Although, as we have noted, the PWS in some instances specifies the

composition of certain materials – including the cable, netting and poles – there is no evidence or even an allegation that the materials themselves were defective or caused the defective performance. The very same materials were ultimately used to complete the approved construction, supplemented by additional materials that Defendant contends should have been used in the first instance.

The sketch accompanying the PWS – we hesitate to classify it as a "diagram" or "blueprint" – is void of any detail. Nothing at all appears on this exhibit concerning the intended structure. It provides merely the location and dimensions of the "area to be covered." *See* Technical Ex. Like the PWS, this document bears no resemblance to a "road map" for contract performance. *See J.L. Simmons Co.*, 412 F.2d at 1362.

Where a specification does "not tell a contractor how to perform a specific task, that part of the specifications can be performance specifications even if the rest of the specifications are design specifications." *PCL Constr.*, 47 Fed. Cl. at 796 (citing *Penguin Indus., Inc. v. United States*, 209 Ct. Cl. 121, 123-25 (1976)). Ultimately, the Plaintiff complains that the specifications did not advise *how* the net construction was to avoid sagging. Because we find that discretion was not only allowed, but required, in arriving at the "how," Trans Metro cannot hold the Government liable for its own deficient business judgment.

## Conclusion

We conclude that Plaintiff sufficiently pled an action for breach of contract. Accordingly, **Defendant's Motion to Dismiss** for lack of jurisdiction, pursuant to RCFC 12(b)(1), is hereby **DENIED**.

Further, we conclude as a matter of law that the specifications at issue in the contract were performance specifications. Consequently, **Plaintiff is not entitled to the warranty provided under the *Spearin* Doctrine, and is responsible for additional costs incurred in performing the contract**. Accordingly, **Defendant's Motion for Summary Judgment** under RCFC 56, is hereby **GRANTED**. The Clerk of the Court is directed dismiss the Complaint and enter judgment in favor of the Defendant. No costs.

**IT IS SO ORDERED.**

LAWRENCE M. BASKIR
Judge