

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 06, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON SEAN F. McAVOY, CLERK

ORANO FEDERAL SERVICES
LLC, a Delaware limited liability
company,

Plaintiff,

v.

BECHTEL NATIONAL INC., a
Nevada corporation,

Defendant.

No. 4:17-cv-05182-SMJ

**ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF’S MOTION FOR
PARTIAL JUDGMENT ON THE
PLEADINGS**

Before the Court, without oral argument, is Plaintiff Orano Federal Services LLC’s Motion for Partial Judgment on the Pleadings, ECF No. 46. Plaintiff seeks judgment under Federal Rule of Civil Procedure 12(c) on Defendant Bechtel National, Inc.’s (“BNI”) counterclaims against it and BNI’s liability to Orano for termination-for-convenience damages *Id.* BNI opposes the motion. ECF No. 48. Having reviewed the pleadings, briefs, and the file in this matter, the Court is fully informed and partially grants the motion.

I. BACKGROUND

In 2000, BNI entered into Contract No. DE-AC27-01RV14136 (the “Prime

1 Contract”) with the U.S. Department of Energy (“DOE”) to design, construct, and
2 commission the Hanford Waste Treatment and Immobilization Plant in Hanford,
3 Washington. ECF No. 43 at 4.

4 In 2003, BNI executed Purchase Order Nos. 24590-QL-POA-MEVV-00001
5 (“MEVV-1”) and 24590-QL-POA-MEVV-00002 (“MEVV-2”) with Orano to
6 perform segments of the work required by BNI’s Prime Contract. *Id.* at 4–5. In order
7 to complete its work under MEVV-1 and MEVV-2, Orano entered into several
8 subcontracts with suppliers and directed them to perform the required work. *Id.* at 6.

9 However, disputes about the parties’ respective obligations arose. On
10 November 13, 2017, Orano filed suit against BNI for breach of contract and related
11 claims. ECF No. 1. A day later, before it had been served with the complaint, BNI
12 issued a notice of termination for convenience¹ for MEVV-2. ECF No. 43 at 17; *see*

13
14 ¹ This termination was pursuant to the “**GC-14 TERMINATION FOR CONVENIENCE**” provision that provides:

15 SELLER’S [Orano’s] performance under this PURCHASE ORDER
16 may be terminated by the BUYER [BNI] for its convenience in
accordance with this clause in whole, or, from time to time in part
whenever the BUYER shall elect

17 If requested in writing, thirty (30) days after notice of termination, the
18 BUYER will pay to SELLER as full compensation: (1) all amounts due
and not previously paid to SELLER for PRODUCTS completed in
19 accordance with this PURCHASE ORDER prior to such notice, and for
work thereafter completed as specified in such notice; (2) a reasonable
20 amount for any PRODUCTS then in production; provided that no such
adjustment shall be made in favor of SELLER with respect to any
PRODUCTS which are SELLER’S standard stock; (3) reasonable costs

1 also ECF No. 44 at 2, 28, 42. It terminated MEVV-2 and directed Orano to submit
2 a termination for settlement proposal (“TSP”)—request for payment—in accordance
3 with GC-14 and Federal Acquisition Regulations.

4 On January 12, 2018, BNI counterclaimed breach of contract and breach of
5 warranty. ECF No. 12. On February 26, 2018, BNI issued a notice of termination
6 for convenience for MEVV-1. ECF No. 43 at 17; *see also* ECF No. 44 at 2, 28, 42.
7 It terminated MEVV-1 and directed Orano to submit a TSP. Since then, the case was
8 stayed while the parties engaged in discussions related to Orano’s submitted TSPs.
9 However, the parties were unable to reach an agreement on a sum, so they requested
10 that the Court lift the stay. ECF No. 35. On February 11, 2019, the Court lifted the
11 stay and on March 4, 2019, issued an amended scheduling order. ECF Nos. 36 & 40.
12 On March 22, 2019, Orano filed an amended complaint asserting (1) breach of
13 contract, (2) breach of contract arising from cardinal change, (3) restitution and

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15 of settling and paying claims arising out of the canceled orders; and (4)
16 a reasonable profit for costs incurred in the performance of the work
17 terminated; provided, however, that if it appears that the SELLER
18 would have sustained a loss on the entire PURCHASE ORDER had it
19 been completed, no profit shall be included.

18 The total sum to be paid to SELLER under this clause, shall not exceed
19 the total PURCHASE ORDER price as reduced by the amount of
20 payments otherwise made and as further reduced by the PURCHASE
ORDER price of work not terminated, and will not include any
consideration for loss of anticipated profits on the terminated work, all
claims for which SELLER agrees to waive.

ECF No. 43-1 at 20–21; ECF No. 43-2 at 17.

1 unjust enrichment, (4) quantum meruit, and (5) Miller Act Payment Bond or
2 equitable lien or retention. ECF No. 34. The amended complaint encompassed an
3 independent breach of contract claim based on BNI's refusal to pay an amount
4 consistent with GC-14. On April 5, 2019, BNI answered and counterclaimed breach
5 of contract and breach of warranty. On April 26, 2019, Orano answered BNI's
6 counterclaims. This motion for partial judgment on the pleadings followed.

7 **II. LEGAL STANDARD**

8 Under Federal Rule of Civil Procedure 12(c), a party may move for judgment
9 on the pleadings "after the pleadings are closed—but early enough not to delay
10 trial." A district court should grant the Rule 12(c) motion when "the moving party
11 clearly establishes on the face of the pleadings that no material issue of fact remains
12 to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach*
13 *Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989). In
14 considering a Rule 12(c) motion, a court must accept as true all material allegations
15 in the complaint and construe those allegations in the light most favorable to the
16 nonmoving party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009).

17 **III. GOVERNING LAW**

18 Both parties agree that under the GC-17 Applicable Law provision in MEVV-
19 1 and MEVV-2, substantive issues of law shall be determined "according to the
20 Federal common law of Government contracts as stated and applied by Federal

1 judicial bodies and boards of contract appeals of the Federal Government.” ECF No.
2 46 at 8; ECF No. 48 at 7. When there is no applicable federal government contract
3 law, the laws of Washington state govern. ECF No. 46 at 8; ECF No. 48 at 7.

4 **IV. DISCUSSION**

5 **A. BNI’s breach-of-contract and breach-of-warranty counterclaims**

6 Orano first moves for partial judgment on the pleadings for BNI’s
7 counterclaims against it. ECF No. 46. It argues that BNI’s breach-of-contract and
8 breach-of-warranty counterclaims are “foreclosed by its decision to terminate the
9 subcontracts [MEVV-1 and MEVV-2] for convenience.” *Id.* at 10. Because BNI
10 elected to invoke the provisions of GC-14 termination for convenience instead of
11 GC-15 termination for default², Orano argues that BNI is left to abide by the

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13 ² “**GC-15 TERMINATION FOR DEFAULT**” states:

14 BUYER [BNI] may terminate the whole or any part of SELLER’S
15 [Orano’s] performance under this PURCHASE ORDER in any one of
16 the following circumstances: (1) if SELLER fails to make delivery of
17 the PRODUCTS or to perform within the time specified herein or any
18 extension thereof; (2) if SELLER delivers nonconforming
19 PRODUCTS; (3) if SELLER fails to provide adequate assurance of
20 SELLER’S ability to meet the quality standards or the delivery date(s)
of this PURCHASE ORDER; or (4) if SELLER fails to perform any of
the other provisions of this PURCHASE ORDER in accordance with
its terms or so fails to make progress as to endanger performance of this
PURCHASE ORDER. In the event of any such failure, BUYER will
provide SELLER with written notice of the nature of the failure and
BUYER’S intention to terminate for default. In the event SELLER does
not cure such failure within ten (10) days of such notice, BUYER may,
by written notice, terminate this PURCHASE ORDER.

1 provisions of GC-14 and cannot then counterclaim that Orano defaulted, which falls
2 under the provisions of GC-15. *Id.*

3 Orano notes that the termination provision invoked is dispositive because had
4 BNI attempted to terminate MEVV-1 and MEVV-2 for default under GC-15 instead,
5 BNI would have been required to “provide [Orano] with written notice of the nature
6 of the failure and [its] intention to terminate for default.” ECF No. 43-1 at 21. Orano
7 would have then had an opportunity to cure the failure prior to actual termination.
8 *Id.* Orano notes that by instead electing GC-14 termination for convenience, BNI

10 In the event BUYER terminates this PURCHASE ORDER in whole or
11 in part as provided in this clause, BUYER may procure, upon such
12 terms and in such manner as BUYER may deem appropriate,
13 PRODUCTS similar to those so terminated and SELLER shall be liable
14 to BUYER for any reasonable additional costs for such similar
15 PRODUCTS; provided, that SELLER shall continue the performance
16 of this PURCHASE ORDER to the extent not terminated under the
17 provisions of this clause.

18 SELLER agrees to assist BUYER in the event that re-procurement
19 action is necessary as a result of default, by co-operation in the transfer
20 of information, in the disposition of work in progress or residual
material, and in the performance of other reasonable requests made by
BUYER.

If, after notice of termination of this PURCHASE ORDER, it is
determined for any reason that SELLER was not in default under the
provisions of this clause, or that the default was excusable under the
provisions of this PURCHASE ORDER, the rights and obligations of
the parties shall be the same as if the notice of termination had been
issued pursuant to the Termination for Convenience clause.

ECF No. 43-1 at 21; ECF No. 43-2 at 17.

1 foreclosed the opportunity for Orano to cure any alleged defects and must be left to
2 provide compensation as set forth in that provision.

3 BNI opposes the motion. ECF No. 48. It does not dispute that it must provide
4 compensation based on Orano's costs incurred and any reasonable profit as set forth
5 in GC-14. *See* ECF No. 44 at 2. It nonetheless points to the fact that it relied on other
6 provisions of the purchase order to plead its counterclaims and argues that Orano
7 fails to identify any provision stating that termination for convenience supersedes
8 the right to recover under other provisions. *Id.* at 19. Having reviewed the purchase
9 orders, which were incorporated in the complaint by reference³, as well as the briefs
10 and pleadings, the Court is fully informed and grants Orano's motion for judgment
11 on the pleadings on BNI's counterclaims.

12 Termination for convenience clauses are common in government contracts.
13 *See CMS Mech. Servs., LLC v. PetSmart, Inc.*, No. CV-15-02040-PHX-NVW, 2018
14 WL 1586647, at *15 (D. Ariz. Mar. 31, 2018) (“‘For convenience’ clauses
15 historically have been in contracts between the government and private
16 contractors.”). “Termination for convenience clauses allow the government to
17 terminate a contract, in whole or in part, when to do so is in the government’s
18 interests.” *Keeter Trading Co. v. United States*, 79 Fed. Cl. 243, 262 (2007). “A
19 termination for convenience essentially converts a fixed price contract into a cost

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³ *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (9th Cir. 2018).

1 reimbursement contract.” *Id.* (citing *Best Foam Fabricators, Inc. v. United States*,
2 38 Fed. Cl. 627, 638 (1997)). Thus, convenience damages are generally limited to
3 costs incurred prior to termination, a reasonable profit on work performed, and
4 certain additional costs associated with termination. *Id.*

5 There is no dispute that under the provisions of GC-14, BNI is obligated to
6 pay Orano full compensation as outlined. Although GC-14 does not expressly
7 supersede BNI’s rights and remedies established in other provisions of the purchase
8 orders, courts have held that as a matter of law, a contractor is not precluded from
9 recovering the costs of producing even defective work following a termination for
10 convenience. *See Best Foam Fabricators*, 38 Fed. Cl. at 640. In *Best Foam*
11 *Fabricators*, the court noted that where a contract is terminated for convenience,
12 “the contractor is entitled to recover its reasonable, allocable, and allowable costs
13 incurred with respect to termination inventory *even if such inventory did not comply*
14 *in all respects with specification requirements.*” *Id.* (emphasis added). In other
15 words, there may not be an “offset” based on alleged defaults by the contractor.
16 Otherwise, the convenience termination would effectively be a default termination,
17 which sets forth its own basis for damages. Common sense dictates the same result
18 in fairness for the contractor, who is no longer able to cure or dispute any
19 deficiencies or continue performance under the now-terminated contract.

1 Thus, Orano is correct that it is entitled to judgment as a matter of law on
2 BNI's breach-of-contract and breach-of-warranty counterclaims, even while
3 construing the allegations in BNI's favor. That is not to say that BNI is left without
4 recourse. Orano's alleged defaults may be helpful in determining the damages owed
5 under GC-14. By way of example, BNI counterclaims that Orano failed "to provide
6 materials that are free from defects" and failed to "timely and properly correct
7 deficient work" in conformance with MEVV-1. ECF No. 44 at 43. To the extent
8 Orano's "alleged deficiencies stemmed from gross disregard" of its contractual
9 obligations, "the costs of performing such grossly deficient work would be
10 considered unreasonable and hence unallowable." *Best Foam Fabricators*, 38 Fed.
11 Cl. at 640. In other words, GC-14, which allows recovery for reasonable costs only,
12 may effectively take into account any grossly deficient work. *See* ECF No. 43-1 at
13 20–21. BNI may also certainly claim relevant defenses as needed.

14 For the foregoing reasons, the Court grants the motion as to BNI's
15 counterclaims and grants judgment in Orano's favor.

16 **B. BNI's liability to Orano for termination-for-convenience damages**

17 Orano next moves for partial judgment on the pleadings as to BNI's liability
18 to Orano based on its termination for convenience. ECF No. 46. It acknowledges
19 that the amount owed under GC-14 is in dispute but argues BNI's liability is subject
20 to judgment on the pleadings. *Id.*

1 BNI's response in opposition misses the mark. It construes Orano's motion
2 as requesting judgment on all of Orano's causes of action: (1) breach of contract,
3 (2) breach of contract arising from cardinal change, (3) restitution and unjust
4 enrichment, (4) quantum meruit, and (5) Miller Act Payment Bond or equitable lien
5 or retention. *See generally* ECF No. 48. However, BNI's confusion is
6 understandable, as such a requested judgment bears no relation to any of Orano's
7 causes of action.

8 Orano replies that the judgment bears a connection to its first cause of action
9 for breach of contract based on BNI's alleged failure to pay damages under the
10 termination for convenience provision. ECF No. 50 at 3. However, a judgment that
11 BNI is liable does not equate to a judgment that BNI breached its contract by failing
12 to pay or failing to engage in good faith negotiations, as there is clearly a dispute
13 on the amount owed. Orano never sought declaratory judgment on the fact of BNI's
14 liability under GC-14, and BNI does not dispute the fact that it has a contractual
15 obligation to pay damages under GC-14; thus, such a "judgment" would be advisory
16 and illogical. Therefore, the Court denies the motion as to Orano's request for
17 judgment on BNI's liability for termination-for-convenience damages.

18 Accordingly, **IT IS HEREBY ORDERED:**

19 **1. Plaintiff's Motion for Partial Judgment on the Pleadings, ECF No. 46,**
20 **is GRANTED IN PART AND DENIED IN PART.**

