UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 6682 DISMISSED; CBCA 6765 AND 6767 DENIED: March 31, 2021

CBCA 6682, 6765, 6767

PRIME TECH CONSTRUCTION LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Chizoma B. Onyems, President of Prime Tech Construction LLC, Auburn, CA, appearing for Appellant.

Thomas M. Cordova, Office of the General Counsel, Department of Energy, Lakewood, CO, counsel for Respondent.

Before Board Judges **ZISCHKAU**, **SULLIVAN**, and **CHADWICK**.

**CHADWICK**, Board Judge.

These consolidated appeals are before the Board for a decision on the written record under Board Rule 19 (48 CFR 6101.19 (2019)). In CBCA 6682, Prime Tech Construction LLC (Prime Tech) prematurely appealed from an alleged deemed denial of a certified claim under a construction contract. In CBCA 6765, Prime Tech timely appealed from a denial of the same claim. In CBCA 6767, Prime Tech timely challenged the termination of the contract for default. We dismiss CBCA 6682 and deny the other two appeals.

Facts

We find the following facts based on documents in the record. We disregard allegations unsupported by evidence. The Western Area Power Authority (WAPA), a component of the respondent, Department of Energy (DOE), awarded fixed-price contract 895032-19C-WA000018 to Prime Tech in September 2019. The project was to construct a drainage system at an electricity substation in Hayden, Colorado. The performance period was 120 days. The price was $245,000, to be paid in progress payments.

The contract included, among other standard clauses, Default (Fixed Price Construction) (Apr. 1984), 48 CFR 52.249-10.[1] It also included Superintendence by the Contractor (Apr. 1984), 48 CFR 52.236-6, which required Prime Tech to "have on the work a competent superintendent who is satisfactory to the Contracting Officer."

WAPA issued the notice to proceed on September 20, 2019, making the completion date January 18, 2020. Prime Tech did not complete the project. We have no evidence, in fact, that Prime Tech mobilized to start the work.[2] In September and October 2019, Prime Tech submitted for WAPA's approval under the contract a series of eight proposed project superintendents. WAPA approved three of the eight submittals, but each time WAPA accepted someone, Prime Tech advised WAPA that the person was no longer available.

In November 2019, Prime Tech submitted its first claim under the contract to the WAPA contracting officer, seeking $138,455.49. The claim included no narrative and consisted of an invoice to WAPA, with supporting documents, for "Certified Payroll," "Equipment Rental," "Geotextile Membrane," and "Fence Screen." After being advised by the contracting officer that the claim lacked a certification, Prime Tech resubmitted the invoice in the same amount with a certification in December 2019. This certified claim also included no narrative, but in the transmittal email, Prime Tech's president wrote in part, "I was not responsible for not doing your work for 120 days I had been in Hayden. Your [contracting officer's representative] is responsible and you know it."

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[1] The Default clause stated in part that "the Government may, by written notice," terminate the contract if the contractor "fails to complete the work" within "the time specified in this contract." 48 CFR 52.249-10(a).

[2] DOE asserts that sometime in late 2019, Prime Tech left project-related items unprotected "in a field" near the substation without coordinating with WAPA. Prime Tech seems to acknowledge that something like this happened, but since the only "evidence" we have on the matter consists of unauthenticated, undated photographs of some dark things covered in snow (Appeal File, Exhibit 27), we cannot make a relevant factual finding.

Less than two weeks after it submitted the certified claim, Prime Tech filed an appeal with the Board (CBCA 6682), stating that the claim had been "denied" (apparently calculating the deadline for a decision from the date of the uncertified claim) and was for $175,705.49. In its notice of appeal, Prime Tech referred to the contract as "suspended" and alleged that Prime Tech had been "locked out." One day after it filed CBCA 6682, Prime Tech advised the Board that Prime Tech would seek $150,000 in that appeal.

The contracting officer denied the December 2019 certified claim in January 2020, stating that "work on the project was never commenced and progress was never made. . . . At no time were any Prime Tech employees, equipment, or materials permitted on site due to the company's failure to meet the prerequisite requirements of the contract." Prime Tech timely appealed the denial in March 2020 (CBCA 6765), describing the project as "failed construction" in its notice of appeal.

In the meantime, on January 17, 2020, the contracting officer advised Prime Tech that WAPA was considering terminating the contract for default as "Prime Tech has made no measurable progress to date." The contracting officer gave Prime Tech ten days to respond. Prime Tech sent a sixteen-page response in two days. The response began with a statement that "I have stated herein exactly what I stated to [the presiding CBCA judge] that constituted failure to continue performing in the contract. I will not state any other issues that was not stated as failure to perform that will negatively impact pending Claims that is being adjudicated." Without citing evidence or examples, the response went on to allege as "causes of delay," among other things, that WAPA's project engineer and contracting officer "were not getting along," that a "defective" design required Prime Tech to perform unspecified "redesign work," that the contracting officer should have issued a "stop-work order," and, ultimately, that Prime Tech "has proved beyond reasonable doubt Respondent improperly locke[d] Prime Tech out of the facility with the intention to put him out of business [and] caused irreparable harm to his business. The motive of being locked out is because an Amputee . . . was present on site . . . not because of any lack of experience." The response did not quantify days of delay or explain why any delay should be excused in the absence of mobilization or an approved superintendent. Prime Tech ended its response by offering two "options," either a termination for convenience or allowing Prime Tech to perform with its president as the superintendent, with "[d]ate of New Mobilization [to] be agreed."

On March 11, 2020, fifty-two days after the contractual completion date, the contracting officer terminated the contract for default, calling Prime Tech's response to the January 17 notice "insufficient." Prime Tech timely appealed the termination (CBCA 6767). We granted unopposed motions to consolidate the three appeals. As Prime Tech is not represented by an attorney, we did not require Prime Tech to file complaints or DOE to file answers. The parties submitted the case under Rule 19 in August and September 2020.

Discussion

First, because CBCA 6682 and CBCA 6765 involve the same claim submission, and because Prime Tech filed CBCA 6682 prematurely as an appeal from a purported deemed denial, *see* 41 U.S.C. § 7103(f) (2018); Rule 2(d)(2) (a contractor may appeal "when a contracting officer has not issued a decision on a claim within the time allowed"), we dismiss CBCA 6682. This causes Prime Tech no harm or disadvantage.

In its Rule 19 brief on the merits, Prime Tech lists twelve "Questions Presented." None of the questions has anything to do with Prime Tech's entitlement to recover on its certified monetary claim, or with the propriety of the termination for default.[3] In its December 2019 certified claim, Prime Tech sought costs associated with preparing to perform. That is the only claim that we may decide within the scope of CBCA 6765. *See Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). Under this type of contract, however, Prime Tech was entitled only to *fixed progress payments* unless WAPA changed the work and caused Prime Tech to incur increased costs. *E.g.*, *ITS Group Corp v. Department of Agriculture*, CBCA 6621, et al. (Jan. 7, 2021); *G&R Service Co. v. Department of Agriculture*, CBCA 121 (Mar. 14, 2007). Prime Tech cites no evidence that any actions by WAPA caused Prime Tech to incur increased costs for payroll, equipment rental, or materials that Prime Tech would not otherwise have incurred as its costs of performing the contract. Nor would we have any basis to find Prime Tech entitled to progress payments, had they been claimed. A "firm, fixed-price contract obligate[s]" the contractor "to perform and receive only the fixed price." *Pernix Serka Joint Venture v. Department of State*, CBCA 5683, 20-1 BCA ¶ 37,589. Prime Tech cites no evidence that it made any progress on the contract. Instead, we understand most of Prime Tech's arguments to be explanations of why it could not perform.

We turn to the termination for default. We will sustain such an action by the contracting officer if the agency proves that the contractor did not perform in the time allowed and the contractor does not prove that its failure to perform was excused. *See DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996); *Ucensys Research Corp. v. Nuclear Regulatory Commission*, CBCA 4241, 19-1 BCA ¶ 37,402; *see also Kelso v. Kirk Bros. Mechanical Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir.1994) ("This court sustains a default termination if justified by circumstances at the time of termination[.]").

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[3] Prime Tech filed five other documents, without leave of the Board, but also without objection by DOE, purporting to supplement, clarify, or correct its Rule 19 brief. Assuming those additional filings are properly before us, we do not find relevant information or arguments in them, either.

Prime Tech did not complete the project by the completion date under the contract, January 18, 2020. Therefore, we shift the burden to Prime Tech and ask whether it can demonstrate that "[t]he delay in completing the work ar[ose] from unforeseeable causes beyond the control and without the fault or negligence of the Contractor." 48 CFR 52.249-10(b)(1); *see 1-A Construction & Fire v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913. We agree with DOE that Prime Tech's arguments assigning blame to WAPA for Prime Tech's failure to complete the project on time amount to "accusations . . . unsupported by any credible evidence." We discern in Prime Tech's submissions a suggestion that WAPA contributed to Prime Tech's inability to hire a superintendent satisfactory to WAPA, but Prime Tech cites no evidence upon the basis of which we could decide that factual matter. Prime Tech argues in its principal brief that WAPA "impeded [it] from performing when it locked us out from continuing the contract without giv[ing] us the reasons, instead had us waiting outside the fence for months in winter; looking at ourselves wondering what we did wrong [and] should have corrected. Agency abrogated contract, inflicted heavy losses on us." As best we can tell, this refers to WAPA's refusal to allow Prime Tech to start the work without an approved superintendent. With no supporting evidence, however, we cannot find that Prime Tech's inability to mobilize arose from unforeseeable causes or was not Prime Tech's fault. Prime Tech could not have completed the project without mobilizing. Because Prime Tech does not prove that its failure to perform under the contract was excused, we deny its appeal of the default termination.

## Decision

We **DISMISS** CBCA 6682 and **DENY** CBCA 6765 and CBCA 6767.

*Kyle Chadwick*

KYLE CHADWICK
Board Judge

We concur:

*Jonathan D. Zischkau* *Marian E. Sullivan*

JONATHAN D. ZISCHKAU
Board Judge

MARIAN E. SULLIVAN
Board Judge

**CHADWICK**, Board Judge, writing separately.

We resolve the case without reaching what I alone consider a potential jurisdictional issue. We do so in part because the issue was not briefed. *See, e.g.*, *Avue Technologies Corp. v. Department of Health & Human Services*, CBCA 6360, et al., 20-1 BCA ¶ 37,503 (noting that we may avoid "difficult" questions of statutory jurisdiction that do not affect the outcome). In my view, however, we lack jurisdiction to consider Prime Tech's arguments for a performance period longer than 120 days, because Prime Tech did not present a valid claim for an "adjustment . . . of contract terms" in the form of a time extension for excusable delay. 48 CFR 2.101 (2019) (definition of "claim"). I essentially agree with *ECC Centcom Constructors, LLC*, ASBCA 60647, 18-1 BCA ¶ 37,133 (applying *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010)), *aff'd mem.*, 779 Fed. App'x 750 (Fed. Cir. 2019); *see also DCX-CHOL Enterprises, Inc.*, ASBCA 61636, 19-1 BCA ¶ 37,394 (same jurisdictional ruling as *ECC Centcom* in an appeal from a default termination); *Postscript VI: Defense to a Government Claim Is a Contractor Claim*, 34 Nash & Cibinic Rep. ¶ 7 (2020) (opining that although "[i]t is time for the Federal Circuit to recognize its mistake and overrule *Maropakis*," *DCX-CHOL Enterprises* reflects "a straightforward application of the *Maropakis* rule. . . . Why the contractor's attorney did not know of the *Maropakis* rule is a complete mystery."). To the extent that we have analyzed default terminations without deciding this issue, we are "not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio." *United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 38 (1952), *quoted in Suprema Inc. v. International Trade Commission*, 742 F.3d 1350, 1362 (Fed. Cir. 2013).

*Kyle Chadwick*

KYLE CHADWICK
Board Judge