



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 28, 2012

CBCA 1558

CDA, INC.,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Edward Dixon, Shreveport, LA, counsel for Appellant.

Dorothy M. Guy, Office of the General Counsel, Social Security Administration, Baltimore, MD, counsel for Respondent.

Before Board Judges **GOODMAN**, **STEEL**, and **KULLBERG**.

STEEL, Board Judge.

This appeal involves a commercial items contract for armed guard services at a Social Security Administration (SSA) facility. The contract was terminated for cause pursuant to Federal Acquisition Regulation (FAR) 52.212-4(m). 48 CFR 52.212-4(m) (2008). SSA submits that its termination for cause should be upheld and excess procurement costs awarded. Appellant CDA, Inc. (CDA), argues that SSA has not met its burden of establishing a *prima facie* case based on undisputable evidence to support its termination for cause decision. Following a hearing and review of post-hearing briefs, the appeal is denied.

Findings of Fact

On December 1, 2008, through its contracting officer (CO) Deborah Wilson, SSA notified appellant CDA by email that it had been selected for award of a contract, number SS00-09-60006, to provide armed security guards for SSA's Durham Support Center (DSC). While the actual award would be delayed because a bid protest had been filed, Ms. Wilson wanted to give CDA as much of a head start on the requirements of the contract as possible, since the support center was a new SSA computer facility, set to open for business in mid-January 2009. On the same date, CDA replied that it was "fully prepared to begin fulfilling its service obligation." However, according to testimony from CDA's Vice President Darryl Dates, CDA did no preparation work between December 1 and December 17, when the contract award was made to CDA, except to investigate what was required for securing the North Carolina Private Protective Services Board (NCPSPB) license.

The contract was formally signed by Mr. Dates on December 17, 2008, and SSA CO Donald Wadhams signed the contract on December 18, 2008. The initial contract to CDA was in the amount of \$1,424,702.89 for the base year.

Also on December 18, 2008, CDA's Mr. Dates agreed to a modification to the contract, Mod #1, which changed the base period of performance, including the length of the initial phase-in period, and postponed until January 18, 2009 the date on which qualified guards were to commence work. CDA did not object to this modification, which it signed and returned to SSA without raising any questions or concerns about the shortened period.

As a result of the contract award and Mod #1, CDA had thirty days to perform a number of items in the contract in preparation for opening day, when it was to provide at least nine qualified armed guards for the security of the new DSC. In order to be ready to provide the qualified guards, CDA had to hire persons who met the contract's educational, physical, and security requirements; submit their background information to SSA for suitability clearances (which required a fifteen-day lead time)¹; arrange for physical and drug testing of the candidates; provide extensive guard duty, weapons, and cardiopulmonary resuscitation (CPR) training; arrange for purchase of weapons, providing detailed

¹ The submission of paperwork for a suitability clearance requires that the contractor submit employee-completed forms providing background employment information and fingerprint cards so that the forms can be forwarded to SSA's Center for Personnel Security and Project Management (CPSPM) to complete required security background checks.

information to SSA thereon; and secure North Carolina and Federal Communications Commission (FCC) licenses to arm the guards and operate the guard posts, all before the January 18 start date.

After the contract and modification were signed, there was discussion about when the first post-award meeting would be held. Mr. Dates apparently suggested that the meeting be held on January 9, 2009. On December 24, 2008, Mr. Wadhams sent an email message to Mr. Dates and contracting officer's technical representative (COTR) David Saunders expressing concern that the post-award meeting would not be held until January 9. He also pointed out that:

Suitability clearances take 15 days, which means that the paperwork will need to be submitted by January 2 [for the nine guards needed by January 18]. Training will probably need to begin about the same time.

By January 24 you will need to have an additional nine or ten guards, [sic] hired, trained, equipped and cleared. Suitability paperwork for those will need to be submitted by January 9.

The remaining guard force will need to be hired, trained, equipped and cleared by Friday, January 30, which means suitability paperwork will need to be submitted by January 15.

Bottom line is that by January 9 you will have already either succeeded or failed.

In fact, a formal post-award meeting, finally scheduled for January 15, was never held because CDA's contract was terminated on the fourteenth.

CDA notified SSA by email on December 30, 2008, that the first suitability packages would be submitted by January 2, 2009. By email on December 30, COTR Keith Cloud (standing in for Mr. Saunders, who was on emergency family leave) offered his help and asked to "discuss the suitability clearance process" as soon as possible. On January 2, he required that the suitability packages be sent to Nancy Hinds in SSA's Office of Protective Security Services so she could check for errors before the packages were submitted to CPSPM for clearance. On January 5, CO Wilson learned that no packages had yet been sent. On January 6, Mr. Dates told Mr. Saunders that CDA would send the packages overnight and that they would be received on January 8. When they did not arrive on January 8, COTR Saunders inquired and learned that CDA had not sent them, as "some corrections" were necessary. When they had still not arrived on January 9, CDA gave SSA a Federal Express

(FedEx) tracking number so the agency could check the status of the delivery. SSA followed up with FedEx and learned that the packages had actually not yet been provided to FedEx.

On January 5, 2009, CDA contacted Ultimate Staffing Services (USS) in North Carolina to assist in recruiting guards for the contract. USS' Lorrie Andrews was pleased to do the staffing because her husband is a captain for the Elon, North Carolina, police department and works with security guard firms to do arms training for armed and unarmed guards. CDA later represented to SSA that Captain Andrews would be providing the security training for the guards, but Ms. Andrews testified that she was not aware of any training that he did for CDA. She further did not observe any training for CDA guards. Whether or not CDA's associate Fred Meyers was providing training to prospective guards, as of January 13 that training had not been submitted to, or approved by, SSA.

Ms. Andrews intended to look particularly for guards who were already certified as armed guards in North Carolina. She phone-screened candidates and attempted to secure the suitability information required by the contract. Candidates came to her office to fill out the suitability forms. Fingerprinting was also done in her office, using the official fingerprint cards provided by CDA to USS on January 12.²

On January 9, CDA finally sent by facsimile the first set of suitability packages for candidates recruited by CDA's management consultant Alan Rousseau and trainer Fred Meyers for initial review by SSA. When the agency reviewed these packages, several glaring problems and omissions were apparent. First, several applicants had not completed high school or secured a General Educational Development (GED) equivalency degree, as required under the contract. Further, the applications were replete with errors such as missing or incomplete addresses, telephone numbers, work histories, and other information. Because of the obvious errors, although it is not normal practice, SSA agreed to do "quick checks" on submitted suitability paperwork, to determine if there were readily identifiable deficiencies that would automatically disqualify an applicant from employment on a government contract. In addition, SSA allowed CDA to use the standard form 85, a simpler form than the contract-required standard form 85P, for its submissions.

SSA also learned that no suitability packages for previously trained law enforcement officers had been prepared because CDA erroneously believed these personnel did not

² CDA argued that it was delayed in performing the contract because SSA was late delivering fingerprint cards to CDA. While the delivery was delayed two or three days, the cards were ultimately delivered to CDA on December 31, 2008, nearly two weeks before CDA got those cards to USS.

require suitability packages. CDA informed SSA that it would send suitability packages for these personnel to SSA on January 12, 2009.

SSA was so concerned about CDA's progress with the suitability submissions that on January 12, 2009, Ms. Hinder from SSA's Office of Protective Security Services traveled to Durham, North Carolina, to meet with COTR Saunders and CDA representative Alan Rousseau to review the packages. CDA provided five suitability packages, none of which were acceptable since they contained incorrect information, were missing pages, were missing dates, had incomplete addresses, and were submitted without any fingerprint cards.

On January 13, CDA was still having problems submitting properly executed suitability paperwork to SSA. Ms. Hinder met again with CDA personnel to review the prior day's packages, but those packages were still missing information, or contained erroneous or incomplete information. SSA also performed quick checks on the five applicants, and one quick check was unfavorable because the applicant had previous felony convictions.

The initial set of seven candidates Ms. Andrews recruited came to her office to fill out the paperwork, and the documents they prepared were sent on to SSA from her office on January 13. USS's second set of seven candidates filled out their paperwork, and their documentation was sent to SSA on January 19, 2009 (five days after the contract had been terminated).

Also on the afternoon of January 13, 2009, five days before opening day, a conference call was held between SSA and CDA personnel, including at least Mr. Wadhams, Mr. Cloud, and Mr. Dates. SSA expressed its many concerns, including how many guards had been hired so far, the incomplete and inaccurate suitability packages, and the status of the training. When CDA was unable to answer virtually any question asked or to satisfy SSA's many concerns, Mr. Wadhams asked that Mr. Cloud send an email message requesting that CDA provide all the required deliverables, such as suitability packages and copies of the training plans and training completion reports, drug testing and medical exam results, Federal Communications Commission (FCC) radio licenses and NCPPSB licenses to operate a security guard business, and firearm information. The email message requested that CDA submit the documents listed by close of business that same day. At the end of the call, Mr. Wadhams stated that this was CDA's final opportunity to perform prior to termination. CDA responded with its documentation by email on January 14 at 4:06 a.m.

Mr. Cloud and Mr. Wadhams reviewed the documents attached to the email message. CDA provided some information about when it planned to perform the medical examinations and drug testing, and complete the suitability packages, and stated when it planned to provide training. CDA also submitted the applications for NCPPSB and FCC licenses, and proposed

a solution (unacceptable to SSA) for its unlicensed status -- working through another security firm in the state. After discussing the submission, Mr. Cloud and Mr. Wadhams agreed that the documents did not meet the contract requirements, and concluded that it would be impossible for CDA to provide the proper number of armed guards for opening day four days later.

Therefore, on January 14, Mr. Wadhams electronically sent a letter indicating that SSA was terminating the contract for cause (the commercial items equivalent to a termination for default) because CDA had failed to make adequate progress to complete any of the contract tasks required in the phase-in period. The letter stated that CDA had failed to hire sufficient personnel, prove that it had developed or submitted any physical fitness training, submit complete and accurate suitability clearance requests, complete guard training for any employees³, certify trainers, supply FCC or NCPPSB licenses, and provide model information on the firearms intended for the guards' use. SSA also notified CDA of its intent to acquire the services of another contractor and charge CDA with any excess procurement costs.

Also on January 14, SSA determined that the best way to cover the guard posts by January 18 was to modify an existing SSA contract. Thus, on January 15, 2009, it negotiated the modification of an existing contract for armed security guard services with Paragon Systems (Paragon) to bridge the time it would take to reprocur the guard services. Due to time constraints, SSA allowed Paragon to provide two unarmed guards for an initial ten-day period, instead of two of the armed guards that were required under the CDA contract. Other than this minor change, the Paragon bridge contract called for the same services as the CDA contract through March 15, 2009. SSA reports that the two-month modification of Paragon's contract resulted in a cost of \$273,870.94. Paragon was selected because it met all of the licensing, training and suitability requirements and could immediately move guards, who were already qualified in North Carolina, from another location under contract to SSA, into place by opening day on January 18.

Since the solicitation had been recent, SSA selected the contractor with the next best offered price to CDA's under the original solicitation. A replacement contract was

³ In fact, CDA had admitted that it would be unable to complete any training by January 18 and had requested a waiver of the training requirements, despite the clear direction in the contract that:

THERE WILL BE NO WAIVERS OF ANY TRAINING REQUIREMENTS SPECIFIED IN THIS CONTRACT.

subsequently awarded to Basic Contracting Services, Inc. (BCSI) to provide guard services at the DSC starting in March 2009. Since the replacement contract was based on the same solicitation which resulted in the CDA contract, the two contracts contained identical terms.

Over the life of the contract, assuming that BCSI will complete the entire contract, including the option years, SSA expects that its excess reprourement costs will total \$775,633.06. SSA has shown that through the base and first option year, it actually incurred excess reprourement costs in the amount of \$172,006.82. CDA has not disputed the figures reported.

Discussion

Termination for Cause

The question presented in this appeal is whether SSA properly terminated CDA for cause. A termination for cause is the equivalent of a termination for default, so we apply the same legal standards to both types of cases. SSA must prove by a preponderance of the evidence that the termination for cause was proper. If SSA presents a *prima facie* case that the termination was proper, the burden shifts to CDA to rebut SSA's case. *Integrated Systems Group, Inc. v. Social Security Administration*, GSBICA 14054-SSA, 98-2 BCA ¶ 29,848, at 147,735.

SSA has met its burden to show that the termination was proper. CDA failed to meet numerous schedules and reported that it would be unable to meet other requirements timely. SSA was more than justified in terminating CDA. For example:

- Contract Clause C-3.6(g) required that CDA submit complete and accurate suitability forms “at least 15 days prior to the date work is to begin,” which for the start date of January 18 required submissions for at least nine guards by January 3, 2009. Despite SSA's time flexibility and on-hand assistance with the forms, only two forms out of thirty submitted prior to termination were acceptable for submission to the CPSPM.⁴
- Section B-7(i) of the Statement of Work (SOW) required that CDA's guard employee training plan be submitted to the COTR fifteen calendar days after

⁴ This alone would be sufficient grounds to terminate the contract for cause, per contract provision C-3.6(i): “If SSA determines that the number or percentage of unfavorable determinations make successful contract performance unlikely, SSA may terminate the contract for cause or default.”

the date of the award of the contract, or by January 3, 2009. No training plan, even an unacceptable plan, was submitted until January 14, 2009.

– CDA never provided the supervisory instruction-training plan due January 3, 2009, as required by SOW section B-7(j).

– The training plan submitted on January 14 did not cover all training required by the contract, and the training it did propose was not to be completed until January 22, four days after the date the guards were to commence duty, although the contract required that training be completed before any guard stood post.

– CDA failed to complete physical fitness and drug testing required under SOW section B-3(d)(2), and did not anticipate doing so until after the guard training it planned for January 22.

– Section B-8(b) of the SOW required that the contractor possess FCC and NCPPSB licenses to be delivered to the SSA upon contract award. The licenses were not provided prior to termination, much less upon award.

SSA CO Wadhams had a reasonable belief that there was no reasonable likelihood that the contractor could remedy these errors within the time remaining before guards assumed their posts. A termination for default will be upheld where a demonstrated lack of diligence indicates that the Government could not be assured of timely completion. *Global Construction, Inc. v. Department of Veterans Affairs*, CBCA 1198, 10-1 BCA ¶ 34,363, at 169,699, citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). SSA was entirely justified in its decision to terminate CDA's contract for cause.

CDA argues that nonetheless SSA was required to issue a cure notice prior to issuing a termination for cause. The contract clause on which CDA relies is FAR 12.403(c)(1), which requires the issuance of a cure notice prior to termination for cause "unless such termination is for late delivery." CDA apparently bases its argument on the fact that Ms. Wilson stated in deposition testimony that the basis for the termination was "non-performance" rather than late delivery, and that therefore, CDA argues, issuance of a cure or show cause notice was required.

The non-performance resulted from late delivery, however. Thus, SSA had no legal obligation to issue a cure notice. *Business Management Research Associates v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486, at 165,991. CDA did not timely submit any of the training plans or other deliverables it was contractually obligated to

provide, much less complete any phase I requirements. According to the regulations governing the contract between the parties, because CDA failed to deliver its services on time, SSA was not obligated to provide CDA with a cure notice. Thus, a cure notice was not a legal prerequisite to the termination of CDA's performance of the contract. *Geo-Marine, Inc. v. General Services Administration*, GSBCA 16247, 05-2 BCA ¶ 33,048, at 163,830.

Reprocurement Costs

Since SSA properly terminated CDA's contract for cause, it is entitled to receive its costs to reprocure the guard services that CDA had agreed to provide. FAR 12.403(c)(2) instructs the Government to acquire similar items from another contractor and to charge the defaulted contractor with any excess reprocurement costs.

In order to recover reprocurement costs, the Government must prove that: (1) the reprocured supplies or services are the same as or similar to those involved in the termination; (2) the Government actually incurred excess costs; and (3) the Government acted reasonably to minimize excess costs. *National Printing and Copying*, VABCA 7211, 06-1 BCA ¶ 33,183, at 164,471, citing *Cascade Pacific International v. United States*, 773 F.2d 287, 293 (Fed. Cir. 1985).

Here, similar services were procured. The temporary reprocurement contract modification awarded to Paragon was different from CDA's only in that for the first ten days of the bridge contract, the guards did not need be armed. In addition, the reprocurement contract with BCSI was procured under the same solicitation and is the same in nearly all respects as the CDA contract. SSA seeks excess reprocurement costs based on the initial contracts, without regard to later modifications to the BCSI contract increasing costs for items such as increased wage rates.

In a similar case, the General Services Board of Contract Appeals held that the Government's contracting officers acted reasonably in reprocurring services:

When GSA's contracting officials terminated Old Dominion's contract for default, they had a clear idea of what they needed to do: take quick action to secure guard services for the facilities in question so as to avoid safety problems for Government employees and visitors there. . . . The officials also had a reasonable plan for achieving this objective: extend the existing Tatt contract covering those services for a month and conduct a procurement that would lead, within a short period of time, to award of a contract that would include the remainder of the base period of the defaulted contract. . . . We find

the initial actions taken in furtherance of this plan to be reasonable, and therefore approve two elements of the agency's claim.

Old Dominion Security, Inc., GSBCA 9126, 90-2 BCA ¶ 22,745 at 114,165.

Further, the Government proved at the hearing that the costs it seeks, at least for the base year and option year 1, were actually incurred, satisfying the second test in *Cascade Pacific International*.

Finally, in order to recover, SSA must have acted reasonably to minimize costs. As in *Old Dominion*, it was reasonable of the SSA CO to select BCSI, the next highest bidder in the recent solicitation. Thus, SSA has satisfied the three elements for award of reprourement costs.

SSA provided testimony that the total amount of excess reprourement costs over the life of the CDA contract would be \$755,633.06, if SSA exercises its options to continue the contract through all option years. SSA's expected expenditures in comparison with CDA's contract follow:

Year	CDA initial contract	BCSI initial contract	Paragon bridge contract	Excess repro- curement costs
Base/phase 1	\$1,372,608.00	\$1,063,746.20	\$273,870.94	-\$34,991.74
Option Year 1	\$1,572,490.64	\$1,779,489.20		\$206,998.56
Option Year 2	\$1,578,665.52	\$1,779,489.20		\$200,823.68
Option Year 3	\$1,589,450.36	\$1,784,349.20		\$194,898.84
Option Year 4	\$1,591,585.48	\$1,779,489.20		\$187,903.72
Total Contract:	\$7,704,800.88	\$8,186,563.00	\$273,870.94	\$755,633.06

The Government may generally recover excess reprourement costs for the entire reprourement period, including option years, of the follow-on contractor, as long as the original contractor had agreed to perform for that duration, as CDA has here. *Lewis Management & Service Co.*, ASBCA 24802, *et al.*, 85-3 BCA ¶ 18,416, at 92,467. However, the Government is not entitled to assess excess procurement costs for an option year until performance for that year is complete and final payment has been made. *National Medical Staffing, Inc.*, ASBCA 45046, *et al.*, 96-2 BCA ¶ 28,483, at 142,259. As of the date of the hearing, only Option Year 1 had been completed. Therefore, the Government is entitled to \$172,006.82 (\$206,998.56 - \$34,991.74) for the excess costs of reprocurring guard services from the base year through the last pre-hearing fully-completed option year (Option Year 1).

When a premature assessment is made and litigated, the appeal will be sustained, but left open for a further contracting officer's decision. *American Photographic Industries, Inc.*, ASBCA 29272, et al., 90-1 BCA ¶ 22,491 at 112,894 (1989), *aff'd on reconsideration*, 90-2 BCA ¶ 22,728.

Decision

The appeal is **DENIED**.

CANDIDA S. STEEL
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

H. CHUCK KULLBERG
Board Judge