



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 12, 2009

CBCA 775

R.C. PROFESSIONAL SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Richard Cora, President of R.C. Professional Services, Inc., Gurabo, Puerto Rico, appearing for Appellant.

Wilbert Jones, Office of Procurement Law, United States Coast Guard, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **VERGILIO**.

VERGILIO, Board Judge.

On May 29, 2007, the Board received a notice of appeal from R.C. Professional Services, Inc. (contractor) regarding its contract with the United States Coast Guard of the Department of Homeland Security (Government). The contractor was to rehabilitate (selectively demolish and reconstruct) a building. The Government conducted an inspection after the contractor had requested a final inspection. The Government determined that various items did not comply with specification requirements and that the contractor had not provided warranties required under the contract. Items were not remedied in response to a cure notice or to a show cause directive. With work remaining incomplete, the contracting officer issued a termination for default of the contractor's right to proceed under the contract. With its timely-filed appeal, 41 U.S.C. §§ 601-613 (2006), the contractor here disputes the validity of the default determination.

The Government has filed a motion for summary relief; the contractor has responded in opposition. The Government maintains that uncontested facts demonstrate the propriety of the termination for default. The Government points to various items of work that the contractor furnished that do not conform to requirements of the contract and the contractor's failure to provide warranties regarding aspects of the roofing system. The contractor contends, not that it provided items and assurances in accordance with the contract as signed, but that it acted in accordance with approved shop drawings, and provided approved materials that the Government has accepted. The contractor asserts that it was not obligated to provide the work and assurances now required by the Government unless it received an appropriate change order, affording it additional time and money. Having fulfilled its view of the contract requirements, and having not received such a change order, the contractor concludes that it was not in default. The contractor also opines that the determination to default was excessive, not well supported, improperly motivated, and intended to retaliate against the contractor.

The Board makes factual findings as permitted in resolving a motion for summary relief. The contract establishes the requirements and obligations of the parties. As specified in contract provisions, the Government's approval of shop drawings and intermediate inspections does not lessen the contractor's duty to provide compliant materials and services. In its submittals, the contractor did not indicate that materials or products would deviate from any contract term. The Government was entitled to obtain performance consistent with the contract. When the contractor did not satisfy its obligations (refusing to perform without a change order), the contractor was in default. The Government acted within its rights under the contract in terminating for default the contractor's ability to continue with performance. Accordingly, the Board grants the Government's motion for summary relief and denies the appeal of the contractor which challenges the termination for default.

Findings of Fact

1. On August 10, 2005, the Government awarded contract HSCG82-05-C-3WCA54. For a fixed price (with some fixed unit-pricing), this contractor agreed to selectively demolish and reconstruct a building at a United States Coast Guard Station in San Juan, Puerto Rico. The contractor agreed to perform the work required in strict accordance with the terms of the solicitation. Exhibit 4 at 1, 4, 5 (¶ 17), 8 (all exhibits are in the appeal file, unless specifically noted).

2. As specified in a submittal/shop drawings provision:

The Contracting Officer will indicate his/her approval or disapproval of the submittals/shop drawings and if not approved as submitted shall indicate

reasons thereof. Any work done prior to such approval shall be at the Contractor's risk. Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from the responsibility for complying with the requirements of this contract.

Exhibit 4 at 17 (¶ G.1).

3. A contract clause deals with the contractor submittal/Government review procedures, particularly noting in the second paragraph the limited nature of drawing approval by the contracting officer:

The Contractor shall submit to the Contracting Officer for approval five (5) copies of all shop drawings as called for under the various headings of the contract specifications. These drawings shall be complete and detailed. If approv[ed] by the Contracting Officer, each copy of the drawings will be identified as having received such approval by being stamped and dated. The Contractor shall make any corrections required by the Contracting Officer. If the Contractor considers any corrections indicated on the drawings as constituting a change to the contract drawings or specifications, notice as required under the clause entitled "Changes" will be given to the Contracting Officer. . . .

The approval of the drawings by the Contracting Officer shall not be construed as a complete check, but will indicated [sic] only that the general method of construction and detailing is satisfactory. Approval of such drawings will not relieve the Contractor of the responsibility for any error which may exist as the Contractor shall be responsible for the dimensions and design of adequate connections, details, and satisfactory construction of all work.

Exhibit 4 at 43 (Attachment J.7).

4. The Inspection and Acceptance section of the contract contains an Inspection of Construction (AUG 1996) clause, Federal Acquisition Regulation (FAR) 52.246-12, 48 CFR 52.246-12 (2005):

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to the Government. All

work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.

(c) Government inspections and tests are for the sole benefit of the Government and do not --

(1) Relieve the Contractor of responsibility for providing adequate quality control measures;

(2) Relieve the Contractor of responsibility for damage to or loss of the material before acceptance;

(3) Constitute or imply acceptance; or

(4) Affect the continuing rights of the Government after acceptance of the completed work under paragraph (i) below.

(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.

....

(f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(g) If the Contractor does not promptly replace or correct rejected work, the Government may (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor or (2) terminate for default the Contractor's right to proceed.

(h) If, before acceptance of the entire work, the Government decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or non conforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract requirements,

the Contracting Officer shall make an equitable adjustment for the additional services involved in the examination and reconstruction including, if completion of the work was thereby delayed, an extension of time.

(i) Unless otherwise specified in the contract, the Government shall accept, as promptly as practicable after completion and inspection, all work required by the contract or that portion of the work the Contracting Officer determined can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee.

Exhibit 4 at 13-14 (¶ E.1).

5. The contract contains the Payments under Fixed-Price Construction Contracts (SEP 2002) clause, FAR 52.232-5, a paragraph of which states:

(f) Title, liability and reservation of rights. All material and work covered by progress payments made shall, at the time of payment, become the sole property of the Government, but this shall not be construed as --

(1) Relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work; or

(2) Waiving the right of the Government to require the fulfillment of all of the terms of the contract.

Exhibit 4 at 17-19 (¶ G.3).

6. The contract's Disputes (JUL 2002), Alternate I (DEC 1991) clause, FAR 52.233-1, specifies:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

Exhibit 4 at 25 (¶ I.1).

7. The contract contains a Default (Fixed Price Construction) (APR 1984) clause, FAR 52.249-10. The clause states:

(a) If the contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under the clause, if--

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. . . . ; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of the delay. . . .

Exhibit 4 at 26 (¶ I.1).

8. The contract contains specifications and drawings detailing requirements and standards that products and work are to satisfy, including the requirement for the contractor to provide a warranty regarding material and labor of some products and their installation. The particulars of the requirements, detailed in the contract, Exhibits 5, 6, are not of specific importance to this decision. During the course of performance, the contractor submitted shop drawings and material approval request forms, ultimately approved by the contracting officer, sometimes with intermediate disapprovals and various comments. In its submittals, the contractor did not indicate that materials or products would deviate from any contract term, or that it did not intend to comply with the requirements of the contract, or request a change order relating to the particular items. *E.g.*, Exhibit 635.

9. The contractor requested a final inspection for September 27, 2006. By letter dated October 2, 2006, the contracting officer issued a cure notice to the contractor. The notice specifies: "Completed means all submittals, cleanup and final inspection are to have been accomplished." Further, the notice states that an inspection was performed, but that it cannot be called a "final inspection" because the inspection revealed work that is not acceptable (i.e., not done in accordance with specifications) and work that is not complete. The notice identifies various items of work that the contracting officer has concluded do not comply with contract specifications. The notice indicates that work is to be corrected without charge to the Government. Exhibit 419.

10. The contractor responded, indirectly and directly addressing the cure notice. The contractor and record do not suggest, much less demonstrate as factually plausible, that the contractor installed, in accordance with contract requirements, various items identified in the cure notice, of importance here: the roofing system, windows, flooring, doors, and door hardware. Rather, the contractor urges repeatedly that the items were installed in accordance with its Government-approved shop drawings and accepted by the Government during the course of performance as demonstrated by the progress payments made by the Government to the contractor. Exhibits 428, 439, 442 at 4, 448; Contractor's Response at 2-6, Exhibit 2.

11. In unilateral modification 18, with an effective date of December 7, 2006, the contracting officer states that the contract delivery date has lapsed.

To date, you have not satisfactorily completed the contract as required by its terms. This is to advise you that the Government is re-establishing the date for delivery of the final construction project to 12 January 2007. At that time, if you have not satisfactorily completed performance of the contract as required by its terms, the Government may pursue its right under the Default clause in the contract.

Exhibit 4 at 91.

12. By letter dated December 11, 2006, to the contracting officer, counsel for the contractor expressed concerns, particularly with references to alleged communications between the contracting officer and surety, and stated that it was impossible for the contractor to meet the new terms and demands. That letter and an email message, dated January 11, 2007, from the contractor to the contracting officer, express concerns about payment. Exhibits 578, 593. However, the only unpaid invoice referenced by the contractor in its submissions is one dated November 28, 2006, seeking payment for 100% of the contract work (all work other than asbestos abatement, a line item identified within the contract price). Contractor's Response, Exhibit 3. In resolving the motion for summary relief, it is

assumed that the Government received the invoice. By January 12, the contractor had not completed performance. Exhibit 594.

13. A company (not this contractor) provided the contracting officer a detailed cost estimate for the completion and/or correction of the omitted and non-conforming items as identified by the Government. The date of the estimate is January 22, 2007. With the inclusion of previously unpriced items, in a submission dated January 23, 2007, the cost for such work is approximately \$130,000. Exhibits 607, 608. This amount exceeds the remaining payment the contractor sought under the contract for completion (as described in Finding of Fact 12).

14. By issuance dated January 24, 2007, the contracting officer provided the contractor with a show cause notice. The notice informs the contractor that the Government is considering terminating the contract under the provisions for default, because the contractor has failed to perform the contract within the time required and has failed to cure the conditions, as described in the cure notice, endangering performance. The show cause notice identifies the items that the contractor has failed to perform in accordance with the terms of the contract. Exhibit 611.

15. In a response, dated February 1, 2007, the contractor states that the work identified in the show cause notice was completed, inspected, and approved several months earlier. The response states that correction of the identified items would require a change order to pay for additional work and materials. The response does not provide warranties for the installed roof system, although such warranties are required by the contract. Exhibit 619. On February 5, 2007, the contracting officer provided the contractor with comments regarding its response. The comments address specifically the items not conforming to contract requirements, after a general statement:

A walk through of the facility will show that the items are not completed or acceptable. This has not changed since September. I would also like to remind everyone that a final inspection was never conducted as the discrepancy list was too large and the facility was not ready. We have not taken final acceptance nor beneficial occupancy of anything in the facility. A "Cure Notice" was sent 2 October 2006, due to the inspection of 9/26/06. Nothing has changed, not even after having the meeting you requested with SBA [the Small Business Administration] in November.

Exhibit 621. The record provides no reasonable basis to dispute the inspection-based, documented conclusions regarding the items identified as not complying with contract requirements.

16. By decision dated February 26, 2007, the contracting officer terminated for default the contractor's right to proceed under the contract. The decision explains that the acts constituting the default are the contractor's refusal and failure to perform construction services within the time required by the contract and in accordance with the contract specifications. The decision notes that the Government issued a cure notice on October 2, 2006, and a show cause notice on January 24, 2007, identifying non-conformities which the contractor has refused to correct. Exhibit 2.

17. On May 23, 2007, the contractor filed the underlying notice of appeal of the contracting officer's notice of termination for default. Exhibit 1.

Discussion

The contractor maintains that the termination for default was improper. It asserts that work was performed in accordance with Government-approved submittals, and inspected and accepted by the Government, such that performance under the contract was complete and change orders required for additional work. The contractor states that the default was excessive because the contracting officer could have selected other means to obtain a completed building. Further, the contractor alleges that any non-performance regarding the roof is excused because its difficulties with its roofing contractor constitute matters beyond its control and explain its inability to provide the Government-requested warranties. The contractor seeks various forms of relief arising from what it concludes was an improper determination of the contracting officer to terminate for default.

The Government moves for summary relief. It states that undisputed facts demonstrate the validity of the termination for default of the contractor's right to proceed under the contract. In support, the Government focuses upon the incomplete performance, the contractor's failure to satisfy various requirements of the contract (non-compliant products and a lack of warranties for the roofing system), and the contractor's responses to the cure notice and order to show cause, particularly the refusal to complete performance without a change order.

With a motion for summary relief, the moving party bears the burden of establishing the absence of any genuine issue of material fact; all significant doubt over factual issues must be resolved in favor of the party opposing summary relief. At the summary relief stage, the Board may not make determinations about the credibility of potential witnesses or the weight of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). However, "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) (citations omitted). To preclude

the entry of summary relief, the non-movant must make a showing sufficient to establish the existence of every element essential to the case, and on which the non-movant has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If a motion is made and supported as required in Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denial in its pleadings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324.

The contractor installed items that do not conform to the requirements of the contract, and provided a roofing system without the warranties required by the contract. Findings 10, 15. The contract requires the contractor to proceed with performance pending resolution of any dispute. Finding 6. Failure to prosecute work subjected the contractor to a termination for default of its ability to proceed with performance. Findings 4 (¶ g), 5, 7. The Government has demonstrated that the default determination was in accordance with the contract's provisions.

In raising defenses to the default determination, the contractor reveals a misinterpretation of its duties and obligations under the contract, and fails to appreciate the limited nature of the approvals of submittals and interim inspections and interim acceptances by the Government.

The contract dictates the requirements for products and services to be provided. In the course of performance, the contractor provided submittals which do not identify any deviation from the contract terms and specifications. Approval of a submission by a contracting officer does not diminish the contractor's obligation to ultimately provide contract-compliant products and services within the time and for the price established in the contract. Findings 2 ("Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from the responsibility for complying with the requirements of this contract."), 3 ("The approval of the drawings by the Contracting Officer shall not be construed as a complete check Approval of such drawings will not relieve the Contractor of the responsibility for any error which may exist."). Similarly, regarding inspections, the contract directs that the contractor is to perform inspections to ensure that work conforms to contract requirements. Government inspections are conducted solely for the benefit of the Government, and do not constitute or imply acceptance. Moreover, the contractor shall, without charge, "replace or correct work found by the Government not to conform to contract requirements," unless the Government consents to accept the work. Finding 4 (¶¶ b, c, f). As demonstrated by the contractor's request for a final inspection and the Government's response, Findings 9, 15, the Government's interim inspections do not constitute final acceptance of the work in question. Progress payments do not indicate final acceptance of work, or relieve the contractor from complying with requirements of the contract. Finding 5.

The Government's approval of submittals and shop drawings, interim inspections, and progress payments do not constitute the Government's acceptance of non-compliant work or serve to diminish the contractor's obligation to complete performance under the terms of the contract. When the contractor installed non-compliant items under these circumstances, it was not entitled to a change order and additional money and time to provide compliant products. At the time of the default, the contractor both had failed to satisfy contract provisions and had indicated that it could not complete the project without additional money and time. The contracting officer acted reasonably, within the terms and conditions of the contract, in issuing the termination for default.

Although not raised in response to the cure notice or order to show cause, the contractor suggests that the Government's lack of payments improperly prevented the contractor from performing. The Government withheld less money than was projected as required to complete work in accordance with the contract's requirements. Finding 13. The contractor has not established a credible factual issue or a legal basis for the Board to potentially conclude that the contractor's failure to perform was caused by an improper withholding of payments due.

In seeking to invalidate the default, the contractor asserts that the Government adversely impacted the project by its failure to cooperate and its proclivity to intervene in matters involving a subcontractor. The allegations do not offer a supportable defense to the termination for default because the contractor did not comply with terms and conditions of the contract, and refused to complete performance without a change order. The contractor has not alleged facts material to the actual default, given that a contractor is liable for the unexcused defaults of its subcontractors. *General Injectables & Vaccines, Inc. v. Gates*, 527 F.3d 1375, 1377 (Fed. Cir. 2008). That is, the contractor's failure to timely provide compliant performance did not arise from unforeseeable causes beyond the control and without the fault or negligence of the contractor, as would be required to avoid the termination, Finding 7. The contractor has not provided a factual basis to look further into the contracting officer's election to issue the termination for default of the contractor's right to proceed with performance.

Given the conclusion upholding the termination for default, the Board need not address the contractor's requests for relief.

Decision

The Board **GRANTS** the Government's motion for summary relief and **DENIES** this appeal.

JOSEPH A. VERGILIO
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge