



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR SUMMARY RELIEF DENIED; RESPONDENT'S
MOTION FOR SUMMARY RELIEF GRANTED IN PART: May 19, 2016

CBCA 4079

ASHEVILLE JET CHARTER AND MANAGEMENT, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Frank G. Podesta of Bomar Law Firm, LLC, Atlanta, GA, counsel for Appellant.

John J. Hockberger, Jr., Office of the Solicitor, Department of the Interior, Boise, ID,
counsel for the Respondent.

Before Board Judges **SOMERS, SULLIVAN, and LESTER.**

SULLIVAN, Board Judge.

Asheville Jet Charter and Management, Inc. (Asheville) appeals the contracting officer's final decision terminating for cause its flight services contract with the Department of the Interior (DOI or agency). DOI terminated the contract after Asheville canceled required flight services because its key employees had resigned and then failed to provide adequate assurances to the contracting officer that it would be able to perform other flight services required under the contract. Asheville contends that the departure of its essential employees constituted a strike which compelled it to temporarily suspend its operations and that its failure to perform is excusable under the terms of its contract. On this basis,

Asheville requests that the termination for cause be converted to one for the convenience of the Government.¹ Both parties move for summary relief. For the reasons that follow, the Board grants respondent's motion in part, denies appellant's motion, and holds the matter over for further proceedings.²

Background

I. The Contract

On February 1, 2011, DOI awarded a contract to Asheville to provide on-call aircraft transportation of U.S. Fish and Wildlife Services (FWS) personnel and cargo from Honolulu, Hawaii, to the Midway Atoll National Wildlife Refuge. Appeal File, Exhibit 2.³ The contract contemplated a one-year base period and four option year periods. *Id.* at 5, 31. The contract was signed by the former owner of Asheville and the DOI contracting officer. *Id.* at 1.

Pursuant to Federal Aviation Administration (FAA) regulations regarding on-demand flight services found at 14 CFR Part 135 (2011), the contract specified several requirements with respect to flight operations. Section B2.1 of the contract required Asheville to maintain an air carrier certificate (Part 135 certificate). *Id.* at 9. In order for an air carrier to maintain its certificate, the air carrier must employ three key personnel: one pilot-in-command (PIC), one second-in-command (SIC), and one mechanic. 14 CFR 119.69(a); *see also* 14 CFR 135.99(a). Accordingly, section B9 of the contract required the contractor to furnish two

¹ Asheville seeks, in the alternative, reinstatement of its contract. We cannot entertain appellant's alternative request, as the Board is without authority to provide such a remedy. *See Packer v. Social Security Administration, et al.*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,901; *cf. Eyak Technologies, LLC v. Department of Homeland Security*, CBCA 1975, 10-2 BCA ¶ 34,538, at 170,340 ("The Board does not have jurisdiction to order specific performance or grant injunctive relief.").

² DOI also requested that the Board dismiss this appeal for failure to state a claim upon which relief can be granted. Because DOI, as part of its reply briefing and subsequent supplemental briefing, introduced evidence in support of its motion and in opposition to Asheville's motion, we treat DOI's motion as one for summary relief. *See Akal Security, Inc. v. Department of Homeland Security*, CBCA 3389, 14-1 BCA ¶ 35,532, at 174,132 (motion to dismiss is appropriate only if the "Board can decide the appeal on the pleadings without the introduction of further evidence").

³ All exhibits are found in the appeal file, unless otherwise noted.

pilots, one to fulfill the role of PIC and the other to fulfill the role of SIC. *Id.* at 13. This requirement was also found at section B19.2. Exhibit 2 at 16. Section B13 specified the requirement to provide a mechanic. *Id.* at 15. Asheville fulfilled these contract requirements with a Chief Pilot/PIC, Director of Operations/SIC, and a Director of Maintenance. Without each of these key employees, Asheville could not satisfy FAA regulations and maintain its Part 135 certificate and, therefore, could not lawfully conduct flight operations. Appellant's Statement of Uncontested Facts (ASUF) ¶ 13.

The contract incorporated the Federal Acquisition Regulation (FAR) clause Contract Terms and Conditions – Commercial Items (JUN 2010), 48 CFR 52.212-4 (2010) (FAR 52.212-4). Exhibit 2 at 20. This clause provides, in part, that a contractor's nonperformance may be excused by causes that are beyond the contractor's control:

(f) Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers.

Id. at 20.

The termination clause provides, in part, that the agency may terminate the contract in the event of default or for the contractor's failure to provide adequate assurances of future performance:

(m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to provide the Government, upon request, with adequate assurances of future performance.

Id. at 22.⁴

⁴ The contract also authorized the agency to procure replacement services in the event of the contractor's unavailability and seek the costs of those replacement services from the contractor without invoking the termination for cause provision of the contract:

C21.1 The Contractor will be considered to be unavailable when it is not in compliance with all contract requirements or when it is not capable of

II. Events Leading to Termination

By stock purchase agreement dated December 13, 2013, the former owner of Asheville sold his interest in the company to MABS, LLC (MABS). Exhibit 42. The owner of MABS signed on behalf of MABS and assumed control of Asheville. *Id.* Following the execution of the purchase agreement, a dispute arose between MABS and the former owner regarding the management of Asheville. As a result, the former owner disassociated from the company.⁵

providing service as ordered by the Government. Unavailability status will continue until the Contractor has notified the COR [contracting officer's representative] that they are available.

C21.2 During periods of Contractor unavailability, the Government may obtain replacement services elsewhere and charge the Contractor for any resulting excess costs. The Contractor may be liable for any additional actual damages to the Government resulting from such failure to perform.

Id. at 32. Neither party has addressed this clause in briefing, and the contracting officer's decision and the record on appeal are both silent as to its operation.

The Board views this clause as expanding the rights and options available to the contracting officer in the event that a contractor is unable to provide the required flight services. Rather than invoking the termination clause, the contracting officer may, but is not required to, obtain replacement services, recover the costs of those services, and allow the contractor to resume providing services when the contractor is able. This construction harmonizes the clause with the termination clause, *Corners and Edges, Inc. v. Department of Health and Human Services*, CBCA 648, 07-2 BCA ¶ 33,706, and does not limit the broad discretion granted to the contracting officer to invoke the termination clause. *Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1343 (Fed. Cir. 1999). In any event, because Asheville does not rely upon this clause as a basis for overturning its default termination, it has waived any arguments based upon it. *Cemex, S.A. v. United States*, 133 F.3d 897, 902 (Fed. Cir. 1998).

⁵ The parties dispute both when and how the former owner came to leave the company. Appellant suggests the former owner voluntarily resigned on February 25, 2014, ASUF ¶ 11, while respondent alleges the former owner's association with the company was terminated on May 1, 2014. Respondent's Statement of Genuine Issues, at 1. Because the former owner was not one of the key personnel required under the contract, as more fully discussed below, this factual dispute is not one which informs our decision.

On March 12, 2014, DOI exercised its option for the third option year of the contract. Exhibit 37. It is undisputed that Asheville provided all flight services between February 1 and June 3, 2014, as required by the contract schedule.

On the morning of June 10, 2014, the contracting officer contacted Asheville's director of operations/SIC, advising him that representatives of FWS were concerned about the status of Asheville's contract. The e-mail message stated, "John - please give me a call. [FWS] got a supposedly anonymous phone call about your company recently. [The FWS superintendent] is concerned that Asheville will be pulling out of its contractual responsibilities, or possibly that you are near the end of working with the company?" Exhibit 56. The record is silent as to what response, if any, the contracting officer received from the operations director.

In the early morning hours of June 14, 2014, the operations director forwarded his resignation to the contracting officer and to FWS:

To Whom It May Concern,

I . . . hereby resign as Director of Operations of Asheville Jet Charter and Management, Inc. as of this date, June 14, 2014 at 04:01 am EDT. I have no further authority, discretion or control over the operations of, or association with the workings of Asheville Jet Charter and Management, Inc. and or Southern Jet Management, LLC.

Exhibits 58, 59.

In an internal e-mail message later on the morning of June 14, 2014, the FWS superintendent apprised FWS personnel – with a copy to the contracting officer – of a conversation he had with Asheville's operations director:

All,

. . . In addition to [the operations director] resigning, [the chief pilot] resigned as did the Chief Mechanic. When I asked [the operations director] specifically if Asheville could fly according to our contract, he indicated he felt there was no way that was possible (especially by Tuesday [June 17]) since they no longer had appropriate pilot qualifications in the company. I feel the next step should be for [the contracting officer] to contact A[s]heville directly ASDAP [*sic*] to determine if they will be able to meet the DOI requirements and provisions of our contract to fly Tuesday. If not, they are in default and we

need to find an emergency alternative ASAP. [contracting officer] - let me know how we might be able to assist. [The operations director] indicated to me he believed the FAA would pretty rapidly descend on Asheville and their certificate would be in jeopardy.

Exhibit 60.

On June 16, 2014, the contracting officer advised FWS representatives that he had spoken briefly with the operations director and that it was his “opinion . . . that I will need to do an emergency interim contract,” as he had done when a prior contractor “repudiated [its] awarded contract.” Exhibit 62 at 1. The contracting officer then sent an e-mail message to a representative of Asheville indicating that he had learned of the resignation of three key personnel and expressed concern that Asheville would not be able to perform the flight service scheduled for the following day, June 17, and requested that she contact him “as soon as possible to discuss Asheville’s status to perform the services” required by the contract. Exhibit 65. Shortly after, the contracting officer contacted other Asheville representatives and asked that they call as soon as possible. Exhibit 68. The FWS also apprised the contracting officer of the potential effects that cancellation of the June 17 flight would have on that day’s activities. Exhibit 69.

On the morning of June 17, 2014, the contracting officer sent an email message to Asheville’s representatives regarding a scheduled discussion about Asheville’s plan to return to service. Exhibit 72. The record does not contain any evidence of the substance of this discussion. Very shortly after, the contracting officer contacted the former owner of Asheville in order to get his “point of view on what has transpired with Asheville Jet[.]” Exhibit 73. It does not appear in the record what response, if any, the contracting officer received from the former owner.

Mid-day on June 17, 2014, Asheville’s president notified the contracting officer that Asheville would be unable to perform that day’s scheduled flight, due “to recent, unexpected resignations of certain . . . individuals without professional notice considerations. . . . We will put together an action plan immediately and forward that to you later this evening.” Exhibit 76. The contracting officer, in turn, notified FWS that the scheduled flight would not occur. Exhibit 77.

On June 18, 2014, the contracting officer received Asheville’s action plan for returning to service. Exhibit 83. Regarding the chief pilot vacancy, Asheville stated that the position had been offered to and accepted by its top candidate, but the crewmember would not be available until “successful completion of his training within the next two to three weeks.” Exhibit 84. Likewise, a candidate had accepted the position of director of

operations/SIC. While that candidate was already qualified, the crewmember nevertheless required a “reduced training schedule,” and Asheville did not have a “firm date and slot to begin his training.” *Id.* Concerning the mechanic position, Asheville indicated it had interviewed several candidates and was reviewing their FAA qualifications, with the intention to “submit them for acceptance within the next ten days.” *Id.*⁶ Later that evening, the contracting officer requested that Asheville provide an estimated date that the contractor would resume flights to Midway. Exhibit 91. It does not appear from the record that Asheville ever responded to this request.

On June 19, 2014, the contracting officer again contacted Asheville’s former owner, this time seeking his opinion on whether some sort of compromise could be reached with Asheville’s new management. Exhibit 93. The former owner replied, “We have a verbal agreement that enables us to move forward. I hope to have a signed document early next week summarizing our agreement. If that comes together as planned, we’ll be able to finish out the term of our contracts[.]”⁷ Exhibit 94. The agency was also provided with a copy of the terms upon which the former key personnel would return to their positions. Exhibit 100. The following evening, however, the contracting officer – in an e-mail message addressed to the FWS superintendent with a copy to Asheville management – notified FWS that he had received word that the former owner was unable to reach a compromise with the new owners and indicated the contracting officer’s intent to initiate termination procedures. Exhibit 98.

On June 21, 2014, the new owner of Asheville contacted the contracting officer expressing his concern with DOI’s decision to terminate the contract:

You were informed of this delay with the flights and insisted on us providing you with a plan – we provided you with this action plan (see attached) and you felt that to be adequate. . . . We explained to you we would be ready in approximately 2-3 weeks with full support as before[.] [Y]ou agreed to this telephonically and now you are renegeing on your earlier decision[.] [T]his is very misleading from you and has extremely expensive consequences to our company as we have now begun flight and ground training for the replacement crews.

⁶ It is unclear from this statement whether “acceptance” of the candidate(s) was required by DOI or the FAA.

⁷ Asheville was under a separate contract with DOI to provide flight services to Palmyra Atoll, which is not at issue in this appeal.

Exhibit 99 at 1-2. Further, he refuted the former owner's assertion that a compromise had ever been reached between Asheville and those employees who had resigned. *Id.*

On June 24, 2014, the contracting officer issued a final decision terminating the contract for cause due to the fact that appellant had notified the FAA that Asheville had "voluntarily suspended flight operations due to the resignation of multiple key personnel, thereby ceasing critically necessary operations . . . for an indefinite period," and that Asheville had not provided adequate "assurances that . . . operations will resume at any time certain." Exhibit 1. In response to the termination notice, by letter dated the same day, Asheville's president explained that, while Asheville had voluntarily suspended its flight operations, it had worked "diligently" since that time to fill its management vacancies – the last being the mechanic position, for which it was "currently interviewing" and hoped to submit a candidate to the FAA for approval "in the next few days." Exhibit 115. Nevertheless, Asheville's president represented that, because of the key employees' resignations, Asheville had been required to surrender its Part 135 certificate to the FAA. *Id.* On June 25, 2014, the contracting officer issued a modification terminating the contract for cause pursuant to FAR 52.212-4(m). Exhibits 116, 117.

After the parties submitted their motions, the Board granted the agency's motion to supplement the materials in the appeal file with a declaration from an FAA employee regarding Asheville's efforts to obtain review and approval of proposed key personnel by the FAA after the contract was terminated. Respondent's Supplement to Statement of Genuine Issues, Mar. 21, 2016. According to the FAA employee, the FAA restored Asheville's Part 135 certificate briefly between July 17 and October 3, 2014. *Id.*

Discussion

I. Standard of Review and Burden of Proof

"Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based the undisputed material facts." *MLJ Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935, at 175,623. It is the moving party's burden to demonstrate the absence of genuine issues of material fact, and all justiciable inferences must be drawn in favor of the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Only those facts which might affect the outcome of a case are material, and an "issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing." *MLJ Brookside*, 15-1 BCA at 175,623 (quoting *Fred M. Lyda v. General Services Administration*, CBCA 493, 07-2 BCA ¶ 33,631, at 166,571). Where both parties have moved for summary relief, "each party's motion will be evaluated on its own

merits and all reasonable inferences will be resolved against the party whose motion is under consideration.” *Fortis Networks, Inc. v. Department of the Interior*, CBCA 4176, 15-1 BCA ¶ 36,066, at 176,123 (citing *Charleston Marine Containers, Inc. v. General Services Administration*, CBCA 1834, 10-2 BCA ¶ 34,551, at 170,398).

“The purpose of summary [relief] . . . is to avoid a useless trial where no possible version of the facts can affect the result.” *Tera Advanced Services Corp.*, GSBCA 7109-NRC, 85-2 BCA ¶ 17,941, at 89,903-04 (citing *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 891 (Fed. Cir. 1983)), *aff’d on reconsideration*, 85-3 BCA ¶ 18,219. Because summary relief is a “remedy [that] can be harsh in its finality,” a tribunal ruling on such a motion should consider the evidence contained in the entire record and relevant law. *See Yuba Goldfields*, 723 F.2d at 891 (concluding lower court’s grant of summary judgment was in error “having been determined on less than the entire record”). Moreover, it is appropriate for the tribunal to act “with caution” in granting relief, and the tribunal “may . . . deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.” *Anderson*, 477 U.S. at 255.

Regarding the burdens that each party bears, termination for default is a “drastic sanction” that should only be upheld on the basis of “solid evidence.” *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424,431 (Ct. Cl. 1969). It is therefore the Government’s burden to demonstrate the propriety of the default termination. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *MLJ Brookside*, 15-1 BCA at 175,623. The principles applicable to default terminations under the standard Default clause also apply to terminations of commercial items contracts pursuant to FAR 52.212-4(m). *See, e.g., Packer*, 16-1 BCA at 176,899; *Gargoyles, Inc.*, ASBCA 57515, 13 BCA ¶ 35,330, at 173,412. If the Government establishes a *prima facie* case that termination of the contract was proper, it is then the burden of the contractor to establish that its failure to perform is excused. *MLJ Brookside*, 15-1 BCA at 175,623.

II. Whether Asheville Was in Default

DOI seeks a ruling that the termination for default was proper because Asheville failed to perform and failed to provide adequate assurances of future performance. Respondent’s Motion to Dismiss for Failure to State a Claim or for Summary Relief at 1-3. DOI also contends that Asheville failed to provide an adequate excuse for its failure to perform. *Id.* at 5. In seeking summary relief, DOI posits that the contracting officer’s decision is sufficient to carry the agency’s burden and offers no additional proposed findings of undisputed fact. Respondent’s Statement of Uncontested Facts at 1.

It is undisputed that Asheville did not perform its scheduled flight on June 17, 2014, due to resignations of its key personnel. ASUF ¶ 30. It is further undisputed that Asheville voluntarily surrendered its Part 135 certification, a certification that Asheville acknowledges is necessary for it to provide flight services. ASUF ¶ 43. “[W]here a contractor fails to comply with contract delivery schedules the contract may be terminated, pursuant to the default clause.” *Consolidated Industries*, 195 F.3d at 1344 (quoting *Churchill Chemical Corp. v. United States*, 602 F.2d 358, 362 (Ct. Cl. 1979)). Moreover, “[i]f a contractor makes an assignment for the benefit of its creditors, inexcusably abandons performance, or removes equipment needed to perform, such actions are evidence of an anticipatory repudiation even if unaccompanied by words, because such affirmative acts by a contractor leave it unable or apparently unable to perform.” *Geo-Marine, Inc. v. General Services Administration*, GSBICA 16247, 05-2 BCA ¶ 33,048, at 163,831. Asheville’s voluntary surrender of its FAA certification left it unable to perform flight services. This action coupled with the failure to provide the scheduled flight services on June 17 permitted the contracting officer to terminate the contract for cause.

Although the Government is not required to issue a cure notice under the commercial items termination provision following a contractor’s failure to deliver supplies or services, FAR 12.403(c)(1) (2010), the contracting officer sought from Asheville its plans for resuming flight operations. The record shows that, although Asheville was proactive in developing an action plan for returning to service, this plan lacked specificity as to when Asheville would again be certified in order to resume operations. While Asheville stated that it had filled the chief pilot vacancy, the candidate would not be available until he completed future training. Likewise, though it had found a qualified candidate to assume the role of operations director, the candidate still required training, and Asheville did not have a firm date for when that training would begin. With respect to the mechanic, Asheville had not found a replacement but planned to submit for review and acceptance the potential candidate’s qualifications within ten days.

With Asheville’s ability to perform contingent upon two candidates’ successful completion of required training in order to fill the PIC and SIC positions, respectively, and the selection and approval of a third candidate to fill the mechanic position, the contracting officer (in light of Asheville’s vague estimations concerning the availability of each) reasonably could not have been certain of when the contractor would resume services. And when the contracting officer specifically requested Asheville to provide a date certain that it would resume flights to Midway, Asheville, as noted above, did not respond.

The contracting officer deemed these assurances of future performance to be inadequate, and, on this basis, properly issued a termination for cause. Where a contracting officer, “based on the events, actions, and communications, leading to the default

termination,” could not reasonably be assured of the contractor’s timely performance, a default termination may be sustained. *See Kadri International Co.*, AGBCA 2000-170-1, 04-2 BCA ¶ 32,646, at 161,542 (review of a default termination is an objective inquiry into the contracting officer’s decision to terminate based on the likelihood of untimely performance).

The DOI contracting officer properly found that Asheville was in default. Because DOI has carried its burden on this issue, we grant the agency’s motion for summary relief in part and turn to Asheville’s contention that its failure to perform should be excused.

III. Whether Asheville Has Identified a Valid Excuse

Asheville does not dispute that it failed to provide required flight services, but counters that its failure was due to the departure of its three key personnel, which constitutes a “strike” within the meaning of the excusable delay clause. Since its failure to perform is excusable, Asheville seeks to have the termination for cause converted to a termination for convenience.

“Once the Government establishes the existence of default, the burden shifts to the contractor to prove that there were excusable delays under the terms of the default provision of the contract that render the termination inappropriate.” *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,554, *appeal dismissed*, No. 15-1623 (Fed. Cir. Jan. 28, 2016). To establish excusable delay, a contractor must show, by a preponderance of the evidence, that the delay resulted from causes beyond the control and without the fault or negligence of the contractor. *Id.* (citing *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000)).

The commercial items contract terms and conditions expressly list examples of those activities that may be viewed as “beyond the reasonable control of the Contractor and without its fault or negligence,” including “acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers.” FAR 52.212-4(f). Obviously, a contractor has no control over whether it rains, whether there is a flash flood, or whether there are forest fires, and the Government cannot penalize a contractor through a default termination when a delay is caused by such uncontrollable circumstances. Asheville is relying upon the inclusion of the word “strikes” in the list of excusable delays to argue that its failure to perform on June 17 and its subsequent inability

to perform were excusable.⁸ Asheville also asserts that the employees' actions were "unforeseeable" and "entirely outside the control of Asheville," to further fit within the excusable delays clause. Appellant's Memorandum in Support of Motion for Summary Relief at 12.

Tribunals have recognized a contractor's duty to provide the labor necessary to perform its contract obligations and have been hesitant to excuse a contractor when it failed to provide that labor. In general, it is the duty of a contractor to ensure its ability to perform the contract it is awarded. *See Carnegie Steel Co. v. United States*, 240 U.S. 156, 165 (1916) ("Ability to perform a contract is of its very essence."). Consistent with this principle, our predecessor boards and the Armed Services Board of Contract Appeals have all held that it is the responsibility of the contractor to provide the necessary equipment and labor to perform. *Carolina Security Patrol*, GSBCA 5602, 81-1 BCA ¶ 15,040, at 74,418 ("A contractor is generally responsible both for obtaining and retaining a sufficient labor supply to perform the contract."); *Aero Aircraft Manufacturing Co.*, ASBCA 19356, 75-1 BCA ¶ 11,038, at 52,540 ("We conclude that it is appellant's responsibility under the contract to have the personnel and equipment necessary to enable it to perform the contract."). Thus, a contractor's inability to provide sufficient labor generally will not excuse the contractor from performance. *KSC-TRI Systems, USA, Inc.*, ASBCA 54638, 06-1 BCA ¶ 33,145, at 164,260 (2005). Moreover, the voluntary resignation of key personnel does not excuse a contractor from performance. *See Aero Aircraft Manufacturing Co.*, 75-1 BCA at 52,539. "The employment of qualified personnel to perform a contract is the contractor's responsibility and the failure to employ *or retain* the services of qualified personnel necessary to perform a contract is not beyond the control and without the fault negligence of the contractor within the meaning of the 'Default' clause." *Lome Electronics, Inc.*, ASBCA 8642 et al., 63-1 BCA ¶ 3833, at 19,102 (emphasis added).

Although tribunals "will not allow excusable delay from a labor problem other than a strike except in the most unusual circumstance as where the Government also contributed to the delay . . . or where abnormal circumstances exist which could not have been anticipated," *NTC Group, Inc.*, ASBCA 53720, et al., 04-2 BCA ¶ 32,706, at 161,810, "[a] contractor does not need the classic strike situation to invoke the excusability exception in the Default clause." *Carolina Security Patrol, Inc.*, 81-1 BCA at 74,420 (successor

⁸ The contract does not define the term "strike." Exhibit 2 at 20 (FAR 52.212-4(e)). Instead, Asheville urges the Board to be guided by case law definitions, which suggest that a strike is a cessation of work in concert with others, for the purpose of coercing the employer to accede to some demand. Appellant's Memorandum in Support of Motion for Summary Relief at 9-10 (citing cases).

contractor excused where six unionized guards of the predecessor contractor signed a petition indicating their refusal to work for the successor contractor); *see Andrews Construction Co.*, GSBCA 4364, 75-2 BCA ¶ 11,598, at 55,368 (“The fact that the job action causing the delay may possibly not be technically described as a strike does not abrogate the defense of excusability.”) (citing *Fred A. Arnold*, ASBCA 16506, 72-2 BCA ¶ 9,608). Here, appellant alleges that its three personnel left the company in an effort to effect a change during the dispute over Asheville’s management, ASUF ¶¶ 15-16, and has provided documentary evidence showing the employees’ purported demands in exchange for an agreement to return. ASUF ¶ 38. In response, the agency only notes that the record is unclear with regard to these allegations. Respondent’s Statement of Genuine Issues at 2. Moreover, the contracting officer knew of these negotiations and hoped that the employees would return to the company to enable performance to resume. Deposition of Contracting Officer at 40 (Sept. 28, 2015). Viewing these allegations most favorably to Asheville, it is conceivable that the resignations of these employees could be categorized as a “strike.” *See NTC Group*, 04-2 BCA at 161,810-11 (finding “an unanticipated and unforeseen conspiracy by the incumbent chiefs and the unusual . . . requirements” for certified evaluators to be sufficiently similar to a strike to constitute an excusable delay).⁹

“A labor strike, beyond the control of either party, may be analogized to an act of God.” *McNamara Construction of Manitoba, Ltd. v. United States*, 509 F.2d 1166, 1170 (Ct. Cl. 1975). It is clear how a nationwide labor strike or a more limited strike by a supplier’s employees would, like an act of God, be outside of the control of the contractor. *See Products Engineering Corp.*, GSBCA 3479, 72-2 BCA ¶ 9627, at 44,975 (“the delay in the shipment of the steel caused by the impending steel strike and the Longshoremen’s dock strike were factors beyond Appellant or his subcontractor’s control and; therefore, constitute an excusable delay”); *Manhattan Lighting Equipment Co.*, VACAB 417, 1961 WL 178 (July 19, 1961) (“A strike in the plant of a supplier can under some circumstances . . . constitute an excusable cause of delay.”); *George Sheaf & Co.*, ASBCA 4515, 58-1 BCA ¶ 1661, at 6203 (nationwide steel strike that began after contract award created excusable delay in performing construction project). It is less clear that a strike by a contractor’s *own* employees should fall easily into that category.

⁹ In any event, “the termination for cause clause does not limit excusable causes to strikes.” *NTC Group*, 04-2 BCA at 161,811. The clause lists examples of excusable delays and is not meant to be exhaustive. Accordingly, that a delay “may possibly not be technically described as a strike does not abrogate the defense of excusability.” *Andrews Construction Co.*, GSBCA 4364, 75-2 BCA ¶ 11,598, at 55,368.

Nevertheless, because the word “strike” is listed as one of the potential excusable delays, various tribunals (including the Court of Claims, whose reported decisions are binding on us) have allowed contractors to claim strikes of their own personnel as a delay cause for which they should be granted additional time. *See, e.g., International Electronics Corp. v. United States*, 646 F.2d 496, 509-10 (Ct. Cl. 1981); *NTC Group*, 04-2 BCA at 161,811; *Carolina Security Patrol*, 81-1 BCA at 74,420; *Diversacon Industries, Inc.*, ENG BCA 3284, et al., 76-1 BCA ¶ 11,875, at 56,899-900; *Bill Powell d/b/a Bill’s Janitor Service*, ASBCA 10345, et al., 65-2 BCA ¶ 4916, at 22,243. Yet the mere fact that there was a strike, or an employment situation comparable to a strike, does not automatically create an excusable delay. Even though FAR 52.212-4(f) specifically calls out strikes as possible causes of excusable delays, it also provides that such delays are excusable only if they are “caused by an occurrence beyond the control of the Contractor and without its fault or negligence.” FAR 52.212-4(f). “The purpose of the proviso to protect the contractor against the unexpected, and its grammatical sense both militate against holding that the listed events are always to be regarded as unforeseeable, no matter what the attendant circumstances are.” *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 123 (1943). For any type of claimed excusable delay, whether it be an act of God or a strike, the contractor must establish that it was truly unforeseeable and outside the contractor’s reasonable control:

Not every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso. The contract might be one to excavate for a building in an area where a coal mine had been on fire for years, well known to everybody, including the contractor, and where a large element of the contract price was attributable to this known difficulty. A quarantine, or freight embargo, may have been in effect for many years as a permanent policy of the controlling government. A strike may be an old and chronic one whose settlement within an early period is not expected. In any of these situations there could be no possible reason why the contractor, who of course anticipated these obstacles in his estimate of time and cost, should have his time extended because of them.

Id.; *see James Leffel & Co.*, IBCA 205, 59-2 BCA ¶ 2357, at 10,801 (“While strikes were among the enumerated causes of delay, they are not excusable *per se*, and hence it had to be shown that the strike was a factor responsible for delay.”); *Tri-State Construction Co.*, IBCA 63, 57-1 BCA 1184, at 3287 (“the m[e]re fact that strikes are among the enumerated causes of [excusable] delay does not make every strike and its consequences unforeseeable”).

Accordingly, the contractor seeking to establish that an excusable delay resulted from conditions comparable to a strike must show the following:

(1) there was in fact a strike [or a comparable situation], (2) the strike directly affected Appellant's ability to perform the contract requirements, (3) the strike was beyond Appellant's control and did not result from Appellant's fault or negligence, and (4) . . . there was no other source than the [one] affected by this strike from which Appellant could have [obtained and provided the necessary services] in accordance with the contract.

Otis Elevator Co., Material Handling Division, VACAB 1157, 76-1 BCA ¶ 11,738, at 55,995. It is the burden of the party seeking to rebut the Government's showing that the contractor was in default – here, Asheville – to establish these elements by a preponderance of the evidence. *Id.*; *Caskel Forge, Inc.*, ASBCA 6205, 61-1 BCA ¶ 2891, at 15,110.

DOI argues that Asheville's employees never formally declared a "strike" and that Asheville did not initially call its employees' actions a strike when it was attempting to preclude termination. Accordingly, it contends, the provision of the excusable delays clause addressing strikes does not apply. DOI is correct that Asheville never labeled the resignations of its key personnel as a strike prior to the filing of its appeal. But Asheville has submitted evidence showing that its key personnel resigned from the company in quick succession, which Asheville asserts gave rise to a situation comparable to a strike, and that they almost immediately began negotiations about the terms under which they might return to the company. Moreover, the contracting officer was aware of these facts at the time of the termination and made efforts to communicate with both Asheville and the former key personnel to determine if the situation could be resolved short of termination. Finally, according to the declaration of the FAA employee, Asheville did re-employ two of the three key personnel and obtain its Part 135 certificate less than a month after the contract was terminated (although it lost the certificate again two months later).

These findings, however, are not sufficient to support a determination as a matter of law that the resignations of Asheville's key personnel constituted a "strike" within the excusable delay clause. There is little evidence in the record regarding the true reasons for the resignations and whether they were, in fact, beyond Asheville's control and without Asheville's fault or negligence, and DOI has submitted evidence (including pleadings from lawsuits between Asheville and various former employees) that conflicts with Asheville's explanation. The FAR recognizes that "[l]abor disputes may cause work stoppages that delay the performance of Government contracts" and provides that "[c]ontracting officers shall impress upon contractors that each contractor shall be accountable for reasonably avoidable delays." FAR 22.101-2(b). It further provides that standard contract clauses dealing with excusable delays "do not relieve contractors . . . from the responsibility for delays that are within the contractors' . . . control." *Id.* Accordingly, "[a] delay caused by a strike that the contractor . . . could not reasonably prevent can be excused," but "it cannot be excused

beyond the point at which a reasonably diligent contractor . . . could have acted to end the strike.” *Id.*

Asheville alleges that its employees resigned in an attempt to effect a change in management. To establish that any delay resulting from negotiating a resolution to that dispute was excusable, Asheville would need to show that its own position and actions in the employment dispute were reasonable and that the work stoppage was not its fault. To the extent that these resignations occurred because Asheville, for example, had attempted to take advantage of or had taken inappropriate positions with its employees, it could not rely on the strike to excuse its performance failure. *See Building Maintenance Specialist, Inc.*, ASBCA 25552, 85-3 BCA ¶ 18,300, at 91,826 (“Appellant’s act of stopping payment on the payroll checks obviously precipitated the work stoppage,” precluding finding of excusable delay); *Diversacon Industries*, 76-1 BCA at 56,899-900 (finding no excusable delay from strike by contractor’s employees where contractor had engaged in unfair labor practices); *Kobashigawa Shokai*, ASBCA 13741, 69-2 BCA ¶ 7973, at 37,071 (strike resulting from contractor’s failure to pay its employees “was not beyond the control or without the fault of appellant, who bore the final responsibility for seeing that they were paid”). Asheville must also establish that it could not have found, through the exercise of reasonable diligence, alternate workers to perform the services required by its contract with DOI during the time of its employment dispute. *See Caskel Forge*, 61-1 BCA at 15,111 (strike “would not be an excusable cause if the contractor, by the exercise of reasonable diligence, could have obtained the necessary steel and performed the contract on time notwithstanding the steel strike”). Although Asheville has alleged that it was unable to find any qualified workers that were available immediately, the record regarding the reasonableness of its efforts to find temporary relief during the employment dispute is too sparse to allow us to grant summary relief for appellant.

Based upon the record before the Board, we deny Asheville’s motion regarding whether its employment situation created an excusable delay. Because Asheville has alleged excusable delay and supported that claim with substantive evidence, we also deny DOI’s motion for summary relief that the situation cannot constitute a strike within the meaning of the excusable delay clause. We will conduct further proceedings to allow the parties to present further evidence on this matter.

Decision

For the reasons discussed above, respondent's motion for summary relief is granted in part, and appellant's motion is denied. The Board will conduct further proceedings consistent with this decision.

MARIAN E. SULLIVAN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

HAROLD D. LESTER, JR.
Board Judge