



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 19, 2013

CBCA 2899

PAYNE ENTERPRISES,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Donald E. Payne, Owner of Payne Enterprises, Kane, PA, appearing for Appellant.

Vincent Vukelich, Office of the General Counsel, Department of Agriculture, Milwaukee, WI, counsel for Respondent.

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

GOODMAN, Board Judge.

Appellant, Payne Enterprises, has appealed a decision of a contracting officer of respondent, Department of Agriculture. Respondent has filed a motion to dismiss the appeal for failure to state a claim or in the alternative for summary relief. We grant the motion for summary relief, as we find no issues of material facts in dispute and respondent is entitled to relief as a matter of law.

Background

Appellant was awarded the Sheriff West Timber Sale contract (the contract) on June 1, 2001. Appellant completed 92% of the contract, but it was not able to complete the remainder. Appellant and respondent agree that appellant's failure to complete the contract

was caused by declining prices for the timber associated with the contract, overall economic decline, and a precipitous drop in housing starts and housing remodeling resulting in a downward spiral of demand for hardwood lumber.

Respondent's contracting officer issued a decision (the decision) dated June 4, 2012. In the decision, the contracting officer determined that, pursuant to two contractual provisions, appellant owed the Government a total amount of \$283,708.79 for failure to complete the contract by the termination date. The decision assessed and calculated \$216,086.75 in damages pursuant to special provision CT9.4, "Failure to Cut." Appellant also made late payment of a required additional periodic payment. Pursuant to special provision CT4.4, "Payments Not Received," the decision calculated an additional charge to appellant in the amount of \$68,550.86. A credit due appellant reduced the damages by \$928.82.

Appellant appealed the contracting officer's decision on July 12, 2012. A complaint and answer were filed. In its pleadings, appellant has requested that the Board waive appellant's contractual obligation to pay damages.

In response to respondent's motion, appellant states:

The Appellant respectfully requests that the Board take into consideration the Appellant's history of diligent performance under contracts and good faith in its dealings with the Government over a period of many years and recognize that the Appellant was the victim of economic forces beyond its control which prevented it from fully performing under the contract, despite its best efforts. The extraordinary economic forces that disrupted Appellant's business have caused widespread and world-wide economic disruption. The Government of the United States of America, acting through its various agencies, has responded to the economic crisis in part by providing assistance to numerous other private business enterprises. Simply stated, the Appellant merely requests some consideration be given by the Board to exercise in its discretion in a manner that would take these matters into consideration.

Discussion

Respondent's motion is submitted as a motion to dismiss for failure to state a claim upon which relief can be granted or in the alternative as a motion for summary relief. In general, a case can only be dismissed for failure to state a claim upon which relief can be granted when that conclusion can be reached by looking solely upon the pleadings. *Tomas Olivas Ibarra v. Department of Homeland Security*, CBCA 1986, 10-2 BCA ¶ 34,573. The

parties refer to materials outside the pleadings in their respective filings, so we consider this motion as a motion for summary relief. *A to Z Wholesale v. Department of Homeland Security*, CBCA 2110, 11-1 BCA ¶ 34,674; *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 282-ISDA, 09-2 BCA ¶ 34,279.

Summary relief is appropriate only where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. Any doubt on whether summary relief is appropriate is to be resolved against the moving party. The moving party shoulders the burden of proving that no genuine issue of material fact exists. *Patrick C. Sullivan v. General Services Administration*, CBCA 936, 08-1 BCA ¶ 33,820.

Respondent does not dispute appellant's allegations that the Government has received economic benefit from appellant's performance of other contracts. Respondent also acknowledges that appellant made extraordinary efforts to complete the contract.

In addition, respondent emphasizes the cooperation by the Government to assist appellant, and that appellant was given several contract term adjustments to allow it to continue to perform and complete the contract. In 2009, the contracting officer executed an agreement to modify the contract, which resulted in an emergency rate re-determination that reduced the original contract rates by \$978,567.07. Appellant was given additional time to complete contractual work on December 10, 2009; January 25, 2010; June 11, 2010; and August 3, 2010. Respondent states that unfortunately, despite the extraordinary efforts of appellant in attempting to complete the timber harvest on the contract, ultimately those efforts fell short.

Respondent notes that the contracting officer worked with appellant to attempt to alleviate, within the terms of the contract, the increasingly difficult financial situation appellant was in because of falling timber prices. Even so, respondent asserts that the economic conditions that prevailed do not relieve appellant from its contractual obligations and liability for failure to complete the contract.

We find that the contractual provisions relied upon by respondent, as detailed in the contracting officer's decision, entitle the Government to the damages assessed. There are no contractual provisions that would relieve appellant of its obligations to pay the damages assessed. This Board does not have authority or discretion to relieve appellant from its contractual liability.

There are no issues of material fact in dispute and respondent is entitled to relief as a matter of law.

Decision

Respondent's motion for summary relief is granted. The appeal is **DENIED**. Appellant is liable for the damages assessed by respondent in the contractor officer's decision.

ALLAN H. GOODMAN
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

CANDIDA S. STEEL
Board Judge