



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 4, 2021

CBCA 6265, 6273, 6274, 6275, 6276, 6277, 6278,
6280, 6281, 6282, 6283, 6288, 6342, 6343, 6344

CARMAZZI GLOBAL SOLUTIONS, INC.,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Timothy J. Turner, Jonathan D. Perrone, Joseph Whitcomb, and David Tscheschke of Whitcomb, Selinsky, P.C., Denver, CO, counsel for Appellant.

Dorothy M. Guy, Brandon Dell’Aglia, Tal Kedem, and Alice M. Somers, Office of the General Counsel, Social Security Administration, Baltimore, MD, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **LESTER**, and **VERGILIO**.

VERGILIO, Board Judge.

These fifteen cases involve contracts and task orders between Carmazzi Global Solutions, Inc. (contractor) and the respondent, the Social Security Administration (agency), that the agency terminated for cause. The contractor challenges the terminations. In a different set of three parallel, representative cases, the Board granted an agency motion for summary judgment and denied those appeals, concluding that the record demonstrated that the agency justified each termination for cause and the contractor failed to provide potential facts to support its contention that its failures to perform were excused under the contracts. *Carmazzi Global Solutions, Inc. v. Social Security Administration*, CBCA 6264, et al., 20-1

BCA ¶ 37,670. The agency moves for summary judgment in these cases. In opposing the motion, the contractor acknowledges that it failed to perform but maintains that summary judgment is inappropriate.

The background enumerates material facts not in dispute, with the contractor acknowledging its failures to perform. The contractor has not presented credible support for its assertion that its failures to perform were excusable under each contract. Mere allegations are insufficient. Although the contractor misrepresents actions and occurrences during these appeals at the Board, that constitutes but an aside to its failure to meet its burden of proof at this stage. Further discovery is not warranted for the contractor to identify information that it must possess to support its basic theories of relief; the contractor has not marshaled the facts and law to avoid summary judgment. The Board grants the motion by the agency, denies these appeals, and upholds the terminations for cause.

Background

The agency awarded multiple commercial item contracts and issued task orders thereunder to the contractor to provide court reporters at disability appeal hearings before administrative law judges. At issue here are fifteen contracts and related task orders for various cities or areas. After a transition period under each contract, the contractor was obligated to provide 100% coverage for hearings and provide assurances ahead of each hearing that a reporter would be present. The contractor failed to provide reporters under each of the fifteen contracts, before, during, and after the agency had identified actual deficiencies and issued notices to cure and to show cause. The agency found the contractor in default of each contract and task order. The contractor does not dispute these basic facts.

The contracts contained a Termination for Cause clause, 48 CFR 52.212-4(m) (2018), that permitted the agency to terminate each contract or task order if the contractor was in default:

(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 comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

The contracts' definition of "excusable delays" provided an exception to such a termination: "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" 48 CFR 52.212-4(f). The agency justified each termination for cause. The contractor, however, maintains that under each contract its failure to perform should be deemed excused.

After the transition period, the contractor did not affirm coverage or provide 100% coverage under these contracts and task orders, before or after receiving notices of deficiencies, cure notices, and notices to show cause. In its responses to the cure notices, the contractor proposed numerous actions, including holding a joint meeting between executives of each contracting party to identify problems; identifying and agreeing upon which of the various contracts would be subject to 100% compliance; holding a series of meetings and conference calls to address progress, status, any new/old issues, and milestones; requiring the agency to provide advance payment with negotiated repayment terms; allowing the contractor six months to reach 100% compliance (with interim goals of 80% compliance in four months and 90% compliance in five months); requiring the agency to pay invoices within fifteen days of submission and establishing a formal invoice certification policy; requiring the agency to provide security and suitability clearances within four weeks of receipt of submissions; and committing to weekly status reporting and calls. The contractor did not identify excusable delays. Instead, the contractor sought to place extra-contractual demands upon the agency but did not commit to providing the coverage as required under the contracts. Asking for extra-contractual concessions by the agency was not in keeping with the terms and conditions of the contracts. The agency found performance unacceptable and assurances inadequate; the agency terminated for cause each of these contracts because of contractor default. The undisputed facts in the record support the agency's conclusions and determinations.

The contractor has not identified facts to support its legal theory that its failure to perform any or all of the contracts was excusable. In the discussion, the opinion addresses some of the excuses and contractor characterizations and often mischaracterizations of the agency's positions and the underlying facts. Nothing raised by the contractor provides a basis to find an excusable delay; that is, a probative basis to alter the terminations is lacking.

Discussion

The Board applies the standards for summary judgment, as are undisputed and spelled out in Board Rule 8(f) (48 CFR 6101.8(f) (2020)). *Meridian Global Consulting, LLC v. Department of Homeland Security*, CBCA 6906, 21-1 BCA ¶ 37,875 (a party opposing a motion cannot avoid summary judgment by relying on mere allegations without evidence and must set forth specific evidence showing that there is a genuine issue of material fact);

Microtechnologies LLC v. Department of Justice, CBCA 6772, 21-1 BCA ¶ 37,830 (“Appellant fails in its burden of proof, as it rests on allegations that do not offer specific facts evidencing entitlement to recover the costs at issue or showing genuine issues of fact.”); *Carmazzi*; see *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991) (a claimant must “produce specific evidence” for the claim elements when opposing summary judgment).

The contractor states in opposing the agency’s motion, while failing to acknowledge that disputes involving three contracts have been resolved in favor of the agency and are not here at issue,

It is undisputed that [the contractor] was not able to cover 100% of the hearing dockets under the 18 contracts. Rather the heart of this dispute is whether the Agency, through a litany of failures stemming from miscommunications, lack of communication, bureaucratic delay, and even outright hostility to [the contractor], prevented [the contractor] from meeting its obligations under the 18 contracts.

Contractor’s Response at 2.

The contractor identifies and discusses what it deems to be eight genuine issues of material fact that preclude the granting of the agency’s motion for summary judgment. The fault with this analysis by the contractor is that it fails to appreciate that, having acknowledged that it failed to perform under these contracts and task orders, the burden shifts to the contractor to demonstrate that its failure was excused under the contracts. *Asheville Jet Charter & Management, Inc. v. Department of the Interior*, CBCA 4079, 16-1 BCA ¶ 36,373 (“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.” (citing *MLJ Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935)). As noted in the earlier *Carmazzi* opinion denying the claims and upholding the terminations, “[T]he contractor has not identified any disputed fact, or provided proposed facts and associated legal theories, with record support, that could excuse its non-performances. The record, viewed for purposes of resolving the motion for summary judgment, establishes no excusable delay.”

The agency has met its burden of proof

The contractor’s failure to meet requirements under each contract and task order justified the terminations for cause. The burden shifts to the contractor to demonstrate that excusable delays relieve it of liability under each contract.

The contractor has not met its burden to avoid summary judgment

In particular, in its motion, the agency focuses upon the shortfalls of the contractor in these proceedings, which the contractor has not corrected. “[W]hile [the contractor] has had ample opportunity to argue that different questions of law or substantively different facts apply in these appeals [compared to the already denied three appeals], at no time has it done so and, in fact, its positions have taken the opposite stance.” Agency’s Motion for Summary Judgment at 8. The contractor has not met its burden to come forward with a legal theory and plausible evidence to excuse its performance under each contract. While the contractor contends that the agency made different demands of the contractor for the various contracts and task orders, the contracts do not dictate that the agency act consistently with its requirements for payment. The contractor has failed to identify an agency action or inaction that violates a term or condition of a contract or task order. The contractor’s other bases for defeating summary judgment are not material but are briefly discussed.

The contractor has not identified facts for each contract that would permit the Board to conclude that its failure to perform was excused under each or any of the contracts. The contractor always was represented by counsel in these cases, and the three earlier-denied appeals, specifically during depositions and other discovery. The contractor had the opportunity to pursue its broad theories factually and legally. In response to the motion for summary judgment, the contractor states, “Even the one-sided and underdeveloped record presented to the Board in the [motion] reveals no fewer than eight substantial and triable factual disputes which must be resolved.” This opinion addresses each of these items.

First, the contractor asserts that agency personnel at the local hearing offices held the contractor to different invoicing standards, thereby causing significant delays in payment through no fault of the contractor. Assuming the statement is true that personnel at different offices had different invoicing standards, the argument fails because the contracts did not require every office to employ the same standard. The contractor has not suggested with record support that any agency action was contrary to the terms and conditions of the contract.

Second, the contractor maintains that current and former holders of blanket purchase agreements (BPAs) to perform court reporting services for the agency exerted significant market pressure on the contractor to demand compensation higher than the rates at which the contractor was to be paid under these fifteen and the other three contracts. Again, the contractor chose its pricing and has not identified a basis to avoid the termination of each contract.

Third, the contractor contends that the BPA holders held considerable bargaining power over it, and the pressure they exerted on the contractor for higher pay and other demands was largely fueled by the lengthy and bureaucratic suitability and security vetting process that resulted in a bottleneck of hearing recorder recruits who were not allowed to attend and record hearings. Again, specifics of violations by the agency or unforeseeability or lack of contractor culpability are missing from the broad assertions.

Fourth, the contractor asserts that the BPA holders exerted substantial market pressure that adversely affected the contractor's ability to perform and that the situation was further exacerbated by the agency's decisions to keep extending BPAs beyond the date(s) originally agreed upon when the contractor entered into the eighteen contracts. The current and former BPA holders would simply "hold-out" for higher wages or work for the agency directly under their old BPA agreements. Again, in light of the contractor's inability to guarantee coverage for hearings, the assertions, which lack factual underpinnings and specifics, do not serve to excuse the contractor's lack of performance and lack of providing a remedy to the situation to ensure that it would perform in the future.

Fifth, is the contractor's pronouncement that many current and former BPA holders worked in concert to dissuade new court reporter recruits from working for the contractor. Once again, the contractor's decision to reduce pricing without an understanding of the market does not create a basis of excusability to void the terminations.

Sixth, with broad contentions, lacking in specifics of contracts, timing, and individuals, the suggestion that certain agency personnel, perhaps including local hearing office directors and administrative law judges, did not welcome the new court reporting recruits that the contractor managed to push through the lengthy suitability and security process, is no more than hyperbole without a basis to avoid summary judgment.

Seventh, the contractor states that the agency was not transparent on what the current court reporters were being paid under the BPAs at the time the contractor entered into the eighteen (these fifteen and the three in the earlier appeals) contracts. Again, this provides no basis for excusable delays to void the terminations. That the contractor knowingly priced each contract without the information of then current rates does not assist the contractor in its position in these appeals.

Eighth, the contractor brings to light that the agency often provided far fewer hearings than it originally estimated in the contracts. Whether true or not, the contractor was unable to provide reporters for the hearings scheduled or assure performance in the future. Fewer hearings would make the contractor's task easier, not more difficult.

Even though not material to these cases, the contractor bemoans its prior representation, although it has not demonstrated any impropriety by earlier counsel. The facts do not support its assertions that while in bankruptcy, the contractor lacked legal counsel in all of these cases; the contractor was represented by counsel, even if after the fact, the contractor takes issue with actions and inactions of counsel. Such can happen, intentionally or not, while in bankruptcy. What is determinative here to explain why the contractor does not defeat the motion is simply put—the contractor still has not put forward facts to support its theories of relief. It misinterprets the contract and has not demonstrated that discovery is necessary, given that underlying facts are within its control which it must put forward at this stage. The Board grants the motion of the agency and denies these appeals. The Board upholds the terminations for cause.

One last suggestion by the contractor is that the Board may defer its ruling on the motion until the contractor has a full and fair opportunity to complete its written discovery and take deposition testimony from agency personnel and its organizational representative. By failing to come forward with factual and legal bases to support its claims, when the basics would be in the possession of the contractor, either outright or as a result of the other three appeals, the contractor has shown no need for discovery or a delay in the resolution of the motion.

Decision

The Board grants the agency's motion for summary judgment and **DENIES** the appeals. The terminations for cause are valid.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge