



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 18, 2007

CBCA 464

BUSINESS MANAGEMENT RESEARCH ASSOCIATES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

John C. Lynch, President of Business Management Research Associates, Inc.,
Fairfax, VA, appearing for Appellant.

Michael D. Tully, Office of Regional Counsel, General Services Administration,
Atlanta, GA, counsel for Respondent.

Before the Full Board.

PER CURIAM.

The Civilian Board of Contract Appeals was established on January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3391. The Board hears and decides contract disputes involving executive agencies other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority.

The Board has jurisdiction over matters which were previously heard and decided by the boards of contract appeals of the Departments of Agriculture, Energy, Housing and Urban Development, Interior, Labor, Transportation, and Veterans Affairs, and the General Services Administration. The full board considers the case now before it, the first Contract Disputes Act appeal we decide, for the purpose of determining what case law, if any, may appropriately serve as established precedent. As with our predecessor boards of contract appeals, the holdings of the Court of Appeals for the Federal Circuit are binding on us, of course. In addition, we hold that the holdings of our predecessor boards shall be binding as precedent in this Board.

In this case, appellant challenges the agency's decision to terminate for cause appellant's performance of part of a contract. The parties agreed to submit the appeal for a decision based upon the written record. Because the evidence establishes the agency's decision was justified, we deny the appeal.

Findings of Fact

On November 29, 2005, the General Services Administration (GSA) issued a solicitation with the stated purpose of awarding delivery orders under a Federal Supply Schedule commercial item contract (the contract) to provide training services. The solicitation contained an attachment which listed the training courses and divided them into several lots. For each lot, the attachment showed the title of each course contained in the lot and the dates and locations for each course. The solicitation said GSA expected to issue one delivery order for each lot of courses. The solicitation explained that GSA would advertise the courses and manage the registration process. Exhibits 2, 47, 100.¹

On January 10, 2006, Business Management Research Associates, Inc. (BMRA) submitted a proposal in response to the solicitation. BMRA identified the project manager as its vice president, Mary Ackerman, who had "full authority to act for BMRA in executing contract commitments." BMRA said it had a faculty of forty instructors available to teach the courses. Exhibits 7 at 4, 100. After this appeal was filed, BMRA's president explained that BMRA's standard practice is to engage instructors on a course-by-course basis as either independent contractors or part-time employees. Exhibit 101.

GSA evaluated BMRA's proposal and on February 17, GSA asked BMRA to clarify a few items. This same date, GSA provided BMRA with a revised solicitation attachment, which listed the dates and locations for each course. The revised attachment showed that

¹ All exhibits are contained in the appeal file.

courses in intermediate contract pricing would be taught in Chicago, Illinois, and in Washington, D.C., from June 19 through June 30, 2006. Exhibit 9. When BMRA provided the clarifications requested by GSA, it also provided revised pricing which included the intermediate contract pricing courses. Exhibit 10.

On March 7, GSA issued a delivery order to BMRA under the contract for several courses, including the intermediate contract pricing courses to be held in Chicago and Washington, D.C. Exhibits 11, 100.

On June 7, Ms. Ackerman told GSA that it had been a challenge to bring on board enough instructors to teach the intermediate contract pricing courses. She said BMRA had exhausted potential sources for instructors, and had been unable to find anyone to teach the courses scheduled for Chicago and Washington, D.C., partially due to vacations, illness, and overlapping courses. BMRA suggested either rescheduling the two courses or consolidating them with other intermediate contract pricing courses. Exhibits 26, 100. On June 8, in response to a question from GSA, Ms. Ackerman said BMRA definitely could not confirm or secure an instructor for the two courses. Exhibits 27, 100. She reiterated this position on June 14. Exhibit 30.

BMRA did not provide the two training courses scheduled for Chicago and Washington, D.C., in June. Exhibit 100. The contract contained a clause (48 CFR 52.212-4 (May 1999)) which allowed GSA to terminate all or part of the contract for cause if BMRA defaulted on its contractual obligations, failed to comply with any contract terms and conditions, or failed to provide GSA, upon request, with adequate assurance of future performance. The contract also provided that BMRA would not be in default if its nonperformance was caused by an occurrence beyond its reasonable control and without its fault or negligence, such as acts of God, the public enemy, or the Government, or fires, floods, epidemics, quarantines, strikes, unusually severe weather, or delays of common carriers. Exhibit 47.

On July 10, the GSA contracting officer issued a unilateral contract modification which terminated for cause BMRA's performance of the two training courses which BMRA should have conducted in Chicago and Washington, D.C., in June. Exhibits 40, 100.

BMRA appealed the contracting officer's decision to the Board on July 20. Exhibits 41, 42. The basis for BMRA's appeal was that GSA had not followed the proper procedure when it terminated BMRA's performance of the two training courses. Specifically, BMRA contended that GSA was required to send a cure notice before terminating part of the contract for cause. BMRA explained it had been unable to provide instructors for the two courses because many of its instructors had other commitments during June, and because

two of its instructors had fallen ill. Despite its best efforts, BMRA says, it could not obtain the instructors it needed. Exhibit 42. On August 7, BMRA designated its July 20 appeal submission as its complaint. Letter from John Lynch to the Board of Contract Appeals (Aug. 7, 2006).

On August 2, BMRA wrote to GSA about the two courses which were supposed to have been conducted in June. BMRA said it believed the termination of its performance for the two courses was “nugatory” and that it remained under contract to provide the courses at some future time. Exhibits 45, 100.

Discussion

The question presented by this appeal is whether GSA properly terminated BMRA’s performance of part of the contract for cause.² A termination for cause is the equivalent of a termination for default, so we apply the same legal standards to both types of cases. *Geo-Marine, Inc. v. General Services Administration*, GSBCA 16247, 05-2 BCA ¶ 33,048. A termination for cause is a drastic sanction and should only be undertaken upon good grounds and solid evidence. GSA bears the burden of proving by a preponderance of the evidence that the termination for cause was proper. If GSA establishes a *prima facie* case that its termination was proper, the burden shifts to BMRA to rebut GSA’s case. *Integrated Systems Group, Inc v. Social Security Administration*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848.

The contract permitted GSA to terminate all or part of the contract for cause if BMRA defaulted on its contractual obligations or if it failed to comply with any contract terms and conditions, and GSA had a right to demand strict compliance with the schedule established in the contract. *National Printing and Copying*, VABCA 7211, 06-1 BCA ¶ 33,183; *Sierra Tahoe Manufacturing, Inc. v. General Services Administration*, GSBCA 12679, 94-2 BCA ¶ 26,771. The contract required BMRA to conduct two training courses, one in Chicago and one in Washington, D.C., from June 19 through 30, 2006. BMRA failed to conduct the two courses. This evidence establishes a *prima facie* case that GSA’s

² GSA asked the Board to strike paragraph 10 of Exhibit 101 to the extent it was meant to support a claim for money damages. GSA correctly asserted that we lack jurisdiction to consider a monetary claim because BMRA has presented no such claim to the contracting officer. 41 U.S.C. § 607 (2000). In its response to GSA’s motion, BMRA explained that it makes no claim for money damages and did not intend to use the paragraph in support of such a claim. Because BMRA makes no monetary claim, there is no need to strike the paragraph.

termination action was justified, which means the burden shifts to BMRA to come forward with sufficient evidence to rebut GSA's case.

BMRA challenges the termination for cause because GSA did not provide BMRA with a cure notice prior to terminating BMRA's performance of the two training courses. The regulations governing commercial item contracts require GSA to send a cure notice before terminating for any reason other than late delivery. In the event of a late delivery, no cure notice is required. 48 CFR 12.403(c) (2005). BMRA did not timely deliver the training services it was contractually obligated to provide between June 19 and 30, 2006. According to the regulations governing the contract between the parties, because BMRA failed to deliver its services on time, GSA was not obligated to provide BMRA with a cure notice. Thus, a cure notice was not a legal prerequisite to the partial termination of BMRA's performance of the contract.

GSA asks the Board not to consider the remaining arguments raised by BMRA because, says GSA, it did not realize until it received BMRA's opening brief that BMRA intended to make any argument other than the one related to the lack of a cure notice.³ GSA initially suggested it had been somewhat prejudiced by not realizing BMRA intended to make any additional arguments. However, BMRA's additional arguments are based upon facts known to GSA when it terminated part of BMRA's performance and GSA had no difficulty addressing the arguments in its reply brief. Because the new theories of relief are based upon facts known to GSA and because GSA will not be prejudiced if we consider BMRA's additional arguments, we proceed to do so.

BMRA contends the termination for cause was not valid because GSA used a contract modification to effect the termination. BMRA says the modification did not effect a termination because BMRA never agreed to any such modification. Not all contract modifications, however, must be agreed to by both parties. Some modifications, such as the one GSA issued here, are unilateral. That is, they are signed only by the contracting officer. According to the regulations governing unilateral contract modifications, such modifications can be used to issue termination notices. 48 CFR 43.103(b)(4). GSA's issuance of a unilateral contract modification was an acceptable method for notifying BMRA of the partial termination of its performance and does not render the termination invalid.

³ BMRA asked to include its opening brief as Exhibit 105. This is not appropriate because although the brief is part of the record, it is not part of the evidentiary record. The parties should remove Exhibit 105 from the appeal file and the Board will do the same.

BMRA says GSA should not have terminated its performance of part of the contract because, it says, its nonperformance was caused by its inability to secure instructors, which was an occurrence beyond its reasonable control and without its fault or negligence. BMRA says it diligently sought instructors, but found none who were available. A contractor is responsible for providing the labor needed in order to perform a contract, and its failure to do so is not an occurrence beyond its reasonable control and without its fault or negligence except in the most unusual circumstances, such as where the Government contributes to the unavailability of the labor or where abnormal circumstances exist which could not have been anticipated. *KSC-TRI Systems, USA, Inc.*, ASBCA 54639, 06-1 BCA ¶ 33,145 (2005). There is no evidence to suggest the Government contributed to the unavailability of instructors for the two courses BMRA was supposed to teach. In addition, there is no evidence to establish that BMRA's inability to secure the necessary instructors was due to abnormal circumstances. BMRA entered into the contract without ensuring that it had instructors available for two lengthy courses scheduled for June 19 through 30. It is not an abnormal occurrence that many people take vacations during the summer months, and it should have been foreseeable that it might be difficult to obtain instructors for the courses scheduled in June. Neither was it unforeseeable that course schedules overlapped, because the schedules were known to BMRA when it entered into the contract. The circumstances BMRA encountered were "general difficulties in obtaining the required labor," for which the contractor is held responsible. *Robert McMullan & Son, Inc.*, ASBCA 11998, 68-1 BCA ¶ 7068.

Finally, BMRA says the termination for cause was an abuse of discretion because when the contracting officer decided to terminate BMRA's performance of the two courses, she considered facts not directly related to BMRA's failure to teach the two courses. BMRA also says it could have taught the courses on dates other than those set out in the contract, and it complains because GSA never responded to its suggestions that GSA reschedule the courses. GSA's lack of response, says BMRA, misled BMRA into thinking GSA would schedule the courses at some later date. BMRA's arguments do not convince us the termination was unjustified. The contracting officer might have considered a great many facts when deciding whether to terminate, in part, BMRA's right to perform. Whatever else she considered, however she certainly considered BMRA's failure to teach the two courses in June, and this fact alone justifies the termination decision. As for rescheduling the courses, the contract set out the dates when the training courses would be held and did not obligate GSA to reschedule the courses at BMRA's convenience. In addition, GSA's lack of response to BMRA's suggestions about rescheduling could not have led BMRA to conclude reasonably that GSA would reschedule the courses. If anything, the reasonable conclusion to draw from GSA's silence was that it was not interested in BMRA's suggestion.

GSA has established that its decision to terminate BMRA's performance of part of the contract was justified. BMRA has not established that GSA's termination action was procedurally defective or an abuse of discretion, or that its inability to perform was due to an occurrence beyond its reasonable control and without its fault or negligence.

Decision

The appeal is **DENIED**.