UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 1, 2010

CBCA 1696

C-SHORE INTERNATIONAL, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Jacques Isaac, Executive Director of C-Shore International, Inc., Mojave, CA, appearing for Appellant.

David W. Schaaf, Office of the General Counsel, Department of Agriculture, Kansas City, MO, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **STEEL**.

DANIELS, Board Judge.

A Department of Agriculture contracting officer terminated for default a contract the agency had entered into with C-Shore International, Inc. (C-Shore) for the supply of milled rice. Another agency contracting officer decided that the contractor owed to the agency amounts representing liquidated damages and excess reprocurement costs. C-Shore appealed the contracting officer's decision.

The agency has filed two motions, one for summary relief and another to dismiss a "cross-complaint" filed by C-Shore. We grant both motions. The contracting officer's decision was justified, and we lack jurisdiction to consider the "cross-complaint."

Background

Hurricane Katrina made landfall on the Gulf Coast on August 29, 2005, and dissipated over the eastern Great Lakes on August 31, 2005. Hurricane Rita made landfall on the Gulf Coast on September 24, 2005, and dissipated over southeastern Illinois on September 26, 2005. Respondent's Statement of Uncontested Facts (RSUF) ¶¶ 15-16.

On October 4, 2005, the agency's Kansas City Commodity Office (KCCO) issued a solicitation for bids from "8(a) firms"[1] to supply eight hundred metric tons of milled rice. Bids were due by October 18, 2005. Appeal File, Exhibit 2 at 8-10. At that time, C-Shore was certified as an 8(a) firm by the Small Business Administration (SBA). RSUF ¶ 3.

The solicitation was subject to the terms and conditions of KCCO's Master Solicitation for Commodity Procurements. Appeal File, Exhibit 2 at 12. The Master Solicitation included three provisions which pertain to this case.

The first, incorporated by reference, is the clause published at 48 CFR 52.249-8 (2005), "Default (Fixed-Price Supply and Service) (Apr 1984)." This clause provides that the Government may terminate the contract if the contractor fails to deliver the supplies within the time specified in the contract. If the Government terminates the contract under this authority, "it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies . . . similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies." The Government must afford the contractor at least ten days after receipt of a notice to cure the failure to perform. And it may not terminate the contract for default if the failure was beyond the control of the contractor and its subcontractor and without the fault or negligence of either. One example of this sort of situation is an act of God. Appeal File, Exhibit 2 at 43.

The second provision which is pertinent here is entitled "Time is of the Essence." This clause provides that "[p]erformance shall be strictly in accordance with the applicable

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[1] An "8(a) firm" is a "firm certified by the Small Business Administration in accordance with the Federal Acquisition Regulation (FAR), Part 19." Appeal File, Exhibit 2 at 8. Under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2006), and as referenced in FAR Subpart 19.8, 48 CFR 19.800-.812 (2005), the Small Business Administration administers a business development (BD) program in which "socially and economically disadvantaged small business concerns" may participate. "The purpose of the 8(a) BD program is to assist eligible small disadvantaged business concerns [to] compete in the American economy through business development." 13 CFR 124.1.

quantities and schedules set forth in this contract." The contractor is obligated to inform the Government whenever it will deliver supplies later than required, and additional costs occasioned by delay "shall be borne by the contractor. If the contractor is unable to meet the required performance schedules for any reason, other than a change directed by the Government, the Government shall have the option to cancel this contract, or fill such contract or any portion thereof, from sources other than the contractor." Appeal File, Exhibit 2 at 35-36.

The third provision is entitled "Liquidated Damages." It states that as to contracts for the supply of milled rice, "[i]f the contractor fails to ship/deliver the supplies . . . within the time specified in this contract, the contractor shall, in place of actual damages, pay to the Government liquidated damages" of ten cents per hundredweight per day for not to exceed forty-five days of delay. Further, if the Government terminates such a contract for default, "the Contractor is liable for liquidated damages accruing until the Government reasonably obtains shipment/delivery or performance of similar supplies or services. These liquidated damages are in addition to excess costs of repurchase under the Termination clause." Liquidated damages cannot be assessed, according to this provision, if the delay in delivery was beyond the control and without the fault or negligence of the contractor, as defined in the Default (Fixed-Price Supply and Service) clause. Appeal File, Exhibit 2 at 39-40.

On October 18, 2005, the agency awarded to C-Shore a contract to supply 280 metric tons of milled rice at a price of $317.09 per metric ton. Appeal File, Exhibit 2 at 74-75.

After having been awarded this contract, C-Shore told an agency contracting officer for this procurement that it would use Texana Rice as its supplier of milled rice for the contract. Declaration of Robert W. Buxton (undated, but filed on Dec. 22, 2009) ¶ 5. The agency did not evaluate or approve Texana Rice as a supplier of the rice. *Id.* ¶ 6.

The solicitation provided that the agency would issue a notice to deliver at least seven calendar days prior to the date on which delivery would be required. Appeal File, Exhibit 2 at 12. On November 16, 2005, the agency issued to C-Shore a notice to deliver which specified that the contracted-for rice be delivered to Jacintoport, Texas, no earlier than December 6 and no later than December 20, 2005. *Id.* at 79. The rice was not shipped to Jacintoport during the specified time period. RSUF ¶ 8.

On January 11, 2006, an agency representative told C-Shore that the rice had not been received and asked when it would arrive in Jacintoport. C-Shore's executive director said that he would ask Texana Rice for information. Appeal File, Exhibit 3. On the same date, Texana Rice told the agency that its shipments had been delayed and that it was having cash flow problems due to Hurricane Rita. Buxton Declaration ¶ 8.

On January 13, 2006, an agency contracting officer sent to C-Shore a notice to show cause why the contract should not be terminated for default. The contracting officer observed that C-Shore had neither supplied the rice within the time specified nor informed the agency that delivery would be late. He said that liquidated damages would be imposed and told the contractor that it could present facts bearing on the matter within ten days of receipt of the notice. Appeal File, Exhibit 5.

C-Shore responded on January 17, saying that "the reason we have not been able to deliver the 280 Mt [metric tons] on time is due to the fact, that our supplier Texana Rice was deeply affected by hurricane Katrina." The contractor asked that the agency not impose liquidated damages or terminate the contract. Appeal File, Exhibit 7.

The contracting officer replied on the next day, reserving the right to terminate the contract for default if the rice was not shipped by January 20. He noted that Hurricane Katrina had occurred in August 2005 and Hurricane Rita in September 2005 -- both well before C-Shore submitted its bid. He told C-Shore that he "would expect a prudent business to identify and resolve problems affecting its ability to perform a contract prior to the submission of a bid. . . . [Y]ou should have been sufficiently forewarned of any potential impact the hurricane[s] might have had on your business at the time you submitted your bid for this contract." Appeal File, Exhibit 8.

On January 20, the contracting officer received a letter from Texana Rice. The letter acknowledged failure of delivery and asserted that "cash flow problems are preventing us from delivering against these contracts." Buxton Declaration ¶ 8, Exhibit B.

On January 26, C-Shore forwarded to the contracting officer two letters it had received from Texana Rice. In these letters, Texana Rice requested from C-Shore an advance of $115,000 to purchase rice sufficient to fulfill this contract and one other (the subject of our decision in CBCA 1697, which is being issued contemporaneously with this one). C-Shore told the contracting officer that it was reluctant to provide this advance because it did not know the priority Texana Rice would give C-Shore's shipments. Appeal File, Exhibit 10; RSUF ¶ 18.

On February 2, Texana Rice told the contracting officer that it would not fulfill its own, separate contracts with KCCO. Appeal File, Exhibit 11; RSUF ¶ 19.

Later on February 2, the contracting officer terminated C-Shore's contract for default. He told C-Shore that the Government "may purchase the terminated supplies against C-Shore's account and you will be liable for any reprocurement costs the Government may incur." Appeal File, Exhibit 13.

Before terminating the contract, the contracting officer informed the Small Business Administration of C-Shore's failure to deliver the rice in question, the intent to issue a show cause notice, the issuance of that notice, and C-Shore's response to the notice. The contracting officer also sent a copy of the termination letter to the SBA. Appeal File, Exhibits 4, 5, 8, 13; RSUF ¶ 21.

On March 29, 2006, the contracting officer sent to C-Shore a letter demanding that the contractor pay to the agency a debt in the amount of $40,057.47 under the contract in question. The contracting officer calculated that C-Shore owed the agency $27,160.67 in liquidated damages -- 6172.88 hundredweight (the equivalent of 280 metric tons) times ten cents per hundredweight (the rate prescribed by the contract) times forty-four days (the period between December 20, 2005 -- the date on which the shipment was due -- and February 2, 2006 -- the date on which the contract was terminated). The contracting officer also calculated that C-Shore owed the agency $12,896.80 in excess reprocurement costs -- the reprocurement cost of $101,682 (280 metric tons times the reprocurement price of $363.15 per metric ton) minus the contract price of $88,785.20 (280 metric tons times the contract price of $317.09 per metric ton). Appeal File, Exhibit 14.

C-Shore immediately requested an administrative review of the basis and amount of the agency's claim. Appeal File, Exhibit 16 at 103. A contracting officer (not the one who had been the agency's representative in previous interchanges) responded on May 19, 2009, with a decision that C-Shore is indebted to the Government in the amount of $15,983.24. In this decision, she reasserted the claim for excess reprocurement costs of $12,896.80 (as explained in the letter of March 29, 2006) and reduced the claim for liquidated damages to $3086.45.[2] With regard to liquidated damages, the contracting officer said that she understood that during the week of January 23, 2006, C-Shore and Texana Rice were still attempting to put themselves into a position to complete the contract, so she was considering January 28 to be the deadline for performance. Because only five days passed between January 28 and the contract termination date of February 2, she calculated the debt by multiplying 6172.88 hundredweight times ten cents per hundredweight times five days. Appeal File, Exhibit 1. C-Shore has appealed this decision.

On December 10, 2009 -- while the appeal was pending -- C-Shore filed what it called a "cross-complaint" in this case and CBCA 1697. In this "cross-complaint," C-Shore asserted that the agency had breached the contract and that it owes the contractor

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[2] These two sums actually total $15,983.25. The contracting officer claimed a penny less.

$15,000,000 because of "lost [sic] of profit, concealment, harassment, discrimination, and abused [sic] of power."

Discussion

Motion for summary relief

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, to defeat a motion for summary relief, the non-moving party must come forward with specific facts showing the existence of a genuine issue for trial. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In this case, the contractor has contested none of the material facts noted by the agency.

We address first the agency's termination for default of C-Shore's contract. The contracting officer's decision which C-Shore appeals did not actually terminate the contract; it only assessed liquidated damages and excess costs of reprocurement. The termination action was taken by another contracting officer more than three years earlier. Boards of contract appeals have traditionally permitted contractors to challenge the propriety of terminations for default, however, for the purpose of avoiding liability for the excess reprocurement costs, when appealing contracting officer decisions which claim those costs. *Deep Joint Venture v. General Services Administration*, GSBCA 14511, 02-2 BCA ¶ 31,914, at 157,674-75 (referencing the practice begun with *Fulford Manufacturing Co.*, ASBCA 2143, et al., 1955 WL 808 (May 20, 1955)). Although the Court of Appeals for the Federal Circuit, our appellate authority, has never ruled on whether this practice is permissible, *J.C. Equipment Corp. v. England*, 360 F.3d 1311, 1318-19 (Fed. Cir. 2004), we continue to employ it for the reasons enunciated in *Deep Joint Venture*.

A termination for default is "a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence." *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) (quoting *J. D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). Such a termination is a government claim, and the Government bears the burden of proof that its action was justified. *Id.* at 764-65.

A contractor's failure to make timely delivery of agreed-upon goods, however, establishes a prima facie case of default. Once this failure is established, the burden shifts to the contractor to show that the failure was excusable. An excusable failure of timely delivery occurs when the failure is caused by an occurrence beyond the reasonable control of the contractor and without its fault or negligence. *General Injectables & Vaccines, Inc. v. Gates*, 519 F.3d 1360, 1363 (Fed. Cir. 2008).

Here, C-Shore failed to deliver contracted-for milled rice by the deadline established by the agency pursuant to the contract. This fact provided good grounds for a termination for default, unless the contractor could show that its failure was excusable. This C-Shore has not done. It pins the blame on its subcontractor, Texana Rice. But for C-Shore to prevail, this will not suffice; it must also convince us that whatever difficulties prevented Texana Rice from delivering the rice were excusable, for contractors are generally liable for the unexcused actions of their subcontractors. *General Injectables*, 519 F.3d at 1365, *opinion supplemented*, 527 F.3d 1375 (Fed. Cir. 2008).

Texana Rice's difficulties were ascribed to the effects of Hurricanes Katrina and Rita, and to financial problems. Neither the impact of the storms nor the subcontractor's financial predicament is a valid excuse for non-performance. The hurricanes were, of course, acts of God. As the contracting officer observed, however, the storms occurred well before C-Shore submitted the bid, acceptance of which created this contract; the contractor could and should have ascertained their impacts before bidding. *Hitemp Wires Co.*, ASBCA 11638, 67-1 BCA ¶ 6252, at 28,957. C-Shore has provided no evidence that post-bid repercussions of the hurricanes had any effect on the ability of it or its subcontractor to deliver the rice. A contractor's or subcontractor's financial difficulties are normally not a legitimate excuse for a failure to perform. *Danzig v. AEC Corp.*, 224 F.3d 1333, 1339 (Fed. Cir. 2000); *Consolidated Airborne Systems, Inc. v. United States*, 348 F.2d 941, 946 (Ct. Cl. 1965). C-Shore has given us no reason to depart from that rule in this instance. We consequently hold that the agency has demonstrated the good grounds and solid evidence necessary to justify the termination for default.[3]

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[3] We briefly dispose of two additional arguments C-Shore appears to advance to excuse its failure to deliver the rice. First, the contractor seems to think that the agency bears some responsibility for the failure because it approved Texana Rice as a subcontractor. Although the agency knew that Texana Rice had served as a subcontractor to C-Shore under previous contracts, Exhibits to Appellant's Opposition to Motion to Dismiss Cross-Complaint, there is no evidence that the agency ever gave, or even was asked to give, approval for Texana Rice to serve as a subcontractor under this contract. Second, C-Shore (continued...)

As stated earlier, the contracting officer's decision which is the subject of this appeal claims that C-Shore is indebted to the agency for liquidated damages and excess costs of reprocurement. C-Shore offers no argument whatsoever to the agency's claims, other than to assert that the claims were not made in a timely fashion. The claims were asserted for the first time on March 29, 2006, and re-asserted in a smaller amount (as to liquidated damages) on May 19, 2009. Under the Contract Disputes Act, 41 U.S.C. § 605(a) (2006), "[e]ach claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim." A claim accrues on "the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred." 48 CFR 33.201; *see Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,063.

The claim for liquidated damages accrued on February 2, 2006, when the contract was terminated. The claim for excess reprocurement costs accrued at some time after February 2, 2006, and prior to March 29, 2006, when the agency acquired supplies similar to those which were the subject of the terminated contract. The contracting officer's decision which is the subject of this appeal was issued on May 19, 2009, well within six years of the dates on which the claims accrued. The assertion of the claims was therefore made in a timely fashion. Consequently, there is no basis for denying the agency's claims for liquidated damages in the amount of $3086.45 and excess reprocurement costs in the amount of $12,896.80.

We grant the agency's motion for summary relief, upholding the termination for default and concluding that C-Shore is indebted to the agency in the amount claimed, $15,983.24.

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[3] (...continued)
seems to maintain that the termination for default was flawed because the agency's contract with this 8(a) firm was technically with the SBA, not with C-Shore. Under SBA regulations, however, a procuring activity's contracting officer may terminate an 8(a) contract for default, as long as the contracting officer has consulted with the SBA and advised the SBA of any intent to terminate. 13 CFR 124.518(a). The contracting officer did consult with the SBA and advise it of the intent to terminate before actually terminating the contract.

Motion to dismiss "cross-complaint"

C-Shore filed what it calls a "cross-complaint" with the Board while its appeal of the contracting officer's decision was pending. The "cross-complaint" is a claim by the contractor for $15,000,000. The Contract Disputes Act requires that "[a]ll claims by a contractor against the government shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). The Court of Appeals for the Federal Circuit has held that "a final decision by the contracting officer on a claim . . . is a 'jurisdictional prerequisite' to further legal action thereon." *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995); *see also England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *Bowers Investment Co. v. Department of Transportation*, CBCA 825, 08-1 BCA ¶ 33,783, at 167,202 (implementing court's holding). C-Shore's "cross-complaint" was never submitted to the contracting officer for decision, so we have no jurisdiction to consider it.

Decision

The Department of Agriculture's motion for summary relief is granted. The appeal is **DENIED**. The agency's motion to dismiss C-Shore's "cross-complaint" is granted. The "cross-complaint" is dismissed for lack of jurisdiction.

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STEPHEN M. DANIELS
Board Judge

We concur:

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ANTHONY S. BORWICK
Board Judge

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CANDIDA S. STEEL
Board Judge