



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 28, 2010

CBCA 1198

GLOBAL CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Cynthia S. Emerson of Emerson Law Firm P.C., Eureka Springs, AR; and Joree G. Brownlow, Cordova, TN, counsel for Appellant.

Deborah K. Morrell and Harold W. Askins, Office of Regional Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

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

SOMERS, Board Judge.

Appellant, Global Construction, Inc. (Global), has challenged a contracting officer's decision to terminate for default a contract for construction work at the Department of Veterans Affairs Medical Center, located in Augusta, Georgia. We find that the Government has sustained its burden to justify the termination and deny the appeal.

Findings of Fact

On September 16, 2004, the Department of Veterans Affairs (VA or the Government) awarded a contract to Global. The contract required Global to provide all labor, materials, equipment, and supervision for the demolition and reconstruction of the Spinal Cord Injury Unit in the downtown division of the Augusta VA Medical Center, Augusta, Georgia. Appeal File, Exhibit 1.¹ The specifications included the building of a courtyard with a greenhouse, the construction of a cystoscopy suite comprised of three lead-lined rooms, and the installation of litter baths with corresponding plumbing features to be used for the specialized treatment of spinal cord injury patients. Exhibit 3 (Contract Specifications).

The original contract contained three construction phases. The contracting officer issued a notice to proceed on October 18, 2004. Exhibit 2. The contract required that all work be completed within 660 days from receipt of the notice to proceed, or, in other words, no later than August 29, 2006. *Id.* Phase 1 was completed in June 2005. Phase 2 began on June 13, 2005. Starting on July 11, 2006, during Phase 2, the parties met on a bi-weekly basis to inspect the progress of the construction and to address issues as the project progressed.

Over the course of the contract, the parties extended the time for contract performance through the issuance of bilateral contract modifications. *See, e.g.*, Exhibit 110, Supplemental Agreement No. 2 and Time Extension No. 1 at 3. Even with these extensions, however, subcontractor coordination issues and turnover of contractor management, combined with Global's apparent misunderstanding of certain contract requirements, caused repeated delays to the project.²

Thus, in October 2006, Global submitted a revised schedule changing the anticipated completion date of Phase 2 from the beginning of November to the end of December 2006. The schedule did not address Phase 3 of the project. On November 22, 2006, the contracting officer noted that, based upon the current pace of construction, it did not appear that Global could complete Phase 2 on time. The contracting officer suggested that Global review the current schedule and initiate action to ensure completion or submit a revised schedule. Exhibit 162.

¹ All exhibits are found in the appeal file, unless otherwise noted.

² Multiple job superintendents had been assigned to the project, apparently delaying the project and ultimately resulting in a sixty-day time extension to the contract at the request of the contractor. Exhibit 110 at 33. The last contract modification extended the contract completion date to May 15, 2007. Exhibit 110 at 54-55.

On December 19, 2006, when it became apparent that Global would not complete Phase 2 in accordance with its schedule, the contracting officer asked Global to submit a revised schedule, stating as follows:

Please resubmit a revised timeline reflecting a realistic attainable completion date. In addition you must address the additional time required for completion and request time extensions with consideration. Even though this job is behind schedule, it is our hope that the current hurdles can be rectified and this contract completed in a timely manner.

Exhibit 163.

Global submitted a revised schedule on January 17, 2007. In addition, Global requested a sixty-day time extension, citing problems with subcontractors, management inefficiency, and lack of sufficient construction personnel. The contracting officer rejected that request, stating that Global would need to make an offer of consideration before the contracting officer could justify an extension of time on those grounds. Exhibit 164.

When Global did not resubmit the revised schedule, the contracting officer stated in a letter dated February 8, 2007:

This job is behind schedule and you are currently in a technical default status. In accordance with Specification Section 01001, 52.236-15, *Schedules for Construction Contracts (APR 1984)* and as previously stated in our January 4, 2007 letter, you are directed to submit a revised timeline reflecting [an] attainable completion date for the entire project, as well as the completion date for the Phase 2 portion. The Phase 2 completion date is essential to our planning the relocation of staff from the Phase 3 area to the Phase 2 area. In addition, you must address the additional time required for completion and request required time extensions with consideration acceptable to the government.

Exhibit 165 (emphasis omitted). Global submitted a revised schedule on March 13, 2007, with a proposed completion date of October 1, 2007. The Government found multiple errors in the schedule, and, in light of continuing performance issues, the Government contemplated terminating the contractor at that time. It rejected the revised schedule. Exhibit 166 at 25.

Global resubmitted its revised schedule on April 3, 2007, indicating that Phase 2 would be complete by June 15, 2007. Again, Global did not include Phase 3 in its schedule. In April 2007, Carl Lanier, Vice President of Global, took over as job superintendent. On April 24, 2007, Mr. Lanier requested that the bi-weekly meetings be changed to weekly meetings.

At a meeting on April 25, 2007, Mr. Lanier advised the Government that Global was approximately one week behind the schedule it had just submitted. Exhibit 167 at 26. By letter dated May 29, 2007, the Government requested that Global submit another revised schedule. Exhibit 168 at 16.

On June 15, 2007, Global submitted a new schedule, which the Government rejected because it failed to address all phases of the project. By e-mail message dated June 22, 2007, Global assured the contracting officer that the “scheduled completion [date] of July 31 remains the same for all phases of work except the entrance front, handrails, and automatic doors,” which could be delayed due to supplier delay. Exhibit 169 at 29. The Government responded that the supply submittals had been approved back in July 2005 and November 2006, and noted that the potential problems identified by Global did not provide adequate justification for any delays and further delays would impact payments to Global. *Id.* On June 30, 2007, the Government presented Global with a “pre-punch” list, identifying pages of items needing correction prior to final inspection.

Over the course of the next few months, the parties met regularly, and the Government provided Global with lists of items that needed correction or had been rejected outright and sought revised schedules. In August 2007, using input provided by Global, the Government prepared a schedule identifying the Phase 2 completion date of October 8, 2007, and scheduling Phase 3 to begin on October 19, 2007. Global concurred with the schedule by e-mail message dated August 10, 2007. Exhibit 171 at 5-6. Again, however, it soon became apparent that Global could not meet the new completion date, so, by letter dated August 24, 2007, the contracting officer requested that Global submit another revised schedule.

During the September 19, 2007, meeting, Mr. Lanier requested that the Government consider dropping Phase 3 from the contract. The Government requested that Global submit this request in writing to the contracting officer. Exhibit 172 at 8. Global did not do so.

On November 13, 2007, when Global failed to submit a revised schedule despite numerous requests, the Government issued a show cause notice. The notice stated, in part, as follows:

Since you have failed to perform Contract No. V247C0348(a) within the time required by its terms, *or* cure the conditions endangering performance under Contract No. V247C0348(a) as described to you on numerous occasions, the Government is considering terminating the contract under the provisions for default of this contract.

Exhibit 174. The notice also detailed performance issues that included “failure to meet identified milestones” and “many items requiring correction” that had gone unresolved despite identification in the field reports. *Id.* The notice stated that the current modified completion date based upon the contract modifications granting extensions of time was May 15, 2007. *Id.*; see also Exhibit 110 at 54-55.

The Government conducted a pre-final inspection on November 28, 2007, and confirmed that Global had failed to fix many problems that had been previously identified during the course of contract performance. At a meeting held on December 12, 2007, the Government asked that Global provide a final date for completion of Phase 2 no later than December 21, 2007. On December 19, 2007, Global submitted a schedule with a completion date for Phase 2 of February 15, 2008. The Government rejected the date and told Global that Phase 2 must be completed no later than January 16, 2008. Exhibit 175 at 15.

On January 11, 2008, the contracting officer sent a letter to Global to advise it that the revised and final completion date for Phase 2 of the project would be January 30, 2008, and that any remaining punch list items from an inspection scheduled for that date must be completed by February 6, 2008. Exhibit 205. Phase 3 of the contract was deleted by modification on January 18, 2008. Exhibit 178. The Government conducted a final inspection on January 31, 2008, and issued a sixteen-page report identifying over 300 discrepancies, many of which had been identified during earlier inspections. Exhibit 203.

The Government issued a cure notice on February 7, 2008. Exhibit 177; Trial Exhibit 3. Global requested a re-inspection, which occurred on February 15, 2008. On February 26, 2008, the Government terminated the contract for default.

Among the contract clauses included in the contract that are relevant to this appeal is Federal Acquisition Regulation (FAR) 52.236-15, which requires the contractor to submit a schedule to the contracting officer within five days after work is commenced on the project, showing the order in which the contractor proposes to perform the work and the dates on which the contractor contemplates starting and completing the work. The contract specifically required the schedule to be presented in the form of a progress chart indicating the percentage of work scheduled for completion by any given date during the period and

authorized the contracting officer to withhold approval of progress payments until the contractor submitted the required schedule. Exhibit 3, Specifications, at 01001-77. The Veterans Administration Acquisition Regulation 852.236-84, also included in the contract, specified that the contractor must revise the progress schedule when individual or cumulative time extensions of fifteen calendar days were granted for any reason. *Id.* at 01001-101.

FAR 52.232-5, also included in the contract, states that “a revised construction schedule shall be submitted with each request for progress payment.” Paragraph (e) of this clause permits the contracting officer to retain a maximum of 10% of the amount of the payment if satisfactory progress has not been made. Exhibit 3, Specifications, at IN-11.

The contract included the FAR’s standard clause for default termination of a fixed price construction contract. In pertinent part, this clause provides:

If the contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or separable part of the work) that has been delayed.

FAR 52.249-10(a); Exhibit 1.

At a hearing held in this matter on March 24-28, 2009, in Atlanta, Georgia, the parties presented fact and expert witnesses. After the hearing, the parties submitted posthearing briefs over the next few months.

Discussion

Termination for Default

The Government terminated its contract with Global under the provision of the Default clause that allows termination if the contractor’s failure to make progress endangers performance. A termination for default for failure to prosecute the work requires “a reasonable belief on the part of the contracting officer that there was ‘no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for contract performance.’” *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) (quoting *RFI Shield-Rooms*, ASBCA 17374, et al., 77-2 BCA ¶ 12,714, at 61,735). A termination for failure to make progress usually occurs

where the contractor has fallen so far behind schedule that timely completion becomes unlikely. *Hannon Electric Co. v. United States*, 31 Fed. Cl. 135, 143 (1994), *aff'd*, 52 F.3d 343 (Fed. Cir. 1995) (table). The Government is not required to prove that it was impossible for the contractor to complete performance on time. *Lisbon Contractors*, 828 F.2d at 765. Rather, a termination for default will be upheld where “a demonstrated lack of diligence indicates that [the Government] could not be assured of timely completion.” *Id.* (citations omitted).

The initial burden of proving that there are good grounds and solid evidence to support the termination action falls to the VA, which must establish that its decision to terminate for default Global’s right to perform was justified in light of the circumstances as they existed at the time the decision was made. *Lisbon Contractors*, 828 F.2d at 765; *Ranco Construction, Inc. v. General Services Administration*, GSBCA 11923, 94-2 BCA ¶ 26,678, at 132,702. The Government can meet its burden by showing that the contractor failed to perform in accordance with the contract terms and that timely performance was beyond its reach. See, e.g., *Lisbon Contractors*; *Florida Engineered Construction Products Corp. v. United States*, 41 Fed. Cl. 534, 538-39 (1998); *American Sheet Metal Corp. v. General Services Administration*, GSBCA 14066, et al., 99-1 BCA ¶ 30,329. In determining whether to terminate a contractor for default, the contracting officer may consider, among other things, the contractor’s failure to meet its own representations concerning the progress of the work, e.g., *Guenther Systems, Inc.*, ASBCA 14032, 72-1 BCA ¶ 9443, at 43,869, and the contractor’s performance history, e.g., *Decker & Co. v. West*, 76 F.3d 1573, 1581 (Fed. Cir. 1996).

In this case, the Government established that following the issuance of the notice to proceed on October 18, 2004, the contract obligated Global to submit a schedule for approval and to proceed with the work so as to complete the construction within 660 days (later extended through contract modifications). Global failed to submit revised schedules on a timely basis and did not, in response to the cure notice, provide reasonable assurances that it would perform the work remaining within the time frame required by the contract. The Court of Appeals for the Federal Circuit has stated in this regard:

When the government has reasonable grounds to believe that the contractor may not be able to perform the contract on a timely basis, the government may issue a cure notice as a precursor to a possible termination of the contract for default. When the government justifiably issues a cure notice, the contractor has an obligation to take steps to demonstrate or give assurances that progress is being made toward a timely completion of the contract, or to explain that the reasons for any prospective delay

in completion of the contract are not the responsibility of the contractor.

Danzig v. AEC Corp., 224 F.3d 1333, 1337 (Fed. Cir. 2000) (citations omitted). Here, in response to the cure notice, appellant did nothing to assure the Government that it would perform by the contract completion date. In light of these circumstances, the contracting officer justifiably concluded that there was no reasonable likelihood that Global could or would perform the contract work within the time allotted under the contract. Thus, after establishing a final completion date, which Global failed to meet, the contracting officer had adequate justification for terminating the contract for default. Based on this indisputable evidence, the Government met its burden to establish a prima facie case supporting the termination decision. *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1013-15 (Fed. Cir. 2003); *Lisbon Contractors*, 828 F.2d at 765; see also *NECCO, Inc. v. General Services Administration*, GSBICA 16354, 05-1 BCA ¶ 32,902.

Excuses for Nonperformance

Once the Government has established its prima facie case supporting the termination decision, the burden shifts to the contractor to establish the excusability of its nonperformance. See, e.g., *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996); *Lisbon Contractors*, 828 F.2d at 764. Appellant asserts first that the Government waived the contract completion date. Alternatively, appellant contends that its delayed performance is attributable to the Government's failure to respond to questions, improper directives, and ambiguity in the contract.

First, Global asserts that the Government waived the contract completion date. As Global noted in its posthearing brief, if a completion date is waived by the contracting officer, "the government can establish a new contract completion date, which will serve as a basis for default termination, either through a bilateral agreement with the contractor or by unilateral decision." Appellant's Posthearing Brief at 47 (citing *McDonnell Douglas Corp.*, 323 F.3d at 1019). If the Government opts to act unilaterally, the new date that it sets must be "both reasonable and specific from the standpoint of the performance capabilities of the contractor at the time the notice is given." *Id.* The reasonableness of the action turns on what the Government "knew or should have known" at the time it imposed the new schedule. *Id.*

As noted above, the Government set forth a new completion date after months of delay and after multiple attempts to obtain a realistic revised construction schedule from Global. In opposing the validity of the termination for default, Global contends that only four critical areas of work remained at the time of termination, and the Government's

“inability to finalize designs, testing outside the scope of the contract and unwillingness to accept work performed in accordance with flawed specifications” delayed the completion of the contract. Appellant’s Posthearing Brief at 67-68. It contends that even with the four items identified, Global could have completed the job within one week, if respondent had provided appropriate specifications. *Id.* at 68.

At the hearing, however, Global failed to present any credible evidence showing that the contract contained flawed specifications. Rather, it became apparent during the course of the hearing that Global did not understand contract specifications governing substantial portions of the work, and its confusion created at least some of the delays. For example, Global contended that the contract did not require the cystoscopy rooms to contain radiation shielding with lead-lined walls, nor did it call for testing of the lead shielding. Appellant’s Posthearing Brief at 32-35. Global representatives testified that it interpreted certain shadings on the drawings for the cystoscopy room to indicate that no work should be performed in the area. Transcript at 65, 72 (testimony of appellant’s expert witness Timothy Fitzgerald). This interpretation is inconsistent with the drawings and specifications of the contract, which required the contractor to remove the concrete slabs in one of the cystoscopy rooms and to replace them with a five-inch thick slab and line the walls with lead. *See* Transcript at 483 (testimony of Roger Templeton (the contracting officer’s technical representative)); Trial Exhibits 6, 7. Among the 100 requests for information (RFIs) submitted by Global, none of the RFIs addressed the cystoscopy room. Transcript at 500.

Second, appellant states that multiple constructive changes resulted in excusable delays in contract performance. Under the Excusable Delay clause, the contractor has the burden of proving that the delay was excusable under the terms of the default provision of the contract. FAR 52.249-10(b); *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000). A termination for default may be converted to a termination for convenience of the Government where the contractor can establish that the delay in completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor. FAR 52.249-10(b); *Sauer Inc.*, 224 F.3d at 1345.

In addition, it is well settled that:

When a contractor is seeking extensions of contract time, for changes and excusable delay, which will relieve it from the consequences of having failed to complete the work within the time allowed for performance, it has the burden of establishing by a preponderance of the evidence not only the existence of an

excusable cause of delay but also the extent to which completion of the contract work as a whole was delayed thereby.

Santa Fe, Inc., VABCA 1943, et al., 84-2 BCA ¶ 17,341, at 86,410. Thus, the contractor must demonstrate that the excusable event caused a delay to the overall completion of the contract, i.e., that the delay affected activities on the critical path. *Sauer Inc.*, 224 F.3d at 1345. The contractor must also establish the extent to which completion of the work was delayed by this excusable cause. *Robert P. Jones Co.*, AGBCA 391, 76-1 BCA ¶ 11,824, at 56,457.

Here, as noted previously, the parties extended the time period of performance multiple times through the issuance of bilateral contract modifications. The thirty-seven contract modifications contained time extensions ranging from periods of one day up to sixty days. At the hearing, appellant's evidence focused upon the fact that it had expended considerable efforts in its attempts to complete the contract; nonetheless, even after receiving multiple extensions of time, significant work remained to be completed at the time of contract termination.

Appellant contends that the multiple changes to the contract caused inefficiencies and other problems, which should serve to excuse its delayed performance. However, this argument fails to acknowledge the fact that each of the bilateral contract modifications contained the following release language:

This modification represents a complete equitable adjustment for all costs, direct and indirect, associated with the work and time agreed to herein, including but not limited to, all costs incurred to extended overhead, supervision, disruption or suspension of work, labor, inefficiencies, and this change's impact on unchanged work.

See, e.g., Exhibit 110, Supplemental Agreement No. 2 and Time Extension No. 1, at 3. Therefore, to the extent that the Government issued change orders resulting in contract modifications, these modifications contained time extensions to cover the extra time needed as a result of the changes. By signing the bilateral modifications, the contractor expressly released the Government from any potential impact on its unchanged work resulting from the contract changes.

Ultimately, the contract modifications only extended the contract performance period to May 15, 2007. When, over the next few months, appellant failed to submit a reasonable project schedule for the completion of the work, the contracting officer properly acted to

unilaterally reestablish a contract completion date, issue a show cause notice, issue a cure notice, and, finally, terminate the contract for default. Appellant has failed to present sufficient evidence to meet its burden of establishing by a preponderance of the evidence that an excusable event delayed contract performance.

We conclude that, based upon the evidence presented, the Government established that the contracting officer had a reasonable belief that Global could not perform the entire contract effort within the time remaining for contract performance. Global's evidence did not meet the standard required for rebutting the Government's evidence. Accordingly, we find that the contracting officer acted appropriately when she terminated the contract for default.

Decision

The appeal is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

CANDIDA S. STEEL
Board Judge