



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: August 14, 2014

CBCA 3518

DMW MARINE GROUP,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Respondent.

Mark C. Gregory of DMW Marine Group, Chester Springs, PA, appearing for Appellant.

Ashley Powers, Office of the General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **STERN**.

DANIELS, Board Judge.

The Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) terminated for cause a contract it had awarded to DMW Marine Group (DMW) for the supply of a marine crane. On appeal, we overturn the termination.

Findings of Fact

The parties have asked us to resolve this case on the basis of the written record. That record contains documentation on the basis of which we make the following findings.

In January 2012, an engineer with The Columbia Group, which DMW identifies as a naval architecture firm, asked DMW about its ability to provide a marine crane for the NOAA Coastal Mapping Vessel Ferdinand R. Hassler. Discussions led to NOAA's award of a contract to DMW, on June 22, 2012, for the supply of a knuckle boom crane and a hydraulic power unit for the Hassler.

The contract required DMW to "provide all parts, material, and ancillary equipment required for the operation of the crane in accordance with the [specified] requirements." Some of the requirements in the contract's Statement of Work referenced the American Bureau of Shipping (ABS). ABS describes itself on its website as a "classification society" whose "responsibility . . . is to verify that marine vessels and offshore structures comply with Rules that the society has established for design, construction and periodic survey."

DMW maintains that under the contract, ABS was simply to approve the design of the crane. NOAA asserts that ABS certification of the crane was also specified. We find that the contract mandated both design approval and certification by ABS.

The word "approval" is used by itself in certain paragraphs of the contract's Statement of Work. These include:

- Paragraph 3.1.2: "The crane technical manual will include at a minimum but is not limited to the following items: . . . Crane details to include at a minimum: ABS approval."
- Paragraph 3.1.3: "Contractor shall receive Government and ABS approval of the crane system."
- Paragraph 5.1: "The Contractor shall supply for the Government review and approval all documentation associated with construction, regulatory approval, and operation [of] the crane. Such documentation shall include as a minimum those items listed below: Regulatory approval by the American Bureau of Shipping of the provided crane system."

The word "certification" is used in other places in the Statement of Work, including:

- Paragraph 3.1.1: "Construction of the Crane shall . . . meet the requirements of ABS SVR [Steel Vessel Rules] <90M, ABS Guide for Certification of Lifting Appliances, ABS Cargo Gear Certificate, API [American Petroleum Institute] Spec[ification] 2C, and IEEE [Institute of Electrical and Electronics Engineers]-STD-

45, and ABS Record of Notation CRC for compliance with ABS Guide for Certification of Cranes.^[1]”

- Paragraph 4.1.1.1: “Operation of all electrical, mechanical, hydraulic, and control systems. Tests shall demonstrate proper function of the crane per manufacturer’s specifications as well as the performance requirements ABS Guide for Certification of Lifting Appliances, ABS Cargo Gear Certificate, ABS Record of Notation CRC for compliance with ABS Guide for Certification of Cranes, API Spec[ification] 2C, IEEE-STD-45, and NOAA AMC-573-1C.”
- Paragraph 4.1.2: “Tests shall be conducted for post-installation (pier side) functionality and ABS Cargo Gear Certifications.”
- Paragraph 4.2.2: “An ABS Approved test plan shall be provided for the ABS Cargo Gear Certification.”

The ABS Guide for Certification of Cranes, which is referenced in paragraphs 3.1.1 and 4.1.1.1 of the contract’s Statement of Work, explains the meaning of the terms “approved” and “certification.” “The term ‘approved’ is to be interpreted to mean that the plans, reports or documents have been reviewed for compliance with one or more of the Rules, guides, standards or other criteria acceptable to ABS.” “Certification is a representation by ABS as to the structural and mechanical fitness for a particular use or service, in accordance with its Rules, Guides and standards.”

The ABS Guide provides that “[p]lans showing the arrangements and details of the crane are to be submitted for review before fabrication begins.” Later, “[a]ll cranes are to be surveyed at the crane manufacturer’s plant during construction. In-plant surveys of the cranes during construction are required to the extent necessary for the Surveyor to determine that the details, material, welding and workmanship are acceptable to ABS and are in accordance with the approved drawings.” “Upon satisfactory fabrication, the Surveyor may issue a certificate certifying that the crane has been built in accordance with these requirements.”

In addition to the Statement of Work, the contract contains various standard clauses, among which is one directly relevant to the NOAA action which is on appeal:

¹ The ABS Guide for Certification of Cranes explains, “The vessel or unit classed by ABS having an installed crane certified by ABS in accordance with Chapter 2 of this Guide will be distinguished by the additional class notation **CRC**.”

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.

A separate contract clause states further that if a contract is terminated for the convenience of the Government, “the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination.”

The contract also includes a standard clause which NOAA did not invoke:

Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post-acceptance rights –

- (1) Within a reasonable time after the defect was discovered or should have been discovered; and
- (2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

The contract provided additionally that in exchange for the crane, hydraulic power unit, and associated services, NOAA would pay DMW \$213,000. The agency would pay 50% of this amount at the start of work and 50% at the time of delivery and receipt of the

crane. NOAA could suspend or reduce milestone payments, however, after finding that “[t]he contractor fails to comply with any material requirement of this contract.”

In August 2012, the NOAA contracting officer² informed DMW that the agency would send a representative to witness factory acceptance testing. The crane manufacture was completed by October 1, 2012, and the testing occurred shortly thereafter. A NOAA representative reported to DMW, “[E]verything went well. The crane looks and operates great.”

As far as our record is concerned, the issue of ABS certification was raised for the first time on October 25. On that date, in electronic mail correspondence, the contractor asserted that “certification by ABS was not part of the contract” and the contacting officer responded, “NOAA disagrees with your interpretation.” The dispute continued on November 3, with the contractor writing, “The requirements for ABS [s]tate: contractor shall receive Government and ABS approval of the crane system. It is our intent that upon installation ABS will certify the onboard load test thereby approving the crane system. Please issue concurrence with above, as we are not shipping this crane until it is agreed upon.” The contracting officer continued the discussion on January 3, 2013: “Speaking to the ABS requirements, it appears that you and ABS have a good path forward that meets the requirements of the contract and is acceptable to the Government.”

By letter dated February 28, 2013 (as revised on March 12, 2013), ABS wrote to DMW, stating, “[P]rovided the details and arrangements as indicated be adhered to, the work is to the satisfaction of the Surveyor, and the rules in all other respects are complied with, the same will be approved in accordance with the requirements for the issuance of an American Bureau of Shipping Register of Lifting Appliances.” ABS cautioned, however:

In-plant survey during construction of the subject will be required to the extent necessary for the Surveyor to confirm the materials, welder qualifications, welding procedure approval, compliance with approved drawings, workmanship, quality control, and to witness any shop tests. It is the responsibility of the crane manufacturer to inform the Surveyor prior to the commencement of construction in order to initiate the necessary surveys in due time.

² There were actually two different contracting officers acting for NOAA with regard to this contract. We refer to each of them as “the contracting officer.”

Certification of the crane is contingent upon satisfactory unit proof tests and surveys aboard the vessel.

On March 15, ABS gave full approval to the design. The classification society cautioned, however, "Please contact your local ABS Philadelphia Survey Office . . . to make arrangements for construction survey, inspection and testing, as required for the certification of the crane."

DMW delivered the crane to NOAA on March 26, 2013 and installed it on the Hassler on or about that date.

The contracting officer sent an electronic mail message to DMW on April 15, stating:

The Government has not agreed to your interpretation of the contract as stated in your response. It is a requirement of the contract for the design and construction of the crane to meet the requirements of the Guide for Certification of Lifting Appliances, and ABS Cargo Gear Certification. This remains the Government's expectation. NOAA has not granted a deviation from these requirements of the contract.

During previous conversations/e-mails, this requirement was reiterated. ABS has confirmed that in order for the Surveyor to certify load testing, the design and construction of the crane must meet ABS requirements. The design requirement has been satisfied by submitting and receiving approval for the design and supporting calculations/data. The construction requirement is typically satisfied by communicating with ABS to attend an on-site inspection(s) during construction to ensure the construction of the crane adheres to the ABS-approved design (as stated in ABS's design approval letter). You indicated ABS was not part of the construction of the crane. Since this requirement has not yet been met, it is incumbent upon DMW to coordinate with ABS and determine the best path forward to satisfy this requirement.

DMW responded, by electronic mail message of the same date, "Just ship the crane back to us now and we will refund your slow and late payments."

The correspondence between the parties continued in the same vein. On April 16, the contracting officer wrote to DMW, "As no survey during or after construction has been performed, we are asking how DMW intends to comply with ABS's requirements." On May 7, DMW responded that if the Government would pay in full for the crane, "we will be

happy to assist you should you wish to get the crane certified by ABS,” but if full payment was not made, “[w]e are ready to repossess the crane.” The contracting officer stated on May 9, “ABS certification will require a post-construction survey of the crane system. . . . ABS [has] provided a summary of what post-construction approval/certification entails and is summarized below.” DMW responded on the same day, “No [. . .] We will pick up our crane tomorrow.”

The contractor did not pick up the crane on May 10 or any other day, however. Instead, on May 14, it simply reiterated its view that it had already fulfilled all of its obligations under the contract.

On May 29, 2013, the contracting officer terminated the contract for cause, “based on DMW Marine Group’s refusal to perform pursuant to the terms of the contract which includes the crane to be American Bureau [of] Shipping (ABS) certified.” The contracting officer wrote in her decision:

To mitigate NOAA concerns and rights, the Government has concluded that all payments to date should stand, but remaining funds on the contract will be de-obligated upon termination. . . . [T]he Government . . . will procure the certification through a third party. To date the Independent Government Estimate (IGE) for a third party to perform tasks for ABS certification is \$75,000. However, please be advised that the Government is not bound by the IGE. Once the exact costs of procuring crane certification is [sic] determined, and should the cost exceed the remaining funds on the contract, the Government will issue a demand for payment to DMW Marine Group.

By this time, NOAA had paid \$152,250 to DMW on this contract. By contract modification dated July 9, 2013, NOAA deobligated the remaining \$60,750 from the contract.

The crane continues to be installed on the Hassler.

Discussion

The Board treats a termination for cause as the equivalent of a termination for default. *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,150. 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)); see also *ACM*

Construction, 14-1 BCA at 174,150; *C-Shore International, Inc. v. Department of Agriculture*, CBCA 1696, 10-1 BCA ¶ 34,379, at 169,740. “Such a termination is a government claim, and the Government bears the burden of proof that its action was justified.” *Lisbon Contractors*, 828 F.2d at 764-65; *see also ACM Construction*, 14-1 BCA at 174,150; *C-Shore*, 10-1 BCA at 169,740.

NOAA maintains that its termination for cause of the contract for the supply of the crane is justified because the contract required that the crane be certified by ABS and DMW refused to provide this certification. We agree that the contract required ABS certification; the contract calls for such certification in several places which are quoted above. DMW asserts, in its complaint and in its brief, that before the contract was awarded, DMW made clear to both The Columbia Group (acting as NOAA’s agent) and NOAA itself that due to the need for speedy delivery of the crane, certification was not possible. There is no evidence to this effect, however, and DMW took no objection to any of the contract provisions regarding certification. Nevertheless, the failure of the contractor to provide the certification does not constitute good grounds for the termination.

To reach this conclusion, we look to the Uniform Commercial Code (UCC) for guidance in applying general contract principles, as the Court of Appeals for the Federal Circuit has in the past. *See Hughes Communications Galaxy, Inc. v. United States*, 271 F.3d 1060, 1066 (Fed. Cir. 2001); *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1047-48 (Fed. Cir. 2001); *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1559-60 (Fed. Cir. 1983); *see also John C. Kohler Co. v. United States*, 498 F.2d 1360, 1367 (Ct. Cl. 1974) (at n.6: “The Uniform Commercial Code is applicable to the field of public contracts.”); *ABM/Ansley Business Materials v. General Services Administration*, GSBCA 9367, 93-1 BCA ¶ 25,246, at 125,750 (1992).

Section 2-607(2) of the UCC is highly relevant here. It provides that:

Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

As far back as October 2012, the parties had been discussing whether the contract required ABS certification of the crane, with DMW insisting that “certification by ABS was not part of the contract” and stating that it would provide the crane with ABS design approval only. In November 2012, DMW said that it would not ship the crane unless NOAA agreed to the contractor’s understanding. In February and the first half of March of 2013, ABS gave

design approval, but noted that further arrangements were required for certification. Thus NOAA knew well, when it accepted delivery of the crane on March 26, that there was a non-conformity in the goods: the crane was not ABS certified. Any assumption by the agency on that date that DMW would seasonably cure its failure to have the crane certified was unreasonable, given all that had transpired during the previous several months. Consequently, acceptance of the crane precluded rejection of it. Terminating the contract for cause was not justified.

Under the Inspection/Acceptance clause of the contract, NOAA could have sought an equitable reduction in the contract price when DMW delivered the uncertified crane, rather than the contracted-for certified equipment. That alternative was open to NOAA only “[w]ithin a reasonable time after the defect was discovered or should have been discovered,” however, and the agency did not seek to employ this alternative within a reasonable time.³ DMW offered to repossess the crane and refund the money paid for it, if NOAA did not desire to keep the uncertified crane, but the agency did not choose this option, either.

In *ABM/Ansley*, one of our predecessor boards of contract appeals noted that “[s]ome UCC cases have held that revocation may . . . be valid even absent return of the defective article where it has been shown that the goods are a necessity.” 93-1 BCA at 125,750 n.9. The contracting officer in her decision which terminated the contract did assert that “[t]he crane is essential to the ship’s mission and installation could not be delayed as it was a critical path in the shipyard’s repair schedule.” A statement in a contracting officer’s decision is not evidence, however, and there is no evidence in the record on the basis of which we could reach the conclusion the contracting officer suggested. We need not decide in this case, consequently, whether to follow the cases cited in the footnote in *ABM/Ansley*.

³ This case is reminiscent of another in which NOAA lost its opportunity to take action against the contractor by failing to use a remedy available to it in a timely way. In *Divecon Services, LP v. Department of Commerce*, GSBCA 15997-COM, et al., 04-2 BCA ¶ 32,656, the contractor failed to provide the necessary equipment and services for a scientific cruise, but instead of terminating the contract for default at that time (as it justifiably could have), the agency directed the contractor to repair the equipment. Only after the contractor had accomplished the repairs, having worked around the clock for several days, did the agency terminate the contract. By then, the agency had effectively waived the original contract completion date and had thereby lost its opportunity to terminate for default.

Decision

The appeal is **GRANTED**. NOAA's termination of the contract for cause is, under the terms of the contract's Termination for Cause clause, converted to a termination for the convenience of the Government.

STEPHEN M. DANIELS
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

JAMES L. STERN
Board Judge