UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 19, 2015

CBCA 4011

RAK CONTRACTORS, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Richard A. Kubilus, Sr., President of RAK Contractors, LLC, Wellington, FL, appearing for Appellant.

Daniel B. Rosenbluth, Office of the General Counsel, Department of Agriculture, Golden, CO, counsel for Respondent.

Before Board Judges **HYATT**, **VERGILIO**, and **SULLIVAN**.

VERGILIO, Board Judge.

On July 29, 2014, the Board received from RAK Contractors, LLC (contractor) a notice of appeal contesting the termination for default of its contract, AG-32SD-P-13-0883, with the Department of Agriculture (agency). The contractor was to have replaced a heating, ventilation, and air conditioning (HVAC) unit, but did not obtain a unit from the manufacturer or elsewhere. The contractor lacked sufficient credit to purchase the unit from the manufacturer and did not obtain money from a bank or otherwise to complete a purchase. The contractor contends that its failure to perform was for reasons beyond its control and without its fault or negligence, such that the default should be converted to one for convenience.

The agency has moved for summary judgment (treated by the Board as a motion for summary relief), contending that there is no genuine issue of material fact. It asserts that the contractor did not complete performance under the contract and that the reasons put forward by the contractor do not constitute bases to convert the termination to one for convenience. The contractor opposes the motion, as it contends that its failure to perform arose from reasons beyond its control. The contractor further notes that the contracting officer failed to notify it prior to award that its bid was lower than others. The contractor also states that with an opportunity it may have withdrawn its bid. Also, the contractor contends that the contracting officer simply should have terminated the contract for convenience. Given the issues and positions of the parties, further development of the record is unnecessary; as suggested by the agency's motion and the response by the contractor, this matter is ripe for resolution.

The Board makes findings of uncontroverted fact consistent with the assertions of the parties and the written record. The Board concludes that the contractor failed to perform, such that the agency has met its burden of proof. Relying upon facts as asserted by the contractor, the contractor has not established that its failure to perform arose from reasons beyond its control. Its lack of financing sufficient to satisfy the manufacturer does not constitute a reason beyond its control. The contractor has not established a correctable mistake in its pricing raised post-award: it bid the price intended, although it learned after award that the contract price was below the purchase price of a new unit from the manufacturer. Nothing alleged by the contractor suggests that a mistake occurred, other than of judgment, or that the contracting officer knew or should have known of or suspected a mistake. Given that the agency had a continuing need for the contract work to be performed, the contractor has not established that the contracting officer erred by issuing a termination for default rather than one for convenience. The contractor has not raised a basis that would excuse the default. Accordingly, the Board grants the motion for summary relief and denies the appeal.

Findings of Fact

1. Under simplified acquisition procedures, the agency issued a solicitation to obtain bids for a contractor to replace a rooftop HVAC unit. The solicitation sought a single line item bid price to perform all of the required work, including the delivery of the unit and installation. The solicitation stated that payment security is required if the contract award is for $30,000 or more. Exhibit 2 at 3-4, 8 (all exhibits are in the appeal file). Seven companies responded, with unit prices ranging from the two lowest of $24,661 and $30,645, to the two highest of $61,600 and $62,500. Exhibit 3 at 25-27.

2. On September 28, 2013, the agency and contractor entered into a contract that required the contractor to provide and install a particular make and model HVAC replacement unit within sixty calendar days after receipt of the notice to proceed. The contract price was $24,661. Exhibits 2 at 4-5, 4 at 3 (¶ 10), 31-32, 36, 95, 104-11.

3. The contract contains a Termination for Default (Fixed-Price Construction) clause, 48 CFR 52.249-10 (2013), as well as the Termination for Convenience of the Government (Fixed-Price) Alternate 1 clause, 48 CFR 52.249-2. Exhibit 4 at 63 (¶ I.1). The Default clause specifies that if the contractor fails to complete the work within the time provided, the agency may, by written notice, terminate the contractor's right to proceed with the work. Further, the contractor is liable for any damage to the agency resulting from the contractor's failure to complete the work within the time specified. However, the contractor's right to proceed shall not be terminated nor the contractor charged with damages under the clause, if the "delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of" the contractor. Examples of such causes are listed, including acts of God, acts of the Government, and delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the contractor and the subcontractor or supplier. Additionally, if a contractor was not in default or the delay was excusable, the rights and obligations of the parties are the same as if the termination had been issued for the convenience of the Government.

4. The contractor wrote to the agency on October 23, 2013, asserting that it had made an error in its bid. In substance, the contractor explained that the price of the unit was considerably higher than what it anticipated. The cost of the unit was approximately $27,000. This left the contractor with no money for installation or profit. The contractor stated that it could offer a new price or the contract could be terminated for convenience. The contractor apologized for the mistake. Exhibit 7 at 119. The contracting officer responded. Because of a continuing need for a completed contract and to avoid the loss of fiscal year funds, the contracting officer concluded that he could not enter into a "no cost" cancellation. He offered the contractor two options: perform at the offered and accepted price, or be subject to a termination for default and liable for excess reprocurement costs. Exhibit 8 at 121.

5. On November 6, 2013, the agency provided the contractor with a notice to proceed. Exhibit 9 at 124. As of December 10, 2013, the contractor had not started work at the site. Exhibit 9 at 126. On December 16, 2013, the contracting officer provided the contractor with a cure notice, specifying that failure to begin work within fifteen days of receipt of the notice to proceed was a condition endangering performance. Further, the notice specified that "unless this condition of insufficient, untimely progress is cured within

10 days after receipt of this notice," the agency may terminate the contract for default pursuant to the Default clause of the contract. Exhibit 10 at 127.

6. On February 25, 2014, the agency sought a schedule from the contractor regarding the delivery of the unit and the start date of installation. Exhibit 13 at 156. The contractor provided no schedule by March 7, despite having indicated that one would be provided by then. Exhibit 13 at 155. On March 11, 2014, the contracting officer sought a response from the contractor, specifying that if progress was not made and responses not submitted, a show cause letter–the final step before termination for cause–would be sent. Exhibit 13 at 157.

7. On March 13, 2014, the contractor responded, stating it was working on obtaining the unit and trying to get credit to purchase the unit. Exhibit 13 at 159. On March 19, the manufacturer of the HVAC unit informed the contractor that, due to the contractor's credit history, the manufacturer would not extend a line of credit for the purchase. The manufacturer had offered two options: pay cash in advance at the time the order is placed or place the order and pay in full ten days prior to equipment shipment. The contractor so informed the agency, stating that it lacked the money to purchase the unit. The contractor sought payment from the agency to permit payment ten days before shipment; the agency declined to do this. The contractor asserted that these matters, and the determinations of the manufacturer, were beyond its control. Exhibit 14 at 164.

8. On March 24, 2014, the contracting officer issued a show cause notice to the contractor. The notice specified that because the contractor had failed to perform in accordance with the terms of the contract and had failed to cure the conditions endangering performance the agency was considering issuing a termination for default. With reference to the Default clause, the notice provided the contractor an opportunity to demonstrate that its failure to perform arose from causes beyond its control and without its fault or negligence. Exhibit 16 at 168. The contractor responded on March 31, specifying that the manufacturer rejected the contractor's attempt to purchase on credit and required a cash payment. The contractor noted that it is a small business and a new business that lacks the cash flow to meet the conditions of the manufacturer. Regarding its inability to complete the purchase, the contractor contended that the circumstances were beyond its control; it sought a termination for convenience. Exhibit 18 at 181.

9. On April 23, 2014, the contracting officer made findings (that the contractor had insufficient financial resources or credit to perform) and a determination (to terminate for default the purchase order contract based upon the failure to complete performance within the time required and to cure the conditions endangering performance) but held up issuance of a default. Exhibit 18 at 179. Aware of the consequences of a termination for default, the

contracting officer attempted to get the contractor to complete performance, even exploring whether other units would meet the needs of the end user. Exhibits 18 at 182, 189-201, 19 at 230-33. By mid-May, the user agency was seeking to have the unit installed, noting that two projects were held up, with more to follow if the delay continued much longer. Exhibit 19 at 231. By the end of May, the contractor again stated that it lacked the resources to purchase the unit, as it sought a termination for convenience due to circumstances beyond its control. Exhibit 19 at 243.

10. On June 9, 2014, the contracting officer issued a notice of termination for default, terminating the entirety of the contract due to the contractor's failure to perform within the time frame specified for project completion. The notice apprised the contractor that the agency may repurchase the supplies and services and hold the contractor liable for excess costs. The contract was modified to reflect the default. Exhibit 20 at 248-49.

11. On July 29, 2014, the contractor filed a notice of appeal at this Board, contesting the termination for default. The contractor maintains that the termination should be one for convenience, having arisen from causes beyond its control.

12. The record contains a declaration by the contracting officer, who notes that the twenty-percent difference in price between the awardee and next-low bidder is not uncommon, and that there was no Government estimate for price comparison given that the project was so small. The contractor's submissions identified the unit to be installed and demonstrated that the contractor had investigated the work to be performed. This information together with the successful past performance indicated by the contractor did not give the contracting officer cause to question the price or suggest that the contractor had made a mistake. Declaration of Contracting Officer (Jan. 13, 2015).

Discussion

The contractor disputes the termination for default. The agency has filed a motion for summary relief, maintaining that undisputed facts support the termination for default and that the contract and case law do not treat a contractor's lack of financing to accomplish performance as a matter outside of the contractor's control. Accordingly, the agency asks the Board to conclude that its actions were justified and that the contractor has failed to establish a basis to convert the default to one for convenience. The contractor opposes the motion. In response, it contends that the contracting officer should have noted that the contractor's price was too low and afforded the contractor the opportunity to withdraw its bid, that the contract should have been terminated for convenience because the supplier's actions were beyond the contractor's control, and that the contractor would like to proceed

to a jury trial. This last matter is readily disposed of, because the appeal process does not envision or permit a jury trial.

A party seeking summary relief bears the burden of establishing the absence of any genuine issue of material fact. All significant doubt over factual issues must be resolved in favor of the party opposing summary relief. At this stage, the Board may not make determinations about the credibility of potential witnesses or the weight of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). However, "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) (citations omitted). If a motion is made and supported as required in Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denial in its filings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *J.C. Lee v. Department of Agriculture*, CBCA 3536, 14-1 BCA ¶ 35,595. The Board has made findings consistent with these dictates.

The contractor failed to perform the contract. The agency has met its burden of proof under the Default clause of the contract. The contractor seeks to overturn the default termination on two grounds: (1) it could not obtain necessary financing for reasons beyond its control, and (2) it made a mistake in its bid. The contractor bears the burden of proof to establish the factors to mitigate the default. As a matter of law, the contractor cannot prevail on either of these theories based upon uncontroverted facts.

A contractor is expected to have the financial resources to perform a contract. Nothing in the contract promised or suggested that the agency would pay for equipment before it was ordered or delivered. Case law makes clear that insufficient finances do not constitute a basis beyond the contractor's control. A lack of working capital is not an excuse for non-performance of a contract when the Government does not contribute to the financial problem of the contractor. A contractor is expected to have the financial ability to perform the contract. A default is not excused by a contractor's inability to secure financing. *TGC Contracting Corp. v. United States*, 736 F.2d 1512, 1515 (Fed. Cir. 1984); *Wellington House v. General Services Administration*, GSBCA 14665, 99-1 BCA ¶ 30,279; *Katzdorn Construction & Co.*, AGBCA 87-265-3, 87-2 BCA ¶ 19,929. Based upon these precedents, the contractor's inability to perform cannot be excused by its inability to obtain financing.

To prevail on its mistake in bid theory, raised for the first time after award, the contractor must prove that the error is of the type that may be compensable and that the contracting officer knew or show have known of the mistake at the time the bid was accepted. An error of judgment is not a compensable error. *Bromley Contracting Co. v.*

United States, 794 F.2d 669, 671-72 (Fed. Cir. 1986); *Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157-58 (Fed. Cir. 1987) ("It is well established that an erroneous bid based, like this one, upon a mistake in judgment does not entitle the contractor to reformation of its contract."); 48 CFR 14.407-4 (2013). This test has been characterized as requiring the contractor to establish that (1) a mistake occurred; (2) the mistake was a clear-cut clerical or mathematical error or misreading of the specifications and not a judgment error; (3) prior to award the agency knew or should have known that a mistake had been made; (4) an agency request for bid verification was inadequate; and (5) proof of the intended proposal was established. *Transco Contracting Co.*, ASBCA 47289, 96-1 BCA ¶ 28,090, at 140,222 (1995).

The contractor has offered no support for the position that it made a clerical or mathematical error, or that the alleged error was other than one of judgment. Rather, the contractor has demonstrated that it made an error of judgment underestimating its cost of performance by not seeking pricing from, and terms and conditions of placing an order with, a supplier prior to award. As noted above, the improvident business judgment of the contractor does not serve as a basis for correcting a mistake. Also, the contractor has offered no proof of any intended price. Therefore, the contractor has not met elements two or five.

Regarding elements three and four, the record contains no rebuttal to the declaration of the contracting officer specifying that he was unaware of any error and had no reason to believe that the contractor had made an error in pricing its bid. Further, the contractor has offered no support for its assertion that the contracting officer should have been aware that the awarded price was improperly low so as to require the contracting officer to afford the contractor the opportunity to withdraw its price. The twenty percent price differential, the focus of the contractor's assertions, does not make a mistake apparent, given the single line item pricing for the work, the range of bid prices, and the contractor's own submissions with its bid that revealed a familiarity with the work and required equipment. The terms of the contract are not egregious; enforcement of the agreed terms is appropriate.

The contractor highlights that it is a small, new business, while stating that the default is unfair and crippling to it. If these assertions are treated as allegations of bad faith or impropriety by the contracting officer, no showing has been made to meet the standards for supporting such an assertion. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002). This contracting officer worked with the contractor in attempting to avoid the default. Moreover, the user agency was impacted adversely as it was without the HVAC unit for several months while the contract was not completed. Further, this contractor took the opportunity for performance away from other bidders who potentially could have completed performance in a timely fashion. The record establishes and suggests no impropriety by the contracting officer.

Decision

The Board grants the agency's motion for summary relief and **DENIES** the appeal, such that the termination for default is upheld.

JOSEPH A. VERGILIO
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

MARIAN E. SULLIVAN
Board Judge