



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 3, 2019

CBCA 5907

WALKER DEVELOPMENT & TRADING GROUP INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Terrance Walker, President of Walker Development & Trading Group, Inc., Reno, NV, appearing for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **GOODMAN**, and **CHADWICK**.

BEARDSLEY, Board Judge.

Walker Development & Trading Group, Inc. (Walker) timely appealed from decisions of a Department of Veterans Affairs (VA) contracting officer terminating Walker's contract for cause and denying a certified claim for damages related to the termination. The parties filed cross-motions for summary judgment. The VA asks the Board to sustain the termination based on Walker's failure to meet the delivery schedule, failure to provide adequate assurances of performance, and failure to provide an excusable reason for its failure to perform. Walker argues that the termination was flawed and should be converted to a termination for convenience. Walker also seeks summary judgment on its claim for lost

profits, damages, and other costs as a result of the VA's bias, abuse of discretion, and bad faith termination of Walker for cause. We grant the VA's motion and uphold the termination for cause. We deny Walker's motion and its appeal.

Background

This summary relies on facts undisputed by the parties and documents in the appeal file and attached to the motions on which the parties rely.

On July 10, 2017, Walker and the VA entered into contract VA262-17-D-0165, an indefinite delivery, indefinite quantity (IDIQ) contract for bulk laundry services covering the VA Greater Los Angeles Healthcare System (VAGLAHS), the VA Long Beach Healthcare System (VALBHS), the VA Loma Linda Healthcare System (VALLHS), and the VALLHS Ambulatory Care Center (VALLHS ACC). The contract was for bulk laundry services for VAGLAHS and VALBHS on an "as-needed" basis, for VALLHS 365 days per year, and for VALLHS ACC five days per week, every week of the year. The contract included a base period of performance beginning August 1, 2017, and ending July 31, 2018, with four one-year option periods. The contract included Federal Acquisition Regulation (FAR) clause 52.212-4(m) (48 CFR 52.212-4(m)) which allows the Government to terminate the contract 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." On July 20, Walker accepted two delivery orders, VA262-17-J-6000 for VALBHS and VAGLAHS and VA262-17-J-5594 for VALLHS. The terms and conditions of the IDIQ contract were incorporated into each delivery order.

The contract included estimated quantities of laundry to be cleaned and indicated the category of items—category one through category five—that needed to be laundered at each facility. At VALLHS and VALLHS ACC, Walker contracted only to launder category one items, and at VAGLAHS and VALBHS, Walker contracted to launder all five categories of items. The contract described the finishing requirements (e.g., folded) for each category of laundry but did not require the VA to provide samples of the laundry or of the finishing requirements.

In its proposal, Walker indicated that it had teamed with Valet Services, Inc. (Valet) to perform the contract. Walker also provided a price for each category of laundry without asking for or reviewing laundry samples. In the solicitation, category two items had to be finished through a garment finisher and placed on hangers. At Walker's request, however, the contract was changed to allow Walker to fold category two items. In June, Walker attended a pre-award conference with the VA at Valet's facility. Prior to signing the

contract, Walker asked to see samples of each category two item to see how the VA wanted the items finished. When reminded that category two items could be folded, Walker said it did “not need the samples.” Nonetheless, on July 11, the day after contract award, Walker requested to borrow category two samples to see how the VA wanted them folded. Early the next morning, the VA agreed to send a sample of each item to the Valet plant or if a sample was not available, to explain the required fold in detail to Valet. Walker reported to the VA contracting officer that Valet was arranging to obtain samples and get details on the folding requirements. The VA arranged for Valet to visit VAGLAHS to inspect and review samples of laundry items in order to put together the pricing for the subcontract. Valet obtained all of the samples it needed to price a subcontract, including category two samples. Valet provided these samples to Walker. Valet and Walker, however, never executed a subcontract for the laundry services.

Not until July 20 did Walker email the VA that “[t]here were a few items on category two that were missing (when some folks came [sic] picked them up). Can you share with me those [sic] they are (not on contract)?” The contracting officer responded two minutes later that she was deferring the question to “David and Lawe at GLA,” who had previously worked with Valet to provide samples. Walker claims that it only received about half of the category two samples, and the VA admits it is unsure how many category two items it provided to Walker. Walker asked for pricing from several potential subcontractors after July 20. The only correspondence in the record between Walker and these subcontractors mentioning samples, however, is from M&F Laundry, asking if Walker had “a chance to get the samples.”

On July 25, the contracting officer attempted to coordinate a conference call with Walker and Valet to discuss the August 1 performance deadline for the VALLHS task order. The next day, Valet emailed the contracting officer that “it is not a participant in this project, so we will not be participating in this teleconference.” Walker responded to the contracting officer and Valet that Valet was “breaching our agreement, in part, because they have made fraudulent representations about their capabilities.” That same day, the contracting officer provided Walker with the contact information of the incumbent contractor at VALLHS and asked Walker to advise whether it was able to meet the terms of the contract. Two days later, Walker emailed the contracting officer that it would have “something in place” for all three locations. Walker said it would finalize the subcontract the next morning. That same day, Valet emailed the contracting officer and Walker that it did not have a contract with Walker and was “not interested in working with or through Walker Development.” In reply, Walker stated that Valet had “misrepresented that they could process all of the items” and that it “may have another partner anyway so Valet is irrelevant at this point.”

The following day, July 28, Walker emailed the contracting officer stating,

I'm really sorry but we will not be able to service the VA accounts after the [sic] Valet Services breached their promises. We tried coming up with different solutions and nothing seems to be solid. I do not want to take on an account that we are not 100% on completing it. I will not set us up for failure. You have my permission to cancel with convenience to the government.

Walker and the contracting officer spoke later that day because Walker's president wanted to apologize for Walker's inability to perform. Walker also asked for direction, guidance, and other options. In that call, the contracting officer emphasized that she would not terminate the contract for the convenience of the Government. Walker's president and the contracting officer did not communicate by phone after July 28. After receipt of Walker's email, the contracting officer contacted the second highest-rated bidder for the contract as a back-up to perform the contract. On July 31, she emailed the incumbent contractor, "We have come to believe that laundry services MAY be required tomorrow despite your current contract ending. . . . Would you be able to provide a continuation of laundry services to the VA Loma Linda including the ACC if I called you tomorrow morning and requested the services?"

On August 1, Walker failed to pick up linens from VALLHS as required by the VALLHS delivery order. The contracting officer issued a notice that same day terminating Walker's contract and delivery orders 6000 and 5594 for cause. She wrote:

The Government considers your email dated July 28, 2017 (attached) in which you stated "we will not be able to service the VA accounts" to be a repudiation of Walker Development's obligations under contract VA262-17-D-0165 and a refusal to perform any additional work under that contract. The Government intends to acquire the laundry services described in contract VA262-17-D-0165 and task orders VA262-17-J-6000 and VA262-17-J-5594 from another vendor.

Later on August 1, Walker asked the contracting officer to reconsider her decision, citing potential litigation costs, the breaches of Valet, the fact that Walker only agreed to a termination for convenience, and the fact that the contracting officer had said she was pursuing other offers when Walker asked for further options on July 28. On August 2, Walker asked the contracting officer to convert the termination for cause to a termination for convenience. Walker also claimed that the VA acted "in bad-faith terminating us when attempting to ask for further direction (and parsing our email out of context to justify termination), costs [sic] us additional time wasted with potential subcontractors"; delayed,

hindered, and prevented its contract performance; and repudiated the contract first by pursuing other offers and then rebuffing Walker's inquiry as to other options. On August 6, Walker submitted a certified claim for \$458,175.53, to include costs incurred as a result of the VA's actions, costs incurred "bidding, rebidding, and working on obtaining the contract," lost profits, and damages for the loss of other contracts. On August 12, the contracting officer responded to the requests to reconsider her decision, stating that the "Notice of Termination provides the contracting officer's final decision on this matter. This decision will not be reconsidered." On August 29, the contracting officer issued a final decision denying Walker's certified claim for damages and reiterating that she would not reconsider the termination for cause. On October 30, 2017, Walker timely appealed both decisions.

Discussion

I. The Standard for Summary Judgment

Summary judgment is appropriate when "there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to judgment as a matter of law." *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554, at 166,175 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). While we draw all reasonable inferences in favor of the nonmoving party, "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," summary judgment in favor of the moving party is appropriate. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 599 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

II. Termination for Cause

We agree with the VA's arguments in its summary judgment motion that the termination for cause was proper because Walker failed to perform and failed to provide adequate assurance of future performance. It is undisputed that Walker did not pick up the laundry from VALLHS on August 1. "[W]here a contractor fails to comply with contract delivery schedules, the contract may be terminated." *Asheville Jet Charter & Management, Inc. v. Department of the Interior*, CBCA 4079, 16-1 BCA ¶ 36,373, at 177,300 (quoting *Consolidated Industries v. United States*, 195 F.3d 1341, 1344 (Fed. Cir. 1999)). Walker's statement that it was not "able to service the VA accounts" provided no assurance that Walker could perform the contract or the delivery orders in the future. Furthermore, Walker did not provide any assurance in the July 28 telephone conversation but asked for additional guidance or termination for the convenience of the Government. "Where a contracting officer, 'based on the events, actions, and communications, leading to the default termination,' could not reasonably be assured of the contractor's timely performance, a

default termination may be sustained.” *Id.* (quoting *Kadri International Co.*, AGBCA 2000-170-1, 04-2 BCA ¶ 32,646, at 161,542).

We also agree that the VA did not hinder Walker’s ability to perform or violate the duty of good faith and fair dealing. Viewing the facts in the light most favorable to Walker, Walker fails to identify any material facts or evidence which excuse its default or render the termination improper. See *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913; *Asheville Jet Charter & Management, Inc. v. Department of the Interior*, CBCA 4079, 17-1 BCA ¶ 36,834. When failure to provide information is alleged as a breach of the duty to cooperate or not hinder the contract performance, “the contractor must show that the information requested was necessary for performance and that the government unreasonably either did not provide that information or did so in an untimely fashion.” *Hanley Industries, Inc.*, ASBCA 54315, 08-2 BCA ¶ 33,932, at 167,920 (citing *T&G Aviation, Inc.*, ASBCA 40428, 00-2 BCA ¶ 31,147, at 153,846–47).

There is no support in the record for Walker’s contention that the VA acted unreasonably with regard to Walker’s requests for category two samples. The contract did not require that the VA provide samples, the category two samples were not necessary for performance of the VALLHS delivery order, and the VA did provide category two samples to Walker and Valet. In fact, at one point Walker stated that it did not even need category two samples. There is no evidence that Walker communicated to the VA that without the category two samples, Walker could not find a subcontractor once Valet’s subcontract fell through. Instead, Walker indicated that it had successfully made contact with another subcontractor as of July 26, and it would finalize the subcontract for all three locations the next morning. Two days later, when Walker stated that it could not “service the VA accounts,” it was because “Valet Services breached their promises.” There is no mention of the lack of category two samples. Walker went on to say that it “tried coming up with different solutions and nothing seems to be solid.” Walker has provided no evidence, only assertions, that all of the potential subcontractors refused the work because they did not have all of the category two samples. In opposing a motion for summary judgment, “more is required than mere assertions.” *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626–27 (Fed. Cir. 1984). The nonmoving party “must set out . . . what specific evidence could be offered at trial.” *Id.* at 627.

Even if the VA failed to provide missing category two samples to Walker, this failure did not hinder Walker’s ability to perform. The category two samples were not necessary for performance of the VALLHS delivery order because the VALLHS did not require the laundering of category two items. As such, the lack of category two samples did not prevent Walker from engaging a subcontractor to perform the VALLHS delivery order. The record

reveals no basis to excuse the contractor from performance of the VALLHS laundry services delivery order.

Walker argues that the termination of the delivery order for VALBHS and VAGLAHS was premature, given that the exact date to pick up the laundry at these facilities had not been established. The delivery order, however, incorporated all of the terms and conditions of the contract, and the contract delivery date was August 1. The contract allowed for termination in the event of any default or failure to comply with any terms and conditions. Materially breaching the VALLHS delivery order by failing to pick up the laundry on August 1 was an event of default or failure to comply with the terms and conditions of the contract. *See U.S.I.A. Underwater Equipment Sales Corp. v. Department of Homeland Security*, CBCA 2579, 14-1 BCA ¶ 35,503 (sustaining a default termination where the contractor defaulted under a task order); *Klamath Wildlife Resources v. Department of the Interior*, CBCA 3764, 16-1 BCA ¶ 36,326. Thus, the contracting officer properly terminated the VALBHS and VAGLAHS delivery order and the contract.

Walker asserts that the VA breached its duty of good faith and fair dealing by conspiring to get rid of Walker and setting it up to fail. “Every contract implicitly contains a covenant of good faith and fair dealing, keyed to the obligations and opportunities established in the contract.” *Lakeshore Engineering Services, Inc. v. United States*, 748 F.3d 1341, 1349 (2014) (citing *First Nationwide Bank v. United States*, 431 F.3d 1342, 1349 (Fed. Cir. 2005), and *Metcalf Construction Co. v. United States*, 742 F.3d 984, 990–92 (Fed. Cir. 2014)). Walker argues that the true reason for the termination was that the VA preferred another contractor and that the contracting officer’s decision to terminate was pretextual. Walker points to the fact that the contracting officer did not communicate by phone with Walker after July 28, did not find other options for performance for Walker, and on July 28 and after, contacted other vendors to see if they could perform the contract. However, a few days before, the contracting officer had suggested other subcontractors that Walker could use, and shortly thereafter, Walker had indicated that it had a new subcontractor lined up to perform. Upon receipt of Walker’s notice that it would not be able “to service the VA accounts,” the contracting officer had reason to believe that Walker might not perform. Thus, it was reasonable for her to take steps to find a replacement. The nature of the contract for medical laundry necessitated no interruption in service. Even so, the contracting officer did not award the contract to another contractor until after the termination. We find that the VA’s actions do not rise to the level of breach of the duty of good faith and fair dealing or support a finding that the termination was pretextual or an effort to replace Walker.

We, therefore, conclude that appellant has failed to establish a genuine issue of material fact sufficient to defeat the motion for summary judgment. Consequently, we find as a matter of law that the Government properly terminated appellant’s contract.

III. Bias, Abuse of Discretion, and Bad Faith

Walker claims entitlement to lost profits, damages and other costs because the VA acted in bad faith, abused its discretion, was biased, and did not give Walker a fair opportunity to compete. “To prove bad faith by the Government, a contractor must establish, by clear and convincing evidence, that a government official acted with ‘some specific intent to injure the [contractor].’” *J.R. Mannes Government Services Corp. v. Department of Justice*, CBCA 5638, 17-1 BCA ¶ 36,911, at 179,842 (quoting *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002)). No such intent has been established. Walker relies on pre-contract actions by the VA in bid protest litigation to support its assertion that the VA preferred another contractor and terminated Walker so that this other contractor could perform. The fact that Walker protested successfully a VA laundry solicitation or that this other contractor had been awarded most of the VA’s laundry contracts in California does not support Walker’s claim that the VA acted with the intent to harm Walker in this contract, or acted out of bias or abused its discretion. Instead, the record shows efforts by the VA to assist Walker in performing the contract.

Walker’s argument that the VA failed to give Walker a fair opportunity to compete by inaccurately describing the scope of the work in the solicitation or withholding key information as to the scope of work should have been raised in a bid protest. The Board does not decide issues involving the formation of the contract.

Walker’s other arguments for bad faith, bias, and abuse of discretion are the same arguments it made in arguing that the VA breached the duty of good faith and fair dealing and that the termination was improper. We see no evidence that the VA acted in bad faith, abused its discretion, or acted out of bias. We deny appellant’s summary judgment motion. Walker is not entitled to lost profits, costs, other damages, or any relief in this appeal.

Decision

Respondent’s motion for summary judgment is granted. Appellant’s motion for summary judgment is denied.

This appeal is **DENIED**.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

We concur:

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge

Kyle Chadwick

KYLE CHADWICK

Board Judge