



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 29, 2019

CBCA 4241

UCENSYS RESEARCH CORP.,

Appellant,

v.

NUCLEAR REGULATORY COMMISSION,

Respondent.

Christopher Lee, Director, Research and Technology, of Ucenys Research Corporation, Ashburn, VA, appearing for Appellant.

Michael L. Norris, Office of the General Counsel, Nuclear Regulatory Commission, Washington, DC, counsel for Respondent.

Before Board Judges **KULLBERG**, **ZISCHKAU**, and **SULLIVAN**.

KULLBERG, Board Judge.

Appellant, Ucenys Research Corporation (Ucenys), appeals the contracting officer's (CO's) termination for cause of an order for renewal of service coverage for video teleconference (VTC) equipment and the CO's demand for repayment of the contract price in the amount \$64,784.53. Ucenys contends that its failure to provide the ordered services was due to circumstances beyond its control. The Board conducted a hearing in this appeal, and the parties submitted briefs. For the reasons stated below, the Board denies the appeal and directs appellant to repay \$64,784.53.

Background

On October 17, 2013, the Nuclear Regulatory Commission (NRC) issued solicitation number ADM-14-010 (solicitation), which was reposted on October 21, 2013, for the purchase of Cisco SmartNet enterprise content delivery network (ECDN) service for forty-four items of CISCO/Tandberg VTC equipment. Appeal File, Exhibits 37-39.¹ The solicitation had two contract line item numbers (CLINs). Exhibit 38. CLIN 001 was for “Cisco SmartNet ECDN Service Coverage for one year from 12/1/2013 through 11/30/2014[,]” and CLIN 002 was for “[r]einstatement charge [that may be] applicable to product(s) that have a [lapse] in coverage.” *Id.* The solicitation was limited to “sources that are authorized by Cisco to sell the required services.” *Id.* at 2.

NRC issued the solicitation after it determined that forty-four items of VTC equipment, which were identified by serial numbers, required “renewal of CISCO SmartNet ECDN maintenance and support plans for a period of one year.” Exhibit 1 at 1. Additionally, NRC determined that the existing “Cisco/Tandberg warranty service agreements . . . [had] expired or will expire in calendar year 2013.” *Id.* at 3. NRC contacted Cisco in September of 2013 “to get an estimate of what one year service will cost.” Exhibit 4 at 2. Cisco provided an estimate, which was dated September 7, 2013. Exhibit 50. NRC used that estimate from Cisco to establish an independent government estimate. Transcript, Vol. 1 at 51-52. That estimate from Cisco also confirmed that renewal of service coverage could be obtained for all forty-four of the items of VTC equipment, and any potential bidder would have been able to obtain that same information from Cisco. *Id.*

After receipt of bids in response to the solicitation, NRC determined that some of the bids did not include a price for reinstatement fees under CLIN 002. Exhibit 4, at 2. NRC then issued “[a] repost . . . requesting bidders to ensure they include full reinstatement fee (if applicable) to their current bid.” *Id.* at 1. Ucentsys submitted its final bid on December 3, 2013, in the form of an invoice for \$64,784.53. Exhibit 15 at 4.

On December 18, 2013, NRC awarded purchase order NRC-HQ-40-14-P-0001 (order) to Ucentsys to “[p]rovide funding for CISCO SmartNet ECDN service for 44 CISCO/Tandberg equipment items at the NRC.” Exhibit 14 at 3. The order required Ucentsys to purchase service coverage for the period from December 1, 2013, to November 30, 2014, and the obligated amount of award under the contract was \$64,784.53. *Id.* at 2. The contract schedule stated, “Delivery of supplies or services to the NRC by 1/1/2014.” *Id.* Ucentsys’ contract price consisted of CLIN 001 in the amount of

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

\$47,689, and CLIN 002 in the amount of \$17,095.53. *Id.* On December 24, 2013, NRC approved Uceansys' invoice for the full amount of the order, \$64,784.53. Exhibit 15.

The order incorporated in full Federal Acquisition Regulation (FAR) clause, 48 CFR 52.212-4 (2013) (FAR 52.212-4), contract terms and conditions—commercial items (JUL 2013). Exhibit 14 at 2-9. That clause provided in pertinent part, the following:

(d) *Disputes.* This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. [§§ 7101-7109 (2012)]). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action rising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

....

(f) *Excusable delays.* The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

....

(m) *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.

Id. at 2-3, 6.

Although Ucensys was an authorized reseller of Cisco service coverage it could not obtain a renewal of service coverage under the order for NRC's VTC equipment directly from Cisco, but, instead, Ucensys' agreement with Cisco required that it purchase such services from a Cisco-authorized distributor. Exhibit 29 at 2-3; Transcript, Vol. 2 at 225-29. Ucensys sought to obtain service coverage renewal from Tech Data Corporation (Tech Data), which was a Cisco-authorized distributor, and on December 13, 2013, Tech Data provided Ucensys with "takeover quotes." Exhibit 40 at 6-7; Transcript, Vol. 2 at 276. Ucensys' reply to Tech Data in response to the quote was the following:

Regarding this quote the period of performance is one year from the time the warranty starts through 09/30/2014. Because Cisco maintains continuous service on their equipment, there may be a reinstatement fee on items that have lapsed in coverage. The current end date you have is December 12, 2014. Please advise.

Exhibit 40 at 6. In an email dated December 16, 2013, Tech Data informed Ucensys that it had "a different difference amount." *Id.* at 4. In a later email, which was dated January 3, 2014, Tech Data informed Ucensys that it "won't be able to cover the difference on price during the time [they] have been working on this quote." *Id.* at 1.

During January of 2014, NRC learned that service coverage for one of the items of VTC equipment had not been updated. Transcript, Vol. 1 at 42. On January 27, 2014, NRC advised Ucensys that one of the items of VTC equipment had an expired service agreement. Exhibit 43 at 2. That same day, Ucensys advised the NRC of the following:

Regarding the support issue there seems to have been confusion from the distributor (not Cisco) end which prevented us from issuing a [purchase order (PO)]. My team . . . [is] working to get this resolved. I will keep you posted and please continue to reach out to me with any questions/concerns.

Id.

On May 5, 2014, Cisco advised NRC that the service coverage for all but two of the serial numbers for the VTC equipment listed in the order had expired. Exhibit 46; Transcript, Vol. 1 at 62. NRC forwarded that information to Ucensys by email that same day.

Exhibit 46. In an email message dated May 27, 2014, NRC informed Ucensys of the following:

The NRC's fleet of VTC units must be registered for maintenance coverage with Cisco by [close of business] tomorrow. . . . Your invoice . . . in the amount of \$64,784.53 has already been paid in full. Six months later, we are finding out that our units are still not registered. This is unacceptable. Please provide a path forward no later than 10 a.m. tomorrow.

Exhibit 16 at 4. Ucensys replied to NRC in an email message, which was dated May 28, 2014, that stated the following:

I would suggest modifying the original PO to exclude the piece of inventory (Serial 62.11914 CTS-6000-50-MK2-P). This piece of inventory is not eligible for Smartnet coverage as of December 31, 2013 it reached 'End-of-Life[.]' According to Cisco the NRC was provided with notice, and further, this serial should not have been included in the original PO issued last year. Once we receive and sign off on the amended PO we can proceed with covering all eligible VTC equipment.

Id. at 3. The phrase "end of life" meant that service coverage was no longer available, but continued coverage could be arranged even under those circumstances. Transcript, Vol. 1 at 66-68. Warranty coverage on the other items of VTC equipment under the contract would not have been affected because one item was at "end of life." *Id.* at 76-77.

The CO responded to Ucensys in an email, which was dated May 28, 2014, that stated the following:

Pursuant to the contract you signed with the NRC on December 19, 2013, Ucensys Research Corporation agreed to perform maintenance and support on 44 CISCO/Tandberg equipment items owned by the NRC. You accepted the contract as-written and that obligation does not change unless both signing parties agree to modify the contract. According to my understanding of the situation . . . there exists an issue over whether certain pieces of equipment listed under the contract can still be serviced or whether they have reached their "end-of-life" and thus are no longer eligible to be serviced by Cisco, and that this in turn seems to be related somehow to your failure to perform any other parts of the contract.

Exhibit 16 at 1. Additionally, NRC instructed Ucensys to confirm by June 2, 2014, its intent to perform the services required under the order for the remaining VTC equipment. *Id.*

In its June 2, 2014, email message in response to the CO, Ucensys stated the following:

It is our intention to fulfill the requirements of this contract. It is our position that the performance delays are excusable and have been caused by circumstances beyond the control of Ucensys.

....

Cisco was unable to restructure the dates of coverage to reflect an End Date of 9/30/2014 for all Inventory Equipment. The NRC should have been notified by Cisco during the [request for proposals (RFP)] process that because this was a ‘Takeover’ quote[,] Cisco cannot change the dates. If this information would have been known when preparing the RFP[,] then Ucensys staff would not have had to spend time researching the issue that was not in the scope of services. Consequently[,] this caused a performance delay.

....

The second occurrence is One(1) out of 44 Cisco/Tandberg equipment items was not eligible for Cisco SMARTnet ECDN Service Coverage. CTS-6000-50-MK2-P. The last date of support . . . was December 31, 2013.

Exhibit 17 at 1. Ucensys concluded by recommending that “we proceed with the SMARTnet service coverage on the eligible equipment.” *Id.* at 2.

Representatives from NRC and Ucensys conferred by phone on June 4, 2014, and Ucensys agreed to provide service coverage on forty-three of the forty-four items of VTC equipment by June 6, 2014. Exhibit 20 at 2; Transcript, Vol. 1 at 82-83. NRC’s email message to Ucensys, which was dated June 4, 2014, stated the following:

Per our conversation this morning, please confirm that 43 of the 44 pieces of equipment (referenced in your email below) will be registered for maintenance coverage with Cisco [not later than] 3 p.m. Friday, June 6, 2014 or sooner.

Once this is completed, the Contracting Officer will get in touch with you to discuss the one item of equipment that is unresolved.

Exhibit 19.

Ucensys did not respond to NRC's June 4, 2014, email and failed to provide renewal of service coverage for the remaining forty-three items of VTC equipment by June 6, 2014. Exhibit 20; Transcript; Vol. 1 at 85. On June 13, 2014, NRC sent a cure notice to Ucensys that stated, in pertinent part, the following:

The last time our office spoke with you, in a telephone conference on June 4, 2014, you indicated that you would have the coverage in place for 43 of the 44 pieces of equipment by June 6, 2014. Today, one full week after that June 6 deadline, there is still no Cisco SmartNet ECDN coverage on any of NRC's equipment. Cisco indicated as late as June 11, 2014[,] that Ucensys has still not placed the order with Cisco for the required coverage. While we understand that securing coverage on one of the 44 pieces of equipment is no longer possible, there is no apparent reason why Ucensys has not yet secured coverage on any of the other 43 pieces of equipment six months after Ucensys['] acceptance of the purchase order, when that coverage should have been in place immediately after purchase order acceptance in December 2013.

Exhibit 22. Ucensys did not respond to the NRC's cure notice. Transcript, Vol. 1 at 177-78. NRC confirmed through Cisco that Ucensys had not obtained a service agreement for any of the VTC equipment under the contract. *Id.* at 178. Ucensys did not communicate with NRC subsequent to the cure notice, and NRC had no reason to believe that Ucensys had made any effort to cure the situation. *Id.* at 179.

On June 24, 2014, Tech Data sent Ucensys an email that stated the following:

The requirements were not clear. There were two different requests, with little information. Every time I've opened a case with Cisco, I've uncovered a new issue. I have been trying my best to get this completed, but as you know there is a process with Cisco. This was completed before, but you requested for me to start over. I understand your frustration, but please understand that I'm aligning my resources to get you an updated quote. I will keep you posted. Thanks!

Exhibit 35. NRC did not receive a copy of that email. Transcript, Vol. 1 at 204. The CO terminated the order for cause in a letter to Ucensys dated July 1, 2014. Exhibit 23. In a

second letter to Ucensys dated August 21, 2014, the CO demanded repayment of NRC's previous payment \$64,784.53 as a result the termination of the order for cause. Exhibit 26. The Board held an oral hearing in this appeal, and the parties submitted briefs.

Discussion

The issue before the Board is whether NRC properly terminated the order for cause and can recover its previous payment to Ucensys in the amount of \$64,784.53. NRC contends that Ucensys failed to obtain renewals of service coverage for any of the items of VTC equipment listed in the order, and Ucensys has failed to show that its failure to perform the terms of the order was excusable. Additionally, NRC argues that it is entitled to recover the full amount of its invoice payment of \$64,784.53 to Ucensys. Ucensys contends that its failure to perform the contract was due to circumstances beyond its control.

This Board recognizes that “a default termination is a ‘drastic sanction’ that the Government should impose ‘only for good grounds.’” *Brent Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,898-99 (quoting *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969)). In the case of a commercial items contract, “a termination based upon a failure to comply with ‘any contract terms and conditions’ under the commercial item clause requires that those contract terms and conditions constitute material requirements of the contract. *Id.* at 176,899 (citing *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 413 (1947)). “Under FAR 52.212-4(m), the termination for cause clause for commercial services contracts, the government initially has the burden of proving that the termination for cause was valid.” *Id.* (quoting *KSC-TRI Systems, USA, Inc.*, ASBCA 54638, 06-1 BCA ¶ 33,145, at 164,260 (2005)). “If the Government presents a prima facie case that the termination was proper, the burden shifts to the contractor to rebut the prima facie case.” *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,150 (citing *CDA, Inc. v. Social Security Administration*, CBCA 1558, 12-1 BCA ¶ 34,990, at 171,971; *Integrated Systems Group, Inc. v. Social Security Administration*, GSBICA 14054-SSA, 98-2 BCA ¶ 29,848, at 147,742). Once the Government has shown that a contractor did not complete its contract in a timely manner, the contractor has the burden of proving that its failure to perform its contract was excusable. *See DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996) (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987; *Switlik Parachute Co. v. United States*, 573 F.2d 1228, 1234 (Ct. Cl. 1978)).

Ucensys failed to renew service coverage for any of the items of VTC equipment as required under NRC's order. Although Ucensys invoiced and received payment for providing that service coverage, it failed to do so before January 1, 2014, as required under the order, or at any time after that date. Ucensys attempted to purchase the service coverage

from Tech Data, which was a Cisco distributor, but never finalized such a purchase. In spite of its failure to obtain the service coverage required under the order, Ucensys repeatedly assured NRC that it would comply with the terms of the order. NRC finally issued a cure notice on June 4, 2014, but Ucensys did not submit any response. It appears from the record that one item of VTC equipment became ineligible for service coverage from Cisco because it had reached its “end of life.” Ucensys requested that NRC modify the order to reflect that change, but NRC directed Ucensys to obtain service coverage for the remaining forty-three items of VTC equipment. NRC properly directed Ucensys to proceed as directed and was not required to issue such a modification because the order incorporated the Disputes clause, FAR 52.233-1, and Ucensys was obligated to continue performance of the order. *See Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1277 (Fed Cir 1999).

The Board finds that NRC has established a prima facie case for terminating the order for cause, and the Board’s discussion, accordingly, turns to whether Ucensys has met its burden of proving its nonperformance was excusable. Before issuing the solicitation, NRC obtained an estimate from Cisco for the cost of obtaining service coverage, and such information would have been available to any prospective bidder. Ucensys, therefore, had the ability to determine in advance of award whether it could obtain service coverage before accepting award of the order. Ucensys obtained “takeover quotes” from Tech Data on December 13, 2013. As a reseller, Ucensys had to obtain service coverage from a distributor such as Tech Data because it could not purchase such coverage directly from Cisco, but Ucensys never completed its purchase from Tech Data. A series of email exchanges between Ucensys and Tech Data show that they never reached an agreement as to terms for the service coverage required under the order. Tech Data’s June 24, 2014, email acknowledges Ucensys’ “frustration,” but also, Tech Data noted that the requests had “little information” and that Ucensys had requested that Tech Data “start over.”

Ucensys argues that its failure to obtain the required service coverage under the order was due to circumstances beyond its control, but the Board does not find that Ucensys has proven that fault lies with any other party. Before agreeing to perform a contract, a contractor “must examine the complexity of the contract requirements and its own capabilities, and then make a business judgment as to whether it could complete the work within the time allowed by the contract.” *Ryll International, LLC v. Department of Transportation*, CBCA 1143, 11-2 BCA ¶ 34,809, at 171,305 (citing *American Ship Building Co. v. United States*, 654 F.2d 75, 78-79 (Ct. Cl. 1981)). The Board does not find that Ucensys has offered any persuasive evidence to show that its failure to perform the order was due to either Cisco or Tech Data, which was suggested in its representative’s testimony. Transcript, Vol. 2 at 374-75. As discussed above, the documentary record shows that Ucensys gave repeated assurances to NRC that it would perform the terms of the order, and those assurances belie its effort to now show that it could not perform the order because of

the actions of another party. Ucentsys' failure to obtain service coverage for NRC's VTC equipment, consequently, is not excused under such circumstances. *See Zios Corp.*, ASBCA 56626, 10-1 BCA ¶ 34,344, at 166,620 (termination for cause upheld where contractor failed to obtain "CISCO SMARTnet agreement" through an authorized source).

The Board addresses, finally, NRC's demand for repayment of \$64,784.53. Pursuant to FAR 52.212-4(m), the Government can recover from a contractor the amounts paid for work not performed when a contract is terminated for cause. *See Commissioning Solutions Global, LLC*, ASBCA 57429, et al., 13 BCA ¶ 35,355, at 173,531. NRC paid, in full, Ucentsys' invoice only to receive none of the service coverage for the VTC equipment listed in the order. Having properly terminated the order for cause, NRC has the right to demand that Ucentsys repay in full the amount of \$64,784.53.

Decision

The appeal is **DENIED**. Appellant shall pay the Government \$64,784.53.

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge

We concur:

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge