



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR SUMMARY JUDGMENT DENIED;
RESPONDENT'S MOTION FOR SUMMARY RELIEF DENIED¹:

May 15, 2019

CBCA 5692, 5955

EAGLE PEAK ROCK & PAVING, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Bennett J. Lee and Stephen L. Pessagno of Varela, Lee, Metz & Guarino, LLP, San Francisco, CA; and David B. Wonderlick of Varela, Lee, Metz & Guarino, LLP, Tysons Corner, VA, counsel for Appellant.

Rayann L. Speakman, Western Federal Lands Highway Division, Federal Highway Administration, Department of Transportation, Vancouver, WA; and Milton Hsieh, Eastern Federal Lands Highway Division, Federal Highway Administration, Department of Transportation, Sterling, VA, counsel for Respondent.

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

RUSSELL, Board Judge.

These appeals arise out of a contract between Eagle Peak Rock & Paving, Inc. (Eagle Peak) and the Department of Transportation's Federal Highway Administration (FHWA or

¹ Both parties are moving for the same relief with appellant characterizing its motion as one for summary judgment and respondent characterizing its motion as one for summary relief. Since the appeals were filed, a revision in the Board's rules renamed motions for summary relief as motions for summary judgment. 48 CFR 6101.8(f) (2018) (Rule 8(f)).

agency) for the construction of various improvements along approximately 4.7 miles of road in Yellowstone National Park as well as improvements at nearby parking areas, trails and overlooks. Both parties have moved for summary judgment on Eagle Peak's appeal of the FHWA's decision terminating the contract for default, and FHWA has also moved for summary judgment on Eagle Peak's claim challenging the agency's withholding retainage.

Discussion

A termination for default is "a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence." *Paradise Pillow, Inc. v. General Services Administration*, CBCA 3562, 15-1 BCA ¶ 36,153, at 176,441 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987)). A termination for default is a government claim, and the Government bears the burden of proof that its action was justified. *Lisbon Contractors*, 828 F. 2d at 765; *Affiliated Western, Inc. v. Department of Veterans Affairs*, CBCA 4078, 17-1 BCA ¶ 36,808, at 179,401.

Here, FHWA terminated Eagle Peak under the contract provision allowing for terminations "[i]f the contractor refuses or fails to prosecute . . . work [under the contract] or any separable part, with the diligence that will ensure its completion within the time specified in the contract including any extension, or fails to complete the work within this time." 48 CFR 52.249-10 (1996). "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*, 828 F.2d at 765 (quoting *RFI Shield-Rooms*, ASBCA Nos. 17374, 17991, 77-2 BCA ¶ 12,714, at 61,735); *see also Singleton Enterprises v. Department of Agriculture*, CBCA 2136, 12-1 BCA ¶ 35,005, at 172,038 (citing *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1016 (Fed. Cir. 2003) (adopting this formulation as the controlling standard in default cases involving a failure to make sufficient progress)); *Affiliated Western, Inc.*, 17-1 BCA ¶ 36,808, at 179,401.

"A termination for failure to make progress usually occurs where the contractor has fallen so far behind schedule that timely completion becomes unlikely." *Affiliated Western, Inc.*, 17-1 BCA ¶ 36,808, at 179,401 (citations omitted). "The Government is not required to prove that it was impossible for the contractor to complete performance on time." *Id.* 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." *Discount Co. v. United States*, 554 F.2d 435, 441 (1977); *see also Global Construction, Inc. v. Department of Veterans Affairs*, CBCA 1198, 10-1 BCA ¶ 34,363, at 169,699; *Affiliated Western, Inc.*, 17-1 BCA ¶ 36,808, at 179,401.

Both parties have moved for summary disposition on Eagle Peak's appeal challenging the default termination. As an initial matter, the parties dispute whether the contracting officer applied the correct standard in reaching her decision to terminate Eagle Peak's contract - i.e., whether she had a reasonable belief that there was "no reasonable likelihood" that Eagle Peak could perform the construction services within the time remaining for contract performance. *See Lisbon Contractors*, 828 F.2d at 765. Relying on the contracting officer's deposition testimony, Eagle Peak asserts that the contracting officer based her termination decision on whether there was "a reasonable likelihood" that Eagle Peak would not complete the construction project within the contract period of performance, as opposed to finding, as required, that there was "no reasonable likelihood" that the company could complete the project within the required deadline. For its part, FHWA asserts that, contrary to Eagle Peak's argument, the contracting officer did, in fact, apply the appropriate standard for a default determination as evidenced by language in a letter sent by the contracting officer to Eagle Peak shortly after Eagle Peak was notified of the termination. In the letter, the contracting officer stated that she terminated Eagle Peak's contract because she determined that there was "no reasonable likelihood" that Eagle Peak could meet the completion date in the contract.

From there, the disputed facts on the default termination claim are many. The parties dispute the sufficiency of the agency's consideration of a number of factors as relates to the agency's termination of the construction contract including but, not limited to, Eagle Peak's work progress prior to the termination, proposed schedules, production rates and resources; tasks on the critical path and the impact, if any, of those tasks on project completion; who caused any delay and how long did it last; and the appropriate application of an agency specification for construction of roads. Further, Eagle Peak raises disputed facts relating to the agency's withholding retainage. Specifically, Eagle Peak challenges the agency's withholding of a certain percentage of progress payments based on Eagle Peak's alleged failure to provide a contract-compliant project schedule to the agency within a timely manner.

The parties support their respective motions with references to Rule 4 documents including agency construction specifications, deposition transcripts including those of experts, and other evidence. "It is well settled that in order to obtain summary relief, a party must show that there are no material factual disputes[,] . . . and it is entitled to judgment as a matter of law." *DOT Construction, Inc. v. Department of Agriculture*, CBCA 3966, 15-1 BCA ¶ 36,011, at 175,887; *see also 6th and E Associates, LLC v. General Services Administration*, CBCA 1802, 10-2 BCA ¶ 34,596, at 170,527. We find that there are unresolved disputed facts that preclude resolution of the two appeals by summary disposition. *See AT&T Technical Services Company, Inc. v. Department of Veterans Affairs*, CBCA 6171, slip op. at 4 (May 6, 2019) (denying parties' cross-motions noting that the record was replete with conflicting evidence).

Decision

Appellant's motion for summary judgment is **DENIED**, and respondent's motion for summary relief is **DENIED**. The hearing in these appeals shall commence on May 29, 2019.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

We concur:

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge