UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 8, 2021

CBCA 6565

MASTER'S TRANSPORTATION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Matthew E. Feinberg, Lauren R. Brier, and Camilla J. Hundley of PilieroMazza PLLC, Washington, DC, counsel for Appellant.

James Braswell and Sarah E. Park, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **VERGILIO**, and **O'ROURKE**.

Opinion for the Board by Board Judge **O'ROURKE**. Board Judge **VERGILIO** concurs.

The agency partially terminated for cause a delivery order contract for wheelchair vans after one of the models failed the first vehicle production inspection. Because we find that the contractor's failure to comply with the contract's clear terms was not excused, we uphold the partial termination and deny the appeal.

Findings of Fact

This case stems from a requisition for wheelchair vans placed by the Department of Veterans Affairs through the General Services Administration (GSA). On October 23, 2017, GSA issued a request for proposals for six different models of wheelchair vans under a

multiple award delivery order contract. Each model was identified by a separate standard item number (SIN): 281, 282, 283, 284, 286, and 287. With the exception of SIN 286, competition was limited to small businesses. Appellant, Masters Transportation, Inc. (MTI), submitted a proposal for all vehicle models in the small business category. On February 26, 2018, GSA awarded MTI a contract for all proposed SINs. This appeal concerns SIN 284,[1] which required a wheelchair van with a rear-deploying ramp. The contract contained the following specifications for the ramp:

> A mechanical wheel ramp lift shall be provided. The ramp shall be installed at the rear of the van and stow inside the van while not in use. The ramp shall be a bi-fold. The lift shall have a rated capacity of 1000 pounds. The wheelchair ramp shall have a minimum useable width of 42 inches. Light(s) shall be capable of illuminating the ramp area. When the doors are opened, the wheelchair light(s) shall operate automatically. The ramp shall incorporate a positive locking mechanism to prevent drifting from the stowed position and to reduce rattling during transit. The ramp shall comply with [Federal Motor Vehicle Safety Standards (FMVSS)] and [Americans with Disabilities Act (ADA)] requirements.

Incorporated by reference into the contract was Federal Vehicle Standard 307AW, which also required ADA and FMVSS compliance. MTI modified a Fiat Chrysler ProMaster 2500 wheelchair van. Fiat Chrysler provided an incomplete vehicle document (IVD) for the van for the purposes of the modification. The IVD informed alterers that "the vehicle, when completed, will comply with motor vehicle safety standard 105 if no alterations are made to the service and parking brake systems, wheels, tires or suspension." In the event a certified vehicle was modified, regulations imposed a duty on the alterer "to determine continued conformity of the altered vehicle with applicable Federal motor vehicle safety, Bumper and Theft Protection standards." 49 CFR 567.7(a) (2017).

The contract also required MTI to submit a first production vehicle for inspection to ensure compliance with contract specifications. If the vehicle failed the inspection, the contract permitted GSA "to refuse acceptance of all vehicles until corrective action was taken" and stated that any such failure "shall not relieve the contractor from complying with the contract delivery terms or any other provisions of the contract."

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[1] The parties and documents refer to SIN 284 and SIN 284.1 interchangeably. Both numbers refer to the same vehicle model. We refer to SIN 284 throughout the opinion as simply "vehicle" or "model."

Between May 2018 and March 2019, MTI received ninety delivery orders for the vehicle. Shipment dates ranged from November 2018 to November 2019. Due to the orders and the delivery schedule, MTI decided to produce most of the vehicles prior to receiving approval of a first production vehicle. MTI partnered with Fenton Mobility Products (Fenton), a company that specializes in the modification of wheelchair vans, to fill the orders. First vehicle inspection testing took place on February 26, 2019. The testing results were provided to an independent professional engineering firm, Rock Hill Engineering (Rock Hill). Rock Hill reviewed and certified Fenton's testing data and provided Fenton with a signed, sealed inspection report for GSA's approval. On February 27, 2019, representatives from GSA's Automotive Engineering and Quality Assurance branches inspected the vehicle and reviewed the testing report from Rock Hill. The vehicle failed the inspection after GSA found that it did not comply with ADA or FMVSS requirements. GSA determined that the slope of the wheelchair ramp did not comply with ADA requirements. The provision at issue stated the following with regard to the slope of a vehicle-deployed wheelchair ramp:

> (5) Slope. Ramps shall have the least slope practicable and shall not exceed 1:4 when deployed to ground level. If the height of the vehicle floor from which the ramp is deployed is 3 inches or less above a 6-inch curb, a maximum slope of 1:4 is permitted; if the height of the vehicle floor from which the ramp is deployed is 6 inches or less, but greater than 3 inches, above a 6-inch curb, a maximum slope of 1:6 is permitted; if the height of the vehicle floor from which the ramp is deployed is 9 inches or less, but greater than 6 inches, above a 6-inch curb, a maximum slope of 1:8 is permitted; **if the height of the vehicle floor from which the ramp is deployed is greater than 9 inches above a 6-inch curb, a slope of 1:12 shall be achieved**. Folding or telescoping ramps are permitted provided they meet all structural requirements of this section.

49 CFR 38.23 (emphasis added).

GSA's inspectors concluded that the vehicle met the first part of the slope requirement in that the ramp did not exceed 1:4 when deployed to ground level. However, the vehicle did not meet the second part of the requirement. The inspection revealed that the ramp exceeded a slope of 1:12 when the height of the vehicle floor was nine inches above a six-inch curb. MTI's ramp had a slope of 1:5 when deployed to the curb—more than twice the maximum.

GSA also raised concerns about whether the vehicle complied with FMVSS due to a modified component within the suspension system of the van. The professional engineer who certified the testing data for the modified vehicle determined that the replaced component did not affect FMVSS compliance because it was of the same strength or better

quality than the original component. GSA insisted that MTI have the original manufacturer, Fiat Chrysler, retest the vehicle for FMVSS compliance and certification.

GSA issued two cure notices and a show cause notice to MTI, informing MTI that its failure to comply with the contract's terms or to provide reassurances of the same was endangering performance of the contract. MTI responded to each of these notices in an effort to satisfy GSA's concerns but ultimately refused to make the changes because MTI believed the vehicle fully complied with the contract's terms. On June 28, 2019, the contracting officer issued a termination for cause of the delivery orders for the vehicles and issued a partial termination for default on MTI's contract. MTI timely appealed the decision to the Board and requested a decision on the written record under Board Rule 19 (48 CFR 6101.19 (2020)).

Discussion

The Standards for Challenges to Terminations for Cause

The legal grounds for default terminations are well established. A termination for cause is 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. A termination for cause is a government claim, and the agency bears the burden of proof that its action was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987); *ITS Group Corp v. Department of Agriculture*, CBCA 6621, et al., 21-1 BCA ¶ 37,775. If the agency presents a prima facie case that the termination was proper, the burden of proof shifts to the contractor to rebut the Government's case. *ITRA Coop Ass'n v. General Services Administration*, GSBCA 7974, 90-1 BCA ¶ 22,410 (1989). Whether a termination for cause is proper depends upon "the facts and circumstances of each case." *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913. We will sustain the termination "if the agency proves that the contractor did not perform in the time allowed and the contractor does not prove that its failure to perform was excused." *Prime Tech Construction LLC v. Department of Energy*, CBCA 6682, et al. (Mar. 31, 2021).

The Propriety of the Termination for Cause

The contract incorporated by reference the Federal Acquisition Regulation (FAR) clause governing defaults for fixed price supply and service contracts, which authorized the Government to terminate the contract in whole or in part if the contractor failed to deliver the supplies or perform the services within the time specified in the contract, or any extension. 48 CFR 52.249-8(a)(1)(i) (2017) (FAR 52.249-8(a)(1)(i)). The clause also authorized the Government to terminate if the contractor failed to make progress so as to endanger

performance of the contract after failing to cure the identified deficiencies. *See* FAR 52.249-8(a)(1)(ii).

In this case, the contract contained clear technical requirements for the vehicles, which GSA determined that MTI did not meet. GSA identified the deficiencies and gave MTI a reasonable time to cure them, which MTI did not do. MTI contends that its proffered vehicles were compliant and that its failure to timely deliver the orders arose from causes beyond its control, without its fault or negligence, and that such causes excused its failure to perform. MTI's defenses can be divided into two categories: those pertaining to the ramp slope requirement, and those involving FMVSS compliance. With regard to the former, MTI contends that GSA breached the implied warranty of the specifications because the specifications were defective and were impossible to perform. Alternatively, MTI argues that it is exempt from the second part of the slope requirement because the rear-deploying ramp was only meant to deploy to the ground, not to a curb. MTI insists that any interpretation of the contract that requires "dual compliance" with these specifications is a misinterpretation of the requirement itself and of MTI's proposal.

Regarding the latter requirement, MTI claims that GSA committed a prior material breach of the contract and abused its discretion by mandating compliance in excess of the contract's terms and by repeatedly changing the requirements for certification. MTI insists that GSA did not have adequate cause to terminate the delivery orders and that the contracting officer's termination of the same was arbitrary, capricious, and contrary to the terms of the contract. Because we find that GSA met its burden with regard to the ADA slope requirement, we limit our analysis to that issue.

Impossibility of the ADA Slope Requirement Due to Defective Specifications

When an agency requests that a product be manufactured in accordance with government design specifications, there is an implied warranty that if those specifications are followed, there will be a satisfactory product. *Drennon Consulting & Construction, Inc. v. Department of the Interior*, CBCA 2391, 13 BCA ¶ 35,213 (citing *United States v. Spearin*, 248 U.S. 132, 136 (1918); *White v. Edsall Construction Co.*, 296 F.3d 1081, 1084 (Fed. Cir. 2002)). "Contracts may have both design and performance characteristics." *Blake Construction Co. v. United States*, 987 F.2d 743, 746 (Fed. Cir. 1993). If the Government's design specifications are defective from the start, the contractor's failure to perform may be excused. *Spearin*, 248 U.S. at 136 ("[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.").

In this case, the agency included a mix of design and performance specifications for the vehicle. At issue here is a design specification taken directly from the ADA regulations

pertaining to the slope of a wheelchair ramp. MTI asserts that the bi-fold ramp requirement was impossible to reconcile with the ADA requirements because the ramp would have been eighteen feet long and would not have fit into the van when folded. GSA disagreed and suggested that further kneeling the vehicle would have allowed MTI to meet the ramp slope specification. According to GSA, the key to utilizing a shorter ramp is the kneeled height of the vehicle – the lower the floor height of the vehicle, the shorter the ramp required to meet the slope requirement. MTI did not dispute this point but simply replied that, in this case, lowering the vehicle was impossible because it had been lowered as far as it could go.

We recently addressed the doctrine of impossibility as a defense to a default termination. To prove this defense, a contractor must show "1) a supervening event made performance impractical or impossible, 2) the non-occurrence of the event was a basic assumption upon which the contract was made, 3) the occurrence of the event was not appellant's fault, and 4) appellant did not assume the risk of occurrence." *Daniel J. Etzin v. General Services Administration*, CBCA 6958, 21-1 BCA ¶ 37,811 (quoting *Singleton Enterprises v. Department of Agriculture*, CBCA 2136, 12-1 BCA ¶ 35,005); *see Force 3, LLC v. Department of Health & Human Services*, CBCA 6654 (Apr. 14, 2021). Here, MTI claims that the Government's specifications were defective, rendering performance impossible. The fact that MTI could not perform is not, by itself, conclusive evidence that the specifications were defective or that performance was impossible. Proving the first and third elements identified above requires more than a mere declaration of such from a terminated contractor. The contractor must also prove that no other similarly situated contractor could perform the specifications. *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2002); *see Massachusetts Bay Transportation Authority v. United States*, 254 F.3d 1367, 1373 (Fed. Cir. 2001) (appellant bears the burden of proving impossibility or impracticability). To do that, MTI must show that it "explored and exhausted alternatives before concluding the contract was legally impossible or commercially impracticable to perform." *Blount Brothers Corp. v. United States*, 872 F.2d 1003, 1007 (Fed. Cir. 1989) (citing *Jennie-O Foods, Inc. v. United States*, 371 F.2d 450 (Ct. Cl. 1978)).

Nowhere in the record do we find evidence that MTI explored and exhausted alternatives before declaring the specifications defective and performance impossible. Having already built most of the vehicles in order to meet the required delivery schedule, MTI decided not to pursue alternative designs to meet the specifications. Instead, it attempted to change the requirement to fit what it had already built, an approach that fails to meet the test articulated above. GSA pointed out that MTI could have pursued an exemption to the ADA standard from the Department of Transportation or requested an official interpretation of the ramp slope regulation but did neither. For these reasons, MTI failed to demonstrate that performance of the specifications was impossible.

Misinterpretation of the ADA Slope Requirement

MTI alternatively claimed that this particular vehicle model was exempt from the second part of the ADA requirement because a rear-deploying ramp will *not* deploy to a curb; it will *only* deploy to the ground. This theory has no merit. Neither the contract nor the ADA requirement differentiated between rear-ramp or side-ramp vehicles. Contract interpretation requires parties to give clauses their plain and ordinary meaning, and unambiguous contract language must be read as-is. *Coast Federal Bank v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003); *Bay Shipbuilding Co. v. Department of Homeland Security*, CBCA 54, 07-2 BCA ¶ 33,678. The ADA regulation at issue applied to "[n]ew, used or remanufactured buses and vans," which included this vehicle. The regulations do not specify the type of van, nor do they differentiate between rear-ramps and side-ramps. *See* 49 CFR 38.23(c) (stating the general term "ramp"). The regulation further required compliance with both the 1:4 ground slope ramp requirement and the 1:12 curb slope requirement. *See* 49 CFR 38.23(c)(5) (requiring different slope ratios depending on whether the ramp is deployed to the ground or to a curb). Under a plain reading of the regulation, the 1:12 slope was a requirement that applied to this vehicle.

Despite the unambiguous language of the specification at issue, MTI insists that, based on the opinion of its expert, the wheelchair ramp would not deploy to a curb ("the slope requirement for curb deployment is inapplicable to [the vehicle] because curbside deployment would be illegal and unsafe when a van backs to a curb and exposes itself to oncoming traffic."). We disagree. Contract interpretation is based on an objective reading of the language as opposed to one party's characterization. *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285 (quoting *Champion Business Services v. General Services Administration*, CBCA 1735, et al., 10-2 BCA ¶ 34,539) (denying contractor's claim because the contractor's interpretation of a task order modification was one-sided and contrary to the plain language of the contract). To interpret this provision, MTI relied solely on the testimony of its own expert and asks GSA and the Board to do the same. Because we find that the expert's subjective interpretation of the provisions at issue is contrary to a plain reading of the ADA and the contract's clear terms, we decline to adopt it in these circumstances. We see no need to examine extrinsic evidence, such as industry standards, when the contract's requirements are unambiguous. *Sam's Electric*, GSBCA 8497, 89-3 BCA ¶ 22,166) ("Although evidence of trade usage may be admitted to ascertain the parties' intent, it cannot overcome an unambiguous contract provision" (citing *WRB Corp. v. United States*, 183 Ct. Cl. 409 (1968))).

The Contract Contains Conflicting Terms Regarding the Slope Requirement

MTI also advances the theory that the contract does not harmonize the various provisions and attachments as a whole, creating ambiguities that can only be interpreted as

requiring the ramp to deploy to the ground. For example, MTI compares attachment F5, which related to the vehicle at issue, with attachments F6 and F7, which refer to other vehicle models and use the phrase "curbside ramps," as opposed to the "rear ramp" language in attachment F5. Rather than interpreting these phrases as referring to the location of the ramp in the vehicle, MTI posits that the language refers to the intended use or positioning of the vehicle. MTI attempts to bolster this theory by pointing to a provision of the contract which requires the bidder to submit a photo or drawing of the vehicle with an interior view of the "passenger front elevation, *curbside.*" (Emphasis added.) MTI argues that this language demonstrates the intended and proper use of the vehicle. "If the front passenger compartment is 'curbside' as dictated by the . . . specifications, the rear ramp cannot reasonably be expected to deploy to a curb because the ramp would need to take a sharp left turn out of the rear of the vehicle to do so . . . ." MTI also asserts that the contract references the curb side of the vehicle being the side, *not the rear*, of the vehicle.

It is true that a contract must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts. *Carrington Group, Inc. v. Department of Veterans Affairs,* CBCA 2091, 12-1 BCA ¶ 34,993 (citing *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 (Fed. Cir. 2000)). MTI's assertion, however, is at odds with the very principle it advances here because it negates one part of the ADA regulation. A harmonious interpretation would include the entire regulation and the vehicle photo. Rather than supply the Government with what it required in the first place, an ADA-compliant ramp that would deploy to the ground *and* to the curb, MTI sought to change the requirement to fit what it had already built. Indeed, MTI does not dispute that its ramp failed to meet the slope requirement for deploying to a curb; it challenges the Government's *requirement* for a ramp that deploys to a curb. GSA's expert report left no doubt about the Government's need for a ramp that deployed to the ground and curb alike:

> It is mission essential that the VA will load passengers from both street level and from curbs, in all orientations (parallel and perpendicular) to curbs . . . . Curbs are everywhere and are known barriers to mobility, a catalyst to the creation of the ADA in 1990. It is not only reasonable but likely that a driver would back a vehicle into a parking space and unload a patient onto a curb.

We considered the competing testimony of the parties' experts and found GSA's experts on this issue more credible. They helped write the solicitation and as such are intimately familiar with GSA's requirements and those of its customers. Their personal knowledge in drafting the solicitation, along with their experience managing GSA's vehicle fleet, are more than adequate to address whether GSA required rear-deploying wheelchair ramps to deploy both to a curb and to the street.

Despite the various defenses raised by MTI, we find that its failure to produce a fully compliant wheelchair ramp was not excused and that GSA's termination decision under the circumstances was justified.

Decision

The appeal is **DENIED**.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

I concur:

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

VERGILIO, Board Judge, concurring.

I concur with the result denying the appeal and upholding the termination. The contractor failed to satisfy requirements under the contract. The specifications do not dictate how the contractor is to achieve the needed result. By agreeing to perform, the contractor became obligated to provide a solution. Moreover, the contractor fails to adequately support its impossibility theory because it focuses on a given ramp and van. The record does not indicate that a solution was unattainable.

The suggestion by the contractor that the ramp slope requirement for unloading to a given height is not applicable because the van will not be used to off-load passengers to a curb from the rear is misguided. The contract sets forth specifications which the Government, not the contractor, prescribes. The notion that a van will be backed up to a curb and off-load passengers from the rear is easily envisioned, even if beyond the apparent ken of the contractor's expert.

In summary, the case is simple and straightforward: the contractor did not satisfy specific contract requirements. Thus, the agency met its burden of proof. That failure is not attributable to the agency. The various arguments by the contractor misread and misapply

the contractual obligations and requirements and fail to demonstrate a basis to excuse the contractor's lack of performance. The termination must be upheld and the appeal denied.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge