



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 7, 2021

CBCA 6621, 6747

ITS GROUP CORP,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Porcia Hopkins, President of ITS Group Corp, Southaven, MS, appearing for Appellant.

Jennifer McVey Thomas, Office of the General Counsel, Department of Agriculture, Juneau, AK, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **ZISCHKAU**, and **CHADWICK**.

SOMERS, Board Judge.

The United States Department of Agriculture (USDA) awarded a contract to ITS Group Corp to paint various buildings in a remote area of Alaska. Because ITS Group failed to paint the buildings to the contracting officer's satisfaction, the contracting officer refused to pay ITS Group progress payments for the work performed. When ITS Group appeared to have vacated the job site, the contracting officer issued a cure notice. In response, ITS Group failed to provide adequate assurance that it could complete the work. The contracting officer terminated the contractor for default.

ITS Group initially appealed the denial of the claim for progress payments. Later, ITS Group appealed the termination for default. Based upon the record and for the reasons explained below, we deny ITS Group's appeals.

Background

On August 8, 2018, USDA solicited bids for the painting of eight buildings in the Kenai Lake Work Center (KLWC), a remote area located in Alaska's Chugach National Forest. The solicitation encouraged potential bidders to travel to Chugach and to visually inspect the buildings prior to placing a bid on the contract. The contract incorporated standard clauses, including Federal Acquisition Regulation (FAR) 52.246-12 (Inspection of Construction), FAR 52.236-3 (Site Investigation and Conditions Affecting the Work), FAR 52.236-2 (Differing Site Conditions), and FAR 52.232-5 (Payments Under Fixed-Price Construction Contracts).

On July 18, 2019, USDA awarded the firm fixed-price contract to ITS Group, a small business located in Southaven, Mississippi. The contracting officer issued the notice to proceed on August 1, 2019. ITS Group employees traveled to Alaska to begin work on the buildings. After a government "inspector-in-training" took the employees on a walkthrough of the site, the inspector discussed and identified certain weathered areas (the southern facing sides of the buildings), noted that the contract required additional preparation and priming to paint those areas, and provided the contractor with paint samples of the paint colors specified by the contract. ITS Group began work that afternoon. Over the weekend of August 10–11, ITS Group painted the exterior of three of the eight buildings with no oversight by government personnel, who did not remain on the worksite over the weekend.

The inspector returned to the work site on August 12, 2019. After examining the painting on the first three buildings, the inspector notified the contracting officer and ITS Group representatives that he did not believe the work conformed with contract requirements because it appeared that ITS Group failed to adequately prep the walls prior to painting and that the painting was uneven. Nonetheless, ITS Group contacted the contracting officer to request an official walk-through of the first three buildings, seeking to receive progress payments on the work. The contracting officer told them that the contracting officer's representative (COR) would be available on August 15.

When the COR arrived on August 15, 2019, it appeared that the paint crew had departed the worksite and removed its equipment. After inspecting the work on the three buildings, the COR determined that the contractor had failed to paint the three buildings in conformance with contract specifications. The COR recommended that the contracting officer not release a progress payment for the work completed as it was not acceptable.

On August 16, the contracting officer sent ITS Group a cure notice as well as a notice of noncompliance with the terms of the contract. On August 20, the contracting officer sent ITS Group a revised cure notice which requested that ITS Group provide a plan for redoing the work to meet contract requirements.

ITS Group responded to the cure notice by asserting that the contractor had rendered services and should be paid its progress payment for the work performed. ITS Group explained that the employees had returned home to avoid incurring expenses while waiting for the Government to issue payment. Somewhat contradictorily, ITS Group contended that the decayed, dry condition of the wood made it impossible to paint the exterior. ITS Group stated that in order to meet contract requirements, the wood would need to be replaced before it could be properly painted.

On August 23, 2019, ITS Group submitted a written claim to the contracting officer seeking a progress payment in the amount of \$46,250, the lump sum price of completing contract work on three buildings. The sum also included costs for equipment storage, warehouse, carpenter shop, travel, lodging, and paint materials.

The contracting officer denied the claim, stating that the contractor's work failed to comply with the contract specifications and that neither the contracting officer nor the COR had accepted the work. Next, rejecting the claim that the decayed wood made painting impossible, the contracting officer asserted that had ITS Group inspected the worksite prior to bidding the project, it would have gained a better understanding of the scope of the work required.

At some point after ITS Group departed, government employees successfully painted the exterior of the buildings, accomplishing the job that ITS was contracted to perform but failed to do.

ITS Group appealed the contracting officer's decision on October 2, 2019, docketed as CBCA 6621. On December 4, 2019, the contracting officer terminated the contract for default because of ITS Group's failure to complete the work in compliance with the terms and conditions of the contract. ITS Group filed a second appeal, CBCA 6747, in which ITS Group contested the termination. The Board consolidated the appeals by order dated February 27, 2020.

The parties elected to submit the matter for resolution on the written record, without a hearing on the merits but with briefs, pursuant to Board Rule 19, 48 CFR 6101.19 (2019), following the submission of the appeal file, complaint, and answer; telephone conferences with the presiding judge; and the development of the record.

Discussion

(CBCA 6621) Claim of Payment for \$46,250

ITS Group argues that it fulfilled contract requirements when it painted three of the buildings required by the contract and that the “inspector-in-training” accepted the work. As a result, ITS Group claims that it is entitled to a lump-sum progress payment of \$46,250. The Government disagrees, stating that the inspector never accepted the work.

The record supports the Government’s position. According to inspection logs, the inspector recommended that the contracting officer not accept the work and withhold payment until ITS Group brought the work into compliance with the contract specifications. Nothing in the record indicates that the Government ever approved the work performed by ITS Group. Instead, it demonstrates that ITS Group failed to meet contract standards and that USDA officials rejected the work.

Under the terms of the contract, the contractor must complete all work and have it accepted by the contracting officer prior to receiving payment. 48 CFR 52.232-5 (2019) (FAR 52.232-5). ITS Group, as claimant, bears the burden of proving that the Government has not paid an amount that is due or owing. *See, e.g., JBG/Federal Center, L.L.C. v. General Services Administration*, CBCA 5506, et al., 18-1 BCA ¶ 37,120; *Navigant SatoTravel v. General Services Administration*, CBCA 449, 11-1 BCA ¶ 34,765; *Springcar Company, LLC v. General Services Administration*, CBCA 1310, et al., 10-1 BCA ¶ 34,407.

ITS Group has failed to meet its burden of proof. As noted above, the Government’s issuance of progress payments is conditioned on the acceptance of ITS Group’s work by the contracting officer. FAR 52.232-5. As the record demonstrates, the contractor’s work contained multiple deficiencies, such as improper preparation, uneven paint coverage, and failure to eliminate shadowing. Thus, the Government’s refusal to pay ITS Group is the direct result of ITS Group’s failure to meet express contract requirements. While ITS Group disputes the findings made by USDA officials, it has submitted no evidence to prove that its work satisfied contract provisions. ITS Group has failed to show that the Government wrongfully withheld payment otherwise owed.

Based upon the above, we find that ITS Group has not established entitlement to progress payments. Accordingly we deny its claim for \$46,250.

(CBCA 6747) Default Termination

The Government holds the burden of proving that a termination for default was proper. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763 (Fed. Cir. 1987). Termination for default is considered to be a drastic sanction “which should be imposed (or sustained) only for good grounds and on solid evidence.” *Affiliated Western, Inc. v. Department of Veterans Affairs*, CBCA 4078, 17-1 BCA ¶ 36,808; *Paradise Pillow, Inc. v. General Services Administration*, CBCA 3562, 15-1 BCA ¶ 36,153 (citing *Lisbon Contractors, Inc.*, 828 F.2d at 765). A termination for default for failure to complete the work under the contract “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.” *Global Construction, Inc. v. Department of Veterans Affairs*, CBCA 1198, 10-1 BCA ¶ 34,363 (citing *Lisbon Contractors, Inc.*, 828 F.2d at 765).

USDA must establish that it was reasonable to believe that ITS Group would not complete work under the contract within the time designated for contract performance. We find that USDA has met that burden. The contracting officer sent a notice of noncompliance and two cure notices to ITS Group. ITS Group failed to address the concerns raised or to provide a plan for completion of the work.

ITS Group argues that it was impossible to paint the exterior of the buildings. Specifically, ITS Group alleges that certain areas of the buildings had not been properly maintained, resulting in decayed wood that could not absorb the paint. ITS Group claims that until the decaying wood is replaced, the contract is rendered impossible to perform.

To establish the defense of impossibility, ITS Group must show that performance was objectively impossible. *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2002) (citing *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 409 (Ct. Cl. 1978)). In order to meet this standard, ITS Group must show that other similarly situated contractors would have been unable to perform the work required under the contract. *Hearthstone, Inc. v. Department of Agriculture*, CBCA 3725, 15-1 BCA ¶ 35,895; see *Rowe Inc. v. General Services Administration*, GSBCA 14211, 01-2 BCA ¶ 31,630.

Here, ITS Group cannot show that it would be impossible to complete the work. The record does not reflect any evidence of similarly situated contractors failing to perform under this contract. However, the record does provide evidence showing that government personnel at KLWC successfully painted the exterior of the buildings, accomplishing the job that ITS was contracted to perform but failed to do. As a result, ITS Group has failed to establish the defense of impossibility. We conclude that the termination for default was

proper because the work was not impossible and there was no reasonable likelihood that ITS Group could perform the contract in the remaining time.

Decision

For these reasons, ITS Group's appeals are **DENIED**.

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge