



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 24, 2023

CBCA 7283

ADVENTUS TECHNOLOGIES, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Ibrahim D. Iscandri, Vice President and Chief Operations Officer of Adventus Technologies, Inc., Houston, TX, appearing for Appellant.

Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

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

LESTER, Board Judge.

Appellant, Adventus Technologies, Inc. (ATI), appeals a contracting officer's decision terminating for cause ATI's purchase order for janitorial services. Under that purchase order, ATI was required to provide janitorial services several times a week at an office of the United States Forest Service (USFS). At a certain point, ATI notified a contract specialist for the USFS that its janitorial employee had quit, that it would let her know when ATI had found someone new, and that the hiring process might take some time. After this disclosure, the USFS contracting officer issued a cure notice, complaining that ATI had stopped providing services. After three weeks without services, and with no response to his cure notice, the USFS contracting officer terminated ATI's contract for cause, an action that ATI believes was unjustified. The parties have submitted this appeal for decision on the written

record under Board Rule 19 (48 CFR 6101.19 (2021)). For the reasons discussed below, we sustain the contracting officer's termination of ATI's contract for cause and deny ATI's appeal.

Background

ATI's Purchase Order

On March 18, 2020, the USFS awarded purchase order no. 12034320P0096 to ATI. Under that purchase order, ATI was to provide janitorial services for the USFS at the Idaho Panhandle National Forest's offices in Avery, Idaho. Appeal File, Exhibit 1 at 1-2.¹ The base period of performance ran from May 1, 2020, through March 31, 2021, but the USFS had the option to extend services on an annual basis for four additional years, up to and including March 31, 2025. *Id.*

The main building of the Idaho Panhandle National Forest's offices contained three floors and approximately 6600 square feet of office space (inclusive of common areas) with four bathrooms. Exhibit 1 at 22. Between May and September of each year, the contractor was required to clean the main building three times a week, and, between October and April, the contractor was to clean it two times a week. *Id.* at 5, 22.² A nearby 500-square-foot, single-story warehouse with two bathrooms was considered a part of the office and covered by the purchase order. *Id.* at 22. The warehouse was to be cleaned three days a week but only from May to September. *Id.* at 5, 22.

The purchase order required ATI to maintain the offices "in a clean condition and . . . provide supplies, materials, and equipment to adequately maintain the premises at an acceptable level." Exhibit 1 at 24. To that effect, it contained "Performance Standards and Guideline Requirements" that the contractor was required to satisfy throughout performance, *id.* at 22, which were designed to meet "the industry standard of providing the intended level of services." *Id.* at 24. Minimum standards included that "[a]ll space covered by this contract shall be free of obvious dirt, debris, and dust"; that "[t]rash cans shall be emptied and kept clean and free of dirt, stains, and debris, and replace liners"; that "[f]urniture and

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

² The purchase order also seems to indicate that each cleaning required five, six, or seven workers, depending on the facility being cleaned and the season. *See* Exhibit 1 at 5-7. It appears, however, that ATI had only one janitorial services employee for the contract. The record does not reflect that the USFS ever objected to ATI's use of a single employee to work this purchase order, and the USFS does not raise any such objection in its briefing.

all surfaces shall be free of obvious dust and dirt”; and that “all resilient floors” be “clean and shine.” *Id.* at 24-25.

The purchase order included the clause titled “Contract Terms and Conditions—Commercial Items (Oct 2018)” from Federal Acquisition Regulation (FAR) 52.212-4 (48 CFR 52.212-4 (2019)). *See* Exhibit 1 at 1, 9-11. That clause contained a termination for cause provision, which read as follows:

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

Id. at 10 (quoting FAR 52.212-4(m)). It also included the following excusable delays provision:

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.

Id. at 9 (quoting FAR 52.212-4(f)).

On March 30, 2021, the USFS contracting officer exercised the USFS’s first option to extend the contract through March 31, 2022. Exhibit 8 at 1.

ATI’s Performance Issues

ATI received several notices of noncompliance during contract performance, both before (Exhibits 3, 4, 6, 7) and after (Exhibits 9, 11) the USFS exercised the first option. In an August 19, 2021, email to the contractor which attached a notice of noncompliance dated the same day, the USFS contracting officer reported that “[c]leaning has not been meeting

the contract standard and requires an equitable price reduction for the month of [August] for nonconforming services.” Exhibit 10 at 5. In the notice, the contracting officer informed ATI that “[t]he Office garbage and bathrooms have not been clean[ed]/removed by the contractor for over a week,” that “[f]requency of work completed is approximately 5 times over the last six weeks” and was “not free of obvious dirt and debris upon government visual inspection,” and that “[t]he floors have only been vacuumed” and “[h]ard surfaced floors have only been cleaned approximately 5 times in the past six weeks, not free of obvious dirt and debris.” Exhibit 9. He also stated in the notice that “government personnel have been cleaning the bathrooms, showers, and emptying multiple garbage cans in an effort to meet a minimum cleaning standard for the Avery Janitorial.” *Id.*

In response, ATI reported that “[t]hrough discussions with our employee, we have validated the concerns you noted in the Notice of Noncompliance” and indicated that the employee had acknowledged not having performed two of the three required cleanings during the week of August 13. Exhibit 10 at 1. ATI stated that its employee “was not very cooperative when [ATI] read [her] the Notice of Noncompliance” and “immediately terminated the call.” *Id.* ATI asserted that it “called her back several times with no success,” had “sent her an email requesting to let us know if she is going to continue working for us,” and had received no reply. *Id.* ATI indicated that “[b]ased on [the employee’s] actions on the phone and her non[-]response to [ATI’s] email, we have begun searching for a replacement just in case she does not return.” *Id.* It “ask[ed] for [the USFS’s] patience as [ATI] work[s] diligently to find a new Janitor.” *Id.*

On August 27, 2021, the USFS contracting officer’s representative (COR) issued another notice of noncompliance addressing issues identified during an inspection earlier that day, including the fact that services were provided only once during the week of August 17 and that the only services provided on that day were trash removal, trash receptacle liner changes, and restroom fixture cleaning and disinfection. Exhibit 11 at 1. The USFS asked that deficiencies be corrected. Exhibits 11 at 1, 12 at 1-2.

On September 9, 2021, ATI’s janitorial employee quit. Exhibit 14 at 2-3. ATI did not have anyone to take her place. On September 10, 2021, ATI sent an email notifying the USFS COR of the employee’s resignation, stating that it would begin looking for a replacement and representing that it would let the USFS know when a replacement was found. *Id.* After the employee resigned, ATI did not provide any janitorial services.

The Cure Notice

On September 15, 2021, the USFS contracting officer issued ATI a cure notice, stating that ATI was in breach of contract for its failure to provide janitorial services:

The cure notice is regarding the non-performance since 09/09/2021, you are currently in breach of the contract terms and conditions. Due to your employee's recent resignation and abruptly quitting with no prior notice in addition to recent performance issues, this has rendered the government with no janitorial services and is a health and safety concern for the employee's [sic] within the government facilities. I have significant concern that the current non-performance and ongoing performance issues have become a major issue for the Avery office and require a written response with an acceptable solution to cure the issue . . . to be submitted to [the contracting officer].

Exhibit 13 at 1; *see id.* (“You are notified that the Government considers your contract performance is non-compliant due to non-performance for the Avery Janitorial contract . . . and is a condition that is endangering performance of the contract.”). ATI was to “respond with a clear explanation and remedy to fulfill the contract requirements and to provide continued janitorial services with a permanent solution regarding new employees and any additional corrective actions.” *Id.* The contracting officer gave ATI ten days to cure the condition and reserved the right to terminate for cause under FAR 52.212-4(m) if ATI failed to do so. *Id.*

ATI did not respond to the cure notice.

Termination for Cause

On September 30, 2021, the USFS contracting officer issued a notice terminating the contract for cause “due to failure to comply with the contract terms and conditions and the failure to provide the Government with adequate assurances of future performance.” Exhibit 15 at 1. The contracting officer indicated that because ATI had not responded to the cure notice issued on September 15 and had not attempted to “remedy the performance issue,” he was terminating the contract. *Id.* The contracting officer also cited to prior notices of noncompliance from August 19 and 27, 2021. *Id.* He provided ATI with notice of its appeal rights. *Id.* at 2.

On November 9, 2021, ATI sent a letter to the contracting officer responding to the termination notice. Exhibit 18 at 2. As for the contracting officer's complaint that ATI had not responded to the September 15 cure notice, ATI indicated that it had not needed to respond because, on September 9, it had told the USFS contract specialist that it was looking for a replacement employee who would provide janitorial services under the contract, and it would let the USFS know when it had found someone. Exhibit 17 at 1. ATI also objected to the contracting officer's citation to earlier performance problems and notices of noncompliance, asserting that they could not be used as a basis for a termination for cause

because they had been corrected. *Id.* at 1-2. ATI asserted that the issues cited in the termination notice “might have created **inconveniences** for the government, but we disagree that these are necessary and sufficient reasons to demonstrate that [ATI] has acted in any way that is substantially prejudicial to the goals and objectives of the contract or has performed in a way or ways that fundamentally breached the contract.” *Id.* at 2 (internal quotation marks omitted).

The USFS contracting officer responded by email on November 10, 2021, indicating that the basis of the termination was ATI’s failure to perform, and he reiterated that he had included appeal information in the termination notice through which ATI could challenge his decision:

I have reviewed your response in your letter dated 11/09/2021 to the Termination for Cause for [Purchase Order] No.: 12034320P0096 Avery Janitorial that was issued on 09/30/2021. Overall, the termination is due to the failure to perform.

Overview for Termination for Cause

- 09/15/2021 – Cure Notice sent and required a written response within 10 days. No written response to the email was received by the Contracting Officer from [ATI].
- 09/30/2021 – Termination for Cause sent for failure to perform and to provide services (no response received to the cure notice email sent on 09/15 and no performance provided for the contract since 09/09/2021 when the custodian quit).

Failure to perform is cause to terminate for cause within the terms and conditions of the contract. The appeal process information was sent in the notice of termination letter with additional information.

Exhibit 18 at 1.

ATI’s Release

When the contracting officer issued the notice of termination on September 30, 2021, he also requested that ATI submit its final invoice for payment. Exhibit 22 at 5. On November 23, 2021, he sent a draft copy of modification no. P00003 for ATI’s signature. The purpose of the modification was to effectuate the termination for cause in a contract modification and to deobligate excess funds. *Id.* at 2. Along with the modification, the

contracting officer provided ATI with a Contractor Notification and Release of Claims, which the USFS needed to process final payment. *Id.*

ATI executed the release of claims document on November 23, 2021, through which it agreed that, upon payment, ATI “does remise, release and discharge the Government, its officers, agents, and employees of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract.” Exhibit 19 at 3. The USFS indicates that ATI also executed modification no. 3, but neither of the two copies of modification no. 3 in the record contains an ATI signature. *See* Exhibits 20, 21.

ATI’s Appeal to the Board

On December 23, 2021, ATI filed a notice of appeal with the Board, challenging the termination for cause. In its notice of appeal, ATI alleged that, when it notified the COR on September 9, 2021, that its janitorial employee had quit, it indicated that it would take time to recruit and hire a replacement because of the staffing shortages that had resulted from the COVID-19 pandemic and the need to find a qualified candidate. ATI attached four documents to its notice of appeal: (1) a copy of the USFS contracting officer’s termination decision; (2) the pages from its contract that reprint FAR 52.212-4; (3) the definition of “force majeure” from a www.wifcon.com page; and (4) a “Record of Pre-Work Meeting” that the parties signed on April 21, 2020. The USFS subsequently submitted the Rule 4 appeal file consisting of the parties’ contract and modifications, various notices of noncompliance and related email communications, the cure notice, the termination decision, and subsequent email communications regarding the termination.

The Board scheduled a hearing in this appeal to commence on May 31, 2023. The USFS filed a pre-hearing brief, plus one additional appeal file exhibit, but ATI filed nothing. The parties then elected to submit this appeal for decision on the written record under Board Rule 19 rather than participate in a live hearing, and the Board provided both parties the opportunity to add additional evidence, including declarations, to the record. Neither party submitted anything.

Discussion

I. Standard of Review

Under Board Rule 19 (48 CFR 6101.19), the parties can include in the written record “(1) any relevant documents or other tangible things they want the Board to admit into evidence; (2) affidavits, depositions, and other discovery materials that set forth relevant evidence; and (3) briefs or memoranda of law that explain each party’s positions and defenses.” *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1

BCA ¶ 35,913, at 175,551 (citing Rule 19). “Based on the parties’ submissions, the Board is authorized to make findings of fact, even if such findings require ‘credibility determinations on a cold [paper] record, without the benefit of questioning the persons involved,’ and can decide issues of law based on those factual findings.” *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 17-1 BCA ¶ 36,863, at 179,613 (quoting *Bryant Co.*, GSBGA 6299, 83-1 BCA ¶ 16,487, at 81,967).

Because ATI is being represented by a corporate representative rather than a lawyer, we have provided ATI with “greater procedural latitude” than we otherwise might. *See I-A Construction*, 15-1 BCA at 175,551-52. Nevertheless, neither ATI’s representation decision nor the parties’ submission on the record under Rule 19 alleviates the parties’ respective obligations to prove the facts supporting their allegations or defenses. *Sylvan B. Orr*, 17-1 BCA at 179,613. “‘While [the Board] can make inferences from th[e] evidence and either accept or deny the probative value of documents, statements or other extrinsic evidence, in order for us to find for a party, that party’s evidence must establish,’ by a preponderance of the evidence, ‘that it is entitled to relief.’” *I-A Construction*, 15-1 BCA at 175,551 (quoting *Schoenfeld Associates, Inc.*, VABCA 2104, et al., 87-1 BCA ¶ 19,648, at 99,472).

II. ATI’s Release of Claims

The USFS argues that because ATI executed a release of claims in order to obtain final payment under this contract, it can no longer challenge the termination of its contract for cause. Through the release language, ATI only released its *own* claims. A termination for cause is a *government* claim. *Malone v. United States*, 849 F.2d 1441, 1443, *clarified and petition for rehearing denied*, 849 F.2d 1441 (Fed. Cir. 1988). Nothing in the release language bars ATI’s ability to defend against that government claim. Even if the release could be interpreted more broadly to encompass ATI’s defenses, the USFS’s knowledge that ATI was objecting to the termination for cause when ATI executed the release precludes the USFS’s argument that the release covers ATI’s objections to the USFS’s claim. *See Ahtna Environmental, Inc. v. Department of Transportation*, CBCA 5456, 17-1 BCA ¶ 36,600, at 178,306 (2016). To the extent that the USFS believes that modification no. 3 constitutes an accord and satisfaction, there is no evidence in the record that ATI ever signed that modification.

III. The Applicability of FAR 52.212-4 to ATI’s Contract

The termination for cause provision upon which the USFS contracting officer relied in terminating ATI’s contract is contained within the standard commercial items clause from the version of FAR 52.212-4 that was in effect in 2020. The Court of Appeals for the Federal Circuit’s decision in *JBK Solutions & Services, LLC v. United States*, 18 F.4th 704 (Fed. Cir. 2021), raises a question about that clause’s applicability to service contracts. In that

decision, the Federal Circuit, dealing with the termination for convenience portion of that clause, stated that “FAR 52.212-4 governs the termination of commercial item contracts for the government’s convenience, and it does not apply to service contracts, such as the contract at issue in this case.” *Id.* at 710. It then held that, “[b]ecause FAR 52.212-4 applies only to commercial item contracts and because . . . [appellant’s] contract is not a commercial item contract, the Claims Court erred in relying on FAR 52.212-4 to supply an applicable termination for convenience clause.” *Id.*

On its face, it might be possible to read the sentence in *JBK Solutions* as holding that the Government cannot apply FAR 52.212-4 to any service contract, whether it is one for commercial services or not. Any such interpretation would directly conflict with the FAR definition of a “commercial item” that was applicable when ATI executed its contract, a definition that expressly viewed commercial services as a “commercial item”:³

Commercial item means—

....

- (5) Installation services, maintenance services, repair services, training services, and other services if—
 - (i) Such services are procured for support of an item referred to in paragraphs (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and
 - (ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;
- (6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—
 - (i) *Catalog price* means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last,

³ Effective December 6, 2021, the FAR was amended to replace the definition of “commercial item,” which included commercial services, with separate definitions for the terms “commercial product” and “commercial service.” 86 Fed. Reg. 61017 (Nov. 4, 2021).

made to a significant number of buyers constituting the general public; and

(ii) *Market prices* means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor

FAR 2.101. The plain intent behind this regulatory definition was to “include[] certain commercial services” in the “commercial item” regulatory contracting scheme. 60 Fed. Reg. 48231, 48232 (Sept. 18, 1995).

The Court in *JKB Solutions* based its statement excluding “services” from the “commercial item” definition on the Government’s concession at oral argument that the contract at issue there was “a service contract (and not a commercial item contract).” *JKB Solutions*, 18 4th at 710 n.2. As at least one commentator has noted, perhaps “[t]he appropriate distinction would have been between a contract for commercial services and a contract for noncommercial services.” Vernon J. Edwards, “Commercial Items: Confusion in Court,” 35 Nash & Cibinic Rep. ¶ 72 (Dec. 2021). Nevertheless, tribunals have recognized, post-*JKB Solutions*, that FAR 52.212-4 properly continues to apply to contracts that involve commercial services. See, e.g., *Heroes Hire LLC v. Department of Veterans Affairs*, CBCA 7195, et al., 22-1 BCA ¶ 38,101, at 185,039-40; *Heartland Energy Partners LLC*, ASBCA 62979, 22-1 BCA ¶ 38,200, at 185,520; *Fluor Intercontinental, Inc.*, ASBCA 62550, et al., 22-1 BCA ¶ 38,105, at 185,101 n.4. We interpret *JKB Solutions* as meaning, consistent with the stipulation of the parties underlying that decision, that contracts for *noncommercial* services (or “other than commercial” services, as the FAR now calls them, 86 Fed. Reg. at 61017) are not covered by FAR 52.212-4.

Here, the janitorial services that ATI was providing were commercial services and, therefore, within the then-applicable definition of a “commercial item.” They have a product/service code (S201) and a product/service description (“Housekeeping–Custodial Janitorial”), and commercial cleaning services are commercially available at catalog prices on an hourly basis in the commercial market. Accordingly, the USFS acted appropriately in applying FAR 52.212-4.

IV. ATI's Failure to Provide Janitorial Services

A. ATI's Default

In defending a challenge to a termination for cause, the Government bears the initial burden of showing that termination was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *Care One EMS, LLC v. Department of Veterans Affairs*, CBCA 3170, 13 BCA ¶ 35,382, at 173,624.

Here, it is clear that ATI defaulted on its contractual obligation to provide continuous janitorial services. Beginning in August 2021, ATI failed to provide janitorial services at the Avery main building and warehouse three times a week, as required by the contract. From September 10, 2021, until the purchase order was terminated on September 30, 2021, ATI provided no services at all. “The Government is entitled to strict compliance with the provisions of its service contracts.” *Johnson Management Group CFC Inc.*, HUD BCA 97-C-109-C2, 99-2 BCA ¶ 30,520, at 150,705. “When the Government shows that a contractor with a service contract requiring daily [or regularly scheduled] performance of necessary services . . . has failed to perform those services over the course of even a short period of time, it has established default.” *Heroes Hire*, 22-1 BCA at 185,037.

“Since occasional failures to render perfect performance during each service performance [are] inherent in such contracts, a termination for default will be sustained only if the performance failure is more than *de minimis* and reasonably substantial.” *Johnson Management Group*, 99-2 BCA at 150,705. Here, though, ATI acknowledged during performance that the only person tasked with providing services under this purchase order skipped some days of required performance in August, and ATI failed to provide *any* services for the three weeks in September leading to termination. “A breach is material when it . . . goes to the essence of the contract.” *Kiewit-Turner, a Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 15-1 BCA ¶ 35,820, at 175,175 (2014) (quoting *Thomas v. Department of Housing & Urban Development*, 124 F.3d 1439, 1442 (Fed. Cir. 1997)). The essence of ATI’s purchase order was to provide janitorial services. Its failure to provide any services after September 9, in and of itself, justifies termination.⁴

⁴ ATI argues that it was inappropriate for the contracting officer to cite to its performance issues from August 2021 as support for termination because it had rectified that month’s cleaning deficiencies by early September 2021. Even if it was, ATI does not deny that it provided no cleaning services after September 9, 2021, which, in and of itself, constitutes a default.

In its notice of appeal, ATI asserts that the contracting officer “made a very serious legal mistake when he did not follow the contract’s Record of Pre-Work Meeting . . . definitization guidelines and instructions.” Soon after executing the purchase order, the parties conducted a pre-work meeting on April 24, 2020, during which, according to the typed-in discussion on the record of that meeting, the USFS represented that if ATI “failed to prosecute the work w/ diligence to insure completion w/in specified time, govt may take over & contractor may be liable for increased costs.” Notice of Appeal, Exhibit 4. In a list of clauses on the pre-printed “Record of Pre-Work Meeting” form that the parties signed, the box for “Termination for Default” was “not marked with an ‘X,’” which ATI argues was necessary to “correctly execute and definitize” the contract. Yet, it is clear from the report that the termination provisions of the purchase order were discussed during the meeting. In any event, contrary to ATI’s understanding, it is the written contract, not the “Record of Pre-Work Meeting,” that identifies the terms of the parties’ agreement and establishes their rights and obligations. *See H.N. Bailey & Associates*, ASBCA 29298, 87-2 BCA ¶ 19,763, at 100,004 (“[W]here the parties have entered into a written contract, the rights, duties and obligations of appellant and respondent are determined by the provisions found in the contract.”). Any minuscule error on the pre-work meeting form does not modify ATI’s previously executed contract, eliminate ATI’s obligation to perform that contract, or bar the USFS from terminating the contract for cause.

B. ATI’s Allegations That Default Was Excusable

“Once the Government has satisfied its burden and default has been established, the burden shifts to the contractor to demonstrate that the causes of the default were excusable under the terms of the contract—that is, that they were beyond the contractor’s control and not due to its own fault or negligence.” *Heroes Hire LLC v. Department of Veterans Affairs*, CBCA 7195, et al., 22-1 BCA ¶ 38,101, at 185,037.

In its notice of appeal, ATI asserts that it was unable to perform because, after its sole employee quit, it could not hire another because of the effects of COVID-19. Under FAR 52.212-4(f), performance failures will be excused if “nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as . . . epidemics.” Were ATI able to show that the COVID-19 pandemic precluded it from hiring a replacement worker, it might be able to establish a basis for overturning the termination for cause.

ATI has submitted no evidence to support its position. It has not detailed any efforts that it made to hire a replacement, provided any analyses of the job market in and around September 2021 that reflect worker unavailability, or submitted any evidence showing that it acted with any sense of urgency after its sole janitorial services employee quit. The record evidence shows that, for a full month before the employee quit, ATI was well aware that she

was disgruntled, was not performing well, and might quit. Although it stated in mid-August 2021, after it became skeptical about her continued employment, that it was going to start looking for a replacement, there is no evidence in the record that it actually did. As we have previously held, “[m]erely citing the word ‘COVID,’ without more, does not provide a basis for excusing a failure.” *GC Columbia, LC v. General Services Administration*, CBCA 7374, 22-1 BCA ¶ 38,197, at 185,503 (quoting *United Facility Services Corp. v. General Services Administration*, CBCA 5272, 22-1 BCA ¶ 38,090, at 184,977). The contractor has to show, through evidence, how COVID affected its ability to perform. *Central Co.*, ASBCA 62624, 22-1 BCA ¶ 38,057, at 184,790. ATI has presented no such evidence. It cannot excuse nonperformance without it.

V. ATI’s Failure to Respond to the Cure Notice

Even though not required to do so in the circumstances here,⁵ the USFS contracting officer issued a cure notice to ATI on September 15, 2021, providing ATI with ten days to cure its failure to provide services. ATI did not respond to the cure notice. ATI asserts, however, that it did not need to respond because, before the cure notice was issued, it had told the USFS COR that it was looking for a replacement and would let her know when it had found one.

Through the cure notice, the contracting officer asked for more information than what ATI had provided the COR. He had previously notified ATI that government employees working in the Avery offices were cleaning floors and bathrooms themselves—tasks outside of their job responsibilities—so that they could continue to perform the regular duties that they were hired to perform. *See* Exhibit 9 at 1. Because that situation could not continue, the contracting officer directed ATI to provide “a clear explanation and remedy to fulfill the contract requirements and to provide continued janitorial services with a permanent solution regarding new employees and any corrective action.” Exhibit 13 at 1. FAR 52.212-4(m) allows a contracting officer “to seek adequate assurances of future performance and terminate the contract if such assurances are not received.” *Alan E. Fricke Memorials, Inc. v. Department of Veterans Affairs*, CBCA 7352, et al., 23-1 BCA ¶ 38,262, at 185,794; *see* FAR 52.212-4(m) (“The Government may terminate this contract, or any part hereof, for cause . . . if the Contractor . . . fails to provide the Government, upon request, with adequate assurances of future performance.”). ATI informed the COR only that, at some indefinite

⁵ “[A] cure notice is not necessary [under a commercial items contract] if the contractor has already failed to perform some services that were previously due.” *Heroes Hire*, 22-1 BCA at 185,039; *see, e.g., NDJ Restoration, Inc. v. General Services Administration*, GSBCA 14487, 98-2 BCA ¶ 29,987, at 148,316; *Chambers-Thompson Moving & Storage, Inc.*, ASBCA 43260, 93-3 BCA ¶ 26,033, at 129,408.

time in the future, it hoped to have a new employee. ATI's actions made clear that, until then, there would be no janitorial services.

In the circumstances here, ATI's failure to present the contracting officer with a more definite plan or to respond to the cure notice at all provides a separate basis justifying the contracting officer's termination for cause decision. *See Danzig v. AEC Corp.*, 224 F.3d 1333, 1338 (Fed. Cir. 2000) (A contractor must "give reasonable assurances of performance in response to a validly issued cure notice."); *International Verbatim Reporters, Inc. v. United States*, 9 Cl. Ct. 710, 723 (1986) ("Once the 10-day cure notice was issued to plaintiff, its failure to correct, explain or communicate with defendant during the period what corrective action that would be taken, justified a termination for default.").

Decision

ATI's appeal is **DENIED**. The USFS's termination for cause is sustained.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

We concur:

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge