



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY JUDGMENT DENIED: July 25, 2025

CBCA 8012

DELTA T JR, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

John Marshall Cook, Paul Marshall Ticer, and Evan Williams of Fox Rothchild, LLP, Washington, DC, counsel for Appellant.

Marcia A. McCree, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **KULLBERG**, and **KANG**.

VERGILIO, Board Judge.

In an initial appeal (CBCA 8012), Delta T Jr, LLC (contractor) disputes the termination for default of its contract with the Department of Veterans Affairs (agency). In a second appeal (CBCA 8373), the contractor seeks payment, denied by the contracting officer, based upon alleged breaches, delays, abuses of discretion, and bad faith by the agency. The cases are consolidated for purposes of developing a single record.

The agency moves for summary judgment in the initial appeal, seeking affirmance of the termination for default, on the theory that the contractor failed to perform in accordance with the terms of the contract and directives of the contracting officer to remedy work. The contractor contends that it satisfactorily fulfilled its contractual obligations. It asserts that

the contracting officer required work beyond the scope of the contract, such that the contractor was not obligated to perform as directed. In particular, the contractor maintains that failures cited in the notice of default were due to government designs and specifications, as well as unusually severe weather under which the government-designed drainage system failed.

It is undisputed that the contractor did not perform as the contracting officer directed. However, under the motion, the facts needed to resolve the dispute are not established. That is, the undisputed facts do not demonstrate that the contractor was obligated to remedy the situation or comply with the directives of the contracting officer. Requiring repair would be outside the scope of the contract if the performance failures or defects were due to government-furnished designs and the contractor performed satisfactorily in completing the construction pursuant to those designs. Accordingly, the motion is denied.

Background

The contract's Disputes clause (MAY 2014) (Federal Acquisition Regulation (FAR) (48 CFR 52.233-1 (2024))) specifies that the contractor "shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer." Appeal File, Exhibit 1 at 578. Further, the contract's Default (Fixed-Price Construction) clause (APR 1984) (48 CFR 52.249-10) provides that if a contractor refuses to prosecute the work or any separable part, with the diligence that will ensure its completion within the time specified in the contract, the Government may terminate the contractor's right to proceed. *Id.* at 579. The contract's Warranty of Construction clause (MAR 1994) (48 CFR 52.246-21) states:

- (i) Unless a defect is caused by the negligence of the Contractor or subcontractor or supplier at any tier, the Contractor shall not be liable for the repair of any defects of material or design furnished by the Government nor for the repair of any damage that results from any defect in Government-furnished material or design.

Id.

Under a firm, fixed-price contract, the contractor expanded a cemetery. Among its tasks, the contractor was to design, furnish, and construct the retaining wall at issue in accordance with specifications and other contract requirements and to install an asphalt road. After construction, the road developed cracks and showed other signs of failure. The retaining wall showed signs of failure. The contracting officer directed the contractor to

correct defects in the supporting retaining wall and roadway, referencing the contract's Disputes clause. The parties engaged in various communications. After the contractor did not take corrective action, the contracting officer issued a termination for default, based upon the contractor's failure to prosecute performance. The cause of the retaining wall failure is disputed.

Discussion

Board Rule 8(f) states, "A party may move for summary judgment on all or part of a claim or defense if the party believes in good faith it is entitled to judgment as a matter of law based on undisputed material facts." 48 CFR 6101.8(f). The Board applies the well-established standards for resolving such a motion. *JITA Contracting, Inc. v. Department of Transportation*, CBCA 7269 et al., 25-1 BCA ¶ 38,778, at 188,501.

The agency moves for summary judgment in the initial appeal (CBCA 8012), seeking affirmance of the termination for default, on the theory that the contractor failed to perform in accordance with the contract and directives of the contracting officer. The agency summarizes its position in its reply, "[T]he government directed [the contractor] to either devise a corrective plan or perform remedial work and [the contractor] did not do either." These undisputed facts, argues the agency, support its motion and the termination for default because the contract contains a Disputes clause that compelled the contractor to proceed diligently with performance of the contract, pending resolution of any request for relief, and to comply with any decision of the contracting officer.

The contractor contends that it satisfactorily fulfilled its contractual obligations, and the failures of the retaining wall and roadway were due to government designs and specifications, as well as unusually severe weather under which the government-designed drainage system failed. The contractor maintains that it satisfactorily completed performance under the contract, such that the termination must be overturned.

While it is undisputed that the contractor failed to perform as the contracting officer directed, the facts needed to resolve the dispute are not established. Although the retaining wall failed, the undisputed facts do not demonstrate the cause or that the contractor was obligated to remedy the situation. Moreover, the parties have yet to address whether the Warranty of Construction clause limited the contractor's obligations. The agency has not established at this summary judgment stage that the contractor was required to perform as directed by the contracting officer.

Decision

The Board denies the agency's motion for summary judgment.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Jonathan L. Kang
JONATHAN L. KANG
Board Judge