

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Lawn Legends LLC) ASBCA No. 59078
)
Under Contract No. W9127S-13-D-0005)

APPEARANCE FOR THE APPELLANT: Mr. Jay McKnight
Managing Member

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
S. DeAnn Lehigh, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Little Rock

OPINION OF ADMINISTRATIVE JUDGE MCILMAIL

INTRODUCTION

The U.S. Army Corps of Engineers (Corps) contracted with appellant for lawn mowing services at a national park. After issuing two delivery orders, and after appellant performed at least some services pursuant to those delivery orders, the Corps terminated the contract and the delivery orders for default. Appellant seeks reversal of the termination, and an award of lost income. The parties have elected to proceed without a hearing, under Rule 11 of the Board's rules. We dismiss the request for a monetary award, without prejudice, for lack of jurisdiction. Otherwise, we deny the appeal.

FINDINGS OF FACT

In March 2013, the Corps and Lawn Legends LLC (appellant) entered into Contract No. W9127S-13-D-0005, an indefinite-delivery, indefinite-quantity (IDIQ) contract for lawn mowing and "bush hogging" services in Piedmont, Missouri (R4, tab C-1 at 1, 30-31).¹ The contract provided for a base year of 8 March 2013 through 7 March 2014, and two option years (*id.* at 31).

¹ "Bush hogging" or "brush hogging" is a form of clearing land of brush around trees and rocks using a heavy-duty mowing device called a "bush hog" or "brush hog," which is, generally, attached to the back of a tractor.

The contract incorporates by reference Federal Acquisition Regulation (FAR) clause 52.212-4, CONTRACT TERMS AND CONDITIONS--COMMERCIAL ITEMS (FEB 2012) (R4, tab C-1 at 12), which, at paragraph (m), Termination for cause, provides:

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, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

At paragraph (f), Excusable delays, the clause provides:

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.

Section 1.6.14.2 of the contract's Performance Work Statement (PWS) provides:

When the contractor experiences delays due to circumstances beyond his control, the Government may allow the contractor to work additional hours beyond normal duty hours (8:00 a.m. and 4:30, Monday through

Friday) and on non-scheduled days, i.e, and weekends, with prior approval from the COR on a case by case basis.

(*Id.* at 37) In addition, section 5.2.1.5 of the PWS provides:

Upon notification to begin mowing, the contractor shall complete a mowing cycle within the ten day [sic] of the notice to proceed activation date.

(*Id.* at 45) Section 5.2.2.3 of the PWS provides:

At notification to begin bush hogging, the contractor shall complete all required services within the specified time periods shown in the delivery order.

(*Id.* at 46) Finally, regarding Flood Reduction Structures (also referred to in the record as a “flood structure,” “flood risk management area (FRM),” and “the dam” (R4, tab A at 9, tab A-2 at 1, tab D-3 at 16; gov’t br. at 2, 4-5), section 5.2.3.3 of the PWS provides:

Upon notification to begin the vegetative removal, the contractor shall complete all work within 14 days from notice to proceed by the COR. This date is usually established at prework.

(R4, tab C-1 at 47)

The Corps issued only two delivery orders pursuant to the contract: Delivery Order Nos. 1 and 2 (R4, tab A at 9-10, tab A-2 at 1). The Corps issued Delivery Order No. 1 on 1 April 2013, in the amount of \$32,570, for “lawn maintenance services in the parks and administrative areas within the Clearwater Project Office Boundaries,” Piedmont, Missouri, through 30 September 2013 (R4, tab C-2 at 1, 5-6). The Corps issued Delivery Order No. 2 on 16 May 2013, in the amount of \$51,605, for the same services at the same locations, through 5 November 2013 (R4, tab C-3 at 1, 6-7). The delivery orders required appellant (1) to perform mowing “cycles” through various locations; (2) to mow at an administrative area; (3) to mow at a flood structure; and (4) to perform bush hogging, according to the following schedule of dates in 2013:

Delivery Order No. 1

19 April	Administrative Area No. 1
22 April	Cycle No. 1
29 April	Administrative Area No. 2
8 May	Cycle No. 2
10 May	Administrative Area No. 3
20 May	Administrative Area No. 4
20 May	Flood Structure No. 1
21 May	Cycle No. 3
22-24 May	Bush Hogging No. 1
31 May	Administrative Area No. 5
10 June	Administrative Area No. 6
21 June	Administrative Area No. 7
1 July	Administrative Area No. 8

(R4, tab A at 9)

Delivery Order No. 2

10 June	Cycle No. 4
24 June	Cycle No. 5
1 July	Bush Hogging No. 2
12 July	Administrative Area No. 9
22 July	Administrative Area No. 10
2 August	Administrative Area No. 11
12 August	Administrative Area No. 12
23 August	Administrative Area No. 13
28 August	Bush Hogging No. 3
3 September	Administrative Area No. 14
13 September	Administrative Area No. 15
23 September	Administrative Area No. 16
4 October	Administrative Area No. 17
15 October	Administrative Area No. 18
28 October	Flood Structure No. 2

(R4, tab A at 10, tab A-2 at 1) Delivery Order No. 2 also lists Cycle Nos. 6-13, but provides no start dates for those cycles (R4, tab A at 10).

Appellant began work on Delivery Order No. 1 in April 2013, performing Cycle No. 1 and Administrative Area Nos. 1 and 2 in a manner satisfactory to the Corps (*see* R4, tab D-1 at 1, tab F-3 at 1-2, ¶¶ 4-5). However, appellant was absent from the

worksite on 20 May 2013 and 21 May 2013 (R4, tab F-3 at 2, ¶ 5); consequently, appellant did not begin Cycle No. 3 on 21 May 2013, the scheduled date for the start of that work (R4, tab A at 9, tab F-3 at 2, ¶ 7). On 22 May 2013, appellant completed Cycle No. 2, having returned to the worksite after a two-day absence including to trim seven acres in “Piedmont Park” that appellant had left untrimmed (R4, tab F-3 at 2, ¶ 5).

On 29 May 2013, appellant began Flood Structure No. 1 and Cycle No. 3 (R4, tab D-1 at 2), which, pursuant to Delivery Order No. 1, were to have begun on 20 May 2013 and 21 May 2013, respectively (R4, tab A at 9). Because of adverse weather, appellant worked until only noon on 30 May 2013, and only two hours on 31 May 2013 (R4, tab D-16 at 16-17; app. supp. R4, tab 1). Appellant never performed Bush Hogging No. 1, which was scheduled to have been performed during the period 22-24 May 2013 (R4, tab A at 9, tab F-3 at 2, ¶ 6). Appellant worked on Flood Structure No. 1 on 29-31 May 2013, then not again until 22-23 June 2013 (R4, tab D-3 at 17, tab F-3 at 4, ¶ 9; app. br. at 3-4). Appellant never completed Flood Structure No. 1 (R4, tab F-2 at 3, ¶ 9).

On 11 June 2013, appellant completed Cycle No. 3 (R4, tab F-3 at 2, ¶ 7). Appellant began Cycle No. 4 on 12 June 2013, two days after the scheduled start for that work (R4, tab A at 10, tab F-3 at 3, ¶ 8). Appellant did not work on 17 June 2013, because a severe storm had been forecast for that day (app. supp. R4, tab 1). Appellant did not begin Cycle No. 5 on 24 June 2013, the scheduled date for the start of that work (R4, tab A at 10, tab D-2 at 3, tab F-3 at 4, ¶ 10). Appellant left the worksite on 24 June 2013, not having completed Cycle No. 4, and did not return until 1 July 2013 (R4, tab F-3 at 3, ¶ 8).

On 1 July 2013, appellant’s subcontractor arrived at the worksite to perform Bush Hogging No. 2, which was scheduled to have begun that day, to find Corps forces already performing that task, on the assumption that appellant, who had not been at the worksite since 24 June 2013, would not appear (R4, tab A-2 at 1, tab F-3 at 3, ¶ 8). Appellant’s subcontractor left the worksite, and appellant did not perform Bush Hogging No. 2 (R4, tab F-3 at 3, ¶ 8). Also on 1 July 2013, appellant was still working on Cycle No. 4 (R4, tab F-3 at 4, ¶ 10). Appellant began Cycle No. 5 on 17 July 2013, the revised date to begin that cycle set by the Corps, and (according to the Corps’ monthly report for July 2013) maintained the schedule for that cycle (R4, tab D-2 at 3).

In August 2013, according to the Corps’ Civilian Engineering Technician at the Clearwater Lake Project Office, appellant completed Cycle No. 6 “in plenty of time” (R4, tab F-3 at 1, ¶ 3, at 4, ¶ 11). Appellant began work on Flood Structure No. 2 on 1 August 2013, but when it left the worksite on 30 August 2013, it had not completed the work on Flood Structure No. 2 (R4, tab F-3 at 5, ¶ 13).

On 19 September 2013, the contracting officer issued Modification No. 1, terminating “this contract for cause due to...unsatisfactory performance,” and de-obligating \$8,315.00 for Delivery Order No. 1 and \$26,551.75 for Delivery Order No. 2, “as a result of this termination to reflect the work that was not completed on those delivery orders” (R4, tab B-4 at 1). Appellant received the termination decision on 20 September 2013 (app. supp. R4, tab 3), and timely filed this appeal on 17 December 2013, challenging the termination and seeking an award of lost income in the amount of \$50,706.75 (R4, tab A at 5, 8).

DECISION

I. The Termination for Default

Background

A contract may be terminated for default when a contractor fails to comply with the contract delivery schedule. *Keystone Capital Services*, ASBCA No. 56565, 09-1 BCA ¶ 34,130 at 168,753. The Corps has the burden of proving by a preponderance of the evidence that the termination for default was justified. Once the Corps establishes that the delivery date has not been met, the burden of proof shifts to the contractor to establish that the termination was not justified. The contractor must prove that its failure to comply with the contract delivery schedule was excused by circumstances beyond its control and without its fault or negligence or that of its subcontractors. *Id.*

A. Delivery Order No. 1

Among the Corps’ allegations of default with respect to Delivery Order No. 1 are that (1) appellant did not complete Cycle No. 2 on time, (2) appellant did not complete Cycle No. 3 on time, (3) appellant did not perform Bush Hogging No. 1, (4) appellant did not complete Flood Structure No. 1 on time, and (5) appellant did not complete Administrative Area No. 8 on time (gov’t br. at 3-10, 13-15).

1. Cycle No. 2

Appellant was to have begun Cycle No. 2 on 8 May 2013, and, pursuant to PWS §§ 1.6.14.2 and 5.2.1.5, have completed that cycle ten weekdays later, on 21 May 2013. However, appellant did not complete Cycle No. 2 until 22 May 2013, when it returned to the worksite, including to trim seven acres in “Piedmont Park” that were left untrimmed when appellant departed the worksite on 20 May 2013. The Corps thus demonstrates that in failing to complete Cycle No. 2 on time, appellant defaulted on Delivery Order No. 1. Appellant asserts that an electric company had “coned off” an “entire area,” and that campers had parked on other areas, putting some

work out of its control (app. br. at 2), but does not directly and expressly address the Corps' reference (gov't br. at 3-4) to the untrimmed, seven Piedmont Park acres. Therefore, appellant does not demonstrate that its default with respect to Cycle No. 2 is excusable.

2. Cycle No. 3

Appellant was to have begun Cycle No. 3 on 21 May 2013, and, pursuant to PWS §§ 1.6.14.2 and 5.2.1.5, was to have completed that cycle by Tuesday, 4 June 2013, ten weekdays later. The Corps concedes that appellant lost two days to rain, extending the completion date to 6 June 2013 (gov't br. at 4). However, as appellant concedes (app. br. at 2), Cycle No. 3 was not completed until 11 June 2013. Consequently, the Corps demonstrates that in failing to complete Cycle No. 3 on time, appellant defaulted on Delivery Order No. 1. Appellant contends that it was rain delays, a holiday, and "soft ground issues" that contributed to it not completing until 11 June 2013, and that Corps agreed to completion of Cycle No. 3 by 11 June 2013 (app. br. at 2), but does not point to any record evidence that proves any of those contentions. Therefore, appellant does not demonstrate that its default with respect to Cycle No. 3 is excusable.

3. Bush Hogging No. 1

Delivery Order No. 1 required appellant to perform Bush Hogging No. 1, but, as appellant admits in its notice of appeal, appellant did not perform that task (R4, tab F-3 at 2, ¶ 6). Consequently, appellant defaulted on Delivery Order No. 1. Appellant's notice of appeal implies that the Corps relieved it of the obligation to perform Bush Hogging No. 1 (R4, tab A at 5), but appellant does not cite any evidence to support that contention. Therefore, appellant does not demonstrate that its default with respect to Bush Hogging No. 1 is excusable.

4. Flood Structure No. 1

Appellant was to have begun Flood Structure No. 1 on 20 May 2013, and, pursuant to PWS §§ 1.6.14.2 and 5.2.3.3, was to have completed that mowing by 7 June 2013, 14 weekdays later. The Corps concedes that appellant lost two days (30-31 May 2013) to rain, extending the completion date to 11 June 2013 (gov't br. at 4). However, appellant began Flood Structure No. 1 late, working on it during the period 29-31 May 2013, and then not until 22-23 June 2013, well after the extended completion date (even then appellant never completed Flood Structure No. 1). Consequently, the Corps demonstrates that, in failing to complete Flood Structure No. 1 by the scheduled delivery date, appellant defaulted on Delivery Order No. 1. Appellant contends that the Corps, prior to 22 June 2013, diverted appellant's efforts away from Flood Structure No. 1, and that hornets infested the areas still left to be worked (app. br. at 3-4), but cites

no record evidence that proves those contentions. Therefore, appellant does not demonstrate that its default with respect to Flood Structure No. 1 is excusable.

5. Administrative Area No. 8

According to the Corps, appellant did not complete Administrative Area No. 8 on time (gov't br. at 9). However, the evidence that the Corps cites in support of that contention (R4, tab F-3 at 8) does not address Administrative Area No. 8. Consequently, the Corps has not proven that appellant defaulted with respect to Administrative Area No. 8.

6. Conclusion Regarding Delivery Order No. 1

Appellant has not demonstrated that its defaults with respect to Cycle No. 2, Cycle No. 3, Bush Hogging No. 1, and Flood Structure No. 1 were excusable; consequently, the termination of Delivery Order No. 1 for default was justified, pursuant to FAR clause 52.212-4(m).

B. Delivery Order No. 2

Among the Corps' allegations of default with respect to Delivery Order No. 2 are that (1) appellant did not complete Cycle No. 4 on time, (2) appellant did not complete Cycle No. 5, (3) appellant did not complete Cycle No. 6 on time, (4) appellant did not complete Administrative Area No. 8 on time, (5) appellant did not perform Administrative Area Nos. 14-16, (6) appellant did not perform Bush Hogging No. 2, and (7) appellant did not complete Flood Structure No. 2 (gov't br. at 3-10, 13-15).

1. Cycle No. 4

Pursuant to Delivery Order No. 2, appellant was to have begun Cycle No. 4 on 10 June 2013, and, pursuant to PWS §§ 1.6.14.2 and 5.2.1.5, was to have completed that cycle by Friday, 21 June 2013, ten weekdays later. Even by Monday, 24 June 2013, Cycle No. 4 was not complete (indeed, appellant never completed Cycle No. 4); consequently, appellant defaulted on Delivery Order No. 2.

Appellant asserts that because of weather-related delays (including delays to Cycle No. 3 that prevented it from commencing Cycle No. 4 until 12 June 2013), it should have had until 26 June 2013 to complete Cycle No. 4 (app. br. at 3). The record contains "1-Day Observed Precipitation" maps from certain dates beginning with 26 April 2013 and ending 15 August 2013 (app. supp. R4, tab 4), as well as daily precipitation summary observations from 1-31 July 2013 (R4, tab E-3), but neither party explains how to interpret those documents. However, appellant's daily reports

record that appellant did not work on 17 June 2013 because a severe storm was forecast, and that, because of weather, appellant worked until only noon on 30 May 2013, and only two hours on 31 May 2013. Based upon those facts, we find that appellant was delayed by weather in the start and completion of Cycle No. 4 by no more than two days—that is, the equivalent of two days over the course of 30 May 2013 through 17 June 2013. Therefore, appellant had until 25 June 2013 to complete Cycle No. 4. However, appellant left the worksite on 24 June 2013, without having completed Cycle No. 4, and did not return until 1 July 2013. Consequently, appellant does not demonstrate that its default with respect to Cycle No. 4 is excusable.

2. Cycle No. 5

Appellant was initially to have begun Cycle No. 5 on 24 June 2013, and, pursuant to PWS §§ 1.6.14.2 and 5.2.1.5, have completed that cycle by 8 July 2013. However, the Corps revised the date to begin that cycle to 17 July 2013, making the completion date 31 July 2013 pursuant to PWS §§ 1.6.14.2 and 5.2.1.5. According to the Corps' monthly report for July 2013, appellant met that schedule; consequently, appellant did not default with respect to Cycle No. 5.

3. Cycle No. 6

According to the Corps, appellant was to have completed Cycle No. 6 on 10 June 2013, but had only completed 50% of that mowing by 12 June 2013 (gov't br. at 5). However, Delivery Order No. 2 provides no start date for Cycle No. 6. In addition, according to the Corps' Clearwater Lake Project Office Civilian Engineering Technician, appellant completed Cycle No. 6 on time, which, elsewhere, the Corps concedes is the case (gov't br. at 9). Therefore, the Corps has not proven that appellant defaulted with respect to Cycle No. 6.

4. Administrative Area Nos. 14-16

The Corps contends that appellant did not perform Administrative Area Nos. 14-16 (gov't br. at 10), but cites no evidence to support that contention. Furthermore, with respect to Administrative Area No. 16, pursuant to Delivery Order No. 2, appellant was to have performed that mowing on 23 September 2013. Of course, by that time the Corps had already terminated the contract, on 19 September 2013. For these reasons, the Corps does not meet its burden of proving that appellant defaulted with respect to Administrative Area Nos. 14-16.

5. Bush Hogging No. 2

The Corps contends that appellant did not perform Bush Hogging No. 2. However, when appellant's subcontractor arrived at the worksite to perform that work,

Corps forces were already performing it (without notice to appellant), on the assumption that appellant, who had not been at the worksite since 24 June 2013, would not appear to perform the bush hogging. In view of the foregoing, we find that the Corps relieved appellant of the obligation to perform Bush Hogging No. 2, and that appellant did not default with respect to Bush Hogging No. 2.

6. *Flood Structure No. 2*

According to Delivery Order No. 2, work at Flood Structure No. 2 was to have begun on 28 October 2013. However, the parties agree that the schedule for Flood Structure No. 2 was revised to begin on 1 August 2013 and be completed by 30 August 2013 (gov't br. at 9; citations to supp. app. br. at 4). Although appellant began that work on 1 August 2013, it did not complete that work, having left the worksite on 30 August 2013 with some work still not performed. Consequently, the Corps demonstrates that, in failing to complete Flood Structure No. 2, appellant defaulted on Delivery Order No. 2. Appellant contends that its work on Flood Structure No. 2 was delayed, but does not contend that it ever completed Flood Structure No. 2 (app. br. at 4). Therefore, appellant does not demonstrate that its default with respect to Flood Structure No. 2 is excusable.

7. *Conclusion Regarding Delivery Order No. 2*

Appellant has not demonstrated that its defaults with respect to Cycle No. 4 and Flood Structure No. 2 are excusable; consequently, the termination of Delivery Order No. 2 for default was justified, pursuant to FAR clause 52.212-4(m).

II. *Appellant's Monetary Claim*

The Board dismisses appellant's claim for lost income in the amount of \$50,706.75, without prejudice, for lack of jurisdiction. For the Board to possess jurisdiction to entertain a contractor's monetary claim, the contractor must have first presented the claim to the contracting officer. *Al Bahar Co.*, ASBCA No. 58416, 14-1 BCA ¶ 35,691 at 174,689. In its brief regarding the Board's jurisdiction to entertain its monetary claim, appellant fails to identify any claim, monetary or otherwise, that it presented to the contracting officer. We find that appellant has presented no claim to the contracting officer; therefore, we do not possess jurisdiction to entertain appellant's request for a monetary award. Accordingly, the Board dismisses that request, without prejudice.

CONCLUSION

The Board dismisses appellant's monetary claim for lack of jurisdiction, without prejudice. Otherwise, the appeal is denied.²

Dated: 30 December 2015


TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur


RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 59078, Appeal of Lawn Legends LLC, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals

² We obviously do not have before us any claim or evidence regarding whether the Corps owes appellant any additional contract payments for items upon which, as we have determined in this decision, appellant was not in default.