

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
EFG Associates, Inc.) ASBCA Nos. 50546, 50848,
) 50849, 50851
Under Contract No. F41685-93-D-0009)

APPEARANCE FOR THE APPELLANT: Theodore M. Bailey, Esq.
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
COL Michael V. Renner, USAF
LT COL Wyckliffe S.G. Furcron, USAF
Edwin R. Babbitt, Esq.
MAJ Christopher M. Petras, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE DELMAN

Under ASBCA No. 50546, EFG Associates, Inc. (EFG or appellant) contends that its contract was terminated for convenience as a matter of law and disputes the Government's default termination of three delivery orders under the contract under ASBCA Nos. 50848, 50849 and 50851. We have jurisdiction under the CDA, 41 U.S.C. § 601 *et seq.* A hearing was held -- the Government attended and presented witnesses but appellant submitted its case on the record. For reasons stated below, we deny the appeals.

FINDINGS OF FACT

1. On or about 28 April 1993 the United States Department of Air Force, pursuant to FAR 19.8, offered Contract No. F41685-93-D-0009 to the Small Business Administration (SBA) for award to an eligible concern under the SBA 8(a) program.

2. The contract was a firm fixed-price indefinite quantity, indefinite delivery contract for Simplified Acquisition of Base Engineering Requirements (SABER) for real property maintenance, repair, alteration and minor construction projects at Laughlin Air Force Base, Spofford Auxiliary Air Field, and Lake Amistad Outdoor Recreation Area, Texas. The Government was to order construction-related items through the issuance of delivery orders. The guaranteed minimum of work was \$100,000 and the maximum was \$15,000,000 over the life of the contract, including option periods.

3. The SBA accepted the offer for award. The Air Force selected appellant, one of four concerns nominated by SBA, as the contractor.

4. A contract was executed by all parties in August 1993. Mr. Eduardo F. Garcia, President of EFG Associates, Inc., executed the contract on 13 August 1993 as the 8(a) subcontractor. Mr. Garcia was the qualifying individual under SBA regulations upon which EFG's status as a qualified 8(a) contractor was based. He also possessed a controlling stock interest in EFG. Mr. Ralph Murillo, an SBA contracting officer, executed the contract on 16 August 1993 as the prime contractor on behalf of SBA. CAPT Lea R. Alholinna, contracting officer, executed the contract on 19 August 1993 on behalf of the Air Force. Hereinafter, reference to the "contracting officer" shall refer to the contracting officer of the Air Force.

5. The basic performance period was from the date of contract award through 30 June 1994, with four annual renewal options. The Government exercised the first three option years, which extended performance through 30 June 1997.

I. Events Leading Up To Appellant's Abandonment of the Contract

6. The SABER contract did not generate as much work as anticipated by appellant. In view of the Government's projected low volume of work for 1996-1997, EFG and the SBA sought a meeting with the Air Force, which was held on 29 July 1996.

7. At the meeting EFG proposed a termination for the convenience of the Government and estimated termination costs in the amount of \$100,000. Alternatively, EFG proposed the continuation of the contract albeit modified to eliminate the requirement for on-site management and facilities. The contracting officer stated that he would take the matter under advisement.

8. By letter to the SBA dated 21 August 1996, the contracting officer rejected both of EFG's proposals as not being in the best interests of the Government, but stated that the Government remained open to a no-cost convenience termination (app. R4 supp. 50546, 50848, 50849, 50851, tab 9).

9. By letter dated 4 September 1996, Mr. Garcia notified the SBA of his intent to transfer all of his stock in EFG to an irrevocable trust (*id.*, tab 18).

10. Insofar as pertinent, the contract as amended included FAR 52.219-17 which provided as follows (R4, 50848, 50849, 50851, tab 1.1):

SECTION 8(a) AWARD (FEB 1990)

(a) By execution of a contract, the Small Business Administration (SBA) agrees to the following:

....

(4) To notify the 47th Contracting Squadron, Laughlin AFB, Texas, Contracting Officer immediately upon notification by the subcontractor that the owner or owners upon whom 8(a) eligibility was based plan to relinquish ownership or control of the concern.

(b) The offeror/subcontractor agrees and acknowledges that it will, for and on behalf of the SBA, fulfill and perform all of the requirements of the contract.

11. We find that neither the SBA nor EFG provided the contracting officer with the notification required by this contract provision.

II. EFG Abandons the Contract

12. On 19 September 1996, EFG began to remove its office trailer from the site. The next day, 20 September 1996, the Government issued a cure notice, stating that appellant's presence on the site was a contract requirement, and that unless appellant rectified the situation within 10 days it could be terminated for default. EFG completed its removal from the site the next day, on 20 September 1996. The record does not establish any wrongful Government conduct or excusable cause which caused appellant to abandon the site. We find that appellant's abandonment of the site, coupled with its contemporaneous written assertions to the Air Force that the contract was effectively terminated (finding 23, *infra*) reflected its unequivocal intent to no longer perform under the contract.

III. The Status of Delivery Orders

13. Delivery Order No. 5044 was issued on or about 9 February 1995, requiring EFG to renovate the x-ray darkroom at the base hospital. The work included the installation of three new light-proof x-ray film cabinets. Performance was to be completed 60 days after receipt of notice to proceed.

14. EFG proceeded with the work but was unable to provide three conforming light-proof x-ray film cabinets as required. By letter to the contracting officer dated 13 September 1996, EFG advised that it was restarting its testing on one of the three

cabinets that remained nonconforming (R4, 50848, tab 47). The cabinet failed its test. This was the status of Delivery Order No. 5044 as of the date EFG abandoned the site.

15. Delivery Order No. 5064 was issued on or about 29 September 1995, requiring EFG to construct a metal building addition with a paint booth and related other work at Building 58 at the base. Performance was to be completed 180 days after receipt of notice to proceed.

16. The Government agreed to extend performance time to 20 June 1996 but advised EFG that liquidated damages would accrue thereafter (R4, 50849, tab 4).

17. By letter to EFG dated 15 July 1996, the contracting officer advised of a number of work items that remained to be performed, including loose cross bracing and the submission of as-built drawings. The Government also questioned the use of welds in lieu of bolts on certain "Z-Grits" (R4, 50849, tab 7).

18. By letter to EFG dated 20 August 1996, the contracting officer solicited a cost proposal to modify the fire suppression system (R4, 50849, tab 8). It is unclear whether the Government ordered this work.

19. By letter to the contracting officer dated 3 September 1996, EFG sought final inspection, but the Government disapproved appellant's as-built drawings on 4 September 1996 and requested resubmission (R4, 50849, tab 9). The Government also notified EFG on 6 September 1996 that certain work items were still outstanding (*id.*, tab 10). The Government reminded appellant of these open items by letter dated 19 September 1996 (*id.*, tab 13). Appellant did not complete these items. This was the status of Delivery Order No. 5064 as of the date appellant abandoned the site.

20. Delivery Order No. 5070 was awarded, effective 11 July 1996, requiring EFG to construct certain curbs and gutters. Performance time was 120 days after receipt of notice to proceed.

21. By letters to EFG dated 19 August 1996 and 30 August 1996, the contracting officer advised that EFG had not provided a payment and a performance bond for this work, which was a condition precedent to the commencement of performance (R4, 50851, tabs 3, 4).

22. Having failed to receive these bonds, the contracting officer on 9 September 1996 issued a cure notice to EFG, stating that its failure to provide the bonds was endangering performance, and warned of default termination if the bonds were not forthcoming within 10 days of receipt of the notice (R4, 50851, tab 5). This was the status of this delivery order as of the date appellant abandoned the site.

23. On 20 September 1996, the contracting officer received a faxed letter from appellant's counsel which stated in pertinent part as follows (app. R4 supp. 50546, 50848, 50849, 50851, tab 37):

This is in response to your cure notice and furnishing the bonds with the 5070 work order. This is to inform you that Eduardo F. Garcia, the qualified 8(a) individual, has transferred all ownership and control of his 85 percent of the stock in EFG Associates, Inc. to a Garcia Family Trust and that he is resigning. The trustee is Johnathan M. Bailey. He now controls EFG Associates. ...

Pursuant to SBA Regulation, 13 C.F.R. § 124.317(a), the contract is automatically terminated for convenience of the Government, since the 8(a) applicant no longer owns or controls the company.

Attached to the 20 September 1996 letter was a copy of a letter from Mr. Garcia to the SBA, also dated 20 September 1996, which stated in part as follows (*id.*):

Pursuant to 13 C.F.R. § 124.317(e) I hereby notify the Small Business Administration that I have entered into an agreement to transfer all of my stock in EFG Associates, Inc. to Johnathan M. Bailey in his capacity as Trustee for the Garcia Family Trust.

Mr. Bailey, the trustee, is an attorney and is employed in the office of appellant's counsel.

24. Insofar as pertinent, 13 C.F.R. § 124.317(a) states in part as follows:

If the owner or owners upon whom eligibility was based relinquishes ownership or control of such concern, or enters into any agreement to relinquish such ownership or control, such contract or option shall be terminated for the convenience of the Government. In such a case, repurchase costs or other damages cannot be assessed against the concern due solely to the provisions of this paragraph.

This language was taken verbatim from the statutory amendments to the Small Business Act, known as the "Business Opportunity Development Reform Act of 1988," codified at 15 U.S.C. § 637(a)(21)(A).

25. Under the Garcia Family Trust set up by Mr. Garcia, Mr. Garcia transferred all outstanding stock of EFG to the trustee which became the initial corpus of the trust and he made himself, wife and children the beneficiaries of the trust estate. Insofar as pertinent, the trust provided as follows (app. mot. sum. judgment, ex. 10):

ARTICLE IV. PAYMENT AND DISTRIBUTION OF TRUST ASSETS

B. Payment of Income and Invasion of Principal

....

The Trustee, at his sole discretion, may pay to or apply for the benefit of the beneficiaries such amounts of the income or principal of the trust estate as he deems reasonably necessary for the proper care, support, maintenance and education of the beneficiaries. The balance of the annual net income of the Trust Estate shall be distributed to the beneficiaries each year. The Trustee is not required to make distributions in equal or unequal shares or to any one or more of the beneficiaries to the exclusion of the others.

26. Following EFG's 20 September 1996 notification to the contracting officer and its abandonment of the project, there followed a period of letter writing and wrangling amongst the parties over the status of the contract. While their positions were not at all times identical, the SBA and EFG basically agreed that under the statute and the SBA regulation the contract was deemed terminated for convenience as a matter of law. The Air Force was of the view that the decision to terminate remained in the hands of the contracting officer and that appellant's claimed divestiture did not require the convenience termination of the contract. The Air Force also contended that neither SBA nor EFG provided the contracting officer with timely notice of EFG's planned divestiture (finding 11) so that it could request a statutory waiver of any termination, pursuant to 15 U.S.C § 637(a)(21)(B). In October 1996, the contracting officer issued a proposed modification for a no-cost convenience termination, appellant and the SBA refused to sign it and the Air Force rescinded the offer.

27. By letter to the contracting officer dated 31 October 1996, appellant contended that the contract was automatically terminated for convenience, and challenged the Government's assertion that the contract was still alive. Appellant denominated the letter as a claim and requested a contracting officer's decision under the Disputes clause within 60 days.

28. By letter dated 30 January 1997, the contracting officer advised appellant of the agency's position "that a termination for convenience has not been legally and properly executed." (R4, 50546, 50848, 50849, 50851, tab 67) The contracting officer, however, declined to issue a decision under the Disputes clause.

29. Appellant appealed from the contracting officer's failure to issue a decision. The appeal was docketed as ASBCA No. 50546.

30. By letter to the SBA dated 25 February 1997 (*id.*, tab 73), the contracting officer sought to obtain a waiver of termination, and provided its official request to SBA by letter dated 16 May 1997 (*id.*, tab 79). The Government continued to maintain that under the circumstances Mr. Garcia's purported divestiture did not require a convenience termination.

31. As the contract expiration period approached, the contracting officer chose not to await the SBA's decision. By contracting officer decisions dated 24 June 1997, the Government determined that EFG had unjustifiably abandoned the site and ceased performance on the three outstanding delivery orders, and terminated them for default. (R4, 50848, tab 51; 50849, tab 17; 50851 tab 12) Appellant appealed each of these contracting officer's decisions to the Board under ASBCA Nos. 50848 (Delivery Order No. 5044), 50849 (Delivery Order No. 5064), and 50851 (Delivery Order No. 5070).

DECISION

Under ASBCA No. 50546, appellant contends that Mr. Garcia's act of transferring his stock in EFG to a family trust compelled the termination of its contract for convenience pursuant to 15 U.S.C. § 637(a)(21)(A) and 13 C.F.R. § 127.317(a). Appellant has the burden to persuade us that its actions meet the statutory and regulatory requirements.

Under the statute and the regulation, a contract shall be terminated for convenience after the party upon whom 8(a) eligibility was based – in this case Mr. Garcia – "relinquishes ownership or control" of the 8(a) concern. The first step in statutory interpretation is to review the statutory language, which should be given its plain meaning absent clear indications to the contrary. *See Lynteq, Inc. v. United States*, 976 F.2d 693 (Fed. Cir. 1992). The plain meaning of the term "relinquish" in this context suggests a permanency or finality that is not supported by Mr. Garcia's actions. *See Webster's Third New International Dictionary* (Unabridged 1986), which defines relinquish as to "forsake," "withdraw," "renounce", "abandon," "release," or "surrender." Clearly, Mr. Garcia did not abandon, release or surrender his ownership interests in EFG. The trustee – a member of the law firm representing appellant here -- had the discretion at any time to distribute any or all of the EFG stock to Mr. Garcia as a beneficiary of the trust. The net income of the stock was to be distributed to Mr. Garcia and his family each year. (Finding 25) Under Texas law Mr. Garcia, as beneficiary of the trust he created, was the equitable or real owner of the

EFG stock. As was stated in *Hallmark v. Port/Cooper-T. Smith Stevedoring Co.*, 907 S.W.2d 586, 589 (Tex. App. 1995):

A trust is a method used to transfer property. *Jameson v. Bain*, 693 S.W.2d 676, 680 (Tex. App.—San Antonio 1985, no writ). “When a valid trust is created, the beneficiaries become the owners of the equitable or beneficial title to the trust property and are considered the real owners; the trustee is merely the depository of the bare legal title.” *City of Mesquite v. Malouf*, 553 S.W.2d 639, 644 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.). The trustee is vested with legal title and right of possession of the trust property but holds it for the benefit of the beneficiaries, who are vested with equitable title to the trust property. *Jameson*, 693 S.W.2d at 680.

Having failed to surrender his controlling ownership interest in EFG, it follows that Mr. Garcia also failed to surrender, *de facto*, the control of his small business.

Under these circumstances, appellant has not persuaded us that Mr. Garcia relinquished ownership or control of EFG as contemplated by the statute and regulation so as to require the convenience termination of this contract. EFG’s abandonment of the site, therefore, was not sanctioned nor was it otherwise precipitated by any wrongful Government action or excusable cause. This abandonment, coupled with appellant’s express assertions that the contract was terminated (findings 12, 23) was tantamount to an unequivocal refusal to perform the balance of the work under the delivery orders, otherwise known as an “anticipatory repudiation,” which was a legally supportable basis upon which to issue the default terminations. *See generally Danzig v. AEC Corporation*, 224 F.3d 1333 (Fed. Cir. 2000); *Cascade Pacific International v. United States*, 773 F.2d 287 (Fed. Cir. 1985).

The appeals are denied.

Dated: 22 February 2001

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
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 Nos. 50546, 50848, 50849 and 50851, Appeals of EFG Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals