

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Southeast Technical Services) ASBCA No. 52319
Under Contract No. N62467-99-M-5181)

APPEARANCE FOR THE APPELLANT: Mr. Robert E. Gibson
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Alan R. Caramella, Esq.
Trial Attorney
Engineering Field Activity, Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from a termination for default. The underlying contract is for installation of playground equipment. We deny the appeal.

FINDINGS OF FACT

1. Southeast Technical Services (Southeast or appellant) was awarded Contract No. N62467-99-M-5181 for the firm fixed price of \$37,535.00 on 26 January 1999. The completion date based on the date of contract award was 26 April 1999. The contract as awarded required, *inter alia*, demolition of 11 existing sets of playground equipment, lead-based paint abatement and installation of 11 new sets at the Naval Support Activity, Millington, Tennessee (Millington). The playground equipment was to be furnished by the Navy. Southeast was to perform certain site work, which included installing pea gravel, covered by filter cloth, and 10” to 12” of wood carpet (hereinafter sometimes “wood chips”) “raked level all the way across the playground area.” Southeast was to procure the wood carpet. Southeast was responsible for minor materials and work not specifically mentioned but necessary for completion of the work. (R4, tab 1)

2. Under FAR 52.211-10 COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984), Southeast was to commence work within 5 days of receiving notice to proceed and complete work within 90 days. However, paragraph 9.0 of the statement of work required all work to be accomplished within 90 days from the date of contract award. (R4, tab 1)

3. The contract contained the following relevant provisions:

FAR 52.213-4 TERMS AND CONDITIONS-SIMPLIFIED
ACQUISITIONS OTHER THAN COMMERCIAL ITEMS (APR 98)

....

(e) Excusable delays. 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.

....

(g) Termination for cause. 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.

(R4, tab 1)

4. The contract incorporated by reference the following relevant clauses: FAR 52.211-12 LIQUIDATED DAMAGES - CONSTRUCTION (APR 1984) (setting liquidated

damages at \$80 per day); FAR 52.233-1 DISPUTES (OCT 1995); and FAR 52.243-5 CHANGES AND CHANGED CONDITIONS (APR 1984). (R4, tab 1)

5. Southeast was the second-low bidder. When the low bidder discovered a mistake and withdrew its bid, Southeast was offered the contract in January 1999 after confirming its price by letter of 19 January 1999. (R4, tab 6; tr. 41, 227) Based on the overall testimony at the hearing, and particularly the testimony at transcript pages 225-28, the Board finds that Southeast is essentially a one-man business that is operated using temporary labor by its president, Robert Gibson. Mr. Gibson was also awarded a contract in California with an award date of 25 February 1999 and an initial delivery date of 11 May 1999¹ (ex. A-10). Mr. Gibson realized that he was taking a chance by accepting award of two contracts with overlapping performance periods, but nevertheless did so. (Tr. 227, 229-30) Appellant was orally told to proceed, and work began on or about 8 February 1999 (R4, tab 3; tr. 78, 226).

6. There were two bilateral modifications to the contract. Modification No. P00001, executed 19 February 1999, deleted the lead abatement requirement and added 154 cubic yards of pea gravel and 4" drainage pipes. The contract price was increased by \$4,465.00 to \$42,000.00. The performance period was unchanged. Modification No. P00002 increased the contract price by \$800.00 to \$42,800.00 to compensate Southeast for additional drilling due to defects in the playground equipment. The performance period was extended by 18 calendar days to 14 May 1999. (R4, tab 2)

7. Both bilateral modifications contained the following:

Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.

(R4, tab 2)

8. By 29 March 1999 all playground equipment was in place, although safety problems existed because Southeast had not properly fenced the area (R4, tab 19; tr. 25-26, 228; ex. G-13). Ground work remained to be completed by Southeast, specifically removal of excess dirt, and installation of gravel, filter cloth and 10" to 12" of wood chips (tr. 118-19). Although the Navy did not know it at the time, it had only furnished enough filter cloth to complete about half of the playgrounds (tr. 119-20). Mr. Gibson was aware prior to 19 April 1999 that there was insufficient filter cloth to complete all the playgrounds (tr. 267). Although Mr. Gibson offered vague testimony that he informed the Navy there was

¹ The completion date was extended to 21 May 1999 (ex. A-10).

insufficient filter cloth (*id.*), we find his testimony lacked probative value. In addition, three support brackets were missing, but these were received by 1 April 1999 (R4, tab 33; tr. 122-23).

9. On or about 19 April 1999 Mr. Gibson departed Millington for the California job (tr. 21, 167, 229). When he left, the three support brackets had been installed, but the ground work remained to be completed (tr. 21-22, 36). He could not have provided wood chips until 15 June 1999 (tr. 266-68).

10. There ensued a series of telephone conversations between Mr. Gibson and Dana Howard, a Millington contract administrator. The gist of the conversations was that Ms. Howard wanted to know when Mr. Gibson would return to complete the contract work, and Mr. Gibson made various representations as to when he would return. (R4, tabs 21-24) During a 24 May 1999 telephone conversation Ms. Howard asserted that a show cause letter would be sent to Southeast (R4, tab 25). The letter was sent on 26 May 1999 (R4, tab 26).

11. Southeast responded by letter dated 27 May 1999 in which Mr. Gibson asserted that Southeast was delayed 35 days because of deletion of the lead abatement and addition of the 154 cubic yards of pea gravel. He stated another 5 days were lost because of missing nuts and bolts. He claimed that more time was lost because of the wrong brackets and rain. He countered the Navy letter with an affirmative request for an equitable adjustment of \$6,638.13 or “[e]nough time that the contractor feels is reasonable to complete this contract in good standing and free of [liquidated damages].” Notably, the letter does not assert that parts or filter cloth were still missing. (R4, tab 27)

12. More telephone conversations followed through 3 June 1999, with more promises to return. Mr. Gibson had purchased a truck to drive back from California which broke down and had to be junked in Phoenix. Thereafter, he had to find an alternate means to return. (R4, tabs 28, 29; tr. 230)

13. By letter of 4 June 1999 the Navy responded to Southeast’s 27 May 1999 equitable adjustment request. The letter countered Southeast’s factual and contractual position and concluded:

Based on the facts outlined above, it is the government’s position that no additional time or money is due Southeast Technical. If you disagree with this decision or have further items you would like to discuss, please submit in writing within ten (10) days from receipt of this letter.

(R4, tab 30)

14. Mr. Gibson returned to Millington on or about 8 June 1999 (tr. 271-72). Modification No. P00003, terminating the contract for default, was issued on 9 June 1999 (R4, tab 2). Southeast did not perform any further work on the contract between 19 April 1999 and termination (tr. 271-72).

15. Mr. Gibson testified that Southeast could not have completed the contract because the Navy failed to furnish all parts necessary for completion (tr. 231). His testimony is strongly undermined by the fact that the playground equipment had actually been installed prior to Mr. Gibson's departure (finding 8). Moreover, while certain parts were missing for the follow-on contractor, the record contains documents and testimony to the effect that nothing necessary to complete the job (except filter cloth) was missing, playground equipment and maintenance kits had been delivered, and Southeast never complained about missing parts during performance (ex. A-13; tr. 124-29; *cf.* finding 11). Southeast has not carried its burden of proof regarding missing materials except for a shortage of filter cloth² (finding 8). Additionally, the remaining ground work (finding 8) would not have been affected by the allegedly missing parts (tr. 128).

16. The Navy became aware that more filter cloth was needed during the follow-on contract and an additional roll was ordered (tr. 109-10). The process of obtaining additional filter cloth took 10 days (tr. 168).

DECISION

We have found that Southeast walked off the job before work was completed (finding 9). We have also found that Southeast has failed to establish that it was delayed by the Navy's alleged failure to furnish equipment (finding 15). Southeast raises a variety of arguments. It contends first that because a written notice to proceed was not issued there was somehow an excusable delay, notwithstanding a bilateral modification which established an extended delivery date of 14 May 1999. This argument lacks merit, as does the personal attack on Ms. Howard.

It next argues the contract did not have a default clause and that this negates the termination here. However, the contract contained a provision entitled "Termination for cause" under which the Navy is empowered to terminate the contract and not be liable for the cost of goods or services (finding 3). This argument is also without merit.

Southeast finally argues it was impossible to complete the contract because of missing equipment. We have found there was only sufficient filter cloth for approximately half of the playgrounds, but that the necessary equipment was otherwise present. The filter cloth would have affected the ground work that remained (findings 8, 15). However,

² Certain benches were late in arriving, but this was never an issue between the parties (tr. 51, 115-17).

Southeast must do more than prove the existence of an excuse. It must also show it took all reasonable action to perform in spite of the excuse. *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 408 (Ct. Cl. 1978). We have Mr. Gibson's testimony that he knew prior to 19 April 1999 the quantity of filter cloth was insufficient to finish the job (finding 8). He not only failed to seek additional cloth, he walked off the job. Moreover, the record establishes that obtaining additional filter cloth took ten days for the follow-on contract (finding 16), and that, by his own testimony, Mr. Gibson could not have had wood chips available before 15 June 1999 (finding 9). Assuming that Mr. Gibson had requested additional filter cloth on 19 April 1999 instead of abandoning the project, and performance had thereby been delayed for 10 days beyond the 14 May 1999 completion date to 24 May 1999, appellant would still have been in default on that date. The appeal is denied.

Dated: 9 January 2002

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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 No. 52319, Appeal of Southeast Technical Services, rendered in conformance with the Board's Charter.

Dated:

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