

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
A-Greater New Jersey Movers, Inc. ) ASBCA No. 54745  
 )  
Under Contract No. W911S1-04-D-0005 )

APPEARANCE FOR THE APPELLANT: Dolcey E. Chaplin, Esq.  
Ridgewood, NJ

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA  
Chief Trial Attorney  
LTC Joseph C. Fetterman, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal involves the termination for default of a contract for household goods and baggage moving services for military service members. The government terminated the contract for appellant's failure to submit required documents and refusal to continue to perform the contract services. The government also maintains that the contractor's poor performance and its express repudiation of performance justify the termination for default. Appellant has argued that the government's improper handling of invoices for payment, lack of oversight of contract performance, and lack of cooperation excuse the default.

FINDINGS OF FACT

1. On 19 November 2003, the United States Army Reserve Contracting Center Directorate of Contracting awarded Contract No. W911S1-04-D-0005 to appellant A-Greater New Jersey Movers, Inc. The effective date of the award was December 17, 2003. The initial period of performance was December 17, 2003 through November 30, 2004, with two one-year option periods. (R4, tab 1)

2. The contract was a requirements contract in an estimated amount of \$822,838 for moving services at Fort Dix, New Jersey and related activity locations in southern New Jersey. The contract schedule in 103 pages set forth unit prices for numerous line items according to one of three geographical areas, outbound or inbound, household goods or unaccompanied baggage, and necessary services required to perform the complete pickup and delivery of a personal property shipment. (*Id.*)

3. The Performance Work Statement (PWS) required the contractor to establish a quality control program as follows:

1.5.1 Quality Control. The contractor shall establish a complete quality control program to assure the requirements of the contract are provided as specified. One copy of the contractor's quality control program shall be provided to the contracting officer at the preaward survey conference or the performance conference if a preaward survey is not held. When required an updated copy must be provided the contracting officer on the contract start date and as future changes occur. Failure to provide copy [sic] is a violation of the requirements under this contract. The program shall include, but not be limited to, the following:

a. An examination and/or testing system covering the services stated in Specific Tasks, Part 5. It shall specify areas to be checked on either a scheduled or unscheduled basis and title of the individual(s) who shall perform the examination and/or testing.

b. A method for identifying deficiencies in the quality of services performed before the level of performance is unacceptable.

c. A file of all examinations/tests conducted by the contractor and when required the corrective action taken when discrepancies have been found. This documentation shall be made available to the Government for review anytime during the term of the contract.

*(Id. at 128)*

4. The government was required to monitor the contract for quality assurance. Section 1.5.2 in the PWS stated in pertinent part:

Quality Assurance. The Government shall monitor the contractor's performance. Inspection of shipments will be performed by using the Report of Contractor Services, MT Form 360-R. Unsatisfactory service will be further documented by issuance of a Contract Discrepancy Report (CDR), MT Form 352-R. When completed, the CDR will be forwarded to the contracting officer for action.

(*Id.* at 129)

5. The PWS provided that unaccompanied baggage may be shipped separately from the bulk of the household goods. The contract defined unaccompanied baggage as follows:

Unaccompanied baggage. That portion of the member's authorized weight allowance of personal property which is not transported free on a ticket used for personal travel and which is shipped separately from the bulk of the household goods. This shipment may be shipped separately from the bulk of the household goods. This shipment may be shipped by the expedited transportation mode. Examples are: personal clothing; professional books and equipment needed on arrival for performance of official duties; pots, pans, . . . .

(*Id.* at 132)

6. The contractor's specific tasks included the requirement in a pre-move survey to "determine the nature of personal property offered for shipment either by physical inspection or telephone survey with the owner" (*id.* at 135).

7. Section G, Contract Administration Data, provided for invoicing. The contractor was required to submit its invoices to specified addresses within 30 days from the date of the government's inspection and acceptance of services. The contract stated, "Erasures or other changes to an invoice must be initialed by the person who signs the invoice." (*Id.* at 215)

8. The contract included standard FAR clauses, including FAR 52.228-5 (INSURANCE – WORK ON A GOVERNMENT INSTALLATION (JAN 1997) (R4, tab 1 at 222-23), which required appellant to provide and maintain workmen's compensation, general liability insurance, and automobile liability insurance in stated minimum amounts and certify to the contracting officer in writing within ten days after contract award that the required insurance had been obtained. The contract incorporated by reference standard FAR clauses 52.232-25 PROMPT PAYMENT (FEB 2002) and 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) – ALTERNATE I (APR 1984) (*id.* at 220).

9. Appellant did not begin performance until February 2004 due to a protest (tr. 85). On 19 February 2004, a pre-performance conference was held where invoicing instructions were discussed (R4, tabs 13, 14; tr. 167). In February appellant submitted evidence of insurance and quality control to the government (tr. 136-37). Beginning in

March complaints began to be sent to the government regarding appellant's performance (R4, tabs 4, 6; supp. R4, tabs E, F; tr. 65-69, 86, 123-31, 134).

10. Appellant had long wait times to access bases to move shipments due to enhanced security requirements and, on one occasion, due to unacceptable identification on appellant's employees (supp. R4, tab C; tr. 116, 127, 139-40).

11. Appellant initially determined the nature of the shipment to be moved. Mr. Arthur Telles, appellant's president, considered unaccompanied baggage could be the category for a service member's personal property only if there were also household goods in the shipment without regard to items in the inventory. Appellant determined the shipments of cadets who were living in dormitory facilities as household goods and invoiced accordingly. Upon review of the inventory, the government changed the invoices and returned them to reflect the lower charges for shipment of unaccompanied baggage.<sup>1</sup> Appellant was not authorized to determine the nature of the shipment for purposes of payment. (Supp. R4, tab P; tr. 26, 140-43, 149)

12. After submission of its invoices, appellant encountered delays in receiving payment from the Defense Finance and Accounting Service (DFAS). The delays were due to several factors, including mistakes appellant made on the invoices with respect to stating gross weight or net weight and household goods or unaccompanied baggage.<sup>2</sup> Appellant also failed to break down the charges according to the branch of services involved which had an effect on sending the invoice to the correct DFAS office for payment. Appellant invoiced for unallowable charges (*i.e.* fuel surcharges and wait time at the access control point) and invoiced after completion of each shipment, instead of monthly as required. (Tr. 24, 31, 40-41, 52, 54-55, 66, 91, 98, 139-40) In addition, DFAS initiated an investigation regarding payments under this contract in order to guard against double billing. The government cooperated to get DFAS to resume the processing of payments to appellant. (Gov't supp. R4, tabs 20 and 21; tr. 90-92, 100)

13. After frequent telephone calls discussing payment issues and work quality, on 20 May 2004, the government met with appellant to discuss the payment issues. Mr. Telles, Ms. Suzanne M. Edgar, the contracting officer, Ms. Emelda Long, the contract administrator, and two representatives from the Small Business Administration

---

<sup>1</sup> The distinction was important for purposes of payment: the contractor was paid for a minimum of 100 pounds of unaccompanied baggage and 500 pounds of household goods (tr. 24).

<sup>2</sup> The government corrected invoices when required, with appellant's permission, to facilitate their processing for payment (tr. 24, 30).

attended the meeting. The government informed appellant that it failed to invoice in accordance with the contract. (Supp. R4, tabs 23-25; tr. 90-91, 97)

14. At the 20 May 2004 meeting, the government could not provide assurance of when appellant would receive payment for services from DFAS. The contracting officer offered to release appellant from its contract obligations, but appellant wanted to continue the contract. At the end of the meeting, Mr. Telles said that he was willing to go another month. (Tr. 144-45, 162)

15. Instances of poor performance and misconduct led the government to request a copy of appellant's quality control plan in an effort to prevent future problems from arising (tr. 60, 65, 86-87, 110). Mr. Telles was personally aware of only one complaint about appellant's performance among over 220 moves that were handled (tr. 134, 138-39).

16. On 16 June 2004, the government notified appellant by email that appellant's insurance certificates had expired on 18 March 2004, and that the contracting officer never received the quality control plan as required by the PWS in the contract. The notice requested new insurance certificates and the required quality control plan. (R4, tab 5)

17. On 29 June 2004, the contracting officer sent a letter to appellant requesting the current proof of insurance and quality control plan that had not been received by 2 July 2004.<sup>3</sup> The letter stated that failure to provide the requested information was a violation of the contract and could result in termination for default. (R4, tab 7; tr. 102-03)

18. Appellant provided the contracting officer with a current copy of its worker's compensation insurance, but failed to provide proof of general liability insurance and automobile liability insurance.<sup>4</sup> Appellant also failed to provide the contracting officer with a quality control program. (R4, tab 8; tr. 87, 89, 104, 165-66) Appellant used a form entitled "Quality Control Report" that it considered met the contract requirements because it was used on prior contracts. The form, however, did not include the examination system, method for identifying deficiencies, and documentation listed as elements of the plan specified in the contract. It was not accepted by the government. (R4, tab 9 at 8; supp. R4, tab G; tr. 101, 105-06, 109, 154).

19. On or about 1 July 2004, appellant stopped performance and notified the government that it was not going to continue performance under the contract (R4, tab 9;

---

<sup>3</sup> The date of 29 July 2004 on the letter was a typographical error (tr. 108).

<sup>4</sup> Mr. Telles spoke to appellant's insurance broker who had placed an incorrect expiration date in 2004 rather than 2005 on the certificate (tr. 136).

tr. 145, 162). Appellant expressly refused to carry out previously accepted and confirmed both pick-ups and delivery of shipments. Appellant informed government representatives at McGuire Air Force Base that it did not intend to show up and provide services for a local move and that the government was on “a month trial” (R4, tab 9 at 1; tr. 92-93). On 2 July 2004, appellant informed the government that it was not delivering any shipments but holding them in storage (R4, tab 9 at 2). On 6 July 2004, and on 8 July 2004, appellant informed the government that it would not release six in-bound shipments and three in-bound shipments, respectively (R4, tab 11). Ms. Long understood the contract was “on hold for non-payment” (R4, tab 9 at 5).

20. When the government learned that appellant was not releasing in-bound shipments for delivery to service members, the contracting officer, by memoranda dated 7 July 2004, regarding seven shipments, and 9 July 2004, regarding three shipments, directed appellant to immediately release the shipments to its warehouse dock for pick up by a government appointed agent. Mr. Telles did not consider that appellant refused the release of personal property, but explained the circumstances of delay in the government obtaining the personal property from appellant’s storage in these specific instances. (R4, tab 11; tr. 145-46)

21. After consideration and receipt of legal advice, the contracting officer recommended an immediate termination for default in a written determination issued pursuant to the Default clause in the contract that discussed the circumstances of appellant’s failure to provide required documents and refusals to deliver and pick up shipments.<sup>5</sup> The determination noted that service members were being inconvenienced and the summer months, as a peak season, required adequate shipping arrangements in support of troop movements. (R4, tab 10; tr. 94-95)

22. On 8 July 2004, the contracting officer terminated appellant’s contract for default for failure to provide evidence of general liability and automobile liability insurance coverage, failure to provide a quality control plan, and failure to perform the services as stated in the contract. (R4, tab 1 at Mod. No. P00001, tab 10) The contracting officer did not send appellant a cure notice before the termination (tr. 101-02, 138).

23. Appellant had borrowed \$80,000 for performance of the contract, purchased equipment, and no longer had money for the contract work. Appellant was paid approximately \$13,000 of the amount of approximately \$186,000 invoiced as of the time of the termination. When appellant inquired, DFAS advised that most of the problem was that the invoices were incorrect. Appellant could not confirm the amounts or timing of payments received, but acknowledged at the hearing the government had paid it at

---

<sup>5</sup> The memorandum is undated, but refers to a conversation on 6 July 2004, and appears to have been prepared contemporaneously with the termination.

least \$160,000. (Tr. 120-21, 146, 158-59) Appellant has not proved that financial incapacity for which the government would be responsible caused its failure to perform.

24. Appellant filed this timely appeal.

### DECISION

The government argues that appellant's refusal to perform contract services is sufficient justification for the government's termination for default. In addition, the government submits that there were other material factors, *i.e.* failure to provide proof of the requisite insurance and evidence of a quality control plan, that support the termination. According to the government, the contracting officer exercised her discretion reasonably in terminating the contract for default.

Appellant asserts that the contracting officer failed in her duty to consider the specific failure of the contractor and the excuses for the failure as required by FAR 49.402-3(f)(2). Appellant argues that the failure to submit documents cannot be sufficient in itself to support the drastic sanction of a default termination. Since appellant did not receive notice of deficiencies in its performance, appellant complains that it did not have an opportunity to rebut the charges against it. Appellant alleges that the government's lack of cooperation and arbitrary and capricious manner in which the government handled service member complaints, access to the base, invoices, and payment provide excuse to invalidate the default termination.

Termination for default is a drastic sanction that should be imposed upon a contractor only for good cause and based on solid evidence. The Government has the burden of proving the propriety of a termination for default by a preponderance of the evidence. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *J.D. Hedin Construction Co., Inc. v. United States*, 187 Ct. Cl. 45, 57, 408 F.2d 424, 431 (1969). If the government satisfies its burden, a defaulted contractor has the burden of proving that its nonperformance was excusable under the provisions of the Default clause. *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir.), *cert. denied*, 519 U.S. 992 (1996); *Plum Run, Inc.*, ASBCA Nos. 46091, 49203, 05-2 BCA ¶ 32,977 at 163,364.

Under the contract the government had the right to terminate the contractor for default if the contractor failed to perform the services as specified in the contract. *See* FAR 49.401 and 52.249-8(a)(1)(i). When a contractor stops work and notifies the government of that fact, the contractor has been held to have manifested a positive, definite, unconditional, and unequivocal intent not to render the required performance. *Danzig v. AEC Corporation*, 224 F.3d 1333, 1337-40 (Fed. Cir. 2000). The repudiation gives the government the right to terminate the contract for default. *Graham International*, ASBCA No. 50360, 01-1 BCA ¶ 31,222 at 154,111; *DWS, Inc.*, ASBCA No. 33245, 87-3 BCA ¶ 19,960 at 101,049. Effective 1 July 2004, appellant notified the

government that it was stopping the performance of moving services. There were refusals to pick up scheduled moves and refusals to deliver service members' property in its possession (finding 19). Under these circumstances, the government could terminate the contract for default.

The government also has the right to terminate a contractor for default if the contractor fails to perform any of the other provisions of the contract, provided that the "other provision" of the contract is a "material" or "significant" requirement. *Precision Products*, ASBCA No. 25280, 82-2 BCA ¶ 15,981 at 79,247. In *L & M Thomas Concrete Co., Inc.*, ASBCA Nos. 49198, 49615, 03-1 ¶ 32,194 at 159,122, the Board found the contractor's failure to provide a written quality control plan to assure it had an inspection system was support for a default termination. Similarly, failure to submit the required liability, property damage, and workmen's compensation insurance called for by the contract has been held to justify a default termination. *Engineering Technology Consultants, S.A.*, ASBCA No. 43454, 94-1 BCA ¶ 26,586 at 132,301; *Good Construction Co.*, ASBCA No. 30387, 86-2 BCA ¶ 18,912 at 95,381; *see UMM, Inc.*, ENG BCA No. 5330, 87-2 BCA ¶ 19,893 at 100,624. Appellant did not submit the contractually required evidence of insurance and quality control program when requested (finding 18). Appellant's failure to comply with these significant requirements of the contract provided further support for the government's termination for default. The government was required, however, to give the contractor the opportunity to cure this type of a failure. *See Bailey Specialized Buildings, Inc. v. United States*, 186 Ct. Cl. 71, 85, 404 F.2d 355, 363 (1968); *Hughes Moving and Storage, Inc.*, ASBCA No. 45346, 98-1 BCA ¶ 29,693 at 147,169.

However, where a contractor expressly repudiates the contract and stops performance, a cure notice is not required to be issued prior to a termination for default. *Beeston, Inc.*, ASBCA No. 38969, 91-3 BCA ¶ 24,241 at 121,221 and cases cited therein. Appellant's intent was clearly expressed as of 1 July 2004, that it would not be performing services while the government was on a "trial" basis due to the payment problems (finding 19). Appellant's conduct was definite and unequivocal. The government was not required to issue a cure notice prior to terminating the contract for default under these circumstances.

FAR 49.402-3(f)(2) requires the contracting officer to consider several factors before exercising business judgment and discretion in making the determination as to whether to issue a termination for default. The contracting officer in this case considered the contractor's failure to perform and the adverse effect it had on the military's mission. She recorded her analysis and rationale for the decision to terminate the contract for default in a contemporaneous memorandum (finding 21). The contracting officer's actions were appropriate and do not invalidate the default determination.

Appellant's reasons for its failure to perform that were presented to the Board in testimony at the hearing and argued in its post-hearing brief have been considered in terms of the excuses that have been held to be justification for nonperformance. Appellant claims that the contracting officer failed to consider appellant's excuses for its failure to perform (app. br. at 16). More specifically, appellant argues as follows:

The ability of a small business to continue to perform under the contract when the government does not pay for services delivered and accepted, when the government fails to follow the Prompt Payment Act [PPA] and notify the contractor within 7 [sic] days of changes to their invoices, which could have been properly addressed. Most importantly unauthorized changes to the invoices resulting in only 5 [sic] jobs payments (\$13,386) out of more than two hundred jobs (\$168,589) invoiced (220) at the time of termination to a small business certainly should qualify as an excuse.

(App. br. at 16-17) The contracting officer's determination does not discuss the changes made to invoices and the alleged failure of the government to follow the PPA and notify the contractor within seven days of changes to its invoices. These matters, however, do not excuse appellant's refusal to perform. The Board does not accord special treatment in determining whether the burden of proof has been met to a contractor because of its status as a small business. *See Torres Construction Company, Inc.*, ASBCA No. 25697, 84-2 BCA ¶ 17,397 at 86,655.

The poor financial condition or insolvency of a contractor ordinarily is not a sufficient excuse for a contractor's default in the performance of a contract. *Preuss v. United States*, 188 Ct. Cl. 469, 484, 412 F.2d 1293, 1302 (1969). The lack of financial resources is not an excuse or justification for nonperformance. *See Local Contractors, Inc.*, ASBCA No. 37108, 92-1 BCA ¶ 24,491 at 122,235, *aff'd on reconsid.*, 92-1 BCA ¶ 24,693, *aff'd*, 988 F.2d 131 (Fed. Cir. 1993)(Table). As the government points out, the PPA normally is the contractor's remedy when the government fails to pay invoices within 30 days of receipt by the designated billing office or within 30 days after the government's receipt of the services, whichever is later. *See FAR 52.232-25*. If it takes the government longer than 30 days to pay the contractor, then the contractor is compensated by PPA interest. (Gov't br. at 21)

When the financial incapacity of the contractor to perform is caused by the acts or omissions of the government, however, the default may be excused. The contractor must show that the default was otherwise beyond its control and without its fault or negligence. *Consumers Oil Company*, ASBCA No. 24172, 86-1 BCA ¶ 18,647 at 93,710. Late payments can thus constitute a defense to a default termination only if they rendered the contractor financially incapable of continuing performance, are the primary

or controlling cause of appellant's default, or are a material rather than insubstantial or immaterial breach of the contract. *Jones Oil Company*, ASBCA No. 42651 *et al.*, 98-1 BCA ¶ 29,691 at 147,151. Appellant asserts that the government's delays in paying its invoices forced the company to abandon the contract. We have found, however, that those delays were caused in part by appellant's improper invoicing (finding 12). Appellant's financial difficulties do not provide excuse for its default.

Appellant also argues that improper contract administration by the government excuses the default. There is no evidence that the government's acts and omissions in handling the invoices or otherwise managing the contract were arbitrary or otherwise amounted to a material breach of contract (finding 11). Furthermore, appellant has failed to prove any connection between the acts or omissions of the government in administering the contract and appellant's failures. *See Good Construction Co., supra*, 86-2 BCA at 95,379. They were not the controlling cause of appellant's failure to perform, and they were not without its fault or negligence.

We have reviewed all the parties' other arguments to consider the appeal, but do not believe it necessary to discuss them to resolve the issue presented.

We conclude that appellant's termination for default was proper. Accordingly, the appeal must be, and is denied in its entirety.

Dated: 24 January 2006

---

LISA ANDERSON TODD  
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 No. 54745, Appeal of A-Greater New Jersey Movers, Inc., rendered in conformance with the Board's Charter.

Dated:

---

CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals