

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Advance Construction Services, Inc.) ASBCA No. 55232
)
Under Contract No. DACW38-03-C-0004)

APPEARANCES FOR THE APPELLANT: Hubert J. Bell, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

The captioned contract was to perform construction and improvement to an existing embankment and levee along the Mississippi River in Louisiana. Appellant moves for summary judgment, arguing that the contracting officer (CO) gave appellant from 8 August to 22 September 2005 to show that it could complete performance by the contract completion date. There were nine days of excusable delay during that 45-day period, but the CO did not extend that period and terminated the contract for default on 23 September 2005. Therefore, movant concludes that the termination was procedurally defective and must be converted to a convenience termination. Respondent opposed the motion. Movant submitted a surreply thereto.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTION

1. On 20 December 2002 the U.S. Army Corps of Engineers (COE), Vicksburg, awarded Contract No. DACW38-03-C-0004 (the contract) to Advance Construction Services, Inc. (Advance or appellant) for levee enlargement and berm construction on the west bank of the Mississippi River in Louisiana (R4, tab D-1 at 1, 3).

2. The contract included the FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause, which provided in pertinent part:

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. . . .

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if—

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include . . . (x) unusually severe weather . . . ; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. . . .

This clause did not prescribe any cure or show cause notice. (R4, tab D-1 at 101-02)

3. The contract required Advance to complete performance within 450 calendar days after receipt of notice to proceed, but stated that the Exclusion Period “between 1 January and 31 May inclusive . . . has not been considered in computing the time allowed for completion” (R4, tabs B at 13, D-1 at 3, § 01000, ¶ 1.29).

4. Advance received notice to proceed on 19 March 2003 (R4, tab D-2 at 2). Thus, the contract required completion of performance by 22 June 2005 (R4, tab D-1 at 00800, ¶ 1.1, tab E-46 at 2; R. Najor aff., ¶ 8).

5. The contract prescribed time extensions for unusually severe weather exceeding 24 calendar days of “anticipated adverse weathers delays” allocated among the

months of June through December after the annual Exclusion Period (R4, tab D-1, § 01000, ¶ 1.28).

6. The COE extended the contract completion date by 145 calendar days for 2003 and 2004 in Modifications A00002 (28 days), A00005 (51 days) and A00006 (59 days) and the CO's 2 December 2005 final decision (7 days) (R4, tabs D-3A, D-3C, D-3D, B at 29).

7. The CO's 21 June 2005 letter to Advance stated that the contractor was approximately 10 percent behind schedule and was not diligently prosecuting the work, its continued lack of progress would prevent it from completing the contract within the required time, and gave Advance 14 days after receiving this letter to cure its delinquent performance (R4, tab E-27 at 1-2).

8. The CO's 12 July 2005 letter to Advance stated that the contractor had not improved its progress and cured the conditions endangering performance and the COE was considering default termination of the contract. The CO gave Advance 10 days after receipt of this letter to present causes beyond its control and without its fault or negligence to excuse its delay. (R4, tab E-29)

9. Advance's 1 August 2005 letter to the CO disputed some of the CO's statements, stated that it was reassessing the number of days of excusable delay for unusually severe weather, high river stages and unnatural drainage from adjacent farmland into borrow area 2B that required considerable pumping, and proposed to meet with the COE on 2 August 2005 to review progress (R4, tab E-35).

10. The CO's 4 August 2005 letter to Advance stated that at the parties' 2 August 2005 meeting, Advance had requested 45 days in which to demonstrate its commitment and capability to complete performance timely, and the CO decided to delay her final decision on contract termination and to grant those 45 days to take the steps Advance promised, namely:

- (a) bring a subcontractor on board, (b) augment your spread of production equipment, (c) operate two 10-hours shifts per day seven days a week, (d) satisfactorily place approximately 10,000 cubic yards of levee and berm embankment per day, and (e) either Mr. Bob Najor or Mr. Lew Najor will be on site at all times to personally oversee the construction operations as well as management of job site personnel.

The CO stated that she would closely monitor Advance's efforts, by granting this 45-day opportunity she did not establish a new completion date, and at the end of the 45-day period she intended "to promptly invoke appropriate sanctions provided under the terms

of the contract in the event you do not perform in accordance with your plan.” (R4, tab E-36)

11. The CO’s 22 August 2005 letter to Advance stated that “based upon your [8 August] receipt date of our August 4, 2005 letter, the 45[-]day period in which you have been granted an opportunity to perform in accordance with your plan will expire on September 22, 2005” (R4, tab E-41).

12. Starting 8 August 2005 Advance brought more earth moving equipment on site and placed embankment (R4, tab E-40 at 1). On 29 August 2005 Hurricane Katrina struck. Advance’s 2 September 2005 letter to the COE stated that, due to Katrina, Advance had run out of diesel fuel and stopped site operations (R4, tab E-43). The COE’s 6 September 2005 letter to Advance stated that days disrupted by Katrina were excusable (R4, tab E-45).

13. COE inspectors reported Advance’s progress from 9 to 21 August 2005 was “satisfactory, but could be better with more hauling and support equipment”; start of night shift and equipment breakdowns from 22 to 28 August 2005; Katrina delay for lack of fuel from 2 to 5 September 2005; and reduced equipment in operation and production from 6 to 22 September 2005. (R4, tab E-10; app. mot., ex. B, tab 32) Advance calculated that it placed an average of 9,699 cubic yards (CY)/day on 23 days, excluding non-work days, from 24 August through 22 September 2005 ($223,076 \text{ CY} \div 23$), and the last three days averaged 10,780 CY/day (Najor aff., ¶¶ 24-25, ex. 5). Respondent disputes that 9,699 CY/day average, calculates an 8,506 CY/day average for 24 days (including 2 September) ($204,136 \div 24$) from Advance’s Quality Control reports and notes that Advance’s 9,699 CY average omitted data from 8 to 23 August 2005 that would reduce the CY average (gov’t opp’n at 14-16; R4, tab E-9).

14. On 23 September 2005 the CO issued to Advance: (a) unilateral Modification No. P00017 which extended the contract performance time by 41 calendar days due to unusually severe weather and fuel supply disruption caused by Hurricane Katrina during the period 1 June through 23 September 2005, of which 22-23 and 29-31 August and 2-5 September 2005 occurred during the 45-day period she had granted on 4 August 2005 (R4, tab E-51 at 7-8) and (b) a notice of termination of the contract for default, stating that she had granted Advance “an additional 45 day period in which to cure the condition that is endangering performance of the contract,” but it had “failed to prosecute the work with such diligence that would ensure its completion within the time specified” in the contract, “failed to cure the condition that is endangering performance of the contract and . . . failed to show that your non-performance is due to excusable causes” and attaching Modification No. P00016 to the same effect (R4, tab E-52).

15. The CO’s Determination and Finding accompanying Modification No. P00017 determined that approximately 50% of the contract work had been completed by

23 September 2005 and considering only the 179 calendar days of excusable delay provided in Modification Nos. A00002, A00005, A00006 and P00017, the revised contract completion date was 18 December 2005 (R4, tab E-51 at 3-4).

16. The following colloquy occurred in the CO's December 2006 deposition:

Q. Now, would you agree that between August 9th of 2005 and September 22nd of 2005 that Advance had at least nine more days of excusable delay?"

A. Yes.

Q. The cure period was not extended by those nine days, was it?

A. That's correct.

Q. It should have been, shouldn't it?

A. Yes.

(App. mot., ex. B, tab 10 at 51)

DECISION

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Respondent contends that that 45-day period was not a "cure period" which it was required to extend for excusable delays (gov't opp'n at 2-4, 10-11). However, the undisputed purpose of the 45-day period was to enable appellant to demonstrate its commitment and capability to complete performance timely (SOF, ¶ 10), and the CO's termination notice expressly described it as a period in which "to cure the condition that is endangering performance of the contract" and that Advance had "failed to cure the condition" (SOF, ¶ 14(b)). In these circumstances, respondent's contention that the 45-day period was not a "cure" period is not a genuine dispute of material fact, but rather is a legal characterization that is wholly unpersuasive.

We agree with movant that the CO should have extended the cure period as well as the contract completion date for the days delayed by Hurricane Katrina. Indeed, the CO in 2006 testified that the cure period should have been extended for those nine days

of excusable delay (SOF, ¶ 16), and respondent's opposition does not contend to the contrary. For example, a gratuitous 10-day "cure notice" that required completion of some items by 21 September 1989 was changed to 22 September 1989, without dispute, because of Hurricane Hugo. *See Delta Marine, Inc.*, ASBCA No. 39649, 93-3 BCA ¶ 26,164 at 130,064 (finding 12, n.4). It does not follow, however, that appellant is entitled, *ipso facto*, to summary judgment.

As a general rule, it is improper to terminate a contract for default before the cure period ends. *Fred Schwartz*, ASBCA No. 23183, 80-1 BCA ¶ 14,272 at 70,303; *B&C Janitorial Services*, ASBCA No. 11084, 66-1 BCA ¶ 5355 at 25,131. This rule applies when a CO gratuitously allows the contractor a cure period. *B&C Janitorial*, 66-1 BCA at 25,130-31. The rationale for this rule is that the CO must consider a contractor's steps taken to cure delinquent performance during the entire cure period. *See Cervetto Building Maintenance Co. v. United States*, 2 Cl. Ct. 299, 303 (1983) (default termination was an abuse of discretion when the CO disregarded the contractor's performance, and submission of actions to shore up overall performance, on the last day of the cure period).

However, there are exceptions to this general rule. A default termination before the end of a mandatory or gratuitous cure period is not improper when it is clear that the default has not been cured and could not be cured before the end of the cure period. *See Contract Automotive Repair & Management*, ASBCA No. 45316, 94-1 BCA ¶ 26,516 at 131,985-86 (denying contractor's motion for summary judgment alleging that default termination before a mandatory 10-day cure period expired was improper; contractor had not alleged that it could have or would have cured deficiencies within the cure period); *KSC-TRI Systems, USA, Inc.*, ASBCA No. 54638, 06-1 BCA ¶ 33,145 at 164,261 (default termination before a gratuitous cure period expired was proper when the contractor did not demonstrate that it could or would have resumed performance).

The key issue in this motion is, whether the CO's failure to extend the 45-day period deprived Advance of the opportunity to establish a satisfactory rate of progress in placing embankment at the job site so as to ensure contract completion by the amended completion date? When a contractor is so delinquent that its performance in the time remaining in the cure period can make no difference, default termination is proper. *Contract Automotive, supra*. But when a contractor has nearly completed performance and remaining work can be performed in a few hours or days, a premature default termination is improper. *See Cervetto, supra*.

The material facts pertinent to this motion lie on some point on the spectrum illustrated by the two foregoing examples. Movant points to a trend towards an improved rate of placement of embankment material from August to September 2005, particularly in the last few days before the termination. Respondent disputes that trend and movant's

average placement data. (SOF, ¶ 13) We hold that the material facts with respect to this motion are not undisputed, and hence preclude summary judgment.

We deny the motion for summary judgment.

Dated: 30 May 2007

DAVID W. JAMES, JR.
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. 55232, Appeal of Advance Construction Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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