

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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ALKAI Consultants, LLC) ASBCA No. 55581
)
Under Contract No. W911S8-06-C-0007)

APPEARANCE FOR THE APPELLANT: James F. Nagle, Esq.
Oles Morrison Rinker & Baker LLP
Seattle, WA

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE THOMAS

ALKAI Consultants, LLC (ALKAI) appeals from the termination for cause of its contract to clean a digester at a wastewater treatment plant (WWTP). We sustain the appeal.

FINDINGS OF FACT

1. On 3 April 2006, the U.S. Army Contracting Agency awarded ALKAI Contract No. W911S8-06-C-0007 in the amount of \$98,765. The contract was a small business set-aside contract. It required ALKAI to “[r]emove and process the solid and liquid waste from the #1 Digester and pressure wash the inside surfaces in accordance with the Performance Work Statement.” The #1 digester (sometimes referred to as digester No. 1) is a component of the Solo Point WWTP, Fort Lewis, Washington. (R4, tab 1 at 1, 3, 5)

2. The contract established the period of performance:

52.111-4002 CONTRACT PERIOD

Any contract awarded hereunder will commence on 1 April 2006, or date of award if later, and shall end on 30 June 2006 for the base period unless sooner terminated under the provisions of the contract.

(R4, tab 1 at 13)

3. The contract incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (SEP 2005), which includes the following paragraphs:

(f) 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....

....

(m) 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.... 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 at 13)

4. The Performance Work Statement described the contractor's duties as follows:

1.2 CLEAN #1 DIGESTER

Remove solid and liquid waste from #1 digester (rough estimates indicate approximately 570,000 gallons) and pressure wash all inside surfaces of the #1 digester to be inspected by the Government.... Waste products removed from the #1 digester shall be dewatered to at least 20% solids on site. Dewatering equipment shall be staged such that water removed during the dewatering process shall be returned to the headworks of the plant via the drain system. The dewatered sludge shall be stockpiled at the Fort Lewis sludge drying beds. Three drying beds will be provided for this project for equipment staging and sludge stockpiling. Water returned to the headworks of the treatment plant shall be limited to a maximum flow of 10% of plant inflow and maximum suspended solids content of 1000 mg/l. Perform a

composite sample...for every 4 hours of press/centrifuge operation....

(R4, tab 1 at 5) The contract did not contain any other explicit information about the contents of the digester except for a statement that the depth of the bottom sediment was unknown but estimated to be two feet (R4, tab 1 at 12).

5. The contract stated that Fort Lewis operated under the ANSI/ISO 14001 Environmental Management System, and that the contractor's services must conform to environmental law and Fort Lewis regulations for Fort Lewis to remain in compliance with ANSI/ISO 14001 (R4, tab 1 at 7).

6. The Solo Point WWTP treats sewage from Fort Lewis and adjacent military facilities. The plant contains digesters, sludge drying beds and other equipment. Digesters are large tanks containing bacteria or "bugs" which eat sewage and leave behind sediment. Periodically, digesters become full of sludge and require emptying and cleaning. A knowledgeable person would expect digesters to contain biosolids. (R4, tab 176; tr. 3/215-16, 4/222)

7. The bugs "hate petroleum hydrocarbons. It kills them." A digester should not contain more than 50 or 100 ppm of oil. As a 14001-authorized facility, Fort Lewis should control contaminants such as oil (petroleum) so that they are not released into the sewage system. (Tr. 3/244-45, 249-50, 270, 292, 4/264, 266; R4, tab 50 at 449)

8. Digester No. 1 had a gas compressor located on top of the digester. Prior to award of the contract, the gas compressor was leaking substantial quantities of oil into the digester. In addition, WWTP operating personnel had been using the wrong type of oil in the compressor. They had been using SAE 30 motor oil, an emulsifying oil, instead of EP Industrial Oil 220 (SAE 50), an oil with better demulsifying characteristics, recommended by the manufacturer.¹ This information was not disclosed to the bidders. (Tr. 2/282, 3/114-17, 225-26, 231, 249, 266-68, 4/121-23; R4, tab 39 at 263, tab 177 at 1542, tab 626 at 2)

9. ALKAI is an environmental engineering firm and a small business. Mr. Riley Evans is its chief operating officer. Mr. George Webster served as the project manager on the contract. He is a highly qualified environmental engineer with over 40 years experience and a specialty in water and waste water. At the time of contract award, he had been involved in at least six projects involving digester cleaning although he had never physically cleaned or been active in the work effort of cleaning a digester itself. (R4, tab 511; tr. 3/208-11, 254, 4/258-59, 5/5, 53)

¹ An emulsification is a mixture of oil and water (tr. 2/213).

10. ALKAI subcontracted performance of the actual cleaning of digester No. 1 to Cowlitz Clean Sweep (CCS). CCS is a large company which has done a great deal of municipal and industrial tank cleaning, including digester and tank sludge dewatering. (R4, tab 3; tr. 3/226-27)

11. Mr. Webster and four CCS representatives attended the pre-award site visit on 10 February 2006. Government representatives did not mention any problem with digester No. 1 or the compressor. The digester had three levels of material: supernatant (liquid), sludge, and grit. Mr. Webster measured the depth of the top level. He calculated that there would be approximately eight feet of supernatant, seven feet of sludge, and two feet of grit. He did not take samples of the contents of the digester although two other individuals at the site visit did. We find that it would not be reasonable to expect a bidder, in the absence of any indication of something unusual, to test the contents of the digester prior to contract award. Furthermore, a reasonable bidder would not have expected digester No. 1 to contain high levels of petroleum or other contaminants. (R4, tab 2; tr. 2/78, 3/230-42, 4/250-52)

12. As part of its proposal, ALKAI submitted a Work Schedule Plan. ALKAI stated that the project most likely would require a month to complete. ALKAI also stated that it would use a dewatering tank to dewater the sludge, and that Mr. Webster would determine "if additives, such as diatomaceous earth, are required to thicken the sludge material." Diatomaceous earth (DE) is an inorganic material which absorbs oil, allowing the release of water by evaporation. It is typically used for oil spills. ALKAI did not plan to use DE as its primary method of performing the contract. ALKAI confirmed that filters or presses would be available if required. Filtering and pressing are mechanical procedures by which one separates water from a solid. The resulting liquid is called filtrate, or, if a centrifuge press is used, centrate. (R4, tabs 3, 4; tr. 3/212, 251-52, 279-80)

13. ALKAI started work on 19 April 2006. It pumped the supernatant into two Baker storage tanks. It tested the contents of each tank in turn to be assured that it could be returned to the headworks of the treatment plant in accordance with the specifications. By approximately 24 April 2006, it had removed nearly 280,000 gallons of supernatant. (Tr. 3/254-57, 4/24)

14. Based on the government's estimate of a total of 570,000 gallons, there were approximately 300,000 gallons of sludge and grit remaining. The plan was to pump the sludge into Baker dewatering tanks. The dewatering tanks have filters allowing water to separate from sludge. ALKAI would return the filtered liquid to the headworks, and transport the dewatered sludge to the drying beds for later disposal by the government. If necessary, ALKAI would add polymers to assist in getting to a higher solids level. (Tr. 3/257, 277)

15. On 25 April 2006, ALKAI started work on the sludge. Mr. Webster and his assistant took a sample of the sludge into the laboratory at the site for testing. The sample proved to be “oily emulsified.” This made dewatering much more difficult. The concept of using mechanical methods such as the Baker dewatering tanks, or a press, would not work. Even if one could achieve 20% solids, the filtrate could not be returned to the headworks because of the oily content. (Tr. 3/213-14, 248, 258-59, 266, 271, 4/25-26, 58-59, 226)

16. On 28 April 2006, Mr. Webster reported the oily condition of the sludge to the contracting officer’s technical representative (COTR), who admittedly was not an expert in this subject. Mr. Webster told the COTR that he had discovered that there was a very high level of petroleum hydro-carbons in the solids. He explained that a mechanical method might cause the possibility of impacting the treatment plant by putting oil back into the headworks of the system. Mr. Webster proposed as a solution to use DE much more extensively than had been planned. Because the volume of the sludge would not be reduced prior to placement in the drying beds, however, more than three drying beds would be required to complete performance. (Tr. 1/62, 2/25-27, 3/264-66, 279, 4/195; R4, tab 50 at 295)

17. On 8 or 9 May 2006, Mr. Webster received outside laboratory test results showing that a sample of the sludge contained 19,800 ppm of diesel and oil, a huge amount for a digester. Later testing showed other levels of toxic materials in the sludge such as mercury. If a plant has control of its mercury waste generation systems, mercury doesn’t get into the sewer. Subsequent tests of other samples of sludge both by ALKAI and the government also showed high levels of diesel and oil. (R4, tab 50 at 292-93, tab 39; tr. 3/269-72)

18. On 9 May 2006, there was a meeting of the contract administrator (CA), the COTR, Mr. Webster, and representatives from Public Works. The attendees agreed that “the contractor’s 30 work days would run from 19 Apr 06-31 May 06.” As we found above, the contractual completion date was 30 June 2006. This date was never changed. Throughout the course of the contract, however, the contracting officer (CO) and CA operated under the assumption that the completion date was 31 May 2006, with an additional two-days because of a government delay. The CA testified how the misunderstanding came about. She was assigned to the contract post-award. She looked at the section of the contract where she would expect to see the completion date and didn’t see it. So she went to the pre-award contracting people and was told that the contractor had 30 days to complete the job based on its proposal. The contractor never said anything different, and so she thought that was the date. (R4, tab 7, *see also, e.g.*, R4, tabs 20, 43; tr. 1/127-29, 141)

19. At the meeting on 9 May 2006, Mr. Webster explained that the sludge contained an unexpectedly high petroleum content, that DE was an industry standard for

dewatering sludge, that mechanical dewatering would not work, and that ALKAI would need more drying beds. The government representatives said that if there were more drying beds available, they would probably offer them to the contractor, but that there were no more beds available. (R4, tab 7)

20. Following the meeting, ALKAI continued with the work, pumping the sludge and mixing it with DE to absorb the oil. As of Tuesday 16 May 2006, ALKAI had filled the three drying beds (Nos. 10, 11, 12). At a meeting on 12 May 2006, the government representatives had said that they would make an additional drying bed available by Monday morning. This had not happened. On Wednesday 17 May 2006, however, the COTR advised that he had been working to coordinate removal of material from two other beds, so ALKAI could use them, and that they would be cleaned out on Thursday 18 May 2006. ALKAI replied that it hoped to finish pumping out the digester by the following Friday or Monday and complete the work including cleaning the digester by the end of the next week, *i.e.*, 26 May 2006. (R4, tab 10; tr. 1/214)

21. On Monday 22 May 2006, the government made one additional drying bed (No. 24) available. ALKAI dumped a pile of DE in it. The government did not, however, make a second bed available. ALKAI explained that one bed was not enough to complete the work. (Tr. 3/289-90; tab 50 at 295)

22. On 23 May 2006, the CO telephoned ALKAI and said that the government was terminating the contract for convenience. On 24 May 2006, the government reversed course, and the CA notified ALKAI that the contract was not being terminated for convenience. (R4, tabs 17, 18)

23. The Director of Contracts wrote ALKAI by date of 24 May 2006 as follows:

Per our conversation earlier, I am confirming that we have to rescind the information given to you by the [CO] yesterday regarding terminating your contract for convenience. You are required to continue with the project, in accordance with the terms and conditions of the contract. We are asking that you utilize a method which would dewater the sludge, such as a press or centrifuge as referenced in your proposal. It appears that utilizing Diatomaceous Earth (DE) is only adding volume and is not actually dewatering as required by the contract. Our research has indicated that even with double the oil content, the sludge can be dewatered by methods such as a use of a press or centrifuge. We are allowing two extra days as we did speak to you yesterday regarding a termination for convenience. Please continue with your performance with a new completion date of 2 June 2006.

(R4, tab 20)

24. As indicated by the director's letter, the government's contractual personnel did not accept Mr. Webster's opinion that the high petroleum content in the sludge meant that mechanical methods such as a press or centrifuge would not work. Because of the government's insistence, ALKAI brought a centrifuge to the site and verified on 31 May 2006 that it would not work because of the oil and other contaminants in the solids. (R4, tab 35; tr. 3/293-95, 299)

25. On 1 June 2006, the CO sent ALKAI a show cause notice. The notice stated that "[s]ince you have failed to perform [the contract] within the time required by its terms, the Government is considering terminating the contract under the provisions for cause of this contract." The CO said that the government contended that the use of DE was not an industry standard alternate method of dewatering. The CO said that the government also contended that the contents of the digester were not unusual, and that market research had indicated that use of a press or centrifuge, even with oily content, would be an effective means to dewater. (R4, tab 43)

26. On 8 June 2006, ALKAI responded to the show cause notice. It included an array of laboratory test results and technical data. It noted that the government had only made available one additional drying bed, and its current estimate was that two more were needed to complete the project. It stated that "[t]he inability to perform [the contract] within the time required and to dewater the sludge within the contract terms is directly related to the unanticipated and unusual highly elevated concentrations of petroleum hydrocarbons in the Digester #1 sludge." It also pointed out that the WWTP operators were well aware of the oil leakage and other problems at digester No. 1, although they were not disclosed to the contractor. It concluded that it looked forward to completing the project. (R4, tab 50 at 293 and *passim*)

27. On 14 June 2006, the CO directed ALKAI to empty the Baker tanks and remove the DE from the bed where it had been dumped. The CO made available two more drying beds (Nos. 18 and 23) for this purpose. The CO continued that "[i]f you do not remove the DE, it will be treated as abandoned property. These actions must be accomplished as soon as possible, but not later than close of business (4:30 PM PDT), Friday, 16 June 2006." The CA e-mailed the directive late in the afternoon of 14 June 2006. ALKAI replied that same afternoon: "You have notified us to remove our remaining equipment by 4:30 pm June 16, 2006.... That gives ALKAI and its subcontractor CCS 48 hours to demobilize the remaining baker tanks and supplies. This is not sufficient time to respond to your request." The CO replied: "this is to notify you that removal by close of business on 23 June 2006 is acceptable; however...removal as soon as possible is preferred." ALKAI met the 23 June 2006 date. We find that although the 14 June 2006 directive did not use the words "stop work" or "demobilize," it was in

substance a demobilization order and the parties so understood. (R4, tabs 54, 55, 59; tr. 2/100-01, 3/78, 4/65-66)

28. At the point when it demobilized ALKAI had completed most of the work. Approximately 50,000 gallons of sludge and grit remained in the digester. Mr. Webster testified credibly, and we find, that if the government had made the additional drying beds available for performance, as opposed to demobilization, ALKAI would have been able to complete the contract including power washing the digester by 30 June 2006. ALKAI could not complete the work because it was ordered to demobilize. (Tr. 3/305-10, 4/201, 265)

29. Before proceeding with the termination, the CO attempted to verify whether the sludge could be dewatered using a press or centrifuge. The COTR sent a 3 to 5 gallon sample of sludge from one of the Baker tanks to a company named Environmental Machines and Services (Environmental). Environmental diluted the sludge with water at a 1 to 1 ratio and reported that it had successfully dewatered the sample with a belt filter press. According to Environmental, the oil content of the sludge in the sample was not excessive. It also said that a centrifuge would not work. We are not persuaded based on this evidence that, given the high petroleum content in other samples, mechanical methods would have been effective to dewater the large quantity of sludge in the digester in a timely manner and in accordance with the specifications. (R4, tabs 60-62; tr. 3/313-19)

30. On 17 July 2006, the CO notified ALKAI that the contract was being terminated for cause “due to your failure to perform the job as identified within the performance work statement and within the performance period.” The CO stated that the government estimated that ALKAI had completed 40% of the work, and that it could bill for that amount. The CO enclosed Modification No. P00001, terminating the contract for cause effective 26 May 2006. The modification reduced the amount to be paid for the digester by 60% and eliminated the requirement for a report. (R4, tab 65) This timely appeal followed.

DECISION

Termination for cause is a drastic sanction that should be imposed upon a contractor only for good cause and based upon solid evidence. *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The government bears the burden of proving that its default termination was proper. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). If the government satisfies its burden, a defaulted contractor has the burden of proving that its nonperformance was excusable. *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996).

Here, the government did not terminate the contract for cause until after the completion date (30 June 2006). The contractor could not, however, complete the work when the CO, who misunderstood the completion date, had ordered it to demobilize on 14 June 2006. Furthermore, apart from that consideration, appellant has established that it was excusably delayed by the combination of the unexpectedly high petroleum content of the digester, which a reasonable bidder would not have anticipated and which required it to change its method of performance, and the government's failure to cooperate by making additional drying beds available so that the contractor could complete the work given that unexpectedly high content. Had the government simply made the beds available for performance that it made available for demobilization, ALKAI would have been able to complete the contract in a timely fashion. Presumably the government did not do so because it thought the completion date had passed, but that is not a basis for sustaining the termination for cause.

CONCLUSION

We sustain the appeal and convert the termination for cause to a termination for convenience.

Dated: 22 January 2009

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

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. 55581, Appeal of ALKAI Consultants, LLC, rendered in conformance with the Board's Charter.

Dated:

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