

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Keystone Capital Services) ASBCA No. 56565
)
Under Contract No. W91GY0-07-C-0018)

APPEARANCE FOR THE APPELLANT: J. Alan Donohue, Esq.
General Counsel

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
LTC James Lewis, JA
MAJ Charlotte Emery, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE WILLIAMS
ON MOTION FOR SUMMARY JUDGMENT

Keystone Capital Services (Keystone or appellant) was awarded a contract to deliver MK19 and M240B machine guns. When Keystone failed to deliver the weapons on the extended due date, its contract was terminated for default. Keystone timely appealed. The government has moved for summary judgment and appellant opposes the motion. Neither party has submitted affidavits. We grant the motion and deny the appeal.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 12 March 2007, the Multi-National Security Transition Command-Iraq (MNSTC-1) Support Division (MSD or government) awarded Contract No. W91GY0-07-C-0018 in the amount of \$977,288.73 to Keystone. The contract required delivery of 12 MK19 grenade-firing machine guns and 57 M240B machine guns 90 days after receipt of an End User Certificate (EUC). It incorporated FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) by reference. This clause provides that the government may terminate the contract in whole or in part if the contractor fails to deliver the supplies or perform the services within the time specified in the contract or any extension thereto. (R4, tab 1 at 1-2, 5-6, 10)

2. The Republic of Iraq issued an EUC to Keystone which the parties agree was delivered on 4 May 2007. Therefore, the delivery date for the weapons was 2 August 2007. The weapons were not delivered on that date. (R4, tab 5; compl. and answer at 1)

3. On 6 October 2007, Captain Johari Hemphill, a government procurement officer, asked Keystone for the status of the weapons delivery (R4, tab 6 at 3). Mr. James Seward, a Keystone director, responded that the M240B machine guns were “simply waiting on [Keystone’s] freight forwarder to provide an [air way bill] for the complete journey to [Baghdad International Airport]....” Mr. Seward went on to state that Keystone had a problem with the MK19s. Turkish customs had stopped the shipment due to internal unrest and concern that the weapons would be used against them. Mr. Seward stated that Keystone would write off and resupply the shipment “or hopefully get it released.” He would know more in 72 hours. (R4, tab 6 at 2)

4. On 22 October 2007, Captain Hemphill again asked Mr. Seward for a status update on the missing M240Bs and MK19s (R4, tab 6 at 2). By email response dated 26 October 2007, Mr. Seward responded that he was waiting for release of the M240Bs by the US State Department’s Directorate of Defense Controls (DDTC), and that the MK19s were still held up in Turkish customs (R4, tab 6 at 1). The government requested another update on 28 October 2007 (*id.*). No response was forthcoming and no weapons were delivered.

5. On 26 December 2007, the contracting officer sent Mr. Seward a cure notice, stating that Keystone had failed to meet the 2 August 2007 delivery date. The cure notice stated that unless the failure was cured within 10 days of receipt of the letter, the contract would be terminated for cause by the government. (R4, tab 7)

6. Mr. Seward responded in an email dated 5 January 2008 that Keystone had “movement” on receipt of the MK19s and delivery should not take much longer as they were “in the queue.” He stated a partial shipment of the M240Bs would take place the following Monday, and they were on the “front row” of the manufacturer’s waiting list for the remainder. The contracting officer replied that he would wait to hear from Mr. Seward “on Monday before I do anything else.” (R4, tab 9 at 2-3)

7. On 8 January 2008, in response to another inquiry, Mr. Seward reported that he had “managed to secure 28 M240Bs for immediate release” which would be sent to New Jersey for shipment. “The remainder of the M240s we hope to collect early the next week.” As for the MK19s, he said they were “simply waiting on the [manufacturer] and we will be speaking with them again today.” (R4, tab 9 at 1-2)

8. On 18 March 2008, the contracting officer issued a show cause notice to Keystone because Keystone had neither provided the weapons nor an explanation for their delay (R4, tab 10).

9. By e-mail dated 4 April 2008, appellant's general counsel informed the government that its manufacturer had an extremely long lead time for the MK19s and proposed an alternative model that could ship in 30 days. The general counsel stated that the supplier had the M240Bs and could ship them within 45 days "pending the grant of an extension." (R4, tab 13 at 1)

10. Keystone and the government executed bilateral Modification No. P00001 on 4 May 2008, establishing "the required delivery date of 31 May 08 for this contract" (R4, tab 18).

11. Appellant notified the government by email dated 28 May 2008 that it could not meet the agreed upon delivery date. Keystone informed the government it had a pro forma invoice with a shipping date of 5 September 2008, and requested a new delivery date. The email justified this request by noting that "there has been a tremendous back log due to the US government direct orders taking precedent over the likes of companies such as ours." (R4, tab 20) The invoice did not identify Keystone as the "bill to" addressee or reference delivery of MK19s as part of the anticipated shipment (R4, tab 21).

12. On 2 June 2008, the government terminated the contract for cause (R4, tab 24). This timely appeal followed.

DECISION

Summary judgment is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The moving party bears the initial responsibility of identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Where the non-movant has the burden of proof on an element essential to its case, it must, in order to defeat the motion, then make a showing sufficient to establish the existence of a genuine issue of material fact as to that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Mere arguments, bald assertions or speculation of counsel are insufficient to defeat a motion for summary judgment. *T&M Distributors, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999); *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). The non-movant must set out, in affidavit or otherwise what specific evidence could be offered at trial or the motion may be granted. (*id.*)

The government has the burden of proving by a preponderance of the evidence that a termination for default was justified. *Lisbon Contractors, Inc. v. United States*, 828

F.2d 759, 765 (Fed. Cir. 1987). It is well settled that a contract may be terminated for default when a contractor fails to comply with the contract delivery schedule. *Lawrence Fabricating Co.*, ASBCA No. 53317, 03-1 BCA ¶ 32,199 at 159,160. Once the government establishes that the delivery date has not been met, the burden of proof shifts to the contractor to establish that the termination was not justified. It must prove its failure was excused by circumstances beyond its control and without its fault or negligence or that of its subcontractors. *Demusz Manufacturing Company*, ASBCA No. 55310, 07-1 BCA ¶ 33,510 at 166,052; *Magna Enterprises, Inc.*, ASBCA No. 51188, 02-1 BCA ¶ 31,660 at 156,419.

Here, the government has established that Keystone failed to deliver any of the weapons contracted for by the original delivery date, 2 August 2007, or the extended date of 31 May 2008. Hence, appellant, as the non-movant with the burden of proof on this issue, must come forward with reasons why the default was excused.

Appellant argues that the motion should be denied because the Default clause excuses delay due to acts of the government in its sovereign and/or contractual capacity. According to appellant, “[t]he US Government’s increased requirements for arms and ammunition to supply its troops in Iraq and Afghanistan were acts of the government falling within this definition.” (App. opp’n at 2)

Appellant’s argument fails because it has not offered evidence sufficient to raise a triable issue of fact that the government’s increased requirements for arms and ammunition caused the default. No specifics regarding orders, attempts to work with other manufacturers, affidavits or formal documentation were submitted by Keystone to support this argument, only the assertion of counsel in an email and in pleadings that orders were backlogged. Appellant cannot defeat the motion by simply making such a bald assertion.

Further, even if there may have been great demand for the contracted items, this does not *per se* relieve the contractor of its performance obligations. Conditions in an industry are presumed to be within the contractor’s knowledge and contemplation in accepting a contract. It is the contractor’s responsibility to investigate sources of supply and delivery before submitting its bid. *Eppco Metals Corporation*, ASBCA No. 38305, 90-1 ¶ 22,349 at 112,304. Appellant’s eleventh hour attempt to justify its failure to deliver on the contract by blaming the government is not persuasive.

CONCLUSION

For the reasons stated, the government is entitled to judgment as a matter of law. The government's motion for summary judgment is granted. The appeal is denied.

Dated: 20 April 2009

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

I concur

I concur

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

PETER D. TING
Administrative Judge
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. 56565, Appeal of Keystone Capital Services, rendered in conformance with the Board's Charter.

Dated:

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