

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Environmental Safety Consultants, Inc.) ASBCA No. 51722
)
Under Contract No. N62470-95-C-2399)

APPEARANCE FOR THE APPELLANT: Mr. Peter C. Nwogu
President

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Senior Trial Attorney
Naval Facilities Engineering Command
Litigation Office
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Environmental Safety Consultants, Inc. (ESCI) appeals the default termination of the captioned contract for failure to make progress and failure to complete within the specified time.¹ We find that the specified time was not of the essence of the contract and that after eleven months had passed, it was incumbent on the government to specify a new and reasonable completion date before terminating the contract for default. It did not do so. Accordingly, we sustain the appeal.

FINDINGS OF FACT

1. On 13 November 1995, the government awarded the captioned contract (hereinafter "Contract 2399") to ESCI to remove old and install new underground and above ground fuel storage tanks at 35 building sites on the Naval Weapons Station (NWS), Yorktown, Virginia. The total contract price at award was \$561,764.25. The specified contract completion date at award was 16 August 1996. (R4, tab 1 at 15, 90, contract drawings C-1, C-17) On 14 December 1995, the government extended the required contract completion date to 26 August 1996 (R4, tab 2 at 1-2).

2. The contract included, among other provisions, the FAR 52.212-5, LIQUIDATED DAMAGES – CONSTRUCTION (APR 1984) clause with a specified rate of \$500 for each

¹ Administrative Judge Van Broekhoven who presided at the hearing of this appeal has retired.

day of delay; the FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989) clause (hereinafter the "Payments clause"); and the FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause (hereinafter the "Default clause") (R4, tab 1 at 59, 69-70).

3. The Payments clause included at paragraph (c) a certification requirement mandated by the Prompt Payment Act (PPA), 31 U.S.C. § 30903(b)(1) as an express condition for approval of an application for a progress payment. Paragraph (c) of the Payments clause stated:

(c) Along with each request for progress payments, the contractor shall furnish the following certificate, or payment shall not be made:

I hereby certify, to the best of my knowledge and belief that –

(1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

(2) Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payment will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of chapter 39 of Title 31, United States Code; and

(3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.

(R4, tab 1 at 70)

4. On 12 December 1995, the government notified ESCI of its approval of the payment and performance bonds and authorized commencement of work at the job site (R4, tab 40). On 9 February 1996, the government notified ESCI that 14 tanks were "available to be removed at your earliest convenience" (R4, tab 46). ESCI, however, did not begin mobilization on site until 3 April 1996 and did not excavate the first underground storage tank (UST) to be removed until 24 April 1996 (R4, tab 36 at 14-74).

5. As of 30 June 1996, after three months of work and less than two months before the specified contract completion date then in effect (26 August 1996), ESCI had completed only 20 percent of the contract work (R4, tab 73 at 1). On 15 July 1996, a fuel oil spill occurred when ESCI failed to properly secure the tank in the excavation (R4, tab 36 at 256-57, tab 74; tr. 1/138). On 22 July 1996, a second fuel oil spill occurred when ESCI failed to properly shore the tank excavation (R4, tab 36 at 274-78, tab 83).

6. By letter dated 24 July 1996 and at a meeting on 30 July 1996, the government expressed its concerns to ESCI about its performance of the contract to date. These concerns included among others, the lack of an effective quality control (QC) program with no full-time QC manager on-site and non-compliance with the contract requirements for: (i) marking utilities; (ii) providing shoring and site safety plans; (iii) notification to the contracting officer 48 hours before beginning excavation; (iv) barricades for open excavations; (v) protection of government utilities; (vi) repair of utilities damaged in the course of the work; (vii) timely submission of daily production and QC reports; (viii) timely submission of weekly payrolls for labor standards enforcement; and (ix) secondary containment piping material, sump and depth of underground installation. (R4, tab 6 at 2-3, tab 75)

7. On 15 August 1996, the contracting officer issued unilateral Modification No. P00005 to the contract adding the following provision to a specification governing the use of fuel-contaminated excavated soil: "The Contracting Officer may choose to use soils which have over a 50 ppm TPH as clean fill. Decisions will be made on a site-by-site basis." (R4, tab 2 at 9-10, tab 63) ESCI alleges in its post-hearing brief that this was a "cardinal change"² and caused "delays in removing contaminated soils and tanks" and "excused ESCI from completing the contract" (app. br. at 4, 11). We find that this change was not a drastic modification beyond the scope of the contract, and we further find no credible evidence that using excavated contaminated soils as backfill caused any increase in the time required to perform the contract.³

8. On 20 August 1996, the government issued three contract non-compliance notices to ESCI for the following: (i) daily reports not submitted by 10:00 AM of the next working day as required by specification section 01400-1.3.a.; (ii) drilling performed on fuel tank in staging area without tank safety certification required by specification

² A "cardinal change" is a unilateral change order for "drastic modification beyond the scope of the contract." *Air-A-Plane Corp. v. United States*, 408 F.2d 1030, 1033 (Ct. Cl. 1969).

³ To the extent excavated contaminated soil was used as backfill, it would increase the unit cost for bid items 1E and 1F. This problem was resolved in bilateral Modification No. P00006 by deleting those bid items and adding a higher unit price pay item for removal and disposition of contaminated soil. (See R4, tab 2 at 12, tab 222 at 21)

sections 13219-3.1.1, 1.3.4 and 1.2.3.7; and (iii) flammable liquids not being stored at staging area in safety cans required by specification section 01560-1.7. (R4, tab 88)

9. On 21 August 1996, five days before the contract completion date specified in Modification No. P00001, ESCI submitted its progress payment Invoice No. 3 indicating that as of 21 August 1996, performance of the contract was 34.9 percent complete. The government estimate of the percentage of completion on that date was 30.4 percent. (R4, tab 89 at 1)

10. On 18 September 1996, the government issued eight contract non-compliance notices to ESCI for the following: (i) failure to keep a copy of the contract specifications on site as required by paragraph (a) of the Specifications and Drawings for Construction clause of the contract; (ii) PVC piping buried without providing non-corrosive material such as cleaned, washed sand at least 6 inches deep for bedding as required by specification section 15483-3.1.1.1.d; (iii) no buried utility warning identification tape for buried PVC secondary containment piping at tank 31 AST1 as required by specification section 15483-2.1.6.7; (iv) no sump basin provided at secondary containment piping buried at Tank 31 AST 1 as required by specification section 15483-2.1.6.2; (v) secondary containment piping buried 2 inches below grade instead of 8 inches below grade as required by specification section 15483-3.1.1.1.f; (vi) copper piping for underground fuel piping procured and delivered to site instead of double wall piping as required by specification sections 15483-1.3.2 and 2.1.5; (vii) submittals 27, 28, 35 and 39 not retained at the project site as required by specification section 01300-1.3.6.i; and (viii) contracting officer not advised as required by specification section 01300-1.3.5.c of variation using copper secondary containment piping instead of the specified double wall piping. (R4, tab 97)

11. Also on 18 September 1996, the contracting officer issued a cure notice citing the performance deficiencies described in the contract non-compliance notices of the same date and in the government's 24 July 1996 letter (R4, tab 6). On 24 September 1996, ESCI submitted a proposal to the government for completing the contract with subcontractors performing most of the remaining excavation of USTs and all of the remaining tank cleaning and new tank installation (R4, tab 101 at 2-3).

12. By letter dated 4 October 1996, the contracting officer told ESCI that the government was considering default termination of the contract because it had not been completed on time and the deficiencies cited in the 18 September 1996 cure notice had not been cured. The letter offered ESCI the opportunity to show that its failure to perform "arose from causes beyond your control and without fault or negligence on your part." (R4, tab 8) By letter dated 7 October 1996, ESCI disputed some of the cited deficiencies and stated that corrective action was being taken on others (R4, tab 9). Six of the non-compliance notices issued on 18 September 1996 were for non-compliance with specific requirements for the installation of the new tanks (*see* finding 10). ESCI

did not dispute these non-compliances. Its stated corrective action was that "ESCI will subcontract all [tank] hookups and installation to companies knowledgeable in tank installation" (R4, tab 9 at 14).

13. Beginning 11 October through 10 November 1996, no work was performed on site (R4, tab 36 at 423-24). As of 30 October 1996, the agreed percentage of completion of the contract work indicated on progress payment Invoice No. 4 (\$252,575.00 ÷ \$561,764.25) was 45 percent (R4, tab 113 at 1).

14. On 18 October 1996, ESCI entered into a subcontract with Rickmond Environmental, Inc. (hereinafter "Rickmond") for performance of 6 "tasks" to complete Contract 2399. The total subcontract price was \$74,170. (R4, tabs 110-11) In addition to the six specific tasks, the Rickmond subcontract provided for changes as follows: "Rickmond Environmental will provide additional services under this contract as requested by the client (upon acceptance of Change Order) and invoice the client for those additional services at standard rates as shown in the attached Fee Schedule." (R4, tab 111)

15. The origin and scope of the Rickmond subcontract were described by ESCI in a subsequent letter to the contracting officer in pertinent part as follows:⁴

In September 1996, it became obvious there was unresolved miscommunication between ESCI and the STATION ROICC. Due to miscommunication, the ROICC directed that the subject contract be proceed [sic] with termination for default. ESCI was directed by ROICC to turn over the remaining portion of the subject contract to a subcontractor as the only option to resolve the problem of contract miscommunication and avoid default. ESCI agreed to this contract requirement modification.

....

In mid October [1996], a meeting was scheduled to discuss the completion of the project under the subcontractor's arrangement. In the meeting, ROICC informed ESCI that it would accept Rickmond Environmental as a subcontractor for the completion of the work....

⁴ The ROICC referred to in this letter and elsewhere in this opinion is the Resident Officer in Charge of Construction at the NWS who was responsible for administering the contract for the government.

....

After the meeting, Rickmond agreed to assume, coordinate and finish the job as directed by ROICC in the meeting.

(R4, tab 128 at 7-8)

16. An internal government memorandum dated 29 April 1997, substantially confirmed ESCI's account of the origin and scope of the Rickmond subcontract. However, what ESCI described as "miscommunication," the government described as "poor performance." The government memorandum stated in pertinent part:

The prime contractor [ESCI] was forced to subcontract the remainder of this contract based on his poor performance. This was determined to be in the best solution for all parties. The customer [the government] is in need of environmental compliance and the prime contractor wanted to avoid default.

(R4, tab 222 at 24)

17. Rickmond began work on site on 11 November 1996, and thereafter was the only entity performing the Contract 2399 work on-site (R4, tab 36 at 424-814). Regarding Rickmond's performance, the government project manager testified: "They did well," and the contracting officer testified: "The performance issues improved greatly. There were no problems." (Tr. 1/128, 2/210) On 30 April 1997 the government approved ESCI's progress payment Invoice No. 6 which showed 54 percent of the contract work completed as of 18 April 1997 (R4, tab 13).

18. On 14 May 1997, the payment bond surety notified the government that it had paid or was in the process of paying the claims of four unpaid suppliers on Contract 2399 in the total amount of \$34,939.42. The surety requested that any funds earned by ESCI in excess of monies owed to Rickmond be withheld "to insure that [the surety] is repaid for its losses." (R4, tab 138)

19. On 16 June 1997, Rickmond left the site and did not return to work thereafter. No contract work was performed on site either by ESCI or any other subcontractor of ESCI after that date. (R4, tab 36 at 807-19; tr. 3/39) When Rickmond left the site, it had an outstanding balance due of \$114,239.60 on its invoices submitted to ESCI for work performed through 31 May 1997 (R4, tab 42 at 15-25). On or about 2 September 1997, Rickmond told the government that it had still not been paid and that it "will not be returning to complete the work until payment is made" (R4, tab 171 at 1).

20. On 23-24 June 1997, the parties executed Modification No. P00006 to the contract. Modification No. P00006 provided for, among other things, added work, deleted work, the requirement that ESCI “[s]ubcontract all remaining work, including supervision, quality control, and punch list items,” a net contract price increase of \$109, and an extension of the required contract completion date to 30 June 1997. The substantive provisions of the modification concluded with the following:

The foregoing is agreed to as constituting full and equitable adjustment and compensation (both time and money) attributable to the facts of [sic] circumstances giving rise to the change directed hereby, including, but not limited to, any changes, differing site conditions, suspensions, delays, rescheduling, accelerations, impact, or other causes as may be associated therewith.

(R4, tab 2 at 12)

21. Also on 23 June 1997, ESCI submitted its progress payment Invoice No. 7 to the government in the amount of \$138,506.50. This invoice showed a total value of completed performance of 78.7 percent of the total contract value. The claimed completed work on the invoice was verified by the signature of the government construction representative on the last page of the supporting voucher. (R4, tab 14 at 1, 17)

22. Although the government’s construction representative had verified the claimed percentage of completion of the work on ESCI’s Invoice No. 7, the contracting officer returned the invoice unpaid to ESCI on 30 June 1997 with the following explanation:

Your prompt payment certification is invalid as we have received notification from your surety that they have paid several of your subcontractors on this project.

Please contact the surety to discuss an agreeable solution to this problem as no invoices will be paid until it is resolved.

(R4, tab 15)

23. By letter dated 2 July 1997, ESCI told the contracting officer that it was relying on government payment of its Invoice No. 7 “to complete payments to subcontractor and suppliers through the June 30, 1997 work completed” (R4, tab 146 at 2). The government, however did not at that time or at any time thereafter pay the invoice.

24. Following the instructions in the contracting officer's rejection of its Invoice No. 7, ESCI entered into protracted negotiations with the surety for an agreement that would enable it to receive the withheld funds on Invoice No. 7 and complete the contract (R4, tabs 154, 158, 167, 181, 183, 185). While these negotiations were taking place, Rickmond submitted a claim against the payment bond which the surety ultimately paid in September and October 1997 in the amount of \$114,009.72 (R4, tabs 160, 190, 203).

25. On 30 September 1997, the contracting officer wrote to ESCI in pertinent part as follows:

Progress on the referenced contract has been stagnant since the second week of July. We have been very patient in allowing you every opportunity to work with your surety and subcontractors in developing an agenda to complete the referenced contract, but we can wait no longer. There are drums, piles of debris, and removed storage tanks which must be removed from government property. The drums contain unknown liquids, the debris has not been confirmed as non-hazardous, and the storage tanks have not been cleaned. We continue to view these conditions as a serious environmental threat....

On 15 September, this office was assured an agreement could be reached between you and your surety by the end of the week of 22 September as to how payment could be made to your subcontractors and progress on our project could continue. We cannot afford to jeopardize the environmental safety of our station or impact our employees by continuing to delay completion of this contract.

Please provide resolution to these issues and an agenda to complete all remaining work on this contract by noon on 3 October 1997 or termination for default proceedings will be initiated.

We shall remain available for assistance but will accept no further delays.

(R4, tab 19)

26. ESCI responded on 9 October 1997 with an agenda stating among other things that "[counsel for the surety] will provide you with the escrow agreement by 10 October

1997” (R4, tab 20). However, the plan for completing the work with government payments deposited to an escrow account foundered when ESCI failed to sign the agreement.⁵

27. By letter dated 6 January 1998, the contracting officer issued a cure notice giving ESCI 10 days to cure a list of discrepancies endangering completion of the contract. The cure notice concluded with a statement that “unless this condition is cured within ten (10) days after receipt of this notice, the Government may terminate for default under the terms and conditions of [the Default clause] of this contract.” (R4, tab 23)

28. By letter dated 22 January 1998, the contracting officer noted that the discrepancies listed in the 6 January 1998 notice had not been cured and offered ESCI an opportunity to show cause why Contract 2399 should not be terminated for default. This letter concluded with the statement that: “Any assistance given you on this contract...will be solely for the purposes of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive rights the Government has under the contract.” (R4, tab 24)

29. On 6 February 1998, ESCIs submitted a proposal to the contracting officer to complete Contract 2399 using subcontractors other than Rickmond “[u]pon the receipt of the past monies due for the work already completed” (R4, tab 27 at 29-31).

30. On 9 February 1998, ESCI replied to the 22 January 1998 show cause letter. The reply stated that ESCI’s failure to complete the contract was caused by government changes and delays and by the government’s wrongful withholding of payment of ESCI’s progress payment Invoice No. 7. The reply further alleged that ESCI had paid all of its subcontractors and suppliers except for amounts in dispute and for work for which the government had not paid ESCI. The reply concluded with a statement that ESCI’s 6 February 1998 proposal was a “solution” for completing the contract. (R4, tab 27 at 2-7)

31. On 20 March 1998, ESCI submitted a letter to the contracting officer stating among other things that “ESCI is owed approximately \$257,833.25 for work completed, plus interest as of June 30, 1997.” This letter also referred to its plan for having the work completed by a subcontractor or subcontractors other than Rickmond. (R4, tab 207)

⁵ The essence of the proposed agreement was that any payments by the government on Invoice No. 7 or otherwise for completion of the work, would be placed in escrow, disbursed only by joint agreement of ESCI and the surety, and in the event of no agreement, deposited with the Federal District Court in Maryland for disposition by the Court in the surety’s suit on its indemnity agreement with ESCI, ESCI’s president and the president’s spouse (R4, tab 198).

32. By letter dated 10 April 1998, the contracting officer replied to ESCI's letter of 20 March 1998 in pertinent part as follows:

The statement that ESCI is owed approximately \$257,833.25 is incorrect. This amount represents funds remaining in the contract of which approximately \$135,000 is for work already completed. At this time, liquidated damages far exceed work completed and any invoice submitted would be returned unprocessed until such time as an agreement is reached between all parties. The balance of \$122,833 shall remain available for payment upon completion of contract work.

....

Please be reminded the Navy is entitled to have the contract work completed in accordance with the referenced contract documents. I would like to reiterate the Government's position at this time...we feel that negotiation of a four-party agreement between the government, ESCI, the surety, and a fourth party (contractor to complete the remaining work) would be in the best interest of the parties. This alternative would allow the remaining work to be completed more expeditiously, be most cost effective, and prevent ESCI from being terminated for default.

I would also like to clarify the rolls [sic] of each of the parties in this agreement. The government and the surety will negotiate the terms of the agreement with input from counsel for ESCI and the completion contractor. Counsel for the government and ESCI have received a blank sample agreement from counsel for the surety to review. Ms. Mann should provide me any comments or concerns on your behalf. If agreement cannot be reached, ESCI's contract will be terminated for default.

The surety has sent two potential contractors to review the work to be completed and provide a cost for completion. It is

at the discretion of the government and the surety as to who will complete the work.

(App. supp. R4, tab A-47)

33. In its post-hearing brief, ESCI alleges that the 10 April 1998 letter was “an act of anticipatory repudiation” because “[t]he letter was talking about agreement between surety and the Navy. ESCI was taken out of the loop.” (App. br. at 2) We find that the 10 April 1998 letter did not repudiate Contract 2399 and did not take ESCI “out of the loop.” The proposed four-party agreement referred to in the letter included ESCI as one of the parties and was an attempt by the government and the surety⁶ to have the work completed by a competent subcontractor and avoid terminating ESCI’s Contract 2399 for default.

34. On 8 May 1998, the government issued its third show cause letter to ESCI, and again it concluded with the statement that “[a]ny assistance given you on this contract...will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive rights the Government has under the contract” (R4, tab 31).

35. By letter dated 11 May 1998, ESCI stated that it “is expressing interest and the willingness to complete the remaining amount of work on the subject contract.” In this letter, ESCI rejected the proposal for a four party agreement and specifically proposed completion of the contract by a subcontractor chosen by it for a cost of \$128,318. (R4, tab 32)

36. By unilateral Modification No. P00007, dated 12 June 1998, the contracting officer issued a final decision terminating Contract 2399 for default for failure of ESCI to make progress to ensure completion of the work and failure to perform the work within the specified time (R4, tab 2 at 13-14). This appeal followed.

DECISION

The Default clause of the contract (finding 2) provided in pertinent part that:

(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...

⁶ The payment bond surety was also the performance bond surety (R4, tab 1 at 50, 52).

When Contract 2399 was terminated for default the contract completion date as specified in bilateral Modification No. P00006 was 30 June 1997 (finding 20). However, when Modification No. P00006 was executed, on 23-24 June 1997, neither party was contemplating that the contract work would actually be completed within the next week. Moreover, the subsequent actions of the parties starting with the instruction in the second paragraph of the contracting officer's 30 June 1997 notice of rejection of Invoice No. 7 and extending over the next 11 months clearly indicated that the 30 June 1997 completion date in Modification No. P00006 was not of the essence of the contract (findings 22 *et seq.*). The repeated incantation of reservation of rights language in some of the government letters, followed by no action to terminate and further suggestions for compromise, further weakened any validity to the 30 June 1997 completion date. After eleven months of this dalliance, it was incumbent on the government to issue a new and reasonable completion date before terminating the contract for default. *See Technocratica*, ASBCA No. 47992 *et al.*, 06-2 BCA ¶ 33,316 at 165,188. It did not do so.

We have carefully considered the government's alternative grounds for default termination and find them unpersuasive (gov't br. at 23-29). Three of the cited grounds – alleged false certifications, failure to pay subcontractors, and failure to comply with terms of the contract – were all known to the government in June 1997 when it executed Modification No. P00006, but it nevertheless for an eleven month period thereafter allowed, if not encouraged, ESCI to seek an arrangement by which Contract 2399 could be completed within the constraints imposed by the government and the surety. As for the alleged ground of abandonment/repudiation, there was no such unequivocal act by ESCI. Its inability to complete the work on site with its own personnel was a result of a condition laid down by the government that the work be completed by a qualified subcontractor. ESCI's letter of 11 May 1998 was a proposal for completing Contract 2399, not an unequivocal repudiation of that contract (finding 35).

The appeal is sustained. The termination for default is converted to one for the convenience of the government.

Dated: 28 September 2011


MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

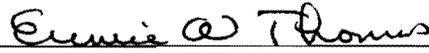
(Signatures continued)

I concur



MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



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. 51722, Appeal of Environmental Safety Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

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