ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Graham International	)	ASBCA No. 50360
	)	
Under Contract No. DAKF57-95-D-0001	)	

APPEARANCE FOR THE APPELLANT: Mr. A.N. MacKenzie-Graham
Principal

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Ralph J. Tremaglio, III, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER

This is an appeal from a contracting officer's decision terminating a grounds maintenance contract for default because of alleged anticipatory repudiation. Appellant challenges the termination, contending that it was brought about by various acts of bad faith. Both parties have elected to submit their cases pursuant to our Rule 11. We deny the appeal.

FINDINGS OF FACT

1. By date of 15 March 1995, respondent awarded Contract No. DAKF57-95-D-0001 (Contract 0001) to Graham International (Graham or appellant). Contract 0001 was a requirements contract that covered a base period of 1 April 1995 through 31 March 1996 and provided for two option years. Under the contract, appellant agreed to furnish grounds maintenance services at United States Army Reserve Centers located in Garden Grove, Long Beach, Hazard Park and Pasadena, CA. (R4, tab 1 at 1-2, C-1)

2. The contract incorporated by reference various standard clauses, including FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) (R4, tab 1 at I-3). The contract also contained specifications, including clause C.5.1.6, Lawn Mowing, which provided that "[l]awns shall be mowed, trimmed, and maintained in such a manner that a neatly groomed appearance is ensured at all times and during all seasons. During the growing season (April - October), the lawns shall be mowed weekly" (*id*. at C-7 - C-8). In addition, clause C.7.4.3 provided that "[n]o payment will be made on invoices for services that are unsatisfactory" and set forth a method for calculating deductions (*id*. at C-18).

3. Respondent awarded appellant three similar contracts, Nos. DAKF57-95-D-0002 (Contract 0002), DAKF57-95-D-0003 (Contract 0003), and DAKF57-95-C-0125

(Contract 0125), at or about the same time that it awarded Contract 0001. Contracts 0002 and 0003 were virtually identical to Contract 0001 but they each covered four other Army facilities. Contracts 0002 and 0003 led to appeals that we docketed as ASBCA Nos. 50434 and 50435. Contract 0125 involved tree removal and trimming at some of the same facilities covered by the other contracts, and it led to an appeal that we docketed as ASBCA No. 50481.

4. By bilateral Modification No. P00002 dated 13 July 1995, the parties increased the estimated base price to pay for one-time work caused by the overgrown and neglected condition of the facilities (R4, tabs 5a, 5j, 5k).

5. By unilateral Modification No. P00003, effective 1 April 1996, respondent exercised the first option year under Contract 0001 for the period 1 April 1996 through 31 March 1997 (R4, tab 6a).

6. During the first option year, in April, May, and June 1996, respondent issued multiple Contract Discrepancy Reports (CDR's) to appellant. Thus:

- by CDR dated 5 April 1996, respondent asserted that appellant had failed to perform contract line items (CLINs) relating to lawn mowing and edging, and to clean-up of the area and watering, respectively, at Long Beach;

- by CDR # 1-96 dated 23 April 1996, respondent's contract administrator asserted that she observed that, at the Reserve Center at Garden Grove, "[t]he entire frontal grass area and side area have not been mowed or weeded for a very long time," as a result of which "weeds are thick and vary in height from two to four feet;"

- by CDR # 2-96 dated 24 April 1996, respondent's Facility Manager asserted that appellant "has not serviced [the Garden Grove] Center this month" and "[t]he last time he serviced this facility was on 18 Mar 96," as a result of which "[t]he lawn is overgrown, with new grass shoots up to a foot high;"

- by CDR dated 10 May 1996, respondent's Quality Assurance Representative (QAR) asserted that appellant had failed to perform CLINs 0031AA and 0031AC, relating to lawn mowing and edging, and clean-up of area and watering, respectively, at Long Beach for the period 6-10 May 1996;

- by CDR dated 23 May 1996, the QAR asserted that appellant had that day signed in to the Long Beach Center at 7:10 a.m. and signed out at 7:25 a.m. after noting in the register that "Grounds Fine, Policed Area;"

- by CDR dated 24 May 1996, the QAR asserted that appellant had failed to perform CLINs 0031AA and 0031AC, relating to lawn mowing and edging, and clean-up of area and watering, respectively, at Long Beach for the period 20-24 May 1996;

- by CDR dated 31 May 1996, the QAR asserted that appellant had failed to perform CLINs 0032, relating to shrubs, flower beds and trees, 0033, relating to native vegetation, and 0034, relating to shrub and tree pruning, respectively, at Long Beach for the period 28-31 May 1996;

- by CDR dated 5 June 1996, the Garden Grove Facility Manager asserted that appellant had performed landscaping services on 14 and 23 May, but was unable to complete the necessary work and thereafter failed to return as promised on 30 May, leaving weeds, uncut grass and a large pile of debris.

(R4, tab 8j, 9i) We find no evidence controverting these CDRs.

7. In June 1996, respondent assessed payment deductions based upon the performance deficiencies appearing in the CDR's (R4, tab 9i). While it is not evident from the record that the deductions were in fact taken, we find no evidence that they were erroneous or not authorized by the contract (*see* finding 2).

8. By letter to the contracting officer dated 17 June 1996, Graham announced that it "hereby stops all work" under Contracts 0001, 0002 and 0003. Appellant stated that its decision was based on respondent's continued "Acts of Bad Faith in meeting and complying with [contract] requirements." (R4, tab 8b at 1)

9. By date of 28 June 1996, the contracting officer issued a show cause notice to appellant. In the notice, he stated that respondent was considering terminating the contract for default because of unsatisfactory work and because appellant "ha[d] not provided any services since the 17th of June 1996." The contracting officer cited seven of the CDR's issued in April and May 1996. (R4, tab 8c; *see also* finding 6)

10. By letter to the contracting officer dated 3 July 1996, appellant acknowledged receipt of the show cause notice and stated that appellant "has no intention of doing business with you" unless respondent took corrective action. Appellant also stated that it had released its labor force and had inventoried its assets for the purpose of selling them. (R4, tab 8f at 1-2) In the 3 July letter, appellant encouraged respondent to "[p]roceed with your default(s)," and in a 5 July 1996 letter, appellant asserted that, to obtain a remedy from this Board, appellant "must be terminated for default" (R4, tabs 8f, 8h). By letter dated 12 July 1996, Graham responded to the show cause notice, but gave no indication that appellant would return to work (R4, tab 8i).

11. We find that appellant did no work under the contract after 16 June 1996. By letter to the contracting officer dated 13 August 1996, appellant stated that it wished to complete Contracts 0001, 0002 and 0003 but seemingly conditioned that on working out "problem areas and issues" (ASBCA 50435 R4, tab 11p).

12. By unilateral Modification No. P00005 dated 14 August 1996, and by letter dated the same day, the contracting officer terminated the contract for default as of 17 August 1996, citing appellant's "stop work" letter (*see* finding 8) and a survey of each site for the period 17 through 21 June 1996 disclosing that no work was performed (R4, tabs 8a, 8l).

13. By date of 14 November 1996, appellant filed its notice of appeal. In response to an inquiry from the Board, appellant stated that it had not submitted an affirmative claim to the contracting officer and that it was seeking a "simple Termination for Convenience."

14. Appellant thereafter filed its complaint. We find no credible evidence to support appellant's allegations that respondent failed to approve submittals, failed to incorporate proper wage determinations, failed to provide accurate maps of the facilities, instructed facility managers to send appellant letters, or lied in response to a congressional inquiry. We further find no credible evidence to support appellant's allegations that respondent failed to notify it of contract discrepancy reports in accordance with the contract, thereby foreclosing the opportunity to respond or take corrective action, or that respondent failed to provide appellant with a list of facility managers in accordance with the contract.

15. By letter dated 9 March 1997, appellant advised the Board that it had gone out of business and that its mail would be "held" until a new address was established.

16. Respondent filed its answer in April 1997 and the Board thereafter requested the parties' elections whether to proceed by hearing or pursuant to Rule 11. Respondent elected a Rule 11 submission. Over the next year, the Board made numerous attempts to obtain an election from appellant. It appears that much, if not all, of the mail sent to appellant from June 1997 through June 1998 could not be delivered to the addresses

provided by appellant. The Board was able to contact appellant by telephone in December 1997 and January 1998. Appellant was directed to file its election or risk dismissal of the appeal. Respondent filed a motion to dismiss for failure to prosecute in February 1998.

17. On 24 August 1998, the Board again directed appellant to file its election or to show cause why the appeal should not be dismissed. In response to the order, appellant filed a 15 September 1998 letter urging the Board "to proceed based on the information provided by [appellant] in its submittal of the Appeal."

DECISION

A. Motion to Dismiss

Respondent has moved to dismiss for failure to prosecute, contending that appellant has shown a lack of interest in the prosecution of this appeal, and has failed to respond to orders from the Board. Despite appellant's long periods of inattention (findings 15, 16), we deny the motion in light of the 15 September 1998 letter (finding 17), which we have treated as appellant's election to submit the appeal under Rule 11.

B. Merits

Neither side has filed a brief and hence the issues regarding the merits must be decided from the pleadings and the Rule 4 file. Broadly stated, the issue before us is the propriety of the default termination of appellant's contract, which was based upon appellant's work stoppage (*see* findings 12, 13).

By stopping work on 16 June 1996, notifying respondent that it "hereby stops all work" the next day, releasing its work force and twice encouraging a default termination (findings 8, 10, 11), Graham manifested a positive, definite, unconditional, and unequivocal intent not to render the required performance. *E.g., Danzig v. AEC Corporation,* 224 F.3d 1333, 1337-40 (Fed. Cir. 2000) *United States v. DeKonty Corporation*, 922 F.2d 826, 828 (Fed. Cir. 1991); *Howell Tool and Fabricating, Inc.*, ASBCA No. 47939, 96-1 BCA ¶ 28,225 at 140,941. That repudiation gave respondent the summary right to terminate and shifted the burden to appellant to prove that its decision to abandon performance was excusable under the Default clause (*see* finding 2) or was caused by a material breach of contract. *DWS, Inc.*, ASBCA No. 33245, 87-3 BCA ¶ 19,960 at 101,049.

Appellant alleges that it stopped work because of respondent's continued "Acts of Bad Faith." The specific acts relied upon were set out in more detail in the complaint. According to appellant, respondent violated the contract by: (1) failing to approve submittals; (2) failing to execute delivery orders; (3) failing to incorporate proper wage determinations; (4) failing to provide accurate maps of the facilities; (5) failing to pay appellant in accordance with the contract; (6) failing to notify appellant of contract

discrepancy reports in accordance with the contract; and (7) failing to provide appellant with a list of facility managers (comp. ¶¶ 80-87). Appellant also alleges that respondent: (8) held a secret meeting with SBA; (9) instructed facility managers to "bombard" Graham with letters; (10) lied in response to a congressional inquiry; (11) allowed the previous contractor to let the facilities run down; and (12) did not terminate Contracts 0002 and 0003 (comp. ¶¶ 88-92).

These allegations do not establish that appellant's anticipatory repudiation resulted from either excusable cause under the Default clause or a material breach of contract. With respect to the alleged failure to pay appellant in accordance with the contract, we recognize that financial incapacity caused by respondent's acts or omissions may excuse nonperformance. But appellant bears the burden of proving that the withholdings were erroneous and that they were the primary or controlling cause of default. *E.g., TGC Contracting Corp. v. United States*, 736 F.2d 1512, 1515 (Fed. Cir. 1984). We have found, however, that the record does not establish that the withholdings preceding appellant's work stoppage were actually made, but that, in any event, there is no evidence that they were erroneous or unauthorized under clause C.7.4.3 (findings 2, 6, 7).

With respect to other allegations, some involve a bad faith component, and hence require proof of a specific intent to injure. *E.g., Kirk/Marsland Advertising, Inc.*, ASBCA No. 51075, 99-2 BCA ¶ 30,439 at 150,408, *appeal dismissed, Kirk/Marsland Advertising, Inc. v. Shalala*, No. 00-1029, 2000 U.S. App. LEXIS 2312 (Fed. Cir. 11 Jan. 2000). Nonetheless, even apart from this requirement, we have found no credible evidence to support the allegations regarding failure to approve submittals, failure to incorporate proper wage determinations, failure to provide adequate maps, causing appellant to be "bombarded" with letters, lying in response to a congressional inquiry, failure to notify appellant of contract discrepancy reports, or failure to provide a list of facility managers (finding 14). Yet other allegations lack an evident contractual basis. That is, the contract did not require respondent to execute delivery orders, and did not prohibit respondent from meeting with the SBA. In addition, the condition of the facilities when appellant started work was the subject of a bilateral modification to pay appellant for restorative work (finding 4). Finally, this contract did not require respondent to terminate Contracts 0002 and 0003, an action that would have redounded to appellant's detriment as the incumbent contractor on both (finding 3).

Finally, although not cited in the termination notice, the record contains evidence of uncontroverted performance deficiencies in the period prior to the default termination (finding 6).

CONCLUSION

Respondent's motion to dismiss for failure to prosecute is denied. The appeal is denied.

Dated: 8 December 2000

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
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. 50360, Appeal of Graham International, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals