ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
G&G Western Painting, Inc.	)	ASBCA No. 50492
	)	
Under Contract No. N62467-95-C-2756	)	

APPEARANCES FOR THE APPELLANT: Sam Zalman Gdanski, Esq.
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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

This is an appeal from a contracting officer's decision terminating the contract for default. Appellant challenges the termination on various grounds. We deny the appeal.

FINDINGS OF FACT

1. On 15 August 1995, the United States Navy (Government or respondent) issued Solicitation No. N62467-95-B-2756, Exterior Painting, Capeheart Housing, Naval Air Station, Key West, Florida (R4, tab 1).

2. The work called for under the solicitation included "complete exterior preparation, painting and repairs to 262 family housing units and incidental related work." Exterior preparation was to include pressure washing and the removal and collection of lead-containing paint. (R4, tab 1, § 01010, ¶ 1.1.1) The Government required commencement of the work within 10 days after receipt of notice to proceed and completion of the contract not later than 423 calendar days after the date of contract award (R4, tab 1, § 00100, ¶ 1.6). Within the overall project schedule, work was to be commenced and completed in phases. Submittals and mobilization were to take 42 days, completion of the Trumbo Point Housing Unit was to take 75 days, and completion of the Sigsbee Park Housing Unit was to take 291 days (R4, tab 1, § 01010, ¶ 1.4).

3. Respondent tested three of the housing units for lead paint and the results were included in the solicitation. Lead paint was found on the fascia, soffits, and utility room doors and frames of one unit. Lead paint was not detected on the exterior stucco walls of two other units (R4, tab 1, § 02090, ¶ 1.4.6). Bidders asked about the Government's tests and whether testing was the Government's responsibility. In response to those questions, the Government referred the bidders to the test results set out in ¶ 1.4.6 of section 02090. The tests done by the Government were described as "random" and bidders were referred to note a on NAVFAC Drawing 5279252 for the Government's conclusions with regard to lead paint removal. Bidders were told that the successful contractor would be required to perform testing in accordance with ¶¶ 1.4.6 and 3.5.3 of section 02090. (R4, tab 1, Solicitation Amendment No. 0006 at 3-4)

4. Note a, referred to above, stated that "all painted fascia, wood soffits and siding, and exterior doors and frames" were to "be regarded as being coated with lead containing paint." Note b directed the contractor to "remove lead containing paint to the extent required to properly prepare surfaces to be painted." It went on to say that the "full removal of lead containing paint is not intended." (R4, tab 1; NAVFAC Drawing No. 5279252; tr. 1/8)

5. Potential bidders also submitted questions about the scope of work, especially with regard to the removal of lead paint. In response, the Government stated:

> THIS CONTRACT IS A STANDARD ROUTINE PAINTING CONTRACT OF EXTERIOR SURFACES REQUIRING STANDARD INDUSTRY PRACTICES IN PREPARING SURFACES PRIOR TO THE APPLICATION OF NEW PAINT COATINGS. IT JUST SO HAPPENS THAT SOME OF THE PAINT CONTAINS LEAD, REQUIRING SPECIFIC PROCEDURES WHEN PREPARING SURFACES IN ORDER TO PROTECT WORKERS AND THE ENVIRONMENT. ALL OF THE SURFACES THAT CONTAIN LEAD PAINT ARE IDENTIFIED UNDER NOTE "A" IN NAVFAC DWG. NO. 5279252. SECTION 09900, PARAGRAPH 3.4.3 SPECIFICALLY INDICATES WHEN IT IS REQUIRED, AS PART OF THE NECESSARY SURFACE PREPARATION, TO REMOVE EXISTING COATINGS PRIOR TO THE APPLICATION OF NEW PAINT. IT IS NOT STATED, NOR IS IT INFERRED IN THE CONTRACT DOCUMENTS, THAT THE AMOUNT OF LEAD PAINT REMOVAL WILL BE DETERMINED BY THE NAVY. ON THE CONTRARY, SECTION 09900 ESTABLISHES SPECIFIC CRITERIA WHICH DICTATES OR WHAT CONSTITUTES WHEN IT IS REQUIRED FOR PAINT COATINGS TO BE REMOVED [sic].

(R4, tab 1, Solicitation Amendment No. 0006 at 3)

6. Section 09900 described the requirements for painting the units including surface preparation. Paragraph 3.4.3 required the removal of existing coatings when they contained large areas of minor defects, when they contained peeling paint, or when surfaces were designated for paint removal by the CO. The same paragraph referred the contractor to section 02090 for the proper procedures for dealing with lead paint.

7. Onorati Construction & Coatings Inc. submitted the low bid and then requested to withdraw its bid. It asserted that it had attempted to amend its bid after reviewing the technical inquiries and responses regarding the lead abatement portion of the job but had made a mistake in doing so. (Ex. A-4) Respondent allowed Onorati to withdraw its bid (ex. G-33).

8. Appellant, G&G Western Painting (G&G), submitted a bid of $468,838.40 (R4, tab 1). This was the second lowest bid. Because the bid was lower than the Government's estimate, respondent asked G&G to review its bid for possible errors or omissions. Respondent also asked G&G to provide statements that it understood the contract requirements and the local conditions, that its bid was correct, and that it waived any claims of a bid mistake after contract award. Along with the letter, respondent included an abstract of the other offers it had received. By letter dated 19 February 1996, G&G stated that it had read and understood the contract documents and that it waived any claims of a bid mistake. (Ex. G-33) G&G visited the work site in February 1996 and met with the Government's project manager, LT Min. Among other things, they discussed the contract's requirements regarding the removal of lead paint. (Tr. 1/28)

9. In April 1996, the Government again expressed concern about appellant's bid and asked it to review the solicitation and its bid a second time. Respondent specifically asked G&G to give special attention to Amendment No. 0006, Specification Section 02090, Removal and Disposal of Lead-containing Paint, and all notes on NAVFAC Drawing No. 5279252. G&G responded on 4 April 1996 saying that it understood all of the contract requirements and local conditions and that its bid was correct "and in accordance with completing the work as specified in the contract documents." On 3 May 1996, the contracting officer (CO) issued a determination that G&G's bid was considered to be a fair and reasonable price. (Ex. G-33)

10. Contract No. N62467-95-C-2756 was awarded to G&G on 9 May 1996 (R4, tab 1). The required completion date was 6 July 1997 (tr. 1/33). The contract incorporated by reference the standard fixed price construction contract clauses including FAR 52.233-1 DISPUTES (MAR 1994); FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984); FAR 52.243-4 CHANGES (AUG 1987); and FAR 52.249-10 DEFAULT (FIXED - PRICE CONSTRUCTION) (APR 1984) (R4, tab 1, § 00721).

11. The contract had several submittal requirements (R4, tab 1, § 01300, Submittal Register). Among the submittals required was a lead paint removal plan approved by a certified industrial hygienist (CIH) (R4, tab 1, § 02090, ¶¶ 1.4.2(b), 1.5.3(e)). The lead paint removal plan also had to be approved by G&G's quality control manager but not by the CO (R4, tab 1, § 01300, submittal register at 2). Another required submittal was the hazardous waste management plan (R4, tab 1, § 02090 at 4). This plan had to be approved by the CO (R4, tab 1, § 01300, Submittal Register at 2).

12. In addition to approving the lead paint removal plan, a CIH was also required to make sure lead paint was actually removed in conformance with the plan, to provide direct monitoring, to guarantee that work was performed in compliance with contract specifications "at all times," and to ensure that hazardous exposure to personnel and the environment was adequately controlled "at all times" (R4, tab 1, § 02090, ¶ 1.4.2). The contract specifically required that the CIH, or an Industrial Hygienist Technician (IHT) under the direction of the CIH, be on-site to monitor and inspect lead paint removal work "during the entire lead-containing paint removal operation" (R4, tab 1, § 02090, ¶ 3.2.2a).

13. Paragraph 1.4.3 of § 01560 dealt with unforeseen hazardous material. It stated that if material that might be hazardous, such as lead paint or asbestos, was encountered, work would be suspended and the contracting officer notified. The Government would determine if the material was hazardous. If it was, and if handling of the material was necessary, the Government would issue a modification pursuant to the Changes clause of the contract. (R4, tab 1)

14. Paragraph 1.1.1.1 of § 01010 dealt with unforeseen major repairs. It stated that if "deteriorated material of a major nature" was uncovered in the course of work, it was to be brought to the attention of the contracting officer, that repairs would be made as directed and that the contract price would be adjusted in accordance with the terms of the contract. (R4, tab 1)

15. The administrative contracting officer (ACO) was initially Phil Linebarger and later Jack Bair. The Government's project manager was LT (then ENS) Tim Min. The President of G&G, George Desipris, was also appellant's on-site supervisor and quality control manager. (R4, tab 4; tr. 1/229)

16. The parties held a pre-construction meeting on 29 May 1996 (R4, tab 4). By letter dated 11 June 1996, appellant stated that it would like to start work on 1 October 1996 and that its estimated completion time was six months (ex. G-5).

17. On 12 June 1996, respondent reminded G&G of the submittals that required Government approval (R4, tab 5). By letter dated 10 July 1996, respondent sent G&G a list of submittals that had been received and their disposition (ex. G-7). On the same date, the

Government sent a letter detailing why appellant's Progress Schedules submittal was not approved (R4, tab 6). The Progress Schedules submittal was disapproved again on 30 July 1996 (R4, tab 7). It was approved by 4 August 1996 (R4, tabs 8, 9).

18. As of 4 August 1996, the hazardous waste submittal had not received Government approval because it had not been signed by the CIH (R4, tab 9). This was accomplished on 27 August 1996 when appellant submitted a new hazardous waste management plan. At the same time, appellant provided respondent with its lead abatement plan. (Ex. A-1) By letter dated 29 August 1996, LT Min confirmed a conversation with Mr. Desipris that G&G would start work on 16 September 1996 (R4, tab 10).

19. In a letter dated 18 September 1996, LT Min informed the ACO that appellant had not started work on 16 September, and that appellant's employees had not received medical examinations or training in lead paint removal, disposal, and air sampling (ex. G-14). The ACO sent G&G a cure notice on the same day (R4, tab 11). Appellant responded to the cure notice on 22 September 1996. Mr. Desipris said that G&G's employees had received their medical examinations and training and that he expected to obtain necessary certificates from the CIH by 24 September. (R4, tab 13)

20. G&G did some preliminary work on 19 September 1996 (R4, tab 3, Contract Production Report No. 2). Appellant took paint samples from the exterior stucco walls of Units 1066A and 1066B on 23 September 1996. The samples contained low levels of lead. (Ex. A-3; tr. 2/182) LT Min was informed of these results and requested a second Government test of the exterior paint. Ed Donohue of the Navy Occupational Safety and Health office took a sample on 1 October 1996. (R4, tab 21 at 2) It appears that the paint on the exterior walls tested by the Government contained low levels of lead. It is not clear if the results of this test were made available to appellant. (Tr. 2/181-88)

21. G&G started surface preparation on 24 September 1996 (R4, tab 3, Contract Report No. 3; tr. 2/25). The CIH was at the work site on that date and began a five-day test of airborne lead levels. According to Mr. Desipris the tests were negative. As a result, he believed that a CIH was no longer required. (Tr. 2/26-28) Mr. Desipris was later informed by Fred Burns, the Government's construction representative, that a CIH or IHT would have to be on-site during any lead paint removal (tr. 2/28-29, 107-10).

22. On 26 September 1996, the CO issued a second cure notice. The notice stated that appellant had not started on-site work until 19 September, that no other work had been done until 24 September, and that the Government was concerned about appellant's ability to complete the contract within the time specified. (R4, tab 15) Under appellant's proposed progress schedule, 50 units should have been completed by the end of September 1996. G&G had not completed any units by that time. (Ex. A-2; tr. 2/72-73, 75-76) G&G responded to the cure notice on 4 October 1996 (R4, tab 16).

23. While doing surface preparation on 30 September 1996, appellant encountered rotten fascia on Units 1066A and 1064A (R4, tab 3, Contract Report No. 7; tr. 2/36-40). It appears that this condition was not expected by either party (tr. 1/158-60, 2/37-38). The Government was informed of the problem (tr. 2/39). Respondent instructed G&G to work around rotten fascia and soffits and said that it would decide how to deal with the problem later (*id*.; tr. 1/158-59, 2/55).

24. On 7 October 1996, G&G began to pressure wash the exterior walls of Units 1064A and 1064B. Mr. Burns was present and called LT Min. LT Min was concerned that appellant may have sprayed the fascia and soffits, which had tested positive for lead paint, and he felt that G&G had not provided for the collection of lead paint chips as required by Section 02090 of the contract. LT Min stopped appellant's work, directed G&G to clean up the paint chips, and called the Navy's environmental people to check the area. (R4, tab 3, Contract Report No. 13, tab 21 at 2; tr. 1/53, 55-56, 153-59, 2/29-34, 110-16)

25. Later on 7 October, Mr. Desipris met with the ACO, LT Min, Mr. Burns, and the Deputy Officer in Charge of Construction, LT Tee. Mr. Desipris stated that he had made a mistake in G&G's bid because he had not realized that a CIH or an IHT would have to be on-site for all lead removal work. The ACO told Mr. Desipris that G&G had three options: make arrangements for a CIH or IHT, try to get Hartzell Painting, the third lowest bidder, as a subcontractor, or prepare for a termination for default. (R4, tab 21 at 2; tr. 1/56-58)

26. By 8 October 1996, G&G had asked Hartzell to take over and finish the contract (exs. G-19, -20). As of 18 October 1996, L.T.S. Consulting, Inc. (LTS) was to act as the project manager for Hartzell and Simpson & Associates would be hired to do the lead removal work (ex. G-24). Government personnel met with G&G, Hartzell, and LTS on 10 October 1996 regarding the contract. LT Min's log indicates that G&G and Hartzell were told that the cost of dealing with rotted fascia and soffits might be added to the contract (ex. G-21; R4, tab 21 at 3; tr. 1/217-18).

27. Mr. Desipris spoke with LT Min about sending his original work force home on 10 October 1996. Actually, it appears that G&G dismissed its original painting and lead removal subcontractor on 10 October 1996. (R4, tab 21 at 3; tr. 1/70-72) It rained at the work site for most of the period between 7 October 1996 and 18 October 1996 (R4, tab 21 at 3).

28. Over this time period, the parties continued to make arrangements for completion of the contract by Hartzell (exs. G-21 to -25, -29; R4, tab 21). LTS informed G&G that if the stucco, caulking, and front and side doors had lead paint, the cost of lead abatement was appellant's problem, but that the Government should give G&G a change order for that work. (Ex. G-22) In a letter dated 18 October 1996, LTS informed the ACO that appellant would seek compensation for 1008 "extra" doors requiring lead abatement (R4, tab 17). Appellant had apparently interpreted the contract to specify that only the

utility room doors had lead paint and had subsequently determined that other doors did as well. It is not clear how LTS calculated that there were 1008 additional doors with lead paint. (R4, tab 17; ex. G-22) LT Min did not believe a change order was appropriate for the doors because the notes to the contract drawings stated that "all . . . exterior doors and frames shall be regarded as being coated with lead containing paint" (R4, NAVFAC Drawing No. 5279252, note a; tr. 1/84-85).

29. Because Hartzell was bringing on new people, Simpson & Associates, to do the lead removal work, a new lead abatement plan was required (tr. 2/122). Simpson faxed a preliminary version of the plan to LT Min on 22 October 1996 (R4, tab 21 at 4). There were some problems with the submittal and LT Min spoke to George Desipris, who was still Quality Control Manager for the project, on 23 October 1996. LT Min sent a letter confirming the conversation the same day. (R4, tab 18) Mr. Desipris faxed LT Min's letter to Simpson which made the required changes (tr. 2/56). Mr. Desipris submitted the revised plan to the Government on 28 October and resubmitted it on 29 October 1996 (R4, tab 21 at 4-5). On 29 October, respondent returned the plan to Mr. Desipris asking for his signature as the approving authority on the cover sheet. (*Id.*; ex. A-7). Mr. Desipris did not want to sign the lead abatement plan as the approving authority (tr. 2/61-63). Despite the parties' discussions, their preparations for Hartzell to take over the contract, and their work on the new submittals, G&G never executed contracts or made other firm arrangements with Hartzell, LTS, or Simpson (tr. 2/120).

30. In a letter dated 29 October 1996, G&G informed the ACO that it was withdrawing from the project. It gave two reasons for doing so. The first was that lead abatement on the 1008 "extra" doors would cost $35,000. The second was that replacement of rotten fascia and soffits would cost about $70,000. (R4, tab 19) G&G removed its men and equipment from the work site on 29 October and returned to Nevada. It was not at the work site after that date. (Tr. 2/138-39) Most of respondent's subsequent attempts to contact G&G at its Key West number and at its Nevada home office were unsuccessful (tr. 1/248-49). The ACO testified that he remembered one phone conversation with Mr. Desipris after 29 October 1996. In the conversation, Mr. Desipris asked the ACO to speak to G&G's attorney. (Tr. 2/176-77)

31. On 6 November 1996, respondent issued a show cause notice. The notice mentioned the two earlier cure notices and G&G's 29 October withdrawal letter. (Ex. G-31) The Government received a letter from appellant's attorney on 18 November 1996. The letter argued that G&G's default should be excused because of the increased costs associated with lead abatement on all doors and with replacement of fascia. In the attorney's view, those items constituted cardinal changes to the contract or were the result of a mutual mistake. G&G's attorney suggested that the default termination should be converted into a termination for convenience. (R4, tab 20) The contract was terminated for default on 6 December 1996 and appellant subsequently filed this timely appeal (R4, tab 2).

32. The record contains different estimates of the additional costs that might be incurred as a result of lead paint on exterior walls, additional doors containing lead paint, and rotten fascia and soffits (R4, tab 19; ex. G- 22; tr. 1/253-55, 266, 2/106-07, 128-29). Because appellant stopped work before completing any work on the contract and because there is nothing in the record indicating how much additional lead paint had to be removed or how many fascia and soffits had to be repaired or replaced, we do not consider any of the estimates persuasive. A follow-on contract was in the amount of $880,000 (tr. 2/187) but there is no clear indication of how much of that was needed to deal with the problems identified by appellant.

DECISION

Initially, the Government has the burden of demonstrating that its decision to terminate the contract for default was proper. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). A default termination is justified if the contractor repudiates the contract and fails to give reasonable assurances of performance in response to a validly issued cure notice. *Danzig v. AEC Corporation*, 224 F.3d 1333, 1338 (Fed. Cir. 2000).

To establish an anticipatory repudiation, respondent must show that the contractor "communicated an intent not to perform in a positive, definite, unconditional, and unequivocal manner either by (1) a definite and unequivocal statement by the contractor that it refused to perform or (2) actions which constitute actual abandonment of performance." *Jones Oil Company*, ASBCA Nos. 42651-56, 44613, 45601, 98-1 BCA ¶ 29,691 at 147,150. Once respondent establishes an anticipatory repudiation, it has the summary right to terminate for default and the burden shifts to appellant to show that its decision to stop work was excusable or was caused by a material breach by the Government. *DWS, Inc.*, ASBCA No. 33245, 87-3 BCA ¶ 19,960, *aff'd on reconsid*. 87-3 BCA ¶ 20,133.

In this case, appellant stopped work and informed respondent, in unambiguous terms, that it was withdrawing from the project. G&G left the work site and did no work under the contract from the time it initially stopped work until respondent terminated the contract. (Findings 30-31) In responding to the Government's show cause notice, appellant's attorney gave no indication that G&G would return to work. He simply argued that the appellant's default should be excused. (Finding 31) We find that appellant repudiated the contract.

In its post-hearing briefs, G&G asserts that having to deal with lead paint on the "extra" doors and exterior walls and with rotten fascia and soffits would have resulted in cardinal changes to the contract. A cardinal change occurs when the Government alters the work so drastically that it effectively requires the contractor to perform duties materially different from those originally bargained for by the parties, is so profound that it is not

redressable under the Changes clause of the contract and renders the Government in breach. *Gassman Corporation,* ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 at 151,741.

It is arguable that some of the circumstances relied upon by G&G for its cardinal change theory may not even support claims for additional work and expenses. The contract disclaimed any intent on respondent's part to determine how much lead paint removal was required (finding 5). The contract drawings stated that all exterior doors should be considered to be coated with lead paint (finding 4). And, the contract clearly required a CIH or IHT whenever lead paint was being removed (finding 12). Even if such claims were supportable, appellant would still have to show that they amounted to cardinal changes. However, the magnitude of the additional work and expense that would have resulted from the changes is not known. G&G defaulted before completing any work and the record does not contain a clear indication of how much work and expense was required of the follow-on contractor as a result of the circumstances cited by appellant (finding 32).

G&G relies on *Krygoski Construction Company, Inc. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), *cert. denied*. 520 U.S. 1210 (1997). That case is cited for the proposition that there were cardinal changes to the contract because contract costs would have increased more than 50%. It is sufficient to state that here we do no know what the additional costs would have been and thus cannot make a computation of what percentage increase in costs would have resulted from the alleged extra work.

G&G also asserts that the Government materially breached the contract by failing to cooperate with appellant in its performance of the contract. The specific acts alleged by G&G were the failure to tell it how to proceed when lead paint was found on the exterior walls and by failing to issue a change order for the additional costs associated with lead paint on the exterior walls and the condition of the fascia and soffits. (App. br. at 37-39)

The record does not support the proposition that respondent kept G&G from proceeding with the contract. By 8 October 1996, within two weeks of starting work, appellant decided to have Hartzell take over the contract. Over the next three weeks, G&G dismissed much of its original workforce, began negotiating the takeover agreement with Hartzell, and worked on the submittals that had to be redone. (Findings 26-29) Whether or not respondent told appellant how to proceed, nothing was going to happen until Hartzell's submittals were approved and, more importantly, until G&G had firm arrangements with Hartzell and its subcontractors. And, as we found, G&G never finalized such arrangements before it abandoned the job on 29 October 1996.

The Government's failure to issue change orders in the time frame desired by G&G was not a material breach of the contract. In essence, G&G argues that it could condition its completion of the contract on an adjustment to the contract. That is not allowed. *Standard Coating Service, Inc.*, ASBCA Nos. 48611, 49201, 00-1 BCA ¶ 30,725. It is immaterial that continuing performance might have been a financial hardship to appellant.

By accepting the contract, G&G assumed the risk of providing funds sufficient to perform the contract and neither undercapitalization nor insolvency excuses a failure to perform. *Id.* at 151,776.

CONCLUSION

The contract was properly terminated for default when appellant stopped work and refused to continue. Appellant has not provided a valid excuse for its actions. Accordingly, the default termination is upheld and the appeal is denied.

Dated: 29 June 2001

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 50492, Appeal of G&G Western Painting, Inc., rendered in conformance with the Board's Charter.

Dated:

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