ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Bison Trucking & Equipment Company	)	ASBCA No. 53390
	)	
Under Contract No. DABT01-00-P-0350	)	

APPEARANCES FOR THE APPELLANT: James S. Phillips, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Richard L. Hatfield, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS
PURSUANT TO RULE 12.3

This timely appeal is from a contracting officer's termination for default of appellant's contract for erosion repair. Appellant requested processing under Board Rule 12.3, Accelerated Procedure, which provides for summary findings of fact and conclusions. The Government failed to respond to the appellant's reasonable request for the Government to designate the location which it would accept for a test of soil compression, and there is no evidence the contracting officer performed an analysis of the time required to complete the contract prior to issuing a default termination. We sustain the appeal and convert the default termination into a termination for convenience.

SUMMARY FINDINGS OF FACT

1. On 21 August 2000 Purchase Order DABT01-00-P-0350 (the contract) was awarded to appellant to provide labor and equipment to repair erosion at Buckhorn Lake, Fort Rucker, Alabama for a fixed price of $60,000. The contract required appellant to remove the lake's original 230 foot long drain pipe which ran under a dam, prepare and compact a new pipe bed, backfill and compact the pipe bed and grade the dam and shoreline after another Government contractor installed a new pipe system, cut a new emergency spillway, and upgrade approximately 1,100 feet of roadway. A temporary cut had to be made in the dam where the elevation was 16 to 18 feet (tr. 34). The contract work could not begin until the Government had drained the lake and cut certain timber. The completion date was 31 December 2000, later extended to 12 June 2001. (R4, tab 1, Sheet C-05) The portion of the plans concerned in this dispute were primarily performance plans showing

the finished product including required densities (tr. 132-33, 185, 187; Gov't PFF #2, app. resp.).

2. The contract contained the following FAR provisions: 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) – ALTERNATE I (APR 1984); 52-243-4 CHANGES (APR 1984); 52.243-5 CHANGES AND CHANGED CONDITIONS (APR 1984); 52.233-1 DISPUTES (DEC 1991); 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); and 52.236-2 DIFFERING SITE CONDITIONS (APR 1984).

3. The contract included in its Special Provisions (R4, tab 1):

> 1. **GENERAL**
>
> 1.2 The Contractor shall protect the finished work from damage and loss resulting from carelessness or by reason of the elements and from other causes until the entire work is completed and accepted. The work is entirely at the Contractor's risk.
>
> . . . .
>
> 5. **GRADING**
>
> 5.1 The subgrade shall be shaped to the line, typical-section, and compaction as specified in the plan drawings. This operation shall include plowing, disking, and any moistening required to obtain specified compaction.
>
> . . . .
>
> 8. **LAKE DRAWDOWN**
>
> 8.1 Buckhorn Lake shall be drained by the Government. The Contractor shall not begin excavations on the dam until notice to proceed with such operations is issued by [Natural Resources Branch (NRB)].
>
> 9. **WORK NOTICE TO PROCEED**
>
> 9.1 The contractor shall not begin work without an official Notice-To-Proceed from NRB. The Notice-To-Proceed will not be issued until the September-October time

frame. Additional information will be provided during the Contractor's Site Visit by NRB.

Amendment No. 1 to paragraph 5 states in part:

> 5.2 Testing shall be performed by an approved commercial testing laboratory. The Contractor shall be responsible for all testing, including coordination with the testing laboratory. Inspections and test reports shall be certified by a Professional Civil Engineer. Test reports shall be furnished to NRB within 5-days of the test.
>
> 5.3 When test results indicate that the specified density is not achieved, then the material shall be removed, replaced, and recompacted to meet the specification requirements. Recompacted areas shall be tested to determine conformance with the specification requirements.
>
> . . . .
>
> 5.7 Compacted fill shall be constructed by compacting fill material in 8" loose lifts. Material to be placed in horizontal lifts only. Compact to 90% Maximum Modified Density for cohesive materials and 95% Maximum modified density for cohesionless, ASTM D-1557 (1991).

4. The compaction tests were not acceptance tests; rather these tests allowed the Government inspector information to correlate with his observation at the site (tr. 36-37).

5. Cindy K. Junger was president and owner of appellant and her husband, Lloyd Dean Junger, was appellant's foreman for the contract (tr. 5, 464). Doug Watkins of the Ft. Rucker NRB acted as the point of contact between the contractor and the Government and oversaw the work, but was not the contracting officer's representative (tr. 180, 272). The plans and specifications for the project were designed by Joseph Long, a civil engineer with the Army Corps of Engineers (tr. 31).

6. Prior to contract award, representatives from all six bidders attended a site visit along with representatives from the Army Corps of Engineers, the Fort Rucker Contracting Office (DOC), and Mr. Watkins of the NRB (R4, tab 2). The prospective contractors were told: (1) work would not begin until late September because the lake was scheduled to be drained about 12 September and certain timber had to be cut; (2) whatever water remained

after draining would be the responsibility of the contractor; (3) the lake was spring fed and a stream would continue to run in the lakebed; (4) de-watering in the work area would be left to the contractor (tr. 43-44, 96-100, 145-46); and (5) the contractor was to give ten days notice to another contractor of the date the pipe could be installed (tr. 146-47, 184). The telephone number and point of contact for the pipe installer were part of the solicitation (R4, tab 1, Bill of Materials).

7. On 23 August 2000 the parties attended a pre-work conference to discuss this and three other erosion control contracts awarded to appellant. The following occurred: (1) Mr. Junger reaffirmed his bid after appellant was offered the chance to withdraw due to its low bid and the amount of work involved; (2) appellant was reminded that timber harvesting could delay the Notice to Proceed but if so, additional days would be given by modification; (3) de-watering of the construction site was discussed in detail and methods discussed included a pump to maintain a minimum flow of water, diversion trenches, and the use of sub-pits; and (4) appellant stated it had all needed items, such as pumps and piping, and that it was experienced in de-watering which is typical for a contract of this type. (R4, tab 3; tr. 46, 168, 185-87, 236)

8. On 13 November 2000 after completion of timber harvesting, NRB officially released the work site for appellant to begin contract performance; Mr. Watkins gave verbal authorization to proceed about 8 November 2000 (tr. 188, 251-52). At Mr. Watkins' request, Modification No. P00001 was issued 18 December 2000, extending the contract performance period until 16 February 2001 (R4, tabs 1, 4). The Government directed appellant to start work on the contract because appellant indicated it was first going to work on one of its other contracts on Fort Rucker (tr. 252, 369).

9. Appellant dug a diversion ditch below the pipe bed grade to channel water around the site (tr. 247). In November 2000 after making the breach cut in the dam, appellant advised the Government that the soils near the point grade were soft and that it was having problems with site water (tr. 47-49) The Government agreed to waive the density test on the first two feet of emplaced fill if proper density was achieved on the next two feet of fill, thereby only requiring a four foot cut and enabling appellant to bridge over weaker soil at the sub-grade (tr. 47-50).

10. During this time Mr. Watkins observed appellant placing the wet soil removed from the pipe trench directly on top of the dam in the work area. Numerous times Mr. Watkins asked appellant to push the wet soil off the site, approximately 3 hours work, because it was acting as a sponge and not allowing water to drain off the site. Except for a small area (finding 17), appellant never moved the soil back. (Tr. 191-92, 325) Mr. Junger did not want to move all the soil back without additional compensation because it would result in "triple handling" the material, which was "not profitable, it's not cost effective" (tr. 474-75).

11. On 8 December appellant obtained a compaction test of the pipe bed (R4, tab 93), and contacted the pipe installer (SR4, tab 6). On 13 December 2000 at 8:30 p.m. appellant faxed DOC that the pipe bed was prepared but the pipe installer was working elsewhere and would begin the contract when possible. Also appellant stated that due to the soil conditions, it might lose the site if there was considerable rain, and would need a modification to rework the site. (R4, tab 6) On or about 14 December 2000 there was a major storm in the area with rain and freezing temperatures (tr. 50). It was impossible to install the pipe system between the 13 December fax and the 14 December winter storm (tr. 135). Mr. Watkins and Mr. Junger agreed that the soil at the site had to be removed and recompressed due to the storm (tr. 196).

12. On 19 January 2001 appellant was paid $11,880 for 25% of the completed work (R4, tab 106).

13. Throughout the entire contract the parties or their attorneys repeatedly met or corresponded, with their positions generally being that each considered the other was responsible for the decisions and costs of dealing with the water and the deterioration of the site, and requested schedules and solutions from the other. Appellant contended the Government was responsible that the pipe was not laid before the December storm and the site water was due to underground springs, thus the Government was obligated to give appellant directions how to solve the problem of site water and a change order covering these expenses. The Government contended that the specifications required appellant to solve the problems of dewatering; had appellant protected the site, such as by proper grading, it would not have been lost by the storm (tr. 278); and appellant could do other work under the contract if necessary to wait for the area to dry. Appellant disputed other work could be done at this time. (R4, tabs 9-13, 17, 19, 20, 23, 27, 29, 32, 33, 39, 41, 43-49, 56; tr. 482) Mrs. Junger testified that if the Government had directed and paid appellant to protect the site, such as by putting up a canopy over the pipe bed, appellant would have done so (tr. 458).

14. Mr. Junger, in describing underground springs, showed that they were not an unusual occurrence in his experience and stated that he could not determine prior to bid whether they were present because the contract gave no soil borings or geotech work (tr. 485-86). The dam and lake were 30 years old and showed no signs of an improper core or of underground springs such as ground bubbling (tr. 137).

15. Due to the site water, a representative of the Army Corps of Engineers visited the site on 8 February 2001 and prepared a trip report to provide "technical assistance and/or recommendations" (R4, tab 14). That representative and other Government employees had noted: (1) the pipe bed was not properly graded toward the diversion ditch and water was standing in all the work areas; (2) the source of the water could be from (a) the spring-fed stream, (b) the 10 to 12 feet of saturated soil from the cut in the dam which was stacked on top of the dam along the work area, or (c) perched water within the dam

embankment; (3) seepage at the side of the cut in the dam was green-black, rather than clear as it would have been from an underground spring (tr. 53, 59, 136); and (4) a berm between the pipe bed and the de-watering trench prevented any water from running off the bed (tr. 210; R4, tab 126).

16. On 15 February 2001, the Government sent appellant a copy of this report which contained a number of "CONCLUSIONS/ACTION" some of which are (R4, tab 14):

> a. Water flowing through the breach from the pond should be blocked to allow some drying of the foundation. A simple earth cofferdam at or a little above the u.s. [up slope] toe should work. There should be provisions to pump or drain ponded water from there to a point beyond the d.s. [down slope] toe of the dam.
>
> b. Water seeping from the left bank face of the breach cut should be intercepted by temporary sump trench or other means and directed to the d.s. toe area so it can no longer saturate engineered fill(s).
>
> c. Exposed earth surfaces within the construction area should be graded to drain always.
>
> d. Side slopes of the breach cut should be flattened (minimum IV:1H) to ensure that a good bond with compaction can be achieved between existing embankment and new fill to plug the breach cut.
>
> e. Material stockpiled on the dam represents a safety hazard as is. It may also be overloading the slopes and contributing to the seepage problem (item b., above). The material should be removed <u>immediately</u> from the crest of the dam and then from the front slopes. Material may be stored on the d.s. slopes in lifts graded to drain. [Underline in original]
>
> f. After the material is removed from the crest of the dam and the slopes laid back (see d. above), check for seepage. If it is determined that the material stockpiled on the dam was not the source of the seepage, and it persists, a permanent drain should be designed and installed. This would serve [to] keep the foundation of the new outlet works pipe from being saturated which could result in unacceptable deflections.

. . . .

> i. The Contractor should be required to submit all compaction and density tests in accordance with the specifications. The moisture content of fill and back fill material should be controlled in order that the best compaction can be achieved. Optimum moisture is determined via compaction tests. Moisture content of the fill and backfill material should be within plus or minus 2% of optimum.
>
> j. The Contractor should be required to submit a plan describing/detailing his proposed method(s) for dewatering and filling the breach cut in accordance with the P&S and recommendations applicable herein. . . .

(R4, tab 14)

17. Mr. Junger considered all items in the report to be changes to the contract and tried none of them (tr. 490; R4, tab 26), with the exception that he moved some of the stacked soil which was considered a safety hazard (tr. 491-92). The area where the soil was removed began to dry and the area on the backside where it was placed began to have water problems (tr. 200).

18. As the time passed, Mr. Watkins hoped appellant would "back out" of the contract and at times voiced his wish that the contract would be default terminated (tr. 294-95). On 26 February 2001 Mr. Watkins told appellant that if he felt he was performing outside the scope of the contract work, to file a claim (tr. 320; R4, tab 26). There is no evidence appellant filed a claim for any of the matters involved in this dispute.

19. On 16 March 2001 DOC issued a cure notice, to which appellant's counsel responded, and the Government replied (R4, tab 50, 52, 53, 55). The parties' positions remained the same.

20. On 2 April 2001 the parties met at the work site. Appellant felt the pipe bed was ready for the pipe to be installed. In the Government's view (1) appellant had not removed a manhole and 2 concrete thrusts; (2) the pipe bed was soft, had been left unprotected, and had not been reworked properly; (3) the integrity of the pipe bed was destroyed and any density reports voided when appellant dug and left open a long trench in the pipe bed which collected rain water from a 1 inch rain and then backfilled the wet trench; and (4) compaction tests were performed in a portion of the pipe bed undisturbed by the trench (R4, tabs 62, 63, 66, 68; tr. 336).

21. On 4 April 2001 the parties met to discuss completion of the work, essentially restating their positions (R4, tabs 69, 71, 73). Appellant asked the Government to designate the point at which it wanted the tests made; the Government never made this designation, seemingly due to Mr. Watkins' earlier observations and results from density testing received by the Government 4 April 2001 which were performed the previous day by the Government's contractor, Quality Assurance Testing Laboratories, Inc (tr. 428, 448-50; R4, tab 98). Two tests were conducted for the Government, showing compaction of 81 percent and 93 percent. (R4, tab 117)

22. On 6 April 2001 DOC submitted a proposed bilateral modification of the contract to appellant. The modification extended the time of contract performance to 12 June 2001; reiterated paragraph 1.2 requirements to protect the site; required compaction tests for all emplaced fill including a nine-foot cut which the Government understood appellant made in the front of the bed; rescinded the verbal instructions for appellant to coordinate delivery of the pipe directly with the pipe contractor; provided for no additional payment; and stated "[a]ll other terms and conditions remain unchanged." (Ex. A-26). The contracting officer considered that the modification contained no additional work for appellant (tr. 423-24). The contracting officer did not believe that failure to provide for additional compensation in Modification No. P00004, as worded, precluded appellant from being able to later file a claim for this work (tr. 424-25).

23. On both 9 and 12 April 2001 appellant requested Modification No. P00004 be reissued unilaterally or the contract be terminated for convenience, and indicated that the proposed 67 day extension was unreasonable and that a 90 day extension should be given (R4, tabs 76, 80, 86-88; tr. 450). DOC refused to reissue Modification No. P00004 unilaterally (R4, tab 79).

24. On 20 April 2001 DOC wrote appellant: (1) to resume performance no later than 25 April 2001; (2) the contract completion was extended to 12 June 2001; (3) there were no changes which required a change order; (4) the Government would not terminate the contract for convenience; and (5) directed appellant to proceed with the work and provide compaction test results to the Government (R4, tab 91).

25. On 23 April 2001, in response to DOC's letter, appellant provided the Government with results of its soil compaction tests on 8 and 13 December 2000 and 2 April 2001. The December reports antedated the storm which had destroyed the site. The 2 April 2001 tests were taken in front of the dam and at the back side of the dam. The report for those tests indicated that "% MAX DENS." was in excess of 100% and the "JOB SPEC." was 95%. Appellant stated its position that the pipe pad fulfilled all contract requirements and awaited the Government's pipe installation. Appellant also asked that if the Government did not consider the test report acceptable, the Government state why it was not and cross-reference the relevant provisions of the contract. (R4, tabs 93, 94)

26. On 1 May 2001, DOC responded that the 2 April 2001 tests were "not representative of the compaction density of the entire pipe bed. Therefore, the compaction reports cannot be relied upon at this time to tell the true compaction density of the entire pipe bed." DOC continued that it was hereby notifying appellant that the Government considered its failure to resume work a condition that was endangering performance of the contract. DOC gave appellant ten days after receipt of the notice to cure this condition. (R4, tab 100)

27. On 3 May 2001, appellant replied to the 1 May 2001 letter. Appellant wrote that there was no requirement for density tests to be representative of the total bed and it had properly performed all required tests. Appellant reiterated the request in its 23 April 2001 letter for identification of the contract provisions the test results did not comply with. Appellant stated that it needed to know how and where to test in order to obtain DOC's desired result. Appellant stated that the "lack of specific or consistent direction has prevented Bison from achieving substantial progress towards completion of the contract." Appellant pointed out that there was no other contract work which it would make sense to perform prior to completion of pipe installation by the Government's installer. (R4, tab 101) We find that appellant's letter was a reasonable request for direction on how to proceed with the testing, which was the logical next step in the work.

28. The DOC did not respond to appellant's 3 May 2001 request for direction.

29. On 21 May 2001 Modification No. P00005, dated 18 May 2001, was issued terminating the contract for default "due to the contractor's failure to cure the deficiencies described in the Government's cure notice dated 1 May 2001." In issuing the termination, the contracting officer considered the factors set out in FAR 49.402-3(f), and felt that appellant *would* not perform the contract. There is no analysis of the work and time remaining in the contract which reflect a justifiable insecurity or show a conclusion of a reasonable likelihood that appellant *could* not complete the work within the time remaining for performance. (Tr. 396-98; R4, tabs 1, 98)

DECISION

Termination for default is a drastic sanction that should be imposed upon a contractor only for good cause in the presence of solid evidence. The Government has the burden of proving that its default termination was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987)

When the Government issued the default termination in this appeal, the contract completion date had not passed. Rather the Government maintains that the contractor failed to cure the deficiencies set out in the 1 May 2001 cure notice and had not provided the required compaction tests. Further the Government felt the contractor simply would not complete the contract work, essentially an assertion of abandonment of the contract. The

law applicable to a contractor's failure to provide assurances of timely completion is a branch of the law of anticipatory repudiation. *Danzig v. AEC Corporation*, 224 F.3d 1333, 1337 (Fed. Cir. 2000), *cert. denied*, 121 S.Ct. 1656 (2001).

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, *et al*., 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.

The Government has not met its initial burden. The Government never responded to appellant's reasonable request made 4 April 2001, and repeated in its 1 May 2001 letter, for the location the Government would accept for a test boring. The Government has not proven that appellant abandoned the contract.

Further if we view this as a progress failure default, we have no evidence that the contracting officer did the required analysis of the time and work necessary to complete the contract. In *Thomas & Sons, Inc.*, ASBCA No. 51874, 01-1 BCA ¶ 31,166 this Board stated:

> The test in a progress failure default termination is whether there was a reasonable belief on the part of the contracting officer that there was no reasonable likelihood that appellant could perform the contract by the completion date as extended. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987); *Michigan Joint Sealing, Inc.*, ASBCA No. 41477, 93-3 BCA ¶ 26,011 at 129, 325-26, *aff'd*, 22 F.3d 1104 (Fed. Cir. 1994) (table). The Government must prove that at the time of termination the contracting officer had a valid basis for concluding there was no reasonable likelihood the contractor could complete the work within the time remaining for performance. Termination is appropriate if a demonstrated lack of diligence indicates the Government cannot be assured of timely completion. *Discount Co. v. United States*, 554 F.2d 435, 441 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 938 (1977).

Accordingly the appeal is sustained and the default termination is converted to a termination for convenience.

Dated: 21 November 2001

JEAN SCHEPERS
Administrative Judge
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. 53390, Appeal of Bison Trucking & Equipment Company, rendered in conformance with the Board's Charter.

Dated:

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