

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
P.R. Contractors, Inc.) ASBCA No. 52937
)
Under Contract No. DACW29-97-C-0031)

APPEARANCE FOR THE APPELLANT: Mr. Cedric Patin
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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U.S. Army Engineer District,
New Orleans

OPINION BY ADMINISTRATIVE JUDGE TUNKS

This is an appeal from a contracting officer's final decision terminating a contract for default for failure to timely complete a construction contract.

FINDINGS OF FACT

1. On 8 November 1996, the New Orleans District of the Army Corps of Engineers (Corps) issued Invitation for Bids (IFB) No. DACW29-97-B0027 to enlarge a levee in Plaquemines Parish, Louisiana (R4, tab D).

2. After the low bidder withdrew its bid, the Corps asked P.R. Contractors, Inc. (PR), the next low bidder, to verify its bid. PR verified its bid on 6 March 1997. (Tr. 35-36; R4, tab C-22)

3. The Corps awarded Contract No. DACW29-97-C-0031 in the amount of \$1,049,277.50 to PR on 17 March 1997. The work included clearing and grubbing, building access roads, ramps and stone pads, excavating fill from a borrow pit, hauling fill to the site, enlarging the levee, building a berm on the flood side of the levee and a double ramp at the Happy Jack Marina. The contract completion date was 240 days after receipt of the notice to proceed (NTP). (R4, tab D; tr. 325)

4. FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984), which was incorporated into the contract by reference, provided, in part, as follows:

(a) If the Contractor . . . fails to complete the work within [the time specified or any extension thereof], the Government may, by written notice to the Contractor, terminate the right to proceed with the work

(b) The Contractor's right to proceed shall not be terminated . . . if—

(1) The delay . . . arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor . . . [or] delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers

(R4, tab D)

5. The project was located on the southwest side of Louisiana Highway 23 (LA Hwy. 23). The levee ran in a north-south direction. The City Price drainage structure formed the upper or northern limit of the project and the Hayes pumping station formed the lower or southern limit. The east side of the levee was "protected" and trucks were not permitted to haul on that side. The west side or the flood side could be used for hauling fill. (R4, tab D, Drawing No. H-8-44755 at sheets 2, 3; tr. 188-89)

6. Specification section 00800, Special Contract Requirements, contained the following provisions that are relevant, in part, to this appeal:

3. CONTRACT DRAWINGS, MAPS AND SPECIFICATIONS.
(DFARS 252.236-7001 - 1991 DEC).

. . . .

d. Omissions from the drawings or specifications . . . of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted . . . details of the work, but shall be performed as if fully and correctly set forth and described in the drawings and specifications.

....

5. PHYSICAL DATA

....

c. Transportation Facilities Access to the lower limit of the . . . site for haul operations opposite B/L [levee baseline] Station 104+50 is by Hwy. 23, then by unimproved corridors across vacant and lightly wooded fields, then across an unbridged drainage canal . . . then across a buried 18 inch water main . . . onto existing levee. Access to the upper limit of the . . . site for haul operations is by Hwy. 23, then along berms and the crown of an existing levee within the . . . right-of way corridor between Hwy. 23 and the back levee The Contractor shall be responsible for maintaining the streets and roads free from any mud tracking, spillage and/or other surface pollution Stone pads [or] wash racks . . . as set forth on the drawings at each haul corridor entrance to Hwy. 23 . . . shall be required to maintain clean streets and roads The Contractor must submit his/her access plans for approval prior to mobilization

(R4, tab D)

7. Specification section 01100, General Provisions, contained the following additional relevant provisions:

3. SAFETY PROVISIONS

....

b. Accident Prevention Program.

....

(4) . . . The Contractor shall not commence physical work at the site until the program has been accepted

....

6. RIGHTS-OF-WAY.

a. Rights-of-way for construction purposes and for access through private lands . . . will be furnished by the Government . . . as shown on the contract drawings

....

15. ORDER OF WORK.

....

b. Marina Ramp Area.

....

2) The Contractor shall provide continuous access to the Happy Jack Marina. The Contractor shall submit a “Continuous Access Plan” . . . for approval

(R4, tab D)

8. Specification section 02220, Excavation, contained the following relevant provisions:

3.3 Contractor-Furnished Borrow Areas.

3.3.1 General. The Contractor, at his/her option, may use borrow areas other than those indicated

3.3.2 Time Extensions. No time extension to the contract completion date will be granted . . . for delays incurred in obtaining Contractor-furnished borrow areas

9. Specification section 02225, Embankment, contained the following relevant provisions:

8.1 Access Roads.

8.1.1 . . . Plaquemines Parish . . . will identify the location of access corridors as shown on the drawings The Contractor shall construct stone pad and surfacing highway entrances as detailed on the drawings . . . to maintain clear streets and roads .

...

....

8.2 Ramps and Crossings.

8.2.1 Ramps . . . shall be constructed at the locations shown on the drawings

(R4, tab D)

10. The contract incorporated sheets 1 through 12 of Drawing No. H-8-44755. Sheets 2 and 3 depicted two “haul access” roads between LA Hwy. 23 and the levee. The upper haul access road was at station 8+00 and the lower haul access road was at station 104+50. The drawings depicted “stone pads” or wash racks on each of the haul access roads where they entered LA Hwy. 23 to protect the highway from mud and other pollutants. (R4, tab D; tr. 190)

11. Sheets 2 and 3 also showed two “light access” roads between LA Hwy. 23 and the levee. One of the light access roads entered the Happy Jack Marina at station 29+00. The other intersected the levee at station 112+00. The contract did not define a light access road. The drawings did not show stone pads on either of the light access roads. (R4, tab D)

12. The contract did not specifically require PR to build turn-arounds (R4, tab D).

13. On 2 May 1997, the Corps requested PR to submit a revised Accident Prevention Plan, stating that work at the site could not begin until an acceptable plan had been submitted (R4, tab C-3).

14. PR acknowledged receipt of the NTP on 15 May 1997, establishing a contract completion date of 10 January 1998 (R4, tab C-4).

15. At the pre-construction conference held on 15 May 1997, PR advised the Corps that it was going to use an alternate borrow pit instead of the Government borrow pits indicated on the drawings (tr. 65-66, 179).

16. On 17 June 1997, the Corps again requested PR to submit its revised Accident Prevention Plan, stating that no work could begin at the site until an acceptable plan had been submitted. The Corps also requested PR to submit its construction progress schedule, submittal register and submittals. (R4, tab C-5)

17. On 27 June 1997, the Corps requested PR to submit its alternate borrow submittal, stating that the contract precluded time extensions for delays in obtaining an

alternate borrow pit. The Corps also advised PR that about 18 percent of the contract time had passed without any work being performed at the site. (R4, tab C-6; tr. 66-70, 179-80)

18. On 24 July 1997, the Corps again asked PR for its alternate borrow submittal, reiterating that no time extensions would be granted for delays in obtaining an alternate borrow pit. The Corps also advised PR that about one-third of the contract time had passed without any work being performed at the site. (R4, tab C-7; tr. 70-71, 180-81)

19. On 8 September 1997, the Corps approved PR's alternate borrow submittal. The Corps also stated that 47 percent of the contract time had passed without any work at the site and urged PR to begin work "without any further delays" (R4, tab C-8).

20. PR's first earthwork subcontractor mobilized at the site on 17 September 1997, 125 days after the NTP was acknowledged (ex. Bd.-1 at Report No. 1; tr. 186).

21. PR submitted its access plan on 18 September 1997. The plan stated that PR intended to proceed by "using the indicated whole access road in the attached sketches and then on top of the levee[,] backing up, dumping and driving back to the same whole road." On the sketches, PR highlighted LA Hwy. 23 and the two haul access roads in green and the two light access roads in pink. The legend stated that green denoted a "2 way haul access road" and pink denoted a "2 way light access road." (Ex. A-2; tr. 208) In view of the legend, it appears that, in typing the plan, the word "whole" was mistakenly typed for the word "haul" and we so find. The plan did not indicate which haul access road PR planned to use or that it intended to have empty trucks exit using the light access road at the marina. With one exception not relevant here, the Corps approved the plan on 19 September 1997 (ex. A-1).

22. In order to make the upper haul access road usable, PR had to strip the levee from the north end, build a stone pad to protect the highways and construct ramps over the levee to allow the trucks to use the upper haul access road. Although PR suggested at the hearing that another contractor may have built a stone pad on the upper haul access road during a prior project, it did not present any evidence that there was an existing stone pad on the upper haul access road (tr. 296-98, 311-13). We conclude that PR did not build a stone pad on the upper haul access road. The un rebutted testimony of Mr. John G. Fogarty, Jr., the Corps' project engineer, establishes that PR did not build access ramps over the north end of the levee until April 1998 (tr. 174-75, 296-98, 301, 313-14). We conclude that the upper haul access road was not usable until at least April 1998.

23. Due to the physical limits of the levee and the fact that the protected side could not be used for hauling, there were only two ways to perform the work. PR could have built the levee cap and left the flood side berm open, which would have allowed access to the upper haul access road for a short time. Once PR began building the berm, however, access to the upper haul access road would have been blocked. (Tr. 188-89, 190-91) This method

was not viable because the upper haul access road was not usable until April 1998. The other option was to build the levee and the flood side berm to their full width at the outset. This approach would have blocked PR's access to the upper haul access road after the first day and is the plan PR chose to use (tr. 296, 300; *see* finding 21).

24. On the first day of hauling, PR's trucks entered the site from the lower haul access road (not from the upper haul access road as PR alleges it planned to do) and dumped their loads on the south side of the marina (tr. 187-88). The first three empty trucks tried to exit via the light access road at the marina. The Corps stopped PR from using that road, stating it could only be used for personnel vehicles. (Tr. 208)

25. PR alleges that it next tried to cross the marina and to exit at the upper haul access road. According to PR, a Corps employee prohibited it from crossing the marina access. (Tr. 208, 348) There is insufficient evidence for us to find that the Corps issued such a directive. PR did not identify the authorized Corps employee who issued the alleged directive and there is no contemporaneous documentary evidence corroborating PR's assertion. In any event, PR could not have used the upper haul access road because the upper haul access road was not usable until April 1998 (tr. 301, 313).

26. PR's trucks turned around on the south side of the marina and exited via the lower haul access road. In turning around, one or more of the trucks allegedly crossed onto the property of a private landowner, Judge Emile E. Martin. Judge Martin and Mr. Hage, appellant's project manager, got into a heated argument. Judge Martin did not make any other complaint regarding PR's trucks crossing onto his property during the contract. (Tr. 207-10, 212-20, 280-81, 305-08) PR did not present any evidence showing that it could have turned around in this area without crossing onto Judge Martin's property.

27. PR built "turn-arounds" in locations where it was too narrow for its trucks to turn around (tr. 210, 303, 332). Before the turn-arounds were built, some haul trucks had to back out of the site (tr. 282). It is a common practice to build turn-arounds where the site is too narrow to permit equipment to turn around (tr. 303-04).

28. The Corps extended the contract completion date to permit PR to perform the work at the marina between 15 January and 15 April 1998 (R4, tab C-1 at Mod. P00001, tabs C-10, C-34; tr. 76). The work at the marina had to be completed by that date in order to avoid interfering with the shrimping season (R4, tab C-23; tr. 84).

29. PR's first earthwork subcontractor demobilized and left the site on 12 January 1998 (ex. Bd.-1 at Report No. 28; R4, tab C-14).

30. On 20 January 1998, the Corps advised PR that the work was 32 percent complete and requested PR to submit a plan showing how it intended to regain the approved schedule (R4, tab C-14; tr. 78-79).

31. On 29 January 1998, the Corps received a letter from Contract Bond Claims Management, Inc., a claims agent retained by PR's surety, National American Insurance Company (National American). The letter stated that the company was investigating a claim that PR had failed to pay \$190,986.56 in equipment rental fees in connection with this project and requested the Corps to make all future contract payments to National American. (R4, tab C-15; tr. 45)

32. On 3 February 1998, the Corps again expressed concern over PR's lack of progress and asked PR how it planned to regain the schedule. The Corps also advised PR that two equipment rental companies had contacted it regarding nonpayment of rental and/or lease costs for equipment supplied to the project (R4, tab 16; tr. 79-80, 182-83).

33. On 11 March 1998, PR's second earthwork subcontractor, H. L. Marshall, began work at the site (ex. Bd.-1 at Report No. 28).

34. On 17 March 1998, the Corps issued an Interim Unsatisfactory Construction Contractor Performance Evaluation Report to PR (R4, tab C-19; tr. 50-51, 80-82, 184).

35. On 18 March 1998, PR requested relief for a bid mistake, stating that it had inadvertently omitted the cost of trucking from its estimate (R4, tabs C-20, C-21, C-28; tr. 34-36). The Corps denied the request on 30 March 1998 on the basis that PR had verified its bid before contract award (R4, tab C-22; tr. 34-36).

36. The Quality Assurance Report (QAR) for 20 March 1998 provided as follows:

Mr. Marshall has been informed from locals [that] P & R Construction's reputation [from the] previous contract is not good. They also informed Mr. Marshall that P & R did not pay the Bank, Grocery, Truckers, Material suppliers etc. so therefore, they will not sell (P & R) anything, nor will they have anything to do with P& R Construction, making it extremely difficult for the dirt sub to complete the Marina on schedule.

(Ex. Bd.-1 at Report 33)

37. On 6 April 1998, National American advised the Corps that it had received claims on several of PR's contracts, including the subject contract, and requested that all further contract funds be paid to National American (R4, tab C-24).

38. The work at the Happy Jack Marina was not completed by 15 April 1998 (tr. 185-86, 201).

39. On 24 April 1998, Marshall demobilized and left the site due to nonpayment (ex. Bd.-1 at Report No. 58). Through-out the time Marshall worked at the site, PR had difficulty paying its subcontractors and material suppliers (ex. Bd.-1 at Report Nos. 28 through 58; tr. 201).

40. The Corps deleted the uncompleted portion of the work at the marina on 28 April 1998 (tr. 54; R4, tabs C-1, C-34 at Mod. No. P00003).

41. On 7 May 1998, PR requested the Corps to make all payments due or to become due on account of its contract to its surety, National American (R4, tab C-31).

42. On 14 May 1998, the Corps again expressed concern over PR's lack of progress, noting that PR had not worked at the site since 24 April 1998 (R4, tab C-32; tr. 82-83).

43. On 1 June 1998, PR asked National American to complete the work. In its agreement with the surety, PR admitted that it could not pay "certain subcontractors and suppliers of labor and//or materials" under this contract and that it "can not [sic] complete the [project] without financial assistance . . . from the surety." (R4, tab C-33 at 1, 2)

44. On 16 June 1998, the Corps issued a show cause notice to PR, requesting it to present any excuses it had for failing to complete the work (R4, tab C-34). PR did not respond (tr. 53; R4, tab C-35).

45. The contract completion date was ultimately extended until 30 June 1998 (R4, tab C-2 at Mod. P00009; tr. 139).

46. On 1 July 1998, the contracting officer terminated the contract for default for failure to timely complete the work (R4, tab C-1, Mod. No. P00009; tr. 29).

47. PR timely appealed the contracting officer's decision to the Corps of Engineers Board of Contract Appeals on 21 September 1998, where it was docketed as ENG BCA No. 6428. The appeal was re-docketed as ASBCA No. 52937 on 12 July 2000.

48. On 1 October 1998, PR submitted "PR Contractor's, Inc. Defense of Termination for Failure to Perform" (PR's Defense). This document provided, in part, as follows:

Upon commencement of the work, the [Corps] issued a directive to PR prohibiting haul trucks from crossing the marina area. This directive constituted a constructive change order of tremendous impact

....

This [change] made performance by PR all but impossible, as the much more expensive method of construction imposed by the [Corps] required the work to be performed at an excessive and unreasonable cost exceeding the financial and commercial capabilities of PR to perform.

PR's initial efforts to perform were abandoned after roughly 3 months, with costs exceeding production revenue, and financial resources. Subsequently, after roughly 2 months of inactivity, PR's second effort to perform, spanning a 6-week period, met with similar results. The work was abandoned again and PR was terminated for default

(Ex. G-2; tr. 36-40)

DECISION

When the Government terminates a contract for default, it has the burden of proving the propriety of its actions. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). Under the default clause in this contract, FAR 52.249-10 DEFAULT (FIXED PRICE CONSTRUCTION) (APR 1984), the contracting officer had the right to terminate the contract for default if PR failed to complete the work within the time specified or any extension thereof. As extended, the contract completion date was 30 June 1998. It is undisputed that PR did not complete the contract by that date. Accordingly, the Government has established a *prima facie* case that its termination for default was proper.

The burden of proof now shifts to PR to prove that the default was beyond its control and without its fault or negligence. *Magna Enterprises, Inc.*, ASBCA No. 51188, 02-1 BCA ¶ 31,660 at 156,419. PR contends that the default should be excused because the Corps changed the "means and methods" by which it planned to perform the work, causing it to incur such excessive and unreasonable costs that it was financially incapable of completing the contract (app. post-trial memo. at 1). PR alleges that the Corps changed the way it planned to do the work in the following ways:

1. By directing the contractor to cease using the "light access" road from the Happy Jack Marina to Hwy. 23.
2. By directing the contractor to cease crossing the Marina on the levee crown.

3. By directing the contractor to cease turning trucks around in the vicinity of Judge Martin's property near the marina.
4. By directing and forcing without option, PR's having to build turnarounds in the marsh, outside the right of way.

(App. reply memo. at 1)

A contractor is responsible for having sufficient financial resources for the performance of a contract and its financial inability to perform is not generally regarded as beyond its control. *Local Contractors, Inc.*, ASBCA No. 37108, 92-1 BCA ¶ 24,491 at 122,235, *aff'd on reconsid.*, 92-1 BCA ¶ 24,693, *aff'd*, 988 F.2d 131 (Fed. Cir. 1993) (table). In order for a default termination to be excused on the basis of financial incapacity, the contractor must prove that its incapacity was caused by the Government. *Danzig v. AEC Corp.*, 224 F.3d 1333, 1339 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 995 (2001). Although we are satisfied that the cause of PR's inability to perform was financial incapacity, PR has failed to prove by preponderant evidence that the Corps was the cause of that incapacity.

PR's four arguments rest on the premise that the Corps interfered with the manner in which it planned to do the work. According to PR, it planned to enter the site at the upper haul access road and exit on the light access road at the marina or at the lower haul access road so that its trucks could avoid "cumbersome turn arounds." The most reliable evidence of how PR planned to perform the work is the access plan it submitted to the Corps for approval on 18 September 1997. The plan indicated that PR intended to use "the indicated [haul] access road in the attached sketches and then on top of the levee, backing up, dumping and driving back to the same [haul] road," meaning that PR planned to enter and exit using the same haul access road. The plan did not indicate that PR planned to use the upper haul access road or that it planned to have its empty trucks exit at the light access road at the marina. Thus, PR's access plan does not support the position it has taken in this appeal.

PR first argues that the Corps changed the contract by directing it to cease using the light access road at the marina. According to PR, once its trucks were empty they were light loads and should, therefore, have been allowed to use the light access road at the marina. PR misconstrues the issue. The issue is not whether the empty trucks were light loads, but whether LA Hwy. 23 was protected from "mud tracking, spillage and/or other surface pollution" as required by Louisiana law. The contract required that roads used for haul operations have stone pads built where they enter LA Hwy. 23. Since the contract did not require a stone pad on the light access road at the marina, we conclude that the light access road at the marina was not to be used as an exit for haul trucks.

PR next argues that the Corps changed the contract by directing PR to cease "crossing the marina." There is no evidence that the Corps ever issued such a directive and

we are convinced that PR never planned to cross the marina. PR's access plan states that it planned to exit back to the "same [haul] road." In order for PR's alleged plan to work, both haul access roads had to be usable. However, the upper haul access road was not usable until at least April 1998. Finally, given the physical limits of the levee and the prohibition against running trucks on the protected side of the levee, there were only two ways to perform the work: PR could have built the levee cap, left the berm open and finished the berm at a later time, or it could have built the levee and the berm to full width from the outset. Either method would have shut off access to the upper haul access road for a majority of the contract. Thus, we cannot find that PR planned to cross the marina.

PR thirdly argues that the Corps improperly directed it to cease turning around in the vicinity of Judge Martin's property. PR did not present any evidence showing that its trucks could have turned around in that area without incursion into Judge Martin's property. In the absence of any evidence showing that PR could have used that area to turn around, the Corps acted properly in directing PR to turn around in another area.

PR lastly argues that the Corps changed the contract by directing it to build turn-arounds. On this record we are unable to find that the Corps directed PR to build turn-arounds. Even if the Corps did direct PR to build turn-arounds, the construction of turn-arounds is a common practice in this type of work and was necessary to perform the work. DFARS 252.236-7001 - 1991 DEC, Contract Drawings, Maps and Specifications, which was included in this contract, provided that "details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted . . . details of the work. . . ." Accordingly, we conclude that the Corps did not change the contract by directing PR to build turn-arounds. *Elter, S.A., ASBCA Nos. 52791 et al., 02-1 BCA ¶ 31,672 at 156,512.*

The appeal is denied.

Dated: 30 July 2002

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

EDWARD G. KETCHEN
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. 52937, Appeal of P.R. Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

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

