ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Nu-Waay Enterprises, Inc.	)	ASBCA No. 53245
	)	
Under Contract No. N62467-99-D-3409	)	

APPEARANCE FOR THE APPELLANT: Mr. Jerome M. Simpson
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Alan R. Caramella, Esq.
Trial Attorney
Naval Facilities Engineering Command
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

This timely appeal is from the government's default termination of appellant's indefinite quantity contract for roof work at the Marine Corps Logistics Base in Albany, Georgia. The government issued one delivery order for appellant to do roof work at Building 1215, but appellant refused to perform any work and failed to prove its nonperformance was excusable under provisions of its contract. A hearing was held. The government has filed a post hearing brief; appellant did not file any brief. We deny the appeal.

FINDINGS OF FACT

1. On 23 February 2000 Naval Facilities Engineering Command (NAVFAC), Officer in Charge of Construction (OICC), awarded appellant Contract No. N62467-99-D-3409, an indefinite quantity contract with a guaranteed minimum of $50,000 for roof repairs at the Marine Corps Logistics Base, Albany, Georgia. The contract award was for a base year and two option periods. (R4, tab 1, § 00720, ¶¶ 1.8, 1.10).

2. The government planned to award the contract in September 1999. However, at that time appellant conveyed to the government representatives that appellant wanted to add some line items to the contract and change some of its prices. (Tr. 1/39-41, 2/61)

3. At the government's request, appellant submitted its suggestions in writing. The government's review reflected that these suggestions would put appellant out of the competitive range, and would require asking other bidders in the competitive range to review their prices and resubmit their bids. The government asked appellant to confirm its proposal, which appellant did twice, in December 1999 and again in February 2000. (Tr. 1/41-42, 2/64; ex. G-4 at 3, exs. G-9 to G-11)

4. Appellant could refuse a delivery order if that delivery order was: (1) under $2,000; (2) over $250,000; or (3) a combination of orders over $500,000 (R4, tab 1, § 00720, ¶ 1.7).

5. The contract provided a schedule for completing delivery orders based on their dollar value, ranging from 30 to 90 days (R4, tab 1, § 00720, ¶ 1.3).

6. In bidding, appellant proposed a unit price for each of the construction activities for the roofing work. When the government issued a delivery order, the government engineers picked the appropriate line items for work at a specific location. (R4, tab 1, amendment 0003; tr. 1/43-44)

7. The contract required appellant to submit and receive approval of both a quality control plan and a safety plan before performing any on-site work under any delivery order (R4, tab 1, § 01450, ¶ 1.4.2, § 01525, ¶ 1.4.1.1). Additionally appellant had to submit information on the qualifications of both the manufacturer and the applicator of roof material (R4, tab 1, § 07550, ¶¶ 1.2.3, 1.3.1, 1.3.2).

8. The contract included FAR 52.233-1, DISPUTES (DEC 1998) – ALTERNATE I (DEC 1991), and FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) – ALTERNATE II (APR 1984), the latter of which states in part:

> (a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. . . .
>
> (b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if-

> (1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. . . .

(R4, tab 1, § 00721, ¶¶ 1.16, 1.46)

9. Prior to the contract, appellant had one indefinite quantity contract and understood that the government had no obligation to order more than $50,000 under the contract (tr. 2/176-77).

10. After award, representatives of the government accompanied appellant to Building 5500, one of the buildings that the government planned to include in the contract work, when funding became available. Appellant objected to the equipment on top of Building 5500. The government did not receive sufficient funding to order replacement of the roof on Building 5500 at that time. (R4, tab 6 at 1; ex. G-4 at 4; tr. 1/61-63, 2/68-71, 79, 3/29-30) Appellant has not proved that there were any government misrepresentations regarding a potential delivery order for Building 5500.

11. On 11 July 2000 appellant faxed NAVFAC Southern Division in North Charleston, South Carolina requesting assistance and guidance concerning different opinions between appellant and the Marine Corps Logistics Base, Albany, Georgia regarding "application for flat roof systems" (R4, tab 4).

12. On 14 July 2000 the government issued Delivery Order 0001 which required appellant to remove the existing roof at Building 1215 to existing precast concrete decking, spot mop the ventilating base sheet, fully mop one-inch polyisocyanurate and perform other related services for a price of $25,253.85. Based on the scheduling provisions of the contract, appellant had 45 days from receipt (until 30 August 2000) to complete the work. (R4, tab 1, § 00720, ¶ 1.3, tab 3, blocks 10, 18, 19)

13. Appellant never submitted either a quality control plan or a safety plan (tr. 1/51-52, 2/162-63).

14. Appellant never provided the qualifications of the manufacturer and the applicator of roof material (tr. 1/53, 2/164-65).

15. On 20 July 2000 appellant faxed the OICC: (1) stating that it would like to install a 2-ply vapor barrier on Building 1215; (2) objecting it had not received Building 5500; and (3) stating it had often attempted to involve a government roof consultant or provide a private roof consultant to arbitrate the issues (R4, tab 5).

16. On 24 July 2000 the OICC wrote appellant and stated among other points that: (1) their research reflected that installation of a 2-ply vapor barrier was not needed, and appellant should proceed with Delivery Order 0001 as issued; and (2) they accompanied appellant at its request to Building 5500, and intended to award Building 5500 once funds were received (R4, tab 6).

17. The OICC understood that appellant wanted to replace the spot mopped ventilating base sheet with a fully mopped, 2-ply vapor barrier and was not satisfied with the government's research of the industry standards. In light of that understanding, the OICC contacted a roofing expert with Southern Division in Charleston, South Carolina. (Tr. 3/21-26)

18. Richard Dumay, a roofing expert at Southern Division, investigated this issue. Mr. Dumay determined that the contract requirement for a spot mopped ventilating base sheet was in accord with industry standards and appropriate for use on Building 1215. Mr. Dumay therefore advised the OICC office to proceed with the delivery order as written. (Tr. 2/133-34, 138; ex. G-7)

19. Mr. Dumay received a BS in Civil Engineering in 1971 and a MS in Engineering Management in 1972, had worked as a roofing specialist with the government since 1988, and was licensed as a professional engineer in the State of Kentucky. At trial Mr. Dumay presented expert testimony on the propriety of spot mopping on Building 1215 and other technical issues in this regard. (Tr. 2/126, 150; ex. G-7)

20. Mr. Dumay testified that it would not have been appropriate to substitute a fully mopped application for the spot mopped ventilating base sheet. A fully mopped application would not allow the moisture in the existing concrete deck to escape into the atmosphere, which would result in damage to the waterproofing insulation above the concrete deck. (Ex. G-7 at 5-6; tr. 2/131-34)

21. On 27 July 2000 appellant wrote the OICC objecting that appellant did not receive Building 5500 and stated:

> We, hereby, again request in writing from the government's roofing consultant and our private roofing consultant for the two issues stated below:
>
> (1) Spot mopped ventilating base sheet in lieu of a fully mopped vapor barrier.

(2) Spot mopped ventilating base sheet onto the light weight concrete in lieu of mechanically fastening this product.

(R4, tab 7 at 2)

22. On 31 July 2000 the government wrote appellant directing appellant to forward the required submittals for approval "so work can commence at the earliest possible date" (R4, tab 8).

23. On 1 August 2000 the OICC wrote appellant and stated: (1) after discussing appellant's 27 July 2000 letter with the roofing consultant, the government concluded Delivery Order 0001 was correct as written; (2) approved submittals were required prior to beginning work; (3) appellant was directed to proceed with Delivery Order 0001; and (4) if appellant disagreed with the determination it could request a contracting officer's decision pursuant to the Disputes clause (R4, tab 9).

24. On 1 August 2000 appellant faxed the OICC and requested a formal meeting with the roofing consultant from Charleston, South Carolina and a member of the American Standards Roofing Code regarding the dispute that a fully mopped vapor barrier should be applied (R4, tab 10).

25. On 2 August 2000 the OICC denied appellant's request for the meeting, reminded appellant the submittals had not been received, and stated that appellant could request a final decision pursuant to the Disputes clause of the contract (R4, tab 11).

26. On 2 August 2000 appellant faxed the Southern Division Naval Facilities Engineering Command in North Charleston, South Carolina requesting that office to intervene in the "arbitration/roofing consultant" dispute (R4, tab 12).

27. On 4 August 2000 the OICC issued a cure notice to appellant, specifically citing its failure to provide the necessary submittals (R4, tab 13).

28. On 4 August 2000 appellant wrote the OICC regarding this dispute and stated: "The Government has failed to respond with expertise to Nu-Waay Enterprises, Inc." (R4, tab 14).

29. On 22 August 2000 the OICC again notified appellant that the contract might be terminated for default, and gave appellant 10 days from receipt of the notice to provide any excuses for its non-performance (R4, tab 16).

30. On 25 August 2000 appellant responded by raising numerous concerns:

> 1. The government's "total efforts have been designed to destroy this contract from the beginning."
>
> 2. The government had created a "false and financially binding situation" on appellant by issuing a delivery order for Building 1215 which, in appellant's view, did not need a new roof.
>
> 3. The government had failed to resolve appellant's suggestion regarding the fully mopped vapor barrier.

(R4, tab 18)

31. On 29 August 2000 the OICC responded to appellant's concerns and again pointed out that the procedures to get to a hearing were set out in the contract's Disputes clause (R4, tab 19).

32. Appellant never began removal of the roof as required by Delivery Order 0001 (ex. G-4 at 4).

33. On 15 September 2000 the Albany, Georgia office drafted a memorandum for the contracting officer at Southern Division headquarters in Charleston, South Carolina recommending the contract be terminated for default (ex. G-4).

34. On 28 September 2000 the government terminated the contract for default (R4, tab 2).

35. Mr. Simpson testified that he wanted to install the fully mopped vapor barrier *in addition* to the ventilating base sheet, and that when he used the term "in lieu of" in his 27 July 2000 letter, he intended to say "in addition to" (tr. 2/180-86).

36. Mr. Simpson testified that having to start off with a small delivery order, like the one issued for Building 1215, would "cripple [appellant's] business." Appellant could not recoup its mobilization costs on Delivery Order 0001. (Tr. 1/140-41, 2/171-72, 197-202)

37. Appellant presented copies of roofing contracts which the government awarded to other contractors between 1999 and 2001 (exs. A-1 to A-6).

DECISION

Termination for default is a drastic sanction that should be imposed upon the contractor only for good cause in the presence of solid evidence. *J. D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). 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). If the government satisfies its burden, a defaulted contractor has the burden of proving that its nonperformance was excusable under the provisions of the default termination clause. *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 992 (1996). A contractor's abandonment of performance gives the government an independent right to terminate. *Polyurethane Products Corp*., ASBCA No. 42251, 96-1 BCA ¶ 28,154 at 140,545; *Olson Plumbing & Heating Co. v. United States*, 602 F.2d 950, 957 (Ct. Cl. 1979).

Appellant seemingly abandoned this indefinite quantity contract for roof work. Appellant never provided the required submittals (findings 13, 14), and never began removal of the roof as required by Delivery Order 0001 in the amount of $25,253.85, which was to be completed by 30 August 2000, four weeks before the default termination (findings 12, 34). The record reflects the government considered the objections which appellant presented and reasonably addressed appellant's concerns (findings 17, 18, 23). No less than three times the government wrote appellant that it must provide the submittals set out in the contract (findings 22, 25, 27). The government issued cure notices on 4 August 2000 and 22 August 2000 due to appellant's failure to perform (findings 27, 29). On 24 July 2000 and 1 August 2000, appellant was directed in writing to proceed with Delivery Order 0001 (findings 16, 23). The government has carried its burden that the default termination was justified.

Appellant offers essentially two excuses for not performing. First, appellant asserts that the government misunderstood appellant's statements that it wished to provide a fully mopped vapor barrier "in lieu of" the spot mopped ventilating base required by Delivery Order 0001 (finding 21). Rather, appellant's intention was that the fully mopped vapor barrier would be "in addition to" the spot mopped ventilating base (finding 35).

Second, Building 1215, which was the subject of Delivery Order 0001, was too small for appellant to recoup its mobilization costs. Appellant felt it had reason to believe it would first receive Building 5500, a much larger building. (Findings 30, 36) Additionally, appellant presented copies of other roofing contracts which were awarded during the same time period as the contract (finding 37). Perhaps appellant asserts this was work which appellant should have received under the contract.

Regarding the appellant's first point, the undisputed expert testimony was that the fully mopped vapor barrier would not allow moisture in the existing concrete deck to escape into the atmosphere, resulting in damage to the waterproofing insulation above the concrete deck (finding 20). Thus, although the government was justified in its interpretation of appellant's proposed change to Delivery Order 0001, it is immaterial whether the fully mopped vapor barrier was in lieu of or in addition to the spot mopped ventilating base sheet. The government was within its rights to refuse this suggestion by appellant.

Regarding appellant's second point, appellant obligated itself by contract to perform delivery orders for work of an amount between $2,000 and $250,000, with a guaranteed minimum of $50,000 (findings 3, 4). Appellant had had one indefinite quantity contract prior to the contract, and understood that the government had no obligation to order more than $50,000 under the contract (finding 9). The government had no obligation to order additional work from appellant in the face of its refusal to perform Delivery Order 0001.

Appellant has not carried its burden of proving that its nonperformance was excusable under the provisions of the default clause.

Accordingly, the appeal is denied.

Dated: 29 December 2003

JEAN SCHEPERS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

PAUL WILLIAMS
Administrative Judge
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. 53245, Appeal of Nu-Waay Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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