ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Griffin Services, Inc.	)	ASBCA No. 53802
	)	
Under Contract No. DAKF11-00-C-0006	)	

APPEARANCES FOR THE APPELLANT: Karl Dix, Jr., Esq.
W. Stephen Hart, Esq.
Smith, Currie & Hancock LLP
Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
Raymond M. Saunders, Esq.
Chief Attorney for Bid Protests

OPINION BY ADMINISTRATIVE JUDGE COLDREN ON
APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Appellant's contract was partially terminated for default, and appellant appealed that decision. Appellant now seeks summary judgment "as to Count II of its Notice of Appeal and Complaint."

Appellant claims that the default termination was improperly issued without a required cure notice. The Government rescinded a previously issued cure notice. The Government seeks to have that rescission vitiated, arguing (1) that performance of appellant's proposed performance plan submitted in response to the cure notice was a condition precedent to its rescission of that cure notice; and/or (2) appellant misrepresented that it intended to adhere to that proposed performance plan causing the contracting officer to rescind the cure notice.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 13 October 2000, the Government awarded appellant Contract No. DAKF11-00-C-0006, under which appellant was to perform "Installation Support Services" at Fort McPherson, Fort Gillem, and a nearby recreational area. Appellant's major functional duties within those services were: "Supply and Services; Environmental Services; Real Property Operations, Maintenance, Repair, Construction and Other Related Services; Transportation Services; Equipment Maintenance Services; and Administration & Automation." (R4, tab 1, at ¶¶ C.1, C.1.1)

2. Under the contract, appellant's responsibilities, as relevant here, included "Preventive Maintenance," "Plumbing and Pipefitting," "Boiler and Heating Plants Operation," "Boiler and Heating Plants Maintenance and Repair," "Chiller Operations," and "Chiller Maintenance and Repair" (R4, tab 1, at ¶¶ C.5.6.2.7, C.5.6.2.16, C.5.6.2.27, C.5.6.2.28, C.5.6.2.29, C.5.6.2.30). To accomplish those duties, appellant was required to provide, among others, "Facilities Operations Personnel" and "Utilities Maintenance Personnel" who were fully qualified as delineated in the contract and referenced criteria (*id*. at ¶¶ C.1.3.1.2, C.1.3.1.3).

3. A special requirement of the contract was that appellant had to "provide on-site 24 hour support for the building systems for Buildings 200 (HQ FORSCOM), 363 (Third U.S. Army HQ), and 315 (U.S. Army Reserve Command)" (R4, tab 1, at ¶ C.1.13.2). The contract identified Buildings 200 (HQ FORSCOM) and 363 (Third U.S. Army HQ) as "Special Facilities." It required appellant to "operate, maintain, and repair facilities" at those locations, among others, "24-hours-a-day, 7-days-a-week." (*Id*. at ¶¶ C.5.6.2.2, C.5.6.2.2.1)

4. The requirement for security clearances was delineated in the Department of Defense Contract Security Classification Specification, DD Form 254, attached to the contract. The classification specification stated that access to equipment within "secured compartmented information facilit[ies]" (SCIFs) would be necessary, and required: (a) that appellant's employees which were expected to work within those SCIFs maintain Top Secret clearances, and (b) "arrive at duty site on the first day of the contract . . . with required security clearances." (R4, tab 1 at ¶ C.1.5.5.3.1; tab 2)

5. By letter dated 7 February 2002, appellant was issued a Cure Notice. The notice stated that appellant's "failure to perform Preventive Maintenance, Boiler and Heating Plants Operations, Boiler and Heating Plants Maintenance and Repair, Chiller Operations and Chiller Maintenance and Repair, [were] conditions that are endangering performance of the contract." The notice listed several "statement of work paragraphs" which would be affected if the Government terminated the contract as a result of contract performance not improving. Except for ¶¶ C.1.3.1.2, and C.1.3.1.3, which dealt with "Facilities Operations Personnel" and Utilities Maintenance Personnel," the listed sections corresponded to the conditions identified as deficient, *i.e*., boiler, heating plant, and chiller operation, maintenance, and repair. The cure notice stated:

> [The Government is] particularly, but not exclusively, concerned with conditions in Building 200, Headquarters, FORSCOM. Energy management systems in Building 200 monitor and control Building 200, United States Reserve Command (Building 315) and Third United States Army (Building 363), as well as many other facilities on post. If operations fail in Building 200 – other facilities also fail.

(R4, tab 5)

6. The cure notice referenced five Contract Discrepancy Reports (CDRs) which the contracting officer (CO) had received since 28 January 2002. The record includes no evidence that appellant had received copies of the CDRs prior to this cure notice. Some of these CDRs were accompanied by supporting documentation and photographs. At least four of the CDRs dealt with conditions concerning contractor performance in Building 200. The cure notice also delineated several other issues, most of which also involved Building 200. Finally, the cure notice cautioned that, if appellant did not cure these performance problems within ten days, the Government would "delete these items from the option periods beginning in March 2002." (R4, tab 5)

7. By letter dated 8 February 2002, appellant responded to the cure notice, informing the Government that it would provide, by 18 February 2002, its "plan to remedy or address the issues raised" by the notice (R4, tab 6). By letter dated 13 February 2002, the Government replied to appellant that "[a] plan will not satisfy the requirements of the cure notice." The Government further stated that "[a]t this stage of the contract we need to see performance – not a plan. Unless the deficiencies are cured within 10 days from the date of receipt of the Cure Notice the government will terminate the identified paragraphs from the contract." (R4, tab 7)

8. By a letter dated 18 February 2002, counsel for appellant responded to the cure notice by stating that appellant by "this letter and other actions taken at the Project site, . . . has fully cured any deficiencies identified in the Army's letter." The letter contended that the alleged performance deficiencies were either factually incorrect or items already corrected. It further stated that the deficiencies raised did not "merit the issuance" of a cure notice. It further pointed out that no prior documentation of deficiencies had been provided to appellant. The Government was urged to begin its obligations of cooperation and non-hindrance by timely notification of any deficiencies in appellant's performance and Government withdrawal of the cure notice. (R4, tab 8)

9. By letter dated 22 February 2002, the Government responded to counsel's cure notice rebuttal letter by taking exception to several of appellant's rebuttal points. The letter concluded by rejecting appellant's request for withdrawal of the cure notice, stating, "In as much [sic] as some of the items you have already 'cured' and others have been 'resolved' the government sees no benefit to withdrawing the Cure Notice." (R4, tab 9)

10. After a meeting between the parties, the contracting officer wrote a letter dated 25 February 2002 to appellant and stated that the parties' "mutual understanding" of the cure notice and appellant's "proposed response" should help avoid a default. The Government also announced that it would exercise its first option, and would eventually revisit whether to put back into the contract some work previously terminated for convenience. Regarding the cure notice, the Government stated that it was "exercising forbearance under the cure

notice to allow additional time to correct issues" identified at the meeting. The Government further stated:

> We are anxiously awaiting [appellant's] plan for these procedures and will review [appellant's] progress in meeting the goals of your plan in 30 days after implementation of the plan. At that time we will review whether or not to lift the cure notice.

(R4, tab 10)

11. The Government exercised its first option by contract Modification No. P00011, with an effective date of 1 March 2002 (R4, tab 14).

12. By letter dated 7 March 2002, appellant's counsel responded to the Government's letter of 22 February 2002 by renewing its request that the cure notice be withdrawn (R4 , tab 12).

13. By a letter dated 11 March 2002, the Government replied to appellant's counsel that some items in the cure notice still required attention, and raised a new problem. That problem was that the HVAC in Building 200 was not operating causing the beginning of the loss of server operation which in turn "jeopardizes our mission as the Forces Command Headquarters." (R4, tab 13)

14. At some point, apparently in early March 2002, appellant presented its "Plan of Operations – Facility 200 (FORSCOM)" to the Government. The plan stated that appellant understood the "critical nature" of Building 200, and that the successful operation of that building was "the highest priority." The plan indicated that its staff would have the technical expertise to perform the work but failed to mention anything about the security clearances of these employees except that it asked the Government's help "in obtaining either interim secret security clearances or at least waivers until the system can process the applications. Currently we only have a few personnel who can operate within facility 200 areas without another Griffin escort. All applications have been in for at least 6 months." (R4, tab 18, encl. 2)

15. By letter entitled "Rescission of CURE NOTICE," and dated 23 April 2002, the Government informed appellant:

> The Reorganizational Chart and Plan of Operations for Building 200 has been reviewed and accepted by this office. Based on these submittals the Government hereby rescinds the CURE NOTICE issued 7 February 2002.

> Close monitoring by the COR and QAE's [sic] will ensure performance is in compliance with these submittals. Hopefully corrective action as stated in the reorganizational chart and plan of operations will prevent future discrepancies.

(R4, tab 17)

16. There is no extrinsic evidence in the present record that the Government intended to accept any obligation under the plan when it stated in its 23 April 2002 rescission of cure notice letter that the Reorganizational Chart and Plan of Operations for Building 200 had "been reviewed and accepted." (*See* finding 15) On the other hand, there is no indication in the record that the Government took any exception to the plan's requests for Government assistance, such as "in obtaining either interim secret security clearances or at least waivers until the system can process the applications." (*See* finding 14)

17. By final decision letter dated 14 May 2002, the contracting officer notified appellant that "effective immediately all performance associated with boiler operations at Fort McPherson and Fort Gillem, as well as operations and preventive maintenance of special facilities, buildings 200, 315 and 363 is terminated pursuant to contract clause, Termination (Cost-Reimbursement), FAR 52.249-6(a)(2)." She noted that the termination was based on non-performance of both the contract specifications and the plan appellant submitted in response to the cure notice. The termination for default notice further stated:

> A Cure Notice was issued on 7 February 2002, giving notice of a "systematic and widespread failure to perform preventive maintenance and required operations tasks" for special facilities "particularly . . . with conditions in Building 200, Headquarters, FORSCOM". A number of specific failures to perform were also noted. In letter [sic] dated February 25, 2002, the Contracting Officer notified [appellant] of the Government's intent to exercise the first option period; the Contracting Officer also extended the Cure Notice into the option year allowing 30 days for [appellant] to implement its plan in response to the Cure Notice. Based upon [appellant's] commitment to implement its Plan of Operations, Facility 200 (FORSCOM), the Contracting Officer lifted the Cure Notice on 23 April 2002.
>
> Since the Cure Notice was lifted, performance continues at a low level for operational tasks in the special facilities area. Performance has also been greatly hindered by the lack of qualified personnel performing these tasks in secure areas due to failure in providing personnel with required security clearances. . . . I also learned that second and third

> shifts were being staffed solely by personnel without security clearances. These workers may enter only the mechanical control room and have no access to the rest of Building 200 or the other special facilities. They cannot perform required rounds through the building, respond to any emergency, nor can they perform preventive maintenance or service orders.

(R4, tab 18 at 1-2) The termination was incorporated into the contract via Modification No. P00013, effective 15 May 2002 (R4, tab 19).

18. Attached to the termination letter were CDRs dealing with a lack of performance on the part of appellant, and documenting problems which occurred in the period shortly before the partial termination. A 3 May 2002 CDR concerned a serious water leak problem in Building 200 originating from "a blocked condensate drain" which "should have been cleaned as part of the preventive maintenance schedule." According to this CDR: "None of the building operators on duty had security clearance to enter the building." Although the CDR was apparently written the day of the mishap, *i.e*., 3 May 2002, the contracting officer did not sign it until 12 May 2002. There is no indication that appellant received this CDR, or any of the others, prior to the termination notice. (R4, tab 18, encl. 3)

19. A CDR dated 9 May 2002, and signed by the CO on the same date, states that the reason preventive maintenance was not being performed was attributable to the fact that only two employees of appellant working the first shift had security clearances. Accompanying that CDR are two tables, each purportedly showing the names of appellant's employees assigned to work in Building 200, which shifts each employee worked, and who had security clearances during a six-day period. One table showed a period in mid-April 2002, and the other table covered a period in early May 2002. According to the tables, during those twelve days, none of appellant's employees assigned to the second or third shift had a security clearance. During five of the first shifts, no employee is shown to have a security clearance. In other words, under 20% of the shifts shown had a cleared employee assigned to work. (R4, tab 18, encl. 4) Appellant disputes the Government's "assertions that it did not perform the requirements of its contract", claims that these matters are irrelevant, but has taken no specific exception to these documents in its motion or accompanying briefs. (App. reply br. at 2)

20. A CDR dated 7 May 2002, and signed by the CO on 12 May 2002, states that, over the past month, the author had repeatedly been told by appellant's employees that they could not perform required tasks "because no one had a clearance to get into the buildings," *i.e*., Buildings 200, 363, and 315. Another CDR dated 3 May 2002, and signed by the CO on 12 May 2002, relates that an investigation showed that none of appellant's employees assigned during any shift had the requisite security clearance. Another CDR dated 1 May 2002, and signed by the CO on 12 May 2002, states that appellant's employees continued "to perform in the Special facilities Buildings (200, 315 and 363) without proper security

clearances." According to this CDR, this situation required that the Government hire other contractors to perform some of appellant's tasks. A CDR dated 4 May 2002, and signed by the CO on 12 May 2002, states that appellant's employees could not investigate "an audible alarm" or "a strong chemical odor" in an area of Building 200, because no one had a security clearance to get into the building. (R4, tab 18, encls. 4, 5) Other than generally disputing allegations of non-performance, appellant has taken no specific exception to these documents in its motion or accompanying briefs.

21. According to a memorandum for record dated 14 July 2002, and an electronic message dated 3 June 2002 (e-mail), which are accompanied by a spread-sheet (all of which were apparently prepared after the present litigation began), not only did many of appellant's employees not have security clearances, many did not have applications for a security clearance on file at the time the cure notice was issued, or when the partial termination was announced (R4, tab 21). Other than generally disputing allegations of non-performance, appellant has taken no specific exception to these documents in its motion or accompanying briefs.

22. The contract incorporated by reference FAR 52.249-6, TERMINATION (COST-REIMBURSEMENT) (SEP 1996) (R4, tab 1, ¶ I.70). In relevant part, the clause provides that:

> (a) The Government may terminate performance of work under this contract in whole or, from time to time, in part, if --
>
> (1) The Contracting Officer determines that a termination is in the Government's interest; or
>
> (2) The Contractor defaults in performing this contract and fails to cure the default within 10 days (unless extended by the Contracting Officer) after receiving a notice specifying the default. "Default" includes failure to make progress in the work so as to endanger performance.
>
> (b) The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying whether termination is for default of the Contractor or for convenience of the Government, the extent of termination, and the effective date. If, after termination for default, it is determined that the Contractor was not in default or that the Contractor's failure to perform or to make progress in performance is due to causes beyond the control and without the fault or negligence of the Contractor as set forth in the Excusable Delays clause, the rights and obligations of the parties will be the same as if the termination was for the convenience of the Government.

DISCUSSION

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co*., ASBCA No. 30144, 90-2 BCA ¶ 22,847.

In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *See, e.g., Gen. Dynamics Corp*., ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851; *ITT Fed. Serv. Corp*., ASBCA No. 46146, 97-1 BCA ¶ 28,655, *aff'd*, 132 F.3d 1448 (Fed. Cir. 1997). A party cannot raise a material dispute of fact by making mere allegations without providing any proof of its version of the disputed facts through affidavits, documents, or other evidence supporting those allegations. *Brinderson Corp*., ASBCA No. 30938, 86-3 BCA ¶ 19,107 at 96,592.

As noted earlier, appellant seeks summary judgment only "as to Count II of its Notice of Appeal and Complaint." That count, *in toto*, reads:

COUNT II – CONVERSION TO TERMINATION FOR CONVENIENCE

43.

> The contract requires the Army to issue a CURE notice before terminating for default.

44.

> The only CURE notice issued by the Army was **rescinded** by the Army.

45.

> The only termination without a Cure notice allowed by the clause relied upon by the Army, [sic] is a termination for convenience.

46.

> [Appellant] was prejudiced by the Army's failure to issue a CURE notice since the basis of the CURE notice was factually and legally incorrect. [Appellant] was fully complying with its performance plan that the Army had accepted. The Army had failed to fulfill its obligations under the performance plan. Any deficiencies of [appellant] were excusable.

47.

> By failing to issue a CURE notice, the termination ordered by the Army is a termination for convenience.

Count II presents the legal issue of whether or not the Government terminated the contract for default without fully complying with the contract's termination clause requiring that a cure notice be issued giving appellant 10 days to cure the specified contract deficiencies. The only cure notice issued was formally rescinded by the Government prior to the termination (finding 15). Therefore, the Government did not comply with the literal terms of the contract for issuing a termination for default.

The Government seeks to avoid that non-compliance on two grounds. First, it argues that it was fraudulently induced into rescinding the cure notice. The Government characterizes the letter rescinding the cure notice as a "voidable" contract; therefore, the Government was entitled to repudiate the cure notice rescission once the Government learned of appellant's misrepresentation. Second, the Government argues that the rescission itself was void, "because of the nonoccurrence of a condition precedent." According to the Government, "conforming performance" by appellant in accordance with its Plan of Operations was "a key condition precedent to the rescission" of the cure notice. (Gov't opp'n at 7) We examine each argument in turn.

Material Representation.

The Government characterizes the rescission of the cure notice as a "contractual action." From there, it moves to the proposition that a "contract" may be voidable if it is based upon a material misrepresentation. *See*, *e.g.*, *Morris v. United States*, 33 Fed. Cl. 733, 745 (1995) (contract voidable when fraudulent or material misrepresentation made to induce entry into contract and party was justified in relying upon misrepresentation). Emphasizing that it does not consider the "entire contract" voidable, the Government seeks to only void the rescission letter. The Government contends that appellant misrepresented that appellant could perform its plan of operations when it submitted that plan without informing the Government that it lacked adequate staff with the requisite security clearances. We need not address the validity of the Government's legal argument

concerning voidability as it applies to a cure notice because the argument fails in any event on the following ground.

As appellant points out in its reply brief, the Government's cure notice did not specifically mention the lack of security clearances for appellant's employees as an item requiring correction (app. reply at 3). Therefore, the Government could not reasonably rely on the plan as representing a cure for issues not addressed in the notice. Although there may have been some nexus between the issues complained of in the cure notice and the lack of security clearances for some of appellant's employees, that is simply not shown in the cure notice. Since the relationship has not been shown, it provides no basis for any reliance.

Condition Precedent.

The Government next argues that performance by appellant in accordance with its plan was a "condition precedent" to the Government's rescission of the cure notice. Appellant's failure to perform, according to the Government, in effect made the rescission void. (Gov't reply at 7)

Parties are free to make an event a condition "by agreement of the parties." RESTATEMENT (SECOND) OF CONTRACTS § 226 (1979) ("An event may be made a condition either by agreement of the parties or by a term supplied by the court.") Even assuming, *arguendo*, that the Government did intend to make the rescission conditional upon appellant's performance, the Government has pointed to no act or statement on the part of appellant which shows agreement to make performance in accordance with the plan a condition precedent.

DECISION

For purposes of deciding the motion, we assume appellant was not performing in accordance with the provisions of the contract. Under those circumstances, the Government was entitled to exercise its rights under the contract. It did so when it issued the cure notice. However, once it rescinded that notice, it was obligated to start the process again, *i.e*., issue a cure notice and wait ten days. Having issued a default termination notice without a cure notice, the Government failed to follow the terms of the contract. *The Swanson Group, Inc.*, ASBCA No. 44664, 98-2 BCA ¶ 29,896.

Neither of the Government's arguments mitigates that failure to adhere to the terms of the contract and the termination for default is converted to one for the convenience of the Government. Appellant is entitled to summary judgment as a matter of law as to Count II of its complaint. The motion is granted and the appeal sustained.

Dated: 27 February 2003

JOHN I. COLDREN, III
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. 53802, Appeal of Griffin Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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