ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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KSC-TRI Systems, USA, Inc.	)	ASBCA No. 54638
	)	
Under Contract No. F45603-03-P-0021	)	

APPEARANCE FOR THE APPELLANT: Mr. Charles Igwe
Vice President, Operations

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Sigurd R. Peterson, Jr., Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This appeal involves a commercial items contract for the provision of exercise instructors at an Air Force base. The contract was terminated for cause under FAR 52.212-4. The government has filed a motion for summary judgment asserting that its termination of the contract for failure to provide the services was justified. Appellant has requested oral argument in its opposition to the motion. The grant of such a request is discretionary with the Board. *Jackson Engineering Company, Inc.*, ASBCA No. 27104, 83-1 BCA ¶ 16,195. Appellant has not made a showing that oral argument is necessary or appropriate, and we deny the request. The motion is granted.

STATEMENT OF FACTS

Contract No. F45603-03-P-0021, a small business set-aside, was awarded to appellant KSC-TRI Systems, USA, Inc. (KSC), a company located in Granada Hills, California, on 11 December 2002. The initial contract period was 1 January 2003 through 31 December 2003, for a price of $21,904. The contract included an option year of 1 January 2004 through 31 December 2004 with an increased contract price of $22,784. (R4, tab 1 at 1-2) Mr. Charles Igwe, Vice President, Operations, administered the contract for KSC (R4, tab 3).

The contract included a Statement of Work (SOW) that required appellant to provide qualified instructors to teach aerobic dance classes at McChord Air Force Base (McChord), Washington. The instructors were required to be certified by an organization listed in the SOW or another nationally recognized organization. The SOW specified the

class schedule and allowed for additional classes by mutual agreement of the parties. The government reserved the right to cancel classes on 24-hour notice to KSC. (R4, tab 1 at 3-5)

The contract incorporated by reference FAR 52.212-4 CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (FEB 2002). In pertinent part, that clause provided the following:

> (f) Excusable Delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers . . . .
>
> . . . .
>
> (m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance . . . . If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.
>
> . . . .

(R4, tab 1 at 3)

KSC did not begin performance as required in early January 2003. On 7 January 2003, Ms. Kaye Moorman, the contract specialist, called appellant regarding the failure of instructors to show up. (R4, tab 6) On the same date, the government sent appellant a letter stating that KSC was in default and that a continued failure to perform could lead to termination of the contract (R4, tab 8). KSC hired Ms. Carliss Crowley to arrange for and coordinate the provision of the exercise classes, and the contract was not terminated (*id.* at 12).

Bilateral Modification No. P00002, dated 3 October 2003, provided for additional yoga classes and increased the contract amount by $958 (R4, tab 1, P00002).

On 12 December 2003, the government exercised the option and extended the term of the contract to 31 December 2004 (*id.*, P00003).

Appellant sent a lump sum payment for payroll expenses to Ms. Crowley for herself and for her distribution to the instructors (R4, tab 28). On 21 January 2004, Ms. Crowley discussed payment problems with Ms. Moorman and asked about procedures for filing a complaint against KSC. When Ms. Crowley later filed her complaint, the contracting officer forwarded it to DOL. (R4, tabs 26, 27) On 28 February 2004, as a result of delayed payments and nonpayment since December 2003, Ms. Crowley sent an email notification to the government that, beginning Monday, 1 March 2004, she and the instructors would not conduct classes at McChord. (R4, tabs 9, 26, 30) She noted the specific action required from KSC to resolve the ongoing payment issues. The email stated: "This is in no way a reflection of the McChord AFB Services or Contracting Offices. The issues are with the awarded contractor." (R4, tab 9)

KSC instructors were at the exercise facility on 1 March 2004, and met with the classes to explain why the classes were cancelled until further notice (R4, tabs 12, 13).

On 1 March 2004, Ms. Sherry Duenas, the contracting officer, issued a cure notice to appellant that the government considered KSC's failure to provide qualified aerobic instructors a condition that endangered appellant's performance of the contract. The notice stated that unless the condition was cured "within five (5) days after receipt of [the] notice, the Government may terminate for default under the terms and conditions of FAR 52.212-4, *Contract Terms and Conditions – Commercial Items* clause of [the] contract." (R4, tab 14)

The government sent the cure notice to KSC by facsimile transmission on both 1 and 2 March 2004. Each of the transmission sheets shows that the "Result" of the transmission was "OK." (R4, tab 15) Although there was some controversy as to whether and when Mr. Igwe received the notice, appellant has acknowledged notification of the problems by 3 March 2004 (app. opp. at 3). According to this receipt, KSC had until 8 March 2004 to cure the condition by resuming contract performance.

On 5 March 2004, Mr. Igwe sent an email to Ms. Moorman and Mr. William Johnson, the athletic director at the government facility, in response to the cure notice. He first stated that the search for "replacement instructors" had produced "some positive results," and KSC would send the instructors' resumes to the government "early next week" (R4, tab 17). Second, as to the original instructors, Mr. Igwe reported that

information from the coordinator needed to make separate direct payments, *i.e.* names and hours worked, had been sent but not yet received. There were issues between Ms. Crowley and the instructors and Mr. Igwe as to payment for work done. (R4, tabs 9, 17, 28 through 31) Appellant has not pointed to any evidence that KSC made timely payments, that Ms. Crowley did not pay the other instructors, or that KSC needed information that was not forthcoming from Ms. Crowley to contact the instructors and arrange for individual payments to them.

On 8 March 2004, Mr. Igwe sent another email to Mr. Johnson, with a copy to the contracting officer, that KSC had a team "to restart the stalled program" and that the new leader, Ms. Glenda Shepard, wanted to meet with the athletic director "to possibly start or coordinate [an] appropriate start date" (R4, tab 18). Mr. Igwe had informed Ms. Duenas the week before that the faxed cure notice was not received because of an upgrade of KSC equipment and asked that any faxes sent be sent again (*id.*). In response on the same day, the contracting officer sent a copy of the cure notice by email to Mr. Igwe. The email noted that the cure notice had been faxed and confirmations received on 1 March 2004. We have inferred that KSC had until 8 March 2004 to cure its failure to perform. The government warned appellant that if it failed to provide qualified instructors by 6:00 a.m. on Tuesday, 9 March 2004, the government would terminate the contract for cause. The contracting officer asked Mr. Igwe to send copies of certifications for the new instructors and additional information so that access badges could be obtained for them. (R4, tab 20) Mr. Igwe sent an email to the government on the afternoon of 8 March 2004. He said that Ms. Shepard was the "team leader and coordinator" for KSC and was authorized to act for KSC and that he was waiting to hear what the class schedule was for 9 March 2004. (R4, tab 21) Since the class schedule for Tuesdays did not begin until 10:00 a.m., he may have thought the government was changing the schedule based on the directive to be on site at 6:00 a.m. In addition, there was a notice that all the classes had been cancelled (app. resp., exh. III).

No classes were held on the morning of 9 March 2004. That afternoon, Mr. Igwe sent an email to the government reiterating that Ms. Shepard would coordinate KSC's program and advising that she would teach the 5:00 p.m. class on 9 March. (R4, tab 22) On the same day Ms. Duenas learned from Ms. Shepard that she was not familiar with the fitness program at McChord and would need a month to prepare and hire instructors. Ms. Shepard has also stated in her Declaration that she had not tried to go to the base and was not denied access. (R4, tab 34; gov't resp., att. A)

Ms. Joyce Groda, another contracting officer, contacted Mr. Igwe on 10 March 2004 to tell him that the government would be terminating the contract (R4, tab 34). Mr. Igwe sent an email to the government on 10 March 2004 to complain that the government had not properly notified KSC of the problems and had not given KSC a reasonable time to remedy the problems. He also said that the government had given him

a false start time of 6:00 a.m. on 9 March 2004, and had not provided KSC access to the base. (R4, tab 23)

By letter dated 11 March 2004, the contracting officer terminated the contract for cause, effective immediately, under FAR 52.212-4. The termination stated that it was based upon appellant's failure to provide contract services since 1 March 2004 and appellant's failure to remedy performance problems within the date specified in the 1 March 2004 cure notice. (R4, tab 35) Appellant has not shown that it provided exercise classes at McChord after 1 March 2004.

On 18 March 2004, Mr. Igwe sent emails to the base commander and other government officials at McChord protesting the termination of the contract. Mr. Igwe said that appellant was not notified on time and not given enough time to fix the problems. He asserted a conflict of interest on the part of the government and complained about "RAMBO" contracting officials acting in haste and not following government guidelines and procedures. (R4, tab 24)

Appellant filed this timely appeal.

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. As movant, the government has the burden of showing that there are no genuine issues of material fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-1391 (Fed. Cir. 1987). The nonmoving party must then set forth specific facts showing that there are genuine and material factual issues. Disputes about irrelevant or immaterial facts are insufficient. The nonmoving party must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient. *Ver-Val Enterprises, Inc.*, ASBCA No. 49892, 01-2 BCA ¶ 31,518 at 155,597.

The nonmoving party's evidence is to be believed, and all reasonable factual inferences are to be drawn in its favor. A genuine dispute arises only when the nonmovant presents enough evidence so that a reasonable fact finder, drawing the requisite inferences and applying the applicable evidentiary standard, could decide the issue in favor of the nonmovant. Even if material facts are in dispute, summary judgment may be granted, if, after factual inferences are drawn in favor of the party opposing summary judgment, that party still could not prevail. *Ver-Val Enterprises, Inc., supra.*

The government maintains that it is clear that KSC failed to provide services required under the contract and did not cure that problem in the time granted by its cure notice. The government submits that the failure was not excusable. Appellant argues

that there are genuine issues of material fact concerning payment issues, failure by the government to provide needed equipment, and scheduling changes (app. opp. at 3). According to appellant, its failure to provide services was caused by the coordinator of the exercise instructors at McChord, and it was attempting to remedy the problem. Appellant also complains about how the government provided notice and states that it was not given a reasonable time in which to cure the problem. Appellant seeks to excuse its failure to perform on the basis that it had hired a new coordinator, but the government refused to provide her with access to the base or with the class schedule. KSC also accuses the government of acting with haste in bad faith and asserts that the termination was an abuse of discretion.

FAR 12.403 TERMINATION, provides in part:

> (a) *General.* . . . [T]he requirements of Part 49 do not apply when terminating contracts for commercial items . . . .
>
> (b) *Policy.* The contracting officer should exercise the Government's right to terminate a contract for commercial items . . . for cause only when such a termination would be in the best interests of the Government . . . .
>
> (c) *Termination for cause.*
>
> (1) . . . [The] requirement [that a contractor notify the contracting officer of any excusable delay] should eliminate the need for a show cause notice prior to terminating a contract. The contracting officer shall send a cure notice prior to terminating a contract for a reason other than late delivery.
>
> . . . .
>
> (3) When a termination for cause is appropriate, the contracting officer shall send the contractor a written notification regarding the termination . . . .

Under FAR 52.212-4(m), the termination for cause clause for commercial services contracts, the government initially has the burden of proving that the termination for cause was valid. Appellant did not provide services required by the contract from 1 March 2004 through the date of termination, 11 March 2004. KSC was not able to begin performance again within a reasonable time period. Ms. Shepard's Declaration states that she needed at least a month to start work as the new coordinator. Appellant

has not disputed these facts. Accordingly, the government had grounds to terminate the contract for cause.

Because the government has shown that its termination of the contract was proper, KSC has the burden of establishing that its nonperformance was caused by an occurrence beyond its reasonable control and without its fault or negligence. FAR 52.212-4(f); *Double B Enterprises, Inc.*, ASBCA Nos. 52010, 52192, 01-1 BCA ¶ 31,396 at 155,110. Appellant has attempted to excuse its nonpayment of the instructors, which caused the work stoppage, by alleging that the coordinator refused to provide information that would have allowed KSC to pay the instructors directly. Appellant has provided no evidence that the coordinator was its subcontractor, that it made timely payments to the coordinator, that the coordinator did not pay instructors, or that it could not have paid the instructors without the information it requested from the coordinator. Moreover, such evidence would not establish that appellant's failure to provide the services required by the contract was beyond its reasonable control or without its fault or negligence. A contractor is responsible for providing the necessary labor for performance of a contract awarded to it, and a failure to do so is not good cause for excusing performance. *NTC Group, Inc.*, ASBCA Nos. 53720, 53721, 53722, 04-2 BCA ¶ 32,706 at 161,809. The circumstances under which labor problems might form a basis for excusability are limited to "the most unusual circumstance as where the Government also contributed to the delay . . . or where abnormal circumstances exist which could not have been anticipated." *Id.*, 04-2 BCA at 161,910. Appellant was the responsible party for resolution of the payment issue or providing new instructors. Its failure to do so under the circumstances was not excusable.

KSC asserts problems with the cure notice provided by the government. First, appellant notes that the government did not notify the Small Business Administration (SBA). The provision of a copy of a cure notice to the SBA is required by FAR 49.402-3(e)(4). As the government points out, however, the requirements of Part 49 do not apply where a contract contains the commercial items clause at FAR 52.212-4. FAR 12.403(a).

Second, appellant disputed receiving appropriate, timely notice of its failure to perform, but has acknowledged receipt of the cure notice on or about 3 March 2004 (app. opp. at 3). There is no doubt that the government provided appellant with the time allowed in the cure notice* and that KSC did not satisfactorily explain its failure to perform, remedy that failure, or provide adequate assurance of future performance.

* The government specified the deadline as 9 March 2004, which covers five days starting 3 March 2004.

Third, appellant argues that it did not receive the ten days normally allowed under Default clauses or a "reasonable" time in which to cure the problem. The standard Default clause does not require a cure notice when a contractor fails to provide services on time. *See e.g.*, FAR 52.249-8(a)(1). The regulations relating to the commercial items clause also do not require a cure notice before a contract is terminated for late delivery. FAR 12.403(c)(1). The government gave appellant some time to cure the problem, but it was not thereby required to allow ten days or a "reasonable" time. We have upheld, on summary judgment, a partial termination for default that was issued before expiration of the time provided in a cure notice where it was clear that the default had not been cured and could not be cured before the expiration of the cure period. *Automotive Repair & Management*, ASBCA No. 45316, 94-1 BCA ¶ 26,516 at 131,986. KSC has not demonstrated with sufficient evidence that it could or would have resumed performance within a reasonable time if given the opportunity. Thus there is no genuine issue of material fact, nor has appellant raised a legal argument with respect to the cure notice that would prevent the entry of judgment in the government's favor.

Appellant argues that the government was responsible for its nonperformance because Ms. Shepard, its new coordinator, was prepared to start on 9 March 2004, but she did not because the government did not provide her with access to the base and because scheduling changes, while the classes were currently cancelled, needed to be discussed. Ms. Shepard's Declaration, however, states that she would have needed 30 days to restart the exercise classes, and she was not denied access to the base. Appellant has not shown that the government's request for performance early on 9 March 2004 was unreasonable whether or not a class was scheduled for that time.

KSC makes some broad generalizations about bad faith, haste, and malice on the part of the government. It provides no evidence in support of these allegations. Appellant has the burden of proof, but has failed to provide evidence to raise a genuine issue of material fact with respect to any abuse of discretion by the contracting officer. *Ver-Val Enterprises*, *supra* (conclusory statements or completely insupportable, specious, or conflicting explanations or excuses will not raise a genuine issue of fact).

Appellant also asserts that summary judgment is inappropriate because it should be allowed to take discovery. Appellant has had ample time for discovery since the complaint was filed in August 2004. Appellant does not explain what issues the discovery would relate to or what evidence it expects to find. Under such circumstances, there is no need to deny summary judgment. *See Scientific Management Associates, Inc.*, ASBCA No. 50956, 00-1 BCA ¶ 30,828 at 152,154 (denial of summary judgment is not required if the discovery is merely to satisfy a litigant's speculative hope of finding some evidence that might tend to support a complaint); *Padilla v. United States*, 58 Fed. Cl. 585, 593 (2003) (a party opposing summary judgment must set forth with some precision

the evidence it hopes to obtain, how the evidence would likely disclose issues of material fact, and why it is unable to access such evidence without further discovery).

CONCLUSION

For the reasons stated above, the government's motion for summary judgment is granted, and the appeal is denied.

Dated: 8 December 2005

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

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. 54638, Appeal of KSC-TRI Systems, USA, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals