

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Ingenium Corporation) ASBCA No. 56764
)
Under Contract No. F01620-03-D-0003)

APPEARANCE FOR THE APPELLANT: William A. Shook, Esq.
Shook Doran Koehl LLP
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APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
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Trial Attorneys

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

The Department of the Air Force (government) has moved for summary judgment in ASBCA No. 56764. This appeal was filed by Ingenium Corporation (appellant) from a decision of the contracting officer (CO) terminating for default Task Order (TO) Nos. 0012 and 0014 under the above captioned contract.¹

As stated by the government, the legal issue presented by its motion is a narrow one, as follows:

Whether Appellant's failure to assist the Government in loading the required software onto the Government's test equipment, and its failure to ensure that the software loaded properly (detailed in Undisputed Material Facts Nos. 68-72) justify terminating Appellant's contract for default as a matter of law.

¹ This appeal is consolidated with ASBCA No. 56883, an appeal from a CO decision denying appellant's monetary claim in the amount of \$1,528,525.

(Mot. at 1) The government asserts that appellant's failure to render assistance to the government is undisputed and constituted a repudiation of appellant's contract obligations, thereby justifying a default termination as a matter of law. Appellant opposes the motion, asserting that there are material facts in dispute. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

STATEMENT OF FACTS (SOF) PERTINENT TO THE MOTION

1. On 29 September 2006, the government awarded appellant fixed-price TO No. 0012, in the amount of \$2,344,177, under Contract No. F01620-03-D-0003 (R4, tab 1). The parties dispute the scope of the work to be performed under this TO. They do agree in general that appellant's task was to convert Cargo Movement Operation Systems (CMOS) 7.2 software from a client-server environment to a web-based environment, along with related deliverables. On 21 September 2007, the government awarded appellant fixed-price TO No. 0014, which provided for related labor and data support in the amount of \$96,926 (R4, tab 24). The Statement of Work (SOW), as revised, required delivery of the software to the government, ready for government testing, by 30 June 2008 (R4, tab 45 at 9, ¶ 3.1).

2. Appellant encountered difficulties and delays incident to the performance under these TOs. The parties dispute who was responsible for these difficulties and delays.

3. By e-mail and letter to appellant dated 22 July 2008, Ms. Sherrita D. Muse, CO, issued a cure notice to appellant, asserting that appellant had failed to provide certain deliverables to the government by 30 June 2008 as required (R4, tab 77).

4. By e-mail and letter to the government dated 1 August 2008, appellant responded to the government's cure notice. Appellant stated as follows:

Please be advised that the CMOS version 8.0 is substantially complete and currently meets "established requirements" as set forth in the Statement of Work, as amended. We would be pleased to demonstrate the system to you at your convenience. Furthermore, as of July 31, 2008, Ingenium's Formal Qualification Testing shows that 78.75% of the Government-identified Test Description steps have been accomplished and 94 of the 169 Government-identified Test Descriptions have been "Passed" during Government Observed tests. We continue working on the remaining Government-identified Test Descriptions and expect successful completion of those tests as well.

Appellant also stated as follows:

As discussed at the briefing on July 16th, the delays and extra costs encountered by Ingenium in producing the required deliverables has been the result of numerous factors including compensable additional Government-identified Test Descriptions, defective specifications, a difference in interpretation of the Contract's Statement of Work, and changes in contract requirements. While Ingenium is currently focused on completing the deliverables as presently understood, we are also in the process of documenting the changes, delays, and increased requirements. The following is a partial listing of those differences that we have identified to date. Please note that because many of these differences have an impact on scheduling and sequencing as well as additional costs, we do not yet have a definitive schedule of delays and extra costs. Total extra costs and associated delays will not be known until all of the Government-identified Test Descriptions have been completed.

(R4, tab 80 at 4, 6 of 12)

5. Appellant performed a demonstration of the software during the period 21-28 August 2008 (R4, tab 99 at 1, ¶ 1). The parties dispute whether appellant's CMOS version 8.0 was substantially complete at this time.

6. By memorandum to appellant dated 8 October 2008, Mr. Raymond McCain, Termination Contracting Officer (TCO), issued a show cause notice to appellant under the TOs, asserting, *inter alia*, that appellant's position that the government was responsible for delay and additional cost was unfounded, and that since appellant had "failed to deliver CMOS 8.0 and the required deliverables under the subject contract task orders in accordance with the contract terms, the Government is considering terminating the contract task orders for default...." The TCO provided appellant the opportunity to show whether these failures "arose out of causes beyond your control and without fault or negligence on your part." (R4, tab 102 at 1, 2 of 4)

7. On 23 October 2008, appellant replied by e-mail, asserting that the show cause notice was sent to appellant's old address and the government's e-mail of the notice was received on 22 October 2008. Appellant disputed the government's assertion that its position was unfounded, contending that the government constructively changed the TOs,

and appellant was entitled to a time extension and additional costs. Appellant concluded as follows:

[A]s demonstrated at the 6 day demonstration of CMOS v. 8 conducted between August 21, 2008 and August 28, 2008, Ingenium successfully demonstrated a system that meets contract requirements. Each of the very minor issues reported by the Government to Ingenium at the end of the day of testing has now been resolved. Out of abundance of caution and in an effort to demonstrate Ingenium's good faith effort to cooperate with the Government in this matter, we are preparing the final deliverables listed in Section 8.0 of the Task Order. Attached hereto is a schedule for delivering those deliverables. Please note that the deliverables will meet the stated requirements of the Task Order but are incomplete with regard to all of the Government-mandated TDs.

(R4, tab 106 at 5 of 5)

8. By memorandum to appellant dated 31 October 2008, the TCO responded to appellant's 23 October 2008 letter. The TCO stated, *inter alia*, that a decision on default would not be made prior to receipt and testing of deliverables, and that appellant "should not retain your work force or incur any further costs pending this review." (R4, tab 110 at 3 of 3)

9. In a letter to the TCO dated 31 October 2008, appellant listed the deliverables provided to the government to date. It also listed the claimed changes made by the government, resulting in increased cost and increased time for performance (R4, tab 108 at 4 of 11). Appellant's e-mail and letter to the TCO dated 3 November 2008 addressed certain remaining deliverables (R4, tab 112 at 3 of 7).

10. By e-mail and letter to appellant dated 21 November 2008, the CO stated as follows:

The purpose of this letter is to inform you that the Government is reviewing the hard and soft documentation copies of the deliverables and source code submitted in response to the Government's Show Cause Notice dated 08 Oct 08. We have not been able to load and run this software based on the documentation submitted by Ingenium Corporation. *If Ingenium considers the code submitted to be functional, we would like to offer you the opportunity to assist*

in the loading process at the government facility. It is the Government's expectation that any support as part of the show cause response would be at no additional cost to the government. If you would like for the Government to consider what has been delivered, please provide a response no later than 4:00 p.m. (CST), 24 Nov 08.

If you decide to agree and assist the Government at no cost for the above request, we anticipate Ingenium Corporation to commence on 02 Dec 08, if not sooner.

(R4, tab 117 at 2 of 2) (emphasis added)

11. Appellant timely responded by e-mail and letter dated 24 November 2008. Appellant stated as follows:

This letter responds to your letter dated November 21, 2008, Show Cause Notice for Contract F01620-03-D-0003, Task Orders 0012 & 0014.

Ingenium successfully demonstrated the load and run process with the functionality of the CMOS 8.0 software during our government-observed demonstrations held on August 21-27, 2008. The documentation provided to the government addressed the steps for the load & run processes used during these demonstrations. Ingenium is available to answer questions regarding our documentation for the load and run process for CMOS 8.0 installation to determine if there may have been a misinterpretation of a step/process. *Can you provide detail as to where in our documentation the government is experiencing their issue(s)? An understanding of the issues encountered by the government using our documentation during their load and run process will help determine, if necessary, the appropriate level of resources needed for assistance.*

As of 31 Oct 2008, Ingenium was directed by Mr. McCain "not to retain" our work force pending review of the software. Therefore, key personnel on our CMOS project are not available. Depending on the type of resources that may

be needed, commencing any type of assistance to the government will not occur until after 02 Dec 08.

Please advise.

(R4, tab 118 at 6 of 7) (emphasis added)

12. Ms. Angie Gibson, appellant's director of contract administration, contacted the CO and inquired when appellant could expect a response to its letter. The CO advised that the government would not be responding to appellant's letter. (App. opp'n, attach. 2, Gibson aff., ¶ 10)

13. The government conducted an assessment of whether the subject TOs should be terminated for default. By unilateral contract modifications dated 26 February 2009, the government terminated the TOs for default, confirming the notice of default termination issued on said date (R4, tabs 7, 125). The notice of default termination stated that appellant "failed to complete the requirements of the subject contract within the time required by the terms thereof" (Bd. corr. ltr. dtd. 26 February 2009). Appellant filed a timely appeal with this Board.

14. Insofar as pertinent, SOW 4.1.3.2, as revised, provided as follows:

Government testing consists of tests run by the Government to determine compliance with requirements and demonstrate the operational capabilities of the system.... If option one (1) is exercised, the Contractor shall support all three tests by providing telephone and/or *onsite* assistance, *as needed*. [sic] to resolve problems found during testing, analysis of reported problems to determine causes and solutions, and development and delivery of corrective software as required or requested by the Government. The Contractor shall deliver new software versions at the conclusion of each test to incorporate software fixes as necessary to proceed to the next test. These software fixes or patches shall be provided at no cost to the Government. *When required during FST/DT&E testing, the Contractor shall come to the FST/DT&E location to investigate reported problems. The Contractor shall ensure that the software is fully tested and that all software deliveries shall load the first time on Government hardware.*

(R4, tab 45 at 12 of 27) (emphasis added)

DECISION

As stated by the government, the basis for its motion is narrow, as follows:

[T]he specific basis for default asserted in this Motion is Appellant's failure to come to the government's assistance in loading the software Appellant had delivered and represented met task order requirements, and Appellant's subsequent failure to support government testing by identifying and fixing the problems with the software. The fact of this failure is indisputable and provides sufficient grounds by itself for default.

(Mot. at 25)

[T]he only question before the Board is the narrow issue of whether Appellant's failure to assist the government in loading the required software onto the government's test equipment, and its failure to ensure that the software loaded properly, as required by the Contract, justify terminating the Contract for default as a matter of law.

(Reply at 1)

The law of summary judgment is familiar. Summary judgment is proper when there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Keystone Capital Services*, ASBCA No. 56565, 09-1 BCA ¶ 34,130. A material fact is one which may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

We believe the government, as moving party, has failed to meet its burden on this record. The record contains a number of material, disputed facts as well as a number of issues that need further evidentiary development, which may bear on the propriety of the default termination, including but not limited to the following: (1) whether the TCO's direction to appellant on 31 October 2008 not to retain work force and incur additional cost was authorized or otherwise ratified, and if so, whether this direction had any bearing on the appellant's ability to respond to the CO's later request for technical assistance on 21 November 2008; (2) whether there was a factual and legally supportable basis for the government to limit its request for technical assistance on 21 November

2008 to a period no later than 2 December 2008; (3) whether the CO's request for technical assistance on 21 November 2008 ("we would like to offer you the opportunity to assist...") reasonably constituted a direction for performance under SOW 4.1.3.2; (4) whether appellant's offer, in its letter dated 24 November 2008, to provide some undefined assistance after 2 December 2008 reasonably constituted a repudiation of contract performance; and (5) whether there was justification for the government's failure to respond to appellant's letter of 24 November 2008.

For reasons stated, the government's motion for summary judgment is denied.²

Dated: 15 March 2010

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

² Since we deny the government's motion for summary judgment for reasons stated, we need not address appellant's other grounds for denying the motion.

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. 56764, Appeal of Ingenium Corporation, rendered in conformance with the Board's Charter.

Dated:

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