

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
)
Colony Construction) ASBCA No. 63630
)
Under Contract No. W912WJ-22-P-0131)

APPEARANCE FOR THE APPELLANT: Mr. Jay Harris
President

APPEARANCES FOR THE GOVERNMENT: Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
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U.S. Army Engineer District, New England

OPINION BY ADMINISTRATIVE JUDGE SMITH

Proceeding *pro se*, appellant Colony Construction (Colony) challenges respondent Army Corps of Engineers' (USACE's) default termination of Colony's \$156,000 contract. The parties elected to waive a hearing and submit the appeal on the written record pursuant to Board Rule 11. USACE has shown sufficient grounds for termination, and Colony's arguments do not rebut them. So, for the reasons stated below, we deny the appeal.

FINDINGS OF FACT

On September 19, 2022, Colony was awarded a \$156,000 contract to upgrade the campground electrical system at West Thompson Lake, North Grosvenordale, CT, with a completion date of February 24, 2023 (R4, tab 3; tab 5 at 68).¹ The premise of the contract was to have the on-site work done prior to the 2023 recreation season at the lake, which began on or about April 17, 2023 (R4, tab 2 at 12). The original completion date was extended to require all physical construction to be completed by April 17, 2023 (R4, tab 6 at 70).

The contract incorporated by reference clause 52.249-10 Default (Fixed-Price Construction) (APR 1984), which allows the government to terminate the contract if the contractor fails to prosecute the work in a timely manner or fails to complete the

¹ The Rule 4 file contains 26 tabs in a single 164-page .pdf document. Our page citations are to the .pdf page numbers 1-164, not the watermarked numbers at the bottom of each page, or the internal pagination of each document.

work within the contractually agreed time. The clause further provides that the contractors' right to proceed will not be terminated if the delays in completing the work "arise[] from unforeseeable causes beyond the control . . . of the Contractor." (R4, tab 3 at 33).

Prior to beginning work in the field, the contract required preconstruction submittals that included an initial progress schedule, quality control plan, accident prevention plan, activity hazard analysis (AHA), construction site plan, work plan, environmental protection plan and waste management plan (R4, tab 4 at 52-60). The name and qualifications of a proposed testing organization and lead engineering technician was subject to USACE approval (R4, tab 4 at 61). USACE's response to submittals could be, as appropriate, approval, disapproval, or a requirement for revisions to the submittal identified in the government's review remarks on the submittal form (R4, tab 4 at 59-60).

Notice to proceed was issued on October 25, 2022 (R4, tab 5), but by January 18, 2023, after several submittals that required revisions or were disapproved (R4, tabs 7-8, 10-11), USACE summarized six insufficiencies in Colony's submittals that were delaying the scheduled March 1, 2023, mobilization date (R4, tab 12). Three of the six submittals required revisions and the other three had not been sent to USACE at all (*id.*).² The summary review remarks of January 18 referred to the earlier submittal responses which gave an explanation of each problem and how to solve it (*id.*). In addition, a product data submittal was still absent (R4, tab 9 at 82).

After several more revisions, disapprovals, and comments, with Colony's submittals still lacking necessary information (R4, tabs 12-17) and timely completion unlikely, USACE issued a cure notice on February 16, 2023, requiring a remedy within 10 days (R4, tab 18). Colony acknowledged the cure notice on February 17, 2023 (R4, tab 19), and revised two submittals that were again insufficient (R4, tabs 20, 23).

USACE issued a show cause notice on March 1, 2023, (R4, tab 24) to which Colony again responded without actually fixing the submittals (R4, tabs 22, 25). Colony indicated that it was "too late" for timely performance prior to the summer season. *Id.* On March 8, 2023, Colony informed USACE for the first time that the panelboard (the dominant piece of equipment for the project) would not be delivered until August and that work could be completed "in the fall," which was after the 2023 recreation season and untimely by at least four months (R4, tabs 25-26).

² USACE's review comments identified specific defects in the AHA, work plan, and QC plan (R4, tab 12). The missing submittals were the construction site plan, environmental protection plan, and waste management plan. *Id.*

Based on Colony's repeated inability to produce sufficient submittals and the critical delay to the panelboard which made timely performance impossible and defeated the basic purpose of the contract, USACE terminated Colony's contract for default on April 7, 2023 (R4, tab 2). The termination notice described Colony's faulty submittals and summarized the reason for termination as Colony's as a "failure to make progress and failure to provide all required submittals in order for work to begin, a condition that warrants a Termination for Default in accordance with Contract FAR Clause 52.249-10 DEFAULT (Firm Fixed Price Construction). No work has been performed on site since Notice to Proceed was issued on October 25, 2023" (R4, tab 2 at 11).

Colony timely challenged the termination, stating that "Colony Construction claims that the Corps has wrongly terminated contract #W912WJ-22P-0131 for 'default' and not 'convenience.' We pray that the Board will change the designation accordingly. Colony is asking for no monetary damages." (app. resp. to resp't mot. to dismiss at 1).

USACE has submitted a 164-page Rule 4 file which contains 26 documents showing in detail the problems with Colony's submittals and the untimeliness that caused the termination, summarized above. Colony did not supplement the Rule 4 file or otherwise provide any additional evidence to the Board. Colony's briefs total only six pages, with considerable repetition. They essentially repeat Colony's contemporaneous arguments to USACE with few references to the record.

DECISION

USACE bears the initial burden to justify its default termination which was amply described in the termination notice/final decision (R4, tab 2), and reiterated in its Rule 11 brief here. *Johnson Mgmt. Grp. CFC, Inc. v. Martinez*, 308 F.3d 1245, 1249 (Fed. Cir. 2002) ("The government bears the burden of proof in establishing the validity of a default termination."). In order to have the default overturned, the burden then shifts to Colony to show that its nonperformance was excusable. *See Zulco Int'l*, ASBCA No. 55441, 07-2 BCA ¶ 33,701, citing *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996). USACE's position that Colony failed to provide some submittals entirely, and that the rest were repeatedly insufficient, is supported by record evidence (R4, tabs 7-8, 10-17, 20, 23) and is largely unchallenged. Colony contends that it provided "39 submittals [that] seems to be lost after Cpt. Rindone got transferred" (app. br. at 1) and argues without specifics that it made several submittals to which USACE did not respond (compl. ¶ 13). But Colony does not support these allegations in its brief with any record evidence of unacknowledged submittals. To the contrary, all 12 (not 39) submittals in the record show a response by USACE (R4, tabs 7-8, 10-17, 20, 23).

Regarding the adequacy of the submittals that Colony did provide, USACE's contemporaneous review comments identified the many specific problems that justified rejection or revision of those submittals – most of which were never addressed by Colony (*id.*). Certainly, Colony has provided no evidentiary basis to challenge the factual findings above, that the review comments identified legitimate bases for our finding that Colony's submittals were deficient.

Colony also alleges that its AHA was “verbally approved [and] [t]here is no disapproval in the record” (app. br. at 1) which is contrary to USACE's AHA review remarks that required at least two additional items in the AHA submittal (R4, tab 10). If that is not clear enough, USACE's review remarks of January 18, 2023, lists the AHA as “Disapproved [on] 12DEC2022” (R4, tab 12). The review comments of February 14, 2023, reiterate faults in Colony's AHA resubmittal (R4, tab 16).

Colony asserts that its proposed testing firm is reputable (app. br. at 1), which may be true, but that statement does not meet the requirements for the testing submittal (R4, tab 4 at 59, 61, tab 25).

Colony argues that its panelboard delivery delay could not have been foreseen (app. br. at 1) but does not support this contention with any record evidence. The panelboard delay alone, which made timely performance impossible, justifies Colony's termination without even considering Colony's numerous other problems. *See Empire Energy Mgmt. Sys., Inc. v. Roche*, 362 F.3d 1343, 1357 (Fed. Cir. 2004).

Colony argues that “[a]ll outstanding [i]tems can be cleared in a matter of days,” and “I remain ready, willing, and able to start, complete, and finish the project” (app. br. at 1). Perhaps reassuring if the contract was still in effect, but these statements seem to concede that the outstanding items were not completed on schedule, or in response to USACE's cure notice, or, in some cases, not at all.

In sum, USACE has met its burden of proof and Colony's contentions do not meaningfully rebut USACE's submittal responses, cure notice, show cause notice, or termination. Colony does not refute USACE's showing that Colony's submittals were insufficient or absent, that the panelboard delay was not excusable, or that Colony's failure to make progress was Colony's fault. These problems delayed the project well past the completion date and are grounds for default termination. While Colony's offer to resume performance appears heartfelt, it does not justify reversing USACE's termination decision. Accordingly, Colony has failed to meet its burden.

CONCLUSION

For the foregoing reasons, we deny Colony's appeal.

Dated: September 12, 2024



BRIAN S. SMITH
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



J. REID PROUTY
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. 63630, Appeal of Colony Construction, rendered in conformance with the Board's Charter.

Dated: September 12, 2024



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals