DIXON CONTRACTING, INC.,	)	**AGBCA No. 98-191-1**
	)	
Appellant	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

February 8, 2000

Before HOURY, POLLACK, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

This appeal arises out of Contract No. 50-447U-8-104 (the contract) between the U. S. Department of Agriculture, Forest Service (the Government or FS) and Dixon Contracting, Inc., of Van Buren, Arkansas (Appellant), for the reconstruction of a bathhouse located at Cove Lake in the Ozark-St. Francis National Forest, Arkansas. The original contract amount was $206,000.

The Contracting Officer (CO) gave the contractor notice of termination for default for failure to complete during the contractual performance period. This appeal is from that decision. Only the propriety of the termination for default is at issue.

The parties have submitted this appeal for a decision on the record without a hearing under Board Rule 11. The record consists of the Appeal File prepared by the Government in accord with Board Rule 4. The documents in the Appeal File include the CO's decision (Appeal File (AF) A 1, 2); cure

notices (AF D 1-10); the original progress schedule and two revisions (AF C 1-5); invoices (AF F 1-19); copies of daily reports (AF H 1-85); and the contract (AF L 1-193). During a telephonic conference on May 3, 1999, Appellant stated that it did not wish to supplement the Appeal File.

The Board has jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. For reasons set out below, we find the termination for default proper.

FINDINGS OF FACT

1. The contract to reconstruct the Cove Lake Bathhouse located on the Magazine Ranger District, Ozark National Forest, Arkansas, was awarded to Appellant November 19, 1997 (AF L 21). Clause F.1 of the contract required Appellant to commence work within 10 calendar days after receipt of notice to proceed; to prosecute the work diligently; and to complete the entire work ready for use not later than 150 days after receipt of notice to proceed (AF L 31). Notice to proceed was issued December 2, 1997; it indicated that time on the contract would begin December 10, 1997. The date on which Appellant signed acknowledging receipt of the notice to proceed is illegible on the copy in the record. (AF I 1.) The parties calculated the start of the performance period from December 10, 1997. The CO referred to May 8, 1998, as the expiration date for the performance period. The first two Contract Daily Reports (daily reports) show May 9, 1998, as the contract completion date (AF H 84-85). Appellant's original progress schedule indicated a plan to complete by May 10, 1998 (AF C 5). By the Board's calculation, May 9, 1998, became the required completion date.

2. The contract contains the DEFAULT (FIXED-PRICE CONSTRUCTION) (FAR 52.249-10) (APR 1984) clause which permits the Government to terminate the contractor's right to proceed with the work for failure to complete the work within the time specified in the contract. The clause also provides that the right to proceed shall not be terminated if the delay in completion arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor. One such cause is unusually severe weather. (AF F 88, 89.)

3. The contract contains clause H.12, SCHEDULES FOR CONSTRUCTION CONTRACTS (FAR 52.236-15) (APR 1984). The clause requires the contractor to submit a schedule in the form of a progress chart indicating the percentage of work scheduled for completion by any given date during the performance period. (AF L 39.)

4. Appellant's original schedule was dated December 1, 1997. The schedule indicated the following completion dates for construction activities: roofing on January 15; interior demolition on January 20; clearing, site work, excavation and drainage on February 5; concrete form work on February 15; interior and exterior masonry on February 30 [sic]; rough carpentry on March 15; finish carpentry on March 30; drywall and painting on April 10; interior tile on April 20; plumbing, electrical and mechanical on May 5; and exterior railings, landscaping and seeding on May 10. The schedule was approved by the CO on January 26, 1998. (AF C 5.)

5. The Appeal File contains daily reports for the days that the inspector or CO's Representative (COR) visited the site. Each report indicates the date; time that the Government representative was present; ground conditions; weather; percentage of the time used; percentage of the work complete; materials furnished to the job site; workers on site; and a narrative description of job site activities. (AF H 6 - H 85.)

6. The initial daily report is for December 18, 1997, 9 days into the performance period. The owner, superintendent and four roofers were on site. (AF H 85.) By January 5, 1998, the work was behind schedule. On that date, only the superintendent was on site and 18 percent of the performance period had elapsed while only 5 percent of the work had been completed. (AF H 83.)

7. As of January 14, 1998, only 8 percent of the work was completed and 24 percent of the time had passed. (AF H 81.) Appellant's first progress payment request was dated January 15, 1998. He requested payment in the amount of $39,000 broken down as $12,000 for bonding and insurance; $7,000 for roofing; $10,000 for demolition; and $10,000 for overhead and profit. (AF F 18.) On January 16, 1998, the COR met with Appellant at the project site. At this time, the COR questioned Appellant about the invoice (AF H 80). The COR refused to certify the entire amount for payment stating, "he has not earned it." Instead, he certified $12,000 for bonding and insurance; $7,000 for roofing; $6,000 for demolition; and $0 for overhead and profit, for a total of $25,000. (AF F 16, 17.) During the January 16 meeting, the COR also told Appellant it appeared Appellant was already behind schedule. While roofing was complete, demolition was not. (AF H 80.)

8. On January 26, 1998, the parties discussed the job's being behind schedule; Appellant's proposals for modifications being high; Appellant's pay estimate[1]; the need for more workers on the job; and failure to submit payrolls. Appellant replied that everyone working on the job, including the superintendent was a subcontractor. The COR and inspector expressed skepticism with the propriety of that arrangement. Appellant stated that no work had been done the previous Wednesday and Thursday (January 21 and 22). Addressing the modification proposal prices, Appellant stated that he was not trying to get the cheapest prices for the work. The Government representatives noted that the superintendent was working alone on the project most of the time. They also told Appellant that the rate of progress needed to increase. (AF H 78.)

9. The CO issued a cure notice dated January 27, 1998. In it, she noted that Appellant had submitted no weekly payrolls and asked for submission by January 30, 1998, of weekly payrolls for each week that work had been performed. She also observed that Appellant's progress schedule was very general and asked that it be revised by February 6, 1998, to reflect the major items under each of the categories shown on the schedule. In addition, the CO commented that Appellant had not proposed reductions in price in its proposals for deductive modifications. Subcontractor information forms, pending since the prework conference, had not been completed and returned to the COR. She asked that they be provided to the COR by February 6, 1998. Finally, she informed Appellant that the letter served as a cure notice and gave Appellant the period from receipt through February 6,

[1] It is unclear from the record what pay estimate was under discussion.

1998, to correct the deficiencies mentioned earlier in her letter. In so doing, she cited the Default clause in the contract. (AF D 7-8.)

10. Appellant's revised schedule was submitted February 2, 1998. It added more detail to the activities increasing the number from the 11 shown on the original schedule to 20 on the revised schedule. The revised schedule showed the final activity of exterior railing/landscaping as taking place from April 15 to April 30, 1998. (AF C 3, 4.) During the month of February, Government representatives visited the site several times and discussed the fact that the job was behind schedule with the contractor. By February 28, 1998, when 54 percent of the contractual time period had elapsed, work completed was estimated at 22 percent. (AF H 59-72.)

11. The CO issued a second cure notice on March 3, 1998. In it, she referenced the earlier cure notice of January 27, 1998. She also stated that Appellant's revised progress schedule indicated that interior masonry block work was to be complete by February 28, 1998. That work was not complete. The interior concrete floor was to be complete by March 6, 1998. Other items of work, interior stucco, rough carpentry, and exterior masonry were scheduled for completion on March 13, 1998. The CO pointed out that these items constituted a large portion of the work and that before interior stucco could be applied, the walls would have to be sandblasted. She estimated that sandblasting would take a week during which no other interior work could be performed. She directed Appellant to take every necessary step to complete the items listed by March 13, 1998. If these were not completed, she would have no choice, but to terminate the contract for default. (AF D 5.)

12. From March 3 to March 13, the contract time used increased from 57 percent to 63 percent and the estimated work completed increased from 25 percent to 32 percent. During that period, the workers present on site ranged from a low of two (on 1 day) to a high of 11 (on 1 day). (AF H 49-55.) On March 13, 1998, the CO wrote Appellant extending the cure notice of March 3, 1998, through the close of business on March 17, 1998. She commented that more activity was going on at that time. She expressed her desire to meet with Appellant at the site on March 17 to discuss remaining work and to assist in planning a work/progress schedule to insure completion by May 8, 1998. (AF D 4.)

13. The CO, the COR, the inspector and Appellant's president met on March 17, 1998. Appellant had prepared a revised schedule which the attendees discussed. The revised schedule was approved and then the attendees visited the site.

14. The second revised schedule, dated March 16 indicated completion dates for various activities as follows: interior stucco, March 24; rough-in plumbing, March 31; rough-in electric, March 31; rough carpentry, March 20; interior painting/drywall, March 31; interior finish carpentry, April 20; exterior concrete/front porch, March 31; interior tile, April 15; cabinets/counter tops, April 24; electric/plumbing/mechanical, April 30; exterior paint, April 30; exterior sidewalks/masonry, April 30; exterior railing/site work, April 30; and bath partitions/accessories, May 8 (AF C 1, 2).

15. In the CO's March 23, 1998 letter to Appellant discussing the March 17, 1998 meeting, she stated that work seemed to be moving along much better than at any time during the project. In that letter she also stressed the importance of keeping the subcontractors informed as to when they needed to be on the site in accordance with the revised schedule. She urged Appellant not to waste time in light of the fact that the performance period would expire on May 8, 1998. The letter stated that the CO was "extending the previous cure notice." (AF D 3.)

16. By April 10, 1998, 81 percent of the contract time had expired and the inspector's estimate of work complete was at 49 percent. The CO wrote the contractor to state that several items of work which the revised schedule indicated would be complete by April 10, 1998, were not complete. These included exterior concrete (footings and porch) and interior painting and drywall. In addition, interior tile was scheduled to be complete by April 15, 1998. She understood that the tile setter was scheduled to arrive on the site that day, April 10. She urged the contractor to make sure that tile was complete by the scheduled date. She also reminded the contractor that the contract time was to expire on May 8, 1998, and stated that if work were not complete by that date, termination and reprocurement were possibilities to insure completion by the Memorial Day weekend. (AF D 1.)

17. Appellant continued to perform slowly after the April 10, 1998 letter. According to the daily reports, interior tile, which was to start April 1 and be completed April 15, actually started April 9 and was still in progress April 30. (AF H 32, 29, 22, 18 and 15.) Interior painting and drywall were to begin March 13 and be completed by March 31. The first mention in the daily reports of painting being performed was on March 20 (AF H 43). It was still ongoing when the contract was terminated on May 13, 1998 (AF H 6). The activity, exterior sidewalks and masonry, was to have begun April 6 and to have been complete April 30 (AF C 2). The rock supplier did not price the job until April 27 and masons on the job that day left because there were no rocks for them to lay (AF H 18). Exterior masonry was not complete as of the termination date, May 13, 1998 (AF H 6).

18. A cause of untimely performance was Appellant's failure to furnish materials in sufficient time to keep workmen steadily working. From March 17 until termination, the daily reports mention work stopping for lack of lath (AF H 44); paint (AF H 11, 22, 3); compliant hand dryers and complaint ceiling fans (AF H 11); rock (AF H 18); and plumbing supplies (AF H 6).

19. On May 8, 1998, the CO signed Modification No. 3 extending the contract time through close of business May 11, 1998. On its face, the modification indicated that its issuance was due to the contract time expiring on May 8, 1998, a Friday, and stated that the weekend did not allow time for any decisions on time, possible termination or time extensions. The modification was signed by the CO on May 8, 1998, and by Appellant's president on May 9, 1998. On the copy of the modification in the record, the phrase "time extension" has been stricken and the initials "M.D." written next to the strike through. Appellant's president's name is Morlin Dixon. Despite the wording that the expiration of the performance period on a Friday did not allow time for decision regarding termination or a time extension or the strike through, the modification extended the performance period by 3 days. (AF L 3.)

20. On May 12, 1998, the CO sent the Appellant a notice of termination for default. She stated that progress had not been made in accordance with the Appellant's revised schedule. She noted that she had executed a change order to extend the time through close of business May 13, 1998 "due to the fact that the weekend did not provide an opportunity to do otherwise." Actually the modification extended the time through close of business May 11, 1998. She then informed Appellant that the contract was terminated effective close of business on May 13, 1998. She again cited the need for completion prior to the Memorial Day weekend. The letter stated that it was the final decision of the CO and provided appeal rights. (AF A 1, 2.)

21. The CO entered into individual contracts with a number of contractors to complete the contract work (AF W 1-14). Reprocurement work included door and trim work; painting; electrical; tile work; plumbing; masonry concrete finishing; rails and iron work; installation of partitions; toilet accessories; stucco work; rock work; and cabinetry (AF Y 1-4). The reprocurement and its costs are not at issue before the Board.

22. After the termination, in a letter dated May 15, 1998, Appellant requested a 30-day time extension alleging more than 47 rain days and a delay associated with cancellation of an order for metal doors and the ordering of the wood doors originally specified (AF E 13). The CO responded that since the contract had been terminated, she could not consider a time extension (AF E 12). The CO's decision to terminate was appealed to this Board.

23. With its brief, Appellant provided two exhibits, an undated letter from a supplier regarding lead times for metal doors and unsworn notes of the surety's agent's telephone conversations with the CO or Appellant. Of these, only three of the notes pertained to pre-termination conversations with the CO. The agent's notes indicate that the CO informed him on March 12, 1998, that major items on the job had been stumbling along. Progress needed to continue. The CO's main concern was getting a plan of action for project completion. The agent's notes of a March 20 conversation indicate that the CO said that if the contractor proceeded as he was then doing, everything would be okay. The CO would keep the contractor under a cure notice in case someone walked off the job. The agent's notes indicate an April 24 conversation in which the CO referred to a dispute between Appellant and its plumbing subcontractor. According to the notes, the CO reported that the Appellant was off schedule and that the engineers were telling her that there was no way Appellant would be finished by May 8. (Exhibit B to Appellant's Brief.)

24. The Government filed a reply brief objecting to consideration of the exhibits to Appellant's brief as untimely and unsworn. The reply brief also argues that the exhibits are not probative of the facts and the issues as argued by Appellant.

DISCUSSION

Burden of Proof

A termination for default is a Government claim and the Government has the burden of proving that a default termination was justified. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987). The contractor, on the other hand, has the burden of proof as to the excusability of the default. TCH Industries, Ltd., AGBCA Nos. 88-224-1, 89-166-1, 91-3 BCA ¶ 24,364.

Contentions of the Government

The Government contends that the termination was proper under the Default clause in the contract because the work was not completed within the contractual performance period.

Contentions of Appellant

Appellant does not dispute that the work was incomplete on the completion date or that the CO had issued cure notices. Rather, Appellant contends that the CO had assured it that the "setbacks were not a problem" and that she did not intend to terminate the contract. Appellant also argues that the project was substantially complete at the time it was terminated.[2]

Appellant failed to perform the contract work within the contractual performance period. Such a failure is grounds for default termination absent excusable delay. John F. Richmond, AGBCA No. 84-179-1, 85-3 BCA ¶ 18,450; Stutesman & Sons Construction Co., AGBCA No. 83-203-1, 84-2 BCA ¶ 17,499; Craig Honkala, AGBCA No. 83-206-1, 84-2 BCA ¶ 17,486. Appellant has provided no evidence which we find legally excuses its failure to complete. While Appellant alleges more than 47 rain days, it has provided no evidence that it rained 47 days, or if it did, that the rain constituted unusually severe weather within the meaning of the Default clause (FF 2).

Appellant asserts that the CO misled it by "reassurances." The contemporaneous record does not support that interpretation. While the CO did acknowledge the occasions when Appellant appeared to increase resources to the project (FF 15, 18), the record demonstrates that she was consistent in pointing out that the rate of progress indicated that the job would not be completed on time without increases in the allotted resources (FF 9, 14, 15, 19). While the CO indicated on particular occasions

[2] Proposed Finding of Fact (FF) 18 in Appellant's brief contains "estimates" of work which had been completed as calculated by the contractor allegedly "using a combination of information relative to each construction phase using information taken from the Contract Diary, subcontractor bills and supplier invoices." The "estimates" break down the work into more and different activities than do Appellant's progress schedules. For some of them, Appellant cites to pages in the Appeal File; in other cases it does not. Many of the citations provided are to the technical specifications and provide neither a basis for measuring the proportion that work bears to the totality of work in the contract nor evidence of the amount of the particular work completed at the date of termination. In addition, the estimates are unsworn and were not provided prior to the close of the record. The Board has found them to be of little probative value.

that she did not intend to terminate at those times, the record does not indicate that the CO ever provided assurance that she would never terminate the contractor's right to proceed and, in fact, her correspondence indicates otherwise.

Appellant asserts that it was almost 90 percent complete rather than 64 percent complete as indicated on the daily reports (Appellant's Brief at p.10 (unnumbered)). Appellant argues that at 90 percent complete, it had achieved substantial performance. These assertions regarding the percentage of completion are no more than allegations and do not contradict the contemporaneous daily reports or findings of the CO during performance. The amount of work remaining to be done indicates that Appellant had not achieved substantial completion.

DECISION

The appeal is denied.

ANNE W. WESTBROOK
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
February 8, 2000