Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR SUMMARY RELIEF DENIED:
February 5, 2004

GSBCA 15979-ST

THOMSON & PRATT INSURANCE ASSOCIATES, INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Joseph R. Cruse, Jr., Long Beach, CA; and Kevin M. Murphy and Valerie G. Preiss of Carr Maloney P.C., Washington, DC, counsel for Appellant.

Luisa M. Alvarez, Office of the Legal Adviser, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **DANIELS** (Chief Judge), **PARKER,** and **NEILL.**

NEILL, Board Judge.

This case concerns a contract awarded by the Department of State (DOS) to appellant, Thomson & Pratt Insurance Associates, Inc. (T&P), for insurance coverage for works of art on loan to the Department and exhibited at posts worldwide as part of DOS's Art in Embassies Program. By letter dated October 3, 2002, DOS terminated appellant's contract for default. T&P has appealed the contracting officer's decision to terminate its contract. The Government, in reply, has filed a motion for summary relief in which it contends that there is no dispute regarding the material facts in this case and that the Government's decision was, as a matter of law, entirely correct. For the reasons stated below, we deny the Government's motion.

Background

1. On February 5, 2002, DOS issued a solicitation for commercial items (standard form 1449). The solicitation sought offers for a single fine art insurance policy. The policy was to run for six months starting February 28, 2002, and was to include an option to extend coverage for an additional six months. The scope of work read:

> SCOPE OF WORK: Continuation of fine arts insurance coverage for works of art valued at $30,000,000 on loan to the Department of State, Art in Embassies Program and exhibited at posts worldwide.

Appeal File, Exhibit 1 at 2.

2. In describing the coverage being sought, the solicitation stated:

> a. PROPERTY COVERED
> This policy covers only property described in the schedule dated January 2002 and any items added thereto, on file with the Art in Embassies Program.
>
> b. PERILS COVERED
> This policy covers the described property against all risk of loss or damage to such property including War and Terrorism, except hereinafter excluded.

Appeal File, Exhibit 1 at 2.

3. In describing the limits of coverage, the solicitation stated:

> 2. LIMIT OF COVERAGE
> This company shall not be liable for more than:
> a. $5,000,000 while in transit or otherwise within the policy limits.
> b. $5,000,000 in any one loss, disaster or casualty which is the aggregate amount insured.
> c. The aggregate amount insured is $30,000,000.

Appeal File, Exhibit 1 at 3.

4. The schedule dated January 2002, which was mentioned in the solicitation's description of property covered, was also contained in the solicitation itself. It consisted of seventy overseas locations with a specified dollar value listed for each location. For example:

> Abidjan
> $18,500.00
> Abuja
> $31,800.00
> Accra
> $31,800.00

Appeal File, Exhibit 1 at 8-10. The values thus listed totaled slightly more than $18,700,000. Id.

5. Shortly after issuing the solicitation, DOS issued the following clarification to all vendors who had shown an interest in the solicitation:

> Intent as respects unscheduled property.
> There is no unscheduled property. All property is scheduled and documented as such in the loan agreement. No object is insured without one.

Appellant's Supplement to the Appeal File, Exhibit 41.

6. By letter dated February 10, 2002, T&P submitted a proposal in response to DOS's solicitation. The letter introducing the proposal read in part:

> The enclosed is designed to complete the solicitation by the Department of State to provide a quotation for loaned art valued at $30,000,000 under the Art in Embassies Program and Exhibit[ed] at posts world wide. The stated price of the contract to be held for 30 days is proposed as per the following:

T&P thereupon provided three quotes. The first was for six months of coverage at a total premium of $372,106.20. The second was for an additional six months of coverage at a total premium of $351,706.20. The third was a quote for twelve months of coverage at a total premium of $644,461.50. Appeal File, Exhibit 2 at 1.

7. T&P's cover letter also contained a paragraph which read:

> There are 70 locations with total scheduled values of $18,744,410 and a schedule is attached with the value at each location.

Appeal File, Exhibit 2 at 1. Within minutes of submitting its response to the solicitation, T&P submitted a revision of page one of its cover letter. The revision made only one change. It added to the above quoted sentence the following:

> No premium adjustment will be made unless totaled scheduled values exceed $20,150,000.00.

Id., Exhibit 3 at 1.

8. DOS eventually offered to T&P a contract to provide twelve months of coverage at the price quoted. On February 21, T&P accepted the offer. Appeal File, Exhibit 8.

9. The awarded contract incorporates by reference Federal Acquisition Regulation (FAR) clause 52.233-1, DISPUTES (DEC 1998), which requires the contractor to proceed diligently with performance pending final resolution of any dispute arising under the contract. Appeal File, Exhibit 8 at 21.

10. The contract also contained FAR clause 52.212-4, CONTRACT TERMS AND CONDITIONS -- COMMERCIAL ITEMS (MAR 2001). Under paragraph (m) of this clause, the Government has the right to terminate the contract, or any part thereof, 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. Appeal File, Exhibit 8 at 22.

11. Following award of T&P's contract, DOS sought to add to the values shown in the January schedule which was included in the original solicitation. This precipitated a meeting on May 7, 2002, between DOS representatives on the one hand and T&P officials and representatives of Huntington T. Block Insurance Agency (Huntington Block) on the other. Huntington Block is an intermediary broker for Lloyds with offices in Washington, D.C. The firm had assisted T&P in securing terrorism and war coverage from underwriters for items in DOS's Art in Embassy Program. There is disagreement regarding many details of this meeting of May 7. Nevertheless, from the various versions of what occurred, it is clear that one matter of particular concern was whether the underwriters were entitled to an adjustment in the premium once the schedule of values increased beyond $20,150,000. DOS officials expressed the opinion that the coverage was for values up to $30,000,000 and that no additional premium should be charged as the total values stated in the original solicitation increased to $30,000,000. Huntington Block representatives instead contended that an adjustment of the premium was called for once the values on the modified schedule exceed the level of $20,150,000. Appeal File, Exhibits 12, 21, 38.

12. Following the meeting of May 7, T&P submitted an invoice for coverage of values added to the schedule of values in excess of $20,150,000. Appeal File, Exhibit 13. The contracting officer rejected the invoice on the ground that the $30,000,000 coverage had already been purchased with the original premium of $644,461.50. Id., Exhibit 21. The ongoing disagreement between the parties ultimately led to the issuance of a contracting officer's decision formally denying T&P's claim for an additional premium. Id., Exhibit 39. This, in turn, prompted letters from the underwriters advising DOS directly that it was their intent to cancel all coverage for failure to make payment for additional values. Id., Exhibits 43, 46. By telefacsimile dated September 19, T&P confirmed to DOS that coverage would terminate on September 26 pursuant to the underwriters' notices. Id., Exhibit 46.

13. By letter dated October 3, 2002, the DOS contracting officer terminated T&P's contract for cause. The contracting officer's decision states:

> You have breached your contract by failing to continue providing insurance coverage to the Government as required under the contract. Although your contract expires on February 28, 2003, and you have been paid in full for the entire contract period, you have illegally terminated the contract and cancelled the insurance coverage as of September 27, 2002. Therefore, the Government hereby terminates your contract for cause pursuant to FAR clause 52.212-4(m) in your contract.

Appeal File, Exhibit 49.

14. Counsel for T&P appealed the contracting officer's decision by letter dated October 22, 2002. Appeal File, Exhibit 50.

Discussion

It is well established that resolving a dispute on a motion for summary relief is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986);

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000); Olympus Corp. v. United States, 98 F.3d 1314, 1316 (Fed. Cir. 1996); Dairyland Power Co-op. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994); Copeland Enterprises, Inc. v. CNV, Inc., 945 F.2d 1563, 1565-66 (Fed. Cir. 1991); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986). A fact is material if it might significantly affect the outcome of the suit under the governing law. Anderson, 477 U.S. at 248. Any doubts regarding such factual issues must be resolved in favor of the non-moving party, in whose favor all justifiable inferences are to be drawn. Id. at 255.

In bringing this motion for summary relief, the Government is convinced that there is no dispute regarding material facts relating to the termination of T&P's contract. DOS sees these facts as relatively simple so far as termination of the contract for default is concerned. The first fact is that T&P had a contractual obligation to provide insurance for the Art in Embassies Program for a twelve-month period. The second fact is that T&P failed to meet this obligation following cancellation of the policies it initially secured for the Government following contract award.

The Government realizes, of course, that there is a dispute over whether T&P was obliged to provide insurance for a value of $30,000,000 or for the lesser figure of the total of the values listed in the schedule which was provided with the original solicitation. For purposes of this motion, the Government suggests that it is enough to look to the lower figure (which presumably T&P does not dispute) to determine the contractual obligation which the contractor has failed to honor. As to the fact of non-performance following cancellation of coverage, that too appears to be beyond dispute. Regardless of what T&P's reasons may have been for not providing alternative coverage after cancellation of the original policies, it does appear to be beyond dispute that, once the initial coverage was cancelled, T&P did not arrange for alternative coverage for the remaining months of the contract. See Respondent's Motion at 16-25.

In the law of Government contracts, a dispute regarding contract interpretation does not normally discharge a contractor from its obligation to continue performance. Traditionally, the Government, in awarding its contracts, has required that contractors covenant that they will continue contract performance even in the event of dispute. This is a highly significant provision which is obviously inserted into Government contracts to protect the public interest. It assures that the Government will not suffer loss or detriment from the interruption of contract performance occasioned by an administrative appeal. Dynamics Corp. of America v. United States, 389 F.2d 424, 432-33 (Ct. Cl. 1968); C. W. Schmid v. United States, 351 F.2d 424, 432-33 (Ct. Cl. 1965). The Government's right to use a provision of this nature is recognized in the Contract Disputes Act, which expressly acknowledges the right of executive agencies to include a clause in Government contracts requiring contractors to proceed diligently with performance pending resolution of any contractual dispute. 41 U.S.C. § 605(b) (2000).

The requirement to continue performance in the event of contract dispute is found in FAR clause 52-233-1 DISPUTES (DEC 1998), which, as already stated, was incorporated by reference into T&P's contract. FAR 33.214 requires contracting officers to insert the Disputes clause in solicitations and contracts. In entering its contract with DOS, T&P clearly

agreed to the provision. T&P's subsequent failure to arrange for alternative coverage following cancellation of the original coverage, therefore, would normally justify the Government's decision to terminate the contract for default and render this case ripe for summary relief.

In this case, however, there is a remaining issue which needs to be examined before we can determine that the termination was proper. We must ascertain whether T&P was excused from continuing performance. DOS has failed to convinced us that there are no genuine issues of material fact regarding whether T&P's default was excusable. Among the reasons offered by T&P for why it was excused from further performance is the contention that the Government imposed a cardinal change in the contract requirements. See Appellant's Opposition to the Government's Motion at 25.

A cardinal change is said to occur:

> when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties material[ly] different from those originally bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract and thus renders the government in breach.

Allied Materials & Equipment Co. v. United States, 569 F.2d 562, 563-64 (Ct. Cl. 1978). It is, of course, well settled that a cardinal change constitutes a material breach of a contract and thus frees the contractor of its obligations under the contract, including its obligations under the Disputes clause. Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1276 (Fed. Cir. 1999); General Dynamics Corp. v. United States, 585 F.2d 457, 462 (Ct. Cl. 1978). Whether a change is cardinal, however, is principally a question of fact requiring that each case be analyzed individually in light of the totality of the circumstances. Allied Materials & Equipment, 569 F.2d at 565.

In the instant case, there are two underlying questions of fact which are particularly relevant to the issue of whether there has been a cardinal change. The first is whether there was actually a change in the contract requirement after award. In opposing the Government's motion, appellant has submitted deposition testimony and documentary evidence which allegedly indicate that the Government was well aware at the time of contract award that blanket coverage against antiterrorism was not feasible. Nevertheless, according to T&P, this is what the Government, subsequent to award, insisted T&P was required to provide. Appellant's submissions satisfy us that there is a genuine dispute regarding this first question of whether there was, in fact, a change in the contract requirement.

The second question is whether this change, if indeed it did occur, was of sufficient magnitude as to constitute a cardinal change. In opposing the Government's motion, T&P alleges that the contracting officer's demand after award that the contractor provide a $30,000,000 blanket policy, as opposed to a schedule policy for a lesser amount, constituted such a change. In support of this contention, appellant has provided excerpts from depositions of individuals associated with the insurance industry, which allegedly support the proposition that such a change is indeed a radical one which normally would require an entirely new solicitation. As with the first question, appellant's submissions in its opposition

to the Government's motion satisfy us that there is a genuine dispute regarding this question as well.

There is, therefore, in this case, disagreement on two material facts relevant to the issue of whether T&P was excused from further performance. These disagreements are obviously related to the ultimate issue of whether the Government acted properly in terminating T&P's contract for default. In a motion for summary relief, it is the moving party which bears the burden of establishing the absence of any genuine issues of material fact. Armco, 791 F.2d at 149. Here, the Government has failed to do so. Further, where questions of material fact remain open, in ruling on a motion such as that which is before us, we must resolve any doubts in favor of the non-moving party, T&P. Assuming T&P's version of the facts to be true, the Government's termination of the contract for default may have been improper. Accordingly, we deny the Government's motion. Instead, we invite the parties to provide for the record evidence and argument relative to T&P's contention that the Government imposed a change in the contract requirement so profound that it was not redressable under the contract.

Decision

The Government's motion for summary relief is **DENIED**.

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EDWIN B. NEILL
Board Judge

We concur:

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STEPHEN M. DANIELS
Board Judge

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ROBERT W. PARKER
Board Judge