Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: March 1, 2005

GSBCA 16354

NECCO, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Paul Sipple, President of NECCO, Inc., Waitsfield, VT, appearing for Appellant.

Richard O. Hughes, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **PARKER**, **NEILL**, and **HYATT**.

HYATT, Board Judge.

Appellant, NECCO, Inc., has challenged a contracting officer's decision to terminate for default a task order for the replacement of the roof of the Montpelier Federal Building in Montpelier, Vermont. We find that the Government has sustained its burden to justify the termination and deny the appeal.

Findings of Fact

1. On August 9, 2002, the General Services Administration (GSA) accepted an offer made by NECCO, Inc. for a multiple award term construction contract in the State of Vermont, and awarded appellant contract number GS-01P-02-BZD-0038. This contract is for an indefinite quantity of term construction work, including limited design capacity. The contract established the terms and conditions under which NECCO would perform repairs and alterations to Government-owned and leased space in Vermont, under task orders to be

issued by the contracting officer and other designated officials. Appeal File, Exhibit 3A. GSA has in place three other term contracts of this nature, allowing it to seek and order construction repair work as needed for buildings located in Vermont. Transcript at 29.

2. The term contract contained various terms and conditions pertinent to the administration of work procured by GSA pursuant to delivery orders awarded under the term contract. Paragraph 4.2 provided for the designation of a contracting officer's representative (COR), in pertinent part, as follows:

> (c) The Contracting Officer's letter of delegation to his/her representative shall contain specific instruction as to the extent to which the representative may take action for the Contracting Officer, and shall set forth all other responsibilities, authorities and limitations associated with the delegation.
>
> (d) Functions of a COR may include: resolution of issues between the Contractor and the Government in connection with matters of workmanship or technical compliance; approval and acceptance of work; placement of and modifications to task orders; and inspections.
>
> (e) A COR shall perform only those functions specifically designated in the letter of delegation, even though the individual may hold a limited Contracting Officer's warrant.
>
> (f) Certain stipulated authorities are not delegated to the Contracting Officer's representative, such as those authorities which significant[ly] impact contract terms; e.g., disputes and terminations.

Appeal File, Exhibit 3A.

3. The term contract incorporated by reference the Federal Acquisition Regulation's (FAR's) standard clause for default termination of a fixed-price construction contract. Appeal File, Exhibit 3A. In pertinent part, this clause provides:

> If the contractor refuses or fails to prosecute the work or any separable part, with the diligence that will ensure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.

48 CFR 52.249-10(a) (2002).

4. In July 2003, GSA determined that the roof of the Montpelier Federal Building needed replacement. On July 9, the contract specialist issued a request for proposals (RFP) to NECCO and to the three other contractors holding term contracts to perform construction work in Vermont. Appeal File, Exhibits 1-2. The RFP specified that the anticipated award date for the work was August 12, 2003, and that the anticipated date for issuance of a notice to proceed was August 26, 2003. Id., Exhibit 1. According to GSA, this was to provide sufficient time to complete the repair before the onset of winter weather. Transcript at 45.

5. After issuing the initial RFP, amendments were circulated on July 31 and August 13, 2003. NECCO submitted a proposal in response to the RFP and the two amendments on August 15, 2003. This proposal was prepared with the understanding that the schedule required completion of the work by the end of calendar year 2003. Appeal File, Exhibits 2-3; Transcript at 133.

6. By letter dated August 18, 2003, the contracting officer awarded delivery order P-01-03-BZ-0004, a contract to replace the Montpelier Federal Building roof, to the low bidder, NECCO, Inc. This letter further designated Waldemar Rogowicz as the contracting officer's representative (COR), with responsibilities for the day-to-day administration of the project. Appeal File, Exhibit 3; Transcript at 32-33.

7. In a separate letter, also dated August 18, 2003, the contracting officer elaborated on the extent of Mr. Rogowicz's authority as the designated COR. As the COR for this delivery order, Mr. Rogowicz had the authority and responsibility to (1) conduct inspections and accept or reject the work; (2) perform labor standards interviews and wage checks of the contractor's employees; (3) administer the contract on a day-to-day basis; (4) approve schedules, shop drawings, material samples, operating and maintenance manuals, and other technical submittals; (5) monitor the schedule and progress of the work and recommend appropriate progress payments; (6) conduct the pre-construction conference and prepare minutes of the meeting; and (7) issue change orders up to the amount of $25,000 on work within the scope of the contract and grant any time extension. The letter further stipulated that the contracting officer's representative did not have the authority to (1) issue change orders for amounts over $25,000; (2) issue supplemental agreements; (3) determine dates of substantial or final completion or to close out the contract; (4) render final decisions; and (5) issue change orders for work outside the scope of the contract. Appeal File, Exhibit 4.

8. After the work order was awarded to NECCO, and prior to the preconstruction conference, Mr. Rogowicz discussed the project with NECCO's President, Paul Sipple. In this conversation, Mr. Rogowicz noted the potential for difficulties in completing construction in winter weather, and commented that there might be some possibility of a delayed start to avoid working in the winter. Transcript at 80-82. Mr. Rogowicz explained that he was alluding to problems encountered on previous contracts with other contractors and was simply speculating to Mr. Sipple that GSA might choose to postpone the project should unanticipated slippages delay the schedule in the winter months. He did not intend to offer a delayed notice to proceed to NECCO, nor did he think he had the authority to effect such a change to the contract terms based on his status as the COR. Mr. Sipple did not, during this conversation, lead Mr. Rogowicz to understand that the contractor expected a delay in issuance of the notice to proceed. Transcript at 84-86.

9. A preconstruction meeting was convened on August 27, 2003. The meeting was attended by the COR and the GSA property manager for the Montpelier Federal building. Also in attendance were the president of NECCO and two representatives of NECCO's principal subcontractor for the project, Palmieri Roofing. At that meeting, Mark Palmieri, the president of Palmieri Roofing, offered dates for the performance of the work. These dates were memorialized in the meeting minutes, which state that the proposed start date for the project was mid-October 2003. Construction was anticipated to be complete four to six weeks after the contractor commenced removal of the existing roof. As of that time, Mr. Palmieri understood that the date for contract completion would be in December 2003, and he expected to be able to meet that schedule. There was no mention at this meeting of modifying the schedule, either through a delayed issuance of the notice to proceed or by extending the completion date to allow construction to be postponed until spring.[1] Appeal File, Exhibit 5; Transcript at 82-83, 134-35.

10. The notice to proceed was issued on September 2, 2003. The completion date established by the issuance of the notice to proceed was December 2, 2003. Appeal File, Exhibit 7.

11. At the time of the preconstruction meeting, NECCO had issued a letter of intent to award the roofing subcontract for this project to Palmieri Roofing, but had not yet finalized the contract terms. Shortly after the preconstruction conference was held, Palmieri Roofing won a job that was roughly four and one half times the size of the Montpelier roof project, requiring performance in the same time frame as the Montpelier project. After reviewing his resources and the contract terms for the larger job, Mr. Palmieri determined that he would not be able to meet the proposed schedule for NECCO's Montpelier Federal Building roof replacement contract. Mr. Palmieri then contacted Mr. Sipple, alerting him that he no longer expected to be able to complete that job before winter set in. Transcript at 134-47. Mr. Sipple, recalling his earlier conversations with Mr. Rogowicz, told Mr. Palmieri this would probably not be a problem because GSA seemed willing to move the installation of the new roof for the Montpelier building to the spring. Transcript at 172.

12. In mid-September 2003, GSA initiated several electronic mail messages concerning the proposed start date for the project. On September 15, the property manager contacted the COR, asking what day NECCO would start construction. The COR responded that based on the preconstruction meeting the start date would be October 13, 2003, and asked Mr. Sipple to confirm this understanding. Mr. Sipple replied that he had just learned that his subcontractor might not be in a position to start the job right away and was leaning toward a spring start date. This response prompted Mr. Rogowicz to inform Mr. Sipple that he had already spoken to the contract specialist about delaying the start of the contract work several weeks ago and she had stated at that time that this would not be an option. Appeal File, Exhibit 8.

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[1] Apparently some mention was made of a delayed start just prior to the preconstruction meeting, but because at that time Palmieri believed it was available to do the work, and proposed dates to perform the roofing replacement that comported with the contract terms, the subject was not pursued in the meeting. Transcript at 173.

13. These electronic mail messages were forwarded to the contract specialist, who, on September 16, 2003, informed Mr. Sipple that the notice to proceed with the contract work could not be delayed to accommodate the subcontractor:

> This project is scheduled to be completed within 90 calendar days after your receipt of the Notice to Proceed. We did not want a delay in the Notice to Proceed. We made this decision prior to issuing the RFP [Request for Proposals] to the Term Contractors. If we did want a delay in the Notice to Proceed we would have offered each of the term contractors the same opportunity to submit a proposal based on the delay. A delay in the Notice to Proceed would certainly have impacted the prices that were offered.

Appeal File, Exhibit 8.

14. Mr. Sipple replied that he was not asking for a delayed notice to proceed, since he planned to purchase all of the necessary material in 2003, but wished to delay the actual replacement of the roof until spring. He added that this had been offered at the preconstruction meeting and noted that the GSA COR and property manager had both recognized the inadvisability of doing a major roofing job in the winter months. Appeal File, Exhibit 8.

15. The contract specialist responded to Mr. Sipple's statements in an electronic mail message dated September 18, 2003. In her message, she stated that she had consulted with the COR and she understood that while the possibility of a delay in the notice to proceed was raised prior to the preconstruction meeting, during the meeting itself, the COR made it clear that no such delay would be forthcoming. She also understood from Mr. Rogowicz that NECCO did not pursue a delayed notice to proceed in that meeting and, rather, gave every indication that the work would be completed on time. She acknowledged that the inability of NECCO's preferred subcontractor to perform the work in a timely fashion was unfortunate, but again emphasized that GSA did not want to delay completion of the project and expected NECCO to perform in accord with the contract's time limits. Appeal File, Exhibit 8.

16. On September 19, 2003, Mr. Sipple e-mailed the COR with dates on which he and his subcontractor would be available to discuss the Government's "withdrawal" of its "offer to extend the notice to proceed." On September 22, 2003, the COR responded, advising that no meeting would be scheduled for this purpose and repeating the gist of the contract specialist's earlier communication:

> Based on the receipt of the Notice to Proceed date of 9/03/03, your scheduled completion for the project is 12/2/03, based on the 90 day contract duration for the project. We do expect the project to be complete by December 2, 2003.

A second electronic mail message from the COR was sent on September 29, 2003, reminding NECCO that the schedule and certain submittals were now overdue. In addition, the COR

pointed out that he had been informed of a considerable roof leak in the building, another reason for the requirement that the project be completed promptly. Appeal File, Exhibit 9.

17. In response to the COR's September 29, 2003, electronic mail message, appellant's president replied that his roofing subcontractor's president had been out of town and that he intended to address these issues at a meeting scheduled for the next day. Appeal File, Exhibit 9. On September 30, 2003, NECCO notified the COR that Palmieri was prepared to fix leaks in the roof of the Montpelier Federal Building at no charge pending completion of the roof replacement. Id., Exhibit 11.

18. By letter dated October 10, 2003, the contracting officer sent a cure notice to NECCO. The cure notice addressed NECCO's failure to provide the requisite construction schedule and advised that the contractor's failure to make progress was endangering timely performance of the contract. The letter further cautioned that unless this omission was remedied within ten calendar days, the Government would consider terminating the order for default under the terms and conditions of the Default clause. Appeal File, Exhibit 10.

19. In a letter dated October 22, 2003, NECCO responded to the cure notice, setting forth a chronology of the events and discussions that had caused the contractor to believe that the construction work on the roof could be performed in the spring. In that letter NECCO's president stated, inter alia, that between the date the contract was awarded, August 19, and the conduct of the preconstruction conference on August 27, he had a conversation with the COR in which the COR raised the possibility of delaying the notice to proceed until spring. He pointed out that the preconstruction meeting was conducted with preprinted notes, and that on that date the COR had again mentioned extending the date of the notice to proceed. At the preconstruction meeting, Palmieri offered an October 13 start. On September 15, 2003, when the COR contacted NECCO concerning submittal of the construction schedule, NECCO responded that the roofing subcontractor was considering accepting a delayed notice to proceed. According to Mr. Sipple, only then did the COR advise NECCO that he had contacted the contract specialist and been told that a delayed start would not be permitted. Subsequent to that, NECCO's subcontractor offered to commit to fixing leaks at no charge to the Government in exchange for the flexibility to replace the roof in the spring. In summarizing his position, NECCO's president stated the following:

> We listened to an offer made by a person who had full authority to make the offer, we responded to inquiries. . . . We were surprised that an offer made by the COR was not being honored by someone above him and then left totally in the dark about who had authority on the job. In talks with the COR we sensed some dissatisfaction with the position he had been put in. He expressed his understanding of the position we were in. He expressed that the roof had several leaks and he was twice told that they would be repaired at no cost. He apparently could not accept the offer even though it is well within the authority we were told he had. . . .
>
> We have worked with this COR on other projects, responded to his offers and followed his direction without any second-

> guessing or negative consequences. There was no over-stepping his authority by others in GSA on those projects. Why is this job different?
>
> We feel that by responding to the COR, whose authority is given by the contracting officer, we are complying with the requirements of the contracting officer and that there are absolutely no grounds for termination.

Mr. Sipple concluded by submitting a project schedule, which he characterized as "approximately five months early" with a statement that the notice to proceed that NECCO would need to meet the schedule would need to be issued in April 2004. Also provided with this letter was a letter authored by the president of Palmieri Roofing confirming that the company was fully booked for the fall months in 2003 and unable to proceed with the Montpelier Federal Building project prior to the spring of 2004. Appeal File, Exhibit 11.

20. By letter dated November 3, 2003, the contracting officer notified NECCO that delivery order number P-01-03-BZ-004 was terminated for default for failure to cure the conditions outlined in the contracting officer's letter of October 10, 2003. Appeal File, Exhibit 12. NECCO filed a timely appeal at the Board. Id., Exhibit 13.

21. At the hearing in this dispute, the contracting officer testified that she terminated the contract for failure to make progress because NECCO never submitted an acceptable schedule and never commenced work at the site. It was clear that the roof replacement would not be completed by the due date in early December. One of the reasons she rejected NECCO's offer to ensure that leaks were repaired free of charge until the spring, when Palmieri could replace the roof, was because she believed that it would be unfair to the other three term contractors, who had competed for the work, to permit NECCO to alter the initial contract terms and scope in this manner since the other contractors were not offered the opportunity to compete for a later completion date. Transcript at 38-47.

22. NECCO's president testified that NECCO had worked previously with the COR on other federal construction contracts in Vermont and that he and the COR had a good working relationship, with the ability to iron out the details of the job and "get the work done." In his experience, the COR was reasonable to work with. Transcript at 171-75. In particular, Mr. Sipple noted that on numerous occasions, Mr. Rogowicz had, in his capacity as COR, modified the work to be done by NECCO under prior contracts and suspended work under prior contracts. This routine give-and-take between NECCO and the COR on other projects, and the language of the letter describing the COR's authority, led Mr. Sipple to believe he could rely on the COR's earlier suggestion that performance could be delayed into the spring when Mr. Palmieri informed him his firm could no longer do the work on the Montpelier building in the fall of 2003. Id. at 176-79.

23. NECCO's president further testified that he contacted several other roofers in the area when he realized that Palmieri would not be able to perform the work in the fall of 2003, but could not locate any that were available to perform the work. Transcript at 173-74. At that point he hoped that the offer to have Palmieri make repairs to the roof free of charge

and then complete the replacement in the spring would be accepted by GSA, particularly given the conversations he had already had with the COR. Id. at 172.

24. Following termination, NECCO's surety performed the takeover contract, using NECCO and Palmieri to perform the work, which was done in the spring as NECCO had offered. Transcript at 194.

Discussion

A termination for default is regarded as "a drastic sanction which should be imposed or sustained only for good grounds and on solid evidence." J. D. Hedin Construction Co. v. United States, 408 F.2d 424, 431 (Ct. Cl. 1969). The initial burden of proving that there are good grounds and solid evidence to support the termination action falls to GSA, which must establish that its decision to terminate for default NECCO's right to perform was justified in light of the circumstances as they existed at the time the decision was made. Lisbon Contractors v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987); Ranco Construction Inc. v. General Services Administration, GSBCA 11923, 94-2 BCA ¶ 26,678, at 132,702. GSA can meet its burden by showing that the contractor failed to perform in accordance with the contract terms and that timely performance was beyond its reach. See, e.g., Lisbon Contractors; Florida Engineered Construction Products Corp. v. United States, 41 Fed. Cl. 534, 538-39 (1998); American Sheet Metal Corp. v. General Services Administration, GSBCA 14066, et al., 99-1 BCA ¶ 30,329; SAE/Americon, Inc. v. General Services Administration, GSBCA 12294, et al., 98-2 BCA ¶ 30,084, at 148,906. Once the Government has established its prima facie case supporting the termination decision, the burden shifts to the contractor to establish the excusability of its non-performance. See, e.g., DCX, Inc. v. Perry, 79 F.3d 132, 134 (Fed. Cir.), cert. denied, 519 U.S. 992 (1996); Lisbon Contractors, Inc., 828 F.2d at 764.

In this case, GSA has established that following issuance of the notice to proceed on September 2, 2003, the task order obligated NECCO to submit a schedule for approval and to proceed with the work so as to complete the roof replacement by December 2, 2003, ninety days following receipt of the issuance of the notice to proceed. NECCO failed to submit an appropriate schedule and to commence work on the roof, and did not, in response to the cure notice, provide any assurances that it would perform the work in the time frame required by the contract. The Court of Appeals for the Federal Circuit has stated in this regard:

> When the government has reasonable grounds to believe that the contractor may not be able to perform the contract on a timely basis, the government may issue a cure notice as a precursor to a possible termination of the contract for default. When the government justifiably issues a cure notice, the contractor has an obligation to take steps to demonstrate or give assurances that progress is being made toward a timely completion of the contract, or to explain that the reasons for any prospective delay in completion of the contract are not the responsibility of the contractor.

Danzig v. AEC Corp., 224 F.3d 1333, 1337 (Fed. Cir. 2000) (citations omitted). Here, in response to the cure notice, appellant not only did not assure GSA that it would perform by the contract completion date, but rather revealed that it required a substantial amount of additional time to perform the work. In light of these circumstances, the contracting officer justifiably concluded that there was no reasonable likelihood that NECCO could or would perform the contract work within the time allotted under the contract, and she terminated the delivery order for default. Findings 12-19. Based on this indisputable evidence, GSA has met its burden to establish a prima facie case supporting the termination decision. McDonnell Douglas Corp. v. United States, 323 F.2d 1006, 1013-15 (Fed. Cir. 2003); Lisbon Contractors, 828 F.2d at 765; see also Discount Co. v. United States, 554 F.2d 435, 441 (Ct. Cl.), cert. denied, 434 U.S. 938 (1977).

NECCO bears the burden of demonstrating that its failure to make progress was excusable. To this end, NECCO maintains that it was not in default of the contract because the COR was authorized to extend the time for completion, that he in fact made an offer to delay the issuance of the notice to proceed, and that NECCO accepted this offer. From the record developed in this case, it is patently clear that the contracting officer at no time was willing to extend the completion date for this project, nor was she willing to delay its start. To prevail on its theory, then, NECCO must show (1) that the COR had the authority to agree to a later start date for the work, thus allowing the contractor to postpone the roof replacement until the spring; (2) that such an offer was actually made; and (3) that the offer was binding even though it was never reduced to writing.

Appellant argues that it understood the contracting officer's letter, setting forth the COR's responsibilities, authorities and limitations, to permit the COR to agree to adjust the time frame for the performance of the roof replacement work by delaying the notice to proceed so as to move the time for performance into the spring of 2004. NECCO's conclusion in this regard is based on the letter's statement that the COR was authorized to administer the contract on a day-to-day basis, to approve and monitor the contractor’s schedule, and, among other things, to "grant any time extension." GSA disagrees with this contention, maintaining that the COR did not have the authority to alter this contract term, and that NECCO's assertion in this regard is an unreasonable interpretation of the COR's stated authority and responsibilities.

In considering this contention, we note that appellant's proposed interpretation of the COR's authority may only be considered if, upon review, of the contract and letter detailing the COR's authority, read as a whole, are ambiguous and the contractor's proposed interpretation is reasonable. See McAbee Construction Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir. 1996). From this standpoint, appellant's understanding of the COR's authority, taken out of its context, is dubious at best. We note that the overall term contract provides that the COR may resolve issues arising with respect to matters such as workmanship or technical compliance, approval and acceptance of work, placement of and modifications to task orders, and inspections, but also expressly states that the COR may not be delegated authorities which would significantly impact contract terms. The letter detailing the COR's authority must be interpreted in the context of the overall contract terms and with regard to the full scope of its own terms.

NECCO argues that it understood the letter to permit Mr. Rogowicz to "grant any time extension," including the ability to agree to delay issuance of the notice to proceed so as effectively to extend the time for contract performance. This interpretation, however, fails to recognize the context of the complete sentence, which provides that the COR may "[i]ssue change orders up to $25,000.00 on work within the scope of the contract and grant any time extension." This would suggest that the authority to grant a time extension is tied to the authority to issue limited change orders to the work, and is not an unrestricted authorization to revise the start and end dates for contract work outside the parameters of a change to the contract work. The Government urges that this is the proper interpretation of this authority and, we note, this construction comports with the letter's additional proviso that the COR not be delegated authority to significantly change contract terms.[2]

We are not required, however, to resolve the proper construction of the COR's authority, because the appellant's argument fails for another, even more compelling, reason. In particular, the evidence simply does not support the conclusion that the COR actually made an offer to delay the issuance of the notice to proceed, nor does it show that NECCO undertook, in a timely manner, to accept that offer, so as to establish an ostensibly binding oral modification of the contract. The evidence on this point is too diffuse and vague to persuade us that anyone representing the Government, including the COR, actually offered to delay the notice to proceed or, alternatively, offered or agreed to allow the contractor to postpone the installation of the new roof until the spring of 2004. Nor does the record establish that any Government representative understood that NECCO expected a delayed contract start prior to the end of September, when NECCO determined that its subcontractor would not be able to undertake this project until the spring of 2004 and raised this issue with GSA. Far from corroborating NECCO's president's understanding of their early conversations, the COR testified only that he had speculated about a delayed start to the contract work because of his experience with winter construction conditions, not because he intended to offer a delayed start. His testimony does not suggest that he intended to encourage NECCO to seek, or insist on, a delay of the notice to proceed, nor did he believe that he had the authority to change the contract schedule in this manner.

The evidence similarly does not establish that NECCO actually expected it could delay the contract start until well after the preconstruction conference, where NECCO, through its subcontractor, proposed dates for completion by early December 2003. The notice to proceed was issued at the beginning of September, without objection from NECCO until the contracting officer inquired about the submission of a schedule. Shortly after that occurred,

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[2] We recognize that NECCO has also attempted to justify its reliance on the COR's offhand remarks about delaying until the spring the roof replacement work on its prior experience with contract performance under this COR on other delivery orders and construction projects for GSA in Vermont. Finding 22. The general nature of this testimony, however, at best supports the day-to-day administrative role properly delegated to the COR. It does not establish that Mr. Rogowicz ever previously revised the completion date of contract work outside his authority to issue a change order in amounts up to $25,000. Thus, the evidence does not show a prior course of conduct that would support NECCO's interpretation of the COR's authority and intent. See, e.g., Products Engineering Corp. v. General Services Administration, GSBCA 12503, 98-2 BCA ¶ 29,851.

appellant determined that it would not be in a position to perform the work through the efforts of its intended subcontractor, which had, in the interim, accepted a contract for another project and would not be able to address the Montpelier project until the spring of 2004.

Since we cannot find that anyone in GSA, including the COR, ever made an offer to delay the notice to proceed, or otherwise extend the time for performance of the roof replacement, we must conclude that appellant cannot show that its failure to make progress was excusable. The fact that Palmieri Roofing found itself overbooked with projects shortly after NECCO was awarded this task order, and could no longer perform the subject contract work in the required time frame, does not constitute a legally cognizable excuse for NECCO's failure to perform in accordance with the contract's terms. It is the contractor's obligation to ensure that it has the capability to perform the contract work prior to bidding; when a prospective subcontractor reneges following award it is unfortunate, but not the responsibility of the Government, which is still entitled to insist upon compliance with the contract terms, including the date for completion of the work. See, e.g., Ameritech Manufacturing Co., ASBCA 49016, 96-2 BCA ¶ 28,397; JR & Associates, ASBCA 41377, 92-1 BCA ¶ 24,654 (1991). NECCO recognized this as well, as illustrated by its efforts to find a substitute subcontractor. Finding 23.

Finally, we address the ancillary question of whether the contracting officer's decision to terminate the contract for default was properly exercised in accordance with the FAR's requirements. We conclude that it was.

It is well-established that the default clause does not require the Government to terminate a contract upon a finding of default, but merely gives it the discretion to do so. See, e.g., Darwin Construction Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987); Marshall Associated Contractors, Inc., IBCA 1901, et. al, 01-1 BCA ¶ 31,248. In this regard, under FAR 49.402-3(f), the contracting officer is instructed to consider a variety of factors in determining whether to terminate a contract for default.[3] At the same time, these regulations

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[3] The FAR factors are as follows:

(1) The terms of the contract and applicable law and regulations.

(2) The specific failure of the contractor and the excuses for the failure.

(3) The availability of the supplies or services from other sources.

(4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

do not confer rights upon a contractor, and a contracting officer's failure to consider one or more of the factors does not necessarily invalidate a default termination. DCX, Inc. v. Perry, 79 F.3d at 135; Darwin, 811 F.2d at 598. Rather, to pass scrutiny, the contracting officer's decision to terminate for default must reflect a reasoned consideration of the totality of the circumstances.

NECCO points out that since the start date had already lapsed at the time of termination, the contract work, performed under the auspices of the surety, was still delayed until the spring – the time frame that NECCO had offered to achieve. This fact is not enough to demonstrate the exercise of the right to terminate for default was an abuse of discretion, however. The contracting officer testified that she considered a variety of factors in concluding that she should terminate the contract for default. She determined that the totality of the circumstances did not counsel against termination for default in this case. Although NECCO had provided performance dates at the preconstruction meeting that comported with the contract terms, it had not made any progress in performance of the work thereafter. Its excuse, the unavailability of its intended subcontractor, was not acceptable. The contracting officer was particularly concerned by the fact that the other term contractors had also bid on this work with the understanding that the roof had to be installed prior to winter. She deemed it important to protect the integrity of the procurement process and the confidence of the other contractors in that process, and she thus concluded that it would not be proper to allow a change of such magnitude to the initial terms of the contract in the manner proposed by NECCO. Thus, she concluded the proper course of action would be to terminate the delivery order for default. This was not an unreasonable exercise of her discretion.

In conclusion, we find that there is no persuasive evidence that any representative of the Government actually made a viable commitment or offer to extend the performance time of this contract. NECCO's failures to submit an appropriate schedule for completion of the work and to commence work in a timely fashion were not excusable. The contracting officer did not abuse her discretion in deciding to terminate the task order for default. Accordingly, the termination for default was proper.

Decision

The appeal is **DENIED**.

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(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

CATHERINE B. HYATT
Board Judge

We concur:

ROBERT W. PARKER
Board Judge

EDWIN B. NEILL
Board Judge