Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: August 2, 2006

GSBCA 16739

MMI CAPITAL, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

J. Hatcher Graham, Warner Robins, GA, counsel for Appellant.

Torrie N. Harris, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **DeGRAFF**.

BORWICK, Board Judge.

In this appeal, MMI Capital, appellant, contests the termination for default of its lease contract with the General Services Administration (GSA or respondent). The contracting officer terminated the contract for default for failure to make progress. The parties submitted their dispute on the record pursuant to Board Rule 111.[1] We sustain respondent's termination for default as respondent established that there was no reasonable likelihood that the contractor could perform within the time remaining for performance and appellant did not establish excusable cause for its default. The doctrine of commercial impracticability does not apply in this case so as to excuse appellant's default.

---

[1] 48 CFR 6101.11 (2005).

Findings of Fact

On or about August 6, 2004, respondent issued solicitation for offers (SFO) 2FL0569 for the lease of 15,992 net rentable square feet of office space in Longwood, Florida, for use by the Social Security Administration. Appeal File, Exhibits 1-4. The SFO described a fully-serviced lease, with the landlord building out the space to government requirements, and with the Government paying for the build-out as part of the rental rate. *Id*., Exhibit 1 at 7, ¶ 1.8E.1.a-d. The SFO required offerors to provide evidence of their capability to perform, including "evidence of ownership and control of [the] site." *Id*. at 17, ¶ 3.14A5.[2]

The SFO contemplated a ten-year lease term, with a five-year firm term. Appeal File, Exhibit 1 at 6, ¶ 1.5. The SFO stated that occupancy was required on or before September 12, 2005. *Id*. at 6, ¶ 1.7. Towards that end, the successful offeror was to provide, within fifteen working days after award, a tentative construction schedule giving the dates on which the various phases of construction would be completed to coincide with the Government's occupancy date. *Id*. at 17-18, ¶ 3.15.

Appellant submitted an offer to lease without owning the land for the building it proposed to lease to the respondent. Appeal File, Exhibit 7. During the bidding process appellant submitted to the respondent a real property purchase contract for the land. *Id.,* Exhibits 7-8. The land was a piece of property called the Bayhead Racquet Club, which appellant explains was a defunct and abandoned tennis club. Appeal File, Exhibit 8; Letter from Appellant to the Board (July 12, 2006). The property was zoned "agricultural," but the local planning and zoning commission had designated the property's zoning to be changed to "commercial." *Id*.

The purchase contract, dated October 14, 2004, was between Heath & Associates--acting on behalf of appellant--and Dat M. Le & Dung K. Le, the property owners. Appeal File, Exhibit 8. Dat M. and Dung K. Le agreed to sell the property to Heath & Associates for $325,000. *Id*. The purchase contract established an "inspection period," which commenced on September 30, 2004, and ran for ninety days or until such time as the property was zoned for a professional office building by the governing authority. If, at the

---

[2] That paragraph also required the offeror to provide satisfactory evidence of a conditional commitment of funds to prepare the space; the name of the proposed construction contractor, as well as evidence of the contractor's competency; the license or certification to practice in the locality from individuals or firms providing architectural or engineering design services; and compliance with local zoning laws or variances approved by the local zoning authority. *Id*.

end of the initial inspection period, the property was not zoned for an office building, the inspection period could be extended at the discretion of the purchaser. *Id*. The sellers undertook to begin the process of re-zoning for a professional office and such zoning was a condition of consummating the sale. The purchase contract provided that if professional office zoning were to be denied by the governing authority, the purchase contract would be void. *Id*. The real property purchase contract established March 15, 2005, as the latest closing date by which the purchase was to be consummated. *Id.*

On May 2, 2005, the respondent notified Heath & Associates of the lease award for the term and square footage of space stated in the SFO. Appeal File, Exhibit 5. The lease, dated May 3, 2005, provided that the respondent would furnish space layouts within thirty days of award and that the appellant was to complete all tenant alterations within thirty days of receipt of the respondent's tenant layouts or within thirty days of the effective date of the lease, whichever date was later. *Id*., Exhibit 6 at 2. Paragraph two of the lease stated its term as running from May 1, 2006, through April 30, 2016. *Id*. at 1.

The Default in Delivery clause of the lease provided:

> (a) With respect to Lessor's obligation to deliver the premises substantially complete by the delivery date, time is of the essence. If the lessor fails to work diligently to ensure its substantial completion by the delivery date or fails to substantially complete the work by such date, the Government may by notice to the Lessor terminate this lease.
>
> . . . .
>
> (d) The Government shall not terminate this lease under this clause nor charge the Lessor with damages under this clause if (1) the delay in substantially completing the work arises from excusable delays and (2) the Lessor within 10 days from the beginning of any such delay (unless extended in writing by the Contracting Officer) provides notice to the Contracting Officer of the cause of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If the facts warrant, the Contracting Officer shall extend the delivery date, to the extent of such delay at no additional costs to the Government. A time extension is the sole remedy of the Lessor.

Appeal File, Exhibit 2 at 3, ¶ 11 (552.270-18--DEFAULT IN DELIVERY--TIME EXTENSIONS (Sep 1999)).

Excusable delays were defined as "delays arising without the fault or negligence of Lessor and Lessor's subcontractors and suppliers at any tier" and included "delays of

subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Lessor and any such subcontractor or supplier." Appeal File, Exhibit 2 at 1, ¶ 1(f) (552.270-4--DEFINITIONS).

The lease also provided:

> (a) Each of the following shall constitute a default by Lessor under this lease:
>
> (1) Failure to maintain, repair, operate or service the premises as and when specified in this lease, or failure to perform any other requirement of this lease as and when required provided any such failure shall remain uncured for a period of thirty (30) days next following Lessor's receipt of notice thereof from the Contracting Officer or an authorized representative.
>
> (2) Repeated and unexcused failure by Lessor to comply with one or more requirements of this lease shall constitute a default notwithstanding that one or all such failures shall have been timely cured pursuant to this clause.
>
> (b) If a default occurs, the Government may, by notice to Lessor, terminate this lease for default and if so terminated, the Government shall be entitled to the damages specified in the Default in Delivery-Time Extensions clause.

Appeal File, Exhibit 2 at 4, ¶ 16 (552.270-22--DEFAULT BY LESSOR DURING THE TERM (SEP 1999)).

On May 19, 2005, Heath & Associates wrote the GSA contracting officer that the landlord's purported seller of the land had reneged on the sales purchase contract:

> Despite [the contract for the sale of land] Mr. Le has demanded additional money for the sale of the land; he has attempted to reduce the amount of land being sold to a size that is incompatible to our needs; and he has proposed to sell the entire office park at a greatly increased price. It is apparent that he believes that he is able to demand more now that there is a GSA Contract pending on the site. It is our intention to disabuse him of the notion.

Appeal File, Exhibit 7. Heath & Associates advised the contracting officer that at the commencement of these "shenanigans" it had retained a law firm to file a lawsuit demanding performance of the existing land sales contract and to seek an injunction. *Id*.

By letter of July 1, 2005, the Government's real estate broker, Johnson Management Group (JMG), wrote to the Heath & Associates, referencing the Default and Default in

Delivery clauses in the lease, noted May 3, 2005, as the effective date of the lease, and demanded that "closing" on the property sales contract take place within thirty days. The letter warned appellant that if closing did not take place in thirty days, the respondent would pursue its remedies under the Default in Delivery clause. Appeal File, Exhibit 9.

Heath & Associates responded that it had filed suit against the landowner and that "it is our expectation to have control of this property in the very near future." Appeal File, Exhibit 10. By letter of July 21, 2005, however, Heath & Associates's attorneys advised Heath that it could expect the litigation over the land purchase contract to last between twelve and twenty-four months, not including any appellate period. Appeal File, Exhibit 13. The attorney also advised that, having prevailed in the litigation, the period to re-zone the property would take an additional four to twelve months to complete. *Id*.

Appellant forwarded this letter to JMG and stated, "[A]s you can see, the Florida legal system cannot provide relief in time to meet the deadlines which we are struggling under." Appeal File, Exhibit 12.

By letter of August 10, 2005, the respondent terminated the contract for default, stating:

> It is the position of GSA that these attachments [referencing exchange of correspondence on the lawsuit] indicate that MMI Capital is incapable of meeting the occupancy date of September 12, 2005 required by the Lease and the statements referenced above evidence a breach of the Lease contract.

Appeal File, Exhibit 14. Respondent explains that the reference in that letter to the September 12, 2005, occupancy date stated in the SFO was a mistake; the contracting officer had meant to refer to the occupancy date of May 1, 2006, mentioned in the lease. Respondent's Response to the Board's Oral Request for Additional Information (July 27, 2006).

Discussion

A termination for default is a drastic sanction, to be imposed only for good cause and on the basis of solid evidence. *Products Engineering Corp. v. General Services Administration*, GSBCA 12503, 98-2 BCA ¶ 29,851 (citing *DeVito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969)).

In this case, on August 10, 2005, the contracting officer terminated appellant's lease contract for appellant's failure to make sufficient progress to meet the "occupancy date of September 12, 2005," mentioned in the SFO. The parties had executed a lease establishing

the lease term commencing on May 1, 2006, however. Respondent admits that the reference to September 12, 2005, instead of May 1, 2006, was a mistake. A default termination may be sustained on other than the grounds stated in the default termination if alternate grounds existed at the time of the termination. *Wood Sanitation Service*, ASBCA 44651, 94-2 BCA ¶ 26,833 (citing *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1277 (Fed. Cir. 1985)). Therefore, the issue before the Board is whether the record supports the Government's termination for default for failure to make progress to enable the lease term to commence on May 1, 2006.

Where the Government terminates a contract for failure to make progress, the Government must establish that, at the time of termination, there was no reasonable likelihood that the contractor could perform within the time remaining for performance. *Jo-Ja Construction Ltd. v. General Services Administration*, GSBCA 14786, 05-1 BCA ¶ 32,861 (citing *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006 (Fed. Cir. 2003)); *Ranco Construction v. General Services Administration*, GSBCA 11923, 94-2 BCA ¶ 26,678 (citing *Lisbon Contractors v. United States*, 828 F.2d 759 (Fed. Cir. 1987)), *reconsideration denied,* 94-2 BCA ¶ 26,797. In this case the lease term was to commence on May 1, 2006. As of August 10, 2005, instead of possessing a building well on its way to completion so as to enable the Government to occupy the space when the lease term was to commence, appellant was ensnared in a lawsuit with its purported seller of the land. Not only was there no conceivable likelihood that the leased space would be ready by May 1, 2006, but at the time of termination, there was no reasonable likelihood that the Government could occupy the space for any date in the then-foreseeable future, since litigation would have taken between twelve and twenty-four months, proper zoning was not yet obtained, and the building did not yet exist.

Appellant argues that the delay was excusable because the delay was the fault of Dat M. and Dung K. Le, the sellers of the property, not appellant. However, when a contractor enters into a contract with a subcontractor or supplier, it assumes the risk that the subcontractor would be unable to perform in a timely manner. The contractor is legally responsible for whether the subcontractor or supplier performs. *Jacob Gehron Co.*, DOTCAB 1079, 80-2 BCA ¶ 14,534.

Consequently, an excusable default is one that is beyond the control and without the fault or negligence of both the contractor and its subcontractor or suppliers. 48 CFR 552.270-4, -18; *American Technical Coatings Corp. v. General Services Administration*, GSBCA 13052, 96-1 BCA ¶ 27,991 (construing termination for default clause in supply contract); *Conquest Industries, Inc.*, ASBCA 38738, 90-3 BCA ¶ 23,090. Here, appellant has not demonstrated that its failure in performance was without the fault or negligence of Messrs. Dat M. and Dung K. Le; to the contrary, appellant blames its suppliers for its non-

performance, accusing them of bad faith and "shenanigans." Appellant has not demonstrated excusable cause for the default.

Appellant argues that the case of *Transfair International Inc. v. United States*, 54 Fed. Cl. 78 (2002), mandates that its supplier's default not be attributed to appellant. Appellant's reliance on *Transfair* is misplaced. *Transfair* is not a termination for default case; rather, it presented the issue of whether a contract for delivery of humanitarian relief supplies was rendered illegal due to a subcontractor's conduct in using banned Iranian airliners for the delivery of those supplies. Thus the case concerns illegal performance of the contract, not, as in this case, a contractor's failure of performance triggering the Government's remedies under the default clauses of the contract. In *Transfair*, the court, in denying the Government's motion to dismiss the case, merely refused to accept the Government's argument that a contractor should be held strictly liable for the illegal actions of a subcontractor in the same manner as a contractor would be held liable for the non-performance of a subcontractor in a termination for default situation. *Transfair*, 54 Fed. Cl. at 82-83. *Transfair* makes no change in a contractor's evidentiary burden to establish excusable cause under a contract's default clause.

Finally, appellant argues that its default should be excused by the doctrine of impossibility of performance. The doctrine of impossibility of performance excuses non-performance when the agreed-upon performance has been rendered commercially impracticable by an unforeseen supervening event not within the contemplation of the parties at the time the contract was formed. *Massachusetts Bay Transportation Authority v. United States*, 254 F.3d 1367, 1374 (Fed. Cir. 2001). The closely related doctrine of existing impracticability of performance is applicable where, at the time the contract is made, a party's performance under it is impracticable without that party's fault because of a fact of which the party has no reason to know and the non-existence of which is a basic assumption on which the contract is made. *Id.* (citing Restatement (Second) of Contracts § 266(1) (1979)). The asserted impossibility is measured by objective, not subjective standards. *ESB Inc.*, ASBCA 22914, 81-1 BCA ¶ 15,012.[3] Neither doctrine will excuse non-performance

[3] For example, courts have found impossibility arising from defective design specifications when the immutable laws of physics and chemistry prevented the satisfactory performance expected from the specifications, *Ordance Research Inc. v. United States*, 609 F.2d 462, 479 (Ct. Cl. 1979) (explosion of magnesium igniters produced as specified); *Maxwell Dynamometer v. United States*, 386 F.2d 855, 872 (Ct. Cl. 1967) (roller of specified dimension could not meet horsepower, time and speed performance requirements), or when the condition would have an adverse affect on any contractor attempting performance, not just the particular contractor. *International Electronics Corp. v. United States*, 646 F.2d 496,

arising from inadequacies of a proposal about which a contractor knew or should have known. *Short Brothers PLC v. United States*, 65 Fed. Cl. 695, 784 (2005).

Here, the facts that resulted in appellant's default were that the land for the building to be leased to respondent was (1) not then zoned for its intended commercial use and (2) not even owned by appellant. Appellant, knowing of these fundamental defects concerning the property, had its agent enter into the land sales contract with Messrs. Dat M. Le and Dung K. Le. Since the latest closing date for conveyance of the land to appellant was March 15, 2005, and under the SFO occupancy was originally to commence on September 12, 2005, appellant's bet that it could obtain ownership of properly zoned property in time to both build to the Government's requirements and meet the original occupancy date in the SFO was audacious indeed. Even at the time of respondent's lease award in early May 2005 appellant knew that the property still was not zoned for commercial use and that appellant did not own the property. The doctrines of impossibility or commercial impracticability do not excuse appellant's default.

Decision

The Board sustains the respondent's termination for default, and the appeal is **DENIED**.

_____
ANTHONY S. BORWICK
Board Judge

We concur:

_____
MARTHA H. DeGRAFF
Board Judge

_____
CATHERINE B. HYATT
Board Judge

510-12 (Ct. Cl. 1981) (labor strike excused default given shortage of calibration technicians in Far East necessary to perform contract).