



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 29, 2020

CBCA 5766

SCS BUILDING MAINTENANCE, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Trevor H. Rhone, President/CEO of SCS Building Maintenance, Inc., Framingham, MA, appearing for Appellant.

Michael Converse, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **DRUMMOND**, and **SULLIVAN**.

VERGILIO, Board Judge.

SCS Building Maintenance, Inc. (contractor) disputes the termination for cause by the General Services Administration (agency) of its contract to provide janitorial and related services at a courthouse and a federal building. The agency terminated the contract during its fourth option year, after issuance of a letter of concern and a cure notice, and receipt of a response.

The parties elected to submit the case on the written record. The contractor's recent attempt to seek a hearing, after the evidentiary record closed, is unavailing; the Board denies the request. The agency has met its burden of proof, demonstrating that the contractor failed to provide sufficient necessary services. The contractor has not demonstrated that the

termination for cause was excused. Although the contractor attempts to recover what it describes as damages of \$242,391, the Board lacks jurisdiction to consider that allegation because there is no underlying claim and appeal before the Board regarding such a dispute. The Board denies the appeal.

Findings of Fact

1. With an effective date of December 1, 2012, the agency awarded the underlying contract to the contractor to provide janitorial and other services at a federal building and a courthouse. The period of performance was for one year, with a separately priced line item for each facility, and different line items for other services. Similar line items were priced for four option years. Exhibit 1 at 1, 7-18 (all exhibits are in the appeal file). The contract incorporates a Termination for Cause clause:

Termination for cause. The Government may terminate this contract, or any part hereof, 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. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

Exhibit 1 at 73 (48 CFR 52.212-4(m) (2010)).

2. The contract was a performance-based service contract. Exhibit 1 at 80. The contract does not detail how the contractor is to perform, but sets forth performance quality standards and desired results. Exhibit 1 at 27 (¶ C.1.0.15), 28 (¶ C.2), 89-120. For example, under floor care, the standard for successful performance specifies: "Floors, base moldings and grout shall be clean and free of debris, including but not limited to, (dirt, water streaks, mop marks, string, gum, tar and other foreign matter). The floors shall maintain their natural luster and not have a dull appearance." The quality assurance surveillance method states that the Government may evaluate performance based on any or all of the following: tenant satisfaction, surveys, tenant interviews, periodic inspections, and service call documentation." Exhibit 1 at 92. For exterior hard surface areas (sidewalks, brick areas, etc.), the standard is "Shall be clean and free of dirt, debris, gum, litter, gravel, weeds, oil, and grease. No residual dirt shall remain after the removal of the debris." The quality assurance surveillance method is as above. Exhibit 1 at 101.

3. Consistent with the solicitation, the contract incorporated a building information sheet which provided details on the dimensions and attributes of the buildings. For the courthouse, it identifies for courtrooms and a jury room further details on the spaces, operating hours, and number of days used annually. Exhibit 1 at 82-88.

4. The agency exercised all options to extend the contract. Although no issues are in dispute regarding the contractor's performance for the initial years of performance, in February 2016, the agency and contractor had discussions and exchanged correspondence concerning the contractor's performance and quality thereof. The contractor wrote that it had provided services in line with the anticipated level of usage, as detailed in the contract, and would continue to do so. It further noted that it could no longer provide free services that exceeded those detailed in the contract. The contractor was of the view that the users at the courthouse were requiring full-time courtroom coverage—more services than the agency had contracted for, as this contract reduced services from the prior contract. To support its assertion that it was being asked to provide additional services, the contractor provided a spreadsheet and charts said to reflect how often it was asked to provide these services. It also sought a contract modification if the agency continued to seek service levels over those detailed in the contract. Some of the information is not self explanatory; the contractor has not provided details. Information for four days of usage shows that multiple courtrooms were used on each of the days; but such a small sampling does not demonstrate usage in excess of that contracted for. Specifics of additional tasks or effort are not apparent in the correspondence, Exhibit 13, or elsewhere in the record.

5. In June 2016, the agency informed the contractor of insufficient performance at the federal building. The contract requires grounds maintenance, with the standard to maintain all plants and shrubs in a manner that sustains a healthy appearance. Exhibit 1 at 102. The lack of adequate performance is supported by photographs, which show, for example, shrubs in need of pruning and weeds in planters, demonstrating a lack of services over a period of time. Exhibit 16. Inspection reports from May and June 2016 for the courthouse identify unsatisfactory (1) cleaning of other than courtrooms, (2) record maintenance, and (3) outdoor maintenance. Exhibits 43, 44.

6. In July 2016, the agency issued a letter of concern, identifying shortfalls in the contractor's performance at the two facilities:

The Government has received numerous complaints from tenants and inspection reports demonstrate numerous deficiencies and that there are problems with day to day performance. There also seem to be some problems with quality control.

As discussed on the teleconference on June 23, 2016, [the contractor's] performance and lack of quality control are adversely impacting [the agency's] ability to provide properly maintained facilities for our tenants.

Exhibit 17 at 10-12. The letter details issues of inadequate cleaning, supported by observations of the tenants and the agency quality control person. Deficiencies are noted in items such as outdoor grounds maintenance, window sills and dusting, and inconsistencies in daily cleaning, and a lack of a schedule for periodic maintenance. The contractor responded by asserting that the users were requesting services well over the anticipated usage. Exhibit 17 at 7. The contractor points to nothing in the record to support its assertions regarding excess usage. The contractor also testified in a deposition that it did not submit a formal response to the letter of concern until responding to the cure notice. Exhibit 52 at 132-33.

7. In December 2016, the contractor again asserted in communications with the agency that the users were requiring services above those covered under the contract. Exhibit 17 at 8. The contractor does not support its contentions by reference to information in the record.

8. Shortly thereafter, on December 16, 2016, the contracting officer issued a cure notice, with performance to be brought up to acceptable levels by the end of January 2017. Exhibit 28. The email with the attached cure notice states: "Services continue to be less than satisfactory after numerous meetings and discussions with the [agency] staff. The continued lack of sufficient management oversight and training is a key part of the problem." Exhibit 27 at 1.

9. The contractor provided a response on January 17, 2017, again maintaining that the courthouse personnel demand performance levels in excess of those in the contract. The contractor identified a short-term plan, to include hiring a part-time employee, addressing service levels and tenant needs, making various submittals, performing unannounced twice-monthly inspections, and identifying contracted service level deficiencies and executing an action plan to mitigate deficiencies. Exhibit 50. Subsequent inspection reports, from late January and early March, identify unsatisfactory performance. Exhibit 51.

10. On March 10, 2017, the contracting officer issued a notice of termination for cause. A cover letter provides reasons for the termination, noting the July letter of concern, the "numerous unsatisfactory inspection reports, numerous tenant complaints, a lack of proper management and poor Quality Control" over the past ten months, as well as the lack of a corrective plan and a failure to correct deficiencies. Exhibits 31-33.

11. The contractor acknowledged receipt of the termination for cause, and noted: “To substantiate our position a history of the contract, the work performed, and additional costs absorbed by [the contractor] will be presented in the form of a request for equitable adjustment (REA) showing the termination for cause was not a justifiable nor reasonable act.” Exhibit 35. The promised factual support for the assertions that the contractor performed work in addition to that required under the contract is not part of this record.

12. In June 2017, the contractor filed a timely notice of appeal with the Board challenging the termination. Exhibit 36. The contractor states in its appeal and complaint that it will file a claim with the contracting officer seeking \$242,391. No such monetary claim was made a part of this evidentiary record.

13. Although the contractor starts its brief with the statement that the contracting officer acknowledged more building usage than contracted for, the referenced exhibit 18 does not support the statement. Moreover, the agency denies that it conceded that more services were being required of the contractor, as it sought support from the contractor to demonstrate excess usage and work in addition to that priced under the contract. Complaint, ¶¶ 23, 27, 29, 36; Answer, ¶¶ 23, 27, 29, 36. Although the contractor asserts that the agency told the contractor to keep logs of its performance, when the contractor expressed concerns that the users would be seeking cleaning in addition to that in the contract, Complaint, ¶ 21, the record contains no such logs that detail performance or support the contractor’s allegations for the period in question.

14. To rebut the contractor’s claims regarding actual service or performance requirements in excess of those identified in the contract, the agency included in the record courtroom usage data for the period from September 1, 2015 to February 26, 2016, that belies the contractor’s contentions. Exhibit 13. While some courtrooms were used for more than half the annual usage in the contract over this half-year period, the overall usage was less than half the annual usage identified in the contract. Of the seven courtrooms, three were used for more than half the projected usage for the year; however, the size and attributes of the courtrooms compared to the others do not by themselves demonstrate that the contractor had to engage more effort or person hours to perform the work under the contract than if other courtrooms were in use instead. Exhibits 1 at 86-88, 13 at 48-51. Additionally, the record contains the figures provided by courthouse personnel of courthouse usage for calendar year 2016, that show six courtrooms being used significantly less than projected in the contract, one being used on forty-nine rather than the projected twenty-four days, and the jury assembly room being used every day rather than the projected 104 days. Exhibit 29. Overall, the contractor would have required less effort to complete the actual services than the projected services, given the size and characteristics of the rooms involved. The contractor does not provide evidence to contradict the usage, or evidence of its actual efforts.

At deposition, the contractor's president testified that he compiled a log that documents usage of the courtrooms in excess of that specified in the contract, but that he did not provide it to the agency. Exhibit 52 at 143-45. Such a log is not part of the record.

15. The parties elected to submit the case on the written record. On September 30, 2019, the evidentiary record closed. By October 31, 2019, the parties could each file a brief. The agency did so. The contractor did not. The presiding judge inquired of the parties, if the contractor had submitted a brief, because none had been received, noting that the contractor had the burden of proof to establish that the termination was excused if the agency met its initial burden. The contractor had until November 26, 2019, to file a response or a brief. Without an objection by the agency, the contractor received additional time to file its brief. On the day that submission was due, December 9, 2019, the contractor sought an extension through January 30, 2020, to submit its brief. The presiding judge denied that request, for failure to show good cause. In its brief submitted on December 9, the contractor makes the request to have a hearing on the merits.

Discussion

The contractor's request to obtain a hearing after electing to submit the matter on the record, and after the evidentiary record closed, comes too late. Rule 24 (48 CFR 6101.24 (2019)). With the evidentiary record closed, there is no basis to grant the request, which the Board denies.

An agency bears the burden of proof to demonstrate that a termination for cause was justified; a contractor bears the burden of proof to demonstrate that it was excused from performance and that the termination should be converted to one for convenience. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764-65 (Fed. Cir. 1997); *RAK Contractors, LLC v. Department of Agriculture*, CBCA 4011, 15-1 BCA ¶ 35,934.

The agency has met its burden of proof. The record reveals that the contractor failed to satisfactorily perform services at the buildings. The contractor provided unsupported excuses, and no assurances that it would or could perform as required by the contract. Various requests for additional money to perform the contracted for services does not assure performance. The contractor did not cure performance after receipt of the cure notice.

The contractor makes various factual allegations in the complaint and subsequent submissions, without reference to material in the record. For those items in the complaint, the agency has denied the substantive facts asserted by the contractor, while providing record references that contradict the contractor's position. That is, for the period in dispute, the agency did not require the contractor to clean and provide services in excess of those

identified in the contract. The contractor's broad, general, or specific assertions to the contrary, without a reference to the record do not suffice to meet its burden of proof. The contractor acknowledges that it did not submit documents that it compiled to support its position. While the contractor alleges that the agency issued defective requirements, improperly added scope, or violated duties of good faith and fair dealing, failed to cooperate or improperly hindered or interfered with performance, and improperly terminated the contract, the contractor has not provided support for these allegations.

Although the contractor incorrectly refers to the anticipated usage found in the building information sheets as details being issued post award, the thrust of the contractor's arguments is that it priced the line items bearing in mind the anticipated levels of efforts based on the specified usages, to which it maintains the occupants did not adhere. It asserts that the occupants were not satisfied with the reduced level of cleaning prescribed by the contract, with the result that the contractor was required to perform at greater effort than anticipated and priced under the contract. In theory, this is a plausible defense, that the users demanded greater services than the agency contracted for. However, the contractor has not identified in the record support for its assertion that it performed greater work than the contract required or that the agency (the contracting officer or appropriate official is required to alter the compensable work under a contract; a user request is not sufficient) changed the contract. The litany of allegations (defective specifications, improperly added scope, violations of duties of good faith and fair dealing, failure to cooperate, and improperly interfering with performance, and improperly terminating the contract) all take issue with the agency's actions under the contract, while the facts do not support the allegations. Assertions without support in the record are not material or helpful. The record demonstrates that the contractor failed to perform. The contractor has demonstrated no acceptable basis to excuse its failure to perform.

The contractor states in its claim and complaint that it will file a claim with the contracting officer seeking \$242,391. No such monetary claim was made a part of this evidentiary record. Thus, the Board lacks jurisdiction to consider such a claim in this case.

Decision

The Board **DENIES** the appeal.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

We concur:

Jerome M. Drummond

JEROME M. DRUMMOND

Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge