

Appeal of: :
: :
MASCO, INC., : HUDBCA No. 95-G-146-C15
: :
Appellant : :
: :
Contract No. H03C95004500000 : :
: :

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DECISION BY ADMINISTRATIVE JUDGE DAVID T. ANDERSON

November 4, 1996

Statement of the Case

On July 11, 1995 MASCO, Inc. ("Appellant") filed a notice of appeal of a final decision of a contracting officer, dated June 22, 1995, partially terminating Contract No. H03C95004500000 for default. By letter dated September 12, 1995, Appellant elected to proceed under Rule 12.1(b), which provides for an accelerated procedure in the issuance of a decision in this appeal. However, Appellant was subsequently advised that it would not be possible to adhere to the timeframes envisioned by that rule for several procedural reasons. On March 18, 1996, following the death of the presiding judge, this case was transferred to another Board judge. A hearing was held on June 5, 1996, during which the Government, for the first time, contended that Appellant "double-billed the Government." The Government did not aver in its answer that issue as a ground for the termination for default, and gave no notice to Appellant prior to the hearing that it was raising this issue as an additional ground. Since the Government has failed to raise this additional ground in a timely manner, this Board will not consider it as a basis for upholding the termination for default.

Findings of Fact

1. On November 28, 1994, the U.S. Department of Housing and Urban Development ("HUD," "Department," or "Government") awarded to Appellant Contract No. H03C95004500000, a fixed price, indefinite quantity contract for Mortgage Credit Technical Review, Insurance Endorsement Processing, Mortgage Insurance Certificate ("MIC") Correction, and Single Family Data Input services for the HUD Washington, DC field office ("field office"). The effective date of the contract was December 1, 1994. (Appeal File ("AF") 2.1; Stipulation of Fact, Transcript ("Tr.") 5.)

2. The contract incorporated by reference the Default (Fixed Price Supply and Services) (Apr. 1984) clause set forth at FAR 52.249-8. (AF 2.1.)

3. On June 22, 1995, the contracting officer issued a final decision terminating the MIC Corrections and the Single Family Data Input portions of the contract for failure to complete the required services in a timely manner. The other portions of the contract remained in effect. (AF 1.1, 2.4; Tr. 167-8.)

I. MIC Corrections

4. The contract's MIC Corrections Statement of Work required Appellant to perform the following tasks:

1. Determine that the necessary documentation that supports the requested correction has been submitted. These documents will vary with the type of correction requested, but will not be any other document than called for in the original closing package.

2. Review the documents and request for compliance with HUD guidelines.

3. Input the corrected MIC data into CHUMS (Computerized Home Underwriting Mortgage System] (the automated system) and issue a corrected MIC.

4. Return the request to the lender, if the request is incomplete. Outline the additional info/documentation that is needed.

5. Print the corrected MIC; after the corrected MIC has been printed and signed, the contractor shall sort and match the MIC with the request, verifying that the corrections were made and are accurate. The contractor will then put the MIC and the request in an envelope for mailing and place in a designated location.

6. Perform all work in the field office, using a PC and software supplied by HUD.

7. Attend a training session (not to exceed 8 hours), given by the Field Office on the CHUMS system and other pertinent program requirements.

8. ACCEPTABLE CONTRACT PERFORMANCE: The data input and related tasks shall be completed within 10 (working] days of assignment. The required information shall be free of errors; other tasks shall be performed accurately.

(AF 2.1; Tr. 14-6, 27, 41.)

5. When Appellant was assigned MIC correction requests to process, Appellant discovered that requests for duplicate MICs were mixed in with the assignments. Although not part of his contract, Appellant printed the duplicate MICs as well

as making the corrections. As of March 31, 1995, the field office began to sort the requests for duplicate MICs from the requests for MIC corrections prior to assignment to Appellant. The field office explored the option of modifying Appellant's contract to include the printing of duplicate MICs, but rejected that option. (AF 4.8; Tr. 54-6, 119-21, 142-4, 157-9.)

6. Beginning in March, 1995, the Washington, D.C. field office staff ("field office staff") received calls from unidentified mortgage lenders who had not received their corrected MICs. After checking the CHUMS, the field office staff determined that the requested MIC corrections had not been completed by Appellant. The field office staff searched Appellant's work area in the field office for the lender's correction request, and once found, made the correction and sent the corrected MIC to the lender. (AF 4.23; Tr. 24-5, 32, 45, 47, 138, 175-6.)

7. The field office staff occasionally performed a random check, using the CHUMS, of Appellant's billing logs to verify that the MIC corrections listed on Appellant's billing logs had actually been completed. During one such check, the field office staff discovered that Appellant had not completed the MIC corrections that were received by the field office between April 12 and April 17, 1995 within ten working days as required by the contract. The work was completed by the field office staff. (AF 4.13, 4.16; Tr. 27-9.)

8. On May 8, 1995, the contracting officer notified Appellant that Appellant was not completing the MIC corrections in a timely manner, and that the field office staff would perform MIC corrections in the future. The field office decided to perform the work itself to meet production goals, and to ensure that the lenders received their corrected MICs in a timely manner. If the lenders did not receive their MICs in a timely manner, the lenders would have a more difficult time selling mortgage pools, potentially causing increases in their mortgage rates or withdrawal by the lenders from the mortgage insurance program. HUD had assigned to Appellant the minimum amount of work required by the contract. (AF 3.7, 4.18, 4.23; Tr. 125-6, 129-31, 140, 159-60.)

9. On May 25, 1995, the contracting officer issued to Appellant a ten-day show cause notice, with regard to the MIC Corrections portion of the contract. The notice stated that an unspecified number of requests for MIC corrections received by the field office in March and April, 1995 were found on May 11, 1995 in the drawer of the desk used by Appellant in the field office. More requests for MIC corrections were found in a box underneath the desk used by Appellant with the corrections entered into the CHUMS, but not spooled for printing and distribution. The field office staff completed the work that was found in Appellant's work area in response to more phone calls from mortgage lenders. At the time that the field office staff discovered the MIC correction requests, the CHUMS had automatically purged the files from the system because no action had been taken on the files for an unspecified time. The field office staff could not confirm, using the CHUMS, that Appellant had not completed the MIC corrections. (AF 3.8, 4.20, 4.22, 4.23; Exh. G-3; Stipulation of Fact, Tr. 5, 29-34, 39-42, 45-7, 63, 138, 168-9, 179, 183-4, 246.)

10. Appellant responded to the May 25, 1995 show cause notice on June 2, 1995. Appellant stated that it felt that HUD was undermining Appellant's efforts to succeed as a small business. Furthermore, Appellant claimed that it was not responsible for the MIC corrections because the May 8, 1995 letter from HUD to Appellant stated that the field office staff would be doing the corrections. Prior to the May 25, 1995 notice, Appellant was not informed of the discovery of the requests for MIC corrections, and Appellant was not given an opportunity to

examine the discovered requests for MIC corrections in preparing its response to the cure notice. (AF 3.8; Tr. 151-3, 250, 253.)

11. Alvins Waller, Appellant's president and sole owner, testified that Appellant did spool the MIC corrections for printing because it only required the typing of a "5" at the end of the screen. According to Waller, it would have been impossible not to complete the process unless there was a problem with the system. On June 5, 1995, Appellant did claim that there was a spooling problem which prevented the printing of the corrected MICs for March and April, 1995. Appellant never mentioned a spooling problem in its response to the May 25, 1995 show cause notice. After investigation, the field office staff determined that there never was a spooling problem. (AF 4.23; Tr. 15, 127-9, 183-4, 252, 255.)

12. A sample of forty-five requests for MIC corrections that were found in the desk drawer used by Appellant were offered into evidence by the Government. Six of these requests had notations on them by Waller stating "Case number not in system, Thanks, Al." (Exh. G-3, A, J, 5, T, EE, II; Tr. 34-9, 178, 240-5.) Five other requests had similar notations, but the person who made those notations was never identified. (Exh. G-3, F, G, H, I, K.) Eleven of those MIC correction requests submitted into evidence by the Government were date-stamped as received by the field office between April 12 and April 17, 1995. One of the MIC correction requests received between April 12 and April 17, 1995 states "Case not in sys. Thanks, Al." (Exh. G-3, FF, GG, II, JJ, KK, LL, MM, NN, OO, PP, QQ.) Appellant contends that these MIC correction requests prove that Appellant fully performed the MIC Correction Statement of Work in a timely manner, including the MIC correction requests received by the field office between April 12 and April 17, 1995. (Tr. 193, 237-40.) Although five of the forty-five MIC correction requests indicate that Waller performed some work on those requests, it is impossible to tell from the requests whether Appellant did or did not complete the entire MIC Corrections Statement of work in a timely manner.

II. Single Family Data Input

13. The contract's Single Family Data Input Statement of Work required Appellant to perform the following tasks:

1. Specifically, the contractor shall perform the following CHUMS data input tasks:
 - a) Enter Master Conditional Commitments (MCC) and Group cases, using the Application for Property Appraisal and Commitment (Form HUD-92800).
 - b) Enter or change information about specific house models that are in the MCC or Group, using the Uniform Residential Appraisal Report (URAR), Home Mortgage ADP Code Chart, and the MCC/Master Appraisal Report (Form HUD91322).
 - c) Record/log the receipt of appraisal documents, making the determination that the package is complete, entering the value of the property, and relogging when problems have been resolved. Distribute documents to the branch clerk.
 - d) Enter or change the results of a field review of a property appraisal. Mail copies to appraiser and reviewer. Distribute copies to the branch clerk.
 - e) Log/record the compliance inspection on a property

by inspector. Distribute to the branch clerk.

f) Enter or changes (sic] the results of field reviews of compliance inspections. Distribute to the branch clerk.

g) Enter/log closing packages for MICs (DE and HUD processed), to establish the date of receipt and clerk assignment. Also, enter/log packages resubmitted after Notice of Return has been corrected by lender. Resolve any input problems/errors that stop the logging process(.J Mail binders with unresolvable problems back to the lender. Distribute the logged binders to staff for endorsement.

h) Enter rating data relative to an [sic] Direct Endorsement underwriter's performance, using the Form HUD-54118. Select 10% of the cases for quality control purposes and distribute them to the appropriate branch. Mail copies of the reports to the lender. Box cases and prepare for shipping.

2. Reasons for giving Fair or Poor mortgage credit ratings to underwriters are recorded on the Technical Review screen. A valid reason code must be entered when there is at least one F(air) or P(oor) rating. The reason for the rating can be found on form HUD-54118-MCR. Valid codes are M01-M07, M10-M14, M16-M18, M20-M26, M30-M36, M38-M42, M45-M56, M60, and M70-M91. The only valid codes for the Closing Package Rating are M70-M91.

3. The work shall be performed in the field office, using a PC and software supplied by HUD, in an office workstation.

4. Acceptable contract performance: the data input and related tasks shall be completed within 2 days of assignment. The required information shall be correct and free of errors, and other tasks shall be performed accurately.

5. HUD will provide to the contractor up to eight hours for training on the CHUMS system and other pertinent program requirements. In the event that the contractor is unable to acquire the necessary skill to perform the tasks set out about in the maximum eight hours training, the contractor may be terminated. HUD will not reimburse the contractor for training; HUD will only pay the contractor for cases processed.

(AF 2.1; Tr. 48.)

14. As of March 23, 1995, a total of 156 single family data input cases were removed from Appellant's work area because Appellant had failed to complete the cases within 2 days of assignment as required by the contract. (AF 4.4; Tr. 231-2.)

15. On April 26, 1995, Lisa Wilburn, Appellant's employee, told a member of the field office staff that she did not know how to enter monthly appraisal field

reviews into the computer system, i.e., task 1(d) of the Statement of Work. Because Gloria McDonald, a former employee of Appellant, had received the maximum eight hours of training from HUD as authorized by the contract for single family data input, HUD did not initially offer to provide Wilburn any additional training. Wilburn was given McDonald's notes from the training sessions, but misplaced them. The field office staff completed the work that Wilburn could not. The field office agreed to provide Appellant additional training for task 1(d), and agreed to reduce the quantity of work assigned to Appellant effective May 9, 1995. Appellant never received the additional training, because the field office staff discovered that Appellant needed additional training on other single family data input tasks. Those tasks included logging appraisals in the correct month, logging in closing packages, and removing appraisal rejection codes. Retraining Appellant on the entire Single Family Data Input statement of work was too cumbersome. Appellant disputes that it received the full eight hours of training, and therefore the office should have provided additional training prior to terminating for default. However, Waller was present for "very little" of McDonald's training, while he testified that McDonald could not have received the full eight hours of training because she would not have needed the full eight hours due to her exceptional abilities. We do not find Appellant's arguments on the issue of training sufficient to rebut the testimony of the Government witnesses that Appellant received eight hours of training. (AF 3.7, 4.12, 4.16, 4.18, 4.20, 4.21; Tr. 20-1, 59-60, 70-6, 84, 94, 102-3, 114, 121-5, 155-6, 165, 181-2, 208, 215-20.)

16. On June 7, 1995, the May 25, 1995 show cause notice was extended to include deficient performance of the Single Family Data Input portion of the contract. Appellant was not completing the entire statement of work in a timely manner. The field office staff discovered on the desk used by Appellant a stack of folders with notes on them regarding input problems that had not been resolved. The field office staff removed the folders from the desk, and resolved the problems. (AF 3.10; Stipulation of Fact, Tr. 5, 50-1, 169-70.)

17. Appellant responded to the June 7, 1995 show cause notice on June 16, 1995. Appellant stated that it would have completed the cases if they had not been removed from its desk. Also, most of the cases had been purged from the CHUMS, and Appellant was waiting for the cases to be reactivated on the CHUMS before completing the input process. Appellant also stated that the field office informed Appellant that it was no longer required to perform Single Family Data Input as of June 6, 1995. (AF 3.11.)

18. At the hearing, Waller testified that the field office inserted security barriers into the CHUMS which prevented contractors from accessing certain screens on the CHUMS. This prevented Appellant from completing the required data input tasks in a timely manner. Each field office determined which screens a contractor could access. When Appellant could not access a screen, it made a notation and gave it to the field office staff to complete. Appellant then had to wait for the field office staff to complete the work. This testimony was un rebutted by the Government. (Tr. 194-5, 233.)

Discussion

The Government may terminate a contract completely or partially for default if the contractor fails to (a) make delivery of the supplies or perform the services within the time specified in the contract, (b) perform any other provision of the contract, or (c) make progress and that failure endangers

performance of the contract. Federal Acquisition Regulation (FAR) 49.402-1. However, a termination for default is a drastic action which is only to be imposed for good cause and upon solid evidence. OFEGRO, HUDBCA Nos. 88-3410-C7, 89-4469-C7, 91-3 BCA ¶ 24,206, citing J.D. Hedin Construction Co. v. United States, 408 F.2d 424 (Ct. Cl. 1969). The consequences of a termination for default include contractor liability for excess costs of reprourement and poor past performance ratings which may negatively impact future award decisions to the contractor. FAR 49.402-2, 52.249-8. A termination for default is a form of forfeiture which is not looked upon favorably. D.W. Sandau Dredging, ENGBCA No. 5812, 96-1 BCA ¶ 28,064. Because of the serious consequences of a termination for default, the Government bears the burden of justifying its action when it terminates a contractor for default. Lisbon Contractors. Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987).

Appellant contends that the termination for default of the MIC Corrections portion of the contract was wrongful because it did complete all of the MIC corrections, as evidenced by the requests for MIC corrections found in Appellant's work area. In response, the Government argues that the presence of the MIC correction requests prove that Appellant did not complete the MIC corrections in a timely manner.

The record in this appeal does not demonstrate by a preponderance of the evidence that Appellant defaulted on the MIC Corrections portion of the contract. The MIC correction requests, relied upon by both parties to support their positions, do not conclusively show that Appellant failed to complete the work in a timely manner, nor do they conclusively prove that Appellant did complete the work in a timely manner. Therefore, the Government has failed to carry its burden of proof that Appellant defaulted on the MIC Corrections portion of the contract.

Furthermore, the record of this proceeding provides evidence that the field office staff may have contributed to Appellant's performance difficulties under the MIC Corrections portion of the contract. The field office staff appears to have failed to diligently monitor the contract. The cases assigned to Appellant were allowed to automatically be purged by the CHUMS before the field office staff could verify whether Appellant had completed the MIC corrections or not. In addition, the field office staff failed to take action within a reasonable time on the numerous requests for MIC corrections which were found in Appellant's work area. This lack of vigilance seems to have contributed to the performance problems experienced by Appellant.

Appellant contends that the Single Family Data Input portion of the contract should not have been terminated for default because it did not receive the maximum eight hours of training from the Government allowable under that portion of the contract. The Government submits that it provided eight hours of training to Appellant. The preponderance of the evidence convinces us that Appellant did receive the full eight hours of training.

However, the field office contributed to Appellant's performance failures under the Single Family Data Input portion of the contract. The contract required Appellant to enter information into screens on the CHUMS to which Appellant did not have access for security reasons. The field office determined the particular screens to which Appellant had access, and inserted the security blocks into the CHUMS. Without access to the necessary screens of the CHUMS, Appellant could not perform the contract in a timely manner. Where the Government's action impedes Appellant's access to information and equipment necessary to the successful performance of a contract, a termination for

default is improper. Apex Int'l Management Serv.. Inc. - by Trustee in Bankruptcy, ASBCA Nos. 38087, 38241, 38242, 41365, 42747, 43222, 43971, 44647; 94-2 BCA ¶ 26,842. Because the field office contributed to Appellant's performance problems, the termination for default must be converted to a termination for convenience in accordance with the default clause of the contract, FAR 52.249-8(g).

Conclusion

The appeal is GRANTED. The termination for default shall be converted to a termination for the convenience of the Government.

David T. Anderson
Administrative Judge

Concur:

Jean S. Cooper
Administrative Judge

Lynn J. Bush
Administrative Judge