



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 4, 2014

CBCA 3911

L&L EXCAVATING & LAND CLEARING, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Larry E. Strickland, Manager of L&L Excavating & Land Clearing, LLC, Oak Hill, OH, appearing for Appellant.

Vincent F. Vukelich, Office of General Counsel, Department of Agriculture, Milwaukee, WI, counsel for Respondent.

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

VERGILIO, Board Judge.

On June 19, 2014, the Board received a notice of appeal from L&L Excavating & Land Clearing, LLC (purchaser) concerning its Lyra Timber Sale contract, 0914-03001506, with the Forest Service, Department of Agriculture (agency). Idled by the Government shutdown in 2013, the purchaser seeks to recoup \$18,540, said to be lost income for three days during which additional work was not found to provide substitute income. The contracting officer denied the claim, relying upon the contract language which permits compensation for certain out-of-pocket expenses incurred during a suspension but prohibits the recovery of lost profits.

The contract anticipates such periods of non-performance and provides for time extensions but not for compensation of lost profits or income. The suspension of performance caused by the Government shutdown does not constitute a breach of contract

by the agency. The purchaser is not entitled to the relief sought. Accordingly, the Board denies the appeal.

Findings of Fact

1. With an award date of September 2, 2011, the purchaser and agency entered into a contract under which the purchaser was to cut and remove specified timber and provide road maintenance. Exhibits 2, 31 (all exhibits are in the appeal file).

2. The contract contains a Contract Term Adjustment clause, under which the period of performance could be extended. One identified cause supporting an extension is acts of the Government which interrupt the purchaser in active operations for ten or more consecutive days during a normal operating season. Exhibit 31 at 183 (¶ BT8.21).

3. The contract's Out-of-Pocket Expenses clause states:

“Out-of-Pocket Expenses” are Unrecovered expenditures arising directly from performing the contract that were rendered unrecovered due to delay, interruption, or termination pursuant to BT8.33 or BT8.34. An expenditure is “Unrecovered” within the meaning of this Subsection when Purchaser did not gain the benefit of its expenditure because Contract operations were not permitted. In determining whether an expenditure is “Unrecovered,” Contracting Officer shall not conclude that an award of liquidated damages constitutes the benefit of that expenditure.

(a) Out-of-Pocket Expenses shall not include, in particular and without limitation, any of the following:

- ...
- (iii) expectancy damages; and,
- (iv) anticipatory profits.

Exhibit 31 at 187 (¶ BT8.35). The clause identifies the only expenses that the agency may reimburse. Exhibit 31 at 187 (¶ BT8.35(b) (the agency “shall reimburse Purchaser for only the following Out-of-Pocket Expenses”--which do not include anticipated income or profit).

4. By written directive dated October 7, 2013, the contracting officer informed the purchaser that there were no appropriations for fiscal year 2014, and that pursuant to legal requirements in the Antideficiency Act and under Attorney General opinions, the agency was unable to administer existing timber sale contracts except for the minimal activities necessary to bring about a prompt and orderly suspension of ongoing operations. The contracting

officer ordered the purchaser to suspend operations upon prompt completion of required erosion control work and seasonal road maintenance work. The order further noted that, following the completion of shutdown requirements, allowable activities would include equipment maintenance or removal from the sale area. Exhibit 7 at 53.

5. On October 8, 2013, the parties discussed the need for the purchaser to track out-of-pocket expenses should it seek reimbursement under BT 8.33 due to the shutdown. Exhibit 8 at 57. On October 10, 2013, with erosion control complete, the purchaser removed equipment from the site. Exhibit 8 at 58.

6. On October 17, 2013, the Government shutdown ended. Seeking to establish a time frame for the purchaser's resumption of performance, the contracting officer inquired of the purchaser. The purchaser could, conditions permitting, resume operations at that time. Exhibit 9 at 60. However, due to the weather, site conditions meant that an immediate return to work was not possible. Exhibit 8 at 59.

7. Site conditions did not permit reentry until November 4, 2013, when the agency approved reentry to the site. Exhibit 12 at 71. During November 2013, the purchaser moved equipment to the site and resumed logging operations. Exhibits 12 at 72-73, 14 at 94.

8. In December 2013, the purchaser requested a contract term adjustment (CTA) due to the Government shutdown and other matters. The agency granted a CTA of nine days because of the Government shutdown (October 10-18) and ten days because of subsequent weather which prevented a resumption of operations (October 19-28). Exhibits 15 at 95, 17 at 105-06.

9. Through claims and revised claims the purchaser sought to recover expenses. The agency has paid some or a portion of some out-of-pocket expenses not in dispute here (such as equipment move out and return costs, and equipment cleaning costs). Exhibits 18, 21 at 113, 23 at 137. At issue here is the \$18,540 the purchaser describes as a lost time expense. The purchaser calculates income that would have been received for paperwood products and saw logs during three days of the shutdown during which the purchaser was unable to obtain replacement work. Exhibit 24.

10. By decision dated April 22, 2014, the contracting officer denied this aspect of the claim, with the explanation: "This claim is not being considered an out of pocket expense per BT8.35 Out-of-Pocket Expenses. I consider this to be an anticipatory profit that is not an unrecovered expense, per BT 8.35(a)(iv)." Exhibit 26 at 147.

11. On June 13, 2014, the purchaser submitted a notice of appeal. Exhibit 30.

Discussion

The purchaser wants to be put in the position it says it would have been in but for the suspension of its contract, namely, receiving income on days when it was idle. However, the contract makes no promise that work will be uninterrupted. Instead, through the Contract Term Adjustment clause, the contract recognizes that performance may be interrupted because of sovereign acts or other causes beyond the control of the purchaser. The clause permits term adjustments, thereby extending the period for performance, and specifies that there is to be no recovery of lost income or profits. Findings 2, 3.

The purchaser's claim suggests invoking those cases which recognize that a contractor may be put in the position in which it would have been but for a breach of contract by the Government. However, the suspension of performance during the Government shutdown and furlough of employees does not here amount to a breach. The Contract Term Adjustment clause demonstrates that the contract contemplated such a cause for delay. The agency acted within the terms of the contract in suspending performance. The sovereign act does not constitute a breach by the agency.

Under the language of the contract, the suspension because of the lack of funding and furlough of employees does not represent an agency breach. The purchaser has received additional money and compensation for out-of-pocket costs arising from its additional efforts. The purchaser is not entitled to recover the lost income sought here.

Decision

The Board **DENIES** the claim.

JOSEPH A. VERGILIO
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

JEROME M. DRUMMOND
Board Judge