



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: August 15, 2024

CBCA 7824

BLUEICE CONSTRUCTION LLC,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Bryan B. Arnold of Gordee, Nowicki & Blakeney LLP, Irvine, CA, counsel for Appellant.

Lindsay Cronin, Office of the Regional Solicitor, Department of the Interior, Anchorage, AK, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **SHERIDAN**, and **KULLBERG**.

**SHERIDAN**, Board Judge.

The issue presented by this appeal is whether the contracting officer properly terminated the contract for cause. As BlueIce Construction LLC (BlueIce) did not complete the contract during the period of performance and has presented no compelling reasons excusing its nonperformance, BlueIce's termination for cause was proper and is upheld.

The appeal was submitted for decision on the written record pursuant to Rule 19 (48 CFR 6101.19 (2023)).

### Background

On September 23, 2022, the Bureau of Land Management (BLM), a component of the Department of the Interior (DOI), awarded an \$86,412 commercial services contract to BlueIce to remove and replace the glycol in the heating system of building 1003 at Fort Wainwright, Alaska. The contract incorporated Federal Acquisition Regulation (FAR) 52.212-4(m) (48 CFR 52.212-4(m) (2022)), which provides, “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 . . . .”

The contract stipulated: “Any additional work/cost above the obligated amount must be approved via modification by a warranted contracting officer prior to commencement or the vendor does so at their own risk/expense.” The statement of work (SOW) required BlueIce to: (1) drain glycol from the heating system; (2) flush the system with cleaner; (3) install new 50/50 glycol solution; and (4) perform quarterly sampling for one year. The SOW provided that, “[w]hen removing old glycol, it must be verified that all heating system coils/components have been properly drained of old glycol.” The SOW also provided that after the trisodium phosphate (TSP) cleaning solution circulated through the system for twenty-four hours, “it must be verified that all system coils/components have been properly drained of the TSP solution before any new glycol is introduced into the system.”

The notice to proceed established a ninety-day contract performance period, September 23 to December 23, 2022. The contract was transmitted to BlueIce by email, and both identified Mike Wise as the Government’s point of contact (POC). Mr. Wise was BLM’s maintenance mechanical supervisor; he had no contracting authority to obligate funds or modify the contract. The contract did not designate a contracting officer’s representative.

In its opposition to DOI’s motion for summary judgment, filed before the parties elected to submit this case for decision on the written record, BlueIce submitted a declaration by Ron Tash, an employee of Reagent World, Inc., which is a sister company of BlueIce that provides management services to BlueIce. Declaration of Ron Tash (Dec. 6, 2023) (Tash Declaration) ¶ 1. Mr. Tash stated that he called Mr. Wise in October 2022 to ask some questions regarding the work. *Id.* ¶ 5. Mr. Tash claimed that, during the call, Mr. Wise told him that every heating system component, coil, and part on each floor had to first be drained of glycol and tested on each floor. *Id.* ¶ 6. According to Mr. Tash, Mr. Wise said that BlueIce would have to make sure, on a floor-by-floor basis, that the TSP had been removed from each heating system component and coil. *Id.* In a February 3, 2023, email to the contracting officer, BlueIce alleged, instead, that its “technicians were informed onsite by the POC” of the increased contract requirements. A February 9, 2023, email from BlueIce to the contracting officer similarly stated that, “when our technicians were onsite discussing

the scope with the POC, the POC informed our technician that we had to flush each floor with the solution, clean each component[] of the system.”

In support of its motion for summary judgment, DOI submitted a declaration by Mr. Wise that contradicts the allegations of BlueIce and Mr. Tash. Declaration of Michael D. Wise (Nov. 3, 2023) (Wise Declaration). Mr. Wise stated that “[t]he heating system in Building 1003 is a single heating system for the entire four-story building. To remove and replace the glycol requires one flushing process for the entire system. There is no requirement to flush the glycol one floor at a time.” *Id.* ¶ 5. Although Mr. Wise acknowledged that he had one telephone conversation, on October 21, 2022, with Mr. Tash, *id.* ¶ 3, he declared that “[a]t no point have I represented to anyone, including any BlueIce representative, that the heating system needs to be flushed separately for each individual floor.” *Id.* ¶ 7. He further stated that, “[t]o [his] knowledge, no BlueIce representative [came] onsite to Building 1003, which is a secured facility and requires escorted access.” *Id.* ¶ 4. Mr. Wise verified with the housing manager that no visits had taken place without the maintenance shop being notified and with the maintenance shop staff that they had not walked anyone through without his knowledge.

BlueIce asserts that it spent November and December 2022 trying to find a way to remove and replace glycol on a floor-by-floor basis. Tash Declaration ¶ 9.

The contracting officer reached out to BlueIce on November 14, 2022, requesting a status update on its progress. BlueIce did not respond. In fact, nothing in the record supports the conclusion that BlueIce communicated with any DOI or BLM representatives during the entire period of performance, with the sole exception of the phone call between Messrs. Tash and Wise on October 21, 2022. BlueIce declares that it attempted to contact the contracting officer in December to discuss the project, but its phone calls were not returned. Tash Declaration ¶ 11.

The contract’s period of performance ended on December 23, 2022. On December 29, 2022, the contracting officer received a voice mail from Mr. Tash stating that he wanted to discuss “the glycol project.” The contracting officer did not return that call because she was in the middle of drafting a determination and findings memorandum for a termination for cause and “the phone call came after the end of the period of performance.”

The contracting officer noted in her determination memorandum in support of the termination for cause that BlueIce had “failed to perform within the required time frame.” She further noted that when she contacted BlueIce six weeks before the end of the performance period, BlueIce failed to respond. She stated that BlueIce had not asserted any type of excusable delay and determined it was in the best interest of BLM to terminate the contract for cause because BLM needed the service to be completed in a timely manner.

On January 23, 2023, the contracting officer sent a show cause notice to BlueIce, noting that BlueIce had failed to perform within the time required by the contract's terms. She informed BlueIce that she was considering a termination for cause but gave it the opportunity "to present, in writing, any facts bearing on the question to the Contracting Officer within 10 days after receipt of th[e] notice." The contracting officer wrote that a failure to present reasonable justification within the ten days could be considered an admission that a justification does not exist. BlueIce did not respond in writing to the order to show cause. The termination for cause was issued on April 24, 2023, citing "[f]ailure to perform requirements within the time required by the [contract's] terms."

It is clear from the record that BlueIce did not complete the work within the performance period. Notably, February 2023 appears to be the first time BlueIce alleged to the contracting officer that there had been a change in the contract's scope. During a February 8, 2023, telephone call with the contracting officer, BlueIce alleged that Mr. Wise had directed a change in the contract's scope of work. A February 3, 2023, email from BlueIce to the contracting officer also referenced this purported change.

### Discussion

The question presented by this appeal is whether BLM properly terminated BlueIce's contract for cause. A termination for cause is the equivalent of a termination for default, and the same legal standards apply to both. *Geo-Marine v. General Services Administration*, GSBCA 16247, 05-2 BCA ¶ 33,048, at 163,829. A termination for cause is a drastic action that should only be undertaken for "good grounds and on solid evidence." *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,150. Under FAR 52.212-4(m), the termination for cause clause for commercial services contracts, the Government has the initial burden of proving that the termination for cause was valid. *Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,899 (quoting *KSC-TRI Systems USA, Inc.*, ASBCA 54638, 06-1 BCA ¶ 33,145, at 164,260 (2005)). If the Government presents a prima facie case that the termination was proper, the burden then shifts to the contractor. *ACM Construction*, CBCA, 14-1 BCA at 174,150 (citing *CDA, Inc. v. Social Security Administration*, CBCA 1558, 12-1 BCA ¶ 34,990, at 171,971; *Integrated Systems Group v. Social Security Administration*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848, at 147,742). Once the Government has shown that a contractor did not complete its contract in a timely manner, the contractor has the burden of proving that its failure to perform was excusable. *Ucensys Research Corp. v. Nuclear Regulatory Commission*, CBCA 4241, 19-1 BCA ¶ 37,402, at 181,816 (citing *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996)). "A contractor must show, through evidence, how an occurrence or event that, in the right circumstances, could support an excusable delay actually affected the contractor and caused its inability timely to perform." *INQEM LLC v. Department of Health & Human Services*, CBCA 7645, 23-1

BCA ¶ 38,428, at 186,772 (citing *Adventus Technologies, Inc. v. Department of Agriculture*, CBCA 7283, 23-1 BCA ¶ 38,392, at 186,544).

The Government has met its burden to present a prima facie case that BlueIce failed to perform the contract within the required period and that the termination for cause was proper. BlueIce did not perform any work onsite. Blue Ice failed to respond to either the contracting officer's request for a status update or her subsequent show cause notice. In fact, there is no evidence in the record that BlueIce communicated with the contracting officer during the period of performance. Aside from initiating one phone call in October 2022 and making what appears to be meager attempts to find a local vendor to perform the services, BlueIce did not make any substantive effort to perform under the contract.

BlueIce has failed to prove that its failure to perform was excusable. BlueIce argues that it would have completed the work had it not been misled by Mr. Wise. BlueIce's assertion, however, that Mr. Wise changed the scope of the work during the October 2022 telephone call is contradicted by BlueIce's emails alleging that the conversation regarding contract scope took place in-person with BlueIce's technicians. Not only does BlueIce's recitation of events in the emails seem unlikely given that BlueIce representatives were never onsite, but Mr. Wise disputes that he ever discussed a change in the scope of work with BlueIce. Even if he did, Mr. Wise did not have the authority to change the terms or requirements of the contract. See *Vet4U, LLC v. Department of Veterans Affairs*, CBCA 5387, 19-1 BCA ¶ 37,336, at 181,579. Certainly, BlueIce never timely raised its concerns with the contracting officer, who had authority to interpret and change the contract. We find, therefore, that the Government did not change the contract's scope to require a floor-by-floor replacement of the glycol (rather than through a single building flush, as provided in the SOW).

BlueIce argues that the contracting officer abused her discretion in issuing the termination for cause because it was "based on erroneous information and a revised interpretation of the SOW that was not shared with BlueIce." Appellant's Rule 19 Brief at 7. This Board's standard of review for the contracting officer's decision is:

In determining whether the decision . . . was so arbitrary or capricious as to constitute an abuse of discretion [the Board] will consider— "(1) evidence of subjective bad faith on the part of the government official, (2) whether there is a reasonable, contract-related basis for the official's decision, (3) the amount of discretion given to the official, and (4) whether the official violated an applicable statute or regulation."

*Optimum Services, Inc. v. Department of the Interior*, CBCA 4968, 19-1 BCA ¶ 37,383, at 181,735 (quoting *AFR & Associates, Inc. v. Department of Housing & Urban Development*,

CBCA 946, 09-2 BCA ¶ 34,226, at 169,169 (quoting *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999))).

The contracting officer's decision to terminate BlueIce was not arbitrary or capricious and did not constitute an abuse of discretion. There was no evidence of bad faith, and the contracting officer had a reasonable, contract-related basis for the decision to terminate the contract. BlueIce points only to communications with the contracting officer after the period of performance ended and no work had been completed by BlueIce. Had BlueIce responded to the contracting officer in November 2022, confusion regarding the scope of work could easily have been resolved. We conclude that the contracting officer did not abuse her discretion, and the termination for cause was proper based on BlueIce's failure to perform any work on the contract.

Decision

We **DENY** the appeal.

*Patricia J. Sheridan*

PATRICIA J. SHERIDAN  
Board Judge

We concur:

*Erica S. Beardsley*

ERICA S. BEARDSLEY  
Board Judge

*H. Chuck Kullberg*

H. CHUCK KULLBERG  
Board Judge