UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 24, 2008

CBCA 1072

OREGON WOODS, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Rick Herson, President of Oregon Woods, Inc., Eugene, OR, appearing for Appellant.

Richard A. DeClerck, Office of the Regional Solicitor, Department of the Interior, Portland, OR, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **VERGILIO**, and **McCANN**.

DANIELS, Board Judge.

The Fish and Wildlife Service (FWS), a bureau of the Department of the Interior, bungled virtually every step of the way in conducting a procurement for the construction of a boardwalk. Like the old saw about Christopher Columbus, it didn't know where it was going, didn't know where it was when it arrived, and once it had left, didn't understand where it had been. Along the way, however, the FWS somehow found a rational reason for terminating for the convenience of the Government the contract it had awarded to Oregon Woods, Inc. (Oregon Woods). We therefore grant the agency's motion for summary relief and consequently deny the contractor's appeal.

Background

In June or July of 2007, the FWS issued a solicitation requesting proposals to remove and replace the Blackhorse Lake boardwalk at the Turnbull National Wildlife Refuge near Cheney, Washington. Appeal File, Exhibits 6[1] at 197, 200; 7 at 202.

Section M, paragraph 1.1 of the solicitation establishes the basis for award of a contract. It states, "The Contracting Officer will select the best overall offer, based on an integrated assessment of Experience, Past Performance, and Price/Cost. A contract may be awarded to the Offeror . . . whose proposal . . . is judged, based on the evaluation factors to represent the best value to the Government." Appeal File, Exhibit 7 at 230.

The FWS changed the type of decking required for the boardwalk through solicitation amendment 1 (August 10, 2007) and provided detailed specifications as to the type of foundations required and how to install them through solicitation amendment 2 (August 13, 2007). Appeal File, Exhibit 7 at 296-300. Solicitation amendment 2 reads as follows:

> Foundations to be Diamond Pier DP-50, with Schedule 40, 1" nominal (1.315" actual OD) galvanized pipe pins. Pin length to vary based on site conditions from min.30 [sic] inch to max 60 inchs [sic] - 4 same length Pins per pier. Contractor to probe soils ahead of installation and supply field cut Pin lengths to match conditions. In rocky conditions, Pins shall be double miter cut (2 - 45 degree cuts on penetration end) with a steel cutting chop saw. In soft conditions, butt cut ends shall be used. All field cut ends shall be sprayed with a cold galvanizing compound before driving.
> Note: Any thread ends from raw pipe lengths must be removed before making Pin length cuts.

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[1] As can be observed from the fact that a document which appeared very early in the history of this case is labeled "Exhibit 7" in the appeal file of eight exhibits, the FWS has not adhered to the Board's rules regarding organization of that file. Those rules state clearly, "Appeal file exhibits . . . shall be arranged in chronological order, earliest documents first." Rule 4(b) (to be codified at 48 CFR 6101.4(b) (2008)). Additionally, each exhibit contains numerous documents, many with separate dates and subjects, in violation of the requirement that "[t]he index shall include the date and a brief description of *each* exhibit." *See id.* (emphasis added). When agencies follow the cited provisions of Rule 4, they ease the task of the Board and the appellant in understanding the development of the documentary record in a case. This in turn makes cases proceed more efficiently and economically. We will appreciate the FWS's paying closer attention to Rule 4 in the future.

> See also Manufacturer's Installation Instructions for refusal criteria, and allowable cutting of partially driven Pins. (attached)
>
> For estimating purposes, an average Pin length of 42" throughout the site shall be used.
>
> ** Pier to bracket connection to be Simpson ABU 44 ("z max" as pressure treating dictates). Bracket attaches to embedded 1/2 galvanized anchor bolt already in the Pier. Contractor to provide bracket to post fasteners - (2) 1/2" hd galv thru bolts.
>
> ** (this bracket will work with your 4x6 posts, and will transfer all the load to the 4x4 top of the Diamond Pier. Please check your Note 2 on the Boardwalk section and elevation page - this bracket needs 1/2" thru bolts - not 3/8")

Id. at 300.

Oregon Woods submitted a timely proposal in response to the solicitation. Offers submitted by this firm and three others were evaluated by FWS. On September 4, 2007, Oregon Woods' offer was selected for award and the agency's decision was announced to firms which had expressed an interest in the procurement. Appeal File, Exhibits 2 at 6; 4 at 162. Oregon Woods signed the contract on September 5. *Id.*, Exhibit 2 at 5.

The contract incorporates by reference Federal Acquisition Regulation (FAR) clause 52.249-2, "Termination for Convenience of the Government (Fixed-Price) (May 2004)." Appeal File, Exhibit 2 at 32. This clause provides that "[t]he Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest." 48 CFR 52.249-2 (2007).

The contract also incorporates by reference FAR clause 52.243-4, "Changes (June 2007)." Appeal File, Exhibit 2 at 32. This clause provides that "[t]he Contracting Officer may, at any time, . . . make changes in the work within the general scope of the contract, including changes . . . [i]n the specifications (including drawings and designs)." 48 CFR 52.243-4.

On September 5 -- the same day that Oregon Woods signed the contract -- the contracting officer unilaterally issued modification 1 to the contract, stating, "Terminate for Convenience of the Government as evaluation process is not complete." Appeal File, Exhibit 2 at 119.

According to the contracting officer's notes:

> Two offers were missed -- and on September 10th, I asked Monique to rate the one that was in the competitive range. She reviewed the a [sic] 5th offer and said that they would have rated green [acceptable] for experience [as opposed to blue (exceptional) for Oregon Woods] and blue for past performance [same as Oregon Woods' evaluation] and she stated in an email that she would still use Oregon Woods for this project.

Appeal File, Exhibit 4 at 159; *see id.* at 160. Evidently, Monique's evaluation and recommendation were accepted by the FWS, for the agency states in support of its motion for summary relief, "[T]he FWS evaluated the two missed bids, and still recommended Oregon Woods for the Contract based on its experience and past performance." Respondent's Motion for Summary Relief at 6.

On September 11, Oregon Woods' president wrote to the contracting officer, "express[ing] our concern with your proposed Modification No. 1." He maintained that the Government "may have no reasonable basis" for the termination "since there has been no change in circumstances of which we have been apprised." "Government mistake should not be the basis of prejudicial actions against Oregon Woods, which acted in good faith and properly competed for and received the award." He was particularly concerned about the prospect of further competition, given that his firm's price had been disclosed to competitors as a consequence of notification of the award decision. "We look forward," he said, "to receiving Modification No. 2 reinstating the Contract." Appeal File, Exhibit 3 at 123-26.

On September 12, the contracting officer unilaterally issued a very different modification 2 to the contract from the one Oregon Woods had anticipated. This modification states, in its entirety, "Replace Modification 1 with Modification 2. After further review of solicitation/award package, award . . . is terminated for the convenience of the Government, the grounds for this termination are: 1) Improper evaluation criteria posted in the solicitation. 2) Inadequate specifications and drawings." Appeal File, Exhibit 2 at 121.

FWS has placed in the appeal file for this case copies of e-mail correspondence among agency personnel. One of these messages is dated September 13, 2007, and is from the regional engineer to an employee in the acquisition branch. It states:

> [T]his project . . . should not have been submitted . . . for acquisition action. The specifications and drawings included in the solicitation are inadequate and we're [sic] not approved by appropriate Engineering staff. There was no qualified engineering review. The project should be cancelled and reissued

> next Fiscal Year with new specs and drawings when my office has time to prepare them. Changes will include, but are not limited to, a design of the observation deck and the boardwalk . . . plan, profile, elevations, and details. Detailed information regarding the pin piles need [sic] to be included and provided in the solicitation package. Structural components need to be evaluated and probably redesigned. The live load appears to exceed the design load. Please give us time to work this up properly. We don't want the public exposed to unsafe facilities.

Appeal File, Exhibit 8 at 303.

On September 19, the contracting officer wrote to Oregon Woods in explanation of the agency's decision. She said, "The Fish and Wildlife Service will be using the rule of - Void Ab Initio Doctrine and FAR Part 3.7 Voiding and Rescinding Contracts, [the] Contract . . . is hereby rescinded from Oregon Woods." Appeal File, Exhibit 3 at 127. She stated further:

> In addition to the mishandling of proposals by the government, the specifications and drawings included in the solicitation are inadequate and were not approved by appropriate Engineering staff. There was no qualified engineering review. Changes will include, but are not limited to, a design of the observation deck and the boardwalk . . . plan, profile, elevations, and details. Detailed information regarding the pin piles need [sic] to be included and provided in the solicitation package. Structural components need to be evaluated and probably redesigned. The live load appears to exceed the design load. Please give us time to work this up properly. We don't want the public exposed to unsafe facilities.

Id.

In response, Oregon Woods' president questioned the justification for considering the contract void *ab initio*. He wrote, "We believe [the contract] does have legal validity; otherwise, why would you have exercised FAR 52.249-2 and terminated it for convenience?" Appeal File, Exhibit 3 at 128. Further:

> In reviewing your citation of FAR 3.7, we are also questioning why you believe that citation is applicable to this circumstance since it only grants the ". . . discretionary authority to declare void and rescind contracts in relation to which --

> (1) There has been a final conviction for bribery, conflict of interest, disclosure or receipt of contractor bid or proposal information or source selection information in exchange for a thing of value or to give anyone a competitive advantage in the award of a Federal agency procurement contract, or similar misconduct; or
>
> (2) There has been an agency head determination that contractor bid or proposal information or source selection information has been disclosed or received in exchange for a thing of value, or for the purpose of obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract."
>
> In light of the Scope of Subpart FAR 3.700, this citation in support of your determination to rescind the Contract is a *nonsequitur* [sic] and not applicable since Oregon Woods, Inc. has not been convicted of any crimes or other misconduct whatsoever; nor are we aware of any proposal information that was exchanged for a thing of value or for the purpose of giving anyone a competitive advantage.

Id. at 128-29.

On November 16, 2007, Oregon Woods submitted to the contracting officer a claim for damages "under two Contract principles: Damages for (1) Termination for Convenience and (2) Breach of Contract." Appeal File, Exhibit 3 at 133. Under damages for termination for convenience, Oregon Woods claimed $8029.92, which it asserted were "the ordinary and prudent costs of proposal preparation." *Id.* Under damages for breach of contract, the contractor claimed $64,430.91, "[t]he total amount to make Oregon Woods whole from the loss of anticipatory profits due to the Government's breach." *Id.* at 134. The breach claim was based on the following theories: The first termination for convenience was invalid because it was made for the sole purpose of acquiring the same goods and services at a lower price from one of the offerors whose proposals had been misplaced. The second termination was invalid because the contracting officer did not ascertain prior to issuing it whether the modifications were within the scope of the awarded contract. *Id.* at 134-37.

The contracting officer denied the claim because it had not been submitted on a standard form 1436, "Settlement Proposal (Total Cost Basis)." Appeal File, Exhibit 3 at 151-52. In her decision, she also contended that termination settlement costs do not include costs of proposal preparation and that competition to meet the Government's requirements, as revised through discussions with the regional engineer, could only be achieved after

termination of the contract and issuance of a new solicitation package. *Id.* at 152-53. Oregon Woods appealed this decision. *Id.* at 154.

As late as April 10, 2008, the contracting officer said that she still did not have information as to "what the project is going to entail and about how long it will take and what the new estimate is." Appeal File, Exhibit 8 at 306.

Discussion

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

In moving for summary relief in this case, the Department of the Interior asserts that the FWS contracting officer was justified in terminating the contract for the convenience of the Government. Oregon Woods maintains to the contrary that the termination decision was arbitrary and capricious, and that it was made in bad faith. Thus, according to the contractor, the FWS breached the contract by terminating it.

A court or board of contract appeals may find that a termination for the convenience of the Government constituted a breach of contract only if the tribunal finds that the termination was motivated by bad faith or constituted an abuse of discretion, or that the Government entered into the contract with no intention of fulfilling its promises. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 415, et al., 07-2 BCA ¶ 33,619, at 166,510 (citing *T & M Distributors, Inc. v. United States*, 185 F.3d 1279, 1283 (Fed. Cir. 1999); *Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1541, 1543-44 (Fed. Cir. 1996); *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995)). As long as adequate cause for the termination is found, the termination will be held valid, even if that cause was not known at the time of termination. *John Reiner & Co. v. United States*, 325 F.2d 438, 443 (Ct. Cl. 1963).

The FWS contracting officer advanced four separate reasons why the termination of this contract is justified, and the Department of the Interior believes that three of them support her decision. Three of the reasons put forward by the contracting officer are unconvincing. The fourth and final reason, on the other hand, is a rational ground for terminating the contract for the convenience of the Government.

The first justification essayed by the contracting officer, in contract modification 1, was that the evaluation process was not complete. The process was evidently not complete because the contracting officer had misplaced two offers and believed that those offers should be evaluated. While this reason might have made sense at the time it was enunciated, it was properly abandoned by the contracting officer shortly after it was announced. After the misplaced offers had been found, and the one within the competitive range had been evaluated, the judgment of the FWS continued to be that the offer submitted by Oregon Woods represented the best value for the Government. At that point, terminating the contract with the best value offeror would have been pointless.

Thus, a week after issuing modification 1, the contracting officer replaced it with modification 2. This time, she said that there were two grounds for termination. The first of these was "[i]mproper evaluation criteria posted in the solicitation." The solicitation said that the contracting officer would select for award the offer representing the best value to the Government, based on an integrated assessment of experience, past performance, and price/cost. As Oregon Woods points out, the Government has never presented any evidence (including in its statement of uncontested facts which accompanies its motion) to the effect that these evaluation criteria were improper. Terminating the contract because the evaluation criteria were improper was consequently an abuse of discretion.

When the contractor complained about modification 2, the contracting officer responded that the FWS "will be using the rule of - Void Ab Initio Doctrine and FAR Part 3.7 Voiding and Rescinding Contracts," and rescinded the contract. Again as Oregon Woods points out, this action was totally unjustified. "Ab initio" is a Latin phrase meaning "from the beginning." *Black's Law Dictionary* 4 (7th ed. 1999). The FAR provision cited by the contracting officer, which Oregon Woods quoted accurately in objecting to its application, authorizes contracting officers to declare contracts void when the procurement process has been tainted by contractor misbehavior. "[T]he general rule is that a Government contract tainted by fraud or wrongdoing is void *ab initio*." *Godley v. United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993). "[T]o prove that a government contract is 'tainted from its inception by fraud' and is thus 'void ab initio,' the government must prove that the contractor (a) obtained the contract by (b) knowingly (c) making a false statement." *Long Island Savings Bank, FSB v. United States*, 503 F.3d 1234, 1246 (Fed. Cir. 2007), *cert. denied*, 129 S. Ct. 38 (2008). There is not even a hint, in all the documents and filings made by the Government, that the contractor might possibly have obtained the contract by knowingly making a false statement or in any other way engaged in fraud or wrongdoing. In making its motion, the FWS has wisely abandoned this purported reason for terminating the contract.

The second justification cited by the contracting officer for the modification 2 termination for convenience was "[i]nadequate specifications and drawings." In support of this justification, she parroted to Oregon Woods the statement of the FWS regional engineer that --

> specifications and drawings included in the solicitation are inadequate and were not approved by appropriate Engineering staff. There was no qualified engineering review. Changes will include, but are not limited to, a design of the observation deck and the boardwalk . . . plan, profile, elevations, and details. Detailed information regarding the pin piles need [sic] to be included and provided in the solicitation package. Structural components need to be evaluated and probably redesigned.

Oregon Woods takes issue with this reason for termination in two ways. First, the contractor questions whether the regional engineer's statement is true. How, Oregon Woods asks, could the agency have amended the solicitation to include detailed instructions for construction of the boardwalk's foundation and then, only a month later, assert that the specifications were inadequate and that they had never been reviewed by qualified personnel? To the contractor, this juxtaposition of facts reeks of bad faith. Second, the contractor contends that even if the engineer's statement is true, it does not give any indication of the magnitude of the changes that might be necessary. The contractor believes that the contracting officer's invocation of the Termination for Convenience clause, rather than the Changes clause, was an abuse of discretion.

We look first to the contractor's allegation of bad faith. Government officials are presumed to act in good faith. To overcome that presumption, a contractor must prove, by clear and convincing evidence, that the officials had specific intent to injure the company. *Galen Medical Associates, Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004); *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002). As Oregon Woods points out, something could be amiss when an agency writes very detailed instructions for construction and shortly thereafter asserts not only that the instructions were inadequate, but also that they had never been reviewed by the people who should have been responsible for issuing them. The suggestion that the agency's actions smell bad is insufficient, however, to create a genuine issue as to bad faith. A speculative hope of finding evidence that might tend to support a claim does not raise a genuine issue of material fact. *T&M Distributors, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999). "[T]he party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Presidio County, Texas v. General Services Administration*, CBCA 1209, slip op. at 6 (Oct. 2, 2008) (quoting *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987)). Oregon Woods has not presented

any evidence on the basis of which we could call into question the validity of the regional engineer's assertion that the contract's specifications and drawings are inadequate, require evaluation, and probably require redesign. The contractor has not shown, for example, cause for us to doubt the engineer's conclusions that "[t]he live load appears to exceed the design load" and that the boardwalk as designed would likely be unsafe. Nor has Oregon Woods presented any evidence on the basis of which we could conclude that the FWS terminated the contract due to an intent to injure the contractor.

Based on the uncontested facts, it appears to us that the purpose of the termination was to rescue the FWS from a faulty contract entered into due to apparent ineptitude on the part of agency personnel -- a contract whose specifications the appropriate agency officials could not find time to evaluate for an indeterminate period of time after the contract was awarded. While ineptitude which prompts prospective offerors to prepare offers to meet ill-conceived government requirements may show bad faith toward the contracting community as a whole, it does not meet the test established by the Court of Appeals for finding the bad faith sufficient to overturn a convenience termination.

Oregon Woods' contention as to abuse of discretion is that the contracting officer should not have terminated the contract without first determining that the magnitude of modifications needed to be made to the specifications was sufficient to constitute a cardinal change. In making this argument, the contractor calls to our attention the analysis made by the Court of Appeals in *Krygoski Construction Co. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996). In that decision, the court explained that when a contracting officer discovers that bid specifications inadequately describe the contract work, in the interest of full and open competition to meet the Government's actual requirements, a "contracting officer may need to terminate a contract for the Government's convenience." *Id.* at 1543. However, "[n]ot every necessary alteration of the contract scope . . . requires a new bid procedure. Only 'modifications outside the scope of the original competed contract fall under the statutory competition requirement.'" *Id.* (citations and quotations omitted). Such a modification -- one which is "so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for" -- is called a "cardinal change." *Id.*

The Court went on to establish:

> [C]ontracting officers have no incentive to terminate a contract for convenience except to maintain full and open competition under [the Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (1984)]. With an adequate contractor in place, the contracting officer has no interest to reprocure. Moreover, where an officer must choose between modifying or

> terminating a contract, ease of administration usually imparts a bias in favor of modification.

Krygoski, 94 F.3d at 1544.

While the *Krygoski* analysis is useful in many cases, there is no reason to reach it here. The contracting officer understood from the regional engineer's e-mail message that the specifications would have to be reviewed and revised, and that the engineer would need time to take the necessary actions. The engineer did not specify how much time he would need, and in light of the uncertainty, it was not an abuse of discretion for the contracting officer to terminate the contract for convenience rather than open the agency to a delay claim of unknowable proportions. The engineer proved the wisdom of her choice by having failed to finish his task seven months after he had identified the problem.

Having found that the FWS had a reasonable basis for terminating the contract, we turn finally to the contractor's claim for monetary damages. Neither of the items Oregon Woods seeks is appropriate for recovery when the Government terminates a contract for its convenience. The kinds of costs which are appropriate for reimbursement are specified in the termination for convenience clause, and they do not include costs of proposal preparation. *See* 48 CFR 249-2(g)(2). Furthermore, "it is well-settled that a contractor terminated for convenience is not entitled to anticipated profits." *Salsbury Industries v. United States*, 905 F.2d 1518, 1522 (Fed. Cir. 1990).

Decision

The motion for summary relief filed by the FWS is granted. The appeal is consequently **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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JOSEPH A. VERGILIO
Board Judge

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R. ANTHONY McCANN
Board Judge