

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of D & G PAINTING &)
ASBESTOS ABATEMENT COMPANY) Docket No. MSBCA 1791
)
Under DGS Contract No. A0-032-)
092-010)
)

June 21, 1994

Termination for Default - Grounds - Failure to obtain a license required by law or contract may be grounds to terminate a contract for default. The contractor's failure to timely renew its license for the removal and encapsulation of asbestos necessary to perform asbestos abatement work provided proper grounds for the termination of its contract for default.

Termination for Default- Burden of Proof - The contractor failed to initially demonstrate that the action of a State agency caused delay in renewal of its license and therefore, the Board did not consider whether the delay in the license renewal was excusable so that the termination for default would be converted to one for convenience.

APPEARANCE FOR APPELLANT: Gerson B. Kramer, Esq.
Chevy Chase, MD

APPEARANCE FOR RESPONDENT: John H. Thornton
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim that the termination of the captioned contract for default be converted to a termination for convenience.

Findings of Fact

1. Appellant submitted a bid in response to the Department of General Services (DGS) invitation for bids for construction work denominated as Asbestos Abatement-Cottage # 16-Crownsville Hospital Center in March 1993.
2. At the time of its bid submission Appellant possessed a valid and subsisting license from the Maryland Department of the Environment (MDE) for the removal and encapsulation of

asbestos materials. By its terms the license was for a one year period and was due to expire on May 5, 1993.

3. Bids for the work were opened on March 23, 1993. Appellant was the low bidder. At the time of the bid opening and upon award on May 3, 1993 Appellant possessed a valid and subsisting license from MDE for the removal and encapsulation of asbestos materials. However, as noted, Appellant's license was due to expire on May 5, 1993. The contract required Appellant to complete the work within ten (10) calendar days of "written authorization" to proceed.
4. On April 29, 1993, DGS awarded the contract to the Appellant and, by letter dated May 5, 1993, forwarded to Appellant necessary documents to execute the formal contract and to accomplish other preliminaries. Appellant executed the documents and returned them to DGS which acknowledged their receipt by letter dated May 28, 1993.
5. On May 27, 1993, Appellant submitted its application for renewal of its asbestos license with MDE.
6. At a work initiation conference on June 23, 1993, Appellant advised DGS that its asbestos license was in the process of being renewed.
7. On or after June 23, 1993, there were communications between DGS and MDE with regard to the status of Appellant's renewal application.
8. By letter dated July 1, 1993, DGS sent Appellant a letter stating that its contract was terminated for default on the ground that the failure to timely renew its asbestos license was the sole responsibility of the Appellant.
9. By letter dated July 9, 1993, Appellant protested the termination.
10. On August 25, 1993, MDE issued a renewal of the Appellant's asbestos license. The delay in renewal was due to deficiencies in Appellant's May 27, 1993 renewal application and in the supplemental submissions of Appellant with MDE concerning its application.
11. By letter dated December 23, 1993, DGS issued a final decision affirming the default termination of Appellant's contract.
12. This appeal followed. No hearing was requested, the parties determining to rely on the written record and submission of briefs.

Decision

Subparagraph B of COMAR 26.11.21.12 pertaining to the renewal of asbestos abatement licenses from MDE reads in part as follows:

B. The Department may renew a license annually if the business entity or public unit:

1. Submits a completed application on forms provided by the Department not sooner than 90 days and not later than 30 days before the license expires;

Appellant alleges that it was and is the general practice of MDE to provide previously licensed business entities with the necessary renewal forms approximately ninety (90) days in advance of the running of the time period for the submission of license renewal applications.

Appellant further alleges that it, therefore, assumed that MDE would furnish it with the necessary forms for the renewal of its asbestos license at least ninety (90) days before the expiration of its then current license. Thus, in the case of the Appellant, Appellant asserts MDE should have furnished the necessary forms to the Appellant on or before February 3, 1993, since its license was due to expire on May 5, 1993. This alleged neglect on the part of MDE is said by Appellant, citing standard provisions of its contract concerning delay and contract termination, to excuse the delay in renewal of its license.

Appellant further asserts that for reasons not known to Appellant, MDE failed to furnish the Appellant the forms for renewal of its asbestos license until April 4, 1993 when Appellant's Maryland project manager, called at the MDE offices to pick up the forms. At that time, Appellant alleges it first learned that it was MDE's policy not to permit licensees to pick up the forms and that these forms had to be mailed by MDE to the licensee's home office. The forms were mailed to Appellant's home office, filled out by Appellant and filed with MDE on May 27, 1993. However, due to deficiencies in the renewal application and in Appellant's supplemental submissions with MDE, Appellant's license was not renewed until August 25, 1993.

DGS contends that it was MDE's policy to furnish the necessary forms for business renewal approximately sixty (60) days prior to license expiration. In this particular instance, Appellant was

advised in the cover letter with which Appellant's first license¹ was sent to Appellant by MDE that: "Approximately sixty days prior to the current expiration date an application package will be forwarded to the address on the current license which you may use to renew your license. If you do not receive this package within the approximate time frame, contact this office and request that the materials be forwarded to you."

DGS also contends that MDE refused to allow the Appellant's project manager to pick up the license renewal forms in person on April 4, 1993 because Appellant's President had previously requested that MDE forward documents directly to him at the Appellant's headquarters in New Jersey.

The record does not reflect when the application forms were mailed to Appellant's headquarters by MDE, but DGS denies the Appellant's allegation that MDE failed to timely furnish Appellant with the forms for renewal of its asbestos license. Appellant submitted its application for renewal of its license with MDE on May 27, 1993.

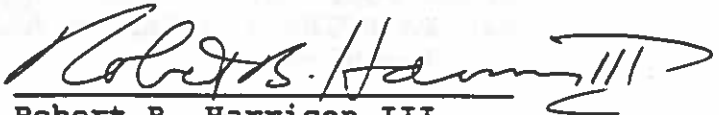
Appellant could not perform the required work without a valid license. Failure or inability to obtain a license required by law or contract may be proper cause for terminating a federal government contract for default. See Thumpers Reforestation, IBCA No. 1576-5-82, 83-1 BCA ¶16,373 (1983); R.S.S. Inc., GSBCA No. 6634, 83-1BCA ¶16,280 (1983); Employers Security Company, Inc., GSBCA Nos. 6917, 7051, 85-1 BCA ¶17,885 (1985). Such is also the case with Maryland State Contracts. State law and the contract herein required Appellant to be licensed by MDE to abate asbestos. Appellant was licensed at the time of bidding (March 23) and the time of contract award (May 3). After contract award the work was to be completed within ten (10) days of "written authorization" to proceed. Such authorization could not be given until Appellant had a valid asbestos license. However, Appellant allowed its license to expire as of May 5, 1993. Appellant's application was not filed

¹The license that expired on May 5, 1993.

with MDE until May 27, 1993 and, as a result of deficiencies in Appellant's application and supplemental submissions to address deficiencies, Appellant's license was not renewed until August 25, 1993. Since the Appellant could not perform the required work in a reasonable period of time from the date of award, termination of its contract for default by DGS was appropriate. Based on our review of the record we do not find that Appellant has proven its assertion that MDE, a sister State agency, was responsible for the delay in renewal of Appellant's license. Therefore, the Board need not consider the legal affect of such a circumstance on the validity of the termination. Accordingly the appeal is denied.

It is Ordered this 21st day of June, 1994 that the appeal is denied.

Dated: June 21, 1994


Robert B. Harrison III
Chairman

I concur:



Candida S. Steel
Candida S. Steel
Board Member

Certification

COMAR 21.10.01.02 Judicial Review.

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 Time for Filing Action.

(a) Generally. - Except as otherwise provided in this Rule or

by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) **Petition by Other Party.** - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1791, appeal of D&G PAINTING & ASBESTOS ABATEMENT COMPANY under DGS Contract No. A0-032-092-010.

Dated:

June 21, 1994

Mary F. Priscilla

Mary F. Priscilla
Recorder