

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 H&F Transfer, Inc., d/b/a)
 Palmetto Specialty Transfer,)
)
 Plaintiff,)
)
 v.)
)
 Carolina Procurement Institute, Inc.,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 CASE NO.: 2011-CP-40-07011

ORDER

2013 MAY -8 AM 11:55
 JEANETTE W. MCBRIDE
 C.C.P. & G.S.
 RICHLAND COUNTY
 FILED

This matter came before the court for a bench trial on October 12, 2012. Plaintiff commenced the present action by filing a Summons and Complaint alleging two causes of action for breach of contract and specific performance. The Defendant, through its attorney, filed and timely served an Answer and Counterclaim also alleging a claim for breach of contract. At trial, evidence was introduced in the form of testimony and documents. After considering the evidence, the Court renders the following findings of fact and conclusions of law:

I. Plaintiff's Cause of Action for Breach of Contract

Evidence was presented that on or about February 11, 2011, the Plaintiff and the Defendant, each through their authorized representatives, entered into a subcontractor agreement (hereinafter "Agreement") to execute all projects described in the scope of work for a contract of services entered into between the Defendant and the United States Army. The contract for services was identified and referenced in the Agreement as Department of the Army Barracks and Office Furniture Moves at Fort Jackson, SC, W9124C-10-R-0008.

Following the trial, Defendant moved to have the entire agreement introduced into evidence over Plaintiff's objection. The Court issued a prior Order ruling that the contract for service was admitted into evidence for consideration (hereinafter referred to as "Army

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SCANNED

Contract").

The scope of work referenced in the Agreement and fully set forth in the Army Contract related to the packing, moving, and transport services for government furniture and equipment at Fort Jackson. The Army Contract was effective April 29, 2011, and had a total value of \$190,380.00.

The Agreement contained in part the following provisions which were at issue at trial:

- In exchange for providing services to complete the military contracts on behalf of the Defendant (including obtaining all necessary liability and workers compensation insurance), Plaintiff would receive from Defendant 49% of the funds received from completing the services less the payroll for employees performing the work, which was to be paid by Defendant;
- The Agreement provided for payments to employees on an hourly basis and salaried employees would be paid bi-monthly;
- The Agreement provided that Defendant would make all payments to employees providing services under the Agreement upon the agreed times per month ensuring that the workers were paid on time and first;
- The Agreement specifically provided that the contracting parties were to remain independent entities and in no way was the Agreement intended to create any type of joint venture, partnership, or other relationship;
- The Agreement provided that if any party defaulted on the terms of the agreement, then the non-defaulting party may elect to terminate the Agreement if the default was not cured within ten (10) days after written notice of the default was provided to the party and the default was not cured;
- The Agreement provided a term of seven (7) years with the option of an extension

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at the conclusion of the seven (7) year period;

- The Agreement does not contain a walk-away provision but only provides for termination of the agreement for default or breach.

It is uncontested that the parties began performance of the Army Contract through the terms of the Agreement in June 2011, whereby Plaintiff provided labor, materials, and transportation services at Fort Jackson as provided for by the Agreement and the Army Contract. Evidence was presented in the form of Defendant's payroll summary that the labor provided by Plaintiff as part of the Agreement for the move was paid by Defendant per the terms of the Agreement on a weekly basis.

A second, larger phase of the move was to begin at Fort Jackson at the end of September 2011. In preparation for commencing the second phase, Plaintiff made arrangements for labor, material and transportation and began to incur costs for labor and expenses. However, on September 24, 2011, Defendant's president issued an e-mail communication to Plaintiff's president stating that all subcontracted workers participating in the second phase would be required to sign a form indicating that the worker agreed not to receive compensation until 40 days after the project completed, which was anticipated to be November 17, 2011. On September 29, 2011, when Defendant failed to pay Plaintiff's employees for the weekly work already performed in preparation for phase two, Plaintiff paid his employees. It appears from the testimony presented that Defendant did not pay its employees who were working on the same project.

On October 3, 2011, Defendant's president hand-delivered to Plaintiff's president a letter incorrectly dated September 5, 2011, terminating the Agreement on the grounds that Plaintiff failed to follow instructions "to not pay employees, not training Mr. David McGee in the supervisor role and not hiring the student."

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On October 15, 2011, Plaintiff, through its counsel, delivered to Defendant's president a written notice of default and demand that the Agreement be reinstated and performed according to its terms, which Defendant's president admits to receiving. Defendant's president refused to rescind the termination.

The required elements of a contract are an offer, acceptance, and valuable consideration. Armstrong v. Collins, 366 S.C. 204, 222, 621 S.E.2d 368, 377 (Ct.App. 2005). It is uncontested the parties voluntarily entered into the Agreement with an exchange of rights and benefits and, therefore, the required elements of offer, acceptance and consideration have been met.

Having found that a valid and enforceable contract existed, the Court must now determine if the Defendant breached the terms of the agreement and, if so, whether the Plaintiff suffered damages as a result.

Defendant's notice of termination stated that the Agreement was being terminated as a result of Plaintiff's failing to follow formal written instructions "to not pay employees, not training Mr. David McGee in the supervisor role and not hiring the student." However, for the following reasons, the Court finds that none of these allegations constitute a breach of the Agreement that Defendant failed to provide written notice of the breach and right to cure prior to terminating the Agreement and, therefore, Defendant has breached the terms of the Agreement.

First, Defendant maintains that regulations regarding the performance of the Army Contract required that employees not be paid until completion of the contract, which resulted in the request that all persons working on the project agree not to be paid until forty days after the project completed.

The Army Contract submitted by Defendant over Plaintiff's objection contains no such provision. In fact, the only reference with regard to timing and payment for services appears on page thirty-one (31), part 1, subpart b, which states, "The percentages outlined in Figure 1-Q are

the maximum percentages available for reducing the contractor's *monthly payment* when services are determined to be defective." (emphasis added).

In light of the plain terms of the Agreement which provided that that Defendant would make all payments to employees providing services under the Agreement upon the agreed times *per month* ensuring that the workers were paid on time and first, the fact that the only evidence regarding prior payments to hourly employees for the June 2011 phase I move indicated that Defendant paid the hourly employees on a weekly basis despite his allegation of the terms of the Army Contract, that failure to make a required payment when due constituted a default, and the fact that it is uncontested Defendant refused to pay the hourly employees for work performed under the Agreement in late September 2011 which necessitated Plaintiff paying the employees constituted a breach by Defendant of the payment terms of the Agreement.

Next, the Court finds that Defendant's contention that Plaintiff's president refused to hire certain potential employees as grounds for termination of the Agreement is without merit. Defendant's president testified at trial that the actual scope of the Agreement intended for Plaintiff to provide consultation and training services to Defendant in order for Defendant to become more proficient in the moving area. Defendant's president further testified that it was the intent of the agreement that Plaintiff's employees were actually Defendant's employees as allegedly required by the Army Contract.

Defendant's interpretation of the scope of the Agreement goes far beyond the stated terms. Moreover, Plaintiff's president specifically denied the allegations that his company was to provide any type of service other than the moving services contemplated by the referenced scope of work and further denied that there was any intent that Plaintiff's employees would be the employees of Defendant. As the Agreement contains plain terms regarding its scope and there is a complete disagreement between the parties as to any other alleged scope of work contemplated,

5/10 *[Signature]*

the Court must look solely to the terms of the Agreement. Gilliland v. Elmwood Properties, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990) (the parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument).

The plain terms of the Agreement specifically provided that the contracting parties were to remain independent entities and in no way was the Agreement intended to create any type of joint venture, partnership, or other relationship. The Agreement further specifically stated that neither of the parties to the Agreement, nor any of their respective employees, agents, or other representatives, shall be construed to be the agent, employee or representative of the other party.

According to the terms of the Agreement, Defendant's contentions regarding the Plaintiff's failure to comply with alleged provision of the Agreement is without merit and, therefore, the termination of the Agreement based upon these terms constitutes a breach of the Agreement.

Finally, it is uncontested that Defendant failed to give written notice of the alleged default and the Plaintiff's required right to cure the alleged default within ten (10) days. Defendant's president testified that sending the written request would serve no useful purpose. The evidence before the Court indicates that the Defendant terminated the Agreement within four (4) days from the date in which Plaintiff paid his employees for work performed. The termination letter fails to raise any of the arguments relied upon by Defendant with regard to scope of work, payment requirements allegedly contained in the Army Contract, or status of the employees. Arguably, had Defendant complied with the written notice and right to cure provision of the Agreement, the parties may have reached an amicable resolution.

Regardless of Defendant's president's belief as to the usefulness of providing a written

notice of default, the terms of the Agreement are plain and must be strictly construed.

Accordingly, Defendant's failure to comply with the written notice and right to cure requirements constitutes a breach of the Agreement.

For the foregoing reasons, the Court finds that the Defendant breached the terms of the Agreement. The sole remaining issue is whether Plaintiff suffered damages and, if so, to what extent.

Defendant's president testified at trial that his company has earned gross revenue in the approximate amount of \$200,000.00 for services performed pursuant to the Army Contract. The face value of the Army Contract is \$190,380.00. Plaintiff's president testified that his cost margin is typically thirty (30) percent of the gross.¹ It is uncontested that the terms of the Agreement provided that ~~Plaintiff~~ ^{ED Defendant} would pay ~~Defendant~~ ^{Plaintiff ED} 49% of the funds received from the Army Contract less employee wages. Accordingly, based upon the stated margin for costs and the amount received by Defendant from performance of the Army Contract, Plaintiff has suffered lost potential profits in the amount of \$65,300.34.² In addition, Plaintiff's president testified that he incurred damages for work performed prior to the breach in the amount of \$4,238.00 less a payment made by Defendant during the pendency of this action in the amount of \$1,147.52 for additional damages of \$3,090.48.

Therefore, the Court finds that as a result of the Defendant's breach of the Agreement, the Plaintiff has suffered actual monetary damages in the form of past due amounts and future profits totaling \$68,390.82.

IT IS THEREFORE ORDERED that judgment be entered on behalf of the Plaintiff

¹ As will be discussed as part of Defendant's breach of contract claim, Defendant's president testified that the actual cost for services was between \$55,000.00 and \$75,000, which is well within Plaintiff's cost margin.

² \$190,380 less 30% margin (\$57,114.00) equals \$133,266.00. Plaintiff's 49% portion of \$133,266.00 equals \$65,300.34.

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against the Defendant in the total amount of \$68,390.82.

II. Plaintiff's Cause of Action for Specific Performance


Specific performance is a form of relief that is equitable in nature. Due to the amount of time that has elapsed from the breach of the agreement and the trial and taking into account the relatively brief business relationship between the parties, the Court finds that an Order for specific performance would not be equitable under the circumstances and, therefore, the request for specific performance is denied.

III. Defendant's Cause of Action for Breach of Contract

Defendant has brought a counterclaim for breach of contract. The Answer and Counterclaim filed with the Court is factually silent as to the grounds upon which the claim rests. However, as extensively discussed above, Defendant's president testified that Plaintiff breached the terms of the agreement as set forth in the Notice of Termination letter delivered on October 3, 2011. Defendant's president further testified as to the alleged services intended to be provided by Plaintiff as part of the scope of work as well as the issues related to the apparent refusal to hire individuals requested by Defendant.

As previously discussed, the Plaintiff disputes Defendant's oral recitation of the alleged scope of work and intent of the Agreement. Accordingly, the parol evidence rule prevents the Court for accepting such testimony to contradict, vary, or explain the plain terms of the Agreement. As set forth above, there is no evidence that Plaintiff's decision to pay its employees for work they performed when Defendant refused make payment as required by the Agreement constituted a breach of the Agreement by Plaintiff.

In addition, there is no evidence that Plaintiff was required to hire or train any individual requested by Defendant, which arguably violates the separate and independent status provisions between the parties as set forth in the Agreement and discussed above. As such, there can be no

8/10 

breach of the Agreement by Plaintiff for refusing to do some act not required by the Agreement.

Finally, Defendant's willful failure to provide written notice of the alleged default and a ten (10) day window to cure before declaring the Agreement terminated is itself not only a breach of the terms of the Agreement, but the failure to satisfy a condition precedent prior to terminating the agreement and seeking legal relief. See generally Hitachi Elec. Devices (USA), Inc. v. Platinum Technologies, Inc., 366 S.C. 163, 169, 621 S.E.2d 38, 41 (2005); Orange Bowl Corp. v. Warren, 300 S.C. 47, 52, 386 S.E.2d 293, 296 (Ct.App. 1989).

For the foregoing reasons, the Court finds that the Plaintiff did not breach any terms of the Agreement. Even if the Court would have found Plaintiff breached the Agreement, Defendant's cause of action still fails as it has failed to produce sufficient reliable evidence of damages suffered.

Had a breach of the Agreement occurred as a result of Plaintiff's actions, damages would be measured in the form of the expectation having the Agreement performed. Defendant's president testified that after he terminated the Agreement, he sought out another company able to perform the services. Defendant's president also testified that Army Contract was performed so there are no lost profits relative to the Army Contract.

Defendant's president testified, however, that having to find a new company cost Defendant \$75,000.00 in additional damages. The method of computation used in support of arriving at this figure is unclear, especially in light of his testimony that the actual cost of services of the new company could have been as low as \$55,000.00.

"Neither the existence, causation nor amount of damages can be left to [the judge or jury's] conjecture, guess or speculation." Yadkin Brick Co., Inc. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct.App. 2000).

If Defendant's oral testimony is taken as true, the costs for the move would have been a

minimum of \$130,000.00 on a \$190,380.00 contract. Moreover, Defendant's range what the actual costs of obtaining and paying the new company to perform the services that were to be performed by Plaintiff could have equaled or even been less than what might have been incurred had the Agreement been performed. As such, the Court cannot determine with any rational basis or accepted method of accounting the amount of monetary damages incurred, if any at all, had the Court found that Plaintiff breached the Agreement, which it did not.

IT IS THEREFORE FURTHER ORDERED that the Court finds in favor of the Plaintiff on the Defendant's claim for breach of contract.

IT IS SO ORDERED.



Edgar W. Dickson
Presiding Judge

Orangeburg, SC

~~March~~ April 19, 2013