

PROTECH-ATLANTA, INC.

CONTRACT NO. V568C-322

VABCA-6000

VA MEDICAL CENTER  
HOT SPRINGS, SOUTH DAKOTA

*R. Evan Daniels*, Protech-Atlanta, Waukegan, Illinois., for the Appellant.

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### **OPINION BY ADMINISTRATIVE JUDGE THOMAS**

This is a timely appeal by Protech-Atlanta, Inc. (Protech or Contractor) of a Termination for Default of Contract No. V568C-322 (Contract) entered into with the Department of Veterans Affairs (VA or Government) Medical Center, Hot Springs, South Dakota. The Contract was for Phase 2 of the replacement of the fire alarm system.

A hearing was held at which Protech did not appear. In addition, Protech did not file a post hearing brief. The record before the Board consists

of: pleadings; an appeal file with 58 exhibits (cited as "R4, tab\_"); 56 exhibits introduced into evidence at the hearing by VA (cited as "Exh. G-"); Government's brief; and, the 2 volume transcript of the hearing (cited as "Tr. [vol. #]:\_."

## **FINDING OF FACTS**

On August 22, 1997, the VA awarded Contract No V568C-322 in the amount of \$425,000 to Protech for the replacement of the fire alarm system. This was Phase 2 of a two-phase project. Under Phase 1, in 1992, a Johnson Controls fire alarm system had been installed in Building 12, the main building at the Medical Center. (Tr. 10) Phase 2 called for the replacement of smoke and duct detectors, pull stations, bells, relays, annunciator panels and the expansion of the main panels to allow extra alarm zones in the remaining buildings. The VA wanted one integrated system monitoring the entire Medical Center. In order to insure compatibility with the main building's system, Phase 2 contained the following requirement: "All fire alarm system components must be Johnson Controls to provide compatibility with existing system." (R4, tab 57) Protech subcontracted with Johnson Controls for the installation and programming of the fire alarm devices.

On December 5, 1997 Contracting Officer (CO) Joann Walker sent Protech a letter regarding problems with its submittals. When Protech's response was not forthcoming, CO Walker sent a cure notice on March 17, 1998, advising Appellant of additional problems and stating the VA believed Protech was approximately 30% behind schedule. In that letter, CO Walker

said she would consider the defects cured if Appellant provided a progress chart, cost breakdown by trades, list of key personnel, subcontractor forms and a list of what measures Protech intended to take in order to meet the August 17, 1998 completion date. (R4, tab 10)

On March 25, Protech responded with a progress chart but stated its hands were tied because Johnson Controls had subcontracted the drawings and was having trouble getting them done. Johnson Controls' delay was in turn preventing Protech from developing a more sophisticated progress chart, and other submittals. If the job were to take longer due to the Johnson Control delays, Protech requested a time extension at no cost to the VA. (R4, tab 11) On March 31, CO Walker responded with clarifications concerning some of the items included in Protech's response, and denied the request for a no-cost time extension. CO Walker stated there would be no extension without consideration from Protech. (R4, tab 12) She believed that since Protech knew whom it had to work with when it signed the Contract, Protech should have worked out any problems. (Tr. 295)

On June 15, 1998, the VA asked Appellant for a proposal to use fiber optic cables that were being installed under another contract in lieu of installing the new fire alarm base loop. (R4, tab 15) The fiber optics issue had not been resolved and on June 26, CO Walker informed Protech that it should not come on site to commence work until July 31, 1998. (R4, tab 18) All of the various problems were eventually worked out and, in early September, a 167-day time extension was agreed to by the parties, making the new completion date January 31, 1999. (Tr. 227; Exh. G 39; R4, tab 31)

Johnson Controls notified CO Walker on December 14, 1998 that Protech was delinquent in their payments in the amount of \$146,675.18. In its invoices to the VA, Protech had certified that payments had been made to Johnson Controls. On February 4, 1999, Johnson Controls, without notice to the VA, removed its personnel from the job. (R4, tab 35) On February 8, Johnson Controls' attorneys notified Protech's payment bond company that it was owed \$84,497.64. (R4, tab 34)

Protech advised CO Walker on February 19 that it would finish the work that remained when Johnson Controls walked off the project. (R4, tab 37) Protech tried to use existing spare parts to complete the work. During the hearing a site inspection was made on the record. Protech's work was sloppy, non-compliant and caused extremely dangerous life safety issues because they created a false impression that a fire alarm was in place.

On February 23, Protech's proposal to use a subcontractor named Notifier was rejected by the VA because it was not an authorized representative of Johnson Controls. The VA then issued a show cause letter. (R4, tab 39) Change orders were issued by the VA for a total of 6 additional smoke detectors and 12 devices and Protech requested and received a Contract extension until February 25, 1999. In early March, Protech tried to enlist Johnson Controls to perform these changes but was told by Johnson Controls that it would not perform any work until the \$84,497.64 was received. (R4, tab 40)

CO Walker advised Protech on March 4 that it had not adequately responded to her February letter and that the VA was considering terminating

the Contract for default. Protech was given 10 days to provide reasons why its failure to complete the Contract was the result of causes beyond Protech's control or without its fault or negligence. (R4, tab 43) It was at this point that Protech simply walked away from the job. Based on CO Walker's recollection and the daily logs, March 10, 1999 was the last day anyone from Protech was at the site. (Tr. 72)

On April 27, CO Walker issued a letter stating that "approximately 95% of the work had been completed" but pointed out 26 contract items remaining to be performed or corrected. The letter also declared Protech to be in technical default and gave Appellant 10 days to advise when the project would be completed. (R4, tab 48) Doug Sprinkle, VA Project Engineer, Frank Maynard, VA Fire Safety Program Specialist, Jeff Wiedow, a VA Firefighter assigned the responsibility for this project, and James Wagner, VA Engineering Program Manager, all testified that the new system could not be tested or used for its intended purpose until all the devices were installed and programmed. (Tr. 173-76, 180, 187)

Receiving no response from Protech, CO Walker determined Protech's lack of communication to be a repudiation and abandonment of the Contract and terminated it for default on June 1, 1999. (R4, tab 50; Tr. 290) At the time of the hearing, the VA was in final stages of negotiating with the surety to complete the Contract. (Tr. 347; Exh. G-48)

## **DISCUSSION**

On the evidence in the record, the VA has presented a prima facie case supporting the termination by showing that Protech abandoned the Contract. *ERG Consultants, Inc.*, VABCA Nos. 3223, 3345, 3346, 92-2 BCA ¶ 24,905  
Protech bears the burden to prove the default was excusable. *Ricmar Engineering, Inc.*, ASBCA No. 44,260, 98-1 BCA ¶ 29,463.

Appellant asserts that it was the VA's mandate to use Johnson Controls and Johnson Controls' delay in providing Contract submittals was the root of its problems.

It is clear from the record that Protech made a business decision to stop making payments to its subcontractor, Johnson Controls. It is equally clear that Johnson Controls stopped performing because of the failure to pay. As we have previously held, a subcontractor's failure of performance due to the prime contractor's business judgment not to pay does not excuse a default termination. *Nitro Electrical Corp.*, VABCA No. 3777, 95-1 BCA ¶ 27,492.  
Protech's decision to withhold such large sums of money was a business decision within Protech's sole discretion. The failure of Johnson Controls to perform does not excuse Protech's abandoning the job.

Protech asserts several other reasons allegedly excusing its failure to complete, for which there is absolutely no support in the record. Consequently, there is no evidentiary basis for our consideration of these allegations. Protech has failed to meet its burden of proof.

The VA's default termination of the Contract was proper.

**DECISION**

For the foregoing reasons, the appeal of Protech-Atlanta, Inc. under Contract No. V568C-322 is DENIED.

DATE: **January 23, 2002**

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WILLIAM E. THOMAS, JR  
Administrative Judge  
Panel Chairman

We Concur:

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JAMES K. ROBINSON.  
Administrative Judge

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RICHARD W. KREMPASKY  
Administrative Judge