



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF DENIED: March 5, 2012

CBCA 2579

U.S.I.A. UNDERWATER EQUIPMENT SALES CORPORATION,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Joseph G. Billings of Miles & Stockbridge, P.C., Baltimore, MD, counsel for Appellant.

Wilbert Jones, United States Coast Guard, Department of Homeland Security, Washington, DC, counsel for Respondent.

SOMERS, Board Judge.

On September 25, 2010, the United States Coast Guard, Department of Homeland Security (the USCG, Coast Guard, or Government) issued a delivery order for 777 dry suits under U.S.I.A. Underwater Equipment Sales Corporation's (U.S.I.A.'s) General Services Administration (GSA) Federal Supply Schedule (FSS) contract GS-07F-0209K. The Coast Guard ultimately terminated the delivery order for default. The contracting officer issued a final decision addressing the termination for default and potential government assessment of procurement costs. U.S.I.A. appealed.

Pursuant to Board order, the Coast Guard filed its complaint, asserting that it terminated U.S.I.A. for its failure to comply with the terms of the delivery order. U.S.I.A.

has moved to dismiss the complaint, or, alternatively, for summary relief.¹ Asserting various defenses, U.S.I.A. posits that it should not have been terminated for default. In its cross motion for summary relief, the Coast Guard asserts that, as a matter of law, none of these defenses justify U.S.I.A.'s failure to deliver dry suits that did not leak.

It is well established that summary relief will not be granted if the moving party fails to establish the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The fact that both parties have moved for summary relief does not mean that the Board must grant relief in favor of either party; if there are any issues of material fact, then summary relief is not proper for either one of the parties. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987); *6th and E Associates v. General Services Administration*, CBCA 1802, 10-2 BCA ¶ 34,596. At this stage in the process, our function is not to weigh the evidence and determine the truth of the matter, but rather, to determine whether there is a genuine issue for trial.

While both parties are of the opinion that this dispute is ultimately one of contract interpretation, a review of the submissions by both parties indicates that it is not. The submissions indicate considerable disagreement regarding the circumstances leading up to the ultimate termination for default. We find that these unresolved factual issues are material to the ultimate issue of whether the Government had adequate justification to terminate the contract for default. Accordingly, we deny the motions for the reasons explained in more detail below.

Background

On September 25, 2010, following solicitation and receipt of quotes, the Government placed an order against U.S.I.A.'s GSA FSS contract for 777 dry suits, valued at \$497,528. The size of the order exceeded the maximum order on U.S.I.A.'s schedule contract, which was \$50,000. Nonetheless, U.S.I.A. accepted the order. Pursuant to the delivery order, U.S.I.A. shipped a partial order of 100 suits to the USCG Training Center in Yorktown, Virginia, on November 10, 2010.

¹ This opinion focuses on appellant's alternative motion for summary relief rather than appellant's motion to dismiss for failure to state a claim. We note that although we may not address each and every point presented by the parties in their cross-motions, we have considered all of the arguments in reaching this decision.

The specifications in the solicitation consisted of a single page and required, among other things, that the dry suit neck and wrist seals be neoprene, and that they have a circumference that is “Velcro adjustable” to accommodate the various sizes of students. Upon inspection of the suits, the Coast Guard determined that the neck and wrist seals of the suits did not comply with the specifications because each had to be cut to fit an individual user. The Coast Guard issued a cure notice on November 19, 2010, notifying U.S.I.A. that the suits had failed inspection because they did not comply with the specifications.

The parties discussed the problem and agreed that an upgrade of the suits through the use of different material for the neck and wrist seals would reduce the need for trimming and likely improve water tightness. On December 12, 2010, the parties executed a bilateral modification to the delivery order. The modification states that “[t]he purpose of this modification is to change the delivery date, change the specification, and add a first article requirement.” The modification detailed the changes to the specifications, increased the price, and extended the delivery date to 150 days after award. The modification did not provide any details about what was intended by the “first article requirement.”

On December 29, 2010, U.S.I.A. shipped 120 new dry suits with the newly configured neck and wrist seals to the Yorktown Training Center. The Government tested three of the suits and determined that the suits leaked. As a result of more testing conducted on January 18, 2011, the Government determined that 66 of the 120 suits leaked.

Meanwhile, on January 19, 2011, U.S.I.A. sent 100 additional dry suits to USCG, with an invoice for \$59,900. The contracting officer contacted U.S.I.A. by e-mail on January 27, 2011, advising that USCG had received the second shipment of 100 suits. He also noted that the Government observed a failure rate of 32.5% of the suits provided in the first shipment. The contracting officer advised U.S.I.A. that the Government would not accept any more shipments until the issue could be resolved. U.S.I.A. immediately questioned whether the tests had been properly conducted and requested a meeting to discuss the problem. The Government did not meet with the contractor at that time.

On February 1, 2011, the contracting officer issued a cure notice, advising U.S.I.A. that the Government considered U.S.I.A.’s failure to supply acceptable dry suits to be a condition endangering performance of the delivery order. The contracting officer warned U.S.I.A. that USCG would terminate the order for cause under the terms and conditions of Federal Acquisition Regulation (FAR) 52.212-4(m) unless the condition was cured within fifteen days after receipt of the notice. U.S.I.A. immediately contacted the Government, stating that U.S.I.A. is “still waiting for a response on the conference call. We are extremely concerned with the problems and really would like to know what the issues are.”

On February 2, 2011, the Government responded that “[t]he results of the tests were attached to the cure notice. We can discuss this matter, but you’re still obligated to cure this [within] the time frame of the notice.” U.S.I.A. responded, telling the Government that U.S.I.A. had “issued a call tag to have the suits picked up at the delivery site. We will examine the suits to see what exactly is the problem.” When U.S.I.A. had not received the suits back, on February 11, 2011, U.S.I.A. stated that “[u]nfortunately we have yet to receive the suits back from Yorktown to test them. Which is an issue seeing as how we are required to send back the cure notice within the 15 days.” U.S.I.A. finally received the suits on February 14, 2011.

In the meantime, U.S.I.A. took some actions in a further attempt to eliminate any leakage problems. It proposed sending five more suits to the Coast Guard for additional testing before sending the bulk of the order, and requested to “have a U.S.I.A. representative come out to Yorktown and assist and observe the testing of these suits after they have been received by the US Coast Guard. We feel this is extremely important to make sure that everyone is comfortable and confident in our suits.” It also offered to pay for the Coast Guard’s technical representative to come to its manufacturing facilities to observe U.S.I.A.’s manufacturing and testing procedures.

Over the course of the next few months, U.S.I.A. repeatedly requested that the Government return the 100 suits that had been sent to the Coast Guard on January 19, 2011. During one e-mail exchange on March 31, 2011, U.S.I.A. stated that it had 700 “nearly completed” suits on its production floor, had spent “a tremendous amount of money” on the order, was experiencing “severe financial strain,” and USCG had neither returned the 100 suits for evaluation nor paid the \$59,900 invoice for the 100 suits. U.S.I.A. complained that it had not heard from the Coast Guard in nearly two months. According to U.S.I.A., the Government did not respond to its inquiries.

On May 26, 2011, the Coast Guard notified U.S.I.A. that it had made arrangements for the Navy to test the suits. The Coast Guard requested that U.S.I.A. send twenty-five dry suits to the Navy for testing. The parties sent e-mail messages back and forth. Ultimately, U.S.I.A. agreed to send suits to the Navy facility. (U.S.I.A. disputes that it agreed to this testing.)

The Navy tested twenty suits on July 25, 2011. The Navy reported that all of the suits had failed. On September 22, 2011, the Navy returned seventeen of the twenty-five suits that had been sent for testing. All of the suits were in the original packaging.

The Coast Guard issued a show cause notice to U.S.I.A., dated September 1, 2011, together with a copy of the Navy's report. The notice gave U.S.I.A. ten days to show cause as to why its contract should not be terminated.

On September 7, 2011, U.S.I.A. responded, pointing out that the value of the order exceeded the maximum order limitation under U.S.I.A.'s GSA schedule contract and indicating that U.S.I.A. had decided to decline the task order. U.S.I.A. noted that the Coast Guard had failed to pay for any of the 100 suits delivered on January 27, 2011. In a separate letter, U.S.I.A. stated that it no longer wished to work with the Coast Guard on the order, stating:

The inability of the United States Coast Guard to cooperate and communicate with U.S.I.A. in opening a meaningful dialog, not returning phone calls, not answering e-mails, not involving us in the process in a timely manner has led us to this point. [U.S.I.A.'s representative is] happy to discuss this matter with any authorized Coast Guard representative at any time.

By letter dated September 16, 2011, the Coast Guard terminated the order for cause. The termination letter stated:

Consistently between November 2010 and July 2011, U.S.I.A. supplied faulty products that did not meet the requirement set forth in the task order. As detailed in the testing results (Attachments A, B, and D), the suits repeatedly failed testing and inspection procedures with such problems as leakage from the seams and tearing of the seals. These products are not compliant with the task order and suitable for use by USCG personnel.

The termination letter states that the Coast Guard "intends to seek damages in the amount of procurement costs."

The Coast Guard ordered 149 suits on January 28, 2011, and 333 more suits on April 20, 2011, from Kokatat, Inc. (Kokatat). These orders preceded the termination for default. In addition, the Coast Guard ordered 660 suits from Mustang, Inc. (Mustang) on September 26, 2011, ten days after the termination.

According to the Coast Guard, of the 482 suits purchased from Kokatat, 423 were purchased as replacement suits at a cost of \$380,172.10 to cover suits under the U.S.I.A. order. Of the 660 suits purchased from Mustang, 354 were purchased as replacement suits at a cost of \$247,584 to cover suits under the order. In sum, the Coast Guard purchased 777 suits at a total cost of \$627,756.10 to replace the suits originally ordered from U.S.I.A.

In its prayer for relief, the Coast Guard requested payment of reprourement costs of no less than \$627,756.10. U.S.I.A. asserts that this amount does not include any credit for the contract price of \$497,528, which “would result in U.S.I.A. paying for the procurement of the 777 dry suits and the USCG paying nothing.”

Discussion

The parties have very different views of the matters at issue. The Coast Guard asserts that it tested the dry suits several times and concluded that the suits did not meet contract specifications because they leaked. As a result, the Coast Guard believes that it was entitled to terminate the contract for cause and to be reimbursed for any excess reprourement costs.

By contrast, U.S.I.A. maintains that the task order did not provide for testing the dry suits, and, even if testing was required, neither the Coast Guard nor the Navy properly tested the suits. Presumably, U.S.I.A. believes that had proper procedures been used to test the suits, the results would confirm that the suits did not leak and that the Coast Guard should not have terminated the contract on that basis. U.S.I.A. also maintains that, by ordering suits from other manufacturers, the Coast Guard breached the order because, at the time it placed the orders, U.S.I.A. had not defaulted on the contract.

On the issue of whether the delivery order provides for testing, the answer is not clear. As U.S.I.A. says, the request for quotations, with its single page of specifications, did not provide for testing. However, the delivery order does provide for inspection and testing of the suits. Section E of the delivery order, entitled Inspection and Acceptance, specifically provides that the “supplies will be inspected and accepted at destination.” Paragraph E2 details the inspection, testing, and acceptance requirements to be fulfilled.

However, the parties modified this delivery order. The addition of the requirement of “first article testing” appears, on its face, to require some type of testing. Nevertheless, the record does not contain sufficient information to enable us to determine what the parties intended by this modification. This presents a genuine issue of material fact sufficient to preclude summary relief.

Moreover, U.S.I.A. asserts that even if the delivery order required testing, the Government failed to conduct the tests properly. The Government maintains otherwise. We conclude that the issue of whether testing has been properly conducted presents a genuine issue of material fact, particularly since the Government terminated the contract for cause based upon the test results. The Government relied upon test results as evidence that the suits did not meet the requirements set forth in the delivery order.

Decision

Appellant's motion for summary relief is **DENIED**, and respondent's cross-motion for summary relief is **DENIED**. A trial date will be established at the next status conference.

JERI KAYLENE SOMERS
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

PATRICIA J. SHERIDAN
Board Judge