



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: October 27, 2015

CBCA 3562

PARADISE PILLOW, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Daniel A. Bellman of Bellman Law, Granville, OH, counsel for Appellant.

Michael J. Noble and Stephen T. O'Neal, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **POLLACK**, and **ZISCHKAU**.

DANIELS, Board Judge.

Paradise Pillow, Inc. (Paradise) appeals the termination for “default/cause” by a General Services Administration (GSA) contracting officer of a delivery order for blankets. After reviewing the documentary record and hearing testimony from Paradise’s president, two GSA contracting officers, and a representative of the Federal Emergency Management Administration (FEMA), we are persuaded that good grounds for the termination did not exist. Consequently, we grant the appeal.

Findings of Fact

Hurricane Sandy made landfall in New Jersey on October 29, 2012. That state and others around it were devastated by the storm's impact. Among other difficulties, utility services were disrupted. The State of New Jersey established a power restoration task force. A FEMA representative, John (Jack) Herbert, was assigned to assist the task force by helping the utility companies to secure materials necessary to make repairs to their systems.

The utility companies were concerned that their customers stay warm in the ensuing cold temperatures despite the loss of power. For that reason, they asked Mr. Herbert, on behalf of FEMA, to secure blankets which they could distribute to needy customers. Thus began the misadventure which spawned this litigation.

Mr. Herbert thought that purchasing blankets made no sense because a million blankets were already on hand in the state for use in emergency situations. He acceded to the request, however, thinking that an order for throwaway blankets, costing \$1.20 each, would not be excessively expensive. On November 5, at 4:13 p.m., FEMA asked GSA, which provides acquisition support to FEMA during disasters, to purchase 300,000 blankets for delivery to two locations by 5 p.m. on November 7. The locations were yards of Jersey Central Power and Light (JCP&L); points of contact there were identified as John Sperone (at Dover) and Troy Brier (at Farmingdale – incorrectly spelled “Farmindale”). Mr. Herbert was noted in the FEMA request as the agency's point of contact.

At GSA, the request was assigned to Bridgette Overbey, a contracting officer who served as the director of the Acquisition Emergency Branch, and Eun Mi Yu, a contracting officer who served on Ms. Overbey's team. As Ms. Yu testified, “It was, as you can imagine, a very challenging situation trying to fulfill these requirements on a very quick turnaround.” On November 6, GSA issued a request for quotations to supply 300,000 cotton blankets to the Government. Ms. Yu called Paradise, a firm which had worked with GSA for more than a decade in providing emergency relief supplies, and asked Freddy Halfon, the firm's president, to respond to this request. Mr. Halfon told Ms. Yu that he could supply 150,000 blankets, but due to transportation difficulties resulting from the storm, could not promise delivery as quickly as FEMA wanted. GSA issued another request for quotations on the morning of November 7, specifying a need for “150,000 blankets, white, 100% cotton, 66" x 90”.”

Ultimately, late in the afternoon of November 7, GSA issued and Paradise accepted a delivery order for 150,000 blankets, half to be delivered to the Dover location (later changed to Wharton) and the other half to the Farmingdale location, by 9 a.m. on November 9. The order required Paradise to “deliver to both locations via drop trailers.”

Contacts listed were Mr. Sperone at Dover (and later, at Wharton) and Mr. Brier at Farmingdale; telephone numbers were provided for each of these JCP&L employees. The order was placed against Paradise's GSA multiple award schedule contract. This contract contains a clause permitting the Government to terminate a delivery order for cause "if the Contractor fails to comply with any contract terms and conditions," and stating that "[i]f it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience." The price of the blankets was \$17.23 each; the total amount of the order was \$2,584,500. Another contract, also for the supply of 150,000 blankets, was awarded by GSA to another company, American Textile Systems (American).

In the chaos of the moment, the contracting arrangements were not provided to Mr. Herbert. He expected the blankets to be delivered by 5 p.m. on November 7 and was upset that no deliveries had been made by that time. On the afternoon of November 9, he was complaining to others at FEMA, "I don't even know who the vendor(s) are. We have no copies of any purchase order, shipping instructions etc. at this location." On November 14, he was still grouching that all the deliveries had been late – that is to say, they had not been made by Wednesday, November 7 – and that "[t]here is [no] way I would have gone along with this deal had we known that the cost was 10 times [\$1.20 per blanket]." As late as November 19, he wrote to others at FEMA, "I have no information as to who the actual vendor is for this project."

Mr. Halfon secured a commitment from Gary Porat, the owner of trucking company NJ Transport, to ship the blankets in drop trailers to the designated locations. Mr. Halfon testified that working around the clock with his employees, employees' family members, friends, and "anybody who knew me," he was able to get all the blankets ready for shipment and loaded into NJ Transport trailers by late afternoon on November 8. On the afternoon of November 9, Mr. Halfon sent to Ms. Yu bills of lading showing that the blankets had been loaded into six trailers, all of which were delivered to Wharton and Farmingdale on the evening of November 8 and the wee hours of the morning of November 9. Paradise has submitted manifests which it maintains are associated with the bills of lading. According to these manifests, 152,500 blankets were contained in the shipments – 76,250 to each of the two locations. Paradise paid NJ Transport for making the deliveries.

The parties disagree as to whether the trailers were actually left at the two JCP&L locations, as contended by Paradise. Unfortunately, we do not have conclusive proof about this key matter. Mr. Halfon testified in person at our hearing, and Mr. Porat testified by affidavit, that the deliveries were made. Neither of them drove any of the trucks, however, and neither observed the trucks at the sites. The bills of lading contain handwritten notations of delivery times and places, but the individual or individuals who made these notations and

the truck drivers (who may or may not have been those individuals) were not presented as witnesses. The most specific testimony we have on this matter from Paradise's perspective is from Mr. Porat, who tells us that while his drivers left three trailers at the Wharton yard and two at Farmingdale, "the person at the gate [at Farmingdale] would not permit my employee to leave the [third] trailer at [that] location, with the explanation that the yard was full." An electronic mail message from Mr. Herbert on November 29, combined with testimony from Mr. Halfon (referencing documents in the record), indicates that the delivery in the third trailer was most likely finally accomplished late in the evening of November 28. We also know, from Mr. Halfon, that Mr. Porat called him very early on the morning of November 9 and reported that the job was completed, but that no one at either site would sign for receipt of the trailers.

The Government offers no contemporaneous evidence at all on the issue. Ms. Overbey and Ms. Yu were not in New Jersey at the time and had no independent knowledge about delivery; they relied on Mr. Herbert for such knowledge. Mr. Herbert, in turn, relied on JCP&L employees Sperone and Brier to be his "eyes and ears." Those men were supervisors, however, and were not necessarily at the sites when delivery was purportedly made; neither of them was called as a witness at our hearing. Mr. Herbert complained in an electronic mail message on the afternoon of November 9 that "[t]here apparently was a lack of communications on the part of the Utility with their employees about the receipt of the trucks. I had told them that it was imperative that they sign and date the BOL's [bills of lading] . . . [but] I'm not even sure there is/was a 24/7 person on site to receive them." He testified that he later learned that JCP&L did not have someone at either site at all times.

By November 10, Mr. Herbert testified, the utility companies were restoring power to the affected communities, as a consequence of which the need for blankets was rapidly diminishing. "So the need for these blankets sort of was pretty much off, almost by the time [of] the delivery date," he said. None of the 300,000 blankets ordered by GSA – either those to be supplied by Paradise or those to be supplied by American – was ever distributed. On November 14, Mr. Herbert suggested to others at FEMA and to New Jersey officials, by electronic mail, that the blanket contract (he apparently still did not know that two vendors were involved) should be canceled and the contractor told to pick up the trailers it had dropped off. The next day, he complained to the same group that "[n]umerous contacts with GSA to stop, cancel all remaining trailer loads have gone unanswered." He recommended "that the vendor be told to recover the 12 trailers that were dropped in NJ [New Jersey] and the most we should have to do is pay a restocking fee for the 12 trailers we received." On November 16, Ms. Overbey wrote to Ms. Yu, "There's a mess at FEMA about the blankets. . . . [T]hey wanted Paradise Pillow to stop shipping the blankets and come and pick them up because there was no longer a need."

Meanwhile, Mr. Herbert and JCP&L personnel were trying to determine what they had on their hands. Mr. Herbert testified that he thought he was at Farmingdale on November 10 and found there six trailers and no paperwork. He opened some trailers and made a “rough cursory count” of blankets in them, but did not open other trailers. He did not know what company had left the trailers there. On the next day, a JCP&L employee told him by electronic mail that there were six trailers but no paperwork at Wharton as well. After a visit to the Wharton yard on or about November 20, Mr. Herbert told Robert Hill, another FEMA official, “The loads are so mixed up it’s nearly impossible to get a dead on accurate count, that would take finding a warehouse and unloading and separating the bundles to see how mis-marked they are.”

Mr. Herbert’s testimony about what he found at Wharton on November 20 was inconsistent. At first, he told us that there were six trucks there. Then he said there were eight trailers, two of which were storage trailers, “the kind you lease to put on property to keep stuff.” He also said that a few days later, he found at Farmingdale two storage trailers which were identical to the ones he had seen at Wharton; all four had Herman’s Leasing signs on them. Mr. Herbert assumed that the blankets in the storage trailers had just been delivered. He testified that he never opened the storage trailers “because at that point I had committed that, ‘We’re not going to open them. We’re not going to count them. Whatever they deliver, the contract, we thought, was terminated and being sent back.’”

Mr. Halfon explained why the four Herman’s Leasing storage trailers were at the JCP&L yards. Mr. Porat of NJ Transport had become upset that his transport trailers were still at these locations; he wanted the trailers back so that he could use them in his operations. He threatened to charge Paradise \$5000 per month per trailer as a rental fee if the trailers were not returned. Mr. Halfon then asked Ms. Yu when the Government was going to remove the blankets from the trailers. Ms. Yu did not know, so Mr. Halfon rented the storage trailers from Herman’s Leasing (at \$90 per month per trailer), had them delivered to the two JCP&L yards, sent his employees to the yards from his Philadelphia facility to move the blankets from the transport trailers to the storage trailers, and notified Mr. Porat that he could remove his transport trailers from the sites.

On November 20, FEMA, through Mr. Herbert, finally told Paradise and American that the blankets were no longer needed. Mr. Hill wrote to Mr. Herbert on November 20 and 21 that the Government had discussed with both vendors the possibility of their taking back the blankets. On November 21, Mr. Hill reported, “Paradise Pillows has tentatively agreed to restock the blankets for a 35% restocking fee. . . . American Textiles will not accept return or re-stockage [sic] of the blankets.” Mr. Herbert testified that he had opposed paying the restocking fee because “I don’t even have a delivery.” Mr. Halfon testified, however, that he had indeed agreed to accept a return of his company’s blankets in exchange

for the firm's standard restocking fee of 35%, and that Ms. Yu had agreed to this proposition, provided that Paradise would promptly remove the blankets from the JCP&L yards.

On November 29, Mr. Herbert sent an electronic mail message to Mr. Hill, with a copy to Ms. Overbey, expressing doubts about the number and quality of blankets American had delivered and stating that "we have not found any of [Paradise's] 6 reported trailers."

On December 3, Ms. Yu continued the conversation with Mr. Halfon by writing, "Please pickup [sic] all 150,000 unis [sic] of blankets from both the Wharton, NJ and Farmingdale, NJ locations, as soon as possible." A Paradise representative responded, "We cannot pick [sic] these today. . . . We will start tomorrow. Expected to finish within 5 days as long as the pick up locations cooperate with our truckers." Later that day, GSA issued a modification to the Paradise delivery order. The modification states:

The contractor shall pick up all 150,000 units of blankets on December 3, 2012: 75,000 units from Wharton, NJ and and [sic] 75,000 units from Farmindale [sic], NJ locations.

The amount of this Purchase Order shall be decreased from \$2,584,500.00 to \$904,575.00. The \$904,575.00 is the contractor's restocking fee of 35%. Applying the 35% restocking fee to the original purchase order amount of \$2,585,500.00 [sic], results in the amended amount of \$904,575.00.

This modification was signed electronically by Ms. Overbey, on behalf of GSA. A printed version, with slightly different wording but no difference in substance, was signed in writing by Mr. Halfon, on behalf of Paradise. On the copy signed by Mr. Halfon, the "on" before "December" is crossed out and "by" is inserted in its place, and the "3" after "December" is crossed out and "7th" is inserted in its place.

After the modification was issued, Mr. Halfon testified, he asked Mr. Porat to send transport trailers to receive blankets from the storage trailers. Mr. Porat did so, Paradise employees moved the blankets from the storage trailers back to Mr. Porat's transport trailers, and Herman's Leasing (upon request from Mr. Halfon) removed the storage trailers from the JCP&L yards. Mr. Halfon further testified that during the movement of blankets at one of the sites, one of his employees called him and said that Mr. Herbert had happened by. The employee arranged a telephone conversation between Mr. Herbert and Mr. Halfon. Mr. Herbert told Mr. Halfon that he wanted to count the blankets, and Mr. Halfon offered him the opportunity to do so. Mr. Herbert insisted he could perform the count only if he had access to a loading dock, however, and Mr. Halfon said that because GSA had directed him to remove the blankets without delay, Mr. Herbert could have the blankets moved to a

loading dock only if GSA permitted such action. There is no evidence that Mr. Herbert ever asked GSA for such permission.

On December 5 – two days after issuing the contract modification – GSA sent to Paradise a very different document, terminating the delivery order for “default/cause.” This document, which was signed by Ms. Overbey, says that the order “is cancelled in its entirety . . . because Contractor did not meet delivery deadline.”

Mr. Halfon testified without contradiction that the termination came without notice. Ms. Yu testified that at some time between the issuance of the modification and issuance of the termination, GSA’s position changed based on information the agency received from Mr. Herbert. Whatever that information might have been was not made known to us by Ms. Yu, Ms. Overbey, or Mr. Herbert, however. The record does contain a December 7 memorandum to file written by Ms. Yu and approved by Ms. Overbey which purports to justify the termination for default/cause. This memorandum says that on November 24, FEMA had notified Ms. Overbey’s branch “that they had a concern that the some [sic] of the blankets had not been delivered by the delivery deadline,” and that on November 29, FEMA had notified the branch “that Paradise Pillow had not delivered the blankets by the delivery deadline to the Wharton, New Jersey and the Farmindeale [sic], New Jersey locations.” The memorandum asserts that on November 29, “the Branch Director and Contracting Officer contacted Paradise Pillow to notify them that they had not met the delivery deadline for both locations.” The memorandum then notes the issuance of the December 3 delivery order modification, but says that it was issued “[b]y error” and that the termination document had “corrected” it.

Discussion

A termination for default (or cause) is “a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence.” *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,150 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) (quoting *J. D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969)); *C-Shore International, Inc. v. Department of Agriculture*, CBCA 1696, 10-1 BCA ¶ 34,379, at 169,740 (same)). Such a termination is a government claim, and the Government bears the burden of proof that its action was justified. *ACM Construction; C-Shore*. “[A] termination for default will be set aside if it is arbitrary or capricious, or constitutes an abuse of the contracting officer’s discretion.” *Divecon Services LP v. Department of Commerce*, GSBCA 15997-COM, et al., 04-2 BCA ¶ 32,656, at 161,633 (quoting *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999) (citing *Darwin Construction Co. v. United States*, 811 F.2d 593, 598 (Fed. Cir. 1987))).

GSA based its December 5, 2012, termination for “default/cause” of the delivery order on the ground that “Contractor did not meet delivery deadline.” That is the reason cited in both the contracting officer’s decision and the agency’s post-hearing brief. GSA has no proof that Paradise did not meet the delivery deadline, however.

The agency had no one on the ground to monitor deliveries of the contracted-for blankets; it relied on FEMA, and in particular, FEMA’s Jack Herbert, to ensure that the deliveries arrived as promised. Mr. Herbert, in turn, relied on JCP&L employees John Sperone and Troy Brier to be his “eyes and ears” as to the deliveries. We have no evidence that either Mr. Sperone or Mr. Brier was actually on duty when deliveries were made, however, and Mr. Herbert acknowledged that contrary to his directive, the utility did not have someone at either delivery site at all times.

Compounding GSA’s difficulty, Mr. Herbert was confused as to the identities of the blanket vendors with which GSA had contracted (he thought, well after Paradise’s delivery date, that there was a single vendor) or the type of blanket for which GSA had contracted (he thought the blankets were to cost \$1.20 each, was upset upon learning that they cost ten times that amount, and apparently never understood that they actually cost more than fourteen times \$1.20 each). Although Paradise president Freddy Halfon provided bills of lading to a GSA contracting officer on the afternoon of the day on which delivery was required, there is no evidence that prior to termination of the delivery order, Mr. Herbert ever received any paperwork regarding Paradise’s delivery efforts. Whatever paperwork he had appears to have been associated with the other blanket contractor, American.

Mr. Herbert never counted the blankets which arrived from Paradise. On November 10, he made a “rough cursory count” of blankets in some trailers, but did not open other trailers. On November 20, he told another FEMA official that making a count of blankets would be “nearly impossible.” After Paradise transferred its blankets from transport trailers to storage trailers – an action made necessary by the Government’s delay in dealing with the blankets, and about which Mr. Herbert was evidently uninformed – he decided not to open the storage trailers or count the blankets inside. When given one more chance to count the blankets – when Paradise was transferring them back from storage trailers to transport trailers to comply with a requirement in a contract modification – Mr. Herbert declined to take an action which was a necessary prerequisite to making a count.

Because GSA’s basis for terminating the delivery order for “default/cause” was invalid, we conclude that the termination was arbitrary and capricious. Consequently, pursuant to the terms of the contract under which the delivery order was placed, the termination is converted into one for the convenience of the Government.

This story has been plagued by miscommunications and misunderstandings. They began with FEMA asking GSA to order blankets, although the FEMA official involved thought they were unnecessary, and never specifying what kind of blankets it wanted. GSA then contracted for the delivery of blankets which were far more expensive than what FEMA expected. Neither agency provided any personnel to monitor delivery of the blankets; FEMA relied on JCP&L to perform this task, but the utility did not comply with FEMA's direction that it have someone on site at all times to confirm delivery times. By the time the blankets arrived, whatever need for them had ever existed had vanished. FEMA knew that there were trailers full of blankets at the utility's yards, but did not secure paperwork from GSA as to all of those trailers and did not count the blankets inside the trailers. The Government's delay in dealing with the blankets caused Paradise to move its blankets from transport trailers storage trailers, but FEMA's representative, who had no paperwork for the storage trailers, did not realize that they contained Paradise's blankets. Eventually, GSA and Paradise modified their delivery order to require Paradise to retrieve its blankets – which it did – and GSA to pay a restocking fee – which it did not. And then relying on an unfounded conclusion from a FEMA official, GSA terminated the order for “default/cause.”

Whether GSA must pay the restocking fee is an interesting question which is beyond the scope of this decision. We are authorized under the Contract Disputes Act to hear and decide appeals from decisions of contracting officers of executive agencies. 41 U.S.C. § 7105(e)(1)(B) (2012). The only GSA contracting officer decision regarding this delivery order which has been appealed to us is the decision which terminated the order for “default/cause.” In their post-hearing briefs, the parties have devoted some attention to the modification which involves the restocking fee. Paradise maintains that in drafting and signing the modification, “the contracting officer . . . knew that . . . she was binding the United States government.” GSA, on the other hand, believes that the modification “was not a legally binding agreement between the parties” because it “did not have a sufficient contractual basis.” Specifically, GSA says, the schedule contract against which the order was placed did not include authorization for a restocking fee, so the contracting officer had no authority to amend the order to include one, and GSA did not receive anything of monetary value – it did not receive any consideration – in return for Paradise receiving the fee. Whether either of these positions is correct, and if Paradise's position is valid, whether the contractor can demonstrate that it delivered and retrieved the 150,000 blankets on which the fee was based, will have to await the outcome of the termination for convenience settlement or, if necessary, an appeal regarding that matter.

Decision

The appeal is **GRANTED**. The termination of the delivery order in question is converted to a termination for the convenience of the Government.

STEPHEN M. DANIELS
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

JONATHAN D. ZISCHKAU
Board Judge