UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 21, 2016

CBCA 3487

R&G FOOD SERVICES, INC. d/b/a PORT-A-PIT CATERING,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

John Lukjanowicz of Law Offices of John Lukjanowicz, PC, Seattle, WA, counsel for Appellant.

Antonio Robinson, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

Before Board Judges **SULLIVAN**, **O'ROURKE**, and **CHADWICK**.

**CHADWICK**, Board Judge.

This appeal involves a contract for "national mobile food services" to feed people fighting fires in federal forests. R&G Food Services, Inc., doing business as Port-a-Pit Catering (Port-a-Pit or appellant), timely appealed the denial of its certified claim for lost profits for a breach by the United States Forest Service, a component of the United States Department of Agriculture (USDA or respondent). Port-a-Pit alleges that the Forest Service violated the express contract or the implied duty of good faith and fair dealing when it dismissed Port-a-Pit from an active fire and kept another contractor's food crew on site. Following discovery, USDA filed a motion for summary relief under Board Rule 8 (48 CFR 6101.8 (2015)). Based on the language of the contract and the evidence cited by Port-a-Pit, we find no breach, grant USDA's motion, and deny the appeal.

## Background

USDA's statement of uncontested facts in support of its motion for summary relief does not cite record evidence as required by Rule 8(g)(2). Port-a-Pit did not move to strike USDA's motion on procedural grounds. It responded on the merits and filed a consolidated statement of genuine issues and statement of facts with record citations under Rule 8(g)(3). We rely here on the agreed facts supported by the record and on the contract documents submitted without objection for the appeal file.

### I. Relevant Contract Provisions

The Forest Service awarded Port-a-Pit this contract, one of several contracts awarded under the national mobile food services program, in 2006. As pertinent here, the contract allowed the Forest Service to dispatch Port-a-Pit on short notice to feed firefighters in western states. There was no guaranteed minimum order. The contract included, among other standard clauses, Federal Acquisition Regulation (FAR) clause 52.216-18, Ordering (Oct. 1995) (48 CFR 52.216-18) (2005)), FAR clause 52.216-21, Requirements (Oct. 1995), and a tailored version of FAR clause 52.216-19, Order Limitations (Oct. 1995).

The contract provided that, during "mandatory availability dates" in the summer and early fall, the Forest Service would dispatch to a fire (or "incident") the "national mobile food service unit" whose designated dispatch point was closest to the incident's command post, "provided that the unit can meet the incident's needs and required time frames. If the unit cannot [do so], the Government may dispatch another [contractor's unit] determined to be the best value to the Government." Appeal File, Exhibit 1 at 17. The FAR Requirements clause stated in part, "Except as this contract otherwise provides, the Government shall order from the Contractor all the . . . services specified in the Schedule that are required . . . by the [Forest Service]." 48 CFR 52.216-21(c). Although these provisions made clear that this was a requirements contract, the contract also said that "[t]he Government may, *at any time*, order more than one Mobile Food Service Unit to support an incident," and that, if an additional unit "is ordered for the same Incident camp site," the contractor already on site "*may* [not must] be given the first opportunity" to meet the requirement. Appeal File, Exhibit 1 at 10, 19 (emphasis added).

The Order Limitations clause further circumscribed the Government's commitment. It stated in relevant part that "the Government is not required to order a part of any one requirement from the Contractor if that requirement exceeds the maximum order limitations," among which limitations were "[a]ny order for a single incident in

excess of twenty-one (21) days." This clause required the contractor, on the other hand, "to honor any order exceeding the maximum order limitations . . . unless that order (or orders) is returned to the ordering office within 1 hour[] after issuance" with a written explanation of the contractor's rejection. Appeal File, Exhibit 1 at 65-66.

Section C.2.2.2 of the contract addressed what would happen if the Forest Service had more mobile food services contractors at an incident than it needed. This section said in relevant part that the agency would release other, "non-national" contractors before it released national mobile food services contractors, and that "the Logistics Section Chief will determine which National Mobile Food Unit(s) will be the first to be released based on design, capability, size, need, performance, price and/or setup location at the incident. The [contracting officer's representative] will forward documentation of the decision to the [contracting officer]." Appeal File, Exhibit 1 at 20-21.

## II. The Cascade Complex Fire and the Alleged Breach

On July 19, 2007, the Forest Service dispatched Port-a-Pit to the Cascade Complex fire in central Idaho. This order was for a projected "14 day duration." Appeal File, Exhibit 2. Port-a-Pit began serving meals at the Cascade Complex fire on July 21 and did so for thirty-seven days, until August 26.

During this time, the official scope of the Cascade Complex fire changed at least twice. On August 3, the Forest Service "spun off" a section of the Cascade Complex fire and designated it the Landmark Complex fire, with a new incident number and different management. The Forest Service dispatched Blagg's Food Services, Inc. (Blagg's), another national mobile food services contractor, to the Landmark Complex fire on August 7, Appeal File, Exhibit 3, and Blagg's began serving meals there on August 8. On August 22, however, the two fires merged again, and the Forest Service designated the merged fire as the Cascade Complex fire.

As of August 22, Port-a-Pit and Blagg's were serving meals at different locations near the merged Cascade Complex fire. Blagg's did not receive a new order to report to the merged Cascade Complex fire; it continued to invoice for its services under the Landmark Complex incident number. On August 26, the Forest Service released Port-a-Pit from the Cascade Complex fire. The appeal file contains some evidence bearing on the circumstances of the release, but neither party proposed relevant findings of fact. USDA asserts in its statement of facts that the Forest Service decided to consolidate its management of the merged Cascade Complex fire at the former Landmark Complex command post, where Blagg's was working, "due to operational considerations and . . .

health risks," but USDA's statement cites no evidence of this. Port-a-Pit's statement of facts and genuine issues cites evidence but does not say why Port-a-Pit was released.

Blagg's continued to serve meals at the merged Cascade Complex fire until September 25, 2007.

III. The Claim and Appeal

Port-a-Pit submitted a request for equitable adjustment (REA) in May 2013 seeking lost profits based on the number of meals served by Blagg's from August 21 through September 25, 2007. Port-a-Pit certified the REA as a claim for $518,039.66 in June 2013. A Forest Service contracting officer denied the claim in July 2013. Port-a-Pit filed this appeal in August 2013. The complaint has two counts. One alleges that the Forest Service breached the contract by releasing Port-a-Pit while keeping Blagg's at the Cascade Complex fire; the other alleges that the agency thereby breached the implied duty of good faith and fair dealing. In its response to USDA's motion for summary relief, Port-a-Pit makes a different argument (which it raised in its claim), that the agency committed a breach by failing to *document* why it released Port-a-Pit instead of Blagg's.

## Discussion

I. Summary Relief Standard

Because USDA cites no evidence outside the contract in its statement of uncontested facts, we rely on the evidence cited in Port-a-Pit's factual statement and approach USDA's motion almost as we would a motion to dismiss for failure to state a claim under the contract on which we could grant relief. *See Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316, at 169,505 (2009) ("Pure contract interpretation is a question of law that may be resolved by summary judgment." (citing *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984))). We may grant the motion only if the evidence cited by Port-a-Pit, which has the burden of proof as to its breach claim, cannot support the claim, *see Simanski v. Secretary of Health & Human Services*, 671 F.3d 1368, 1379 (Fed. Cir. 2012) ("[W]hen the non-moving party bears the burden of proof . . ., the moving party can simply point out the absence of evidence creating a disputed issue of material fact. The burden then falls on the non-moving party to produce evidence showing that there is such a disputed factual issue in the case." (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994))), bearing in mind that, "[t]o the extent that the contract terms are ambiguous,

requiring weighing of external evidence, the matter is not amenable to summary resolution." *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988).

Port-a-Pit urges us to deny USDA's motion because USDA's statement of uncontested facts does not comply with Rule 8(g)(2). We agree that USDA should have cited evidence for its factual contentions, but we cannot deny the motion on that basis. As a matter of law, a party without the burden of proof is entitled to seek summary relief by "simply point[ing] out" that the other party lacks evidence to support its case. *Simanski*, 671 F.3d at 1379. We must decide whether Port-a-Pit's response cites more than the proverbial scintilla of evidence to justify proceeding to a hearing. *E.g.*, *Karp v. General Services Administration*, CBCA 1346, 11-1 BCA ¶ 34,716, at 170,934.

## II. Scope of the Government's Contractual Duties

Port-a-Pit does not meet its burden. Significantly, when read as a harmonious whole, *see Electronic Data Systems*, 10-1 BCA at 169,505, this was a requirements contract in the same limited sense as were the contracts at issue in *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000). Both here and in *Ace-Federal*, the Government awarded contracts containing the FAR Requirements clause to multiple vendors for the same general requirement. "[A]s consideration for the contractors' promises regarding price, availability, delivery, and quantity, the government promised that it would purchase only from [a limited number of] contractors . . . , with few exceptions." *Id*. at 1332. Winning one of the contracts had "substantial business value because there were [a limited number of] authorized sources" of the requirement. *Id*. Here, "[r]ather than vying with [a larger number of] other [contractors] for the government's business," the national mobile food services contractors "had to compete with only [a few] other" contractors, although we do not know the exact number. *Id*.

"[T]he contracts at issue [in *Ace-Federal*] were not typical requirement contracts and . . . did not guarantee any of the individual contractors business, because the agencies were free to choose amongst the contractors" when ordering covered services. *Rumsfeld v. Applied Cos., Inc.*, 325 F.3d 1328, 1338-39 (Fed. Cir. 2003) (discussing *Ace-Federal*). Here, the Forest Service did not have quite the same freedom of choice. The contract required the agency to dispatch to an incident the national mobile food service unit based nearest to the incident, unless the requirement fell outside the order limitations, or the contractor could not fulfill it. The agency did *not* promise, however, to dispatch only *one* of the contractors to a given incident. To the contrary, the contract stated in several places, including but not only in section C.2.2.2, that the agency could call on more than one mobile food services contractor per fire, and indeed, could do so "at any time."

Nor did the contract say that an order, once placed and accepted, had to last for a certain number of days, or for as long as the agency needed food services at the incident. Port-a-Pit argues that the requirements language in its contract "is identical" to the language at issue in *Ace-Federal*, and that the Requirements clause "required [the Forest Service] to order from [Port-a-Pit] the services specified in the Schedule to be purchased by the Agency for the Cascade Complex Fire." The Requirements clause, however, obligated the agency to order its requirements from Port-a-Pit "[e]xcept as this contract otherwise provides." As in *Ace-Federal*, this was a large exception. The contract provided that once the Forest Service dispatched Port-a-Pit to a fire, the agency could send another mobile food services unit to the same fire, as happened here (and even to the same camp, which did not happen), and that if the agency had two or more national mobile food services contractors at the same incident, it could release one "based on design, capability, size, need, performance, price and/or setup location." Notably, this list of considerations did not include which contractor had arrived at the fire first.

III. Port-a-Pit's Breach Theories

Port-a-Pit identifies no contract term that the Forest Service breached when it released Port-a-Pit from the Cascade Complex fire on August 26, 2007.

Port-a-Pit argues that the agency violated the written contract terms in three ways. First, it argues that Blagg's should not have been serving meals at the Cascade Complex fire in the first place, because Blagg's "was never dispatched to" that fire. Based on Port-a-Pit's own statement, which the record supports, that the Landmark Complex fire, where Blagg's was dispatched on August 7, "merged" with the Cascade Complex fire on August 22, we view the Forest Service's retention of Blagg's at the merged fire as contractually unobjectionable. The Forest Service could have issued Blagg's a new order, documenting that the merged Cascade Complex incident had superseded the Landmark Complex incident, but we view its failure to do so as, at worst, a harmless administrative error, since Port-a-Pit's contract expressly allowed the agency to dispatch a second mobile food services contractor to the Cascade Complex fire "at any time."

Second, Port-a-Pit argues that the Forest Service breached the contract by failing to preserve the "documentation of the decision" to release Port-a-Pit that is mentioned in section C.2.2.2. Because USDA cites no evidence that this documentation currently exists, we assume for purposes of ruling on USDA's motion that it does not. We agree with USDA, however, that section C.2.2.2 plainly said that the contracting officer's representative would "forward documentation of the decision" from the incident site to the *contracting officer* (evidently to formally confirm that the released unit was free to

leave), not to the contractor. Failing to forward this paperwork internally would not, by itself, breach a duty owed to Port-a-Pit or entitle Port-a-Pit to damages.

Although Port-a-Pit argues that the lack of contemporaneous documentation deprives it of the ability to find out why it was released, Port-a-Pit was able to take discovery and depose the logistics section chief for the Cascade Complex fire, who was also the contracting officer's representative. The burden now falls on Port-a-Pit to produce evidence supporting an inference that it was released on a basis other than "design, capability, size, need, performance, price and/or setup location." Because this list of considerations in section C.2.2.2 used the compound conjunction "and/or," it was disjunctive, requiring the decision maker to consider at least *one* of the factors. *See* Kenneth A. Adams and Alan S. Kaye, *Revisiting the Ambiguity of "And" and "Or" in Legal Drafting*, 80 St. John's L. Rev. 1167, 1190 (2006) (noting "and/or" "has a specific meaning" and that "X, Y, and/or Z means X [alone] or Y [alone] or Z [alone] or any two or more of them"). The Forest Service could in theory have breached the contract by releasing Port-a-Pit solely for a reason not listed in section C.2.2.2, or for no reason at all. Substantial evidence for either scenario would be enough to support a breach claim and defeat USDA's motion. *See Campbell Plastics Engineering & Manufacturing, Inc. v. Brownlee*, 389 F.3d 1243, 1250 (Fed. Cir. 2004) (noting requirement of "a reasonable, contract-related basis for" a discretionary decision).

As noted, Port-a-Pit's Rule 8(g)(3) factual statement cites no reason why the Forest Service released Port-a-Pit. To ensure that Port-a-Pit was not misled by USDA's failure to cite evidence into thinking it need not cite evidence either, we advised Port-a-Pit of the standard for summary relief and invited it to file a supplemental response. In that filing, Port-a-Pit argues for the first time that there is triable evidence that the Forest Service released Port-a-Pit in violation of section C.2.2.2.

Port-a-Pit relies on two kinds of evidence for this third breach argument. First, citing the deposition of the logistics section chief, Port-a-Pit argues that he considered "safety" when deciding to release Port-a-Pit, but that "Contract Clause C.2.2.2 did not list safety as one of the seven factors" to consider. As USDA points out in reply, however, appellant's counsel never asked the logistics section chief at his deposition why he released Port-a-Pit. The witness testified that he was concerned about safety in general, and that he directed Port-a-Pit to move its unit from one location to another during performance to escape heavy smoke; but he was not asked and did not testify about the basis for his *release* decision, so his deposition supplies no evidence on that point.

Alternatively, Port-a-Pit argues that the record suggests the Forest Service destroyed or withheld the documentation of the release decision in an act of spoliation,

and that we should infer on that basis that the documentation would have shown that the decision was based on contractually impermissible grounds. Port-a-Pit cites *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007), in which the Court said that a party urging such an adverse inference must prove that the other party destroyed or otherwise failed to preserve "relevant" evidence "with a culpable state of mind." *Id*. at 1375 ("The burden is on the party seeking to use the evidence to show the existence of each criterion."). In 2015, this standard was substantially adopted in amendments to Rule 37 of the Federal Rules of Civil Procedure concerning discovery of electronically stored information.

We lack grounds to draw the requested inference. First, Port-a-Pit cites no substantial evidence that the allegedly missing evidence existed to begin with. The logistics section chief testified in 2014 that he "assume[d]" he forwarded documentation of his decision to the contracting officer in 2007, but that he did not recall doing so. Port-a-Pit argues, in fact, that "[t]he most likely scenario is that" the logistics section chief "never prepared the Contract Clause C.2.2.2 documentation." While we cannot weigh evidence at this stage, the record reflects nothing more than a bare assumption that the documentation existed. A further, unsupported leap would be required to infer that the Forest Service mishandled it. Certainly, there is no evidence of bad faith on the part of the agency. *See* Fed. R. Civ. P. 37(e)(2) (adverse inference warranted only if a party "acted with the intent to deprive another party of the information's use in the litigation").

Of equal importance, Port-a-Pit cites no evidence that the documentation would have explained *why* Port-a-Pit was released. Thus, even if spoliation occurred, we could not find harm. Section C.2.2.2 said that the contracting officer's representative would send the contracting officer a document stating which food contractor the logistics section chief had decided to release. When asked at his deposition how this process was supposed to work, the logistics section chief said he would ordinarily "fill out a general message form saying 'Please release Port-a-Pit Catering as of this date and time,'" then hand that form to a subordinate, who "would drop it into" an electronic "system" that would distribute copies within the agency. Given this unchallenged description of what "documentation of the decision" would look like, no "reasonable trier of fact could find that" discovery of such a bare-bones message "would support" Port-a-Pit's breach claim. *Residential Funding Corp. v. DeGeorge Financial Corp*., 306 F.3d 99, 107 (2d Cir. 2002), *cited in Jandreau*, 492 F.3d at 1375; *see also Micron Technology, Inc. v. Rambus Inc*., 645 F.3d 1311, 1329 (Fed. Cir. 2011) (equating spoliation prejudice with material effect on substantial rights). Port-a-Pit thus cites neither direct evidence nor evidence of prejudicial spoliation from which one could reasonably infer that the Forest Service breached contract section C.2.2.2 in releasing Port-a-Pit from the Cascade Complex fire.

Absent such evidence, we also have no basis to find that the release decision violated the Government's implied duty of good faith and fair dealing. Imposing procedures or requirements for making a release decision beyond those in section C.2.2.2 would impermissibly alter "the contract's discernible allocation of risks and benefits." *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014).

## Decision

The respondent's motion for summary relief is granted. The appeal is **DENIED**.

KYLE CHADWICK
Board Judge

We concur:

MARIAN E. SULLIVAN
Board Judge

KATHLEEN J. O'ROURKE
Board Judge