



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 5179 GRANTED; CBCA 5440 DISMISSED AS MOOT: February 1, 2017

CBCA 5179, 5440

PARADISE PILLOW, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

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

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

DANIELS, Board Judge.

Paradise Pillow, Inc. (Paradise) appeals the deemed denial, by a General Services Administration (GSA) contracting officer, of a claim for payment due to the termination for the Government's convenience of a delivery order for blankets. We grant the appeal on Paradise's motion for summary relief.

Background

The facts upon which this appeal is based were described in detail in our decision in *Paradise Pillow, Inc. v. General Services Administration*, CBCA 3562, 15-1 BCA ¶ 36,153, a case which involved the same parties and actions under the same delivery order. We

summarize those facts here and refer the reader to that decision for a more complete recitation.

GSA, at the request of the Federal Emergency Management Agency (FEMA), contracted with Paradise to supply 150,000 blankets, on a rushed basis right after a hurricane, to two locations in New Jersey. The arrangement was specified in a delivery order which provided that Paradise would be paid \$2,584,500 for the blankets. The delivery order was issued under a multiple award schedule contract between GSA and Paradise.

After Paradise made its deliveries, FEMA decided that the blankets were not needed and asked Paradise – and another company which had contracted to supply an equal number of blankets – to pick up the blankets and accept their return. Paradise agreed to do so, provided that the Government paid the company’s standard restocking fee of 35% of the contract price. GSA and Paradise then bilaterally modified 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 Farmin[g]dale, 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.

Paradise sent personnel and transport trailers to the two specified New Jersey locations and picked up the blankets. Two days after the contract modification was signed, however, GSA sent to Paradise a very different document, terminating the delivery order for “default/cause.” This document says that the order “is cancelled in its entirety . . . because Contractor did not meet delivery deadline.”

The Board held that the termination was not justified because GSA could not prove that Paradise did not meet the delivery deadline. The contract against which the order had been placed contained a clause 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.” We consequently converted the termination to one for the convenience of the Government.

The contract's Termination for the Government's Convenience clause is one of the contract terms and conditions for commercial items, set forth at 48 CFR 52.212-4 (2005). The clause reads as follows:

The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

On November 20, 2015, Paradise submitted to the GSA contracting officer a certified claim in the amount of \$904,575 – the amount specified in the contract modification – or in the alternative, \$2,584,500 – the original contract amount. Paradise said that if GSA would pay the latter figure, it would make available to the Government 150,000 blankets at its facility.

The Contract Disputes Act requires that “[a] contracting officer shall, within 60 days of receipt of a submitted certified claim over \$100,000 – (a) issue a decision; or (b) notify the contractor of the time within which a decision will be issued.” 41 U.S.C. § 7103(f)(2) (2012). On February 3, 2016, Paradise, having heard nothing from the contracting officer, filed an appeal from the deemed denial of this claim. The Board docketed the appeal as CBCA 5179. In its answer to the appellant's complaint, GSA maintained that “the claim, as of the filing date, was premature. However, the legal matter is now moot as the 120-day appeal period has lapsed.” On August 1, 2016, “to eliminate any jurisdictional issues,” Paradise filed a second appeal from the deemed denial of the claim. The Board docketed this appeal as CBCA 5440.

Discussion

Paradise has moved for summary relief in these appeals. Resolving a dispute on such a motion is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the

absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, to defeat a motion for summary relief, the nonmoving party must come forward with specific facts showing the existence of a genuine issue for trial. “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Paradise maintains that the delivery order modification providing for the contractor to retrieve the blankets it had delivered, in exchange for a restocking fee, is valid, now that the subsequent modification (terminating the delivery order for cause/default) has been overturned. Paradise contends that the initial modification dictates the amount of recovery in this case. In support of its position, Paradise has submitted a statement of uncontested facts, as required by our Rule 8(g)(2) (48 CFR 6101.8(g)(2) (2015)), noting evidence that we found in our decision in the earlier case that more than 150,000 blankets were loaded onto transport trailers at the contractor’s facility, delivered to the locations specified by the Government, and later picked up at those locations.

GSA’s position is that the initial delivery order modification, providing for retrieval of the blankets in exchange for a restocking fee, is invalid because it is inconsistent with a provision of the contract against which the order was issued. The contract includes the words “RESTOCKING: Not applicable.” Consequently, according to the agency, its contracting officer was without authority to modify the order to provide for a restocking fee. GSA urges that instead of following the initial modification, we should apply the contract’s Termination for Convenience clause. Further, says the agency, it “needs discovery to ascertain whether the full Order’s costs could have been avoided through the sale of the blankets that had previously been returned. In GSA’s view, that revenue should be excluded from any T for C [termination for convenience] recovery under the Schedule Contract’s T for C clause.”

GSA filed a statement of genuine issues, as required by Rule 8(g)(3), but that statement does not address Paradise’s statement that noted evidence of blanket delivery and retrieval. Indeed, the statement of genuine issues does not comply with the rule’s mandate that “[t]his document shall identify, by reference to specific paragraph numbers in the moving party’s Statement of Uncontested Facts, those facts as to which the opposing party claims there is a genuine issue necessary to be litigated.” Instead, the statement of genuine issues requests discovery on a number of matters, which it lists as follows:

1. Did Paradise Pillow deliver the full 150,000 blankets contracted for in the Order[?]
2. Did Paradise Pillow obtain a profit as a result of accepting the Order[?]

3. What profit did Paradise Pillow obtain as a result of completing the Order[?]
4. What was the value of the blankets upon their return to Paradise Pillow[?]
5. What efforts did Paradise Pillow make to resell the blankets[?]
6. What was the revenue received by Paradise Pillow as a result of reselling the blankets[?]
7. What were the shipping costs associated with the delivery of the blankets to the Wharton and Farmingdale delivery sites[?]
8. What were the shipping costs associated with retaking delivery of the blankets[?]
9. What were the trailer costs associated with keeping trailers at the Wharton and Farmingdale delivery sites prior to the termination[?]
10. What were the inventory costs associated with having to retake delivery of the blankets[?]

We spare the parties the trouble of engaging in discovery by finding that, as suggested by Paradise, the only reasonable reading of the schedule contract's words "RESTOCKING: Not applicable" is simply that the contract did not include any provision for the Government to demand a return and restocking of the blankets. These words did not preclude the parties from agreeing, as they did, in an appropriate circumstance, to modify the delivery order to have the contractor retrieve and restock the blankets in exchange for fair compensation. Any other result would have been foolish for the agency, since whatever need might ever have existed for the blankets had vanished by the time the contractor had delivered them. Thus, the initial modification to the delivery order was not inconsistent with the contract, and the contracting officer – who possessed an unlimited warrant – had the authority to agree to the modification.

That modification stipulated a price for the contractor's work under the delivery order – accumulating 150,000 blankets, delivering them to specified locations on short notice and under difficult conditions in the wake of a hurricane, maintaining the blankets in trailers at the locations for several weeks, retrieving the blankets, and restocking the blankets in a warehouse. GSA has given us no reason to believe that this price, which was the product of an arm's-length negotiation, represented anything other than fair market value for the work performed. *See, e.g.,* 26 Am. Jur. 2d *Eminent Domain* § 28 (2016) (in eminent domain proceeding, fair market value is what a willing buyer would pay and a willing seller would accept, in a transaction at arm's length); 37 Am. Jur. 2d *Fraudulent Conveyances and Transfers* § 28 (whether the value a debtor receives for a challenged transfer is "reasonably equivalent" to what he gives up is based on fair market value of what he receives, the existence of an arm's-length relationship between the debtor and the transferee, and the

transferee's good faith). There is no need for any discovery as to matters 2 through 10 listed by GSA, since all of those matters were implicitly considered by the parties in agreeing to the price.

GSA's matter number 1 – whether Paradise delivered all of the blankets – could be a relevant topic of discovery, but GSA has not made a showing that it should be allowed to take such discovery. Under the contract's Termination for Convenience clause, the contractor is to be paid "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination." The contractor performed one hundred percent of the work, as specified in both the original delivery order and the initial modification, prior to the notice of termination. This is indicated by Paradise's statement of uncontested facts (referencing evidence we found in the earlier case between the parties), which is not challenged in GSA's statement of genuine issues.

Under Federal Rule of Civil Procedure 56, regarding summary judgment –

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

Fed. R. Civ. Pro. 56(d). The Board looks to this rule when considering requests for discovery in response to motions for summary relief, our analogous procedure to summary judgment. *See* Rule 1(d).

Courts have held, in applying Federal Rule 56(d) (formerly 56(f)), that a nonmovant "cannot defeat a motion for summary judgment by merely restating . . . conclusory allegations . . . and amplifying them only with speculation about what discovery might uncover." *Serdarevic v. Advanced Medical Optics, Inc.*, 532 F.3d 1352, 1364 (Fed. Cir. 2008) (quoting *Contemporary Mission, Inc. v. U.S. Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981)); *see also RQ Squared, LLC v. United States*, No. 12-527C, 2017 WL 24656, at *13 (Fed. Cl. 2017). "[T]o defeat summary judgment, [the nonmovant] ordinarily must contest [the movant's] affidavits with proper evidence or, . . . pursuant to rule 56[(d)], must indicate concretely why more time for discovery is warranted." *Price v. Greenspan*, 374 F. Supp. 2d 177, 183 (D.D.C. 2005); *see also Todd v. Montoya*, 877 F. Supp. 2d 1048, 1083 (D.N.M.

2012) (“Rule 56[(d)] may not be invoked based solely upon the assertion that discovery is incomplete or that the specific facts necessary to oppose summary judgment are unavailable.” (citation omitted). GSA has not indicated concretely, by affidavit or declaration (or otherwise), why more time for discovery is warranted here – a particular problem in this case, since in the previous case, whether the contractor had delivered all the blankets was at issue and the agency offered no credible evidence on the matter. GSA has not challenged Paradise’s assertions of full delivery in the agency’s statement of genuine issues. There is consequently no reason to allow discovery and no reason to doubt that full delivery occurred.

We therefore grant Paradise’s claim for the amount agreed upon in the first modification to the delivery order, \$904,575, as the proper measure of termination for convenience costs. Granting the contractor its alternative measure of relief, the original contract price, would be unreasonable because the delivery order was modified to change the work required (returning the blankets to the contractor) and decreasing the price in light of that change.

One final issue remains before us: What should we do about the fact that Paradise has filed two appeals regarding the same claim? GSA at one time questioned whether the first appeal was premature because it was filed before the time for appeal to the Court of Appeals for the Federal Circuit had run. *See* 41 U.S.C. § 7107(a)(1) (board decision is final unless appealed within 120 days from the date the party receives the decision). The agency has not pursued this theory, however, and we know of no justification for it. The Contract Disputes Act places only one time restriction on when a contractor may appeal a contracting officer’s decision on (or deemed denial of) a claim to a board of contract appeals: “within 90 days from the date of receipt of [the] decision.” *Id.* § 7104(a); *see id.* § 7103(f)(5) (“[f]ailure by a contracting officer to issue a decision on a claim within the required time period is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal”). The Act does not otherwise limit when an appeal of a contracting officer’s decision may be filed. CBCA 5179 was filed with the Board more than sixty days after the contracting officer failed to issue a decision within the required time period (for this claim of more than \$100,000, the date specified by the contracting officer, within sixty days of receipt of the claim), so it was filed at a permissible time. We address that appeal here by granting it. CBCA 5440, the duplicate appeal, is superfluous now that CBCA 5179 has been resolved. We therefore dismiss CBCA 5440 as moot.

Decision

Paradise Pillow, Inc.’s motion for summary relief in **CBCA 5179** is granted, and that appeal is **GRANTED**. The General Services Administration must pay to Paradise Pillow,

Inc. (a) \$904,575 plus (b) interest from the date on which the contractor's claim dated November 20, 2015, was received by the contracting officer until the date on which the \$904,575 is paid. 41 U.S.C. §§ 7108, 7109. **CBCA 5440 is DISMISSED AS MOOT.**

STEPHEN M. DANIELS
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

JONATHAN D. ZISCHKAU
Board Judge