UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED: May 18, 2018

CBCA 5976

TRIBUTE CONTRACTING LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Tiffany Brown, Owner of Tribute Contracting LLC, Atlanta, GA, appearing for Appellant.

Lindsay J. Stoudt and Samantha S. Ahrendt, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **DRUMMOND**, and **CHADWICK**.

CHADWICK, Board Judge.

Tribute Contracting LLC (Tribute) timely appealed from a decision of a Federal Emergency Management Agency (FEMA) contracting officer terminating Tribute's commercial items contract for cause. The parties filed cross-motions for summary relief after submitting the appeal file but before taking any discovery. FEMA urges us to sustain the termination based on Tribute's failure to meet the delivery schedule. Tribute argues that the termination was procedurally flawed and should be converted to a termination for convenience. Because we see material facts in dispute and find neither party entitled to relief at this stage as a matter of law, we deny both motions.

Background

We base this factual summary on undisputed statements filed by the parties with their cross-motions and on documents in the appeal file on which the parties rely.

In October 2017, FEMA awarded Tribute a contract for thirty million "self-heating" meals to be delivered to the seaport in Jacksonville, Florida, at a fixed price of $5.10 per meal. The meals were intended for disaster relief operations in Puerto Rico. The contract originally called for Tribute to begin delivering self-heating meals to the seaport on Saturday, October 7, 2017, at a rate of one million meals per day, increasing to two million meals per day the following week, and three million meals per day for a third and final week. The contract contained Federal Acquisition Regulation (FAR) Clause 52.212-4, Contract Terms and Conditions—Commercial Items (Jan 2017) (48 CFR 52.212-4 (2017)), including subpart (m), Termination for cause, which used the same language that we quoted (from an earlier FAR) in *Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,899.

After award, Tribute and the FEMA contracting officer agreed to a revised schedule, with daily deliveries of self-heating meals to the Jacksonville seaport beginning on Wednesday, October 11, and continuing until Friday, November 10, in gradually increasing amounts that would not reach one million meals per day until October 26.

The first scheduled delivery was 50,000 meals on October 11. Tribute delivered 50,000 meals that day. Although a disagreement arose as to whether the delivered meals were "self-heating" within the meaning of the contract, FEMA accepted the meals and later paid Tribute for them. Tribute never delivered another meal under the contract.

At 7:52 p.m. on October 11, the day of the first delivery, the FEMA contracting officer emailed Tribute, under the subject line "48 hours," "They are asking vendors to delay delivery on all meals for 48 hours. This only includes drivers not [e]n route. The wait in Jacksonville is extensive."

The next day, Thursday, October 12, Tribute emailed the contracting officer that Tribute had "a new [meal] supplier. The self heating bag and pouch is in a separate box. They will be combined in the next shipment." Tribute attached a photograph of a new meal package.

On Friday, October 13, a different FEMA contracting officer advised Tribute and other vendors by email that the "Jacksonville loading dock will close [for deliveries] this weekend" and would "resume business on Monday, October 16, 2017."

Exactly what happened on Monday the 16th through Wednesday the 18th is unclear from the record. At midday on Thursday, October 19, Tribute emailed the first FEMA contracting officer that it planned to deliver meals to Jacksonville with "an adhesive heater attachment . . . in separate boxes." It appears from the record that Tribute attached to this email a photograph of the new meal and heater. The contracting officer immediately replied to Tribute, "The meals you sent were not authorized. The meals in the pictures are not authorized in accordance with the terms of the evaluation or contract." The contracting officer wrote that shipping meal pouches and heaters in separate containers "is unacceptable," and concluded, "Please do not send another meal."

Tribute replied that two truckloads of the meals were "already in transit since yesterday [October 18] and will arrive at 1900 [7:00 p.m.]." The contracting officer replied, "As stated[,] these meals are unacceptable, please contact the drivers and have those trailers return to origin."

After further email exchanges, the contracting officer advised Tribute by email at 7:17 p.m., "Do not ship another meal[.] Your contract is terminated. The trailers that you are sending are the ones in our inventory that have meals in one and heater packs in another. This is a logistical nightmare" (paragraph breaks omitted).

On Monday, October 23, the contracting officer issued a unilateral contract modification terminating the contract for cause under FAR Clause 52.212-4. The modification stated in relevant part, "The contract is being terminated due to late delivery of the approved heater meals. The meals that were delivered on 11 October were 50,000. The 36,000 meals scheduled on 19 October did not comply with the approved meals at the time of award." Tribute appealed from this decision on December 26, 2017.

Discussion

We have jurisdiction of Tribute's timely appeal from the termination for cause, which is a government claim. 41 U.S.C. § 7104(a) (2012); *Primestar Construction v. Department of Homeland Security*, CBCA 5510, 17-1 BCA ¶ 36,612, at 178,329 (2016). "[T]he only relief available under an appeal of a default [or for-cause] termination is the conversion of the default termination to one for the convenience of the Government." *Aurora, LLC v. Department of State*, CBCA 2872, 16-1 BCA ¶ 36,198, at 176,648 (2015). After reviewing the cross-motions for summary relief, we conclude that neither party is entitled to judgment, either sustaining or converting the termination, "based on uncontested material facts . . . as a matter of law." Board Rule 8(g)(1) (48 CFR 6101.8(g) (2017)); *see Karp v. General Services Administration*, CBCA 1346, 11-1 BCA ¶ 34,716, at 170,934 (explicating the summary relief standard).

FEMA bears the "burden of proving that [Tribute] did not perform in a timely fashion," whereas Tribute bears the "burden of proving that its nonperformance [if any] was excusable." *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996); *see Packer*, 16-1 BCA at 176,898; *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,552-54. Tribute argues that the true reason for the termination was that FEMA considered Tribute's meals unacceptable as "self-heating" under the contract, and that the contracting officer's reference in the final modification to untimely delivery was pretextual. FEMA has elected not to argue, at least for now, about whether Tribute was able to deliver "self-heating" meals. Despite the email traffic quoted above, FEMA "disputes that the Contracting Officer terminated Appellant's contract because [Tribute] provided nonconforming goods." FEMA focuses, instead, on arguing that Tribute "was also late." Specifically, FEMA argues that Tribute could and should have made deliveries in Jacksonville on October 12, 13, 16, 17, 18, and 19.

We find that, on the record before us for purposes of the parties' motions, there are too many disputed material facts to decide the case in this posture. As suggested by our summary above, factual ambiguities exist as to, among other issues, whether FEMA was strictly enforcing the terms of the contract, including the daily delivery deadlines, *see, e.g.*, *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969); *S.T. Research Corp.*, ASBCA 39600, 92-2 BCA ¶ 24,838; whether Tribute reasonably should have understood that FEMA expected Tribute to deliver meals on any of the six days cited by FEMA; and whether the disagreement that the parties obviously had during performance—about whether the meals that Tribute said it was prepared to deliver complied with the contract or would create "a logistical nightmare"—might provide grounds to justify the termination, should FEMA choose to make that argument. *See, e.g.*, *Kelso v. Kirk Bros. Mechanical Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994) ("This court sustains a default termination if justified by circumstances at the time of termination, regardless of whether the Government originally removed the contractor for another reason."). This is a non-exclusive list. The parties may raise other issues as the case proceeds.

Decision

Both motions for summary relief are DENIED.

Kyle Chadwick

KYLE CHADWICK
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge