



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

---

MOTION FOR SUMMARY JUDGMENT DENIED: December 2, 2021

CBCA 7090

ZACH FUENTES, LLC,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Benjamin L. Keime of Waldman Barnett, P.L., Coconut Grove, FL, counsel for Appellant.

Tami S. Hagberg and Terrius D. Greene, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **SHERIDAN**, and **KULLBERG**.

**SHERIDAN**, Board Judge.

This matter is before the Board on appellant's motion to compel payment, which we restyled as a motion for summary judgment. Appellant, Zach Fuentes, LLC (ZFL), asks the Board to find that respondent, the Department of Health and Human Services (HHS), is responsible for goods that ZFL asserts were delivered but that HHS, upon a recount, asserts it did not receive. This motion arises from a larger dispute where appellant claims that it delivered one million KN95 masks, as required by its contract, and respondent is in breach of the contract by refusing to pay for them.

HHS asserts that it is not responsible for the missing masks on the grounds that there is no proof that all of the masks were in the initial delivery. Respondent further maintains that it rejected the masks and therefore does not owe appellant any payment for them. Respondent points out that the parties dispute what happened to the masks and whether they were ever accepted.

### Background

This appeal arises out of purchase order 75H71020P01137, which called for the delivery of one million “KN95 Respiratory Masks, FDA, CE Certified,” to the Indian Health Service (IHS), Navajo Area, in New Mexico. The KN95 mask is designed to filter out 95% of 0.3 micron particles in the air. Purchase order 75H71020P001137 was issued to ZFL on April 13, 2020.<sup>1</sup>

There was significant confusion about where the masks were coming from, when they were being delivered, how many packages respondent should expect, and the type and number of masks to be expected in each package. Masks arrived later than respondent expected, were from different manufacturers than expected, were different types of masks than expected, originated from a different location than expected, and arrived in different amounts than expected. There even was a change in price for the masks when Mr. Zach Fuentes, the chief executive officer of appellant, told the contract specialist that the price for each KN95 mask would be \$3.24 instead of the agreed-upon \$3.29.

ZFL’s representative contacted IHS, making various representations as to when the masks would arrive that were not met. Meanwhile, ZFL began invoicing for the masks. On May 18, 2020, ZFL’s representative contacted the contract specialist to confirm receipt of deliveries. She requested confirmation that 50,000 masks were delivered on May 5, 2020; 25,000 masks on May 16, 2020; and 130,000 masks on May 18, 2020. The representative told the contract specialist that two more shipments were to be expected – one on May 19, 2020, with 695,000 masks, and one on May 20, 2020, with 100,000 masks – which would complete the delivery of 1,000,000 masks.

Problems began arising around May 18 or 19 when the Navajo Area Gallup Regional Supply Service Center (Navajo Receiving Department) contacted the contract specialist regarding the shipments of masks that it had received. ZFL sent emails making several representations about the names of mask manufacturers and how many of each had been shipped. These representations, however, did not match what the Navajo Receiving

---

<sup>1</sup> The extensive history about how ZFL was awarded the purchase order is not pertinent to this decision, so we will not address that here.

Department received. The Navajo Receiving Department received shipments of products from two different manufacturers, but the purchase order only specified one product line. This led to confusion as to whether these were parts that needed to be assembled for one mask or if they were two different masks from different manufacturers. The confusion got worse on May 20 when the contract specialist received another email from the Navajo Receiving Department stating that it just got a shipment of two new product lines. This now brought the total to four different manufacturers when IHS believed it was only receiving masks from one. In an email of May 20, IHS represented it had added up the masks it had received from each shipment received, and it totaled 1,058,300 masks. The email stated that from four shipments, IHS thought it had 657,000 KN95 folding face masks; 247,000 KN95 protective face masks, non-medical; 23,700 KN95 protective face masks; and 130,400 protective respirator masks. The Navajo Receiving Department noted that this was an overage from the 1,000,000 KN95 masks it had expected to receive. On May 20, 2020, IHS thought it had in its possession four different kinds of masks from four different manufacturers, and 58,300 more masks than it ordered. However, the Navajo Receiving Department expressed concern over the items received and stated that it was not sure if it was going to need to inspect the masks since it was unable to tell which masks were the ones it ordered. Prior to any inspection, on May 22, the ZFL representative reached out to the contract specialist to ask whether IHS would be keeping the masks or if any replacements were needed. On that same day, the contract specialist responded, "Yes I got confirmation this morning that we are keeping the goods."

The contract specialist received an invoice on May 29, 2020, for \$3,266,892 due. This invoice had two line items, one for 950,000 KN95 protective masks and one for 58,300 KN95 protective masks. Each invoice showed the masks as priced at \$3.24 per mask.

Shortly thereafter, the contracting officer conducted an inspection of the masks and, on June 10, 2020, sent ZFL a notice stating that the goods tendered for acceptance did not conform to the terms of the purchase order. The contracting officer also offered ZFL a no-cost termination for convenience, with ZFL retrieving the delivered masks. ZFL responded to this letter on June 16, 2020, telling the contracting officer that it delivered what had been ordered. The contracting officer responded to ZFL on June 17, 2020, stating:

Upon final inspection of the masks that ultimately were delivered, however, it was found that the masks delivered were produced by at least four different manufacturers based in China, and that none of the masks delivered were the Mezzorison KN95 masks specified in the quote that the Agency accepted. Because your company did not deliver the Mezzorison KN95 masks that were identified in the quote, the Agency has exercised its rights under FAR [Federal Acquisition Regulation] 52.212-4 to reject those items that do not "conform to the requirements of this contract."

ZFL was given until June 22, 2020, to decide if it wanted to enter into the no-cost termination for convenience settlement. On June 22, 2020, ZFL sent the contracting officer a certified claim asserting it was entitled to be paid \$3,428,892 for the 1,058,300 masks that were delivered. ZFL also rejected the no-cost settlement offered by the contracting officer. It was at this point that the IHS Head of Contracting Authority assigned a new contracting officer to be responsible for this claim.

Given all of the confusion over the items received, the contracting officer determined that a more thorough inspection and testing of the masks was necessary. Prior to the testing, the Navajo Receiving Department conducted a manual hand recount of the masks received, which concluded on January 15, 2021. The results were that IHS only had 947,381 masks, 52,619 fewer than the 1,000,000 that were ordered and over 100,000 fewer than the initial IHS count showed. ZFL was notified of the results of the recount on February 4, 2021, including a breakdown of the manual hand count and notification that IHS would be conducting inspection and testing of the masks.

Testing was performed by the National Institute for Occupational Safety and Health (NIOSH), National Personal Protective Technology Laboratory (NPPTL). The results of the testing were that twenty-five of the forty masks tested did not meet the 95% filtration rate. On March 5, 2021, the contracting officer notified ZFL of the testing results and stated that, because the masks did not conform to the material terms of the order, the masks that were tendered for acceptance were rejected.

ZFL appealed the contracting officer's "deemed denial" to the Board on March 30, 2021, and as part of its appeal, asked that a final decision be made regarding its claim seeking payment of \$3,428,892 for the delivery of 1,058,300 masks. The contracting officer issued a final decision on June 17, 2021, denying the claim.

### Discussion

For summary judgment to be granted, there can be no genuine issue of material fact, and the moving party must be entitled to judgment as a matter of law. A fact is material if it is necessary and relevant to the proceeding or if it might significantly affect the outcome of the case. A genuine issue exists concerning a fact if the evidence presented is sufficient to enable a reasonable fact finder to decide the question in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a motion for summary judgment, the Board's role is not to resolve factual questions, or to weigh the evidence and determine the truth of the matter. Rather, our role is to ascertain whether there are material facts in dispute and whether there exists any genuine issue for trial. The burden is on the moving party to establish it is entitled to

summary judgment by proving first that there is no genuine issue of material fact. Further, the reasonably disputed evidence offered by the non-moving party is to be believed for purposes of the motion, and we must resolve any doubts over whether factual issues are in dispute in favor of the party opposing summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson*, 477 U.S. at 248; *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984).

It is evident to the Board that there are significant disagreements between the parties regarding various material facts: how many masks were initially delivered to IHS, whether the masks were accepted or rejected, and what happened to cause the discrepancy in the number of masks revealed by the hand recount. The fact is that neither party has provided enough information on any of these issues for the Board to make a proper ruling. Both parties have made assertions regarding these issues, but the facts supporting these positions are underdeveloped and therefore cannot be resolved with a motion for summary judgment.

Both parties have offered contrasting theories for how many masks were originally delivered and what happened to them. Appellant asserts that it delivered 1,058,300 masks and that respondent either used, lost, or misplaced 110,919 masks, resulting in the discrepancy revealed in the hand recount. Appellant has offered no affirmative evidence, such as packing slips, to verify the number of masks delivered. Respondent argues that appellant does not have any concrete proof of how many masks were delivered and only relied on internal IHS emails and a media report to support its claim that 1,058,300 masks were delivered. Respondent has failed to explain why it initially believed that 1,058,300 masks had been delivered. Neither party has offered sufficient evidence as to how many masks were delivered or what happened that resulted in a purported discrepancy of 110,919 masks. It is apparent from the facts that not all of the delivered masks conformed to the specifications, but how many masks were nonconforming is unknown. The Board does not even know what types of masks are supposedly missing or their value, and, as stated earlier, there are open questions as to whether or not these missing masks met specifications.

The current record is unclear on whether respondent accepted the masks or, as it posits, simply accepted delivery of the masks. Respondent also maintains that it chose to reject the masks, as indicated in its June 10, 2020, communication with appellant. However, respondent retained possession of the masks and exercised its right to test the masks, followed by a second rejection.

The purpose of summary judgment is to resolve a matter where there are no disputed material facts. Clearly, to resolve this matter, the Board will have to make several findings of facts that are currently in dispute.

Decision

Based on the reasons set out above, appellant's motion for summary judgment is **DENIED**.

*Patricia J. Sheridan*  
PATRICIA J. SHERIDAN  
Board Judge

We concur:

*Harold D. Lester, Jr.*  
HAROLD D. LESTER, JR.  
Board Judge

*H. Chuck Kullberg*  
H. CHUCK KULLBERG  
Board Judge