



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION FOR SUMMARY JUDGMENT GRANTED IN PART: November 9, 2023

CBCA 7557

THE KMASK GROUP LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Koule Addams, Executive Vice President of The Kmask Group LLC, Elmira, NY, appearing for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **SHERIDAN**, and **KULLBERG**.

**BEARDSLEY**, Board Judge.

The Department of Veterans Affairs (VA) moved for summary judgment in The Kmask Group LLC's (Kmask) appeal of the termination for cause of its contract to supply medical gloves to the VA and its claim for payment for delivered gloves. We find that the termination was proper because Kmask failed to deliver all of the gloves by the contract's delivery date and failed to provide adequate assurances of performance. Disputed material facts, however, remain as to whether the VA owes Kmask for fifty-two boxes of gloves delivered to the VA. Accordingly, we grant summary judgment affirming the VA's termination for cause. We deny summary judgment on the question of whether the VA owes Kmask for fifty-two boxes of gloves.

### Background

In March 2022, the VA entered into a contract with Kmask for the delivery of five line items of non-sterile/non-latex and sterile/non-latex medical gloves (gloves). By bilateral modification dated July 19, 2022, the VA accepted alternatives for the gloves ordered under line items 004 and 005 and changed the delivery date to September 30, 2022.

With not all of the gloves delivered, the contracting officer sent an email to Kmask on September 28, 2022, stating:

We modified the contract in order to accept the substituted product and extend the contract date, under the assurance the substituted product was available for shipment. This has not been the case in addition to having received cases of damaged product which had to be shipped back to you, as the vendor.

Since we have not received the products as indicated above and in the contract modification, we will need to receive all line items by October 31, 2022. If that is not a viable option, please let me know. Our only recourse will be to terminate the remainder of this contract and enter an adverse CPARs [(Contractor Performance Assessment Reporting System)] report.

I will need your response by 4:00 pm on Thursday, September 29, 2022, in order to move forward with this requirement.

On that same day, Kmask responded:

The points raised in your email are all accurate and justified. But please do remember that it took us several months to locate acceptable/comparable replacements coupled with the fact that the manufacturer has to comply with the 5 years expiration.

We have forwarded your mail to our contact with both the supplier as well as the manufacturer. We have been assured that we will have the delivery update for the remaining items later today or tomorrow. We will then be able to respond to your email with an appropriate time line for the delivery of remaining items.

On October 3, 2022, Kmask sent an email to the contracting officer, stating:

I am forwarding the email below as received from [the manufacturer]. The supply/delivery will commence promptly from October 18th. I do hope/trust

you will continue to cooperate with us and give us the chance to complete this contract. The delay is due to the manufacturer and nothing we can avoid.

The email forwarded from Kmask's manufacturer contained a revised delivery schedule that projected glove deliveries continuing into February and March 2023.

On October 4, 2022, the contracting officer sent Kmask an email explaining the VA's intent to terminate the contract because "we have not received the gloves in a timely manner and as agreed upon and extended." On October 26, 2022, the VA issued modification P00002, terminating the contract for cause effective September 30, 2022, for failure to deliver all of the gloves by the delivery date.

In its notice of appeal, Kmask claims \$36,569.72 for gloves delivered to the VA in September and October 2022. However, in its reply to the motion for summary judgment, Kmask indicates that it is now only claiming \$5084.56 for fifty-two boxes of gloves delivered to the VA on September 15, 2022. While the VA insists that it returned these gloves to Kmask's manufacturer with Kmask's consent, it is unclear whether the VA retained these gloves; whether Kmask consented to their return; whether Kmask received the gloves, still has them, or sold them back to the manufacturer or to another buyer; and whether payment is due.

### Discussion

A motion for summary judgment will be granted "when the moving party is entitled to judgment as a matter of law, based on undisputed material facts." *P&C Placement Services, Inc. v. Social Security Administration*, CBCA 391, 07-1 BCA ¶ 33,492, at 166,009 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). "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.'" *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,205 (quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

#### I. Termination for Default

Termination of the contract was justified. "We may sustain a default termination on any grounds supported by the record." *Magwood Services, Inc. v. General Services Administration*, CBCA 5588, 18-1 BCA ¶ 37,057, at 180,396 (citing, e.g., *Empire Energy Management Systems, Inc. v. Roche*, 362 F.3d 1343, 1357 (Fed. Cir. 2004)). Kmask did not deliver the gloves by September 30, 2022, the delivery date. "A contractor's failure to make timely delivery of agreed-upon goods establishes a prima facie case of default." *ORSA*

*Technologies, LLC v. Department of Veterans Affairs*, CBCA 7141, 22-1 BCA ¶ 38,025, at 184,658 (quoting *General Injectables & Vaccines, Inc. v. Gates*, 519 F.3d 1360, 1363 (Fed. Cir. 2008)). The VA has, therefore, established a prima facie case of default.

In the event that the delivery date is considered to have been revised to October 31, 2022, Kmask still defaulted on the contract by failing to provide adequate assurances of timely performance. *Magwood Services, Inc.*, 18-1 BCA at 180,396 (citing *Douglas P. Fleming, LLC v. Department of Veterans Affairs*, CBCA 3655, et al., 16-1 BCA ¶ 36,509, at 177,878-79). The VA was entitled to treat Kmask's "failure . . . to give adequate assurances of performance in response to a validly issued cure notice . . . as repudiation of the contract,' warranting termination for default." *Id.* (quoting *Douglas P. Fleming, LLC*, 16-1 BCA at 177,879). Kmask's response to the VA's September 28 email asking for assurances of timely performance indicated that glove delivery would extend into 2023, warranting termination of the contract. The VA also had "a reasonable belief that there was no reasonable likelihood of timely completion' as of the termination date." *Id.* (citing *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1017 (Fed. Cir. 2003)). Therefore, Kmask's indication that the gloves could not be delivered by the September or October delivery dates justified the termination.

Kmask argues that the delay was excusable due to the COVID-19 pandemic and the resulting lack of available personal protective equipment (PPE) throughout the nation. However, the COVID-19 pandemic and resultant lack of PPE arose two years before Kmask entered into this contract. The pandemic and lack of PPE was, therefore, "not an unfor[e]seeable risk beyond [the contractor's] fault and control' and provides no excuse for delay." *ORSA Technologies*, 22-1 BCA at 184,659.

KMASK further argues that it deserved additional time to find substitute gloves. The VA, however, had already approved substitute gloves several months before the termination. The VA had no duty to extend the contract again to allow Kmask to find a different manufacturer for substitute gloves.

## II. Fifty-Two Boxes of Gloves

The parties agree that fifty-two boxes of gloves were delivered to the VA on September 15, 2022. There is a material question, however, as to what happened to the gloves. Facts therefore remain in dispute that preclude summary judgment on the issue of the payment owed for these fifty-two boxes of gloves.

Decision

The motion for summary judgment is **GRANTED IN PART**.

*Erica S. Beardsley*

ERICA S. BEARDSLEY

Board Judge

We concur:

*Patricia J. Sheridan*

PATRICIA J. SHERIDAN

Board Judge

*H. Chuck Kullberg*

H. CHUCK KULLBERG

Board Judge