



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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GRANTED: January 12, 2023

CBCA 7352, 7353

ALAN E. FRICKE MEMORIALS, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Ryan J. McCall of Tully Rinckey, PLLC, Albany, NY, counsel for Appellant.

Krishon Gill-Edmond and Shawn Larson, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **RUSSELL**, **KULLBERG**, and **SULLIVAN**.

**SULLIVAN**, Board Judge.

Alan E. Fricke Memorials, Inc. (Fricke) appealed the decisions of the contracting officer terminating for cause its contracts to provide on-site grave marker inscription services at two national cemeteries maintained by the Department of Veterans Affairs (VA). Because Fricke was not overdue on the delivery of markers at the time the contract was terminated and VA failed to issue a proper cure notice seeking adequate assurances of future performance, we grant the appeals and convert the terminations for cause into terminations for convenience.

## Findings of Fact<sup>1</sup>

### Contract and Relevant Terms

In October 2020, Fricke contracted to provide “all labor and materials necessary to perform inscription services” for headstones and other markers at Calverton Cemetery and Long Island National Cemetery (LINC), both located on Long Island, New York. Appeal File, Exhibits 4, 5 at 7.<sup>2</sup> Combined, these cemeteries inter 6000–7000 veterans annually. Transcript, Vol. 1 at 330, Vol. 2 at 18.<sup>3</sup> Ensuring that graves are marked in a timely manner is a vital part of the mission of the National Cemetery Administration within VA. Transcript, Vol. 1 at 235, 332. The contract included the Federal Acquisition Regulation (FAR) Commercial Items clause at FAR 52.212-4. Exhibits 4 at 16-22, 5 at 16-20; *see* 48 CFR 52.212.4 (2021) (FAR 52.212-4).

The contract listed line items, each with a different type of marker to be inscribed. Exhibits 4 at 5 (four line items), 5 at 5 (three line items). VA issued orders to Fricke for inscription on individual markers. Exhibits 4 at 12, 5 at 12. Fricke was required to complete the inscription and make the headstone or marker available for inspection and acceptance within ten days of receipt of an order. Exhibit 4 at 7, 12. To complete the inscriptions, Fricke used “an air blast abrasion with a suitable non-hazardous aggregate,” Exhibit 4 at 8, and required stencil material, from which it cut the letters that would be inscribed. Transcript, Vol. 1 at 133-34 (stencils could only be used once).

### Course of Performance

Fricke quickly fell behind in delivering markers. In January 2021, Fricke had a backlog of more than 700 markers at Calverton and approximately 150 markers at LINC. Transcript, Vol. 1 at 85-86, 335, Vol. 2 at 20. Fricke reported to VA that, although Fricke had stated in its proposal that it had the necessary equipment on hand, its performance at Calverton was delayed because Fricke was awaiting delivery of a dust collector. Transcript,

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<sup>1</sup> Although it did not object to the cases being consolidated for the purposes of the hearing, Fricke requested that the cases not be formally consolidated. We consolidate the cases for the purposes of issuing this single decision. Board Rule 2(f) (48 CFR 6101.2(f) (2021)).

<sup>2</sup> All exhibits are found in the appeal file, unless otherwise noted. Respondent’s appeal file exhibits are designated Exhibits 1 through 202. Appellant’s appeal file exhibits are designated Exhibits A through AV.

<sup>3</sup> The Board conducted a two-day hearing on September 28 and 29, 2022.

Vol. 1 at 78. Fricke also did not receive orders initially because they were sent to the wrong email address. *Id.* at 79, 216. Both cemetery and contracting personnel stepped in to assist Fricke to make a plan to reduce the backlog. *Id.* at 81-82. Those efforts were successful—as of April 2021, Fricke had eliminated the backlog of overdue markers. *Id.* at 94, 335 (contracting officer saw a “marked decrease” in the backlog).

In June 2021, the backlog began to grow again. Fricke reported that the delays were due to a shortage of stencil material. Transcript, Vol. 1 at 96, 101, 121; Exhibit AG. VA investigated the issue and determined that the stencil shortage was a major problem affecting the industry. Transcript, Vol. 1 at 110; *see id.* at 227-28 (industry had “major issue with getting stencil.”). The problem continued into October 2021, when Fricke notified VA that 3M, a major stencil producer, had decided to cease stencil production. Exhibit 167a.

The contracting officer and the contracting officer’s representatives testified about their frustration at Fricke’s lack of responsiveness to inquiries about Fricke’s plan to catch up on the backlog and Fricke’s inability to meet plans that it had laid out to eliminate the backlog. *See, e.g.*, Transcript, Vol. 1 at 112, 234, 299-300. Nevertheless, VA was pleased with the quality of Fricke’s work. *Id.* at 61-62, 300.

In August 2021, the backlog of orders was more than 500 markers at Calverton and almost 200 markers at LINC. Exhibit 112a. To allow Fricke to eliminate this backlog, VA began sending new orders to other VA inscription contractors. Exhibit 116; Transcript, Vol. 1 at 243.<sup>4</sup> Diverting the markers cost VA money because the prices on the regional contracts were higher and VA incurred additional transportation costs. Transcript, Vol. 1 at 139-40. Fricke was not responsible for the markers that were sent to other contractors. *Id.* at 228. The only new orders that Fricke received were for the inscriptions to be cut on the back of existing grave markers at the cemeteries because those markers had to be inscribed on-site. *Id.* at 124.

When the work was diverted, VA contracting officials expected that Fricke would eliminate the backlog by mid-September. Transcript, Vol. 1 at 246. When that goal was not achieved, VA issued a contractor deficiency report (CDR) for LINC. *Id.* at 246-47; Exhibit 147b. The CDR noted that “[d]ue to the lack of stencils, which is a Nationwide issue, Fricke Memorials fell behind in their production and were again not meeting” the contractual deadline for delivery of markers. Exhibit 147b at 1. VA further complained that “NCA has held various meetings, conference calls and sent emails to address this issue, for the purpose

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<sup>4</sup> The contracting specialist responsible for diverting the work explained that NCA uses this “methodology” whenever an on-site contractor has difficulty meeting the workload. Transcript, Vol. 1 at 237.

of resolution. You have not provided accurate timeframes for completion of the overdue orders, you have failed to meet the deadlines that you have set, and the issue has not been cured.” *Id.* Finally, the VA advised that “the next step after a CDR is a cure notice,” and requested that Fricke “respond with your correct actions for completing these orders up to date. On the CDR, you are required to detail exactly how you plan on doing this. The Government will discuss the efficacy of your plan and accept or reject it.” *Id.* Attached to the CDR was a list of the more than 200 markers, the oldest of which had been ordered on July 12, 2021. *Id.* at 3-9. About the same time that the CDR was issued for the LINC contract, the Calverton director reported that Fricke had a backlog of 533 markers at that cemetery. Exhibit 133a.

It does not appear that Fricke responded to the CDR specifically. Instead, Fricke continued to send emails advising VA whether it had received stencil supplies and the plans to complete markers based upon the stencil material that it received. *See, e.g.*, Exhibit 159.

Despite the noted deficiencies in Fricke’s performance, one day after issuing the CDR, the contracting officer exercised the options on both contracts for another year of performance. Exhibit AO. The contracting officer testified that she issued the options because she thought that Fricke could catch up:

Q: Help us understand why you exercised the options for both contracts in light of knowing some of these circumstances both at Long Island and Calverton.

A: Because due to his catching up and doing so well earlier when he was so far behind, we knew he had the capability of doing it. We just weren’t seeing that drive at this point. We also had other ways that we could help him that we hadn’t gotten to yet.

Transcript, Vol. 1 at 109-10. VA also continued to divert orders to other contractors. *See, e.g.*, Exhibit 149 (diverting all markers for LINC ordered in September to nationwide contractor). On October 4, 2021, markers in this backlog were cancelled with Fricke and reassigned to other contractors. *See* Exhibits 160a, 161a.

### Cure Notices

In October 2021, approximately a month after exercising the options, the contracting officer issued a cure notice on the LINC contract. Exhibit 171b. The contracting officer cited the contract requirement for inscriptions to be completed within ten days of receiving an order and described Fricke’s performance problems on the contract. The contracting officer acknowledged the stencil shortage: “While every contractor had stencil issues and

you looked for alternate sources and methods of completing the work, throughput was disjointed.” *Id.* at 1. The contracting officer criticized Fricke’s failure to be responsive to inquiries. The contracting officer stated that “Alan E. Fricke Memorials, Inc., is being notified [of] the failure to provide Onsite Inscription Services at the Long Island National Cemetery in accordance with the terms and conditions of the contract, and that has endangered satisfactory performance of this contract.” *Id.* The notice warned that “[u]nless this condition is cured within [ten] days of the date of this notice, the Government may terminate for cause under the terms and conditions” of the Commercial Items clause. The contracting officer further warned that “[y]our failure to present any alternate plan for cure within this time may be considered as an admission that none exist.” *Id.* at 3. On the date the cure notice was issued, Fricke was delinquent on two markers. Transcript, Vol. 2 at 14; Exhibit 168e. These markers were delivered during the first week of November 2021. Transcript, Vol. 2 at 14.

In the second cure notice concerning performance of the Calverton contract, the contracting officer listed the same complaints about Fricke’s performance and listed nine markers that were ordered in May and June and had not been delivered. Exhibit 176b. On the date the cure notice was issued, Fricke was delinquent on only these nine markers. Transcript, Vol. 1 at 128, 340 (contracting officer testifying that number of delinquent stones was less than 25).<sup>5</sup> These markers were delivered during the second week in November 2021. *Id.* at 340-41.

The contracting officer testified that, in response to the cure notices, she expected Fricke to put forth a plan as to how it would be able to take on additional orders:

It should start with cleaning up the delinquencies because that’s what we asked him to do, but that still wouldn’t have completed the contract. He needed to tell us how he was going to bring these [contract line items] back, in part, . . . even saying I could handle ten [headstones (U1s) – check] per week, 20 [headstones] a week. . . . Anything to say how we wanted to pick the work up and then becoming compliant and finish out the five years of the contract.

Transcript, Vol. 1 at 123, 126-27. There was no testimony or documentary evidence that the parties discussed the cure notice or the need for Fricke to present a plan after the notice was issued. *See id.* at 187-88. Other than providing the markers that were delinquent at the time the cure notices were issued, it does not appear that Fricke responded to either of the cure notices.

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<sup>5</sup> The Secretary of Veterans Affairs received a complaint about one of these late markers in October 2021. Transcript, Vol. 1 at 337-38.

Notices of Termination

On December 21, 2021, the contracting officer terminated Fricke's contract at LINC. Exhibit 198. The termination notices cited three reasons for the termination: Fricke's failure to respond to cure notice, its failure to provide timely inscription services for three of the four types of markers on its contract, and its failure to provide services within the ten days required in the contract. *Id.* With regard to the last item, the contracting officer noted that Fricke failed to provide a plan regarding how it would be able to provide timely inscription services:

Despite Agency's efforts to maintain open communication with Fricke, via e-mails, teleconferencing . . . , meetings, the diversion of new orders to the regional vendor, a CDR dated September 17, 2021, a second diversion of new orders and additional aged orders to a regional vendor and an email on October 4, 2021, to remind Fricke to send the promised plan in response to the [contractor deficiency report] there was no effort to provide a plan to come into compliance with providing on-site inscription services for [contract line items].

*Id.* At the time the contracting officer issued the termination, the contracting officer testified that Fricke was not delinquent on any orders at LINC. Transcript, Vol. 1 at 143. Instead, just the day before the notice, Fricke sent an e-mail to the contracting officer, noting that it had not received any new orders since November 21 and advising that it had secured a supply of stencil and could handle orders for some, but not all, of the types of markers under the contract. Exhibit AD. Upon receipt of the termination notice for LINC, Fricke sent an email stating that it was disappointed with the termination because Fricke had understood that the delays associated with the lack of stencil material would not be held against the company. Exhibit 201a. Fricke also stated that it had secured a source of stencil that would allow it to "fulfill [its] obligations of the contract for the year" and that it currently had enough stencil for two months of orders for the Calverton contract. *Id.*

On January 11, 2022, the contracting officer issued a notice terminating the Calverton contract. The contracting officer stated similar reasons for the termination but also described what the agency expected in response to the cure notice and cited the failure to provide this response as a reason for termination:

The cure notice, dated October 29, 2021, specifically requested a plan to show how [Fricke] would comply with the on-site inscription service requirements for [three contract line items]. This would include methods to transfer and complete orders which were temporarily transferred to the Nationwide vendor.

- d. Failure of Contractor to provide Onsite Inscription Services and credible assurance that future performance consistent with the terms and conditions of this contract is realistic and foreseeable.

Exhibit 201 at 2. The contracting officer testified that she terminated Fricke for this failure to provide a plan. Transcript, Vol. 1 at 144.

### Discussion

Fricke challenges the VA's termination of its contracts for cause. While the contracting officer has broad discretion in deciding whether to terminate a contract, *Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1343 (Fed. Cir. 1999), termination for cause is "a remedy to which the Government should not lightly resort." *Decker & Co. v. West*, 76 F.3d 1573, 1580 (Fed. Cir. 1996). In reviewing this matter, we are mindful that termination for cause is a "drastic sanction, which should be imposed (or sustained) only for good grounds and on solid evidence." *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969) (internal citations omitted). "[W]hether the default termination is proper depends upon the facts and circumstances of each case." *Olson Plumbing & Heating Co. v. United States*, 602 F.2d 950, 955 (Ct. Cl. 1979).

The contracting officer listed three reasons for the decision to terminate Fricke's contracts. The first reason was Fricke's failure to provide inscription services within ten days as required by the contract. Although Fricke had been delinquent on the delivery of hundreds of markers, Fricke was not delayed on any orders at the time the contracting officer terminated the contract. The second reason was that Fricke failed to provide timely inscription services for three of the four types of markers on the contract. But Fricke had no orders for these markers at the time of termination. Instead, VA had diverted this work to other vendors in August 2021 and had not asked Fricke to perform this work. While VA's decision to divert this work is understandable, given the importance of delivering grave markers in a timely manner, Fricke cannot be terminated for work that it was not being asked to perform at the time. Moreover, the contracting officer exercised the options for a second year of performance, despite Fricke's record of delinquencies and inability to handle all of the orders itself. A contracting officer may exercise options only after determining, in part, "that the contractor's performance on this contract has been acceptable, e.g., received satisfactory ratings." FAR 17.207(c). The contracting officer cannot exercise the option on the contracts, seemingly accepting these performance difficulties, and then decide to terminate the contract three months later, finding that these performance difficulties are no longer acceptable.

The contracting officer's stated third reason was Fricke's failure to respond to the cure notice. Pursuant to the Termination clause in the contract, a contracting officer was

permitted to seek adequate assurances of future performance and terminate the contract if such assurances are not received: “The Government may terminate this contract, or any part hereof, for cause [if the contractor] fails to provide the Government, upon request, with adequate assurances of future performance.” FAR 52.212-4(m). An agency seeks reasonable assurances with a “validly issued cure notice.” *Danzig v. AEC Corp.*, 224 F.2d 1333, 1338 (Fed. Cir. 2000); *see also Brent Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,899. A cure notice “must properly advise the contractor of the perceived failures that justify the contracting officer’s action.” *Arctic Refrigeration & Air Conditioning, Inc.*, GSBICA 8073, 87-3 BCA ¶ 20,078, at 101,656. A cure notice that fails to provide sufficient details regarding “exactly what [a contractor] had to do, or not to do, in order to avoid the threatened default termination” is “defective.” *Central Air Service, Inc.*, IBCA 1827, 89-3 BCA ¶ 22,185, at 111,629.

With the cure notice, the contracting officer sought a plan from Fricke of future performance, a request for adequate assurances. The problem is that the cure notice was not adequate to put Fricke on notice that the contracting officer sought a plan as to how Fricke was going to receive and process orders that VA was diverting to other inscription contractors. Instead, the cure notice stated that Fricke was failing to provide inscription services “in accordance with the terms and conditions of the contract.” Contrary to the statement in the termination notice, the first cure notice did not discuss the work that was being diverted to other contractors, and the second cure notice simply stated that VA had stopped new orders. While the cure notice expressed the frustration that VA experienced during Fricke’s performance, VA did not explicitly request a plan to handle all of the line items on the contract, as the contracting officer testified she expected. A cure notice can be informed by the parties’ other correspondence or discussions, *Arctic Refrigeration*, 87-3 BCA at 101,656, but there is no evidence that VA communicated its need for a plan with the required specificity. The contractor deficiency report, issued one month earlier, does not sufficiently inform the cure notice because, while the notice asked for a “plan,” the notice did not ask for a plan to be able to perform inscription services for all the line items. Finally, prior to the issuance of the terminations, Fricke advised the VA that it was ready to perform because it had secured stencils, communications that the contracting officer thought insufficient. It appears that the contracting officer terminated the contract because she had no confidence in Fricke’s ability to meet the requirements of the contract. But this lack of confidence does not provide a basis for termination, absent a proper request for future assurances.

In our consideration of this matter, “the government initially has the burden of proving that the termination for cause was valid.” *ORSA Technologies, LLC v. Department of Veterans Affairs*, CBCA 7142, 22-1 BCA ¶ 38,042, at 184,743 (quoting *Packer* (quoting *KSC-TRI Systems, USA, Inc.*, ASBCA 54638, 06-1 BCA ¶ 33,145 (2005))), *appeal dismissed*, No. 2021-2035, 2022 WL 17972180 (Fed. Cir. Dec. 28, 2022). Only if the agency



meets its burden, “the burden shifts to the contractor to establish that its failure to comply with the terms and conditions of the contract was excusable.” *Id.* (quoting *ORSA Technologies, LLC v. Department of Veterans Affairs*, CBCA 7141, 22-1 BCA ¶ 38,025 (quoting *Carmazzi Global Solutions, Inc. v. Social Security Administration*, CBCA 6264, et al., 19-1 BCA ¶ 37,340)). Because we find that VA has not met its burden to show that the termination was valid, we need not examine Fricke’s defense regarding the unavailability of stencil material. Having found the VA’s terminations to be without a proper basis, our remedy is to convert them to terminations for convenience. *See* FAR 52.212-4(m).

Decision

Fricke’s appeals are **GRANTED**. The terminations are converted to terminations for convenience.

*Marian E. Sullivan*

MARIAN E. SULLIVAN  
Board Judge

We concur:

*Beverly M. Russell*

BEVERLY M. RUSSELL  
Board Judge

*H. Chuck Kullberg*

H. CHUCK KULLBERG  
Board Judge