

CONTRACT APPEALS BOARD

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Appeal of --)
)
Paul & Partners) CAB No. 2008-8
)
Under Program No. C261-S)
Print Order No. 90058)

Appearances for the Appellant:

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Appearances for the Government:

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U.S. Government Printing Office

DECISION

Paul & Partners appeals the decision of the contracting officer of the U.S. Government Printing Office (GPO) under Print Order 90058 of Program C261-S that assessed Paul & Partners the postage costs totaling \$100,819.14 associated with mailing Medicare premium bills that were reprinted and remailed by Paul & Partners because of an error in the original printing of these bills.

On June 18, 2003, Paul & Partners received the contract award of Program C261-S for the procurement of Medicare Premium Bill Mailing Kits. Rule 4 (R4), Tab 2, Specifications for Program C261-S, at 1; Tab 3, Notice of Award Letter to Paul & Partners. The kits were requisitioned from the GPO by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS). R4, Tab 1, CMS Requisition (June 18, 2002).

The contract provided for a 2-month testing period, a 1-year term, and four 1-year options, during which print orders could be placed by CMS that would be subject to the terms and conditions of the contract. R4, Tab 2, Specifications for Program C261-S, at 1, 2. It was anticipated that approximately one print order per month would be issued under the contract. *Id.* at 6.

The contract also incorporated the provisions, clauses, and supplemental specifications of GPO Contract Terms, GPO Publication 310.2, effective December 1, 1987 (Rev. 6-01). *Id.* at 2. Some of the clauses included in GPO Publication 310.2 that are pertinent to this appeal are:

14. Inspection and Tests

(a) *Definition.* "Supplies," as used in this clause includes but is not limited to raw materials, components, intermediate assemblies, end products, and supplies by lot.

* * * *

(f) The Government has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. . . .

* * * *

(h) If the contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either:

(1) by contract or otherwise, remove, replace, or correct the supplies and charge the cost to the contractor, or

(2) terminate for default as provided in the Default clause.

* * * *

21. Actual Damages

Unless otherwise prescribed, the contractor is, upon failure to provide services, materials, supplies, and equipment within the time specified for delivery, chargeable with all expenses caused the Government by reasons of such delays in delivery for which no extension of time is provided, as actual damages to the Government on account of such delays. Also, the contractor will be charged, as actual damages, for all expenses caused the Government occasioned by delivery of materials, supplies, and equipment not conforming to specifications.

GPO Publication 310.2, effective December 1, 1987 (Rev 6-01), at 17, 23.

The Medicare Premium Bill Mailing Kit, which was to be printed and provided by Paul & Sons, consisted of a Notice of Medicare Premium Payment Due (Form CMS-500), a mailing envelope, a return envelope, and, where applicable, an enclosure to be included with the premium bill. R4, Tab 2, Specifications for Program C261-S, at 6, 7. The information to be included and printed on the Form CMS-500 for each print order was provided by the government on magnetic tape cartridges or as electronically transmitted data. *Id.* at 6. The CMS-500 included the name and address of the Medicare beneficiary being billed, the billing notice date, the payment due date, the period of Medicare coverage to which the bill applies, the amount of the bill, and a statement of the amount and date of the past payment received. Respondent E-mail

Submission (Aug. 18, 2009), attach., Notice of Medicare Premium Payment Due, dated Aug. 27, 2008. The CMS-500 had a perforation near the bottom half of the sheet to include with the payment. R4, Tab 2, Specifications for Program C261-S, at 7.

Under the contract, the government provided the contractor with “First Class Postage and Fees Paid Permit” indicia that was to be printed and used by the contractor to mail the printed Medicare premium bills from the contractor’s city. Id. at 9. That is, in the ordinary course of contract performance, the contractor was responsible for actually delivering the kits that it had printed to the Postal Service for mailing, and the government was responsible for postage costs. Supplement to Appellant’s Response to Respondent’s Motion for Summary Judgment, Declaration of Paul & Partner’s GPO Contract Administrator, ¶ 4.

The production of the kits and distribution was required to be “made within 3 workdays” of the order. R4, Tab 2, Specifications for Program C261-S, at 9. There was no contract provision for the government to review or approve the production of the kits before they were distributed. Upon completion of each order, the contractor was required to notify the GPO of the date of shipment. Id.

This appeal concerns Print Order 90058 issued to Paul & Partners by a CMS representative on March 28, 2008 for 298,795 Medicare Premium Bill Mailing Kits. The value of this print order was reported as being approximately \$20,000 or \$25,000. Declaration of Paul & Partner’s Contract Administrator, ¶ 8; Appellant’s Response to Respondent’s Motion for Summary Judgment at 6; Appellant’s Memorandum in Response to Board’s June 5, 2009 Order at 3.

These particular kits were for the April Medicare premium bills and were supposed to show a billing date of March 27, 2008 and a payment due date of April 25, 2008. R4, Tab 7, E-Mail from CMS at R-26. However, the bills printed by Paul & Partners showed a billing date of August 27, 2008 and a payment due date of September 25, 2008. Id. The erroneous payment due date appeared in three places on the bill. Respondent E-mail Submission (Aug. 18, 2009), attach., Notice of Medicare Premium Payment Due, dated Aug. 27, 2008. The wrong dates were the result of an admitted programming error by an employee of Paul & Partners. Supplement to Appellant’s Response to Respondent’s Motion for Summary Judgment, Declaration of Paul & Partner’s GPO Contract Administrator, ¶ 3.

The kits apparently were mailed shortly after the print order was received (although the record does not show the precise mailing date). The error was discovered by CMS on April 3, 2008 (after the April Medicare premium bills were mailed to the Medicare beneficiaries), and was brought to GPO’s and Paul & Partner’s attention on April 7. R4, Tab 7, E-Mails from CMS, at R-24, R-25, R-26. CMS advised GPO that because the error was caused by Paul & Partners and “is causing a major problem with the Beneficiaries receiving this notice,” the bill needed to be immediately reprinted and mailed at no additional cost to the government. Id. On April 8, 2008, GPO sent a “show cause” letter to Paul & Sons advising that firm that GPO was considering terminating the print order for default and providing the firm with the

opportunity to explain its failure. R4, Tab 8, Letter from GPO to Paul & Partners (Apr. 8, 2008).

Paul & Partners agreed to reprint and mail the Medicare premium bills. R4, Tab 11, Paul & Partners E-mail to GPO and CMS (Apr. 9, 2009). Paul & Partners reprinted the Medicare Premium Bill Mailing Kits at its own cost. R4, Tab 11, E-Mails Between CMS, GPO and Paul & Partners (Apr. 8-9, 2008); Tab 21, Final Contracting Officer's Decision (Aug. 29, 2008), at 1. Paul & Partner's has not claimed from GPO the costs of reprinting the Medicare premium bills.

The record shows much discussion between Appellant and Respondent concerning the mailing of the reprinted Medicare premium bills and who was responsible for the costs. The record reflects that, because it was the fastest way to mail the reprinted Medicare premium bills, CMS agreed to allow its permit to be used for mailing the bills. R4, Tab 11, E-Mail from CMS to GPO and Paul & Partners (Apr. 9, 2009). The postage costs incurred by CMS in mailing the reprinted Medicare premium bills totaled \$100,819.14. R4, Tab 21, Contracting Officer's Decision, at 1.

The record evidences that GPO believed that Paul & Partners agreed to use its own mailing permit to mail the Medicare premium bills covered by the next print order to be issued by CMS on May 5, 2008 under the contract as consideration for the actual expenses incurred by the government for mailing the reprinted Medicare premium bills under Print Order 90058, and that Paul & Partners reneged on this agreement on April 14, 2008. R4, Tab 12, GPO's Printing Specialist's Memorandum to File (Apr. 14, 2009); Tab 13, GPO Letter to Paul & Partner (Apr. 16, 2009). In contrast, Paul & Partners has submitted a declaration executed by its Contract Administrator during this appeal, in which he stated that he repeatedly advised GPO that postage was not one of the deliverables of its contract, that he did not believe it was fair for Paul & Partners to pay for this postage, that he was under the impression that Paul & Partners could be found in default of the contract if it did not follow the orders of GPO even if the orders were not correct or fair, and that he ultimately advised GPO that Paul & Partners would not use its mailing permit to mail the Medicare premium bills because that was "not fair" and Paul & Partners did not have the funds to pay for all of the postage. Supplement to Paul & Partners' Response to GPO's Motion for Summary Judgment, attach., Declaration of Paul & Partner's Contract Administrator ¶¶ 8-14.

On April 16, 2008, GPO sent a "show cause" letter to Paul & Partners based upon that firm's alleged reneging on its agreement regarding the payment of postage costs. The letter stated that this action endangered performance of the contract in accordance with its agreed upon terms, and further stated that unless the "condition has been cured," the contract may be terminated for default. R4, Tab 13, GPO Letter to Paul & Partner (Apr. 16, 2009). Paul & Partners responded by letter dated April 17, 2008, in which, among other things, it disputed whether an agreement previously had been reached. R4, Tab 14, Paul & Partner's Counsel's Letter to GPO (Apr. 17, 2009). Ultimately, Paul & Partners continued performance under future print orders issued under the contract, which was to end on August 31, 2008, and GPO was to deduct \$3,000 from each print order performed under the contract; GPO has deducted a total

of \$18,000 from the performed print orders. R4, Tab 21, Contracting Officer's Decision (Aug. 29, 2008).

On August, 29, 2008, GPO issued a final contracting officer's decision, in which it found that Paul & Partners was responsible for the \$100,819.14 in postage costs incurred by the government in mailing the reprinted Medicare premium bills and requesting Paul & Partner's to immediately pay the unpaid balance due of \$82,819.14. Id.

On November 25, 2008, a notice of appeal was filed by Paul & Partners with this Board. In its complaint, Paul & Partners asserted that, notwithstanding the admitted printing error that reflected the wrong due date for payments of Medicare premiums, it was unnecessary to reprint and remail the Medicare premium bills "given the minor nature of the error," that CMS had overreacted to the error and should have waited to see if the error affected the return rate by the recipients, and that Paul & Partners should not be held liable for mailing the reprinted kits. Paul & Partners' Complaint.

In its answer, GPO denied Paul & Partners' claims that it was not liable for these mailing costs, and asserted that Paul & Partners originally had agreed to reprint and remail the Medicare premium bills at its own expense, and that its current denial of liability was first raised in a letter from its counsel on April 17, 2008. GPO's Answer.

GPO has filed a motion for summary judgment. GPO first asserts that Paul & Partners had agreed that it was responsible for the printing error, had agreed to repay the government for the resulting actual damages by using its own commercial mailing permit to mail the next print order issued by CMS, and subsequently reneged on this agreement. GPO also argues that Paul & Partners was liable under the contract for the costs of remailing the reprinted Medicare premium bills because its initial printed bills did not conform to the contract, which required prompt replacement of the nonconforming supplies. GPO's Motion for Summary Judgment; GPO's Supplement to Motion for Summary Judgment.

Paul and Partners responds that summary judgment is not appropriate because it is not liable for the mailing costs for the reprinted Medicare premium bills under the contract, GPO has not shown that mailing the reprinted bills was reasonable, and Paul & Partners never agreed that it was liable for the postage costs. Paul & Partners' Response to GPO's Motion for Summary Judgment; Supplement to Paul & Partners' Response to GPO's Motion for Summary Judgment.

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact or facts are material if they constitute a legal defense, or if their existence or nonexistence might affect the result of the action, or if the resolution of the issue they raise is so essential that the party against whom it is decided cannot prevail. RBP Chemical Corp., GPOBCA 4-91, 1992 GPOBCA LEXIS 16 at *45. The facts are viewed in the light most favorable to the

nonmoving party and doubts are resolved against the moving party. American Pelagic Fishing Co., LP v. United States, 379 F.3d 1363, 1371 (Fed. Cir. 2004). However, the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient. Pure Gold, Inc. v. Syntex (U.S.A.), Inc., 739 F.2d 624, 626-27 (Fed. Cir. 1984).

Here, there is no question that the Medicare premium bills initially provided by Paul & Partners were not in compliance with the contract requirements because they reflected a due date on the Medicare premium bills of September 25, 2008 instead of April 25, 2008. As a general rule, the government is entitled to insist on strict compliance with unambiguous contract specifications, and need not accept a nonconforming product. Haig's Quality Printing, Inc., GAO CAB 2007-6, 2008 GAO CAB LEXIS 1 at *14, citing Cascade Pac. Int'l v. United States, 773 F.2d 287, 291 (Fed. Cir. 1985); Advanced Eng'g & Planning Corp., Inc., ASBCA Nos. 53366, 54044, 2005-1 BCA ¶ 32,935; Blake Constr. Co. v. United States, 28 Fed. Cl. 672 (1993). Indeed, under paragraph 14(f) of the Inspection and Tests clause incorporated into the contract, "[t]he Government has the right either to reject or to require correction of nonconforming supplies" provided under the contract. GPO Publication 310.2, effective December 1, 1987 (Rev. 6-01), at 17. As indicated, Paul & Partners, in fact, reprinted the Medicare premium bills with the correct dates and delivered the reprinted bills to the postal service for mailing.

Paul & Partners argues, however, that payment of postage costs was not part of its contract responsibilities and therefore there is no legal basis to require their payment under the contract. It argues that the Inspection and Tests clause, under which it was required to reprint the kits, only deals with "supplies" and nowhere does it provide that the contractor would be liable for postage costs. While it states that it may have been liable for such costs if the contract had been terminated for default, it argues that, absent a bilateral contract modification making it responsible for postage costs or a proper termination for default, Paul & Partners had no liability to pay postage costs.

These arguments fail to consider clause 21, Actual Damages, which was also incorporated into the contract, which states in pertinent part, "the contractor will be charged, as actual damages, for all expenses caused the Government occasioned by delivery of materials, supplies, and equipment not conforming to specifications." GPO Publication 310.2, effective December 1, 1987 (Rev. 6-01), at 23. This clause unambiguously makes the contractor responsible for actual damages caused by the delivery of the nonconforming Medicare premium bills, which led to the agency's decision to require the reprinting and remailing of conforming Medicare premium bills, and incurrence by the government of additional mailing costs.

Paul & Partners nevertheless argues that clause 21, Actual Damages, does not apply where the agency takes action under clause 14, Inspection and Tests, to require correction of nonconforming supplies, but would only apply when the government elected to terminate the contract for default. However, nothing in the Inspection and Tests clause, the Actual Damages clause, the Default clause, or any other contract provision suggests any such limitation of the government's rights to recover actual

damages caused by the delivery of conforming goods. Indeed, the GPOBCA has found that clause 21, Actual Damages, “empowered [GPO] to assess damages resulting from the delivery of nonconforming supplies” when exercising its rights under the warranty clause of the contract, even though the warranty clause contained no explicit provision for the recovery of such costs. Midwest Bank Note Co., GPOBCA 13-95, 1998 GPOBCA LEXIS 15 at *27; see Gugler Lithographic Co., GPOCAB 80-1, 1980 GPOBCA LEXIS 46 at *8-9 (actual damages can be recovered by the government under the contract, even where there is no termination for default); Hendry Corp., DOT CAB 1478, 84-2 BCA ¶ 17344 (common law actual damages can be recovered by the government, even in the absence of a termination for default or a clause authorizing their recovery, when they are the natural and proximate result of a breach of contract by the contractor and are fairly within the parties contemplation).

Paul & Partners argues that summary judgment is not appropriate here because GPO has presented no facts to show that the government acted reasonably in mailing the reprinted Medicare premium bills and expecting the contractor to pay these costs, particularly given that the total mailing costs of \$100,000 incurred were several times the value of the print order. Paul and Partner’s Response to GPO’s Motion for Summary Judgment at 6. Paul & Partners argues in this regard:

Recipients that had already paid their invoice were not excluded from the reproduction and re-mailing of the work, even though sending them a second invoice would serve absolutely no purposes. There is no evidence that the incorrect dates had reduced the payment or “return rate.” There is no evidence that more than one recipient even noticed the incorrect date. Finally there is no evidence to indicate that government even considered the reasonable approach of waiting to determine i[f] the error caused sufficient issues to warrant reproducing a \$20,000 order and spending \$100,000 to mail it.

Paul & Partner’s Response to GAO CAB June 5, 2009 Order at 3. Paul & Partner’s argues that the government must always establish the reasonableness of its actions under a contract in order to recover damages from a contractor.

Here, Paul & Partners is attempting to impose a nonexistent duty on the government as a prerequisite to recovering its actual damages. As indicated, GPO had the undisputed right under Clause 14 of the contract to require that Medicare premium bills be reprinted and delivered to the Postal Service for mailing, and a contractual right under Clause 21 to hold the contractor liable for the actual damages caused by printing bills that did not conform to the specifications. In this regard, there is no doubt that a Medicare premium bill showing a payment due date 4 months later than the date it was supposed to show is materially defective. It is also obvious that time was of the essence here, given that the Medicare premium bills, which were supposed to show that payment must be made within 1 month of the bill, had to be printed and mailed by the contractor within 3 days of receiving the print order from CMS.

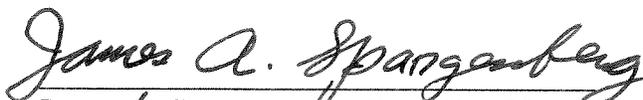
Notwithstanding the foregoing, under Paul & Partners' hypothesis, in order for the government to establish that it was acting reasonably in requiring that the reprinted bills be promptly remailed, CMS would have to wait to see how many of the 298,795 recipients of the bills showing the wrong due date actually paid their bills, and then sort the responses to ensure that new bills were only sent to those who did not pay their bills. Meanwhile, it may be that many recipients may not promptly pay their Medicare premium bill because the due date is stated to be 4 months in the future. The government simply had no duty to do these things, but could exercise its right under the contract to have Medicare premium bills reprinted and to cause these bills to be remailed.

Having properly exercised its contract rights, GPO could hold Paul & Partners liable for the actual damages caused by that firm's failure to provide Medicare premium bills with the correct payment due date, in this case, the mailing costs incurred by CMS in mailing the corrected bills. The contractor's liability for actual costs, caused by its failure to conform to the contract specifications, was stated in the contract and was thus a foreseeable consequence of providing materially defective Medicare premium bills; contrary to Paul & Partners' argument, the fact that the damages greatly exceeded the print order value does not preclude their recovery or impose any extraordinary duties on the government as a prerequisite to recovering its actual damages.

Paul & Partners also argues that because there is genuine dispute of fact regarding whether or not Paul & Partners conceded liability for the mailing costs and therefore summary judgment is inappropriate here. However, because we find that Paul & Partners is actually liable for these costs regardless of whether it conceded its liability for these costs, this disputed fact does not affect the outcome of the case and is therefore not material. See Pure Gold, Inc., 739 F.2d at 627.

We therefore grant GPO's motion for summary judgment and deny Paul & Partner's appeal. We find that GPO is entitled to recover the \$82,819.14 claimed.

It is so ORDERED.



James A. Spangenberg, Presiding Member
GAO Contract Appeals Board



Scott H. Riback
GAO Contract Appeals Board



Glenn G. Wolcott
GAO Contract Appeals Board

Dated: January 27, 2010