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_____))
TRIBUTE CONTRACTING, LLC))
_____))
Appellant,)) CAB No. 2014-03
_____))
v.))
_____))
U.S. GOVERNMENT PUBLISHING))
OFFICE,))
_____))
Respondent.))
_____))
_____))
_____)

Appearance for the Appellant: Tiffany Brown, Owner
Tribute Contracting, LLC

Appearance for the Respondent: Roy E. Potter, Esq.
Melissa A. Pachikara, Esq.
U.S. Government Publishing Office

Board Members: Frank Maguire (Presiding)
Louis A. Chiarella
Cherie J. Owen

DECISION

Tribute Contracting, LLC (Tribute), appeals the final decision of the Government Publishing Office (GPO) contracting officer, imposing a termination for default with regard to Purchase Order No. 92849, Jacket No. 386-477, for tote bags. Tribute asserts that the contracting officer's decision to terminate for default was improper. The respondent has filed a motion for summary judgment.

We deny the appeal.

BACKGROUND

The purchase order, issued on October 20, 2014, was for 3,000 reusable, blue polypropylene tote bags, with a Marine Corps logo printed in white on each side. Rule 4 File (R4), Tab 2, Purchase Order, at 4, see R4, Tab 4, at 15. Delivery was required by October 31. Id. Pertinent here, the purchase order provided: “**PAGES:** Print both sides of bag.” Id. at 4 (emphasis in original). Further, the purchase order provided, with regard to printing:

PRINTING: Screen print both sides of bag in one-color (white) consisting of illustrations, solids, type and line matter and a departmental logo. Approx. image size 14”W x 10”H.

Id. With regard to production proofs, the purchase order provided:

PROOFS:

PRIOR TO PRODUCTION SAMPLES: The sample requirement for this contract is not less than 1 printed sample of tote bag. Each sample must be constructed as specified using the form, materials, equipment, and methods of production, which will be used in producing the final product.

* * * * *

Samples must be submitted prior to commencement of production of the contract quantity. The samples plus the furnished government material must be submitted in sufficient time, using the furnished label, to allow Government testing of the samples and production and shipment in accordance with the shipping schedule.

The Government will approve, conditionally approve or disapprove the samples with in [sic] 1 workday of the receipt thereof.

* * * * *

In the event the Government fails to approve, conditionally approve or disapprove the samples within the time specified, the Contracting Officer shall automatically extend the shipping schedule in accordance with article 12, “Notice of Compliance with Schedules” of contract clauses in GPO Contract Terms Manufacture of the final product prior to approval of the samples submitted is at the contractor’s risk.

* * * * *

Send prior to production samples and one (1) copy of specifications together with the furnished media (copy, transparencies, electronic files) directly to: Marine Band Public Affairs, [Graphic Supply Specialist], phone

[deleted], Marine Barracks Annex, 7th and K Streets, SE, Washington, DC, 20003.

* * * * *

CONTRACTOR MUST NOT PRINT PRIOR TO RECEIVING AN “OK TO PRINT”.

Id. at 5-6 (emphasis in original).

On October 21, Tribute was advised via telephone by the GPO printing services specialist that Tribute had received the order for Jacket 386-477. Complaint at 1. The printing services specialist requested information necessary to send the purchase order to Tribute via a commercial carrier. Id. He emphasized the importance of meeting the delivery deadline of October 31. Complaint at 1; Answer at 2. Tribute asserts that the printing services specialist indicated that the “contract could be cancelled” and Tribute would be “unable to bid on future projects if the deadline was missed.” Appellant’s Response to Motion for Summary Judgment at 3.

Tribute states that, on October 23, it emailed a “virtual” proof to the printing services specialist, and was advised to send it to a Defense Logistics Agency (DLA) procurement specialist. Complaint at 2; Answer at 3. GPO asserts that the printing services specialist advised Tribute that an emailed virtual proof was not required under the purchase order, but instead a Prior to Production Sample (hereinafter, “sample proof”) was required to be sent “direct[ly] to [the] agency,” i.e., to a Marine Band graphic supply specialist at Marine Band Public Affairs. R4, Tab 3, at 11, cited in Answer at 3. Tribute nonetheless sent the virtual proof to the DLA procurement specialist at 4:02 p.m. on October 23 (without including the jacket number). R4, Tab 4, at 12.

The DLA procurement specialist was out of the office from Friday, October 24, through Monday, October 27. Answer at 3.

On October 28, at 6:51 a.m., the DLA procurement specialist responded to Tribute’s October 23 email and requested the jacket number for the job. R4, Tab 4, at 12-13. At 10:18 a.m., he forwarded the virtual proof to the Marine Band graphic supply specialist, requesting review of the proof. R4, Tab 5, at 16. At 10:52 a.m., the supply specialist responded as follows: “This looks good. Can you please confirm that it will print on both sides of the bag and that the canvas bag meets the specs and sample I included?” R4, Tab 6, at 19. At approximately 10:53 a.m. on October 28, Tribute provided the jacket number to the DLA procurement specialist. R4, Tab 4, at 12. Thereafter, the record includes no further exchanges regarding the emailed virtual proof. Complaint at 2; Answer at 3.

Later on October 28, Tribute shipped, by commercial carrier, a sample proof to the Marine Band graphic supply specialist.¹ R4, Tab 7, at 22. Also on October 28, Tribute shipped its 60-package production of the tote bags.² R4, Tab 8, at 27.

The sample proof was delivered on October 29, at 10:08 a.m. R4, Tab 7, at 22; see Complaint at 2; Answer at 3-4.

On October 30, 2014, at approximately 10:40 p.m., Tribute sent the DLA procurement specialist an email "about delivery of final product," listing tracking numbers for the 60 packages. Complaint at 2; R4, Tab 8, at 35. The email advised:

The proof should have arrived yesterday. Since you sent you [sic] the virtual proof on October 31, 2014 [sic] and heard no problems, I took the liberty to send your order in order not to miss my deadline of October 31, 2014.

Id. The DLA procurement specialist was out of the office on October 31. Answer at 4.

The 60-package production shipment (shipped on October 28) was delivered on October 31, at 12:13 p.m. R4, Tab 8, at 27.

On the morning of October 31, GPO received a telephone call from the Marine Band graphic supply specialist advising that, on the sample proof, the logo had been printed on one side only, contrary to the purchase order. R4, Tab 9, at 42; Answer at 4. The GPO printing services specialist thereupon called Tribute at approximately 9:25 a.m. on October 31, and advised that the sample was not correct. R4, Tab 10, at 43. The record indicates that the Marine Band graphic supply specialist also called Tribute. Complaint at 2; Answer at 4. On October 31 at 11:44 a.m., the Marine Band graphic supply specialist emailed the GPO printing services specialist as follows:

Per our conversation this morning, since the contractor did not print the logo on both sides of the bags, we need them to be reprinted and delivered on or before Nov. 12. This should be at no extra cost to us as she did not follow the contract specs. She said she never received word back from [the DLA procurement specialist] on the digital proof and I just got the pre-press bag proof today, so apparently she just moved forward without proof approval.

¹ The agency advises, however, that the sample proof was not received by the graphic supply specialist until the morning of October 31. Answer at 4-5; R4, Tab 11, at 44.

² The record indicates that both the order for shipment of the sample proof and the order for shipment of the 60-package production were processed for shipment by the carrier at the same time, 12:12 p.m. on October 28. Compare R4, Tab 7, at 22 with R4, Tab 8, at 27.

Please keep me informed on the status of this as it is imperative we have the items delivered by Nov. 12 to meet our convention shipping deadline.

R4, Tab 11, at 44. At 12:03 p.m. on October 31, Tribute advised the GPO printing services specialist that the factory was “slammed right now” and there would be a 3-week delay in reprinting the bags. R4, Tab 12, at 45.

On November 3, the contracting officer issued a Show Cause letter to Tribute, advising that GPO was “considering terminating the contract under the provisions for default of this contract.” R4, Tab 13, at 46. At approximately 11:55 a.m. on November 3, Tribute called the GPO printing services specialist and advised him that Tribute “could not afford” to reprint the bags. R4, Tab 14, at 51. At approximately 1:00 p.m. the same day, the contracting officer called Tribute and subsequently memorialized the conversation as follows:

Contractor did not print job per specs, bags should have been printed on both sides, bags were printed on one side only.

Talked to Tiffany Brown at Tribute Contracting and told her that this job needs to be picked up and reprinted, due to the Agency date requirement. Tiffany stated that she is unable to reprint this job, because she will lose out on money.

I told Tiffany Brown that if she is unable to reprint this job per specs, that she will be defaulted and will not get paid for this job, and any difference between her company and the next contr[actor] she will have to pay it.

R4, Tab 15, at 52.

On November 4, the contracting officer advised Tribute by letter that the contract had been terminated for default due to Tribute’s “inability to produce the job per specifications.” R4, Tab 17, at 56. The contracting officer advised that this letter was her final decision. Id.

APPEAL AND MOTION FOR SUMMARY JUDGMENT

Tribute filed a timely notice of appeal of the contracting officer’s final decision on November 4, 2014, and a complaint on December 14, 2014. GPO filed a motion for summary judgment on January 15, 2015, contending that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. A motion for summary judgment is appropriate where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In considering a motion for summary judgment, the Board will view the evidence and any disputed factual issues in the light most favorable to the party opposing the motion, here, the appellant. Data Computer Corp. of Am. v. United States, 80 Fed. Cl. 606, 612 (2008). The party opposing summary judgment, however, must show an evidentiary conflict on the record; mere denials or conclusory statements

are not sufficient. Inventory Discount Printers, GAO CAB No. 2011-1, 11-1 BCA ¶ 34,767 at 171,108.

Pertinent here, when a termination for default is appealed, the government has the initial burden of proving that the termination was justified. Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 763-64 (Fed. Cir. 1987); Montage, Inc. v. Architect of the Capitol, GAO CAB No. 2006-2, 10-2 BCA ¶ 34,490 at 170,099. It is well settled that a termination for default is a “drastic sanction ... which should be imposed only for good grounds and on solid evidence.” J. D. Hedin Constr. Co. v. United States, 408 F.2d 424, 431, 187 Ct. Cl. 45 (Ct. Cl. 1969), Brandywine Prosthetic-Orthotic Serv., Ltd., VABCA No. 3441, 93-1 BCA 25,250. When a default action is challenged, the Government bears the burden establishing by a preponderance of the evidence that there were grounds for the default termination and that the contracting officer's actions were justified. System Dev. Corp., VABCA Nos. 1976R, 2354R, 87-3 BCA ¶ 20,167. If the government demonstrates that the termination was justified, then the burden shifts to the contractor to show that its nonperformance was excusable. Keeter Trading Co., Inc. v. United States, 79 Fed. Cl. 243, 253 (207); Montage, Inc., *supra*, at 170,100. For nonperformance to be excusable, it must be beyond the reasonable control of the contractor and without fault or negligence. GPO Contract Terms, Contract Clause 20(c); *see* General Injectables & Vaccines, Inc. v. United States, 519 F.3d 1360, 1363 (Fed. Cir. 2008). A termination decision will not be reversed unless the contractor can prove that the decision represents an abuse of discretion or was arbitrary and capricious. Darwin Constr. Co. v. United States, 811 F.2d 593, 597 (Fed. Cir.1987).

As set forth below, we find that GPO has demonstrated that the termination for default was reasonable and that Tribute has not shown that its nonperformance was excusable. We uphold the termination for default, grant the motion for summary judgment, and deny the appeal.

DISCUSSION

As a general rule, the government is entitled to insist on strict compliance with unambiguous contract specifications and need not accept a nonconforming product. Cascade Pac. Int'l v. United States, 773 F.2d 287, 291 (Fed. Cir. 1985). Here, there is no dispute that the tote bags delivered by Tribute were plainly noncompliant with the purchase order specifications, in that the logo was printed on only one side of the bags, not on both sides as required by the purchase order. *See* Purchase Order at 4 (“Print both sides of bag.”). There is also no dispute that the appellant printed and shipped the noncompliant tote bags prior to receiving an “OK to Print,” contrary to the purchase order’s repeated, explicit warnings, including: “Manufacture of the final product prior to approval of the samples submitted is at the contractor’s risk” and “CONTRACTOR MUST NOT PRINT PRIOR TO RECEIVING AN “OK TO PRINT.” *Id.* (emphasis in original).

Although Tribute maintains that it was misled by the GPO printing services specialist to believe that timely delivery was of overriding importance, *see, e.g.*, Complaint at 2; Appellant’s Response to Motion for Summary Judgment, at 2-3, there is no contemporaneous evidence in the record that supports this contention. Further, even

accepting the facts as alleged by the appellant, we note that any advice from the printing services specialist regarding the importance of timely delivery would have been a mere restatement of the purchase order's explicit delivery requirement, "Deliver complete (to arrive at destination) by 10/31/2014," and well-established contract law. See, e.g., Silver Springs Citrus, Inc. v. Dep't of Agric., CBCA No. 1659, 10-2 BCA ¶ 34,537 (ability to make timely deliveries within a short time frame essence of contract). Further, there is simply no indication in the record that the printing services specialist, or any other GPO employee, purported to waive the explicit requirement in the purchase order that the contractor not print until receiving an "OK to Print." The mere fact that GPO emphasized the importance of timely delivery did not permit Tribute to ignore other applicable purchase order requirements.

In this regard, the appellant relies significantly on W.H. Armstrong & Co. v. United States, 98 Ct. Cl. 519, 530 (1943), and similar cases. Appellant's Response to Motion for Summary Judgment at 3-4. In Armstrong, which involved construction of officers' quarters at Boling Field in the District of Columbia, the court held that the government's action in directing the contractor to use bricks from a source other than that specified in the contract constituted a proper modification within the terms of the contract. That case is inapposite here, however, where there is no indication in the record that the GPO printing services specialist either attempted to effect, or actually effected, a change in the purchase order regarding delivery. Rather, the record, read most favorably to the appellant, indicates that the printing services specialist merely reiterated the importance of compliance with the explicit delivery terms of the purchase order. See Complaint at 1; Answer at 2; Appellant's Response to Motion for Summary Judgment at 2-3. That conduct did not amount to a contract modification.³

Additionally, there is nothing in the purchase order or elsewhere in the record that indicates that Tribute was justified in shipping the production order without the "OK to Print" required by the purchase order. First, we note that the "virtual" proof sent by Tribute and received by GPO on October 23, 2014, was not required by the purchase order and was in fact wholly inadequate as a "proof" in these circumstances, since it could not indicate whether the logo was printed on both sides of the bags as required by the purchase order. Further, the record includes no evidence of any misfeasance or inordinate delay by GPO with regard to review of the proof. The sample proof was delivered on the morning of October 29 and the Marine Band graphic supply specialist called on the morning of October 31, within 2 days, to advise that the proof was not compliant with the purchase order. There is no indication in the record that this 2-day interval was inordinate or otherwise outside the reasonable expectations of the parties. In any case, we note that the sample proof and the 60-package production order were shipped on October 28, the same day. See R4, Tab 7, at 22; R4, Tab 8, at 27. Accordingly, even had the sample proof been reviewed on October 29, it still would have been too late to avoid shipment of the noncompliant tote bags. In fact, the record

³ We note that GPO Contract Terms require that contract changes be made in writing. GPO Contract Terms, Contract Clause No. 4, Changes. An oral modification of a written contract, which may be modified only by bilateral written agreement, is generally ineffective. Mil-Spec Contractors, Inc. v. United States, 835 F.2d 865, 869 (Fed. Cir. 1987).

indicates that the Marine Band graphic supply specialist did not receive the sample proof until October 31, after Tribute had already shipped the 60 packages of tote bags. Answer at 4.⁴

Although Tribute in its October 30 email to the DLA procurement specialist indicated that it was shipping the order without receiving approval, “in order not to miss [its] deadline of October 31, 2014,” that concern was misplaced. Under the purchase order, any government delay in notifying Tribute that the sample proof was unacceptable would have required the contracting officer to “automatically extend the shipping schedule.” Purchase Order at 6. Although the Appellant advises that it was unaware of this provision, Complaint at 2, we note that it is plain on the face of the purchase order.

Finally, Tribute was given reasonable opportunity to remedy its nonconforming bags, even after the delivery date was missed.⁵ Tribute refused to do so. On November 3, the contracting officer issued a Show Cause letter to Tribute, advising that GPO was “considering terminating the contract under the provisions for default of this contract.” R4, Tab 13, at 46. The same day Tribute called the GPO printing services specialist and advised him that Tribute “could not afford” to reprint the bags. R4, Tab 13, at 51. Later in the day, the contracting officer called Tribute and was advised that Tribute was “unable to reprint this job” because it would “lose out on money.” R4, Tab 15, at 52. Such failure to comply with contract specifications, and to promptly replace or correct rejected work, justifies a termination for default. GPO Contract Terms, Contract Clause No. 14(h), Inspection and Tests; see also FAR § 52.246-4(f); Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA (CCH) ¶¶ 27,593.

CONCLUSION

Accordingly, the record, on its face, clearly indicates that production and delivery of the plainly noncompliant tote bags resulted from the appellant’s failure to comply with explicit requirements of the purchase order with regard to both printing and shipping, not from any delay or other misfeasance by the respondent. The results of Tribute’s non-compliance were unfortunate but were not the fault or responsibility of the agency.

We conclude that there is no genuine issue as to any material fact and that GPO is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, supra, at 323. The motion for summary dismissal is granted. The appeal is denied.

⁴ Although Tribute maintains that, had it been advised more promptly of the error, the “products would have been rerouted,” Appellant’s Response to Motion for Summary Judgment at 3, it does not indicate how any such rerouting would have effected compliance with the purchase order.

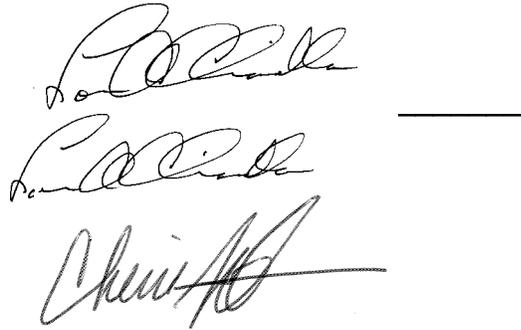
⁵ The government must notify the contractor in writing of its failure to perform any provision of the contract and give the contractor a reasonable opportunity in which to cure such failure before undertaking a default termination. GPO Contract Terms, Contract Clause No. 20, Default; see Federal Acquisition Regulation (FAR) clause 52.249-8, Default (Fixed-Price Supply and Service).

Dated: July 22, 2015



Frank Maguire
Presiding Member

We concur:



Cherie J. Owen
Member