

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
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Ensil International Corp. ) ASBCA Nos. 57297, 57445  
 )  
Under Contract No. W25G1V-08-P-3243 )

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CPT Edward Ahn, JA  
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OPINION BY ADMINISTRATIVE JUDGE GRANT  
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In these appeals, the government has moved for summary judgment, asserting that its termination for cause of its purchase order with Ensil International Corp. (Ensil) was proper because Ensil delivered nonconforming microcircuits. The government also asserts that it is entitled to recover the full purchase price it has already paid. Ensil has cross-moved for summary judgment on the basis that the government waived the delivery date and thus had no right to terminate for cause; Ensil also opposes the government's motion, asserting disputed material facts as to the government's exercise of its post-acceptance rights, and as to whether replacement microcircuits were nonconforming. Both parties have responded to each other's initial motions. We have jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109. For the reasons stated below, we deny both parties' motions.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. Tobyhanna Army Depot awarded Purchase Order No. W25G1V-08-P-3243 to Ensil on 3 April 2008. This purchase order was a fixed-priced commercial items order for Ensil to manufacture and deliver, FOB destination, 74 digital microcircuits at a unit price of \$984.14, for a total contract price of \$72,826.36. (R4, tab 1 at 1-2; gov't mot., Proposed Undisputed Findings of Fact (PUFF) ¶ 2) The microcircuits were component parts for a ground and airborne radio system (PUFF ¶ 1).

2. The purchase order specified that MILSPEC “MIL-M-38510, Microcircuits, General Specification for” would be used to produce the microcircuits (R4, tab 1, drawing specifications, sheet 2, incorporated by reference; gov’t mot., encl. 1). This specification established several requirements relevant to this dispute, specifically concerning the protective case (called package, packaging, or enclosure) and the microcircuit size. Concerning the packaging, the specification required that the microcircuits be “hermetically sealed in glass, metal, or ceramic (or combinations of these) packages.” It stated that “[n]o organic or polymeric materials (lacquers, varnishes, coatings, adhesives, greases, etc.) shall be used inside the microcircuit package unless specifically detailed in the device specification or drawing.” (Gov’t mot., encl. 1 at 16, ¶ 3.5.1, at 18, ¶ 3.5.6.1) The specification also established a maximum microcircuit height of 0.110 inches (R4, tab 1, drawing specifications, sheet 8).

3. The purchase order also contained the clause INSPECTION/ACCEPTANCE, which addressed both parties’ responsibilities in these areas:

The Contractor shall tender for acceptance only those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of non conforming services at no increase in contract price. The Government must exercise its post acceptance rights within a reasonable period of time after the defect was discovered or should have been discovered; and before any substantial change occurs in the condition of the item, unless change is due to the defect in the item.

(R4, tab 1, Part II, ¶ 8).

4. The purchase order also contained a WARRANTY clause, stating that the contractor “warrants and implies that the items delivered hereunder are merchantable and fit for the particular purpose described in this contract” (R4, tab 1, Part II, ¶ 12).

5. The purchase order also included the clause PAYMENTS, FAR 52.232-1, which states in pertinent part that “[t]he Government shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted...” (R4, tab 1, Part II, ¶13).

6. The purchase order contained the clause TERMINATION FOR CAUSE, which set forth the conditions for termination, liability of the parties, and consequences of improper termination. Specifically, the clause stated:

The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(R4, tab 1, Part II, ¶ 11)

7. The purchase order required delivery of the microcircuits by 6 June 2008 (R4, tab 1 at 1, 6). Ensil delivered 74 digital microcircuits almost 10 months later on 2 April 2009. The government paid Ensil in full, in the amount of \$72,826.36 on 22 May 2009. (R4, tab 3; PUFF ¶ 13)

8. In a Corrective Action Report issued 10 June 2009, the government found defects as to material and circuit leads (R4, tab 2); however, the contract specialist did not notify Ensil about this problem until 13 August 2009, two months after the identification of the problems and three months after payment (R4, tab 4). The government asked for information on replacing the defective parts, and, shortly thereafter, sent Ensil some additional details about the identified defects (R4, tabs 4, 6).

9. In September 2009, after some further communication between the parties, Ensil sent five new microcircuits to the government for inspection, holding the rest back until the first five passed inspection (R4, tab 7). But on 17 September 2009, Ensil notified the contract specialist that the part “should not be used as it was not packaged in a ceramic package.” Ensil asked for the parts to be returned, and assured the government that it could “provide this part in proper packaging meeting the specification of the drawing.” (R4, tab 9)

10. The government returned 74 microcircuits to Ensil on 23 October 2009, 69 from the April 2009 shipment (the other five had been damaged and thrown out), and the

five “prototypes” sent in September 2009 (R4, tabs 11, 12). On 18 November 2009, Ensil promised to provide the replacement parts “by the end of the year” (R4, tab 13).

11. As of 31 December 2009, the government had not received the replacement microcircuits. After two requests for status, which went unanswered, the government issued a Show Cause notice on 7 January 2010 asking why the replacement microcircuits had not been received and directing a response by 11 January 2010 (R4, tabs 14, 16, 17). Ensil responded the same day, saying it was trying to get delivery dates from its suppliers (R4, tab 18).

12. On 8 January 2010, the government advised Ensil that status had to be provided by 11 January 2010, and that if Ensil could not deliver soon, the government “may have to look at some remedies.” After some preliminary responses, Ensil advised the government on 18 January 2010, that delivery would be “on or before April 5, 2010,” noting that “the parts work but just had the wrong package.” (R4, tabs 20, 22, 23 at 2)

13. The government did not initially respond to Ensil’s statement that the parts would be delivered on or before 5 April 2010, but on 29 March 2010, over two months later, the government notified Ensil that it considered the new delivery date to be “on or before April 5, 2010,” and that all parts should be delivered by then (R4, tab 25). Ensil responded on 1 April 2010 that “[w]e are still waiting for the enclosure [packaging]. Once this is in we will need one week for testing. Next week I will try and push to get a drop dead date for the enclosure then I will get you a firm date.” On 2 April 2010, the government reminded Ensil that “April 5 was the drop dead date,” said “[w]e expect...the replacement parts...the week of April 12,” and stressed how disruptive the delays had been to the program. (R4, tab 26)

14. On 8 April 2010, Ensil emailed the contract specialist, projecting a new delivery date of 19 April 2010 (R4, tab 29 at 1, tabs 30, 31 at 1). The government asked for consideration for the delivery slippage although none was received (R4, tab 31). Further communications between the parties ensued, reflecting further slippages and explanations by Ensil, and further inquiries by the government as to status (R4, tabs 32, 33, 34, 35, 36).

15. On Friday 30 April 2010, Ensil shipped 50 microcircuits, holding back the other 24 because they did not pass Ensil’s final testing. Ensil explained it was working on the other microcircuits and would update the government on those the next week. (R4, tab 39)

16. The government received the 50 microcircuits on Monday, 3 May 2010 (R4, tab 40 at 1). The contract specialist instructed Ensil not to send the other 24 microcircuits until the government tested the 50 it had just received (R4, tab 41). On 12 May, the

government notified Ensil that the microcircuits were being evaluated by the Engineering and Quality Departments, and that a report and more information should be available later in the month (R4, tab 42).

17. When the Engineering/Quality Testing and Evaluation Report was issued, it was undated and unsigned, and provided no information about who prepared it or the tests performed. It did report problems with the microcircuits as to both packaging and dimension (stating, among other things, that “[t]he underbody packaging of the Ensil chip is of a clear material like epoxy,”), and concluded that the parts did “not meet form, fit or function” requirements. (R4, tab 43, attach. 1 at 1, 2) This information was set forth in a cure notice which the government issued on 14 June 2010; Ensil was provided a copy of the Engineering/Quality Report as an attachment to that notice. The cure notice recapped the history of the past problems and delays, and then focused on the two specific defects identified in the Report, packaging and microcircuit dimension:

1. The material of the enclosure is questionable. The material appears to be neither plastic nor ceramic like the original component manufactured. The bonding wires from the die to the pads can be seen. This material cannot tolerate the temperature increase during the PACE...station soldering/de-soldering process. This has caused functional test failures after running the radio.... The original component was removed and inserted via the PACE station soldering/de-soldering process with no degradation to the component or radio level functional testing.
2. With the de-soldering/soldering, PACE station temperature set as 245 deg C, the Ensil chip packaging separated during removal. With the solder gun temperature set at lower temperature, the chip was not able to be soldered.
3. From the component specification, the maximum height of the chip is 0.110 in. max OD and 0.098 in max ID. The actual measured height of the Ensil chip is 0.120 in. max Outer Diameter (OD).

(R4, tab 43, at 4) The cure notice found that Ensil’s parts were defective and not fit for the purpose intended, and that therefore Ensil failed to supply acceptable material under the contract. The contracting officer stated that unless the condition was cured in 10 days, the government might terminate for cause. (R4, tab 43 at 4)

18. Ensil responded to the cure notice on 27 June 2010. Ensil noted that in September 2009, the government advised that prototype parts sent from Ensil “tested good;” Ensil also stated that the “components are not designed or intended to be soldered/desoldered and to be expected to maintain their physical and/or electrical performance or their engineering specifications.” Ensil explained that “[t]he epoxy’s temperature rating supplied with these components has a much more temperature tolerance rating than is required.” Finally, Ensil asked the government several questions related to the testing, specifically about the soldering temperature, the air flow rate, the type of flux/paste/solder used, when the soldering station was last calibrated, and the rationale for the technician’s particular approach to the soldering/de-soldering test. (R4, tab 45)

19. The government terminated Ensil’s purchase order for cause on 7 July 2010, for failure to provide acceptable material as required. The termination restated the history of past issues and delays, and then focused on the two defects identified in the Engineering/Quality Report (packaging and microcircuit dimension). The decision did not address the concerns Ensil raised in its response to the cure notice. The government also asserted a government claim for refund of the \$72,826.36 paid earlier for the units. (R4, tab 47 at 4) Later that month, the government advised Ensil that no procurement costs would be charged against Ensil, but reminded Ensil of its responsibility to fully refund the \$72,826.36 purchase price (R4, tab 50).

20. Ensil appealed to this Board on 30 July 2010. Ensil’s appeal of the government’s termination for cause was docketed as ASBCA No. 57297. Ensil’s appeal of the government’s claim for refund of \$72,826.36 was later docketed as ASBCA No. 57445 on 2 December 2010, and both appeals were consolidated.

21. In connection with the motions at issue here, Ensil provided an affidavit from Mr. Louis Koikas, Operations Manager for Ensil. Mr. Koikas states that the epoxy-like material appeared on the bottom outside of the microcircuit, not inside the microcircuit package, but he did not identify what packaging material was used. He also states that Ensil did not “change or deviate from the design material in the contract specifications” and that the replacement parts were not nonconforming. Mr. Koikas asserts that no new contract delivery date was ever established, that the government encouraged Ensil to continue performing, and that Ensil relied on that encouragement. He also questioned the testing that was performed and the soundness of the conclusions drawn. He asserts Ensil did not get timely notice of alleged defects, and that it would be “impossible” for Ensil to comply with the 10-day cure period provided in the cure notice. (App. mot., ex. 1, Affidavit of Louis Koikas)

## DECISION

In its initial motion, the government argues that the record shows that Ensil delivered replacement microcircuits that were nonconforming, both as to dimension and as to packaging material, and that the government is entitled, as a matter of law, to a refund of the contract price it paid earlier for all 74 microcircuits (gov't mot. at 1, 13-14, 16). In its response to Ensil's motion and opposition, the government drops the dimensional noncompliance issue due to factual disputes, but still seeks judgment in its favor based on packaging noncompliance. Further, the government asserts that, as to its refund claim, it is at least entitled to recover the \$23,619 it paid for the 24 microcircuits it never received. (Gov't reply br. at 3-6)

Ensil opposes the government's motion, and also cross-moves for summary judgment. In opposition, Ensil asserts there are disputes as to material facts concerning, among other things, compliance with the Inspection/Acceptance clause and whether the government promptly exercised its post-acceptance rights (app. mot. at 2, 23). In its cross-motion, Ensil argues the government waived the delivery date and did not re-establish a new date, making termination improper without a new delivery date with a reasonable period of time for performance (app. mot. at 22).

Summary judgment may be granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may make a difference in the outcome of the case. We do not weigh evidence and decide the issue, but determine only whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). On cross-motions for summary judgment, we evaluate each motion on its own merits, drawing all reasonable inferences against the party whose motion is being considered. *Mingus*, 812 F.2d at 1390-91.

Termination for default (or for cause in this case) is a drastic action which should be imposed (or sustained) only for good grounds and on solid evidence. *Lisbon Contractors, Inc. v. United States*, 828 F.2d.759, 763-65 (Fed. Cir. 1987). The government has the burden of proving that its termination for cause was justified under the standards laid out in the termination clause. *Genome-Communications*, ASBCA Nos. 57267, 57285, 11-1 BCA ¶ 34,699 at 170,889 (the principles that govern termination for default also apply to terminations for cause). As explained below, because of disputed material facts, we deny both parties' motions.

With regard to the government's motion, assuming without deciding that the government accepted the microcircuits in 2009 and then properly revoked its acceptance,

questions remain as to the validity of the termination for cause in 2010.<sup>1</sup> Ensil's statements in the fall of 2009 are not admissions that the May 2010 replacement shipment did not comply with the contract. Nor are Ensil's comments in response to the cure notice dispositive; Ensil only states that epoxy was used; not where on the microcircuit it was used, and Ensil denies that epoxy was used inside the microcircuit package (SOF ¶¶ 2, 18, 21). The government's Engineering/Quality Report does not clearly demonstrate that the microcircuits were not packaged in accordance with the specifications. The report uses qualifying language, only addresses some of specification requirements, and does not categorically establish that the package was improperly sealed or that the epoxy was used inside the microcircuit package. (SOF ¶ 17) Overall, the parties disagree as to whether the replacement microcircuits were packaged properly, and the record does not conclusively show whether they were or not. As this disputed question of fact cannot be resolved on summary judgment, the government's motion is denied. *Kaman Precision Products*, ASBCA No. 56305, 10-2 BCA ¶ 34,529 at 170,287 (unable to determine on summary judgment if contractor tendered nonconforming goods).

We also deny the government's motion for partial summary judgment for refund of the \$23,619 for the 24 microcircuits never received, as this issue is linked to the validity of the termination. If the termination for cause is improper, it is converted, by the terms of the clause, to a termination for convenience and the monetary consequences to the parties will flow from that conversion. We cannot grant a partial recovery to the government when we have not determined the validity of the underlying termination and assessed the parties' respective liabilities. *See AEON Group, LLC*, ASBCA Nos. 56142, 56251, 09-2 BCA ¶ 34,263 at 169,296 (premature to address return of unliquidated performance-based payments on summary judgment when Board had also denied cross-motions as to whether the termination for default was proper).

As noted earlier, Ensil also moved for summary judgment, arguing that the government lost the right to terminate for cause by waiving the delivery date and not establishing a new date, and thus Ensil was entitled to a reasonable time to perform. The government argues that it did not waive the delivery date and that in any event, the termination was for nonconformance, not for late delivery (gov't reply br. at 1, 3). However, as explained below, this issue is tied to disputes of material fact and cannot be resolved on summary judgment.

With regard to the original contract delivery date of 6 June 2008, whether or not the government waived this date, once Ensil shipped the initial 74 microcircuits in April 2009, Ensil established a new delivery date, and was required to deliver substantially conforming goods. *Louisiana Lamps and Shades*, ASBCA No. 45294, 95-1 BCA

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<sup>1</sup> The parties have not discussed the implications of the Warranty clause in their motions and we do not address it in this opinion.

¶ 27,577 at 137,435 (tendering supplies establishes a new delivery date despite previous waiver, and contractor must show substantial compliance with the specification); *Industrial Data Link Corp.*, ASBCA No. 31570, 91-1 BCA ¶ 23,382 at 117,339-40, *recon. denied*, 91-1 BCA ¶ 23,570 (tender of delivery after waiver establishes a new contract delivery date and delivery must be in substantial compliance with the contract requirements). A similar analysis applies for the May 2010 delivery of replacement microcircuits: whether or not the government had further waived or failed to establish a replacement delivery date, Ensil itself established a new date by its tender of replacement microcircuits, and was required at that time to deliver substantially conforming products. As the parties dispute whether the replacement microcircuits complied with the specification, Ensil's cross-motion for summary judgment is denied.

CONCLUSION

Because there are disputed issues of material fact, we deny both parties' motions for summary judgment.

Dated: 30 January 2012



ELIZABETH M. GRANT

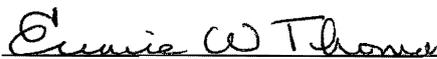
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur



MARK N. STEMPLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals



EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 57297, 57445, Appeals of Ensil International Corp., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals