ARMED SERVICES BOARD OF CONTRACT APPEALS

| | | |
|---|---|---|
| Appeal of -- | ) | |
| | ) | |
| Recon Optical, Inc. | ) | ASBCA No. 56289 |
| | ) | |
| Under Contract No. W15QKN-06-C-0152 | ) | |

APPEARANCES FOR THE APPELLANT: William J. Spriggs, Esq.
David J. Taylor, Esq.
Stephen A. Klein, Esq.
Katherine A. Allen, Esq.
David B. Dixon, Esq.
Rachel W. McGuane, Esq.
Spriggs & Hollingsworth
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
LTC James A. Lewis, JA
MAJ David Abdalla, JA
MAJ Charlotte Emery, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN ON THE PARTIES' MOTIONS AND CROSS-MOTIONS FOR SUMMARY JUDGMENT

Recon Optical, Inc. (ROI) appeals the default termination of the captioned supply contract and has filed two motions for summary judgment. The first motion contends that the termination was procedurally invalid because it was a FAR 52.249-8(a)(1)(ii) and (iii) termination for which an effective cure notice was not issued (app. 1st mot. mem. at 3). The second motion contends that the termination was procedurally invalid because a "D&F" in the contract file explaining the contracting officer's reasons for terminating the contract was not properly signed and did not meet the FAR 49.402-5 requirement for a memorandum (app. 2d mot. mem. at 1). On ROI's first motion, the government cross-moves for a ruling that the termination was a FAR 52.249-8(a)(1)(i) termination that did not require a cure notice (gov't opp'n at 1). On the government's cross-motion, ROI cross-moves for a ruling that there was no basis for a FAR 52.249-8(a)(1)(i) termination (app. opp'n to gov't cross-mot. at 1). For the reasons stated below, we deny both ROI motions, we deny the government cross-motion and we grant the ROI cross-motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF

## THE MOTIONS AND CROSS-MOTIONS

1. On 12 May 2006, the government awarded letter Contract No. W15QKN-06-C-0152 (Contract 0152) to ROI for the production and delivery of between 242 and 275 Common Remotely Operated Weapon Station (CROWS) systems (R4, tab 1 at 1, 5). The delivery schedule at award required incremental deliveries of the systems beginning 28 July 2006 and ending 23 February 2007 (*id*. at 34). The contract included, among other provisions, the FAR 52.249-8 DEFAULT (FIXED PRICE SUPPLY AND SERVICE)(APR 1984) clause (*id* at 40).

2. On 22 September 2006, bilateral Modification No. PZ0001 definitized Contract 0152 in the amount of $73,994,198 for a total production of 275 CROWS systems. This modification included, among other things, a revised Statement of Work, a revised Performance Specification, and the following provision:

> 8. The Government agrees that upon successful completion of UMR1 Testing and all applicable contractual requirements, ROI shall ship in place 90 CROWS systems.… Deliveries will continue at 30 systems per month thereafter.

(App. 1st mot. mem., ex. 6 at 1-2, 4, 7)

3. The UMR1 testing referred to in Modification No. PZ0001 was set forth in a 61-page document entitled: "CROWS UMR 1 – Verification Test 01 May 2006." This was an abbreviated version of the design verification testing (DVT) specified in the Performance Specification for the CROWS systems being produced by ROI under Contract No. W15QKN-05-C-1209 (Contract 1209). That contract had been awarded to ROI on 15 March 2005. When Modification No. PZ0001 for Contract 0152 was entered into, the UMR1 DVT under Contract 1209 was already underway. (R4, tab 31 at 1-2, 51-62, tab 14 at 2, app.1st mot. mem., ex. 7)

4. On 19 April 2007, the government suspended progress payments under Contract 0152 for the alleged failure of ROI's CROWS systems to successfully complete the UMR1 DVT under Contract 1209 (R4, tab 14). On 4 May 2007, the government sent ROI a cure notice for Contract 0152, stating in relevant part:

> Prior unsuccessful Design Verification Testing (DVT) is now a condition that is endangering performance of the contract (see attached document addressing deficiencies). You are notified to identify and deliver three (3) fully compliant systems for Design Verification Testing…no later than 14 May 2007.… These systems shall be verified in accordance with the contract and performance specification

> 4.2, per the Design Verification (ARDEC 143) Clause in the referenced contract at page 41. Therefore, unless this condition is cured by: 1) the delivery and/or identification of three (3) systems by 14 May 2007, AND 2) the successful completion of DVT and approval of the DVT samples, the Government may terminate for default under the terms and conditions of the FAR 52.249-8 clause of this contract.

(R4, tab 15 at 1)

5. On 7 May 2007, ROI and the government agreed in bilateral Modification No. P00002 "to extend the period of performance of Contract 0152 to 31 August 2007." This modification included no incremental delivery dates, only the single contract performance completion date. (R4, tab 49a)

6. By letter dated 10 May 2007 to the contracting officer, ROI acknowledged receipt of the 4 May 2007 cure notice and stated in relevant part:

> Today, Recon Optical shipped four (4) new CROWS units (Serial Nos. 374, 381, 4078 and 413) for UMR1 testing in accordance with your May 4, 2007 letter and CLIN 0001AQ of the Subject Contract. These four units will arrive at Aberdeen Proving Ground (APG) no later than May 14, 2007.
>
> In accordance with the Government's test plan received by Recon Optical on May 7, 2007, we will conduct a one and one half day (1-1/2) day [sic] operator training course prior to commencement of testing. This training will ensure that any operational differences in this latest configuration of the test units have been communicated to APG test personnel.

(App. 1st mot. mem., ex. 11)

7. Although ROI's 10 May 2007 letter stated that it was submitting four new CROWS systems "for UMR1 testing," the cure notice and the UMR1 DVT document required only three CROWS systems for testing (R4, tab 15 at 1, app. 1st mot. mem., ex. 7 at 3 ¶ 1). Four CROWS systems, however, were required by the government test document entitled "CROWS UMR2 – Verification Test PART II Start Date: 14 May 2007" (app. 1st mot. mem., ex. 13 at 5). ROI's 10 May 2007 letter acknowledged receipt on 7 May 2007 of "the government's test plan" for the systems to be tested pursuant to the cure notice. While ROI's 10 May 2007 letter did not identify the UMR2 DVT document as the test plan received, its shipment of the four CROWS systems was consistent with the UMR2 DVT requirement. On this evidence, there is a genuine issue

of material fact as to whether ROI knew and agreed that the DVT for the systems shipped in response to the cure notice was to be conducted under the UMR2 DVT document.

8. From May through early September 2007, the CROWS systems shipped on 10 May 2007 were tested by the government under the UMR2 DVT document (gov't opp'n at 6-7, ¶ 14). The parties do not dispute that the UMR2 DVT requirements were different from the UMR1 DVT requirements (gov't opp'n at 3-4 ¶ 6, app. 1st mot. mem., exs. 7, 13).

9. On 30 August 2007, ROI and the government agreed in bilateral Modification No. A00001 "to extend the period of performance of the contract to 31 October 2007." This modification included no incremental delivery dates, only the single contract performance completion date (R4, tab 49b).

10. By letter dated 10 September 2007, the government referenced the 4 May 2007 cure notice and gave ROI the opportunity to show cause why Contract 0152 should not be terminated for default for failure to successfully complete the DVT on the systems submitted in response to that notice. Attached to the show cause letter was a document entitled: "**CROWS UMR2 VERIFICATION TEST – PART II – PERFORMANCE SPEC REQUIREMENTS TESTED**." This document showed that the ROI systems failed 23 of the 25 UMR2 performance specification requirements tested. The show cause letter gave ROI ten days (subsequently extended to 20 days) to submit its "excuses" for the alleged test failures. It did not provide ROI a specific time deadline or period in which to cure the test deficiencies. (R4, tabs 21, 23)

11. On 28 September 2007, ROI submitted a detailed response to the show cause letter. The ROI response stated that it could substantiate "only" eleven performance requirements failures, but also admitted that it "is not in strict compliance with the performance requirements of the 0152 Contract." ROI's response did not express surprise at the use of the UMR2 DVT document for the tests, nor did it offer to correct the admitted test failures. Instead, it offered consideration in an estimated amount of $5,675,000 for performance specification waivers, engineering change proposals, revised test procedures, and a new incremental delivery schedule extending from November 2007 through July 2008. (R4, tab 24)

12. On 30 October 2007, a detailed evaluation of ROI's response to the show cause letter was presented by the government project manger to the program executive. The project manager recommended termination of the contract for default. (R4, tab 27 at 1, 14)

13. On 31 October 2007, ROI and the government entered into bilateral Modification No. A00002 stating in relevant part: "The purpose of this modification is to extend the period of performance to 31 December 2007…By granting this extension the

Government does not waive any rights or remedies which it has under this contract." This modification did not include any incremental delivery dates, only the single contract performance completion date. (R4, tab 49c)

14. On 8 November 2007, the contracting officer acknowledged receipt of ROI's response to the show cause letter and told ROI that the response was under evaluation (R4, tab 28). By letter to the contracting officer, dated 9 November 2007, ROI again offered to negotiate a settlement of the matters raised in the government's show cause letter (R4 tab 29). On 28 November 2007, the government's program executive officer recommended termination of Contract 0152 for default (R4, tab 30 at 1, 9).
.

15. On 10 December 2007, the contracting officer issued a notice and final decision terminating Contract 0152 for default and demanding return of $24,468,739.62 in unliquidated progress payments. The reason for the termination stated in the notice was:

> your firm's failure to make progress on the contract, and the failure to perform to contract requirements by the failure of three (3) of your systems (which were delivered to Aberdeen Proving Ground on 14 May 2007) to successfully pass Government Design Verification Testing (DVT) required by section I (page 41[sic]) of the contract. See attached table listing these failures.

(App. 1st mot. mem., ex. 15 at 1) The attached table was the same document that was attached to the show cause letter with additional references to specific test documents (*id*. at 3).

16. On the same day that Contract 0152 was terminated, a document entitled "Determination and Findings" (D&F) setting forth the reasons for the termination was submitted for the contract file with the following signature block:

> _*//electronically signed//*_ Date: 12/10/2007_
> Louis Mondello Jr.
> Contracting Officer

(R4, tab 30d) The government does not dispute that there was no discrete, verifiable electronic symbol affixed to the D&F, nor was there an actual pen and ink signature (gov't opp'n to app. 2nd mot. at 2-3).

17. ROI timely appealed the default termination to this Board on 10 January 2008.

## DECISION

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Where there are cross-motions for summary judgment, each must be evaluated on its own merits. *Alameda Reuse and Redevelopment Authority*, ASBCA No. 54684, 06-2 BCA ¶ 33,443 at 165,767.

The FAR 52.249-8 DEFAULT (FIXED PRICE SUPPLY AND SERVICE) (APR 1984) clause of Contract 0152 stated in relevant part:

> (a)(1) The Government may…by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to –
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) of this clause; or
>
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) of this clause).
>
> (2) The Government's right to terminate this contract under subdivisions (a)(1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer ) after receipt of the notice from the Contracting Officer specifying the failure.

A. ROI's First Motion

The default termination notice issued on 10 December 2007 expressly stated that the basis for the termination was "your firm's failure to make progress on the contract, and the failure to perform to contract requirements by the failure of three (3) of your systems…to successfully pass Government Design Verification Testing required by section I (page 41) of the contract." (SOF ¶ 15). The defaults alleged in the notice are those for which paragraph (a)(2) of the Default clause and FAR 49.402-3(d) required a cure notice to the contractor before a termination. *The Swanson Group, Inc.*, ASBCA No. 44664, 98-2 BCA ¶ 29,896 at 147,993.

Seven months before the termination, the government sent a cure notice to ROI citing the unsuccessful DVT of ROI's CROWS systems under Contract 1209 as a condition endangering performance of Contract 0152 and requiring that this condition be cured by: "1) the delivery and/or identification of three (3) systems by 14 May 2007, AND 2) the successful completion of DVT and approval of the DVT samples…" (SOF ¶ 4). ROI contends that this notice was not an effective cure notice for the 10 December 2007 termination because:

> (1) it identifies alleged deficiencies that are different from the alleged deficiencies identified in the December 10 Termination for Default; (2) ROI actually complied with the terms of the cure notice by delivering three new CROWS systems to the Aberdeen Proving Ground by May 14, 2007; and (3) the Army waived any right to terminate based on the May 4 Cure Notice by delaying for an unreasonably long period [of] time – 210 days – between the expiration of the cure period (May 14, 2007) and issuance of the December 10 Termination for Default….

(App. 1st mot. mem. at 3) The government has not responded directly to these arguments, relying instead on its cross-motion.

We are not persuaded that there are no genuine issues of material fact as to the first argument. The record shows that the test applied to the systems submitted in response to the cure notice was the UMR2 DVT and that there were differences between that test and the UMR1 DVT that was applied to the Contract 1209 systems, the failure of which was the cause of the cure notice (SOF ¶¶ 3, 4, 8). However, the record does not make clear the significance of those differences. Furthermore, there remains a genuine issue of material fact as to whether the test plan that ROI received on 7 May 2007 was the UMR2 DVT plan and whether ROI concurred in its substitution for the UMR1 DVT plan for purposes of curing the default (SOF ¶ 7). The absence of any expression of surprise in ROI's response to the show cause letter with respect to this substitution is some indication that it in fact concurred (SOF ¶ 11).

ROI's contention that it complied with the 4 May 2007 cure notice is incorrect. ROI complied only with the first condition of that notice which was delivery of new CROWS systems by 14 May 2007 for a second DVT. The second condition of the cure notice (successful completion of the DVT) was not met. Whether that failure was excused by the government applying the wrong test or erroneously scoring the correct test are genuine issues of material fact. Similarly, ROI's argument that there was unreasonable delay between the cure notice and the termination involves genuine issues of material fact as to the reasonableness of the four-month test period and the two and

one-half month period for government evaluation of ROI's response to the show cause letter.

There being genuine issues of material fact as to the alleged failure of the government to issue a proper cure notice, ROI's first motion for summary judgment is denied.

B. ROI's Second Motion

ROI's second motion argues that it is entitled to summary judgment because (i) the "Determination and Findings ('D&F') used to terminate the contract for default does not contain the required signature of the contracting officer;" and (ii) the contracting officer failed to provide the required memorandum to the contract file explaining the reasons for termination (app. 2nd mot. mem. at 1). We do not agree. A D&F signed by the contracting officer is not required by statute or regulation to terminate a contract for default. FAR 49.402-3 sets forth the procedures for terminating a contract for default. Neither a properly signed D&F nor a "certification" by the contracting officer is one of the specified procedures. [1]

FAR 49.402-5 states that when a contract is terminated for default, "the contracting officer shall prepare a memorandum for the contract file explaining the reasons for the action taken." The document prepared by the contracting officer and incorrectly labeled a "D&F" explained his reasons for terminating ROI's contract and accordingly met requirements for a FAR 49.402-5 memorandum.[2] Therefore, ROI's second motion for summary judgment is denied.

C. Motions on Applicability of FAR 52.249-8(a)(1)(i)

On the parties' cross-motions for a ruling on the applicability of subparagraph (a)(1)(i) of the FAR 52.249-8 Default clause of the contract, there are no genuine issues of material fact. At the time of the termination on 10 December 2007, there were no incremental delivery dates in effect that had been missed by ROI. There was only a single contract performance completion date of 31 December 2007 established in

[1] *Teknocraft Inc.*, ASBCA No. 55438, 08-1 BCA ¶ 33,846, cited by ROI, held that the typewritten notation "//signed//" in the signature block of a typewritten name was not a valid signature for a claim certification. Since the contracting officer who terminated ROI's Contract 0152 was not required to "certify" his termination memorandum, *Teknocraft* is inapposite.

[2] In *Walsky Construction Co.*, ASBCA No. 41541, 94-1 BCA ¶ 26,264, cited by ROI, there was other evidence, in addition to the lack of a FAR 49.402-5 memorandum, indicating that the default termination "was not a reasonable exercise of discretion." 94-1 BCA at 130,625.

bilateral Modification No. A00002 (SOF ¶ 13). The contract was terminated for default 21 days before that specified contract completion date. The general reservation of rights clause in Modification No. A00002 did not negate the specific extension of the contract performance completion date that was the expressly stated purpose of the modification. An interpretation that gives meaning to all parts of the modification is preferred to one that would render its expressly stated purpose useless or void. *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004).

## CONCLUSION

For the reasons stated above, ROI's motions for summary judgment on the alleged lack of a proper cure notice and alleged defective documentation of the termination decision are denied. The government's cross-motion for partial summary judgment ruling that the termination was a proper FAR 52.249-8(a)(1)(i) termination is also denied. ROI's cross-motion for partial summary judgment ruling that there was no legal basis for a FAR 52.249-8(a)(1)(i) termination is granted.

Dated: 20 March 2009

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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 No. 56289, Appeal of Recon Optical, Inc., rendered in conformance with the Board's Charter.

Dated:

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