

DOTCAB

ENVIROSOLVE, LLC, APPELLANT,  
v.  
U.S. DEPARTMENT OF JUSTICE DRUG ENFORCEMENT ADMINISTRATION RESPONDENT.

Under Contract No. DEA-02-C-0020

March 20, 2006

Carolyn Callaway, Esq., Albuquerque, NM, counsel for Appellant.

James Hicks, Esq., and Sheryl Butler, Esq., U.S. Department of Justice, Drug Enforcement Administration, Washington, D.C., counsel for Respondent.

SOMERS, Administrative Judge

OPINION ON SUMMARY JUDGMENT

This case arises from a timely appeal by the contractor, Envirosolve, LLC, (appellant or Envirosolve), from a contracting officer's final decision that the United States Department of Justice, Drug Enforcement Administration (DEA or the government) is entitled to be reimbursed for \$49,871.50, the costs incurred as a result of Envirosolve's failure to respond to a request for a hazardous waste clean up. Envirosolve has appealed the final decision, contending that the contract does not grant DEA the right to recover procurement costs from Envirosolve. Before us for resolution is Envirosolve's motion for summary judgment on that issue. The government responded to appellant's motion by filing the "Government's Motion for Summary Relief and Motion for Decision on the Pleadings," which seeks judgment against Envirosolve for the full amount of procurement costs as set forth in the contracting officer's final decision.

For the reasons that follow, we deny appellant's motion for summary judgment, and hold that the government is entitled to seek damages under common law theory for breach of contract. We deny the government's motion for summary relief because genuine issues of material fact preclude summary judgment at this time.

BACKGROUND

In 2002, DEA issued a competitive request for proposals (RFP) for hazardous waste cleanup services. The RFP contemplated the award of one or more contracts for 44 geographical "Contract Areas" for a base year and up to four option years. DEA awarded Envirosolve DEA Contract No. DEA-02-C-0020 (Contract), dated October 1, 2002, for the removal and disposal of hazardous waste and chemicals seized by DEA or by state and local law enforcement agencies in fourteen Contract Areas.

The contract at issue is a time & materials type contract. AF Exh. 2, H-12, Clause H.16. Under the Federal Acquisition Regulations (FAR), a time and materials contract is defined as "provid[ing] for acquiring supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit, and (2) materials at cost, including, if appropriate, material handling costs." 48 CFR 16.601(a). Among the relevant clauses incorporated by reference in the contract is FAR Clause 52.249-6 Termination (Cost-Reimbursement), Alternate V.

The government alleges that on April 29, 2004, the Los Angeles Field Division,

Southern California Drug Task Force, Group 45, (LAFD), seized a large-scale methamphetamine/PCP clandestine laboratory. After the seizure, a DEA agent, CLC Special Agent Cielecy, contacted Envirosolve to handle the cleanup of the hazardous waste. Mr. James Fehrle, a representative from Envirosolve, informed DEA that Envirosolve would not be able to handle the clean-up and asked if DEA could contact another company or have a state law enforcement agency handle the clean-up. DEA contacted a different hazardous waste disposal company, Onyx, to perform the cleanup. Onyx performed the clean-up services for \$49,871.50. Envirosolve disputes the government's allegations and does not admit that Envirosolve failed to respond to an order for clean up.

In August, 2004, DEA's contracting officer issued a final decision seeking \$49,871.50 from Envirosolve. AF Exh. 1. The contracting officer asserted that Envirosolve must reimburse the government for the costs incurred in procuring hazardous waste clean-up services covered under the contract from another company.

The contract ended on September 30, 2004, the end of the contract period. Envirosolve appealed the contracting officer's final decision by notice dated November 4, 2004.

#### DISCUSSION

Appellant has moved for summary judgment, asserting that the government is not entitled to procurement costs under a time-and-materials contract and that the government is not entitled to common law damages arising from an alleged breach of the contract. [FN1] DEA opposes appellant's motion. [FN2] Although the contracting officer did not terminate the contract for default, DEA argues that Envirosolve's alleged breach should be viewed as a constructive termination of the contract and that the termination provisions of the contract should apply.

We grant summary judgment where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The moving party bears the burden of demonstrating these elements. *Id.*; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Applied Chemical Technology, Inc. v. U.S. Dept. of Justice, Federal Bureau of Prisons*, 2005 WL 518954, Appeal No. 4183 (DOTBCA 2005); *Steinhoff & Salder, Inc., dba SSI*, 00-2 BCA  $\partial$  31,145 (DOTBCA 2000). The facts are viewed in the light most favorable to the nonmoving party and doubts are resolved against the movant. *American Pelagic Fishing Company, LP v. United States*, 379 F.3d 1363, 1371 (Fed. Cir. 2005). Where the moving party has shown an absence of evidence supporting the non-moving party's case, the burden shifts to the other party to establish that there is a genuine issue of material fact. *Celotex Corp v. Catrett*, *supra*. A material fact is one that may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

For the purposes of the motion for summary judgment, Envirosolve concedes only that sufficient facts warrant the inference of anticipatory breach. Nonetheless, Envirosolve contends that even if it breached the contract as alleged by DEA, the government is not entitled to procurement costs under the terms of the contract or damages under common law. Specifically, Envirosolve argues that cost reimbursement contracts, such as the time-and-materials contract involved here, do not provide for the government to obtain excess procurement costs from a defaulting contractor. In support of its argument, the contractor notes that the FAR states that

a cost-reimbursement contract does not contain any provision for recovery of

excess repurchase costs after termination for default.

48 C.F.R. § 49.403(c).

In this case, the parties aver that the contract was not terminated for convenience or for default. Complaint ¶ 10, 11, Answer ¶ 6. The government's right to recover excess procurement costs is governed by contract termination clauses. Only when a contract is terminated for default pursuant to the contract's default clause can the government assess excess procurement costs against a contractor. Generally, where the government does not terminate a contract for default, the right to recover excess procurement costs would not ordinarily arise.

If we assume for the sake of argument that Envirosolve did not provide services as required by the contract, Envirosolve breached the contract. Envirosolve contends that the government cannot seek breach damages under the termination clause contained in this contract. Appellant notes that fixed price contracts typically contain default clauses with the following reservation of rights to the government:

The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

Appellant's Supplemental Memorandum of Law in Support of Summary Judgment, pg. 10. Focusing upon the termination clause incorporated by reference in this contract, FAR Clause 52.249-6 Termination (Cost-Reimbursement), Alternate V, appellant asserts that this clause does not contain similar language expressly reserving the government's common law rights.

This issue presented by appellant is whether, by the absence of language expressly reserving the government's common law rights, the termination clause in this contract precludes the government's right to common law remedies. We find that it does not. We note that the Board has jurisdiction over government claims grounded in common law remedies not limited to those expressly reserved by the contract. As the Board has stated:

Under section 6(a) of the Contract's Disputes Act, 41 U.S.C. § 605(a), the Board has jurisdiction over "all claims by the government against a contractor relating to a contract." All claims means just that. The legislative history makes it clear that Congress particularly intended the Boards to have jurisdiction over breach of contract claims.

TDC Management Corporation, 90-1 BCA ¶ 22,627 (DOTBCA 1989). Indeed, "when only partial relief is available under the contract . . . the remedies under the contract are not exclusive and the [non-breaching party] may secure damages in breach of contract

. . ." United States v. Utah Construction and Mining Co., 384 U.S. 394, 402 (1966). Accord *Len Co. and Associates v. United States*, 385 F.2d 438, 451 (Ct. Cl. 1967). Therefore, if, as appellant contends, the government's right to recover procurement costs under the termination clause is limited, the government can claim breach of contract damages under common law. We decline to adopt the proposition that the termination clause contained in this contract, as a matter of law, constitutes the exclusive remedy for a government's breach of contract damages claim. See *PAE International*, 98-1 BCA ¶ 29,347 (ASBCA 1997). See also *Marine Hydraulics International, Inc.*, 94-3 BCA ¶ 27,057 (ASBCA 1994) (finding that even if added costs for performance are not eligible for inclusion in an equitable adjustment under the Suspension of Work clause, recovery could still be sought on the theory of common-law breach of contract); *General Electric Co.*, 94-1 BCA ¶ 26,578 (ASBCA 1994); *Interstate Forestry, Inc.*, 91-1 BCA ¶ 23,660 (AGBCA 1990).

Accordingly, because we find that the government's remedy is not limited to the termination clause under the contract, we do not need to address the government's argument that Envirosolve's actions should be construed as a constructive termination.

If the facts ultimately show that Envirosolve breached the contract, the general rule in common law breach of contract cases, i.e., that damages should be awarded sufficient to place the injured party in as good a position as he or she would have been had the breaching party fully performed, would apply. PAE International, 98-1 BCA 29,347 (ASBCA 1997), citing San Carlos Irrigation and Drainage District v. United States, 111 F.3d 1557, 1562-63 (Fed. Cir. 1997); Rumsfield v. Applied Companies, Inc., 325 F.3d 1328, 1336 (Fed. Cir. 2003); Carter Industries, 02-1 BCA 31,738 (DOTBCA 2002). The government, however, would not be entitled to recover the entire amount paid to the second contractor. Rather, the proper measure of damages would be the "reasonable procurement price less the original contract price." Cascade Pacific Int'l v. United States, 773 F.2d 287, 293 (Fed. Cir. 1985).

#### CONCLUSION

We find that the government is not precluded from seeking damages in the event that the facts, once developed, show that Envirosolve breached the contract. Accordingly, we deny Envirosolve's motion for summary judgment. We deny the government's motion for summary relief and judgment on the pleadings because genuine issues of material fact, namely, whether Envirosolve failed to respond to a request for a hazardous waste cleanup, preclude summary judgment at this time.

Jeri Kaylene Somers

Administrative Judge

FN1. Although appellant did not address the issue of common law damages arising from an alleged breach in a time-and-materials contract in its initial pleadings, at the Board's invitation, appellant filed a supplemental memorandum of law in support of its motion for summary judgment addressing this issue. Counsel for DEA elected to rely upon its original motions, and declined to address the issue of common law damages.

FN2. DEA filed a response to appellant's motion entitled "Government's Motion in Opposition to Summary Relief and Motion for Decision on the Pleadings."