

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NOBLE ATTORNEY, LLC.

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant

No. 21-1456 C

COMPLAINT

Plaintiff, Noble Attorney, LLC alleges the following:

PRELIMINARY STATEMENT

This action is a claim for lost profits, and correction of termination for cause due to Defendant's wrongful termination of contract.

PARTIES AND RELEVANT NAMES

- 1) Plaintiff, Noble Attorney, LLC (Noble) is a minority-owned small business with a highly regarded reputation and past performance record of providing personal protective equipment ("PPE") in the midst of the COVID-19 pandemic. Noble contracted with the Department of Veterans Affairs to provide nitrile examination gloves but was terminated for cause before it could fulfill the contract.
- 2) Defendant, United States of America, is sued for the acts and omissions of the Department of Veterans Affairs ("VA" or "Government"), an agency of the United States of America.
- 3) Mercator Medical ("Mercator") is the healthcare original equipment manufacturer (OEM) company whose 25,000,000 nitrile gloves Noble ordered through the certified distributor, Sante Group.

- 4) Sante Group is a Mercator North American healthcare distributor through which Noble ordered the 25,000,000 nitrile gloves.

JURISDICTION

- 5) Jurisdiction is proper in this Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1). The statutory basis for invoking jurisdiction is 41 U.S.C. § 7101, et seq.
- 6) Noble challenges the Contracting Officer's decision to terminate its contract for cause. The Contracting Officer's decision was arbitrary, capricious, unsupported by evidence, and a breach of contract.
- 7) In accordance with 41 U.S.C. § 7104(b)(3), this action is brought within one year of the date that the Noble received the Contracting Officer's decision to terminate.
- 8) Noble is entitled to compensation in excess of \$10,000.

BACKGROUND

- 9) The VA issued RFQ 36C24921Q0115 on February 9, 2021 for the purchase of nitrile gloves. As a part of its bid process, offerors were required to submit a bid for gloves that "meet or exceed," the following nine requirements: (1) the ASTM D6319 standard for nitrile examination gloves for medical application; (2) provision of small, medium, large, and x-large gloves; (3) not contain latex; (4) completion of and passing a residual powder test; (5) the material must be nitrile; (6) non-sterile; (7) single use; (8) ambidextrous; and (9) puncture resistant, passing the tensile test with at least 14 MPa and a minimum of 500% elongation.
- 10) The focus of the solicitation was the OEM. Specifically, the VA desired gloves that were equal to or better than nitrile exam gloves produced by Bosma Enterprises. While the solicitation stated that offerors were to submit pictures of the packaging the gloves were expected to be delivered in, the package in and of themselves were not the focus of the

solicitation. The focus of the solicitation was the nitrile examination gloves that met the specifications listed above, which were to be produced by an approved OEM. The contract does not state that intermediate suppliers, much less regional distributors for the OEM are forbidden from being part of the supply chain.

- 11) Accordingly, Noble submitted a quote for gloves produced by several different OEMs, one of which was Mercator, and all of which met the required specifications. The quote, submitted on February 16, 2021 was partially accepted; on April 23, 2021, Noble was awarded a contract for delivery of 25 million gloves which were to meet the same exact nine specifications listed in the solicitation.¹ All gloves were to be delivered by June 10, 2021.
- 12) Prior to the contract being signed, the Contracting Specialist for the contract, Scott Dickey, requested photographs of the OEM's packaging, but at no point stated that the packaging provided had to match for each box delivered. Noble extended the photos to Mr. Dickey at his request, but, as Mr. Dickey is not a Contracting Officer and the emails were in no way discussed as amendments to the actual contract, Noble had no reason to anticipate that the communications with Mr. Dickey could be, much less would be, incorporated into the contract. The contract awarded on April 23, 2021, made no reference to the photographs or email exchange either.
- 13) Noble immediately began delivering the contracted gloves. Unfortunately, and unbeknownst to Noble at the time of bid submission to the VA, Mercator overhauled the trade dress of their nitrile gloves to prevent counterfeiting. In other words, the packaging and product number (which is set by the OEM) changed, but the glove specifications (as required in the

¹ The contract did state it was for the purchase of Mercator mCare nitrile gloves—Section B.3, “Price/Cost Schedule”—but the “Statement of Work” section, Section B.2, contained the exact same nine specifications listed in the solicitation.

solicitation) and manufacturing remained the same. KO Worsham informed Noble that he would be rejecting the gloves because the packaging did not match that of the copy submitted in the quote. Noble immediately explained the purpose for the altered packaging, ensured KO Worsham that the gloves were indeed the same as originally quoted, and then provided KO Worsham with a breakdown of the remaining delivery schedule which would provide all contracted gloves by the required delivery date. A Mercator representative also assured KO Worsham that the gloves were the same as those originally quoted.

14) This did not satisfy KO Worsham. On May 20, 2021, KO Worsham issued a ten-day notice to cure. A mere five days later, on May 25, 2021, KO Worsham erroneously and prematurely terminated Noble for cause. One day later, on May 26, 2021, Atlantic Trading, LLC was issued an award under the same solicitation, for \$9,990,000.00 worth of nitrile gloves. While the notice of award does not provide the number of gloves being contracted for, the total on this contract was \$2,538,000 more than the total quoted by Noble for the full 50 million gloves.

15) In the termination for cause letter, KO Worsham failed to justify why he did not take advantage of the Contracting Officers “wide latitude to exercise business judgement.” KO Worsham also failed to explain how his management of the extraordinary events that delayed this contract upheld his obligation to “[e]nsure that contractors receive fair and equal treatment” in the face of these once in a generation challenges. FAR 1.602-2; FAR 1.602-2(b); FAR 1.102-4(e).² Furthermore, he failed to address why he refused to heed the White

² Under best belief and understanding, KO Worsham has a pattern of treating various contractors in the same disparate fashion. For example, Noble recently learned that where KO Worsham terminated Noble for cause, he (KO Worsham) only terminated for convenience another contractor who found itself in a nearly identical fact pattern as Noble (*i.e.*, unable to deliver the products within the originally contracted timeframe). If true, this would be *direct evidence* of not only bad faith, but unfair and unequal treatment on the part of KO Worsham.

House's advice in OMB Memo M-20-18, which stated that excusable delays that result in adjustments to the contractor's delivery schedule should not negatively impact a contractor's performance ratings. Agencies are encouraged to be as flexible as possible in finding solutions." There can be no greater harm to a contractor's performance ratings than to terminate for cause. This negatively affects every solicitation that Noble has bid on since the termination for cause and intends to bid on in the future, causing Noble to already have incurred, and continue to incur, financial damages.

CAUSE OF ACTION ONE

The Contracting Officer's Termination for Cause was Improper, Unjust, and Oppressive Because it was Not Based on a Material Provision of the Contract

- 16) Noble incorporates by reference the allegations set forth in Paragraphs 1 through 15 of the Complaint.
- 17) At no point did Noble breach the material terms of the contract. The Contract required that the gloves meet the ASTM D6319 standard for nitrile examination gloves for medical application. Noble delivered gloves with the exact same specifications contained in the solicitation, which were quoted by Noble and were produced by the same OEM as the mCare gloves. They merely came in a different trade dress. KO Worsham was made aware of this by both Noble and Mercator representatives. Despite this, KO Worsham still terminated for cause, a whole five days before the notice to cure ended.
- 18) Termination for cause is only proper when the contractor fails to comply with the material terms or conditions of the contract. 48 CFR 52.212-4(m); *see Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 413 (1947) ("an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust"). Because the contract was to provide gloves that fit the necessary standards (even if they weren't in the

boxes from their quote), and Noble was willing, ready, and able to provide gloves that met the requisite standards, Noble's termination for cause was a punishment that was oppressive and unjust.

- 19) In the solicitation bid, Noble offered the mCare gloves from Mercator Medical. This glove complies with the ASTM D6319 standard for use as a medical examination glove. However, unbeknownst to Noble, Mercator changed the trade dress to prevent fraudulent activity from bad actors trying to market other products as meeting their high standards. This was not due to any negligence on Noble's part. Noble had no way of knowing that this occurred when they emailed the packaging to Mr. Dickey, nor did they realize when they did so that KO Worsham would functionally consider this a part of the contract, even though it was never a part of the contract.
- 20) The material term of the contract was that the gloves meet the ASTM D6319 standard and the other eight requirements. Noble requested to deliver a glove with the exact same specifications in order to satisfy their requirements under the contract. While KO Worsham argued that the gloves were not the in the packaging they originally sent in their quote, this was not a material term of the contract. Rather, the material term was that the gloves must meet the "specifications and salient characteristics" listed in Section B.2, "Statement of Work," which they did.
- 21) KO Worsham's unwillingness to accept this glove and subsequent termination for cause was unjust and oppressive and should not be allowed to destroy Noble's reputation as a government contractor. Instead, the termination for cause should be converted to a termination for convenience.

CAUSE OF ACTION TWO

The Government's Failure to Provide Noble Sufficient Time to Cure Renders the Termination for Cause Invalid.

- 22) Noble incorporates by reference the allegations set forth in Paragraphs 1 through 21 of the Complaint.
- 23) Even if the specific gloves that Noble offered in the Solicitation bid were a material term of the contract, the Government does not meet the burden of proving that the termination for cause was valid because they terminated Noble prior to the deadline in the cure notice.
- 24) Contracting officers are required to send a cure notice prior to terminating a contract for a reason other than late delivery. 48 CFR 12.403(c)(1); *see Universal Shelters of America, Inc. v. United States*, 87 Fed. Cl. 127, 144 (2009) (“The FAR requires a contracting officer to send a cure notice to the contractor prior to terminating a [commercial item] contract for reasons other than late delivery.”); *Geo-Marine, Inc. v. General Services Administration*, GSBCA 16247, 05-2 BCA ¶ 33,048, at 163,829 (“Although the commercial item contract termination for cause clause does not mention sending a cure notice, the regulations which apply to commercial item contracts require the Government to send a cure notice before terminating for any reason other than late delivery.”). Although FAR 12.403(c)(1) “do[es] not require a set number of days for the cure period” (unlike the standard Default clause’s ten-day notice requirement), *see Geo-Marine*, 05-2 BCA at 163,829, the regulation makes clear that some cure notice is mandatory prior to termination. *See A-Greater New Jersey Movers*, 06-1 BCA at 164,432 (“The government was required, however, to give the contractor the opportunity to cure this type of a failure.”).

- 25) A contracting officer's failure to provide an opportunity to cure invalidates the termination for cause. *See, e.g., Kisco Co. v. United States*, 610 F.2d 742, 751 (Ct. Cl. 1979); *Bailey Specialized Buildings, Inc. v. United States*, 404 F.2d 355, 363 (Ct. Cl. 1968).
- 26) KO Worsham terminated Noble for cause because he believed Noble was not providing the contractually required gloves. The termination was solely based on KO Worsham's perception of the product's trade dress, and not timely delivery. Accordingly, KO Worsham was required to provide enough time to cure. His failure to do so renders the termination invalid, and it should accordingly be converted to termination for convenience.

CAUSE OF ACTION THREE

The Government's Termination for Cause was Arbitrary and Capricious

- 27) Noble incorporates by reference paragraphs 1 through 27 of the Complaint.
- 28) A KO's decision will be overturned if it is "arbitrary, capricious, or constitutes an abuse of discretion." *Consol. Indus., Inc. v. United States*, 195 F.3d 1341, 1343–44 (Fed.Cir.1999). There are four factors relevant to this determination: "(1) evidence of subjective bad faith on the part of the government official, (2) whether there is a reasonable, contract-related basis for the official's decision, (3) the amount of discretion given to the official, and (4) whether the official violated an applicable statute or regulation." *McDonnell Douglas Corp. v. United States (McDonnell Douglas I)*, 182 F.3d 1319 (Fed.Cir.1999).
- 29) The KO's decision was made in bad faith. Noble was ready and able to deliver the contractually required gloves with all the same specifications from the same manufacturer. Yet, KO Worsham found a non-material issue to pick with Noble, allowing him to terminate for cause and to deliver a contract award the very next day for \$2,538,000 more than the total quoted by Noble for the full 50 million gloves. The KO has an obligation to be fair to each contractor, but in this instance, it was clear that KO Worsham only sought to terminate

because he was upset with Noble pushing back on the OEM's trade dress and he wanted to be done with Noble in order to award to Atlantic Trading, LLC. This is unambiguously in bad faith.

- 30) Second, there is no contractual-related basis for the KO's decision to terminate. As articulated *supra*, the termination was premised on a non-material term or condition in the contract. Noble does not contest that the packaging was different. However, it is concerned over the fact that the packaging in which the gloves were delivered seems to have taken higher priority over the actual contract deliverable: gloves that meet the required specifications. The gloves that Noble delivered were the exact same gloves, from the exact same manufacturer, and the exact same factory. Mercator actually even reached out to KO Worsham to verify this for the VA.
- 31) Finally, it is clear that KO Worsham intended to use his plenary power to terminate Noble for cause thereby enabling him to award the contract to Atlantic Trading, LLC. In order to do so, KO Worsham created arbitrary bases for terminating for cause. Had a particular packaging truly been a requirement, then it should have either been 1) incorporated into the contract or 2) he should have pursued a change under FAR 52.243-4, *Changes*. But, KO Worsham purposefully chose not to pursue this change, as doing so would have resulted in a material change that was out of the scope of the original contract, entitling Noble to renegotiate terms of the Contract. The only logical conclusion is that KO Worsham did not want to pursue making a change to the Contract using the FAR 52.243-4, *Changes* option because it would have been a material change that was out of the scope of the original contract, entitling Noble to renegotiate terms of the Contract. This is a clear abuse of discretion taken without observance to the procedure required by law.

- 32) The KO has clearly acted arbitrarily and capriciously, based on the evidence of (1) subjective bad faith on the part of the KO by creating extra-contractual requirements and then terminating for cause to deliver a contract award to another contractor just one day later, (2) the lack of a reasonable, contract-related bases for the KO's decision, (3) the unparalleled amount of discretion given to the KO related to the Contract and his willingness to abuse this discretion, and (4) the KO's unwillingness to follow well-established procedure by using FAR 52.243-4, *Changes*, to clarify that the packaging was a material term of the contract.
- 33) Accordingly, the termination for cause was arbitrary and capricious and Noble is entitled to conversion to termination for convenience, damages, and lost profits.

CAUSE OF ACTION FOUR

The Government Breached its Implied Duty of Good Faith and Fair Dealing and Duty to Cooperate

- 34) Noble incorporates by reference the allegations set forth in Paragraphs 1 through 33 of the Complaint.
- 35) Implied in every contract with the Government is a duty of good faith and fair dealing and duty to cooperate in performance and enforcement. The KO in this instance did not operate in this contract based on that duty of good faith and fair dealing and duty to cooperate. Instead, KO Worsham terminated for cause solely to provide Atlantic Trading, LLC with the contract one day later.
- 36) "[I]mplied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 828 (Fed. Cir. 2010). "The implied duty of good faith and fair dealing is limited by the original bargain: it prevents a party's acts or omissions that, though not proscribed by the contract expressly, are

inconsistent with the contract's purpose and deprive the other party of the contemplated value.” *Metcalf Const. Co., Inc. v. United States*, 742 F.3d 984, (Fed. Cir. 2014).

- 37) The Government breached its implied duty of good faith and fair dealing and duty to cooperate when the KO directed Noble to comply with a requirement that was not material to the contract, and then terminated Noble for cause when it supposedly failed to comply with this nonbinding requirement. Where Noble was willing to fulfill its agreed upon terms of the contract, Defendant was not.
- 38) Noble contracted with Defendant to provide gloves that complied with the ASTM D6319 standard. Noble intended to procure the products through an Authorized Dealer: Sante Group. Understanding that the purpose of the order was to procure gloves that met the ASTM D6319 standard, Noble procured the gloves that they originally offered. Unbeknownst to them, and through no fault of Noble’s, Mercator changed the trade dress of the gloves.
- 39) Rather than working with Noble to meet the best interest of the Government (the purchase of nitrile gloves to meet the excess need created by the COVID-19 pandemic), the KO then terminated for cause. When Noble made it clear it could not deliver the particular packaging, Defendant changed the terms of the contract. No longer was it acceptable for Noble to deliver the gloves that met the ASTM D6319 standard and the other eight requirements, was from the same manufacturer, and made in the same factory; it now had to be in the quoted packaging, even though they knew Noble could not feasibly acquire gloves that way. The creation of this requirement that was not part of either the Solicitation or the Contract Order—which appears to have been created for the sole purpose of terminating Noble for cause only to issue a contract to another contractor at a substantially higher price the very next day—is the very definition of a breach in good faith and fair dealing.

40) “The remedy for breach of contract is damages sufficient to place the injured party in as good a position as it would have been had the breaching party fully performed.” *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1373 (Fed. Cir. 2005). Noble incurred significant costs attempting to deliver the agreed upon products, and then substantial costs following the termination, to include preclusion from other contracts due to their loss in reputation and diminished status as a contractor that has now been terminated for cause. As such, the Court should find Defendant liable to Noble for all damages incurred by Noble as a result of the breach.

REQUESTED RELIEF

Wherefore, Noble respectfully requests that the Court of Federal Claims find that the termination for cause was erroneously issued and order the termination rescinded, with an appropriate equitable adjustment. Alternatively, that this Court: (1) Convert the Termination for Cause to a Termination for Convenience; (2) Direct Defendant to provide Noble a termination settlement accounting for appropriate costs and profit; and (3) Award all appropriate relief, damages and costs, plus applicable interest and attorneys’ fees, as well as such other and further relief the Court of Federal Claims may find just and proper.

Respectfully submitted,

Dated: June 10, 2021

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