Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR SUMMARY RELIEF DENIED: August 17, 2005

GSBCA 16247

GEO-MARINE, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Paul W. Searles, Sharon N. Freytag, Holly L. Clarke, and Kendyl H. Darby of Haynes and Boone, LLP, Dallas, TX, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **NEILL**, and **DeGRAFF**.

DeGRAFF, Board Judge.

Pending is appellant's motion for summary relief. Because there are material facts in dispute and appellant has not persuaded us it is entitled to relief as a matter of law, we deny the motion.

Background[1]

On October 27, 1998, the General Services Administration (GSA) issued a solicitation for environmental advisory services. The contract to be awarded was a nonmandatory, indefinite quantity, multiple award Federal Supply Schedule contract for commercial items. In order to purchase the supplies or services covered by the contract, Federal agencies would issue delivery orders or task orders to one of the contractors. Exhibit 1001 at 1, 2, 16, 17, 43. Geo-Marine, Inc. responded to the solicitation and on August 27, 1999, GSA awarded it contract number GS-10F-0207J. The contract period ran from August 27, 1999, through August 26, 2004. Exhibits 1004, 1005, 1006.

The contract contained the following provision:

> 52.212-4 Contract Terms and Conditions – Commercial Items
>
> . . . .
>
> (m) Termination for cause. 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 assurance of future performance.

Exhibit 1001 at 10.

On October 7, 1999, GSA's Federal Technology Service's Federal Systems Integration and Management Contracting Center placed order number T0000AJ3022 under the contract. Exhibit 3. Although both parties referred to the order in their statements of uncontested facts, neither provided more than a brief description of it. To better understand the parties' positions, we reviewed the order, including its statement of work.

According to the order's statement of work, although GSA placed the order, the client agency was the United States Air Force. The Air Force experiences over 500 bird strikes each year during low-level and range operations, and these strikes cost the Air Force in excess of $20 million.[2] In the 1980s, the Air Force formed a team whose mission was to

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[1] All citations are to exhibits contained in the appeal file.

[2] In its proposal, Geo-Marine said the Air Force experiences 3,000 bird strikes each year at a cost of $45 million plus several lives. Exhibit 1004 at 224. The difference

reduce the potential for bird strikes, and the team developed the Bird Avoidance Model (BAM). The Air Force also funded an investigation into using the Next Generation Radar (NEXRAD) network as a source of producing near real time hazard advisories, and the final report on this project was completed in 1995. In the autumn of 1998, the Air Force conducted a demonstration project to assess the technical capabilities of NEXRAD to identify potentially hazardous concentrations of birds moving in the northeast corridor of the United States. The demonstration project's system, the Avian Hazard Advisory System (AHAS), produced near real time advisories and forecasts by processing radar data and weather data, and then archived the data for integration into the BAM. The work required by the statement of work was to continue the operation of the AHAS in the northeast corridor, and to expand the geographic coverage of the AHAS to cover the entire continental United States, divided into six regions. In addition, the work included predicting potentially hazardous raptor activity by correlating daily forecast weather data with data from the BAM, continuing to develop and test weather suppression algorithms, and developing a bird hazard advisory format that would be integrated into military flight operations. Exhibit 3.

The order's statement of work set out nine tasks Geo-Marine was to perform. Among other things, Geo-Marine was required to install, configure, and test hardware and software; to develop and test bird hazard warning procedures; to train people to use the AHAS; to process NEXRAD data for bird hazard advisories and weather data for raptor hazard advisors, to compile and disseminate bird hazard advisories according to established format and procedures, to maintain backup files of all advisories, and to prepare files for integration with the BAM; and to archive NEXRAD data and associated data files and export it to the BAM. Exhibit 3.

In June 2003, several Geo-Marine employees left the company. Most of them tendered their resignations in early June and gave Geo-Marine several weeks' notice of their intent to resign. Among these employees were Ronald Merritt, the office manager in Panama City, Florida, where the AHAS project staff was located; T. Adam Kelly, the project manager for the AHAS project; and Ronald White and Mark Howera, who maintained the AHAS system. Mr. Kelly and Mr. Merritt had been negotiating with Geo-Marine to purchase the AHAS operation. Geo-Marine, however, sued Mr. Kelly and Mr. Merritt and alleged they were trying to steal the AHAS from Geo-Marine. This prompted Mr. Kelly, Mr. Merritt, Mr. White, and Mr. Howera to leave Geo-Marine sooner than they had anticipated when they tendered their resignations. Exhibits 22; 1101; 1223 at 128-29, 219, 325-26; 1224 at 341,

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between the information contained in the statement of work and the information contained in the proposal does not constitute a genuine dispute as to a material fact.

346, 348, 526-27; 1227; 1297 at 12, 14, 34-37, 40-41; 1295 at 45-46; 1298 at 18-22, 25-26, 34.

The GSA contracting officer's representative, Nancy Self, learned of these resignations on June 25, 2003, from the Air Force. Exhibit 1227. On June 27, Ms. Self spoke with Geo-Marine's vice president and confirmed their conversation in an e-mail message:

> This letter is in reference to our conversation today, June 27, 2003, regarding Task Order T0000AJ3022, the Avian Hazard Advisory System (AHAS).
>
> AHAS is a critical advisory system that alerts pilots to hazardous bird concentrations. It is essential to the safety of US Air Force and civilian pilots that the AHAS continue to operate on a near real time, 24 x 7 basis, and that the advisories provided by the AHAS are accurate and timely. This Task order allows for the operation as well as maintenance of the system, database, and web site to include archiving and analyzing the data collected.
>
> GSA and our Air Force client are concerned with the events that took place this morning in which the Geo Marine technical staff assigned to the AHAS project resigned. The safety of our Air Force pilots is our foremost objective and the Government's position is that continual AHAS operation is a critical element in ensuring aviation safety.
>
> Immediate action is necessary to ensure that the system continues to operate. During the referenced phone call, you stated that Geo Marine has employees that could continue to operate the AHAS, but were not able to continue operations as the previous employees had not provided the system password.
>
> I will work with the Air Force client to obtain the password. What other resources/elements are required to ensure AHAS continues to operate without disruption? What action is Geo Marine taking to mitigate this serious situation?
>
> Thank you for your immediate attention to this matter.

Exhibit 1101. Ms. Self obtained the password and sent it to Geo-Marine on the morning of June 28. Exhibit 1102.

On June 30, Geo-Marine's vice president sent the following e-mail message to Ms. Self:

> I have some good news.
> [Geo-Marine] has come to an agreement with the employees who walked off the job last week. They have agreed to return to work tonight and get the system up and running as well as to help [Geo-Marine] maintain the system. I am not sure when it will be fully operational but I will let you know as soon as I know.

Exhibit 1103. Geo-Marine included this e-mail message in its statement of uncontested facts. Appellant's Amended Statement of Uncontested Facts at 4.

Although the fact that the June 30 e-mail message was sent is not contested, the statements contained in the message are placed in context and to some extent contradicted by information contained in another exhibit, which says the following: Early in the evening of June 29, the AHAS stopped providing advisories for two regions. On the morning of June 30, Ms. Self attempted to reach Geo-Marine in Panama City, Florida. She also left a message for Geo-Marine's vice president, telling her two regions were down. She called and spoke with Geo-Marine's president in the early afternoon, and he said the system was up and running. Later that day, Ms. Self spoke with Geo-Marine's vice president, who said only two regions were down. However, Ms. Self had discovered all six regions had failed; in addition to the two that had been down since June 29, the other four had been down since 9:00 in the morning on June 30. Mr. White returned to the Geo-Marine facility and restored the system at approximately 9:00 p.m. on June 30. On July 2, Ms. Self learned Mr. White had not agreed to return to work for Geo-Marine. He had returned to Geo-Marine on the evening of June 30 to bring the system back on line at the request of Mr. Kelly, and as a courtesy to the Air Force and for the safety of its pilots. Mr. Kelly and Mr. Merritt were attempting to settle the suit Geo-Marine had filed against them, and they thought it would further their cause if they helped bring the system back on line. Because neither of them was experienced in day-to-day operation of the system, they asked Mr. White to restore the system. Neither Mr. Merritt, Mr. Kelly, Mr. White, nor Mr. Howera had agreed to return to work for Geo-Marine. Ms. Self called Geo-Marine's vice president to obtain a "clarification" of the former employees' role and to find out who was in charge of the system. Exhibit 1227.

On July 7, Geo-Marine's vice president sent the following e-mail message to Ms. Self:

> [Geo-Marine] has maintained and kept the AHAS operational. The former [Geo-Marine] employees have provided minimal support necessary to keep AHAS operational. Today (Mon, July 7) and tomorrow (Tues) two of the

> former employees are to spend most of each day with current [Geo-Marine] employees to provide more detailed instructions about the system and its maintenance and operation. I will let you know if there are any further developments.

Exhibit 1113. On July 10, Geo-Marine's vice president sent another e-mail to Ms. Self:

> Adam Kelly has agreed to come work for [Geo-Marine] to teach other [Geo-Marine] employees how to run and maintain the AHAS system. Two other former employees have also agreed to work for [Geo-Marine] to assist with monitoring the system.

Exhibit 1141. Geo-Marine included these two e-mail messages in its statement of uncontested facts. Appellant's Amended Statement of Uncontested Facts at 4.

Although the fact that the July 7 and 10 e-mail messages were sent is not contested, the statements contained in the messages are placed in context and to some extent contradicted by information contained in another exhibit, which says the following: On July 3, a Geo-Marine employee told Ms. Self that Geo-Marine had hired a clerk to check the Internet every couple of hours to see if the AHAS was running. If a problem occurred, Geo-Marine intended to call Mr. Merritt, who might or might not be able to persuade Mr. White or Mr. Howera to fix the problem. No one was checking the servers to monitor the programs which were updated every twelve hours. No one was validating the data from the radar or weather sites. The Air Force could not obtain information from Geo-Marine which it needed to investigate bird strikes. On July 8, Ms. Self spoke with Mr. Howera and learned he was not working for Geo-Marine and did not know of anyone who had worked on the AHAS who was working for Geo-Marine. Exhibit 1227.

In addition, the statements made in the July 7 and 10 e-mail messages are placed in context and contradicted to some extent by information contained in exhibits which say the following: On July 9, Mr. White notified Ms. Self that two AHAS regions had gone down early in the evening on July 7, and so far as he knew, no one had been contacted about restoring the regions. Ms. Self sent an e-mail to Geo-Marine's vice president early on the morning of July 10, stating the AHAS web site was almost completely down and to tell her two regions had been down since July 7. Early on the afternoon of July 10, Mr. Kelly told Ms. Self he had agreed to work as a consultant to Geo-Marine for thirty days beginning on July 14, in exchange for Geo-Marine dropping the suit against him and Mr. Merritt, as well as legal actions against Mr. Howera and Mr. White. He was to train Geo-Marine employees, to the best of his knowledge, to use Geo-Marine's systems. Because Mr. Kelly had not been able to restore the AHAS a few days earlier, Ms. Self asked him exactly how much he knew

about the AHAS. He said he was a major designer of the system, but did not know how to perform the hands on, day-to-day work critical to operating the system. When Ms. Self asked him how he could train employees, he said he had agreed to perform to the best of his ability and would tell Geo-Marine who could provide information regarding the actual operation of the AHAS. Mr. Howera went to Geo-Marine on the evening of July 10 and restored the two AHAS regions that were not on line. As of July 10, neither Mr. Merritt, Mr. Howera, nor Mr. White had agreed to return to work for Geo-Marine. Although Mr. Kelly began work as a consultant to Geo-Marine on July 14, he left after less than one week due to a family emergency. Ms. Self learned of this development from Mr. Howera, not Geo-Marine. Exhibits 1227, 1136, 1295 at 117, 1298 at 53-54, 112-13.

On July 15, Ms. Self learned Mr. White and Mr. Howera had declined an invitation to work as consultants to Geo-Marine. Exhibits 26, 27, 1227. On July 16, the contracting officer considered whether to terminate Geo-Marine's performance based upon its nonperformance of some of the work required by the task order. On July 17, the contracting officer decided Ms. Self would visit the Panama City facility and evaluate the AHAS operations to determine if tasks were being completed in a thorough and timely manner. If they were not, the contracting officer would terminate the task order without issuing a cure notice because AHAS regions were going down and critical advisory information was not available to aircrews, because Geo-Marine could not provide critical data to investigation boards, and because critical data was being lost daily as the system was not being maintained. Exhibit 1227.

On July 22, Ms. Self and an Air Force representative visited Geo-Marine's facility in Panama City. They met with Geo-Marine employees and determined Geo-Marine was not operating and maintaining the AHAS in accordance with the terms of the task order. More specifically, Ms. Self concluded the monitoring of the system was random and incomplete. Regions were going down and accurate advisories were not available to pilots. The advisories were based upon historical data rather than on near real time data. Troubleshooting for the web site was limited to rebooting the system instead of determining the source of the problem. Data was not being archived and backups were not being produced and, as a result, valuable data had been lost and would continue to be lost. The database was not being updated to incorporate the most recent data from the BAM, and data was not being exported to the BAM to improve the model's data. Technical assistance needed in connection with investigations was not being provided. Exhibits 30, 1227.

On July 23, the contracting officer terminated Geo-Marine's performance of the task order. The termination notice said the termination was for default pursuant to Federal Acquisition Regulation (FAR) 52.249-8, and was based upon Geo-Marine's failure to adequately monitor the AHAS, to take appropriate action to immediately rectify problems

with the web site, to archive data, to export files to the BAM, to incorporate the latest version of the BAM, to incorporate a new instrument route, and to provide technical assistance and information to support investigations.[3] Exhibit 1201.

Discussion

When considering a motion for summary relief, we review affidavits, declarations, documents, and appeal file exhibits relied upon by the parties in supporting and opposing the motion. Board Rule 108. We do not weigh evidence in order to determine the truth of the matter. Rather, we examine evidence in order to determine whether there are factual issues in dispute. Summary relief is appropriate when there are no genuine issues of material fact in dispute and when the moving party is entitled to relief as a matter of law. A fact is material if it will affect our decision. An issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing. Summary relief will be granted if the movant demonstrates there is an absence of evidence to support an essential element of the non-movant's claim or defense. Although the non-movant is entitled to the benefit of the doubt as to the facts, it cannot rest its opposition upon allegations, conclusions, and denials contained in its pleadings. If the moving party demonstrates the absence of a genuine issue as to any material fact, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue as to a material fact to be resolved at a hearing. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986).

Geo-Marine argues the termination for cause should be converted to a termination for convenience because GSA did not send Geo-Marine a cure notice before terminating Geo-Marine's performance of the task order. GSA says it did not send a cure notice because it was not required to do so.

In order to evaluate the parties' positions, we looked at precedent which applies to standard supply and service contracts, because the termination for default clause contained in such contracts is similar to the termination for cause clause included in this commercial item contract. *Integrated Systems Group, Inc. v. Social Security Administration*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848 (same rules apply because a termination for cause is

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[3] Although the Contracting Officer's termination notice said the task order was terminated for default pursuant to FAR 52.249-8, this clause was not a part of the contract between GSA and Geo-Marine. The contract contained the termination for cause clause set out above. Geo-Marine does not contend the notice's mistake invalidates the termination notice.

equivalent to a termination for default). The termination for default clause permits the Government to terminate a contractor's performance of all or part of a contract if the contractor fails to deliver or perform on time, fails to make progress so as to endanger performance, or fails to perform any other provisions of the contract. The clause requires the Government to send a cure notice at least ten days before terminating for default, unless the default is a failure to deliver or perform on time. The clause has contained these provisions for many years. 48 CFR 52.249-8 (2004). The commercial item contract termination for cause clause, set out above in the background section of this opinion, permits the Government to terminate a contractor's performance of all or part of a contract in the event of any default, 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. 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. The regulations do not require a set number of days for the cure period.[4] 48 CFR 12.403(c).

We found two areas of precedent useful in resolving the pending motion. First, we looked at decisions which address the provision contained in the termination for default clause which says the Government is not required to send a cure notice before it terminates performance of a contract or a part of a contract if the contractor fails to perform when the time for performance arrives. Second, we examined decisions which address the common law principle that no cure notice is needed if the contractor repudiates its contractual obligations before the time for performance arrives.

After considering the precedent and the facts set out above, we deny Geo-Marine's motion for summary relief. Geo-Marine has not established, based upon undisputed material facts and as a matter of law, that GSA was required to send a cure notice before it terminated performance of the task order for cause.

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[4] In resolving this motion, we reject GSA's argument that no cure notice was needed because it terminated a task order and not the underlying schedule contract. The provisions of the termination for cause clause apply to terminations of all or part of a contract, and according to the definitions applicable to this contract, the task order was part of the contract. 48 CFR 2.101 (1998).

Failure to perform when the time for performance arrives

Each time a services contractor fails to supply the service required by the contract at the time and in the manner required, the contractor is in default of its contractual obligations. However, a contractor who supplies services to the Government is not required to achieve perfection, and the Government can terminate for default only when the contract has not been substantially performed. *Reliable Maintenance Services*, ASBCA 10487, 66-1 BCA ¶ 5331, *recon. den*., 67-1 BCA ¶ 6194.

In cases which involved terminations for default, whether a contractor had achieved substantial completion was held to depend not only upon the quantity and nature of the defaults, but also upon the nature of the services to be provided. For example, in *Atlantic Terminal Company*, ASBCA 13269, 69-2 BCA ¶ 7852, the contractor was supposed to provide railroad services, which consisted of hauling freight cars between an interchange point and a terminal, and moving cars to where they were required within the terminal. The terminal was used to receive and ship ammunition and explosives, and the safety of the personnel within the terminal depended in part upon the contractor's satisfactory performance. After less than one month of untimely and unsatisfactory performance, the Government terminated the contractor's performance. The board decided because of the type of services required and the critical need to perform the services in a timely manner, the Government was not required to send a cure notice before terminating the contractor's performance.

In *Sentry Corp*., ASBCA 29308, 84-3 BCA ¶ 17,601, the contractor was required to provide guard services at a military range where the Government was conducting tests and storing related instruments, equipment, explosives, and classified materials. After performing well for several months, the contractor failed to provide guards for the nights of January 18 and 19, and part of January 20 - 22, 1984. Services were provided on January 23 until the contract was terminated for default on January 25, 1984. The board held no cure notice was needed before terminating the performance of the contractor. In *Pulley Ambulance*, VABCA 1954, 84-3 BCA ¶ 17,655, the contractor was required to transport patients to and from hospitals, nursing homes, and other locations upon the basis of orders issued by the Government. Between April and July 1983, the contractor made approximately 400 trips. Four times in this period, the contractor failed to perform within the time specified, and four other times, it failed to perform the services at all. In addition, during this time the quality of the contractor's performance was occasionally below that specified in the contract: it had only one ambulance operational instead of the two ambulances required by the contract, and not all of its personnel met the qualifications set out in the contract. The board decided the agency did not have to send a cure notice before terminating the contractor's performance for default. The same result was reached in *Building Maintenance*

Specialist, Inc., ASBCA 25552, 85-3 BCA ¶ 18,300, where the contractor was required to provide lifeguard services. When it did not provide the services for a little more than two days, the Government terminated its performance without first issuing a cure notice.

Like the termination for default clause contained in the contracts which were the subject of the decisions discussed above, the regulations governing terminations for cause did not require GSA to provide Geo-Marine with a cure notice if Geo-Marine failed to perform when the time for performance arrived. 48 CFR 12.403(c). Although Geo-Marine's performance was not required to be perfect, whether it achieved substantial completion depends not only upon the quantity and nature of its defaults, but also upon the nature of the services required. In order to examine the quantity and nature of any defaults by Geo-Marine, as well as the nature of the services it was supposed to provide, we will not weigh competing evidence in order to find facts. Rather, we will examine the evidence in order to determine whether Geo-Marine's motion for summary relief is supported by material facts as to which there is no material dispute.

Geo-Marine did not put forward facts to establish the nature of the services it was supposed to provide under the task order. A review of the task order's statement of work showed Geo-Marine was required to process data for bird hazard advisories and to compile and disseminate advisories according to established format and procedures. In addition, the task order's statement of work required Geo-Marine to maintain backup files of all advisories and to prepare files for integration with the BAM. Also, Geo-Marine was required to archive NEXRAD data and associated data files and export them to the BAM. The task order described the AHAS as a near real time system, and the facts put forward by GSA in response to Geo-Marine's motion show the AHAS was supposed to operate on a near real time basis, twenty-four hours every day, so as to provide accurate and timely advisories to pilots.

Geo-Marine's statement of uncontested facts regarding the quality and nature of its defaults is incomplete and at odds with information contained in exhibits cited by the parties. The exhibits show that early in the evening of June 29, the AHAS stopped providing advisories for two regions of the country. On the morning of June 30, the AHAS stopped providing advisories for the remaining four regions of the country. GSA informed Geo-Marine the system was down. One of Geo-Marine's former employees, not Geo-Marine, restored the system on the evening of June 30, at the request of another former employee and as a courtesy to the Air Force and for the safety of its pilots. On the evening of July 7, the AHAS again stopped providing advisories for two regions. Again, GSA informed Geo-Marine the system was down. A former Geo-Marine employee, not Geo-Marine, restored the system on the evening of July 10. When GSA's Ms. Self visited Geo-Marine's facility on July 22, she concluded system monitoring was random and incomplete, advisories were

based upon historical data instead of real time data, and accurate advisories were not available to pilots. She also concluded data was not being archived and backups were not being produced. Data had been lost and would continue to be lost. The database was not being updated to incorporate the most recent data from the BAM and data files were not being exported to the BAM.

Geo-Marine has not established, based upon uncontroverted facts and as a matter of law, that its performance amounted to substantial compliance with the terms of the contract, taking into account the quantity and nature of the defaults and the nature of the services required. Thus, Geo-Marine has not established that GSA was required to send a cure notice before terminating Geo-Marine's performance of the task order for cause, and has not established it is entitled to summary relief.

Repudiation before the time for performance arrives

At common law, the repudiation of a contract before the time for performance arrives constitutes a complete breach of contract and gives the non-breaching party the right to act to protect its interests. This concept applies to Government contracts, just as it does to contracts between private parties. *Kennedy v. United States*, 164 Ct. Cl. 507 (1964). Decisions applying the default termination clause hold if a contractor repudiates the contract before the time for performance arrives, the Government can terminate a contractor's performance without sending a cure notice because sending such a notice would constitute a useless, futile act. *Polyurethane Products Corp.*, ASBCA 42251, 96-1 BCA ¶ 28,154 (citing cases); *Therm-Air Manufacturing Co.*, NASA BCA 1280-21, 82-2 BCA ¶ 15,881. In *Integrated Systems Group, Inc. v. Social Security Administration*, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848, we held no cure notice was necessary before terminating a contractor's performance for cause based upon an anticipatory repudiation by the contractor.

An anticipatory repudiation is found when one party to a contract receives clear and unmistakable evidence of the other party's intent not to perform. Such evidence can be found when one contracting party learns of words or actions of the other party which show it will not or cannot perform as required. *Kennedy; Therm-Air Manufacturing*. If a contractor makes an assignment for the benefit of its creditors, inexcusably abandons performance, or removes equipment needed to perform, such actions are evidence of an anticipatory repudiation even if unaccompanied by words, because such affirmative acts by a contractor leave it unable or apparently unable to perform. *Pennsylvania Exchange Bank v. United States*, 145 Ct. Cl. 216 (1959); *James B. Beard*, ASBCA 42677, 93-3 BCA ¶ 25,976, *aff'd*, *Beard v. Shannon*, 11 F.3d 1070 (Fed. Cir. 1993)(table), *cert. den.*, *Beard v. West*, 511 U.S. 1018 (1994); *Protective Coatings Co.*, ENGBCA 3205, 72-1 BCA ¶ 9431; Restatement (Second) of Contracts § 250 (1981). If a contractor can overcome a current

inability to perform and says it is willing to do so, there is no anticipatory repudiation. *Scott Aviation*, ASBCA 40776, 91-3 BCA ¶ 24,123. However, an "unsupported declaration of good intentions" does not overcome hard evidence of an inability to perform. *Hampton Business Forms, Inc.*, GSBCA 4026, 75-2 BCA ¶ 11,532 at 55,034.

GSA says no cure notice was needed before terminating Geo-Marine's contract for cause because all of the employees who knew how to operate and maintain the AHAS had left Geo-Marine, and Geo-Marine's legal actions discouraged the employees from returning. GSA says no one remained who could operate and maintain the system.

Geo-Marine asserts it had personnel capable of operating the AHAS. It names one employee who billed time to the AHAS contract, points out it had hired a temporary clerk to monitor the system, says it was in the process of advertising for new employees, and also says it had many employees located at other Geo-Marine offices. Geo-Marine says it never manifested an intent not to perform the work required by the task order, and contends GSA cannot rely upon Geo-Marine's loss of employees as a basis for termination when Geo-Marine repeatedly provided GSA with assurances it would continue to perform.

Both parties accept that the presence or absence of Geo-Marine employees who were capable of operating and maintaining the AHAS is a material fact. This might very well be the case.[5] If so, it is a material fact as to which there is a genuine dispute, and the dispute is not resolved by Geo-Marine's assurances of continued performance. GSA created a genuine dispute as to whether Geo-Marine had any employees who could operate and maintain the AHAS by putting forward facts showing Geo-Marine employees who knew how to operate and maintain the system resigned due to Geo-Marine's actions, Geo-Marine employees did not appear to realize the AHAS was not functioning until notified by GSA of problems, Geo-Marine employees had not been able to restore the system when it failed, and no one at Geo-Marine was performing many of the tasks required by the task order. The dispute is not resolved by Geo-Marine's e-mail assurances of continued performance because there is a genuine dispute as to whether the content of the assurances was accurate.

Geo-Marine has not established, based upon uncontroverted facts and as a matter of law, that its actions amounted to something other than an anticipatory repudiation of the

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[5] *See Fairfield Scientific Corp.*, ASBCA 21151, 78-2 BCA ¶ 13,429, in which the board explained that if the Government had known when it terminated the contractor's performance that the contractor no longer had the technical and production personnel to perform, this fact alone might have been sufficient to establish an unequivocal manifestation of an intent not to perform.

contract. Thus, Geo-Marine has not established that GSA was required to send a cure notice before terminating Geo-Marine's performance of the task order for cause, and has not established it is entitled to summary relief.

Decision

Although GSA will eventually have to bear the burden of establishing the termination for cause was proper, Geo-Marine currently has the burden of establishing it is entitled to summary relief. Because it did not carry this burden, its motion for summary relief is denied.

MARTHA H. DeGRAFF
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

EDWIN B. NEILL
Board Judge