

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Primex Technologies) ASBCA No. 52000
)
Under Contract No. DAAA09-94-C-0337)

APPEARANCE FOR THE APPELLANT: Donald J. Kinlin, Esq.
Thompson, Hine & Flory, LLP
Dayton, OH

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ David Newsome, Jr., JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This appeal arises from a contracting officer's final decision denying appellant's claim for the increased costs of processing defective ammunition provided by the Government. The Government has moved for summary judgment, arguing that it is shielded from liability for any increased costs by the contract clause designated FAR 52.245-19 GOVERNMENT PROPERTY FURNISHED "AS IS" (APR 1984). We deny the motion.

STATEMENT OF FACTS

1. The Army Material Command, Procurement Directorate, Rock Island, Illinois, awarded Contract No. DAAA09-94-C-0337 to Olin Corporation, Olin Ordnance Division (Olin) on 19 May 1994 for the demilitarization of 148,233 rounds of HE projectiles and cartridges at a firm fixed price of \$2,489,091 (R4, tabs 1, 11). The contractor's effort involved the breakdown and disassembly of the ammunition for reuse and resource recovery. The contract incorporated by reference FAR 52.233-1 DISPUTES (DEC 1991) (R4, tab 1 at 21).

2. The contract incorporated by reference FAR 52.245-19 GOVERNMENT PROPERTY FURNISHED "AS IS" (APR 1984) which provided, in pertinent part:

(a) The Government makes no warranty whatsoever with respect to Government property furnished "as is," except that the property is in the same condition when placed at the f.o.b. point specified in the solicitation as when inspected by the Contractor pursuant to the solicitation or, if not inspected by

the Contractor, as when last available for inspection under the solicitation.

(b) The Contractor may repair any property made available on an “as is” basis. . . .

. . . .

(d) Except as otherwise provided in this clause, Government property furnished “as is” shall be governed by the Government Property clause of this contract.

(R4, tab 1 at 22)

3. The contract’s Statement of Work provided, in pertinent part:

4.0 EXECUTION

4.1 Government Responsibilities

. . . .

4.1.2 Government Furnished Material (GFM) - The quantity, type of ammunition and method of transportation is negotiable. Initial delivery shall be ninety (90) days after date of contract award. Total quantity of ammunition provided to contractor’s facility is approximately 5487 short tons.

(R4, tab 1 at Section C)

4. On 14 April 1997, the contract was novated to appellant Primex Technologies, which had been the Olin Ordnance Division (complaint at ¶ 31; answer at ¶ 78).

5. By letter dated 30 June 1998, appellant submitted to the Government a certified claim for \$848,296 based on defective Government-furnished material (GFM) and Government failure to provide technical data (R4, tab 48). In its claim, appellant alleged that a significant proportion of the projectiles provided by the Government for demilitarization contained low levels of wax content in the explosive contained in the projectiles, resulting in excessive hardness, which increased appellant’s costs of processing the ammunition. Appellant alleged that the projectiles were defective because they contained explosive material which did not comply with specification MIL-C-440 (AR) at the time of acceptance of the projectiles by the Government. (*Id.* at 6) In its motion, the Government stated, “for the purposes of this motion we will accept as true Appellant’s contention that 105mm and 106mm ammunition provided to it as GFE [sic] for demilitarization was defective” (Gov’t. mot. at 6).

6. By letter dated 16 November 1998, the contracting officer issued a final decision denying appellant's claim in its entirety (R4, tab 51). Appellant filed this timely appeal.

DISCUSSION

A motion for summary judgment is properly granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

In its motion, the Government argues that, even if the Government-furnished ammunition was defective, FAR 52.245-19 shields the Government from liability for any increased costs associated with appellant's demilitarization of the ammunition. In its opposition to the motion, appellant argues that FAR 52.245-19 does not apply to the ammunition provided by the Government under the contract.

Incorporation of FAR 52.245-19 in the contract, without more, does not establish that the clause applies to the ammunition provided under this contract so as to shield the Government from liability for appellant's alleged increased costs due to the defective ammunition. The two cases cited by the Government in support of its argument that FAR 52.245-19 precludes Government liability for allegedly defective Government-furnished property do not support the Government's interpretation of the contract. In *American Wyott Corp.*, ASBCA No. 42024, 94-2 BCA ¶ 26,758, the Board held that the Government was not liable for the cost of repairs to Government-owned tools provided under the contract. In addition to incorporating FAR 52.245-19, that contract also contained a clause which explicitly stated that the tooling at issue would "be furnished 'as is' in accordance with the clause in FAR 52.245-19, Government Property Furnished 'As Is.'" *Id.* at 133,108. In *McDonnell Douglas Corp.*, ASBCA No. 46266, 99-1 BCA ¶ 30,152, the contract contained a clause which provided that the aircraft to be delivered by the Government under the contract were to be delivered "as is." During contract performance, the parties executed a modification incorporating FAR 52.245-19 into the contract to define the term "as is." The Board relied on FAR 52.245-19 to limit the Government's liability for damaged items. *See L.T. Industries, Inc.*, ASBCA No. 12832, 69-1 BCA ¶ 7534 (contractor held not entitled to reimbursement for repair of tooling that was offered "as is"). In these cases the contract specifically and unambiguously provided that the property in issue was furnished "as is." The Government points to no such provision in this contract.

In this appeal the contract contained no clause specifying that the ammunition to be delivered by the Government was to be delivered "as is." We can find no evidence in the contract, or elsewhere in the record, that the parties ever contemplated that the GFM was to be provided "as is." We conclude that FAR 52.245-19 does not apply, and the Government cannot prevail as a matter of law.

Accordingly, the Government's motion is denied.

Dated: 21 December 2000

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
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 No. 52000, Appeal of Primex Technologies, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals