

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Conley Frog/Switch & Forge Co. ) ASBCA No. 53288  
)  
Under Contract No. 2Z708L )

APPEARANCE FOR THE APPELLANT: Mr. Edward M. Lyons  
President

APPEARANCES FOR THE GOVERNMENT: Thomas B. Dorrier, Esq.  
Associate General Counsel  
Phillip T. Staub, Esq.  
Assistant General Counsel  
Washington Metropolitan Area  
Transit Authority  
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE PAGE

In its memorandum of conference and order dated 5 November 2001, the Board raised *sua sponte* the issue of whether the counterclaim filed by Washington Metropolitan Area Transit Authority (WMATA) with its answer had been the subject of a valid, final decision by the contracting officer (CO). WMATA filed its brief on whether the Board has jurisdiction over respondent's counterclaim on 7 December 2001.

On 12 April 1996, WMATA awarded Contract No. 2Z708L to Conley Frog/Switch & Forge Co. (Conley) in the amount of \$844,232. The contract required Conley to furnish special trackwork, consisting of five fixed-price line items: (1) No. 8 Guarded Double Crossover, Direct Fixation, 36' -10" Track Centers; (2) No. 10 Double Crossover, Direct Fixation, 38' -3" Track Centers; (3) No. 10 Double Crossover, Direct Fixation, 36' -10" Track Centers; (4) No. 10 Left-Hand Single Crossover, Ballasted 14' -0" Track Centers; and (5) No. 10 Right-Hand Single Crossover, Ballasted 14' -0" Track Centers. Special provision 1. DELIVERY SCHEDULE required delivery between 28 July 1997 and 29 August 1997. (R4, tab 2)

Contract clauses include GENERAL PROVISION 11. DISPUTES, which provides in relevant part:

- a. Except as otherwise provided in this Contract, any dispute concerning a question of fact arising under this Contract which is not disposed of by agreement shall be decided by the

Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Board of Directors of the Washington Metropolitan Area Transit Authority. The decision of the Board of Directors or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. In connection with any appeal proceeding under this article, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(R4, tab 2)

By Memorandum of Agreement, the Armed Services Board of Contract Appeals serves as the authorized representative of the WMATA Board of Directors and is authorized to adjudicate appeals arising from contracts between WMATA and its contractors.

A dispute arose between the parties regarding whether appellant had supplied all necessary components for the trackwork. On 26 January 2001, WMATA issued a final decision of the CO in response to Conley's letter dated 28 December 2000, which WMATA treated as a request for a final decision. The decision contained findings of fact regarding Conley's "claim for additional compensation for materials." The CO denied that Conley was entitled to any compensation, and provided Conley with instructions regarding procedural requirements for appealing the decision. (R4, tab 1)

The decision also advised Conley that WMATA had incurred costs of "approximately \$14,380 as the cost for materials and approximately \$9,000 as the cost for labor" in correcting the alleged defects. The contracting officer stated:

Although, the Authority offered to settle this matter as a wash, as stated in its letter to Conley dated July 28, 1999, as an offer of compromise, the Authority hereby reserves its right to pursue its full loses [sic] including the cost of the undelivered materials if this matter proceeds further.

(R4, tab 2)

Conley timely appealed the final decision denying its claim and filed a complaint seeking payment of \$17,759.32.

Respondent's answer included a "COUNTERCLAIM" asserting WMATA had incurred costs of \$20,980 to obtain missing parts; costs of "at least \$32,770" for "correcting incomplete and defective parts," and sought a favorable determination "in the amount of at least \$53,750, plus any additional amount WMATA may prove. . ." (resp. answer at 6, 7).

### DECISION

The counterclaim accompanying respondent's answer seeking "at least \$53,750" was never the subject of a final decision by the CO. Although the 26 January 2001 decision alludes to costs incurred by WMATA in correcting the alleged deficiencies, WMATA only "reserves its right to pursue" an action. Although the decision effectively denies Conley's claim, the CO did not issue a final decision upon any affirmative claim by WMATA as required by the Disputes clause of the contract. The Board is without jurisdiction over the purported counterclaim, and that portion of the pleadings is hereby stricken from the record. This is not a decision upon the merits of any potential claim which WMATA may appropriately assert against Conley.

Dated: 24 January 2002

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REBA PAGE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

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. 53288, Appeal of Conley Frog/Switch & Forge Co., rendered in conformance with the Board's Charter.

Dated:

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