

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Lasmer Industries, Inc.) ASBCA No. 56411
)
Under Contract Nos. SPO750-02-D-7917)
SPO750-04-M-2800)
SPO750-04-C-3482)
SPO750-05-M-7797)
SPO750-04-C-3101)
SPO750-03-D-6A94)
SPO750-05-M-7793)

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APPEARANCE FOR THE GOVERNMENT: Vasso K. Monta, Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE PARTIES' MOTIONS

Lasmer Industries, Inc. (Lasmer) appeals a government claim for reimbursement of money paid for allegedly non-conforming material delivered by Lasmer under the captioned contracts. In our decision of 22 July 2008, we denied a government motion to dismiss for lack of jurisdiction. *Lasmer Industries, Inc.*, ASBCA No. 56411, 08-2 BCA ¶ 33,919. Familiarity with that decision is presumed.

The government now moves to dismiss without prejudice or in the alternative with prejudice on the ground that it has rescinded its claim (gov't mot. at 4). Lasmer opposes the motion to dismiss and moves for "summary judgment and discovery" (app. resp. at 1). We grant the government's motion to dismiss with prejudice and deny Lasmer's motions for summary judgment and discovery.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS¹

1. Following denial of the government's motion to dismiss for lack of jurisdiction, the Board on 14 October 2008 ordered the government to submit a complaint and Rule 4 file. On 18 November 2008, the government submitted a complaint and a second motion to dismiss. The ground of this second motion was that the government claim on which the appeal was based had been rescinded (gov't mot. at 2).

2. A letter of rescission dated 18 November 2008 from the contracting officer to the president of Lasmer was attached to the motion. It stated in relevant part:

I am rescinding the letter dated February 11, 2008 that I sent to you requesting reimbursement for non-conforming material that Lasmer supplied under 16 contracts and purchase orders. I am taking this action not because we believe that the parts you supplied were conforming, but rather because we believe that monetary recovery for this material is unlikely at this point and it is in the government's best interest to not pursue this matter any further. We do not intend to reinstitute a demand letter for this non-conforming material.

(Gov't mot., ex. 2)

3. On 22 December 2008, Lasmer submitted "Lasmer's Combined Response to Motion to Dismiss, Motion for Summary Judgment, and Motion for Discovery." Lasmer's Motion for Summary Judgment sought summary judgment denying the government claim and holding that an unshipped balance of 3,100 automotive parts under Contract No. SPO750-02-D-7917, Delivery Order 0015 was terminated for convenience (app. resp. at 2-7). Lasmer's Motion for Discovery requested discovery and hearing on the issue of whether Lasmer's delivered material was in fact non-conforming to contract requirements (app. resp. at 7-8).

DECISION

The contracting officer's 18 November 2008 letter rescinding the 11 February 2008 claim was unequivocal, and further expressly stated that: "We do not intend to reinstitute a demand letter for this non-conforming material" (SOF ¶ 2). Lasmer cites Board precedent holding that where a government claim is rescinded during an

¹ We incorporate herein by reference the Statement of Facts for Purposes of the Motion in our prior decision. See *Lasmer Industries, Inc.*, ASBCA No. 56411, 08-2 BCA ¶ 33,919 at 167,848-50.

appeal of that claim, the appellant is entitled to summary judgment sustaining the appeal (app. resp. at 2-3).² That precedent, however, has been overruled in effect by the Federal Circuit in *Chapman Law Firm Co. v. Greenleaf Construction Co.*, 490 F.3d 934, 940 (Fed. Cir. 2007). In *Chapman*, the Court of Federal Claims (COFC) granted summary judgment for plaintiff in a bid protest dispute where the government during the litigation voluntarily provided all of the requested relief. The Federal Circuit reversed the COFC decision and held that the case should have been dismissed because the government's corrective action "adequately addressed the effects of the challenged action, and the [COFC] had no reasonable expectation that the action would recur." In Lasmer's case, the contracting officer unequivocally rescinded the claim on which the appeal was taken. Furthermore, there being no clear and convincing proof to the contrary, we accept that the contracting officer was acting in good faith when she stated that: "We do not intend to reinstitute a demand letter for this non-conforming material." (SOF ¶ 2)

Lasmer also contends that, as a result of the rescission of the government claim, it is entitled to (i) a termination for convenience of the undelivered material under Contract No. SPO750-02-D-7917, and (ii) discovery and hearing on the issue of whether its material conformed to contract requirements. Both contentions are without merit. The 11 February 2008 claim was a claim for reimbursement of the amounts paid for allegedly defective delivered material. The claim letter did not terminate any undelivered material for default or for convenience. The 11 February 2008 claim and its 18 November 2008 rescission affected only the allegedly non-conforming delivered material and made no change in Lasmer's obligation to deliver the undelivered material conforming to the contract requirements. The issue of the conformance to contract requirements of the delivered material for which reimbursement was claimed in the 11 February 2008 claim letter has been mooted by the government's rescission of that letter. There is no claim regarding the conformance of any other material before us on appeal from a contracting officer's decision. Therefore we have no jurisdiction for proceeding with discovery, hearing or decision on conformance of such other material.

For the reasons stated above, the government's motion to dismiss is granted and appellant's motions for summary judgment and for discovery are denied.

The appeal is dismissed with prejudice.

Dated: 1 April 2009

MONROE E. FREEMAN, JR.
Administrative Judge

² See *Texas Instruments, Inc.*, ASBCA No. 32154, 90-1 BCA ¶ 22,258 at 111,837.

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. 56411, Appeal of Lasmer Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals