

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Hanley Industries, Inc.) ASBCA No. 56976
)
Under Contract No. W52P1J-05-C-0076)

APPEARANCE FOR THE APPELLANT: Steven E. Kellogg, Esq.
The Kellogg Law Firm
Belleville, IL

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
Scott N. Flesch, Esq.
CPT Tудо Pham, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE STEMLER

This matter comes to the Board on the issue of jurisdiction, raised by the Board *sua sponte*.

STATEMENT OF FACTS (SOF)

1. On 29 September 2005, the U.S. Army, Rock Island, IL awarded Contract No. W52P1J-05-C-0076 to Hanley Industries, Inc. (appellant). The initial price of the contract was \$1,870,812.80 and called for the production and delivery of a quantity of MK 45-1 electric primers. (ASBCA No. 56584 (56584), R4, tab 1)¹

2. The contract contains the FAR 52.233-1, DISPUTES (JUL 2002) clause which provides in relevant part:

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum

¹ The Board has pending before it two appeals: ASBCA Nos. 56584 and 56976, both under the same contract. The Rule 4 file in ASBCA No. 56584 has been deemed submitted in ASBCA No. 56976. (Notice of docketing dtd. 29 October 2009)

certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract.

(56584, R4, tab 1 at 35)

3. The contract also contains the FAR 52.246-2, INSPECTION OF SUPPLIES—FIXED-PRICE (AUG 1996) clause, which provides in relevant part:

(k) ...Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

(l) If acceptance is not conclusive for any of the reasons in paragraph (k) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace the defective or nonconforming supplies..., or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the contract as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement.

(56584, R4, tab 1 at 15)

4. On 16 July 2008, the contracting officer (CO) terminated the remaining quantity of undelivered primers for default. The contracting officer's final decision (COFD) advised appellant of all its appeal rights. (56584, R4, tabs 249, 250)

5. By letter dated 29 September 2008, Hanley filed a timely appeal of the COFD terminating the contract for default. The appeal was docketed as ASBCA No. 56584. (56584, Bd. corr. file)

6. On 8 July 2009, the CO sent Hanley a letter. The letter's introductory paragraph stated:

The Government has completed its review of the information Hanley provided via their January 26, 2009, and February 12, 2009, letters. As a result, the purpose of this letter is to provide Hanley Industries, Inc. with the

Contracting Officer's final determination regarding revocation of acceptance of Lot HYT07D001-001 [Lot 001] as follows....

(56976, Bd. corr. file at 1) Thereafter followed the various reasons the government was revoking its acceptance of Lot 001. The letter closed with the following paragraph:

As a result of the above actions, Hanley has failed to provide sufficient documentation/rationale that ensures the Government that [Lot 001] conforms to all the requirements of Contract W52P1J-05-C-0076. Therefore, per FAR clause 52.246-2, Inspection of Supplies-Fixed Price, the Contracting Officer hereby determines to revoke acceptance of the entire quantity of 7,718 of [Lot 001] based on gross mistake amounting to fraud and latent defects. The Government reserves the right to submit the total dollar amount of its demand for these actions to Hanley at a later date.^[2]

(56976, Bd. corr. file at 5) The letter did not expressly refer to itself as a contracting officer's final decision and contained no appeal rights whatsoever, including the 90-day appeal period to this Board or the 12-month appeal period to the Court of Federal Claims. It also did not direct or require Hanley to take any actions.

7. On 17 September 2009, counsel for both parties conducted a conference in which appellant's counsel indicated to government counsel that appellant would likely appeal the CO's 8 July 2009 letter (56584, Bd. corr. file, joint status report dated 18 September 2009).

8. On 25 October 2009, Hanley's counsel filed a notice of appeal and requested that this appeal be consolidated with the termination for default appeal (ASBCA No. 56584). Appellant's counsel stated:

Hanley Industries, Inc. ("Hanley"), by and through its undersigned counsel, hereby files its Notice of Appeal with respect to the attached Final Decision of the Contracting Officer [the 8 July 2009 letter] regarding its decision to

² The parties have stipulated that Hanley has been paid \$382,812.80 for Lot 001, and the government has not requested a return of those funds (joint stip. dated 26 February 2010).

revoke acceptance for the entire quantity of 7,718 units of [Lot 001] under Contract No. W52P1J-05-C-0076.

(56976, Bd. corr. file)

9. On 29 October 2009, the Board docketed the appeal as ASBCA No. 56976 (56976, Bd. corr. file).

10. On 17 November 2009, the Board issued an order to the parties wherein the Board: (1) questioned whether the appeal in ASBCA No. 56976 was timely; (2) ordered appellant to produce evidence that the appeal was timely; and, (3) ordered the government to provide evidence of the date of receipt of the contracting officer's 8 July 2009 letter by appellant (56976, Bd. corr. file).

11. Appellant's counsel replied to the Order on 8 December 2009. Therein he stated that Lot 001 was delivered and accepted by the government and that the contract had later been terminated for default (ASBCA No. 56584) while appellant was producing Lot 003. Counsel represented that when Hanley received the 8 July 2009 letter from the CO (no date was given for receipt), counsel did not consider the letter to be a contracting officer's decision because: (1) it did not recite any appeal rights; (2) demand for payment was not made; and, (3) and it was expressly reserved for a later action. As a consequence, appellant did not initially file a notice of appeal. Counsel further represented that as the termination for default appeal proceeded, appellant realized that it could not afford to conduct discovery in the termination appeal, and again in whatever appeal resulted when the government sought the return of monies for Lot 001. Consequently, it decided to file a notice of appeal, reasoning that it was timely since the 90-day jurisdictional period contained in the Contract Disputes Act of 1978, as amended (41 U.S.C. §§ 601 *et seq.*) (CDA) never began to run because the letter did not give appellant any of its appeal rights. Appellant relies on *Pathman Construction Co. v. United States*, 817 F.2d 1573 (Fed. Cir. 1987) and *Decker & Co. v. West*, 76 F.3d 1573 (Fed. Cir. 1996) to support its position. (56976, Bd. corr. file)

12. The government responded to the Board's order also on 8 December 2009. The government provided evidence that the contracting officer's 8 July 2009 letter had been sent to appellant by e-mail and had been received that day³ (56976, Bd. corr. file).

13. By order dated 17 December 2009, the Board requested that the government respond to the arguments made in appellant's 8 December 2009 filing (56976, Bd. corr. file).

³ Establishing the 90-day appeal period to this Board to have ended on 6 October 2009.

14. The government responded to the Board's Order on 6 January 2010. The government's position was that the language in the CO's letter of 8 July 2009 was unambiguous and that it was a contracting officer's final decision. The government did not see the absence of appeal rights as meaningful since appellant was represented by counsel, and in any event knew its rights from the language of the contracting officer's 16 July 2008 termination for default decision. The government also relies on *Decker*, and also *American Renovation & Construction Co.*, ASBCA No. 54039, 03-2 BCA ¶ 32,296, stating that appellant has not demonstrated any detrimental reliance. Because appellant's notice of appeal was not made within 90 days of the date of receipt of the CO's 8 July 2009 letter, the government asserts that this Board is without jurisdiction to hear the appeal under the CDA. (56976, Bd. corr. file)

15. On 28 January 2010, the Board afforded the parties an opportunity to supplement the evidentiary record with any support they had for their respective positions by 25 February 2010, and to file additional briefs if they desired (56976, Bd. corr. file).

16. On 9 March 2010, the Board ordered further supplementation of the record with the references from the CO's 8 July 2009 letter (Bd. corr. file).

17. On 7 April 2010, the government supplemented the record as requested (resp. supp. R4, tabs A-D).

18. On 14 April 2010, appellant filed a supplemental brief, arguing additionally that the CO's 8 July 2009 letter was not a COFD because it did not demand anything of Hanley:

It [the government] has not required Hanley to fix the problems the Government claims exist, or to return the money that it has already paid to Hanley for Lot 1. From Hanley's perspective, it has delivered Lot 1 and has been paid in full for that delivery. Hanley has suffered no adverse consequences as a result of the Contracting Officer's July 8, 2009 letter.

(App. supp. brief at 1)

DECISION

The resolution of whether this Board has jurisdiction over Hanley's appeal from the CO's 8 July 2009 letter presents a series of difficult questions. Initially, we must answer the question of whether the 8 July 2009 letter was a government claim and hence a COFD at all. If we answer the question in the affirmative, we must determine whether appellant's notice of appeal, filed beyond the 90-day CDA appeal period to this Board, was effective nonetheless under the principles set forth in *Decker, supra*, and its progeny.

The Contract Disputes Act (CDA), 41 U.S.C. § 601 *et seq.*, grants this Board jurisdiction to hear appeals from final decisions of, among others, COs of the Department of the Army, on claims relative to contracts made by that Department. 41 U.S.C. § 607(d). Section 605(a) of the CDA requires that government claims be the subject of a CO's final decision.

The contract contains an Inspection clause (SOF ¶ 3). It is pursuant to that clause that the CO issued his revocation of acceptance of Lot 001 (SOF ¶ 6). Paragraph (k) of this clause permits the CO to revoke acceptance for latent defects, fraud, or gross mistakes amounting to fraud (SOF ¶ 3). Paragraph (l) of this clause gives the government the right to require the contractor to correct or replace the defective units at no cost to the government, or to require the contractor to repay an equitable portion of the monies paid to it (SOF ¶ 3).

In answering the question of whether the CO's 8 July 2009 letter was a claim and hence an appealable COFD, we look to the regulations to define "claim" since the CDA does not contain a definition. The Disputes clause in the contract provides that a claim is a written demand by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or related to the contract. (SOF ¶ 2)

Garrett v. General Electric Co., 987 F.2d 747 (Fed. Cir. 1993) (*GE*) dealt with matters somewhat similar to the situation that presents itself in the instant appeal. In *GE*, the Navy had contracted for jet engines and had accepted them. After acceptance, the Navy determined that latent defects existed and the CO issued a COFD revoking acceptance and directing GE to correct the defects at no cost to the government. *GE*, 987 F.2d at 749. GE appealed the COFD to this Board. In a decision by the Senior Deciding Group, the Board determined that it had jurisdiction. *General Electric Co.*, ASBCA No. 36005 *et al.*, 91-2 BCA ¶ 23,958.

On appeal, the Federal Circuit stated that:

The Board's jurisdiction depends on whether the Navy's directives under the contract's inspection clause are appealable CDA claims.

GE, 987 F.2d at 749. After setting out the regulation's definition of a claim, the Court determined that the Inspection clause of the contract gave the government the right to direct the contractor to correct or replace the latently defective items, which the Court held to be non-monetary "other relief" within the regulation's definition of a claim. Since the government had so directed the contractor, it had asserted a claim, and the COFD was appealable. *GE*, 987 F.2d at 749-50.

The Board's and the Court's opinions in the *GE* case address the concern that jurisdiction over revocation of acceptance cases may interject the Board into contract administration matters. (*see, GE*, 987 F.2d at 751-52; *General Electric Co.*, 91-2 BCA at 119,947-50). While we acknowledge the importance of this concern, we determine that it is not present in this appeal since the contract was terminated for default approximately one year prior to the revocation (SOF ¶¶ 4, 6). There is no danger here that we are being impermissibly involved in contract administration matters. Nonetheless, we still must determine whether a government claim has been asserted under the principles set forth in *GE*.

The facts of the instant appeal differ from *GE*. In *GE*, the CO issued letters designated as COFDs and gave *GE* its appeal rights. 91-2 BCA at 119,941-42. In the instant appeal, the CO's letter was not labeled a COFD and did not provide any appeal rights (SOF ¶ 6). These facts are not, however, determinative of whether the letter can properly be considered a COFD. *Decker*, 76 F.3d at 1579; *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990). Most significantly, the government elected under the Inspection clause, a monetary remedy, *i.e.*, repayment of an equitable portion of the monies paid (SOF ¶ 6). The CO, however, "reserve[d] the right to submit the total dollar amount of its demand for these actions to Hanley at a later date" (SOF ¶ 6). Thus, the CO having selected monetary relief, the holding in *GE* that a direction by the CO under the Inspection clause to replace or repair latently defective items that had been accepted, was a non-monetary government claim under the "other relief" section of the regulations, is not applicable to the instant appeal.

In *Placeway*, *supra*, the Court held that a COFD that withheld the contract balance from the contractor was a proper government claim because the contract balance was undisputed and due, and the sum certain sought could be easily computed. 920 F.2d at

906-07. In the instant appeal, a sum certain⁴ cannot be ascertained. The Inspection clause gives the government the right to demand an equitable portion of the contract payments. What the CO may consider an equitable portion, if any, is unknown. The CO's 8 July 2009 letter constituted no more than notice to Hanley that the government intended to assert a monetary claim under the Inspection clause at some indeterminate time in the future, if at all. In the government's 6 January 2010 response to the Board's request for its position, the government states:

Appellant's assertion that the July 8, 2009 memo was also a final decision on a demand for payment is incorrect. The letter merely stated that "the Government reserves the right to submit the total amount of its demand for these actions to Hanley at a later date." In accordance with FAR 32.604, the contracting officer shall "issue a demand for payment as soon as the contracting officer has determined that an actual debt is due the Government and the amount." FAR 32.604(a)(3) only requires the contracting officer to issue a demand for payment as part of the final decision if a final decision is required by 32.605(a). None of the provisions outlined in FAR 32.605(a) that require the contacting officer to issue a demand for payment as part of the final decision apply in this case. Therefore, the fact that the July 8, 2009 contracting officer's decision did not include a specific demand amount is irrelevant. The final decision regarding the demand for payment was not required as of July 8.

The government thus concedes that it has not made a monetary demand upon appellant. Consequently, the government's position appears to be that the CO has issued an appealable COFD without asserting a government claim. *GE* makes it clear that there must be an underlying government claim to appeal a decision under the Inspection clause to revoke acceptance. Since the government concedes that it has not made a demand for payment, and the revocation does not fall within the Disputes clause's other provisions (adjustment or interpretation of contract terms or other relief) we are at a loss to find a government claim.

The CO's 8 July 2009 letter does not seek as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief

⁴ The regulations require that monetary claims by either party to a contract must be in a sum certain (SOF ¶ 2).

arising under or relating to the contract. In other words, it is not a claim. In essence, the government would have us hold that a contractor must appeal a revocation of acceptance, where the revocation letter does not assert a government claim, or be foreclosed from ever seeking consideration of the matter. We decline to so hold.⁵

CONCLUSION

The appeal is dismissed without prejudice for lack of jurisdiction. Hanley may appeal from any COFD issued on a government claim, if such is issued.

Dated: 22 April 2010

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

OWEN C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

⁵ In view of our disposition, we do not reach the other issues potentially present and briefed by the parties.

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. 56976, Appeal of Hanley Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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