

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Shelby's Gourmet Foods ) ASBCA No. 49883  
)  
Under Contract No. SPO300-96-C-0201 )

APPEARANCE FOR THE APPELLANT: Albert S. C. Millar, Jr., Esq.  
Mayport, FL

APPEARANCES FOR THE GOVERNMENT: Kathleen D. Hallam, Esq.  
Chief Trial Attorney  
Sandra L. Guydon, Esq.  
Trial Attorney  
Defense Supply Center Philadelphia  
(DLA)  
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

Shelby's Gourmet Foods (Shelby or appellant) appeals from a contracting officer's decision asserting a Government claim for repayment of \$42,508.80 plus interest, the price of alleged nonconforming supplies acquired by the Government from appellant. The Government's claim arises from an alleged defective shipment of rolled oats supplied by appellant. The Government based its decision to demand repayment upon a warranty clause of the contract that gives the Government the right to return or hold for the contractor's account any rejected group of supplies for repayment of the contract price paid by the Government. A hearing was held and only entitlement is before us for decision.

Just prior to trial, counsel for appellant requested a continuance in order to secure the testimony of an inspector from the United States Department of Agriculture (USDA) who had retired from Government service. Rather than continuing the hearing, appellant was given the opportunity to supplement the record with a deposition, an affidavit or a stipulation reflecting the testimony of that inspector. Appellant did not avail itself of that opportunity.

Both parties filed briefs. No representative of appellant testified at the hearing, and, other than counsel, no representative of appellant attended the hearing. The record upon which this decision is based consists of the transcript of the hearing, the Rule 4 file, tabs 1 to 71, Government exhibit 72, admitted during the hearing, Government exhibit 73, Commercial Item Description A-A-20090A (dated 26 March 1986) and three affidavits evidencing the disposition of the goods. Exhibit 73 and the affidavits were submitted by the

Government subsequent to hearing and briefing at the Board's request. Exhibit 73 was referenced in the contract but was not included in the Rule 4 file.

FINDINGS OF FACT

1. On 4 October 1995, the Defense Personnel Support Center, through the contracting officer, Albina A. Farrant, awarded Contract No. SPO300-96-C-0201 to appellant to supply the Government with quick preparation rolled oats (oatmeal) (R4, tab 6). In addition to the award documents, the contract included appellant's offer and the solicitation to which the offer responded (R4, tabs 1, 6). Shelby J. Crow is the owner of Shelby's Gourmet Foods (R4, tab 8).

2. The contract contained DPSC 52.246-9P36, WARRANTY OF SUPPLIES (COMMERCIAL ITEMS) (JAN 1992), which provided in part as follows:

(B) CONTRACTOR'S OBLIGATIONS.

(1) NOTWITHSTANDING INSPECTION AND ACCEPTANCE BY THE GOVERNMENT OF SUPPLIES FURNISHED UNDER THIS CONTRACT, OR ANY CONDITIONS OF THIS CONTRACT CONCERNING THE CONCLUSIVENESS THEREOF, THE CONTRACTOR WARRANTS THAT FOR SIX MONTHS AFTER RECEIPT OF SUPPLIES AT DESTINATION OR, IN THE CASE OF SUPPLIES REQUIRED TO BEAR AN EXPIRATION DATE, FOR THE EXPIRATION DATING PERIOD INDICATED IN THE LABELING THEREOF, ALL SUPPLIES FURNISHED--

. . . .

(III) ARE WITHIN THE VARIATIONS PERMITTED BY THE CONTRACT, AND ARE OF AN EVEN KIND, QUALITY, AND QUANTITY WITHIN EACH UNIT AND AMONG ALL UNITS;

(IV) ARE ADEQUATELY CONTAINED, PACKAGED, AND MARKED AS THE CONTRACT MAY REQUIRE; AND

. . . .

(C) REMEDIES AVAILABLE TO THE GOVERNMENT.

(1) THE CONTRACTING OFFICER SHALL GIVE WRITTEN NOTICE TO THE CONTRACTOR OF ANY BREACH OF WARRANTIES IN PARAGRAPH (B)(1) OF THIS CLAUSE WITHIN SEVEN MONTHS FROM RECEIPT OF SUPPLIES AT DESTINATION OR, IN THE CASE OF SUPPLIES REQUIRED TO BEAR AN EXPIRATION DATE, NO LATER THAN ONE MONTH FOLLOWING THE EXPIRATION DATE INDICATED IN THE LABELING.

(2) CONFORMANCE OF SUPPLIES OR PARTS THEREOF SUBJECT TO WARRANTY ACTION SHALL BE DETERMINED IN ACCORDANCE WITH THE INSPECTION AND ACCEPTANCE PROCEDURES CONTAINED IN THE CONTRACT EXCEPT AS PROVIDED HEREIN. IF THE CONTRACT PROVIDES FOR SAMPLING, THE CONTRACTING OFFICER MAY GROUP ANY SUPPLIES DELIVERED UNDER THIS CONTRACT. THE SIZE OF THE SAMPLE SHALL BE THAT REQUIRED BY THE SAMPLING PROCEDURE SPECIFIED IN THE CONTRACT FOR THE QUANTITY OF SUPPLIES ON WHICH WARRANTY ACTION IS PROPOSED . . . . WITHIN A REASONABLE TIME AFTER THE NOTICE, THE CONTRACTING OFFICER MAY EXERCISE ONE OR MORE OF THE FOLLOWING OPTIONS; AND ALSO, FOLLOWING THE EXERCISE OF ANY OPTION, MAY UNILATERALLY CHANGE IT TO ONE OR MORE OF THE OTHER OPTIONS SET FORTH BELOW:

. . . .

(IV) RETURN ANY SUPPLIES OR GROUP OF SUPPLIES UNDER THIS CLAUSE TO THE CONTRACTOR (IRRESPECTIVE OF THE F.O.B. POINT OR THE POINT OF ACCEPTANCE) FOR SCREENING AND CORRECTION OR REPLACEMENT;

(V) RETURN OR HOLD FOR CONTRACTOR'S ACCOUNT ANY SUPPLIES OR GROUP OF SUPPLIES DELIVERED HEREUNDER, WHEREUPON THE CONTRACTOR SHALL REPAY THE CONTRACT PRICE PAID THEREFOR. IN SUCH EVENT, THE GOVERNMENT MAY REPROCURE SIMILAR SUPPLIES UPON SUCH TERMS AND IN SUCH A MANNER AS THE CONTRACTING OFFICER MAY DEEM APPROPRIATE, AND CHARGE TO THE CONTRACTOR THE ADDITIONAL COST OCCASIONED THE GOVERNMENT THEREBY.

(3) WHEN EITHER OPTION THREE OR FOUR OF THIS CLAUSE IS EXERCISED, THE CONTRACTOR IS REQUIRED TO SUBMIT IN WRITING AND WITHIN 30 DAYS AFTER RECEIPT OF NOTICE OF SUCH INVOCATION A SCHEDULE FOR EITHER;

(I) CORRECTION AND/OR REPLACEMENT OF ALL DEFECTIVE SUPPLIES AND SUBSEQUENT REDELIVERY OF THE RETURNED SUPPLIES; OR,

(II) SCREENING DEFECTIVE SUPPLIES AT EACH DEPOT INVOLVED AND SUBSEQUENT REDELIVERY OF ALL CORRECTED AND/OR REPLACED SUPPLIES. SUCH SCHEDULE WILL BECOME A PART OF THE CONTRACT DELIVERY SCHEDULE UPON AGREEMENT THERETO BY THE GOVERNMENT. IF THE CONTRACTOR FAILS TO PROVIDE AN AGREEABLE SCHEDULE WITHIN THE SPECIFIED PERIOD, OR ANY EXTENSION AGREED TO BY THE GOVERNMENT, THE GOVERNMENT MAY CORRECT THE ITEMS AND CHARGE THE CONTRACTOR' S ACCOUNT; OR, ISSUE A CONTRACT FOR CORRECTION OF THE ITEMS AND CHARGE THE CONTRACTOR' S ACCOUNT; OR, EXERCISE ONE OR MORE OF THE REMEDIES SPECIFIED IN PARAGRAPH (4) BELOW.

(4) IF THE CONTRACTOR FAILS TO ACCEPT RETURN OF THE NONCONFORMING SUPPLIES; OR, FAILS TO MAKE REDELIVERY OF THE CORRECTED OR REPLACED SUPPLIES TO THE GOVERNMENT WITHIN THE TIME ESTABLISHED; OR, FAILS TO MAKE PROGRESS AFTER THEIR RETURN TO CORRECT OR REPLACE THEM SO AS TO ENDANGER PERFORMANCE WITHIN THE TIME ESTABLISHED FOR REDELIVERY AND DOES NOT CURE SUCH FAILURE WITHIN A PERIOD OF 10 DAYS (OR SUCH LONGER PERIOD AS THE CONTRACTING OFFICER MAY AUTHORIZE IN WRITING) AFTER RECEIPT OF NOTICE FROM THE CONTRACTING OFFICER SPECIFYING SUCH FAILURE, THE CONTRACTING OFFICER MAY EXERCISE ONE OR MORE OF THE FOLLOWING REMEDIES:

....

(II) RETURN OR HOLD THE NONCONFORMING SUPPLIES FOR CONTRACTOR' S ACCOUNT, OR REQUIRE THE RETURN OF THE NONCONFORMING SUPPLIES AND THEN HOLD FOR CONTRACTOR' S ACCOUNT, WHEREUPON THE CONTRACTOR SHALL REPAY THE CONTRACT PRICE THEREFOR. IN SUCH EVENT, THE GOVERNMENT MAY REPROCURE SIMILAR

SUPPLIES UPON SUCH TERMS AND IN SUCH MANNER AS THE CONTRACTING OFFICER MAY DEEM APPROPRIATE, AND CHARGE TO THE CONTRACTOR THE ADDITIONAL COSTS OCCASIONED THE GOVERNMENT THEREBY.

(III) IF THE CONTRACTOR FAILS TO FURNISH TIMELY DISPOSITION INSTRUCTIONS, DISPOSE OF THE NONCONFORMING SUPPLIES FOR THE CONTRACTOR'S ACCOUNT IN A REASONABLE MANNER IN WHICH CASE THE GOVERNMENT IS ENTITLED TO REIMBURSEMENT FROM THE CONTRACTOR OR FROM THE PROCEEDS FOR THE REASONABLE EXPENSES OF THE CARE AND DISPOSITION OF THE NONCONFORMING SUPPLIES, AS WELL AS FOR ANY OTHER COSTS INCURRED OR TO BE INCURRED.

(5) THE RIGHTS AND REMEDIES OF THE GOVERNMENT PROVIDED IN THIS CLAUSE ARE IN ADDITION TO AND DO NOT LIMIT ANY RIGHTS AFFORDED TO THE GOVERNMENT BY ANOTHER CLAUSE OF THIS CONTRACT.

(D) FAILURE TO AGREE UPON ANY DETERMINATION TO BE MADE UNDER THIS CLAUSE SHALL BE A DISPUTE CONCERNING A QUESTION OF FACT WITHIN THE MEANING OF THE "DISPUTES" CLAUSE OF THIS CONTRACT.

(R4, tab 1 at 31-34 of 63)

3. There were six line items enumerated in the contract. Each line item represented a certain amount of oatmeal to be supplied by a specific date to one of three different delivery points, FOB destination. (R4, tab 1 at 4 of 63)

4. The oats were to be supplied in accordance with Commercial Item Description A-A-20090A, dated 26 March 1986 (CID) (R4, tab 1 at 6 of 63). The CID, as amended by the solicitation (R4, tab 1 at 7-9 of 63; ex. G-73) provided in pertinent part as follows:

Quality assurance.

When required in the solicitation, contract, or purchase order, the Federal Grain Inspection Service (FGIS), U.S. Department of Agriculture, will determine the quality assurance of the rolled oats according to FGIS procedures. The product shall be examined and/or analyzed in accordance with applicable provisions in the CID, and when applicable, the United States Standard for Condition of Food Containers currently in effect on the date of the solicitation.

....

A. Commercial packaging.

Quick cooking. Eighteen or 42 ounces of product shall be packaged in a paperboard box, or 16 ounces of product shall be hermetically sealed in a size 401 by 411 metal can in accordance with good commercial practice. Cans shall be hermetically sealed and tested for leakage in accordance with section 4.3.1 of PPP-C-29.

5. PPP-C-29 is the Federal specification for the packaging of canned subsistence items (R4, tab 70 at 1). Section 4.3.1 of PPP-C-29 sets forth a leakage test as a method of inspection, as follows:

The seams of the filled and closed cans shall be examined as follows: Submerge can in water contained in a vacuum desiccator, Mead tester, or equivalent device, and draw a vacuum of 10 inches of mercury (atmospheric pressure of 29.9 inches) for thirty seconds and observe for leakage. A leak consists of steady progression of bubbles. Isolated bubbles that can be caused by the release of air entrapped in the double seam are not considered as signs of leaks.

(*Id.* at 36) This test is also referred to as the bell jar test (tr. 70).

6. The contract provided that the acceptance point was at origin following inspection by the United States Department of Agriculture at the contractor's expense. Inspection was also permitted at destination by the military for count, condition and identity. (R4, tab 6 at 3 of 6) In addition, inspection after acceptance was allowed by the Warranty clause of the contract (finding 4).

7. Only Line Item 0005 is at issue in this appeal. Line Item 0005 consisted of 51,840 cans of oatmeal to be delivered to Defense Depot Tracy, California (Tracy), by 20 December 1995 (R4, tab 6 at 2 of 6). This delivery date was extended until 15 March 1996 by Contract Modification No. P00002 (R4, tab 9 at 2).

8. Line Item 0005 was packed at the appellant's plant in St. Marys, Georgia where, after inspection by Walter Seidel, USDA, it was accepted on 22 February 1996 (R4, tab 46 at 3). Line Item 0005 was shipped on or about 23 February 1996, to Tracy (R4, tab 54 at 2). The Government has paid appellant the price of line item 0005, \$42,508.80 (R4, tab 58).

9. Steve F. Jackson, an experienced Government Subsistence Quality Auditor (tr. 51, 54-55), inspected line item 0005 at destination as part of a random audit of food products (tr. 55-56). He properly evaluated a sample of the oatmeal according to PPP-C-29 and the USDA Standards for the Condition of Food Containers (USDA Standards) (tr. 57), which is incorporated by reference into PPP-C-29 (R4, tab 70 at 2) and is therefore applicable to the contract (see finding 4).

10. Jackson rejected line item 0005 for numerous defects. Twelve cans out of 228 had major defects such as incomplete closure, incomplete tucks and improper crimping (tr. 57, 67; R4, tabs 40, 68). For the sample size inspected a maximum of five major defects were allowed by the USDA Standards for acceptance of the lot (R4, tab 68; tr. 71).

11. A second defect was found when the test for hermetic seal was performed using the bell jar test. Jackson performed this test on twenty cans and six failed. In accordance with criteria set forth in Federal Specification PPP-C-29 only one failure required rejection. (Tr. 70-71; R4, tabs 40, 70, 71)

12. Rejection of the entire shipment of line item 5 was warranted based upon either of the two aforementioned categories of defects (R4, tabs 68, 70; tr. 71).

13. A second inspection was done to verify Mr. Jackson's results by the Quality Auditor Monitor, Mr. Chuck McCall (McCall), who used the same inspection methodology and criteria as directed by the contract. McCall also rejected the line item 0005 shipment of oatmeal. (R4, tab 42; tr. 73-75)

14. Following the inspections on March 8th and 11th (R4, tabs 40, 42), the contracting officer notified appellant of the substandard oatmeal by letter dated 14 March 1996 (R4, tab 44). Included in the letter was a description of the warranty actions available to the Government under the contract and appellant was given an opportunity to cure the defects by repair or replacement of the oatmeal (R4, tab 44).

15. Appellant did not take the steps necessary to cure the defects (R4, tabs 46, 48). Instead, appellant requested the contracting officer issue a final decision from which she could appeal (R4, tab 54).

16. Appellant's decision not to cure the defects was based on the fact that the oatmeal had been inspected and accepted by the USDA prior to delivery; therefore, appellant argues the oatmeal was good as delivered and the warranty action was unwarranted (R4, tabs 46, 49). There is nothing in the record to indicate that appellant inspected the oats in question at the point of delivery, nor did it produce any witnesses to testify that the oatmeal was in satisfactory condition upon delivery at Tracy.

17. Originally, the contracting officer chose to enforce warranty action (C)(2)(IV) which required the supplies be returned to appellant for screening and correction or replacement (R4, tab 44). Because of the contractor's adamant refusal to take any action toward curing the defective product (R4, tab 46), the contracting officer modified her decision and invoked warranty remedy (C)(2)(V). Under this clause, the contracting officer has the option to reject the entire line item shipment and demand repayment of the price paid if the contractor does not take steps to cure the defects in the product (R4, tab 53; tr. 34).

18. On 3 June 1996, the contracting officer issued a final decision instructing appellant to accept return of the goods and repay the government \$42,508.80, the price of the supplies in question, as well as interest if not paid within 30 days (R4, tab 58). A timely appeal followed from that decision.

19. At the time of trial, the goods were segregated in a warehouse awaiting action by appellant, and coded in such a way as to preclude shipment (tr. 75). Subsequently, on 8 January 1999, after the expiration of the 18 month shelf life of the oats, the entire shipment was destroyed (affidavit of Gary Kahn at 2; affidavit of Rose Tallant at 2).

### DECISION

We have long held that the warranty clause survives final acceptance and provides remedies to the Government in addition to those provided by the standard inspection clause. *See, e.g., Vi-Mil, Inc.*, ASBCA Nos. 16820, 18005, 75-2 BCA ¶ 11,435 at 54,481; *Cross Aero Corp.*, ASBCA No. 14801, 71-2 BCA ¶ 9075 at 42,086. We stated in *Vi-Mil* as follows:

When the Government asserts its rights under the warranty clause, it assumes the burden of proving all elements of its claim and must establish that [within the warranty period] the supplies did not conform to contract requirements, *Phoenix Steel Container Co.*, ASBCA No. 9987, 66-2 BCA ¶ 5814. It must do so in accordance with the provisions of the warranty clause which governs the method and procedures for the warranty inspection.

75-2 BCA at 54,482.

Here, the oatmeal was inspected at destination within the requisite six months after receipt of the supplies and appellant was notified of the results of the inspection within the requisite seven months from receipt of the oatmeal. The Government inspected the oats pursuant to the sampling procedures set forth in the USDA Standards for the twelve major defects and pursuant to the sampling procedures set forth in PPP-C-29 for the six leak defects discovered. After the initial inspection, the Government also conducted a reinspection in accordance with contract criteria and found the shipment to be non-conforming.

Following appellant's refusal to take any action to correct the defects in the product, the contracting officer unilaterally changed her choice of options and invoked clause (C)(2)(V). With selection of this remedy came the demand for repayment of \$42,508.80, the price of the supplies at issue.

The Government has sustained its burden of proof as to its claim under the warranty clause of the contract. Accordingly, the appeal is denied.

Dated: 27 November 2000

---

RICHARD SHACKLEFORD  
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. 49883, Appeal of Shelby's Gourmet Foods, rendered in conformance with the Board's Charter.

Dated:

---

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