

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Sach Sinha and Associates, Inc. ) ASBCA No. 50640  
 )  
Under Contract No. N00104-91-C-KB41 )

APPEARANCE FOR THE APPELLANT: Mr. Sach Sinha, President

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.  
Navy Chief Trial Attorney  
Sandra D. Baker Jumper, Esq.  
Trial Attorney  
Naval Inventory Control Point  
Mechanicsburg, PA

**OPINION BY ADMINISTRATIVE JUDGE STEMLER**

Our decision in *Sach Sinha and Associates, Inc.*, ASBCA No. 46916, 96-2 BCA ¶ 28,346, *aff'd on reconsid.*, unpublished opinion dated 10 January 1997, denied appellant's appeal from the termination for default of the captioned contract and appellant's appeal from the Government's claim for the return of unliquidated progress payments. Our decision allowed either party to move to reinstate the appeal if they were unable to resolve the quantum of the Government's unliquidated progress payment claim. The Government has moved to reinstate the appeal and we have assigned ASBCA No. 50640 to the quantum phase of the litigation. Both parties have elected to proceed on the record pursuant to Board Rule 11. The Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA) is applicable.

**FINDINGS OF FACT**

The facts found in our decision (96-2 BCA ¶ 28,346) are hereby adopted and supplemented as necessary to determine the issue of quantum before us and are repeated only insofar as is necessary for clarity.

Appellant's contract called for it to supply 1,200 MK 20-1 release parachutes (in 3 lots of 400 each). The unit price was \$312 and the total contract price was \$374,400.00. Appellant delivered and the Government accepted lots one and two. Appellant did not timely deliver lot three and lot three was terminated for default. At the time of the default termination, the contract price was \$369,400 (*i.e.*, a unit price of \$307.83) (R4, ASBCA 46916, tab 2). At the time of the termination, the units procured by appellant's contract

were no longer needed by the Navy (R4, ASBCA 46916, tab S1). The contract contained the standard FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) and 52.232-16 PROGRESS PAYMENTS (AUG 1987) (ALT. I) clauses.

Appellant received \$354,206.00 in progress payments under the contract (R4, ASBCA No. 46916, tab 8). Appellant does not dispute the amount of progress payments it received (conference call of 29 September 1997). The contracting officer's decision terminating the contract for default claimed \$118,068.67 in unliquidated progress payments. The claim amount was calculated by dividing the progress payments paid into thirds, and concluding that since appellant had delivered two-thirds of the required quantity, it was only entitled to two-thirds of the progress payments (R4, ASBCA 46916, tab 7).

### **DECISION**

Appellant challenges the claim for unliquidated progress payments on the bases that: (1) the Government's payment of progress payments allowed appellant to incur costs towards the delivery of lot three, and (2) the Government did not need the material any longer and that is why it terminated the contract. Appellant requests that we "consider the uniqueness of this situation and rise above common precedence and experience and reject the Government demand of the so called unliquidated progress payments" (app. br. at 1-2).

As to appellant's first point of contention: a default terminated supply contractor has no right to costs incurred in manufacturing items never accepted by the Government under the terms of paragraph (f) of the Default clause. As to appellant's second contention: this is an attempt to relitigate the propriety of the termination for default. We upheld the termination in our prior decision.

The Progress Payments clause provides in paragraph (h) that a terminated contractor shall pay to the Government, upon demand, the amount of unliquidated progress payments. The contracting officer claimed the unliquidated progress payments were \$118,068.67. However, although not argued by appellant, the contracting officer did not follow the method prescribed in paragraph (f) of the Default clause in arriving at this figure. Appellant is entitled to payment at the contract price for supplies accepted by the Government. Since the contract price at the time of the termination was \$369,400, the unit price was \$307.83. The Government accepted 800 units. Therefore, appellant was entitled to \$246,264 for its performance. Subtracting this amount from the progress payments of \$354,206, leaves \$107,942 in unliquidated progress payments.

We hold that the Government is entitled to recover \$107,942 in unliquidated progress payments.

The appeal is sustained in part and denied in part as indicated above.

Dated: 20 September 2000

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

I concur

I concur

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

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CARROLL C. DICUS, JR.  
Administrative Judge  
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. 50640, Appeal of Sach Sinha and Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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