

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Steelcraft Industrial)
and Development Corporation) ASBCA No. 50825
)
Under Contract No. 60-3089-001)

APPEARANCE FOR THE APPELLANT: Kristina L. Baird, Esq.
Horecky & Associates
Hagatna, Guam

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
John A. Dietrich, Esq.
Senior Trial Attorney

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Assistant Counsel
Defense Reutilization and
Marketing Service
Camp H.M. Smith, HI

OPINION BY ADMINISTRATIVE JUDGE DELMAN

Steelcraft Industrial and Development Corporation (appellant) seeks damages and lost profits in the amount of \$1,420,858 arising out of the Government’s cancellation of its contract for the purchase of a Navy-surplus power barge. A hearing was held on entitlement and quantum. We have jurisdiction under the CDA, 41 U.S.C. §§ 601 *et seq.* For reasons stated below, we deny the appeal.

FINDINGS OF FACT

1. The *YFP-14 Inductance* (the “barge”) was a 318 foot by 50 foot power-generating vessel built in the 1940s for the Department of the Army. The Army transferred the barge to the Navy in 1977. For a number of years the barge provided electrical power to naval facilities in Guam. By the late 1980s it became clear that the cost to repair the aging vessel was greater than its value to the Navy. The Navy sought and obtained the approval of the Secretary of the Navy in 1991 to strike the barge from the naval vessel register. The vessel remained in the custody of the Naval Public Works Center (PWC) in Guam.

2. The Navy first offered to donate the barge to other federal agencies through the General Services Administration (GSA). The Navy executed a Standard Form 120, Report of Excess Personal Property, which stated in pertinent part that there may be PCB containing material on the barge, and advised that if GSA sought to transfer the barge to other than a federal agency, the prospective recipient was required to test for PCBs and to meet EPA requirements (R4, tab 12). The GSA declined to accept the barge.

3. The Navy then prepared the vessel for disposal through the Defense Reutilization and Marketing Service (DRMS) for sale as scrap, consistent with Navy policy restricting sales of such vessels for scrap only. By letter dated 27 August 1991, the Navy had provided guidance to DRMS as to what should be contained in sales catalogs for all vessel scrap sales. Insofar as pertinent, the Navy suggested that prospective bidders be advised that PCBs exist on the vessels and that the purchasers are responsible to ascertain and to meet those laws and regulations affecting PCB disposal. (Ex. G-26)

4. With respect to the barge in question, the Navy followed the disposal-preparatory procedures contained in NAVSEADETPORTSVAINST 4770.3, "Instructions for Disposal of Inactive Fleet Ships and Craft" dated 7 November 1991. Insofar as pertinent, a visual survey for PCBs was required as part of these procedures. This was performed by taking a list of known PCB manufacturers and checking the vessel's equipment against that list. If PCB items were found, they were to be labeled and the information disclosed in a report to DRMS. (Tr. 2/271-72) Under this Navy instruction, sampling and laboratory testing for PCBs were not required.

5. The Navy did not find any PCB items in the visual survey, but stated in its report to DRMS dated 24 August 1992 that PCBs may be present on the barge, that each bidder under a prospective sale must inspect the vessel for PCBs and rely solely on his/her own inspection, and that should PCB items be present "the purchaser must dispose of them in accordance with all federal, state, and local laws and regulations" (R4, tab 17).

6. Prior to the preparation of the Invitation for Bids (IFB), DRMS requested PWC Guam to test and verify PCB levels in certain fluid-filled electrical components. If these tests were ever performed, they were not reported to DRMS (tr. 2/207).

7. DRMS advertised the barge for sale as scrap under IFB No. 60-3059 in the spring of 1993 with a bid opening date of 16 June 1993 (R4, tab 25). The IFB did not include language specifying the existence of PCBs on the vessel, but provided the following (*id.*):

PCBs may be present on the YFP-14. Visual inspection did not identify any PCBs, however, bidders should inspect the

YFP-14 and rely solely on their own inspection. Should PCBs be present, the purchaser shall be responsible for handling and disposing of all items containing PCB contamination in quantities regulated under applicable federal, state, and local laws and regulations.

The IFB did not disclose the fact that there was a PCB spill and cleanup on the barge in 1987. It also did not provide the results of the Navy's PCB testing arising out of the spill.

8. No bids were received by the closing date in the IFB. The IFB was canceled.

9. Around this time, Mr. Antonio Yu learned of the proposed sale. Mr. Yu was a resident of the Philippines and was president of appellant, a Philippines corporation. At this time electrical power was in short supply in the Philippines and Mr. Yu believed that a profit could be realized by purchasing, overhauling and reselling the barge for use by a Philippines power company. Appellant, however, missed the bid closing date on the IFB.

10. Appellant contacted the sales contracting officer (SCO) in DRMS, Hawaii and expressed an interest in the barge. At first the SCO believed that appellant wished the barge for scrap, but later became aware that appellant was interested in it as a power source. The SCO did not know, however, that appellant wished to sell the barge and realize a share of the profits arising out of its use by a Philippines power company.

11. In the summer of 1993, Mr. Yu sought and obtained access to the vessel on a number of occasions, making those inspections he believed were appropriate. Mr. Yu was aware of the possibility of hazardous material on the barge. He had obtained a copy of the canceled IFB which warned of the presence of PCBs. He knew that chemical tests were required to identify PCBs (tr. 1/212-13). Appellant did not perform these tests.

12. Appellant wrote to the SCO on 15 July 1993, requesting *inter alia*, authority to perform a hull test on the barge for purposes of towing, and the authority "to dispose the hazardous materials on board of the vessel in accordance to [sic] Philippine laws" (R4, tab 28). Appellant performed the hull test, and the barge checked out to appellant's satisfaction. Mr. Yu also requested information about the condition of the turbine generator. The SCO did not provide this information.

13. At appellant's request the SCO sent appellant a Request for Quotation for Negotiated Sale (RFQ). This RFQ differed materially from the canceled IFB. The latter related to a sale of the barge for scrap in accordance with the Navy's direction. The RFQ related to a sale of the barge as a power-generating asset. The SCO did not advise the Navy of this change (tr. 2/205).

14. Insofar as pertinent, the RFQ contained the following provisions:

NOTES:

....

4. PCBs may be present on the YFP-14. Visual inspection did not identify any PCBs, however, bidders should inspect the YFP-14 and rely solely on their own inspections. (Bold in original)

....

ADDITIONAL GENERAL INFORMATION AND INSTRUCTIONS DRMS FORM 82-3 FEB 90

30. PRE-AWARD SURVEY. Prior to the award of a contract, the Sales Contracting Officer (SCO) or his authorized representative will determine whether the potential purchaser has the necessary permits/licenses, experience, organization and technical qualifications (either through its own facilities or the facilities of another firm) to handle materials of the nature offered herein and is capable of complying with all applicable Federal, state and local laws, ordinances and regulations.

31. REGULATED SUBSTANCES. PCB, asbestos, or other hazardous or toxic item(s) or components not identified in the item description may remain on the vessel being offered in this Invitation for Bid. Strict adherence to Federal environmental statutes, U.S. Environmental Protection Agency (EPA) regulations, state and local environmental laws and regulations are required for this item. Purchaser is cautioned that it is solely responsible to ascertain the extent to which Federal environmental laws and other state and local statutes and regulations may effect it [sic] and comply therewith. (Emphasis added)

32. ENVIRONMENTAL PROTECTION. All bidders are advised that they must comply with all applicable Federal, State and local laws, ordinances, regulations, etc., with respect to human safety and the environment during the

processing, use or disposal of material purchased from the Department of Defense, including but not limited to 33 U.S.C. 401, et. [sic] seq., Rivers and Harbors Appropriation Act of 1989, 42 U.S.C. 740 et. [sic] seq., Clean Air Act.

....

PART 1, GENERAL INFORMATION AND INSTRUCTIONS

..

13. EXPORT/IMPORT OF PROPERTY.

Property purchased from the Unites States Government may or may not be authorized for export/import from or into the country where the property is located. It is the sole responsibility of the Purchaser to obtain any necessary clearances or approvals for export/import of any property purchased from the U.S. Department of Defense.

....

**PART 2, SALE OF GOVERNMENT PROPERTY
GENERAL SALE TERMS AND CONDITIONS**

....

2. CONDITION AND LOCATION OF PROPERTY

Unless otherwise provided in the Invitation, all property listed therein is offered for sale “as is” and “where is.” Unless otherwise provided in the Invitation, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose.

....

15. LIMITATION ON GOVERNMENT’S LIABILITY.

Except for reasonable packing, loading, and transportation costs ... the measure of the Government’s liability in any case where liability of the Government to the

Purchaser has been established shall not exceed refund of such portion of the purchase price as the Government may have received.

....

24. REQUIREMENTS TO COMPLY WITH APPLICABLE LAWS AND REGULATIONS.

It is the Bidder’s responsibility to ascertain and comply with all applicable Federal, State, local and multi-jurisdictional laws, ordinances, and regulations pertaining to the registration, licensing, handling, possession, transportation, transfer, export, processing, manufacture, sale, use or disposal of the property listed in the Invitation. Purchasers or users of this property are not excused from any violation of such laws or regulations either because the United States is a party to this sale or has had any interest in the property at any time. (Emphasis added)

....

32. GUARANTEED DESCRIPTIONS.

[T]he Government guarantees to the original Purchaser of the property that the property delivered or offered for delivery under any contract resulting from this Invitation of Bids will be as described in the Invitation for Bids.

....

(d) The foregoing guarantee is in lieu of all other guarantees, express or implied, and all other obligations on the part of the Government to deliver or offer for delivery property as described in the Invitation for Bids and shall not entitle the Purchaser to any payment for loss of profits or any other money damages, special, direct, indirect, or consequential, nor shall any recovery of any kind against the Government under this provision be greater in amount than refund of the purchase price of the specific material found to have been misdescribed. THE GOVERNMENT DOES NOT WARRANT THE MERCHANTABILITY OF THE

PROPERTY OR ITS FITNESS FOR ANY USE OR PURPOSE. (capitals in original)

PART 11, ADDITIONAL SPECIAL CIRCUMSTANCE CONDITIONS

SHIPS

.....

ARTICLE L: EXPORT.

(A) The Purchaser, whether a U.S. citizen or alien, may not export the vessel(s) from the United States, its territories or possessions, without first obtaining the approval of the Department of Transportation, Maritime Administration, Division of Ship Disposals and Foreign Transfers, Washington, D.C. 20590, pursuant to the provisions of the Shipping Act, 1916, as amended.

(b) In addition, the aforesaid Purchaser is required to obtain the approval of the Department of State, Office of Munitions Control, Washington, D.C. 20535, to export a military vessel. For the export of commercial vessel(s), a license from the Department of Commerce, Bureau of International Programs, Office of Export Control, Washington, D.C. 20535, is required.

(c) The Department of Defense does not warrant or guarantee that the above approvals and/or licenses will be issued to the buyer.

15. Appellant offered to purchase the barge, which had a replacement cost of roughly \$26,000,000 (R4, tab 12), for \$20,000. The SCO advised the Navy of the offer and the Navy agreed to accept it. The SCO issued a notice of award to appellant and a contract was executed by the parties in September, 1993. The above-referenced provisions were included in the contract.

16. The Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.*, bans the manufacturing, processing or the distribution of PCBs in commerce except where authorized, excluded or exempted by regulation. 15 U.S.C. § 2605(e); § 2602(3)(4)(13).

Under 15 U.S.C. § 2611(a)(2), the Administrator of the Environmental Protection Agency (EPA) is authorized to issue regulations to restrict PCBs and other relevant chemical substances intended for export. Title 40 CFR § 761.20(c)(1993) provides in pertinent part as follows:

(c) No persons may process or distribute in commerce any PCB, or any PCB Item regardless of concentration, for use within the United States or for export from the United States without an exemption

This prohibition applies to any department, agency or instrumentality of the Federal government. See 40 CFR § 761.3 (Definitions).

17. At the time of award, neither the SCO nor appellant was aware of EPA export prohibitions of PCB items. Nor were they aware that the barge contained significant amounts of PCB contaminated items, although that distinct possibility was disclosed by the RFQ. Hence, neither the Government nor appellant filed a request for exemption from regulatory prohibitions at or before the award of this contract. However the RFQ placed this requirement upon appellant, the purchaser.

18. The SCO made a preaward survey of appellant, per the RFQ, and determined that appellant was a licensed and viable corporation in the Philippines (tr. 2/243). He was also of the view that appellant was capable of complying with all necessary laws incident to the sale (tr. 2/265). Since the SCO was unaware of the need for appellant to obtain an exemption from the EPA to export the barge, he did not ask appellant for such a document as part of the preaward survey.

19. Appellant sought and obtained a number of time extensions to remove the barge from Guam pending an investigation into an alleged theft of certain equipment from the vessel. As part of his involvement with this investigation, PWC counsel in Guam began to question the legality of the sale to appellant in late February 1994. The Naval Sea Systems Command (NAVSEA) advised in late March 1994 that “virtually all vessels manufactured before 1982 have abundant PCBs on-board . . . [w]e can safely assume that the YFP-14 has a very high probability of having PCBs on board,” and that “EPA would probably consider what we did to be illegal disposal if not an unauthorized sale” (R4, tab 59).

20. PWC counsel encouraged the SCO to contact appellant about the Government’s concerns. The SCO did not do so. At or about this time the DRMS office in Hawaii was closed and contract administration duties were transferred to a new SCO in DRMS, Memphis, Tennessee. Presumably, this transition led to coordination and communication difficulties. In the interim, Mr. Yu incurred certain costs to prepare for

the removal of the vessel from Guam. He also hired and paid a consultant to market the vessel to a Philippines power company.

21. On 29 April 1994, Mr. Yu's agents presented themselves at Polaris Point, Guam to secure the barge for towing to the Philippines. PWC counsel advised the Navy personnel present not to release the vessel. As counsel stated at trial (tr. 2/132-33):

I was just not going to allow that vessel to be pulled away until we had the proper approvals from EPA or until we were convinced that we're not violating TOSCA [sic], . . .

22. By letter to appellant dated 6 May 1994, superceding one of 3 May, the new SCO terminated appellant's contract "for convenience,"¹ stating that the sale of the barge for export violated U.S. export prohibitions of PCB items which the Government believed were present on the vessel, 40 CFR § 761.20, and that the Government would provide appellant a full refund of its purchase price. (R4, tab 65) Appellant disputed the termination, and promised a claim.

23. In the meantime, the Navy sought to identify the nature and magnitude of the PCBs contained on the barge. In accordance with a Navy testing protocol dated 4 December 1992, the Government took comprehensive samples from the vessel. It does not appear that this protocol applied in 1991 when the Navy performed the PCB visual survey for the scrap sale. Laboratory testing revealed significant PCB-laden items throughout the craft.

24. The Navy sought a waiver or exemption from EPA with the hope that such action could result in the reinstatement of appellant's contract. EPA refused to grant any relief, stating that "many of the materials containing PCBs on board the YFP-14 are unauthorized use of PCBs and according to the Federal PCB regulations are banned from use, distribution in commerce including export for use or disposal." (R4, tab 74)

25. With its disposal options now limited, the Navy decided to remove the PCBs from the barge. The Navy performed the cleanup at a cost of roughly \$1,100,000 (exh. G-47). The Navy sank the barge in open seas on 18 June 1998.

¹ There was no termination for convenience clause in the contract. Neither party argues that an "imputed" clause would be the proper vehicle to cancel the contract, or would otherwise represent the proper measure of any recovery for appellant. Since we hold, *infra*, that the Government had the right to rescind the contract without regard to any termination clause, we need not decide the issue of whether a termination for convenience clause should be incorporated into the contract as a matter of law.

26. On 28 October 1994, appellant filed a claim with the SCO, seeking the recovery of \$315,043 in expenses to market the vessel for resale and to prepare its removal from Guam, and \$1,105,815 for lost profits from a purported agreement for the resale and usage of the barge for electrical power in the Philippines. (R4, tab 76) There was no contract for resale or for power use pending at the time of the award of the contract for the barge. It was not until January 1994, months after the award, that appellant received a "letter of intent" from Sabah Shipyards Philippines, Inc. to purchase the vessel when it arrived in Manila (R4, tab 83 at 74). It was only at that time that a contract for sale would be entered into with appellant, and then a further agreement would be necessary to sell the barge's power to the National Power Company of the Philippines.

27. By decision dated 21 March 1997, the SCO for the most part denied appellant's claim, stating that the Government's cancellation of the contract was appropriate because the exportation of the barge was a violation of federal law. However the SCO authorized payment to appellant of certain removal - preparation expenses of \$176,534, plus a return of the purchase price of the barge in the amount of \$20,000, for a total payment of \$196,534 (R4, tab 93), which was ultimately paid to appellant (ex. G-35). Appellant did not find this payment sufficient, and this appeal followed.

28. Appellant's claim was audited by the DCAA. DCAA determined that the expenses claimed by appellant were not recorded in appellant's corporate books of account. Appellant's certified public accountant confirmed this fact and explained that Mr. Yu incurred the expenses in his personal capacity pursuant to a resolution of appellant's board of directors (ex. G-53):

The reason why Steelcraft Industrial & Dev't. Corp. has not taken up in its books of Accounts the transaction of the Power Barge (YFP 14) **is because of the Board Resolution No. 93-528-1, that all transaction [sic] shall remain the responsibility of Mr. Antonio D. Yu until such Merchandise are [sic] brought in or arrived in Manila.**

....

Steelcraft Industrial & Dev't. Corp. can not and will not enter into its Books of Accounts all expenses incurred in this transaction since it will Jeopardize its Financial Soundness that will affect its other normal business and its Credit Standing shall suffer. (Emphasis added)

29. Mr. Yu confirmed at trial that he, not appellant, incurred the expenses in question and that he, not appellant, remained liable for them (tr. 1/166-67):

If it [the barge] will not reach Manila, then I will be personally liable. I have to suffer the losses, and that the company shall not be responsible for the losses incurred in case anything happens to the items we bought, and this is to protect the company, others [sic] directors, . . .

DECISION

The parties do not dispute, and we find that it was unlawful to export this PCB-laden barge without an exemption granted by the EPA. This sales contract, when read as a whole, placed upon appellant as purchaser the contractual responsibility to take those actions necessary to insure compliance with law, including compliance with all EPA regulations with respect to PCBs. Appellant's failure to take these actions was tantamount to a material breach of contract which justified the Government's refusal to abide by its contract promise to release the barge, and justified the rescission of the sales agreement. Having failed to obtain the necessary exemption required by law, appellant also may not enforce the Government's return promise on the grounds that to do so would violate public policy - - the protection of the public and the environment from the toxic effects of PCBs. See *ENCORP International, Inc.*, ASBCA Nos. 49474, 49619, 99-1 BCA ¶ 30,254; Restatement (Second) of Contracts, § 181.

Appellant contends, citing cases, that it is entitled to damages because the Government breached the contract by wrongfully withholding superior knowledge from appellant regarding the condition of the vessel, specifically that PCBs were on board. The cases cited are distinguishable; they did not involve sales contracts. This barge was offered for sale on an "as is" basis, and the Government did not have the contractual duty to detail the present condition of the vessel or its repair or accident history, or to provide appellant with records of PCB spills or PCB tests, nor is the Government answerable to appellant for failure to conduct any such tests. These are risks that the appellant as purchaser plainly assumed under the provisions of this "as is" sales agreement.

Assuming, *arguendo*, that the superior knowledge doctrine is applicable to a sale of the type involved here, we believe that appellant has failed to make out its *prima facie* case. As stated in *Hercules Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994), *aff'd on other grounds*, 516 U.S. 417 (1996):

The doctrine of superior knowledge is generally applied to situations where (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance

costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

At a minimum, appellant has failed to prove subsection (3). The contract specifications did not mislead appellant nor did they fail to put appellant on notice to inquire regarding PCBs. The bidding documents clearly raised the prospect of PCBs on the vessel, and squarely placed upon appellant the responsibility to verify that fact and to take those measures required by law. Indeed, appellant was fully aware of the prospect of PCBs on the barge -- prior to bid it specifically sought leave of the SCO to remove hazardous substances from the barge in the Philippines. Appellant's superior knowledge claim is without merit.

We also believe that appellant has failed to make a *prima facie* case on quantum. As for appellant's claimed preparatory and marketing costs, the record is clear that these expenses were incurred by Mr. Yu in his personal capacity.² Based on this record, we cannot reimburse appellant for costs it did not incur and for which it has no legal responsibility. As for appellant's claim for anticipatory or lost profits, appellant has failed to show any material breach of this sales contract or any similar type of wrongdoing that would render null and void the limited nature of a purchaser's recovery under this contract (finding 14). The cases cited by appellant are factually distinguishable.

We have considered all of appellant's other contentions and believe they are without merit. The appeal is denied.

Dated: 29 June 2000

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

² The Government has not asserted any claim for return of the monies paid pursuant to the contracting officer's decision.

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
Acting 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. 50825, Appeal of Steelcraft Industrial & Development Corporation, rendered in conformance with the Board's Charter.

Dated:

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