

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
SGV GmbH) ASBCA No. 51093
)
Under Contract No. MRH-E-91-06-96-41)

APPEARANCE FOR THE APPELLANT: Leodis C. Matthews, Esq.
Matthews & Partners
Frankfurt, Germany¹

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
MAJ Michael O'Farrell, JA
CPT James Dorn, JA
CPT Gregg M. Schwind, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE LIPMAN
ON MOTION FOR SUMMARY JUDGMENT

This is an appeal from an alleged "wrongful termination" of a consignment contract. The Government has moved for summary judgment and appellant opposes the motion. The record consists of the contract, other documents and an affidavit submitted by appellant.

FINDINGS OF FACT

1. The Army and Air Force Exchange Service (AAFES) issued a solicitation for the captioned contract to establish a consignment retail sales shop for the sale of giftware at the Ramstein Main Exchange, Ramstein Air Base, Germany. The solicitation and contract's "Schedule" included:

3. **PERIOD OF CONTRACT AND EFFECTIVE DATE:** The contract will be for one (1) year unless sooner terminated according to the contract provisions. The effective date will be 20 September 1996 or the date of award shown on the face of the Negotiated Contract . . . whichever is later.

¹ At the time of the parties' initial submittals in connection with this motion, appellant was represented by William H. Boyle, Esq. and Reed L. von Maur of the firm of Parker, Poe, Adams & Bernstein L.L.P.

15. **UNILATERAL AMENDMENTS:** The contracting officer may make unilateral amendments to the contract for the purpose of incorporating administrative changes, provided such changes are within the general scope of the contract and that such changes have no cost impact on the contractor. . . .

Its General Provisions included:

3. ORAL REPRESENTATIONS (JAN 94). This contract represents the entire agreement of the parties. Any changes or amendments thereto may not be recognized by AAFES unless committed to writing and incorporated by reference into the contract by the contracting officer.

. . . .

28. TERMINATION BY NOTICE (AUG 92). Either party may, by written notice to the other party, terminate any or all performance under the contract which is not scheduled or required earlier than 10 days after receipt of the notice or which is past due and has not left contractors [sic] shipping point.

. . . .

30. DISPUTES (FEB 95).

a. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

b. "Claim" as used in this clause means a written demand or written assertion by one of the contracting parties seeking the payment of money in a sum certain or other relief arising under or relating to this contract. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Contract Disputes Act.

c. A claim by the contractor shall be made in writing and submitted to the contracting officer for a written decision. A claim by AAFES against the contractor shall be made by a written decision of the contracting officer.

The solicitation and contract also included an “Exhibit B,” which contained an index of items which were authorized to be sold under the contract. (R4, tab 1)

2. On 17 September 1996, prior to award, appellant raised some questions about the contract, including its performance period. In response, the contracting officer sent appellant a fax on 20 September 1996, which stated, in part:

Our contracts are for one-year increments renewable for five years. If this first year is successful, we can extend for two years next year. I do not anticipate any reason why this program will not be successful, however!

(R4, tab 4)

3. Appellant’s signature on the contract is dated 24 September 1996. The copy of the contract in the evidentiary file, signed by appellant, contains the same PERIOD OF CONTRACT AND EFFECTIVE DATE provision as in the solicitation. (R4, tab 1) However, the record also contains evidence of communications between the parties regarding the terms of the PERIOD OF CONTRACT AND EFFECTIVE DATE provision. It includes:

a. a “FAX Transmission,” reflecting on its transmission line that it was sent by appellant to the Government at 2:14 P.M. on 25 September 1996, in response to a Government communication, and stating, in part:

Thanks for your response. I will line out the one year portion, and add the five year, with two two year extensions, as you explained.

.....

I’ll take this fax to [the Ramstein Main Exchange Manager] and have him cosign so that you can process it as either an amendment, or as an addition to the contract.

(R4, tab 5)

b. a page of the contract which included the PERIOD OF CONTRACT AND EFFECTIVE DATE provision. In the provision, the words “for one (1) year” were deleted and replaced with the words “(see page 1a).” There is no indication on the page that it was faxed.

c. a “page 1a,” with the following text:

addition to:

3. **PERIOD OF CONTRACT AND EFFECTIVE DATE:** The contract period will be for a one-year period with performance starting 20 September 1996 or on the date of award on the face of the Negotiated Contract (AAFES Form 4450-32), whichever is later. The contract may be extended for two additional two year periods, not to exceed five (5) years from the date established for the commencement of service.

(R4, tab 6)

d. a "FAX Transmission," reflecting on its transmission line that it was sent from appellant to the Government at 1:07 P.M. but with an illegible date, stating, in part:

Enclosed is a packet with copies of dealership contract, memo, and introduction letter Also the contract, signed, with the clarification we discussed re: duration of contract.

(R4, tab 7)

4. The record reflects no Government response to appellant's faxes with respect to the PERIOD OF CONTRACT AND EFFECTIVE DATE provision. The contracting officer signed the contract on 9 October 1996, indicating that date to be the "Date of Award." The evidentiary file reflects that the copy of the contract signed by the contracting officer contained the original PERIOD OF CONTRACT AND EFFECTIVE DATE provision. (R4, tab 1)

5. Based upon the present record, as reflected above, we are unable to find which version of the PERIOD OF CONTRACT AND EFFECTIVE DATE provision was in the contract when signed by each of the parties.

6. During contract performance, the Government issued two contract modifications. As more fully described below, both were unilateral and both, at least in part, limited the product lines which appellant was authorized to sell. (R4, tabs 2, 3) There is no evidence of any contract modification with respect to the contract's PERIOD OF CONTRACT AND EFFECTIVE DATE provision.

7. On 25 July 1997, the contracting officer unilaterally issued Modification No. 2 to the contract. It stated that a certain company's product was "no longer authorized to be supplied by [appellant] to AAFES or sold by [appellant] in any AAFES facility in performance of this contract." The effective date of the "change" was stated to be 25 July 1997 with all of the previously supplied products from that company to be removed from the AAFES facility no later than 8 August 1997. (R4, tab 3)

8. By an undated fax, the transmission line of which reflects 7 October 1997 at 3:31 P.M. at AAFES headquarters in Dallas, Texas, which is after the close of business in Germany, the contracting officer sent appellant the following letter:

Reference is made to [the captioned contract] for gift items.
This contract expires 08 OCT 1997 and will not be renewed.

The Ramstein Main Store management team has advised that their needs have changed and the requirement for in-store consignment variety gift shops no longer fit [sic] into their plans of supplying the best product mix available to our customer base. The changes being made are done so in the best interest of our customers.

You must continue performance of the contract for the remaining contract term. Do not commence any new work or placement of merchandise which cannot be completed or sold by the expiration date stated above.

Thank you for your support and understanding.

Appellant received the letter on 8 October 1997. (R4, tabs 8, 9)

9. On 8 October 1997, the contracting officer unilaterally issued Modification No. 1 to the contract.² Among other things, it deleted Exhibit B, the index of items authorized to be sold under the contract, and replaced it with a list of three authorized items. It stated:

All other merchandise not listed above is no longer authorized for sale effective 20 July 1997. Any unapproved inventory cannot be brought onto the store sales floor effective 20 July 1997. All inventories of unapproved lines must be removed from the AAFES Ramstein, Germany store and/or property no later than 8 October 1997. Current inventory may continue to be sold until this date to assist in its depletion.

New lines of product can be added to the above list of authorized items by request from the contractor and approval of the HQ contracting officer as a signed amendment to this contract.

² The record does not reflect why Modification No. 1 was issued several months after Modification No. 2.

(R4, tab 2)

10. On 17 October 1997, AAFES sent appellant, by fax, the following “Memo for Record:”

Reference attached copy of contracting officers [sic] Fax stating non-renewal of your contract Sent 8 OCT 97.

This is notification that all your merchandise must be removed from the Ramstein Main Exchange no later than 06:00 the 23 OCT. 97. You are required to make arrangements with Ramstein management for times this will be accomplished.

(R4, tab 11)

11. By letter dated 23 October 1997 and received by the Board on 28 October 1997, appellant appealed from the contracting officer’s “undated letter, copy attached [the letter faxed on 7 October 1997], wrongfully terminating the contract.” In its Complaint, appellant contended that the Government’s “wrongful termination” constituted a breach of contract.

By letter dated, 9 December 1997, appellant submitted a certified claim in the amount of \$50,505.27, alleging that the Government had not paid an invoice in that amount which appellant had submitted to the Government on 29 September 1997 and resubmitted on approximately 1 November 1997.

DECISION

In bringing this appeal in the absence of a contracting officer’s decision, appellant contended that the Government wrongfully terminated this consignment contract. The Government’s position is that it did not terminate the contract, but that the contract simply expired at the end of its stated term.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of establishing the absence of any genuine issue of material fact, and all significant doubt over factual issues must be resolved in the favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

In moving for summary judgment, the Government contends that it is undisputed that appellant signed the contract on 24 September 1996, that the contract was awarded

on 9 October 1996, and that its performance period was from 9 October 1996 for a period of one year. The Government further asserts: that the contracting officer's pre-award representation that the contract could be renewed for up to five years made no commitment to include an option provision in the contract; that appellant's proposed change to the contract's PERIOD OF CONTRACT AND EFFECTIVE DATE provision had no effect on the contract terms because, as awarded, the contract did not incorporate the suggested clause; that appellant's "marked up version" of the contract had no effect on any right to extend the period of the contract beyond the "performance period listed"; and, that, even if the clause proposed by appellant had been incorporated into the contract, the Government would be entitled to summary judgment because the clause contained no minimum notification period and would have been satisfied by the contracting officer's notification to appellant one day before the contract expired that it would not be renewed.

Appellant argues that the provisions of the contract, as executed, resulted in a performance period of more than one year and that the Government's own actions during performance, including its alleged training of appellant's employees shortly prior to the end of the one-year period (in support of which it has provided no evidence), reflected an understanding that the contract would extend beyond one year. However, appellant's arguments do not end there. Supported in part by its General Manager's affidavit, in opposing the motion for summary judgment, appellant for the first time contends: that AAFES breached the contract by its 8 October 1997 unilateral contract modification limiting appellant's product line; that AAFES breached the contract by failing to observe the cash register procedures required by the contract, thereby causing some of appellant's sales to go unregistered; that AAFES breached the contract by failing to provide appellant with the floor space promised or to provide adequate floor space; and, that AAFES failed to cooperate in good faith with appellant in contract performance by not responding to appellant's correspondence, by alleging the existence of customer complaints without support, and by dealing directly with appellant's suppliers.

The record in this appeal, far from being one which discloses undisputed material facts supporting summary judgment, leads to almost nothing but questions--with respect to both contract formation and administration. We do not know why, during contract formation, AAFES apparently did not respond to appellant's communications regarding its proposed substitute provision with regard to the contract term. We do not know which text of the PERIOD OF CONTRACT AND EFFECTIVE DATE provision was incorporated into the contract and, thus, we are unable to properly assess the rights and obligations of the parties with respect to the contract term. We do not know why, on the very day that it contends that the contract expired, the Government issued a unilateral contract modification limiting appellant's product line. We do not know why that contract modification, numbered Modification No. 1, was issued months after Modification No. 2, which included a less severe restriction of appellant's authorized product line.

On the record before us, therefore, this appeal is not one which would be appropriate for summary judgment. However, our analysis does not end there. Although

the Government raised no jurisdictional issues, we have done so, *sua sponte*, as described below.

Appellant has described its appeal as one from the Government's "wrongful termination" of the contract. A Government contract termination may be a Government claim. As in the case of contractor claims, it must be properly asserted in order for us to have jurisdiction. Pursuant to the Contract Disputes Act of 1978, a Government claim must be the subject of a decision of the contracting officer. 41 U.S.C. § 605(a). The record discloses that none of the Government's communications to appellant, including the undated fax transmitted on 7 October 1997 and those communications which followed, constituted contracting officer's decisions. We, therefore, conclude that the Government did not assert a claim terminating the contract from which a proper appeal could be taken.

A close examination of appellant's factual allegations reflects that, although initially described by appellant as an appeal from a wrongful termination, appellant is essentially contending that the Government improperly failed to exercise an option to extend the contract or that Government actions and omissions reflected its intent to extend the contract; it is also contending that the Government failed to cooperate and breached the contract. Those assertions constitute contractor claims, and such claims must first be submitted to the contracting officer for a decision before we have jurisdiction. *LGT Group*, ASBCA No. 44066, 93-3 BCA ¶ 26,184; *Facilities Engineering & Maintenance Corp.*, ASBCA No. 39405, 91-3 BCA ¶ 24,239.

The record reflects no contractor claim to the contracting officer for recovery based upon its contentions regarding the contract duration, Government failure to cooperate, or for breach of contract. In response to our request for the parties' positions on the issue of jurisdiction, appellant pointed to its claim of 9 December 1997 as a basis for jurisdiction. However, as our findings reflect, that claim was submitted long after the notice of appeal here and the subject matter of that claim differs from that presented in this appeal.

We, therefore, lack jurisdiction and dismiss this appeal without prejudice to appellant's submission of an appropriate claim to the contracting officer for decision. Should the parties be unable to resolve the dispute at that level, we trust that the record upon appeal, in contrast to this record, will present more answers than questions.

CONCLUSION

We lack jurisdiction over the appeal, the Government's Motion for Summary Judgment is moot and the appeal is dismissed without prejudice, pursuant to our discussion above.

Dated: 12 May 2000

RONALD JAY LIPMAN
Administrative Judge
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
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. 51093, Appeal of SGV GmbH, rendered in conformance with the Board's Charter.

Dated:

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