

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Rubi's Metals, Inc.) ASBCA Nos. 52059, 52693
)
Under Contract No. 31-7610-0046)

APPEARANCE FOR THE APPELLANT: Mr. Michael Rubi
President

APPEARANCE FOR THE GOVERNMENT: Theodore R. Pixley, Jr., Esq.
Trial Attorney
Defense Reutilization and
Marketing Service
Battle Creek, MI

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

These appeals arise from a sales contracting officer's final decision denying a misdescription claim submitted in connection with a surplus sales contract. The Government moves for summary judgment, asserting that there are no material facts in dispute and that it is entitled to judgment as a matter of law because appellant failed to provide written notice of its claim within 30 days of removal as required by the Guaranteed Descriptions clause of the contract.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On or about 3 December 1996, the Defense Reutilization and Marketing Service (DRMS) issued Invitation for Bids (IFB) No. 31-7610 for the sale of surplus property (R4, tab 1).
2. The IFB incorporated by reference the DRMS document entitled "Sale by Reference" dated March 1994. Part 2 of the document included the following terms and conditions relevant to this appeal:

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. Except as provided in Conditions No. 12 and 14 or other special conditions of the Invitation, no request for adjustment in price or for rescission of the sale will be considered.

....

16. ORAL STATEMENTS AND MODIFICATIONS.

Any oral statement or representation by any representative of the Government, changing or supplementing the . . . contract or any Condition thereof, is unauthorized and shall confer no right upon the . . . Purchaser.

....

25. DEFINITIONS.

....

(b) “Contracting Officer” means the person accepting the bid in whole or in part on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of the representative’s authority.

....

30. GUARANTEED DESCRIPTIONS.

Despite any other conditions of sale, the Government guarantees . . . that the property will be as described in the Invitation for Bid; however:

. . . .

b. If a misdescription is determined to exist after removal of the property, the Government will adjust the purchase price . . . commensurate with the fair market value of the property actually received; however:

. . . .

(2) No adjustment will be made unless the Purchaser notifies the Contracting Officer of any misdescription by written notice, within 30 calendar days after removal of the property

(R4, tabs 1, 2)

3. Item 27 of the IFB offered the following property for sale:

27. IRONY ALUMINUM, SCRAP:

Including panels, ladders, engine blocks, furniture, vehicular components, electrical residue components, distribution boxes, aircraft structural components, window screens, partitions and other irony aluminum components with other ferrous, nonferrous and nonmetallic attachments.

(R4, tab 1)

4. DRMS awarded Contract No. 31-7610-0046 for item 27 to appellant on 30 December 1996. The contract contemplated the sale of an estimated 1,798,356 pounds of irony aluminum scrap at a price of \$480,714.99. Appellant was to pick up the scrap material in self-dumping hoppers at Fort Hood, Texas, and DRMS was to bill appellant monthly for the material removed. The contract term began on 31 December 1996 and ended on 30 December 1999. (R4, tab 4)

5. On 2 June 1997, Mr. Greg Rubi, appellant's manager, notified the sales contracting officer in writing that the 14 April 1997 shipment included 6,000 pounds of iron pipe and requested an adjustment under the Guaranteed Descriptions clause.

Although appellant did not provide notice within 30 days of removal, DRMS granted appellant a credit. (R4, tabs 7, 8)

6. On 3 August 1998, the sales contracting officer issued a cure notice, demanding payment of \$48,778.53, the outstanding balance due for material delivered (R4, tab 9).

7. On 15 August 1998, appellant requested an adjustment of \$37,838.85, alleging that 135,720 of the 945,448 pounds of material delivered between January 1997 and June 1998 “were filled with debris, such as stainless, iron, wood, foam, rubber, dirt, cardboard and paper.” Appellant asserted that it had “on several occasions reported these problems to your office” (R4, tab 10)

8. After reviewing the contract file, Ms. Marie E. Jackson, the Supervisory Property Disposal Specialist at Fort Hood, advised the sales contracting officer on 28 September 1998 that appellant did not provide notice of any misdescriptions other than the iron pipe claim which was resolved in June 1997 (R4, tab 13).

9. On 19 October 1998, the sales contracting officer denied the request for an adjustment (R4, tabs 13, 14, 15).

10. On 19 October 1998, the sales contracting officer issued a second cure notice, demanding that appellant pay \$90,741.01, the outstanding balance due for material delivered as of that date (R4, tab 16).

11. On 29 October 1998, appellant requested the sales contracting officer to reconsider the denial of its claim, stating as follows:

The contract calls for the removal of material from Fort Hood Texas which is over 700 miles away from our facility in New Mexico. We must transport the material via a private carrier. Upon arrival into our facility, we found that many of the loads contained non contracted material Greg Rubi contacted your representative Kathy Thomas as soon as we began to receive these shipments and her instructions to us were to take pictures and file a claim for adjustment at a later time – and we did what was requested. Never did she inform us of a time limitation. At the time we felt that this was the procedure.

(R4, tab 17)

12. In an e-mail to the sales contracting officer, Ms. Thomas, a Property Disposal Specialist, denied telling Mr. Rubi to take pictures of the misdescribed material and file a claim later, stating as follows:

I have not had conversations with [the] Rubis [sic] in months. Since he does not provide specific dates, I cannot even begin to determine what period of time he is referring to. When his contract started, there was one incident in April of 97 that he was given a load with alot [sic] of steel or metal other than aluminum. [The file contains] a letter and pictures . . . for that adjustment. Since that time, I have not been closely involved with the contract . . . I would, at no time, infer to Mr. Rubis [sic] that he had blanket authority to have monthly adjustments to his contract. I have never provided a contractor authority to do anything without first discussing it with my supervisor (which she has no recollection of me asking her about) and without informing the contractor to contact the SCO [sales contracting officer]

There is no indication in the record that Ms. Thomas was an authorized representative of the contracting officer. (R4, tab 19)

13. On 17 December 1998, the sales contracting officer issued a final decision denying the claim, citing appellant's failure to submit written notice within 30 days of removal of the misdescribed material, Ms. Thomas' denial that appellant provided her with oral notice of its claim and the fact that the contract file did not contain any evidence corroborating appellant's assertion. In addition to denying the claim, the sales contracting officer asserted a Government claim for \$199,515.11 for property removed plus liquidated damages and accrued interest. (R4, tabs 19, 26)

14. Appellant appealed the denial on 24 February 1999 (R4, tab 28). The misdescription claim was docketed as ASBCA No. 52059 and the Government's claim was docketed as ASBCA No. 52648. The complaint in ASBCA No. 52059 indicated that appellant was seeking \$14,076 for freight, labor and disposal costs in connection with its misdescription claim. As a protective measure, we docketed that aspect of the appeal as ASBCA No. 52693.

DECISION

The Government moves for summary judgment, alleging that appellant failed to submit written notice of its misdescription claim within 30 days of removal as required by the Guaranteed Descriptions clause of the contract. As a result, the Government concludes that it is entitled to judgment as a matter of law. Appellant admits that it did not submit written notice of its claim within 30 days, but argues that it provided timely oral notice to an authorized representative of the contracting officer who instructed it “to take pictures and file a claim for adjustment at a later time.” Alternatively, appellant argues that the Government waived the requirement for 30 days written notice by accepting untimely notice of its misdescription claim for iron pipe in June 1997.

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Armco, Inc. v. Cyclops Corporation*, 791 F.2d 147, 149 (Fed. Cir. 1986). A material fact is one which will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Since appellant failed to provide written notice of its claim within 30 days of removal of the misdescribed material, the Government concludes that there are no material facts in dispute and that it is entitled to judgment as a matter of law. We agree. This Board has consistently held that compliance with the notice provision in the Guaranteed Descriptions clause is a condition precedent to obtaining relief and conversely, that failure to furnish timely notice bars any right to relief. *Ansam Metals Corporation*, ASBCA No. 39329, 90-1 BCA ¶ 22,589 at 113,370; *Ace Machinery Company*, ASBCA No. 22488, 78-2 BCA ¶ 13,347 at 65,248; *Kaplan’s Wholesale Supply Company*, ASBCA No. 19554, 75-1 BCA ¶ 11,345 at 54,030; *Dreifus Steel Corporation*, ASBCA No. 12794, 68-1 BCA ¶ 6782 at 31,355-56. We explained the reason for this rule in *Brunswick Automotive Surplus, Inc.*, ASBCA No. 11134, 66-1 BCA ¶ 5428 at 25,476:

It [is] only on the basis of prompt notice that the Government agree[s] to make a contractual adjustment for misdescription of property sold and appellant bound itself thereto. The . . . notice requirement has been, as it must be, strictly enforced by the Board.

Appellant argues that it timely notified Ms. Thomas of its claim and that she directed it “to take pictures and file a claim for adjustment at a later time.” These assertions fail for three reasons. First, other than the unsworn, unsubstantiated, after-the-fact assertion of appellant’s president, there is no evidence that the alleged communication took place. Second, even if the alleged communication took place, Ms. Thomas was not authorized to

change the 30-day notice requirement in the contract. The only persons authorized to change the contract were contracting officers, namely Government personnel designated as contracting officers or authorized representatives of the contracting officer acting within the limits of their authority. *Monmouth Recycling Corp.*, ASBCA Nos. 38506, 39657, 90-1 BCA ¶ 22,416 at 112,596, *aff'd*, 928 F.2d 410 (Fed. Cir. 1991) (table). Ms. Thomas was a Property Disposal Specialist and there is no evidence that she was an authorized representative of the contracting officer. Third, the “Sale by Reference” document expressly states that “[a]ny oral statement or representation by any representative of the Government, changing or supplementing the . . . contract or any Condition thereof, is unauthorized and shall confer no right upon the . . . Purchaser.” Thus, appellant’s alleged reliance on Ms. Thomas’ statement, if any, was unjustified. *Billy D. Starks*, ASBCA No. 50205, 97-1 BCA ¶ 28,741 at 143,461.

Appellant alternatively argues that the Government waived the requirement for written notice by granting appellant a credit for iron pipe in June 1997. This contention is without merit. The Guaranteed Descriptions clause requires separate notice of each claim and failure to enforce the notice requirement with respect to one claim does not waive the Government’s right to enforce the requirement as to other claims.

The Government’s motion for summary judgment in ASBCA No. 52059 is granted. The appeal is denied. ASBCA No. 52693 is dismissed as duplicative.

Dated: 31 January 2001

ELIZABETH A. TUNKS
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 Nos. 52059, 52693, Appeals of Rubi's Metals, rendered in conformance with the Board's Charter.

Dated:

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