

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Sharp Electronics Corporation) ASBCA No. 54475
)
Under Contract No. GS-25F-0037M,)
Delivery Order No. N00600-03-F-0188)

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OPINION BY ADMINISTRATIVE JUDGE REED
ON APPELLANT’S MOTION TO DISMISS WITHOUT PREJUDICE

This appeal concerns a delivery order issued by the U.S. Navy (the Navy DO) under a Federal Supply Schedule contract awarded by the General Services Administration (the GSA contract). The dispute relates to Lease to Ownership Plan (LTOP) terms included in the GSA contract and incorporated from that contract into certain line items of the Navy DO. Also of concern in the dispute is the GSA contract provision for termination for the government’s convenience.

The issue under the motion is whether a Navy contracting officer (CO) had authority to issue the CO final decision (COFD) from which the appeal was taken. Appellant contends that the Navy CO lacked the authority to issue the COFD and that this Board lacks jurisdiction over an appeal from that decision. Accordingly, appellant asks that we dismiss the appeal without prejudice to submission of the claim to a GSA CO. The government submitted a response in opposition to the motion. Appellant replied to the government’s opposition.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 18 September 2001, Contract No. GS-25F-0037M (the GSA contract) was awarded to Sharp Electronics Corporation (appellant, Sharp, or the contractor) by a CO

acting for the GSA. The GSA contract is a Federal Supply Schedule contract for, among other products and services, copier equipment, accessories, and maintenance. The contract includes the standard provision found at FAR 52.212-4 CONTRACT TERMS AND CONDITIONS - COMMERCIAL ITEMS (MAY 1999) (the Commercial Items provision). The Commercial Items provision, at subparagraph (d), states as pertinent here that the contract is subject to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613. The provision also incorporates by reference the standard provision found at FAR 52.233-1 DISPUTES. The Commercial Items provision, at subparagraph (l), further provides for termination for the government's convenience. The relevant portion of that subparagraph states the following in the event of a termination for the government's convenience:

Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination.

The original contract addresses LTOP terms but states that they are subject to offer, negotiation, and acceptance into the contract at a later time. (App. mot. ex. 19; aff. of Allan Essenfeld, Sharp National Program Manager (NPM), attach. to app. mot. (aff.), ¶¶ 2-3, 7)

2. Modification Nos. One and Two to the GSA contract, both effective on 1 October 2001, add to the contract Special Item No. (SIN) 51-58, which provides LTOP terms, and incorporates into the contract Sharp's best and final offer (BAFO) for the LTOP dated 28 September 2001. SIN 51-58 sets different pricing for the LTOP based on full-term lease plans for 36, 48, or 60 months. If an LTOP order is placed, the government agrees to "make best efforts to fulfill that agreement, and is not entering into this agreement for the purpose of acquiring LTOP Equipment for a period of time shorter than the LTOP Term." Additional BAFO terms, incorporated into the GSA contract, as pertinent here, follow:

3. LTOP TERM

The Government must lease the copier equipment placed under the LTOP Plans [sic], uninterrupted for the full term. Early termination will incur cancellation charges, see Paragraph 10.

. . . .

7. RENEWAL

The Government cannot obligate funds beyond September 30th of each year. . . .

. . . .

10. CANCELLATION TERMS

. . . .

For Equipment Ordered and Installed under the subject GSA Contract:

. . . .

The Government . . . may not terminate an LTOP under this contract in order to avoid its buyout obligations or to obtain the same or similar equipment at more favorable terms. Should early termination be required, the cancellation charge shall be equal to [a formula provided]. . . .

Termination for Convenience of the Government:

Equipment ordered under the LTOP plan [sic] is intended to provide for a firm commitment by the Government to continue the plan and remit all monthly payments through completion of the committed term. It is understood that for various reasons, the Government may exercise cancellation of the LTOP prior to completion of the committed plan under the Termination for Convenience clause of the Contract. Should the Government exercise early cancellation of an LTOP under this clause, the cancellation charge shall be calculated as described above.

(App. supp. R4, tab 1; app. mot. ex. 1 at 5-7, ex. 19 at 5-7; aff. ¶¶ 7-8)

3. Pursuant to the GSA contract, the Navy issued Delivery Order No. N00600-03-F-0188 (the Navy DO) dated 30 September 2002, listing 21 line items. Line Item Nos. 0001-02, 0004-05, 0007, 0009, 0013, 0017, and 0019 listed copier equipment ordered on a 48-month LTOP. Line Item Nos. 0011 and 0015 listed copier equipment ordered on an LTOP; however, the number of months is not indicated in the DO. Line Item Nos. 0003, 0006, 0008, 0010, 0012, 0014, 0016, 0018, and 0020 are for maintenance service agreements for all 108 LTOP copier equipment units ordered under

the other DO line items listed above. Line Item No. 0021 is for 105 internal controllers for copiers. LTOP is not mentioned in Line Item No. 0021. The period of performance shown in the DO is 1 October 2002 through 30 September 2003. The DO incorporated by reference the Commercial Items provision found in the GSA contract. (App. supp. R4, tab 2; app. mot. exs. 2, 22)

4. On or before 28 May 2003, Navy officials made a decision to replace the LTOP Sharp copier equipment with copiers of another brand name (app. supp. R4, tab 4; app. mot. ex. 4).

5. The Navy decision came to the attention of the contractor's NPM during Summer 2003. In an e-mail to Navy personnel dated 1 July 2003, the NPM highlighted the LTOP terms in connection with what the NPM characterized as "the Navy's premature termination of these LTOP terms" (App. supp. R4, tab 6 at 2; app. mot. ex. 6 at 2; aff. ¶ 14)

6. By letter dated 14 August 2003, a Navy CO notified the NPM of the Navy's "intent not to renew" the Navy DO and that the copier equipment would be returned to the contractor (app. supp. R4, tab 7; app. mot. ex. 7).

7. The NPM, in a letter dated 18 August 2003, responded to the Navy CO. He again addressed the LTOP, cancellation, and termination provisions of the GSA contract. Among other things, he notified the Navy CO that the contractor was calculating the termination charge. (App. supp. R4, tab 8; app. mot. ex. 8)

8. In a letter dated 26 August 2003, the Navy CO, in connection with the NPM's assertions regarding the LTOP terms of the GSA contract, took the position that "any term of the lease that does not comply with the law must be viewed as *void ab initio*. . . . the lease is considered to be a one year lease The Antideficiency Act . . . simply does not allow for any other interpretation when annual appropriations are used, as is the case in this instance." Confirming that the copier equipment would be returned on 30 September 2003, the Navy CO wrote on 29 September 2003 to Sharp's NPM: "The referenced [DO] was issued under your GSA Schedule. In accordance with the terms of this Schedule, the Navy may return these copiers to you at any time, and has decided to return them upon conclusion of the order, i.e. 30 September 2003. . . ." (App. supp. R4, tabs 9, 12; app. mot. exs. 9, 12; aff. ¶ 15)

9. By letter from the contractor's NPM to the Navy CO dated 30 September 2003, Sharp submitted a certified claim in the amount of \$102,254.45, asserting that the government's return of the copier equipment had been accomplished pursuant to the termination for convenience provision of the contract and that the government was liable for LTOP cancellation charges "as specified in the GSA Contract" (app. supp. R4, tab 13 at 2; app. mot. ex. 13 at 2; aff. ¶ 16).

10. In a purported COFD dated 17 November 2003, the Navy CO denied the claim. The decision characterizes the claimed costs as “termination charges [for] returned . . . copiers . . . prior to an illusory five[-]year contract period. It is noted that the [DO] in question was funded with annually appropriated funds.” The decision goes on to cite and discuss case law that, in the Navy CO’s opinion, based on appellant’s position under the claim, “renders the contract illegal” because the LTOP terms would oblige the government to fund with annual appropriations a multi-year lease by annual exercise of options over which the government had no discretion. The Navy CO further noted a court decision¹ that “held that reformation is the preferred method of resolving the illegal language but, in this case, there was nothing to reform in that the Navy’s requirements for your copiers had ceased to exist.” Regarding the right in the contractor to challenge the decision, it stated that an appeal to this Board could be taken or the contractor could bring an action in the U.S. Court of Federal Claims. (App. supp. R4, tab 15 at 1; app. mot. ex. 15 at 1; aff. ¶ 17)

11. The contractor’s NPM submitted a notice of appeal dated 14 January 2004 from the COFD dated 17 November 2003 (aff. ¶ 17). The letter was addressed to this Board but listed the mailing address for the General Services Administration Board of Contract Appeals (GSBCA). A staff assistant at the GSBCA forwarded appellant’s notice of appeal letter to this Board. (Bd. corres. file)

DECISION

Did the Navy CO have the authority to issue the COFD from which the appeal was taken? The key to answering that question flows from the proper construction of the dispute as presented by the claim, the COFD, and relevant contract provisions. We may then apply the regulatory framework under which GSA schedule contract disputes are to be resolved.

The claim submitted by the contractor is a straightforward assertion that the government constructively terminated the LTOP line items of the Navy DO for the convenience of the government and that termination charges, calculated pursuant to the GSA contract, were due and payable to Sharp. In the claim, the contractor did not challenge the propriety of the termination. (Findings 1-9) The claim related to performance of the Navy DO only to the extent that the lease of appellant’s equipment and other services were ended and “performance” was to be completed, according to Sharp, by way of the termination and LTOP provisions incorporated from the GSA contract.

¹ *RCS Enterprises v. United States*, 57 Fed. Cl. 590 (2003).

The COFD denied the claim on two bases. The primary reason concerned the alleged illegality of the LTOP terms of the GSA contract - a direct attack on the terms of the GSA contract. A secondary reason asserted that relief by way of reformation of the allegedly void contract was not available because, according to the Navy CO, the Navy no longer had a requirement for appellant's copiers. The secondary assertion by the CO also concerns the averred illegality of the LTOP provisions or asserts other defenses related to an exception to applicability of the LTOP provisions. (Findings 2-3, 8, 10)

When the GSA contract was awarded (18 September 2001) and when the LTOP provisions were added to the contract by modification (1 October 2001) (findings 1-2), relevant sections of the FAR provided as follows:

8.405-6 Termination for convenience

(a) Ordering offices may terminate individual orders for the convenience of the Government. . . .

. . . .

8.405-7 Disputes

The ordering office shall refer all unresolved disputes under orders to the schedule contracting office for action under the Disputes clause of the contract.

Effective 29 July 2002, prior to issuance of the Navy DO on 30 September 2002 and before the COFD was published on 17 November 2003 (findings 3, 10), FAR 8.405-7 was amended as follows:

(a) Disputes pertaining to the performance of orders under a schedule contract.

(1) Under the Disputes clause of the schedule contract, the ordering office [CO] may-

(i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or

(ii) Refer the dispute to the schedule [CO].

. . . .

(b) Disputes pertaining to the terms and conditions of schedule contracts. The ordering office [CO] shall refer all disputes that relate to the contract terms and conditions to the schedule [CO] for resolution under the Disputes clause of the contract

If the dispute is governed by the pre-2002 version of FAR 8.405-7, it is clear that it should have been referred by the Navy CO to the GSA schedule contracting office for action by a GSA CO. The Navy CO was authorized, under appellant's construction of the claim, to terminate the Navy DO for the convenience of the government under FAR 8.405-6. However, final action on any dispute arising out of that alleged termination was beyond the dispute resolution authority of the Navy CO. Accordingly, the Navy CO had no authority to issue the purported final decision dated 17 November 2003. That decision is a nullity and the appeal from the decision provides no jurisdictional basis for the merits of the appeal to be before this Board. *See United Partition Systems, Inc.*, ASBCA Nos. 53915, 53916, 03-2 BCA ¶ 32,264 at 159,597 (default termination).

If the newer version of FAR 8.405-7, as amended on 29 July 2002, was effective, based on the date of issuance of the Navy DO or the date when the Navy CO would have consulted the regulation in preparation for her decision, then we must determine whether the dispute pertains to performance of the Navy DO or to the terms and conditions of the GSA schedule contract. In this case, the claim addresses and the Navy CO determined that the dispute pertained to the LTOP terms of the GSA contract, as evidenced by her purported COFD dated 17 November 2003, and earlier correspondence. When she determined that the LTOP provisions of the GSA contract, as applied to the Navy DO, did not "comply with the law" and that the contract "must be viewed as *void*" (finding 8), had been rendered "illegal," or that reformation of the contract to avoid the LTOP provisions was unavailable (finding 10), then she was required by the newer version of FAR 8.405-7(b) to refer the claim letter to the GSA contracting office for resolution under the Disputes provision of the contract. Again, the Navy CO had no authority to issue the final decision dated 17 November 2003 as formulated. It is a nullity. The appeal from that decision provides no jurisdictional basis for the merits of the appeal to be before this Board.

The Navy argues that the dispute does not involve the LTOP and convenience termination provisions of the contract because for that to be so, "multi-year funds" would be required. Annually appropriated funds, it is said, cannot support an LTOP order. (Gov't opp'n at 3) The Navy further contends that this case is about the Navy CO's discretion whether to renew an LTOP order in a new fiscal year when annually appropriated funds are used.

The Navy's arguments miss the point of the claim and its construction by the Navy CO. Sharp is not claiming that the Navy could not terminate for the government's

convenience or that the Navy must renew the Navy DO in a new fiscal year. Rather, appellant contends that the Navy, having taken advantage of the LTOP terms, must acknowledge the contractual and financial consequences of (allegedly) prematurely ending those plans. Neither the motion nor this decision addresses the merits of the claim. However, in construing the claim for the purposes of considering the motion, we agree with the parties in that we understand the contractor's claim to be that the convenience termination and LTOP provisions of the GSA contract, taken together, act to liquidate the financial consequences to Sharp of premature interruption of the LTOP. We further consider that the dispute, as framed by that claim and the CO's position, is related solely to the validity and/or applicability of the terms and conditions of the GSA contract, not performance of the Navy DO.

SUMMARY

Appellant's motion to dismiss without prejudice is granted. The appeal is hereby dismissed without prejudice to the proper disposition of the claim as required by the FAR.

Dated: 2 August 2004

STEVEN L. REED
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
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion of the Armed Services Board of Contract Appeals in ASBCA No. 54475, Appeal of Sharp Electronics Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals