

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Vantage Associates, Inc. ) ASBCA No. 55647  
 )  
Under Contract No. SP0935-06-M-R021 )

APPEARANCE FOR THE APPELLANT: Brian J. Donovan, Esq.  
Jones & Donovan  
Newport Beach, CA

APPEARANCE FOR THE GOVERNMENT: Vasso K. Monta, Esq.  
Senior Counsel  
Defense Supply Center, Columbus  
(DLA)

OPINION BY ADMINISTRATIVE JUDGE PAUL ON THE PARTIES'  
CROSS-MOTIONS FOR SUMMARY JUDGMENT

This is a timely appeal of a contracting officer's (CO) final decision denying Vantage Associates' (Vantage) claim in an amount of \$81,283. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, is applicable. Both parties have filed motions for summary judgment. We grant respondent's motion, deny appellant's cross-motion, and deny the appeal.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 15 November 2005, the Defense Supply Center, Columbus, Ohio (DSCC), issued unilateral Purchase Order No. SP0935-06-M-R021 to Vantage for a quantity of 934 carry case assemblies, NSN 5855-00-138-2317, at a unit price of \$106.99 (R4, tab 3 at 2).<sup>1</sup>

2. The purchase order set forth the following delivery date: "DELIVER FOB: DESTINATION BY: 2006 JAN 24." It also stated: "ACCELERATED DELIVERY IS ACCEPTABLE AND DESIRED AT NO COST TO THE GOVERNMENT" (R4, tab 3 at 1, 4).

3. Vantage did not deliver the assemblies on or before 24 January 2006.

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<sup>1</sup> Inexplicably, both parties refer to the award date in their motions as 15 November 2006 (resp. br. at 1; app. br. at 1).

4. On 20 February 2006, Vantage issued a "Delay Notice And Corrective Action Form" (DNACAF). It stated a new target date for final shipment of 1 May 2006. Vantage's explanation was as follows:

Vantage mistakenly bid this item as a thermo-formed plastic case. As it turned out, Vantage did not have the in-house capability to manufacture the entire case. We had to subcontract the injection molded shell.

(R4, tab 4)

5. On 22 February 2006, Vantage issued another DNACAF. It noted its delinquency under the original delivery date of 24 January 2006 and explained that it had "received a reschedule from our vendor...." Vantage restated a target date for final shipment of 30 April 2006 (R4, tab 5).

6. On 14 March 2006, Mr. James Krutko of DSCC forwarded an e-mail to Vantage in which he stated, in pertinent part:

Please furnish anticipated start of deliveries and estimated quantities until completion of order. Item urgently needed to support numerous backorders. Please reply by 3/17/06 as this item is to be presented for briefing.

(R4, tab 6) On 20 March 2006, Mr. Krutko wrote a memorandum for record in which he noted that Vantage had not complied with his request. He contacted Vantage on 17 March 2006 and was informed that "they should start shipping the cases around 4/15/06 and complete by 1st of May 06" (R4, tab 7).

7. Vantage did not meet these delivery dates. Accordingly, on 31 May 2006, Ms. Kathleen Young of DSCC, the contract specialist for this purchase order, forwarded the following memorandum to Vantage:

Request for you to provide the current status of the subject order. If the order has been shipped, provide a copy of your invoice, date, and method of shipment. If an order cannot be shipped by the scheduled delivery date, then indicate why the order will not be delivered on time. If a delivery extension is required, submit your request in writing to this office. Indicating a future shipment date, without formally requesting a delivery extension, or providing any excusable reason for delay, does not waive the Government's right to withdraw this

order at any time for failure to comply with the order's delivery requirements. A reply is desired within 3 days.

It is requested that your reply be directed to the attention of (sender).

(R4, tab 8)

8. Vantage did not respond to Ms. Young's memorandum within three days, as requested. On 12 June 2006, Ms. Sheri Penrose of Vantage responded by e-mail. She stated: "Sorry for the delay in reply, I..have been researching your answer." Ms. Penrose also asserted: "I should be able to ship you [sic] parts by the middle part of next week. Once I have the parts ready which should be the end of this week, I will confirm this information to you and let you know exactly how many parts you [sic] will be having shipped out." (R4, tab 9) No parts were forthcoming.

9. On 12 July 2006, Ms. Penrose forwarded an e-mail to Ms. Young in which she stated: "Per our conversation this morning, we need to have you issue a modification extending the contract date to: August 18, 2006 as we require this additional time to acquire all of the additional parts for carry case assembly" (R4, tab 11).

10. In response to Vantage's request, DSCC executed unilateral Modification No. P00001, dated 12 July 2006, which extended the delivery date from 24 January 2006 to 18 August 2006, as requested by Vantage (R4, tab 12).

11. On 7 August 2006, Ms. Penrose forwarded a memorandum to Ms. Young in which she wrote, in pertinent part:

After speaking with our vendors, unfortunately we are looking at not being able to ship until October as the vendor is unable to fulfill our purchase order due to some mold problems. At this point we do not have the other components in stock but are trying to obtain them. Will this cause us to lose this contract? Please inform me immediately.

(R4, tab 14) As indicated in Vantage's memorandum, it did not ship any assemblies to DSCC on or before the revised delivery date.

12. On 15 August 2006, DSCC received a request for cancellation of the purchase order purportedly sent by Ms. Penrose (R4, tab 28). Accordingly, on 17 August 2006, CO Michael J. Theado executed unilateral Modification No. P00002 cancelling the purchase order "per Ktr email 8/15/06" (R4, tab 16). The cancellation notice was

received by Vantage on the revised delivery date, 18 August 2006 (R4, tab 16 at 3). Vantage contends the 15 August 2006 request for cancellation was a forgery.

13. In an attempt to resuscitate the purchase order, Ms. Penrose forwarded an e-mail to Ms. Young on 22 August 2006, four days after the revised delivery date, in which she promised full delivery by 29 September 2006 (R4, tab 19). On 24 August 2006, DSCC received a letter purportedly sent by Ms. Penrose in which she requested that the purchase order not be reinstated. Vantage contends this letter was a forgery. (R4, tab 28)

14. On 30 August 2006, Ms. Penrose wrote DSCC that she had not requested cancellation of the purchase order. On that same day the CO forwarded an e-mail to Ms. Penrose in which he stated that the purchase order would "remain canceled" (R4, tab 26).

15. On 11 September 2006, Mr. Paul Roy, Vantage's president, forwarded a "claim" in an amount of \$81,283 for costs which it allegedly incurred with respect to the contract (R4, tab 29).

16. On 15 September 2006, Vantage forwarded to the CO information regarding the allegedly fraudulent documents sent to DSCC which claimed that Vantage was unable to perform the contract and requested that it be cancelled. Vantage also referred to an award which had been made to another contractor, Emerson Company, for additional assemblies on 26 July 2006 (R4, tab 30). At the time of the cancellation of Vantage's purchase order, none of the contracting personnel working on the Vantage contract had any knowledge of the award to Emerson (affidavits of Mr. Young and Mr. Theado, attached to respondent's summary judgment motion).

17. On 25 September 2006, the contracting officer denied Vantage's claim in its entirety. He stated, in pertinent part:

Even if your company did not request cancellation, the government does not have an obligation to pay you any costs. We notified you of the cancellation on August 18, 2006, the delivery due date of the order. You had not delivered any material by that date, and emails from your company indicate that the material had not even been completed by that date. As a result, the purchase order lapsed and there was no binding contract between your company and DSCC to obligate the government for any incurred costs.

(R4, tab 31)

18. This appeal followed.

### DECISION

Summary judgment is appropriate when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). As the United States Supreme Court held in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986):

By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted [emphases in original].

Here, the material facts can be simply stated. At Vantage's request, the CO extended the delivery date from 24 January 2006 to 18 August 2006 through the issuance of Modification No. P00001 (SOF ¶ 10). On 7 August 2006, Vantage forwarded a memorandum to DSCC's contract specialist in which it stated that it could not ship the assemblies until October of that year (SOF ¶ 11). In fact, Vantage did not ship any assemblies on or before the revised completion date. The CO cancelled the purchase order, and Vantage received the cancellation notice on the revised completion date. (SOF ¶ 12)

Attempting to invalidate the cancellation, Vantage raises several arguments. First, it contends that certain communications from Ms. Penrose requesting that the purchase order be cancelled are forgeries and cannot serve as a rationale for the cancellation (app. opp'n at 1-4). These documents have not formed a basis for our decision. Vantage does not dispute the authenticity of its memorandum of 7 August 2006 in which it stated specifically that it could not meet the revised delivery date (SOF ¶ 11). This document alone provides an adequate rationale for the CO's decision to cancel. As the CO stated in his final decision:

Even if your company did not request cancellation, the government does not have an obligation to pay you any costs. We notified you of the cancellation on August 18, 2006, the

delivery due date of the order. You had not delivered any material by that date, and emails from your company indicate that the material had not even been completed by that date. As a result, the purchase order lapsed and there was no binding contract between your company and DSCC to obligate the government for any incurred costs.

(SOF ¶ 17) Hence, the allegedly forged documents are immaterial to the Board's decision.

Equally without materiality are Vantage's allegations regarding the timing of DSCC's cancellation order (app. opp'n at 7-9). Generally a contractor has a reasonable amount of time on the delivery day to make delivery. That is not the issue here. Suffice it to state that Vantage had not fulfilled its obligations under the purchase order, and it is irrelevant to the outcome of the Board's decision as to what time of day on 18 August 2006 Vantage received the cancellation notice.

Finally, the Board rejects Vantage's apparent bad faith allegations regarding DSCC's award to Emerson Company of a contract for the assemblies at issue in its purchase order. Simply put, at the time of the cancellation of Vantage's purchase order, there is no evidence that the DSCC contracting personnel working on the Vantage contract had any knowledge of the award to Emerson (SOF ¶ 16).

Accordingly, we grant respondent's motion and deny appellant's cross-motion.

### CONCLUSION

The appeal is denied.

Dated: 31 December 2008

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MICHAEL T. PAUL  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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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 No. 55647, Appeal of Vantage Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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