

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Lasmer Industries, Inc.) ASBCA No. 56411
)
Under Contract Nos. SPO750-02-D-7917)
SPO750-04-M-2800)
SPO750-04-C-3482)
SPO750-05-M-7797)
SPO750-04-C-3101)
SPO750-03-D-6A94)
SPO750-05-M-7793)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT'S MOTION TO DISMISS

This appeal arises from a dispute over a government claim for reimbursement of the contract price for allegedly non-conforming supplies delivered by Lasmer Industries, Inc. (Lasmer) under various contracts. The government moves to dismiss the appeal for lack of jurisdiction. Lasmer opposes. We conclude that the appeal is within our jurisdiction and deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 11 February 2008, a contracting officer of the Defense Logistics Agency (DLA), Defense Supply Center Columbus (DSCC) sent a letter to Lasmer that stated in relevant part:

Between September 2002 and April 2005, [Lasmer] delivered non-conforming supplies under contracts and delivery orders with the [DSCC]. DSCC is seeking \$4,898,314.22 as reimbursement for non-conforming supplies delivered under these contracts and delivery orders.... The DSCC Product Testing Center (PTC) tested numerous items delivered by Lasmer. A description of the product deficiencies discovered through testing by the PTC is outlined below.

....

As outlined above Lasmer delivered and was paid for parts which were defective, unusable and posed a significant risk to the military end user. Thus, DSCC requests Lasmer pay DSCC \$4,898,314.22 for monies paid to Lasmer for these defective and non-conforming parts. Your check in this amount, payable to DFAS, should be sent to DSCC...within ten (10) days after receipt of this letter.

(Notice of Appeal, ex. 1)

2. Although the 11 February 2008 letter asserted unequivocally Lasmer's liability to the government for the claimed amount, it did not state that it was a "final decision" nor did it contain the notices of appeal and other contractor rights required by regulation for a contracting officer's decision finding that the contractor is indebted to the government (Notice of Appeal, ex. 1). *See* 48 C.F.R. 33.211(a)(4)(v) and (vi) (2002); 48 C.F.R. 32.610(b)(2) and (3) (2002).

3. On 2 March 2008, Lasmer's counsel submitted a "Request for Final Decision" to the DSCC contracting officer. This request stated in relevant part:

We represent Lasmer Industries, Inc. regarding the matter of the Government's claim asserted in your letter dated February 11, 2008. Lasmer disputes the claim *in toto*. In accordance with the Contract Disputes Act and on behalf of Lasmer, we request that the Government to issue [sic] a Final Decision on all contracts under which it asserts claims pursuant to that letter....

Despite Lasmer's written commitment to perform the contracts in accordance with the specifications, the Government neither issued notices to cure the defects nor

returned the items to Lasmer for replacement or inspection. In fact, the Government waited three years until Lasmer's debarment was due to expire to assert these claims. This has prejudiced Lasmer's ability to assert claims against the manufacturers who could have replaced the parts with no cost to the Government, if indeed the parts did not meet the government's contract requirements.

....

During the course of the investigation of the parts that are the subject of your letter, Lasmer identified in correspondence to the Government the existence of design and specification defects, conflicts of interest in the testing methods, overinspection and selective acceptance of items manufactured by Lasmer's competitors while rejecting Lasmer's parts. The Government has yet to respond to the correspondence.

(Notice of Appeal, ex. 2)

4. When Lasmer did not receive a reply to its 2 March 2008 letter, it filed a notice of appeal with this Board. The notice of appeal, dated 7 May 2008, stated in relevant part:

Pursuant to the Contract Disputes Act, the undersigned counsel, on behalf of Lasmer Industries, Inc. ("Lasmer"), hereby appeals the deemed denial of a Final Decision by [the DSCC contracting officer].... By letter dated February 11, 2008, [the DSCC contracting officer] issued a demand that Lasmer pay the government \$4,898,314.22 for alleged defective parts that Lasmer had disputed over three years ago. That letter is attached hereto as Exhibit 1.

By letter dated March 2, 2008 Lasmer reiterated its dispute and requested a final decision on that demand. That letter is attached as Exhibit 2. The Contracting Officer to date has not issued a final decision as the Contract Disputes Act as implemented by and through FAR §33.211 requires. Lasmer appeals the deemed denial of its request for a final decision. [The DSCC contracting officer's] arbitrary and capricious actions are designed to place a demand upon the financial

books and records of Lasmer, to create ambiguity in its future preaward survey results as it competes with contractors favored by [the DSCC contracting officer] and the DLA.

Lasmer respectfully requests that the ASBCA issue an order requiring DLA to file its affirmative pleading since it is a government claim and thereafter requires [sic] LASMER to file an answer thereto.

5. Documents submitted by the government in response to the Board's order of 5 June 2008, show that the contracts under which Lasmer allegedly delivered non-conforming supplies were awarded between 23 September 2002 and 24 January 2005 (Bd. corr. ltr. dtd. 16 June 2008).

6. Before pleadings were filed, the government moved to dismiss the appeal for lack of jurisdiction. The government argues that its 11 February 2008 letter was not a Contract Disputes Act of 1978 (CDA) claim or decision because it "merely 'requests' repayment and does not contain any appeal rights" (gov't mot. at 2). The government further argues that Lasmer's 2 March 2008 request was not a CDA claim because "[t]he right to issue a final decision on a government claim belongs to the government, not to the contractor" (gov't mot at 2).

7. Lasmer opposes the motion on the grounds that (i) its request was a proper CDA claim for "interpretation of the contract terms and other relief," (ii) the government's failure to issue a final decision was a deemed denial of its claim, (iii) the government's "demand for reimbursement was an appealable claim under the CDA," and (iv) rigid adherence to the final decision requirement was not necessary (app. opp'n at 2, 5, 6, 7).

DECISION

All of the contracts at issue in this appeal were required by FAR 33.215 to include the FAR 52.233-1 DISPUTES (JUL 2002) clause. That clause stated in relevant part:

- (a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).
- (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.
- (c) Claim, as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as

a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, 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 Act....

(d)(1) ...A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

While the contracting officer's letter of 11 February 2008 did not state that it was a final decision under the Disputes clause, and did not include the required notices for a Disputes clause decision on a government claim for payment of debt, it was nevertheless an unequivocal written assertion seeking as a matter of legal right the reimbursement of the sum certain of \$4,898,314.22, for the alleged delivery by Lasmer of non-conforming supplies. (SOF ¶¶ 1, 2) This was not a routine request for payment on an amount that was not in dispute when the request was made. Lasmer alleges that the issue of the allegedly non-conforming supplies had been in dispute for the three years preceding the contracting officer's 11 February 2008 letter. Lasmer also alleges that the contracting officer's 11 February 2008 letter will adversely affect the determination of its responsibility for future awards until the claimed liability is resolved. (SOF ¶ 4) The government does not contest the first allegation, and on the second allegation it only makes an unconvincing general denial of "any adverse action that has impacted Appellant" (gov't reply br. at 2). We conclude that the 11 February 2008 letter may be interpreted as an appealable decision under the CDA. *See Placeway Construction Corp. v. United States*, 920 F.2d 903, 906 (Fed. Cir. 1990) (contracting officer letter asserting set-off held appealable notwithstanding that it contained "neither the label 'Final Decision' nor the notice of appeal rights"); *Outdoor Venture Corp.*, ASBCA No. 49756, 96-2 BCA ¶ 28,490 at 142,273 (contracting officer's letter requiring contractor to proceed with warranty work held to be an appealable decision notwithstanding absence of "final decision" words and advice of appeal rights).

Lasmer's request for a contracting officer's final decision and its subsequent appeal of a deemed denial of that request were based on a misconception that the contracting officer's 11 February 2008 letter was not an appealable decision. Notwithstanding that misconception, Lasmer's notice of appeal otherwise manifests an intent to appeal that decision. Accordingly, we conclude that we have jurisdiction of the appeal, not on the basis of a deemed denial of Lasmer's request for a final decision, which we are not persuaded meets the requirements for a claim, but on the basis of an appeal of the 11 February 2008 contracting officer's decision.

The motion to dismiss is denied.

Dated: 22 July 2008

MONROE E. FREEMAN, JR.
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 and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56411, Appeal of Lasmer Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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