

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Free & Ben, Inc.) ASBCA No. 56129
)
Under Contract No. W91GY0-07-C-0056)

APPEARANCE FOR THE APPELLANT: Mr. Ben Emosivbe
President

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
Robert T. Wu, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING
ON APPELLANT’S MOTION FOR RECONSIDERATION

On 14 April 2009, we issued our decision denying the government’s motion for summary judgment and denying appellant’s cross-motion for summary judgment. *Free & Ben, Inc.*, ASBCA No. 56129, 09-1 BCA ¶ 34,129. Appellant has moved for reconsideration of our decision that denied its cross-motion (mot. for recon.) and it has supplemented its motion with four declarations¹. The government has filed an opposition (gov’t opp’n) including a declaration, and appellant has submitted a response to that opposition (app. resp.). Familiarity with our earlier decision is assumed.

The Issue of Failure to Cooperate

In its cross-motion for summary judgment, appellant alleges that it “made several futile attempts” to reach 1LT Robert Lady² to “seek his advise [sic] pertaining to the issuance of an EUC by the Iraqi Government.” 09-1 BCA ¶ 34,127 at 168,742. Appellant has not articulated the legal theory behind its allegations. It seemed to us that it might be complaining that the government breached its implied duty to cooperate. *Id.* at 168,742. In our decision denying appellant’s cross-motion for summary judgment, we

¹ Appellant supplemented its motion by filing declarations on 6, 12, and 15 June 2009.

² 1LT Lady has since been promoted to the rank of Captain in the United States Air Force (gov’t opp’n at 3, n.2).

noted that the government disputed that “1LT Lady was slow in responding to appellant and failed to provide information about the end user” (*id.*).

In moving for reconsideration, appellant referred to several telephone logs and argues “This specific evidence in the record would allow a trier of fact to find that 1LT Lady’s [sic] was slow in responding to Appellant” (mot. for recon. at 5). The telephone logs in the record (motion papers No. 2, tab 12) have not been authenticated. As they now stand, we have only appellant’s allegation that telephone calls were made to 1LT Lady from 30 June to 2 July 2007 that were supposedly not promptly returned. On the record before us, there are material disputed facts relating to whether 1LT Lady’s conduct during contract performance was reasonable.

The Issue of Nondisclosure

In cross-moving for summary judgment, appellant alleges that the government failed to disclose information about the end user and was responsible for its failure to perform. The government took the position that it did not contemplate the issuance of an EUC, and appellant and its supplier could have determined from the RFP and publicly available documents that an EUC could be an issue. In denying appellant’s cross-motion, we found there were genuine issues of material fact with respect to whether appellant should have known that Iraqi forces were the end user of the trucks being procured. 09-1 BCA ¶ 34,127 at 168,742-43.

In moving for reconsideration, appellant argues that if the government did not contemplate the issuance of an EUC, it was not in compliance with Department of Defense (DoD) regulation (DFARS 225.001) and directive (DoD Directive No. 2060.1), and it was negligent and made a “unilateral mistake” (mot. for recon. at 10). In reply, the government says “Appellant’s knowledge of the ultimate end user is not material.” The government says it intends to show that “Japanese export control law required Appellant to obtain an EUC regardless of whether the vehicles at issue were being exported from Japan to U.S. Forces in Iraq or to Iraqi Forces” (gov’t opp’n at 5, n.4).

Based on the numerous motion papers filed so far, it appears there are at least material issues with respect to: (1) whether appellant knew prior to execution of Contract 0056 that an EUC could be required; and (2) whether appellant, knowing what it knew, could have offered to provide trucks from a source other than its Japanese supplier.

Appellant has raised numerous other grounds to persuade us to reverse our decision denying its cross-motion for summary judgment. We have carefully considered them and find no reason to change our original decision. The parties’ second round of argument on appellant’s reconsideration motion persuade us all the more there are

material disputed facts and our initial decision denying appellant's cross-motion was correct.

Accordingly, appellant's motion for reconsideration is denied.

Dated: 22 December 2009

PETER D. TING
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. 56129, Appeal of Free & Ben, Inc., rendered in conformance with the Board's Charter.

Dated:

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