

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
MACH II) ASBCA No. 56425
)
Under Contract No. SPO500-01-D-0088)

APPEARANCE FOR THE APPELLANT: David F. Chalela, Esq.
Tampa, FL

APPEARANCE FOR THE GOVERNMENT: Suzanne M. Steffen, Esq.
Trial Attorney
Defense Logistics Agency
Defense Supply Center
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE STEMLER
ON THE GOVERNMENT'S MOTIONS FOR SUMMARY JUDGMENT

This appeal arises from a delivery order issued under a fixed-price, multiple award requirements-type contract for heavy construction equipment and related items. At issue here is Delivery Order No. 0014 for 38 centrifugal dewatering pumps. The contractor invoiced, and the government paid for 38 units; however, MACH II only delivered 11 units. By final decision the contracting officer demanded repayment of the amount overpaid and the contractor appealed. The government has filed a motion for summary judgment maintaining there are no issues of material fact, and as a matter of law, the government is entitled to judgment for the amount overpaid plus interest pursuant to FAR 32.614-1(a). Following appellant's opposition to the motion, the government subsequently filed a motion to strike MACH II's opposition. We deny the government's motion to strike as moot, grant the motion for summary judgment and deny the appeal.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 29 August 2001, the Defense Logistics Agency, specifically the Defense Supply Center Philadelphia, awarded contract No. SPO500-01-D-0088 to Mach II. The contract required Mach II to supply a range of commercial equipment items through individual delivery orders. (R4, tab 7)

2. The contract contains the following termination for cause provision:

The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(R4, tab 7, 10 of 58, ¶ (m))

3. Delivery Order No. 0014, dated 30 September 2003, required 38 centrifugal dewatering pumps (NSN 4320-00-267-4573) to be delivered within 120 days (R4, tab 9 at 1, 4).

4. Unilateral contract modification 0014-01 extended the delivery date to 23 September 2007 (R4, tab 11).

5. Bilateral delivery order modification 0014-02 increased the unit price of the dewatering pumps to \$5,533.75, resulting in a total price of \$210,282.50 for Delivery Order No. 0014. Additionally, the delivery date was incrementally increased as follows:

**DELIVERY SCHEDULE OF SUBJECT DELIVERY
ORDER IS HEREBY REVISED TO READ:**

**9 EACH 30 DAYS FROM DATE OF MODIFICATION
[8 December 2007]**

**9 EACH 60 DAYS FROM DATE OF MODIFICATION
[7 January 2008]**

**9 EACH 90 DAYS FROM DATE OF MODIFICATION
[6 February 2008]**

**9 EACH 120 DAYS FROM DATE OF MODIFICATION
[7 March 2008]**

2 EACH 130 DAYS FROM DATE OF MODIFICAITON
[17 March 2008]

(R4, tab 12).

6. On 18 December 2007, two dewatering pumps were shipped to the Construction Battalion at Gulfport, Mississippi; these were received on 26 December 2007 (R4, tab 15).

7. On 20 December 2007, nine dewatering pumps were shipped to the Construction Battalion at Port Hueneme, California; these were received on 2 January 2008 (R4, tab 16).

8. Despite the fact that a total of only 11 dewatering pumps were shipped, on 12 December Mach II invoiced the government \$210,282.50 for 38 units (R4, tabs 13, 14).

9. On 16 January 2008, the government paid \$210,282.50 to Mach II as invoiced under Delivery Order No. 0014 (R4, tab 17 at 2).

10. By letter dated 3 April 2008, the contracting officer informed MACH II that, as of that date, the contractor had only delivered 11 of the 38 required dewatering pumps but had been paid for 38 pumps. The contracting officer made a demand for the overpayment of \$149,411.25. The contractor was advised that, in accordance with FAR 32.611, the government had the right to take offset action against any unpaid invoices. (R4, tab 19)

11. By letter dated 25 April 2008, MACH II requested that the \$149,411.25 overpayment "...be put in 'claims' until we ship the balance..." (R4, tab 22).

12. By 15 May 2008, the government had withheld \$42,365.00 from invoices submitted by the contractor under Delivery Order No. 0017 (R4, tabs 23, 24). By final decision of 19 May 2008, the contracting officer informed the appellant that after the \$42,365.00 was subtracted from the overpayment, MACH II was still indebted in the amount of \$107,046.25. The contracting officer demanded that MACH II repay the amount still owed. This final decision contained the contractor's appeal rights. (R4, tab 24)

13. By letter dated 27 May 2008, MACH II filed this timely appeal which was docketed as ASBCA No. 56425. The notice of appeal and complaint dated 24 June 2008 acknowledge the overpayment but maintain that the money will be held in escrow to pay its supplier of the dewatering pumps once the supplier ships the balance of the pumps. (R4, tab 25)

14. On 6 June 2008, the contracting officer partially terminated Delivery Order No. 0014 for cause for failing to deliver 27 of the required pumps by Modification No. 0015-03. MACH II did not appeal the termination. (R4, tab 26)¹

15. Appellant has a second appeal (ASBCA No. 56630) under the same master contract, but a different delivery order, No. 0019, that is currently before the Board. The subject matter at issue in ASBCA No. 56630 concerns the fact that the contractor, but not the government, signed Delivery Order No. 0019; therefore, the parties are at odds as to whether Delivery Order No. 0019 is a valid delivery order (app. resp. to mot. to strike at 2-3; gov't opp. to app. mot. to consol. at 4-5).

DECISION

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Mingus Constructors, Inc. v. Untied States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc.*, 812 F.2d at 1390-91.

In this appeal, there is no dispute concerning the fact that MACH II was overpaid by the government on Delivery Order No. 0014. This fact is admitted by appellant. The only argument advanced by appellant in opposition to the government's motion is that MACH II currently has a second appeal, ASBCA No. 56630, before the Board in which it seeks compensation for breach of contract on a different delivery order under the same master contract. The crux of MACH II's argument is that the two appeals arise from the same contract, same facts and circumstances and, as such, the motion should be denied and the two appeals should be consolidated.

In opposition to the government's Motion for Summary Judgment in ASBCA No. 56630, appellant sets forth several issues of material fact which it now incorporates into its opposition to the instant motion. Lastly, appellant contends "that there are facts in dispute in ASBCA NO. 56425 in that the Government owes the Appellant compensation for breach of contract SPO500-01-D-0088 (app. resp. at 1)." We take a dissimilar view.

¹ On 2 July 2008, the government issued Modification No. 0014-04 to correct typographical errors in the third modification to Delivery Order No. 14 (incorrectly referred to as No. 0015-03), to include correcting the contract number from SPM500-01-D-0088-0014 to SPO500-01-D-0088-0014 (gov't mot., ex. 1).

The instant appeal was taken from a government demand for reimbursement of an overpayment to MACH II in the amount of \$107,046.25. Here there is no question that the government overpaid MACH II on Delivery Order No. 0014 by \$149,411.25. Further, it is undisputed that the government is entitled to offset amounts it owed to MACH II when it withheld \$42,365.00 from invoices submitted by the contractor under Delivery Order No. 0017. See *J.G.B. Enterprises, Inc., v. United States*, 497 F.3d 1259, 1261 (Fed. Cir. 2007). Lastly, there is no dispute regarding the fact that MACH II remains indebted to the government for the \$107,046.25 which the government has not been able to offset.

While we are mindful of the fact that appellant has another appeal concerning a claim for compensation under a different delivery order on the same master contract – this fact is irrelevant. The defenses raised in appellant’s opposition to the motion now before us in ASBCA No. 56425, including allegations of breach of contract raised in ASBCA No. 56630, are peripheral to ASBCA No. 56425 and have no direct bearing on the government’s claim for reimbursement for the overpayment made on Delivery Order No. 0014. Each of MACH II’s appeals is based on a specific delivery order, each of which is a discrete contract. Further, there are no relevant issues of fact common to both appeals.

Lastly, appellant’s contention “that there are facts in dispute in ASBCA No. 56425 in that the Government owes the Appellant compensation for breach of contract SPO500-01-D-0088” is inadequate to overcome a motion for summary judgment. Appellant has provided no evidence that the subject matter of ASBCA No. 56425, an appeal of the government’s demand for overpayment on Delivery Order No. 0014 relates to any alleged breach of contract claim against the government on Delivery Order No. 0019.

Even if, *arguendo*, the government did breach the contract in administering the delivery order at issue in ASBCA No. 56630, we do not know of any authority which gives a contractor the right to offset against one delivery order an amount for work not performed on an unrelated delivery order for dissimilar goods.

We deny the government’s request for interest. The government cites FAR 32.614-1(a) as support for this request. This FAR provision contains the instructions for charging interest when the contract includes the FAR 52.232-17 INTEREST (JUN 1996) clause. The government has not pointed out where FAR 52.232-17 appears in the contract and we have not located it therein. The government makes no other arguments respecting interest.

CONCLUSION

There are no genuine issues of material fact and the government is entitled to judgment as a matter of law. The motion for summary judgment is granted.² The appeal is denied. The government is entitled to \$149,411.25.

Dated: 3 August 2009

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

I concur

I concur

MONROE E. FREEMAN, JR.
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

DIANA S. DICKINSON
Administrative Judge
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. 56425, Appeal of MACH II, rendered in conformance with the Board's Charter.

Dated:

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

² In light of our decision to grant the government's motion for summary judgment, we find the government's motion to strike, moot.