

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Connectec Company, Inc.) ASBCA No. 57546
)
Under Contract No. SPM5L4-09-M-1018)

APPEARANCE FOR THE APPELLANT: Ms. Laura Lopez
Vice President Operations

APPEARANCES FOR THE GOVERNMENT: Daniel K Poling, Esq.
DLA Chief Trial Attorney
Matthew O. Geary, Esq.
Senior Counsel
DLA Land and Maritime
Columbus, OH

OPINION BY ADMINISTRATIVE JUDGE CLARKE ON
MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellant Connectec Company, Inc. (Connectec) appealed from the contracting officer's alleged decision to terminate Purchase Order No. SPM5L4-09-M-1018 for default. The government moved to dismiss for lack of jurisdiction contending that Connectec had not submitted a claim to the government. We grant the government's motion and dismiss the appeal for lack of jurisdiction without prejudice.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 10 April 2009, the Defense Supply Center Philadelphia, Land Detachment, issued Purchase Order No. SPM5L4-09-M-1018 on DD Form 1155 to Connectec for 3500 each, "LEVER, MANUAL CONTROL" part number 0021493557 (R4, tab 1 at 1, 3). The DD Form 1155 did not require Connectec to sign the purchase order (R4, tab 1 at 1).

2. Delivery of the levers was in 7 lots of 500 commencing on 4 July 2009 and ending on 13 November 2009 (R4, tab 1 at 6-7). The preprinted DD Form 1155 incorporated a variety of clauses including DLAD 52.246-9004, PRODUCT VERIFICATION TESTING (JUL 2008); FAR 52.233-1, DISPUTES (JULY 2002); and FAR 52.249-1, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE)

(SHORT FORM) (APR 1984) (R4, tab 1 at 11, 13). The DD Form 1155 did not include a termination for default clause.

3. On 4 May 2009 the government approved Connectec's phosphate procedure and authorized commencement of production (R4, tab 6 at 1-2).

4. In September 2009, Connectec's first production lot of levers was completed (R4, tab 8 at 1). A sample of five levers was selected for product verification testing (PVT); the samples failed the PVT (R4, tab 9).

5. Unilateral Modification No. P00004 was issued on 14 June 2010 that extended the delivery dates. The first delivery was now due on 10 September 2010 with the last delivery due on 19 November 2010. (R4, tab 24 at 2)

6. A sample of five levers was resubmitted. As reported on 30 June 2010, all five samples failed. (R4, tab 25 at 1/8)

7. Unilateral Modification No. P00005 was issued on 6 October 2010 that extended the schedule to allow for a third PVT retest for a consideration of \$800.00. The delivery dates now ranged from 26 November 2010 to final delivery on 28 January 2011.¹ (R4, tab 26)

8. Five levers were selected for PVT retest of which two were subjected to salt spray retest.² As reported on 24 January 2011, the two levers subjected to salt spray retest failed. (R4, tab 29 at 15, 16)

9. On 4 February 2011, the contracting officer sent a letter to Connectec notifying it that its levers failed PVT (R4, tab 31). The contracting officer stated:

As Connectec has been unable to provide conforming material to satisfy PVT requirements, this unilateral order will now be withdrawn.

Pending a final decision in this matter, it will be necessary to determine whether your failure to deliver arose

¹ There is a typographical error in Modification No. P00005. CLINs 0005 and 0006 have a delivery date of 1/28/11 however CLIN 0007 has a delivery date of 1/28/10 (R4, tab 26 at 2).

² The date of submission is not in the test documents but the DD Form 1222 indicates that the samples were received on 13 January 2011 (R4, tab 29 at 4).

from causes beyond your control and without fault or negligence on your part. Accordingly, you are hereby afforded the opportunity to present, in writing, any facts bearing on the question to Ms. Duanna Jorgensen within five days after receipt of this notice. Your failure to present any excuses within this time may be considered an admission that none exist.

(*Id.*)

10. Unilateral Modification No. P00006 was issued on 23 February 2011 stating, "The above cited purchase order was an offer to purchase the supplies described therein provided that delivery was made by 01/28/2010.^[3] Since that date was not met, the Government's offer to purchase has lapsed. No deliveries will be accepted by the Government under this order for the following CLIN(s)."⁴ (R4, tab 33)

11. On 24 February 2011, Connectec sent the contracting officer an e-mail indicating that Connectec had received a copy of Modification No. P00006 and stating that Connectec had not received the government's 4 February letter. Connectec also challenged the government's PVT testing results stating that it had hired an independent certified laboratory to conduct salt spray testing and that its levers had passed. The e-mail contained the following:

Report advises that PVT Samples did not pass Salt Spray. Connectec submits that we do not agree with the Salt Spray findings provided by USG. Connectec has processed this product IAW with specification, and we conducted independent Salt Spray Testing by a Certified Test Lab at the time of process.

....

Connected submits that based on the fact that we did not receive the letter dated February 04, 2011, and we were therefore not afforded the opportunity to provide a

³ The error in the delivery date for CLIN 0007 in Modification No. P00005 was mistakenly used in Modification No. P00006. The date should have been 01/28/11.

⁴ The modification thereafter listed all of the CLINs in the order changing the quantity from 500 to 0 for each CLIN.

response/documentation showing that we were without fault or negligence, that Government's action to terminate is unjust, and we therefore request that the decision to terminate be rescinded. Connectec has completed all quantities required for this contract and are confident that the quality of product we have manufactured [sic].

(R4, tab 32) The contracting officer responded, "We will have a response Monday" (app. resp., tab 1).

12. On 1 March 2011, Connectec wrote to the Board to "appeal the Contracting Officer[']s decision to terminate the referenced contract for default pursuant to FAR Clause 52.249-8 entitled 'Default' using Modification No. P00006" (R4, tab 34).

13. On 2 March 2011, the contracting officer responded by letter to Connectec's 24 February 2011 e-mail. The letter stated in pertinent part:

The material on this order is required to pass Salt Spray Testing by the Government. A successful Salt Spray Test by a Certified Test Lab does not waive the requirement of a successful Salt Spray Test from the Government. The decision to withdraw the purchase order was based on the failure of the Salt Spray Test and the delinquency of the order. The erroneous mention of failure of material in item 27 of the Product Verification Test was not considered in the decision.

As this was a unilateral purchase order, the order is not considered binding until the supplies are shipped and received by the Government. Inasmuch as Connectec was unable to comply with the requirements of the order (ie: Salt Spray Testing); the Government's offer to purchase the supplies has been withdrawn.

(R4, tab 35)

14. Connectec responded to the government's 2 March 2011 letter by e-mail on the same day. In the e-mail Connectec stated:

Thank you for the response; however USG did not address Connectec's request to provide proof of delivery of letter dtd

02/04/2011. It is Connectec [sic] position that this letter was not received by our office until a copy was provided by Mr. Roger Ammons, Contract Specialist on 02/23/2011, which was after Modification P00006 had already been issued. And because we never received this letter, we were therefore not afforded the opportunity to respond as requested and detail why we are without fault or negligence.

(App. resp., tab 3)

15. The Board docketed the appeal as ASBCA No. 57546 on 4 March 2011.

DECISION

The Parties' Contentions

The government argues that without a claim by the contractor, the Board lacks jurisdiction:

When the Government cancels a unilateral purchase order, that action is not a Government claim or final decision, thus the Appellant is required to file a claim with the contracting officer, and receive a contracting officer's decision, 41 U.S.C. § 7103(a) or a deemed denial.... Because the Appellant failed to submit a claim, the contracting officer never had the opportunity to finally decide the matter in accordance 41 U.S.C. § 7103(c) thus no factual or statutory basis exists that is necessary for the Board to have jurisdiction to hear the matter.

(Gov't mot. at 3-4)

Connectec characterizes Modification No. P00006 as a termination for default (SOF ¶ 12). A termination for default is considered to be a government claim that does not require a contractor to file a claim for the Board to exercise its jurisdiction. *RO.VI.B. Srl*, ASBCA No. 56198, 09-1 BCA ¶ 34,068 (default termination is considered a government claim).

Discussion

The Board's jurisdiction under the Contract Disputes Act (CDA) is predicated upon a written claim by either the contractor or the government. 41 U.S.C. § 7103(a) (formerly codified at 41 U.S.C. § 605(a)); *Parsons Global Services, Inc.*, ASBCA No. 56731, 11-1 BCA ¶ 34,632 at 170,653 ("Under the CDA, the submission of a claim to the contracting officer and a final decision on (or the deemed denial of) the claim are prerequisites to jurisdiction over contractor claims."), *appeal docketed*, No. 11-1201 (Fed. Cir. Feb. 3, 2011); *Hanley Industries, Inc.*, ASBCA No. 56976, 10-1 BCA ¶ 34,425 (the CDA requires that government claims be the subject of a contracting officer's final decision).

Connectec did not submit a claim to the government; its appeal is from the government's "decision to terminate the referenced contract for default pursuant to FAR Clause 52.249-8 entitled 'Default' using Modification No. P00006" (SOF ¶ 12). The purchase order did not include a termination for default clause (SOF ¶ 2). On its face, Modification No. P00006 does not assert a claim for money nor does it affirmatively "terminate" Connectec's "contract" for default. Modification No. P00006 simply recites that "...the Government's offer to purchase has lapsed" (SOF ¶ 10).

This case is almost identical to the situation in *Surgical Instrument Co. of America*, ASBCA No. 31335 *et al.*, 85-3 BCA ¶ 18,445 where the Board held:

Each of the appeals was taken from a Government cancellation of a unilateral purchase order after the time for acceptance of the order had expired without delivery by appellant of the ordered goods....

Appellant is asserting in effect a claim for breach of contract by the Government with respect to each of the orders. Under the Contract Disputes Act of 1978, these claims must be submitted to a contracting officer for decision, and there must be either a contracting officer's decision or a failure to decide within the time limit prescribed by the Act, before this Board may take jurisdiction on appeal.

Id. at 92,667. In addition, *C&M Machine Products, Inc.*, ASBCA No. 39635, 90-2 BCA ¶ 22,787, cited by the government in its motion, involved the cancellation of a unilateral purchase order before the performance due date. In dismissing for lack of jurisdiction, the Board stated that C&M had not submitted a claim to the contracting officer and that the government's cancellation was not a government claim.

CONCLUSION

The government's motion is granted and the appeal is dismissed for lack of jurisdiction without prejudice.

Dated: 12 July 2011



CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



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. 57546, Appeal of Connectec Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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