

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
)  
Lasmer Industries, Inc. ) ASBCA Nos. 56946, 56966  
)  
Under Contract No. SPO750-02-D-7917 )

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN ON THE GOVERNMENT’S  
SECOND MOTION TO DISMISS, APPELLANT’S MOTION FOR LEAVE TO FILE  
AN AMENDED COMPLAINT AND APPELLANT’S MOTION FOR SUMMARY  
JUDGMENT ON COUNT FOUR OF THE AMENDED COMPLAINT

Lasmer Industries, Inc. (Lasmer) appeals the deemed denial of its claims for (i) a no-cost termination of the captioned contract “because of the impossible specification,” and (ii) that government records “be updated to reflect this satisfactory completion of the contract.” In our 26 April 2010 decision on a government motion to dismiss, we held that the contracting officer’s offer of a no-cost termination without the “because” clause did not grant the full relief requested. We further held that in the absence of that clause the impossible specification issue was not moot. *See Lasmer Industries, Inc.*, ASBCA Nos. 56946, 56966, 10-1 BCA ¶ 34,433. The contracting officer has now terminated the contract at no cost “because of the impossible specification” and the government again moves to dismiss the appeal as moot. Appellant opposes the motion to dismiss, moves to amend the complaint, and moves for summary judgment on Count Four of the proposed amended complaint. We deny appellant’s motions and grant the government’s motion to dismiss.

## STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. The Statement of Facts in our decision of 26 April 2010 is incorporated by reference herein. Familiarity with that decision is presumed. The following are the relevant facts occurring after that decision was issued.

2. On 17 May 2010, the contracting officer sent a letter to Lasmer referring to Delivery Order 0015 and stating in pertinent part:

I understand from our respective legal counsel that you do not want the no cost termination of this delivery order that was sent to you for signature in November 2009. You have previously informed us that you purchased the idler arms to fill this order in 2004 and that they meet all requirements of the applicable specification except for endurance. I am therefore proceeding with inspection of this material as provided by the contract.

Product Verification Testing will be invoked on CLIN 3002 of this order. There will be 10 each randomly selected by the QAR (Quality Assurance Representative) to be sent to the test lab for testing.

I am requesting from your company all purchase orders; all invoices; all material certifications; drawings; testing records and manufacturing, production, and inspections records that pertain to this material. Please provide this documentation to me no later than May 28, 2010. Please also advise me of the location of the 3100 Idler Arm Assemblies by May 28, 2010. Once the documentation and information is provided, the agency will arrange for the inspection, including the selection of 10 items for testing.

(R4, tab 29)

3. Lasmer responded to the contracting officer's 17 May 2010 letter by a Motion for Protective Order to the Board dated 27 May 2010. This motion, among other things, disclosed that Lasmer had never accepted delivery from its supplier of the 3100 idler arm balance due on Delivery Order 0015 because it knew that the idler arms could not pass the endurance specification requirement. (Lasmer Motion for Protective Order at 3-4)

4. Upon learning that Lasmer did not have the balance due of 3100 idler arms under Delivery Order 0015, the contracting officer decided to grant the request for a no

cost termination of the delivery order. She informed Lasmer of her decision by letter dated 9 August 2010, which concluded in pertinent part as follows:

I therefore reviewed the endurance requirement of Note 14 of Drawing 12340016...which requires that the Idler Arm Assembly pass certain criteria...I reviewed and relied on a March 2009 report by the University of Dayton Research Institute, which among other things, reported on Idler Arm endurance tests in 2007 and 2008. I also discussed the endurance specification with [a] DSCC engineer...I have concluded based on that information that the preponderance of the evidence shows that the endurance requirement is impossible to meet.

If Lasmer currently possessed the 3100 idler arms assemblies that it represented it had ready to deliver in 2004 and 2005, we would have the option of accepting the material if it met all requirements other than endurance. However, since Lasmer has advised that it never accepted those 3100 idler arms from its supplier and would have to produce new idler arms to fulfill the delivery order requirement, I have decided to grant the request you made in your April 22, 2009 letter for a “no cost termination of the delivery order because of the impossible specification,” the endurance requirement of Note 14 of Drawing 12340016,

Attached is modification 001551 implementing the termination. As we previously informed you, the basic contract has expired and Delivery Order 0015 has been removed from the ABVS system so it is not affecting your past performance score. Our DIBBS system no longer shows this delivery order as open.

(Gov’t mot., ex. G-2)

5. The modification attached to the contracting officer’s letter stated in pertinent part:

Cancel the following CLIN(s) to the extent indicated below at no cost or liability to the Government or the Contractor

[3100 idler arm assemblies]

This modification is issued at the Contractor's request to terminate this delivery order at no cost because of the impossible specification, the endurance requirement of Note 14 of the drawing.

(Gov't mot., ex. G-3)

6. On 4 October 2010, the government filed a second motion to dismiss on the ground that as a result of Modification No. 001551 the appeals are moot (gov't mot. at 1). Lasmer has responded with a memorandum in opposition, a motion for leave to file an amended complaint and a motion for summary judgment on Count Four of the amended complaint (Bd. corr. file).

7. The amended complaint consists of 215 paragraphs of factual allegations and legal assertions covering the entire course of Lasmer's business relations with the government, not only with respect to Delivery Order 0015 but also with respect to another procurement (the "ball joint contract"), a 3-year debarment for lack of business integrity, a 6-month extension of the debarment, and an "aggregate" of actions allegedly constituting bad faith. (Amended compl.)

8. The proposed amended complaint has eight counts. Counts One and Two are respectively for breach of contract and breach of warranty for including an impossible endurance specification in the delivery order. Damages are alleged in both counts but no monetary amounts of the alleged damages are stated. (*Id.* at 22-23)

9. Counts Three and Four are respectively for reformation of the delivery order to specify an "Alternate Test" and for a declaratory judgment that the specified endurance test was "an erroneous, defective and impossible specification" (*id.* at 23).

10. The remaining four counts are for breach of the implied covenant of good faith and fair dealing by alleged (i) "intentional deprivation of Lasmer's contractual and legal rights," (ii) "intentionally interfering or hindering Lasmer's contract performance," (iii) government "actions based upon ill-will and retaliation," and (iv) "intentional unequal treatment of contractors." Damages to "include lost profits" are alleged for all of the bad faith counts, but again no monetary amounts of the alleged damages are stated. (*Id.* at 24-32)

## DECISION

Lasmer's 22 April 2009 letter to the contracting officer requested "a no-cost termination of the subject contract and Delivery Order 15 because of the impossible specification." It also requested that "the Government's paper and electronic records for this contract, including the ABBS [sic] and DIBBS systems, be updated to reflect the satisfactory completion of the contract." The letter concluded with the following statement that: "[i]f the Government is not willing to grant these requests, please issue a final decision...." *Lasmer Industries*, 10-1 BCA ¶ 34,433 at 169,943, SOF ¶ 9. The first two requests coupled with the request for a final decision if the requests were not granted, amounted in substance to a claim, and the deemed denial of that claim is the subject of these appeals.

The contracting officer's letter of 9 August 2010 and the contract modification included therein have fully satisfied the requests in the 22 April 2010 claim. The letter expressly stated, among other things, that the contracting officer had determined that the endurance specification was impossible to meet, that the delivery order had been removed from the ABVS system "so it is not affecting your past performance score," and that the DIBBS system "no longer shows this delivery order as open." (*See* SOF ¶ 4) Also, the modification included in the letter stated that it was issued "at the Contractor's request...because of the impossible specification" (*see* SOF ¶ 5).

Where an appeal has been rendered moot by the contracting officer granting all of the relief requested in the claim on appeal, the Board should dismiss it with prejudice since there is no longer a dispute between the parties on the appealed claim. *See Chapman Law Firm Co. v. Greenleaf Construction Co.*, 490 F.3d 934, 940 (Fed. Cir. 2007); *Lasmer Industries, Inc.*, ASBCA No. 56411, 09-1 BCA ¶ 34,115, *aff'd*, 360 F. App'x 118 (Fed. Cir. 2010).

Lasmer seeks to escape dismissal of the present appeals by filing an amended complaint asserting for the first time six claims for monetary damages for breach of contract, a claim for reformation of the contract and a claim for declaratory judgment. The claims in the proposed amended complaint for breach damages and reformation, however, are not merely different legal theories or more detailed factual justifications for the no-cost termination relief in the claim that is the subject of these appeals. They are claims for different types of relief and their justifications involve operative facts, in addition to the impossible specification, that are not present in the claim presented to the contracting officer. Accordingly, we find the breach and reformation claims in the proposed amended complaint to be outside our jurisdiction under the present appeals.

*See Lockheed Martin Aircraft Center*, ASBCA No. 55164, 07-1 BCA ¶ 33,472 at 165,933-34.<sup>1</sup>

The only claim in the proposed amended complaint that would potentially be within our jurisdiction is the claim in Count Four for declaratory judgment that the specified endurance test is “an erroneous, defective and impossible specification” (*see* SOF ¶ 9). However, as a result of the contracting officer’s letter of 9 August 2010 there is no longer any dispute on that issue.

The contracting officer having granted Lasmer all of the relief requested in the claim that is before us on the appeals, we deny appellant’s motion to amend the complaint to encompass other claims, and dismiss the present appeals with prejudice as moot.

Dated: 20 January 2011

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

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

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<sup>1</sup> In addition to not having been submitted to the contracting officer for decision, the six breach damages monetary claims in Lasmer’s amended complaint are otherwise outside our jurisdiction because they are not stated in sums certain. *See* FAR 52.233-1, DISPUTES (DEC 1998), ¶ (c); *Northrop Grumman Systems Corp. Space Systems Division*, ASBCA No. 54774, 10-2 BCA ¶ 34,517 at 170,233-34.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 56946, 56966, Appeals of Lasmer Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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