

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Club Car, Inc.) ASBCA No. 61710
)
Under Contract No. NAFBAI-06-D-0022)

APPEARANCE FOR THE APPELLANT: Michael T. Wagner, Esq.
Covington & Burling LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Stephen M. Hernandez, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE KINNER

Club Car, Inc. asks for judgment on the pleadings following its complaint and the answer by the Army Morale, Welfare, and Recreation Fund, a nonappropriated instrumentality of the United States. The Fund¹ filed a cross motion for partial summary judgment. We possess jurisdiction pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137 at 180,733. The appeal is sustained.

BACKGROUND

The facts underlying this dispute are undisputed. On January 3, 2006, the Fund awarded Club Car a contract to supply golf carts to golf courses at Army locations across the United States and overseas (R4, tab 1; answer pt. I ¶ 9). The period of performance was extended to ten years from the initial five-year period, ending on July 2, 2016 (R4, tabs 3, 18-20; answer pt. I ¶ 9). The contract specifications indicated that a replacement battery would be delivered with each golf cart (R4, tab 1 at 10 section C-4(2)(g); answer pt. II ¶ 15;). Rather than accept replacement batteries with each cart delivery, the Fund explained that:

Replacement batteries are ordered in the normal course of business when they are needed, that is when the original batteries wear out. It does not make sense of the [Fund] to

¹ As identified in the contract, the Army Morale, Welfare, and Recreation Fund is referred to as the “Fund” (R4, tab 1 at 9).

ask for shipment of replacement batteries before they are actually needed. If the [Fund] were to do so, it would bear the responsibility of storing and safeguarding the batteries until needed and would run the risk that the batteries would lose effectiveness during storage.

(R4, tab 33; answer pt. I ¶ 13) The Fund never suggested that Club Car violated the contract by not delivering replacement batteries with each golf cart delivery (gov't reply br. at 22).

Contract clause 1-11 Indefinite Quantity spelled out the contractor's responsibility to fulfill orders for carts or accessories (R4, tab 1 at 25). Subparagraph (d) states:

Any order issued during the effective period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order. The contract shall govern the Contractor's and [Fund's] rights and obligations with respect to that order to the same extent as if the order were completed during the contract's effective period; provided, that the Contractor shall not be required to make any deliveries under this contract after twelve (12) months after contract expiration.

(*Id.*) Contracting Officer Ulli Powell confirmed the Fund's interpretation of the indefinite quantity clause in an email on January 10, 2018, stating that the contract "expired on 2 JUL 2016. If a delivery order was issued on 1 JUL 2016, the delivery order is still good for 12 months. During that time frame the customer can still request battery replacements, warranty, etc." (R4, tab 23).

Club Car "initially and consistently supplied one set of replacement batteries throughout the 10 year contract term, when requested, in conformance with the terms of the contract" (R4, tab 33; answer pt. I ¶¶ 13, 21, 28). Once the contract and the following 12 month grace period expired, Club Car ceased fulfilling orders for battery replacements (R4, tabs 25-26; answer pt. I ¶¶ 18, 23, pt. II ¶¶ 26-31, 41). The Fund issued a letter of deficiency to Club Car on March 14, 2018 demanding further deliveries of replacement batteries (R4, tab 33; answer pt. II ¶ 43). Club Car responded on March 29, 2018 asserting that it was no longer obligated to deliver replacement batteries pursuant to the plain language of the contract (R4, tab 34; answer pt. I ¶ 25, pt. II ¶ 44). The contracting officer issued a final decision on April 19, 2018 demanding payment of \$310,200 for replacement batteries that were not delivered with the previously delivered carts (R4, tab 35; answer pt. I ¶ 26, pt. II ¶ 45). Club Car filed this appeal July 18, 2018 (answer pt. II ¶ 46).

DECISION

The scope of review of Club Car's motion for judgment on the pleadings is limited to considering the sufficiency of the allegations set forth in the Fund's answer and matters incorporated by reference or integral to The Fund's claim, such as documents attached or incorporated into the answer. *Arab Shah Construction Company*, ASBCA No. 61565, 19-1 BCA ¶ 37,266 at 181,349 citing *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014) and *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606 (4th Cir. 2015).² The primary document setting forth the claim is not the answer, per se, but the government's claim, asserted in a contracting officer's final decision as required by the Contract Disputes Act. *Arab Shaw*, 19-1 BCA ¶ 37,266 at 181,349 (citing *Lockheed Martin Integrated Systems, Inc.*, ASBCA Nos. 59508, 59509, 17-1 BCA ¶ 36,597 at 178,281).

The Fund's claim cannot survive Club Car's motion because the facts asserted in its answer, the contracting officer's final decision, or other correspondence referenced in pleadings do not entitle it to a legal remedy. *Hartchrom, Inc.*, ASBCA No. 59726, 18-1 BCA ¶ 37,118 at 180,667. The plain language of the contract does not obligate Club Car to deliver replacement batteries that have not been ordered within the "effective period of the contract" (R4, tab 1 at 25). The Fund has not alleged that the battery deliveries it now seeks were initiated prior to July 2, 2016. To the contrary, the Fund acknowledges that Club Car fulfilled all the orders placed for batteries during the contract period and the subsequent 12 month grace period.

For that reason, the contracting officer's reliance in the final decision upon *Security Hunter, Inc.*, ASBCA No. 60896, 18-1 BCA ¶ 36,981 is misplaced. That case stands only for the proposition that the FAR indefinite quantity clause requires a contractor to finish work that was ordered during the contract period. That case does not address the additional one-year limitation provided in subparagraph (d) of the clause in Club Car's contract. While we must draw all reasonable inferences in favor of the government and accept factual pleadings as true, we are not required to accept legal conclusions contained in a pleading as true. *Id.* (citing *K2 Solutions*, ASBCA No. 60907, 17-1 BCA ¶ 36,801 at 179,374).

The Fund's chosen procedure for placing orders for replacement batteries well after the initial cart delivery was a long standing practice during this contract (gov't reply br. at 22-23). Initiating such orders was the responsibility of the Fund (R4, tab 1 at 13 Clause C-8 Delivery Orders, tab 1 at 24 Clause 1-9 Ordering). Having chosen

² *Arab Shaw* is referring to the standards for consideration of a motion to dismiss for failure to state a claim; however, here, where the appeal is of a government claim, a motion for judgment on the pleadings is functionally the same thing.

that procedure, the contractor is not responsible for the Fund's failure to order sufficient replacement batteries, just as Club Car would not be responsible if the Fund mistakenly failed to order sufficient golf carts. There is no obligation on Club Car to supply carts or accessories that have not been ordered pursuant to the ordering clauses.

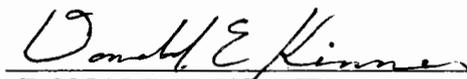
Without a basis in the language of the contract, the Fund's remaining arguments also fail. The Fund has not returned any of the carts to Club Car and is unable to offer a justification to revoke its acceptance of the carts delivered without replacement batteries (R4, tab 1 at 15-6 Clause E-1 Inspection of Supplies). *American Renovation And Construction Co.*, ASBCA No. 53723, 09-2 BCA ¶ 34,199 at 169,056 (acceptance must be revoked within a reasonable time after the mistake is discovered or could have been discovered with ordinary diligence). Club Car's refusal to provide replacement batteries beyond the period of performance in clause 1-11 did not breach the implied duty of good faith and fair dealing. *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019) ("a specific promise must be undermined for the implied duty to be violated"). Finally, the Board does not possess jurisdiction to entertain the Fund's implied in law claim of unjust enrichment. *The Public Warehousing Company*, ASBCA No. 56022, 11-2 BCA ¶ 34,788 at 171,227. Club Car's motion for judgment on the pleadings is granted.

The Fund contends it is entitled to partial summary judgment on Count I of appellant's complaint based upon the unambiguous language of the contract requiring appellant to provide the Fund with golf carts that included replacement batteries for a set price. Count I of Club Car's complaint is that it did not breach the contract because the Army's ability to order replacement batteries expired on July 2, 2017. Based upon our decision granting appellant's motion, we deny the government's motion for partial summary judgment.

CONCLUSION

The appeal is sustained.

Dated: December 30, 2019



DONALD E. KINNER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



J. REID PROUTY
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. 61710, Appeal of Club Car, Inc., rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals