ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Ness Manufacturing, Inc.	)	ASBCA No. 50747
	)	
Under Contract No. SPO450-95-D-0166	)	

APPEARANCE FOR THE APPELLANT: J. Douglas Scherling, Esq.
Colorado Springs, CO

APPEARANCE FOR THE GOVERNMENT: Donald S. Tracy, Esq.
Chief Trial Attorney
Defense Supply Center Richmond (DLA)
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
PURSUANT TO RULE 11

Appellant challenges the denial of its claim for increased costs under a supply contract. Appellant principally contends that a bilateral modification changed its requirements contract to a definite quantity contract, causing increased costs when respondent failed to order the full quantity. Respondent chiefly argues that the modification did not alter the type of contract, which prescribed only estimated quantities. Both parties have elected Rule 11 disposition. We deny the appeal.

FINDINGS OF FACT

1. Effective 24 March 1995, respondent awarded Contract No. SPO450-95-D-0166 to appellant for the manufacture and delivery of aerial towed guided missile target units (NSN 6920-00-613-0312) for the estimated price of $1,051,800 (R4, tab 1 at 1).

2. The contract was awarded for a base term of 24 March 1995 through 23 March 1996 and two one-year option periods, which ultimately were not exercised. The contract provided that "this is a requirements type contract effective 95 March 24 through 96 March 23." The contract schedule set the total "Estimated Quantit[y]" of the Government's requirements for the base contract term at 900 units, which were designated for delivery at specified destinations. (*Id*. at 2-3)

3. The contract incorporated various standard clauses, including: FAR 52.216-18, ORDERING (APR 1984); FAR 52.216-21, REQUIREMENTS (APR 1984); FAR 52.216-19, DELIVERY-ORDER LIMITATIONS (APR 1984); FAR 52.212-15, GOVERNMENT DELAY OF WORK (APR 1984); FAR 52.232-23, ASSIGNMENT OF CLAIMS (JAN 1986); FAR 52.243-1, CHANGES - FIXED PRICE (AUG 1987); FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED - PRICE) (APR 1984); and FAR 52.249-8, DEFAULT (FIXED - PRICE SUPPLY AND SERVICE) (APR 1984). (R4, tab 2 at 6 of 27, 11 of 27, 13 of 27, 14 of 27, 16 of 27)

4. Effective 5 July 1995, the parties executed bilateral Modification No. P00001 on Standard Form 30 (R4, tab 8). Block 14 on the first page included the following description of the modification (with handwritten portions in italics):

> NSN *6920-00-613-0312* PURCHASE REQUEST(S)/REQN NO(S)____REFERENCE: ( ) CONTRACTOR'S CORRESPONDENCE DATED ____: ( ) CONVERSATION BETWEEN CONTRACTOR'S _____ AND DGSC'S _____ DATED _____.
>
> ( ) FAR CLAUSES 52.232-23, ASSIGNMENT OF CLAIMS (JAN 86); 52.243-1, CHANGES-FIXED PRICE (AUG 87); 52.249-1 TERMINATION FOR CONVENIENCE OF THE GOV'T (APR 84) AND 52.249-8 DEFAULT (APR 84) ARE HEREBY INCORPORATED BY REFERENCE NOTE THE CONTRACTOR RECOGNIZES THAT IT WAS NOT PREVIOUSLY CONTRACTUALLY BOUND TO DELIVER THE SUPPLIES DESCRIBED IN THIS PURCHASE ORDER AND THAT BY SIGNING THIS MODIFICATION THE CONTRACTOR BECOMES CONTRACTUALLY BOUND TO DELIVER THE SUPPLIES. TOTAL AMOUNT OF THIS ORDER/CONTRACT IS (***X***) UNCHANGED ( ) INCREASED BY $_____ ( ) DECREASED BY $_____ FROM $_____ TO $_____[.]

(*Id*. at 1) The continuation sheet to the modification consisted of six numbered, handwritten paragraphs. The parties agreed in paragraphs 1 and 2 to change the shipping addresses for certain items (*id*. at 2). They agreed in paragraph 3 that appellant's proposed revisions to the paint specification were acceptable (*id*.). They provided in paragraph 4 for an increased unit price for certain units (*id*.). They agreed in paragraph 5 that the unit prices for other items would remain the same as those originally quoted (*id*.). Finally, they stipulated in paragraph 6 that "[a]ll other terms and conditions of this order remain unchanged" (*id*.).

5. We find that Modification No. P00001 did not purport to render any clauses in the contract inapplicable. We also find that Modification No. P00001 was not a delivery order. We further find that Modification No. P00001 contained no explicit reference to any quantity of units.

6. It is undisputed that during the one-year term of the contract, respondent issued three delivery orders to appellant for a total of 720 units, as follows:

- delivery order 0001 was issued by date of 31 March 1995 for 200 units to be delivered by 13 August 1995;
- delivery order 0002 was issued by date of 12 July 1995 for 144 units;
- delivery order 0003 was issued by date of 22 March 1996 for 376 units.

(App. supp. R4, tabs H at 1, 4; I at 1, 3; J at 1, 3)

7. By date of 1 April 1996, appellant submitted a request for equitable adjustment seeking $62,051 in additional costs allegedly incurred in performing the contract (R4, tab 24). Appellant reiterated the request in a letter dated 10 December 1996, which was converted into a certified claim by letter dated 25 March 1997 (R4, tabs 26, 28). In its submissions, appellant used an Eichleay calculation in claiming $52,455 in unabsorbed overhead, for costs allegedly incurred in producing 180 units, representing the difference between 900 units and the 720 units ordered. (R4, tabs 24, 26, 28) Appellant further claimed proposal preparation and settlement costs of $5,000 and profit of 8 percent (*id*.).

8. By date of 29 April 1997, the contracting rendered a final decision denying appellant's claim (R4, tab 29).

9. Appellant timely appealed the contracting officer's final decision. Both parties thereafter elected to have the appeal decided pursuant to our Rule 11.

10. We find no evidence of a delay or suspension of contract performance, or that appellant was on standby, or that it was at any time unable to take on other work.

11. We find no evidence that respondent acted in bad faith or failed to cooperate in issuing delivery orders.

DECISION

In asserting entitlement to recover for respondent's failure to order the entire estimated quantity of aerial target units set forth in the contract, appellant urges that "[i]n effect, Contract Modification P00001 became the contract between [the parties],

superceding the original contract." (App. brief at 2) Appellant argues that it reasonably interpreted the modification as "requiring the delivery of 900 aerial targets," supplanting the estimated quantity in that amount in the original contract. (*Id*. at 11) Inasmuch as respondent had only ordered 720 units by the end of the contract, appellant insists that it is entitled to recover the costs of producing the 180 unordered units. In addition, appellant contends that there was compensable delay arising from respondent's issuance of delivery orders and failure to order all units. (App. response to respondent's Rule 11 brief (Reply) at 7-8) Finally, appellant alleges that respondent exhibited bad faith and breached the duty to cooperate in its contract administration. We address these issues in turn below.

A. *Modification No. P00001*

The basis of appellant's position that the parties modified the original contract to require delivery of 900 units is found in a portion of block 14 of Modification No. P00001. The terms that appellant focuses upon are as follows:

> NOTE THE CONTRACTOR RECOGNIZES THAT IT WAS NOT PREVIOUSLY CONTRACTUALLY BOUND TO DELIVER THE SUPPLIES DESCRIBED IN THIS PURCHASE ORDER AND THAT BY SIGNING THIS MODIFICATION THE CONTRACTOR BECOMES CONTRACTUALLY BOUND TO DELIVER THE SUPPLIES.

(Finding 4) Appellant urges that, reading this sentence together with paragraph 6 of the modification, which provided that the total amount of supplies was "unchanged," leads to the conclusion that the modification "required delivery of all 900 aerial targets." (App. brief at 22)

We reject this construction. We look to the familiar canon that "an interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions . . . meaningless." *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983). While there is some evidence that respondent included the disputed lanugage out of administrative convenience (respondent's answers to interrogatories, interrogatory No. 2; app. brief, ex. 1) we do not consider that evidence and instead look only to the contract and modifications.

The language that appellant relies upon was not included in, and does not apply to, the parties' requirements contract. The disputed language applies where a purchase order is converted to a bilateral contract, rather than to vary the terms of a pre-existing bilateral contract. By its own terms, the disputed language provides that the contractor was "NOT PREVIOUSLY CONTRACTUALLY BOUND TO DELIVER THE SUPPLIES DESCRIBED IN THIS PURCHASE ORDER" (finding 4), and hence fits the situation classically presented by a purchase order. *See, e.g., Klass Engineering, Inc.*, ASBCA No. 22052, 78-2

BCA ¶ 13,236 at 64,716-18, *modified on reconsid.*, 78-2 BCA ¶ 13,463 (recognizing that issuance of a purchase order "constituted an offer to enter into a unilateral contract," with acceptance occurring by tender of performance). In addition, the box at the beginning of the sentence containing the disputed language is not checked (finding 4), further indicating its inapplicability. There being no period before the word "NOTE," we read the disputed language as part of a longer sentence beginning with the box and the words "FAR CLAUSES" (*see, id.*). Except for the long form Termination for Convenience clause (FAR 52.249-2) in the contract, and the reference to the short form in the modification, the four standard clauses were already in the contract (*see* findings 3, 4), making their addition unnecessary.

This case contrasts with *Kan-Du Tool & Instrument Corp.*, ASBCA Nos. 37636, 37818, 89-2 BCA ¶ 21,822, *aff'd on reconsid.*, 91-1 BCA ¶ 23,611 which shows the use of a provision comparable to the disputed language to convert a purchase order to a bilateral contract. There, the parties cancelled, and then reinstated, purchase orders by executing a bilateral modification. They incorporated into the modification the standard Termination for Default and Termination for Convenience clauses, together with the provision that "[t]he offeree . . . understands that he was not previously contractually bound . . . and by executing this modification . . . and adding the General Provisions intends to become contractually bound for the first time." *Kan-Du*, *supra*, 89-2 BCA at 109,798. We held that, "by executing these modifications[,] such reinstatement was achieved in the form of a binding bilateral contract between the parties." *Id*. at 109,799.

An additional reason for rejecting appellant's construction is that it is manifestly unreasonable. While asserting that its interpretation "does not render any portion of the original contract meaningless, but in fact relies on every provision in the original contract" (Reply at 7), appellant would make at least two standard clauses meaningless: the Ordering clause and the Requirements clause. (*See* finding 3) These two clauses were not deleted by the modification (finding 5). The Requirements clause provided that "[t]his is a requirements contract" and that the stated quantities – 900 units – are "estimates only." FAR 52.216-21(a). The contract's continuation sheet contains a parallel provision declaring that "[t]his is a requirements type contract," which also was not rescinded by the modification (findings 2, 5). In addition, the Ordering clause provides that supplies "shall be ordered by issuance of delivery orders." FAR 52.216-18(a). As we have found, the modification was not a delivery order (finding 5). By rendering the Ordering clause meaningless, appellant's interpretation would also call into question the viability in the contract of the Delivery Order - Limitations clause (*see* finding 3).

Finally, appellant's interpretation is unreasonable because the modification is silent regarding quantities. While appellant insists that the modification "required delivery of all 900 aerial targets" (app. br. at 22), it contains no explicit reference to any quantity of units (finding 5).

B. *Delay*

Appellant has also claimed unabsorbed overhead as a result of delay, seemingly occasioned by the interval between execution of Modification No. P00001 and issuance of delivery order 0003 and by the failure to order all 900 units (*see* findings 4, 6). (Complaint, ¶¶ 33-40)

The record does not support entitlement. In pertinent part, the Government Delay of Work clause (*see* finding 3) requires a "failure . . . to act within the time specified in this contract," (FAR 52.212-15(a)), and delivery order 0003 was undeniably issued during the contract term (*see* findings 2, 6). In any event, there is no evidence of the elements of standby and inability to take on other work (finding 10). *See West v. All State Boiler, Inc.*, 146 F.3d 1368, 1373 (Fed. Cir. 1998).

C. *Bad Faith and Breach of the Duty to Cooperate*

In its complaint, appellant includes allegations of bad faith and breach of the duty to cooperate, seemingly based upon the time span between Modification No. P00001 and delivery order 0003 and upon respondent's failure to order the full 900 units (*see* findings 4, 6). (Complaint, ¶¶ 41-48) We have found no evidence of bad faith (finding 11).

CONCLUSION

The appeal is denied.

Dated: 17 January 2001

ALEXANDER YOUNGER
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. 50747, Appeal of Ness Manufacturing, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals