ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Lawrence Fabricating Co., Inc.	)	ASBCA No. 53317
	)	
Under Contract No. SPO750-99-D-7488	)	

APPEARANCE FOR THE APPELLANT: Daniel R. Boynton, Esq.
Driggers, Schultz & Herbst, P.C.
Troy, MI

APPEARANCE FOR THE GOVERNMENT: Vasso K. Monta, Esq.
Trial Attorney
Defense Supply Center (DLA)
Columbus, OH

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

Appellant timely appealed a contracting officer's final decision terminating the subject contract for default and demand in the amount of $948.20 for overpayment of quantities allegedly shipped by appellant. According to the Government, appellant had failed to deliver the full 90 units for which the Government had paid appellant. The Government in its Motion for Summary Judgment, contends that appellant did not contest the termination for default in its complaint, that the Government's decision to terminate the contract for default was based on appellant's failure to deliver the 367 units ordered under Delivery Order No. 0003, and that the only dispute between the parties concerned whether or not appellant delivered 90 units it claimed to deliver under CLIN 0001 of Delivery Order No. 0003. After appellant made only a partial delivery, the Government terminated the captioned contract. The Government also demanded return of $948.20, claiming that appellant had failed to deliver all of the 90 units for which appellant had been paid. In its appeal, appellant seeks denial of the Government's demand for $948.20 and that its appeal from the termination of the contract for default be sustained. We grant the motion in part.

STATEMENTS OF FACT

1. On 14 June 1999, appellant was awarded indefinite quantity Contract No. SPO750-99-D-7488 for post assemblies. The total estimated contract amount was $45,590.71. Section H, Special Contract Requirements, provided that there were four authorized methods for placing orders under the contract, of which three involved the issuance of delivery orders by the Defense Supply Center Columbus (DSCC). Method 1,

provided for delivery orders for "Stock requirements," shipped to Government storage depots, as referenced by the Contract Line Item Numbers (CLINs). The storage locations were identified by destination zones set forth in the contract Schedule. Paragraph 3 of Section H, Special Contract Requirements provided that partial shipments were acceptable for stock purchases, but not authorized for "DVD" or Direct Vender Deliveries, "FMS" or Foreign Military Sales, and "IMPAC," or International Merchant Purchase Authorization Card purchases, unless specifically authorized in writing by the contracting officer. (R4, tab 1 at 1, 16)

2. The contract contained the standard provisions and clauses for Indefinite Quantity supply contracts, including FAR 52.216-18 ORDERING (OCT 1995), FAR 52.216-19 ORDER LIMITATIONS (OCT 1995), FAR 52.216-22 INDEFINITE QUANTITIES (OCT 1995), and FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). According to paragraph K31, DCSC 52.252-9C02, INSPECTION AND SHIPPING POINTS (APR 1984), inspection, packaging and packing points, and shipping were appellant's facilities. The Default clause provided in pertinent part that the Government may terminate the contract in whole or in part if the contractor fails to deliver the supplies or perform the services within the time specified in the contract, or any extension thereof. The contract specified that delivery would be F.O.B. destination. (R4, tab 1)

3. On 16 May 2000, the Government issued Delivery Order No. 0003 for 367 assemblies to be delivered at specified Government depots (R4, tab 2). The order consisted of CLINs 0001, 0002AA, and 0002AB, with quantities of 202, 153, and 12 each, respectively. All three CLINs designated appellant's facility as the inspection and acceptance points. The first two CLINs had required delivery dates of 13 September 2000, while the third required delivery by 13 October 2000. (R4, tab 2)

4. The Government inspector completed a Material Inspection and Receiving Report, DD Form 250 on 13 September 2000, indicating acceptance of 90 post assemblies under CLIN 0001 (R4, tab 4). Although it is undisputed that appellant shipped assemblies, there is complete disagreement between the parties as to the number shipped and, to some degree, when they were shipped. Appellant asserts that it shipped 90 assemblies in one shipment, and that the Government received all 90, albeit in two deliveries. The Government paid appellant for the 90 units (answer at ¶ 26). However, the Government contends that it received only 68 assemblies during those two deliveries. *Cf., e.g.*, complaint at ¶¶ 2, 4-6, 11, and R4, tab 4 with Gov't. mot. at ¶ 5, and R4, tabs 5, 10, 11. Regardless of the differences in the parties' assertions, what is clear is that the Government received assemblies on 27 September 2000 (either 36 or 58 assemblies), and on 27 December 2000 (32 assemblies). *See*, *e.g.*, complaint, exs. C, G (duplicated as attachments at R4, tab 4); R4, tabs 10, 11.

5. By letter dated 6 December 2000, the contracting officer informed appellant that the Government was considering terminating the contract for failure to deliver all of CLINs

0001, 0002AA, and 0002AB, under Delivery Order 0003 (R4, tab 3). The letter invited appellant to provide any excuses for its failure to perform.

6. Counsel for appellant responded by letter dated 19 December 2000 to the Government's notice that it was considering termination, and laid out appellant's version of events surrounding the shipment of three skids totaling 90 pieces, allegedly on 14 September 2000, how one skid had been misdirected by the freight company, how it had been recovered, and then delivered to the Government in December 2000 (R4, tab 4). The letter was accompanied by several documents purporting to support appellant's version of events. One of the documents evidences receipt by the Government of some assemblies on 27 September 2000, a delivery receipt that appeared to be annotated in an attempt to show that only two skids were received. Nevertheless, appellant's counsel did not assert that there had been any deliveries of assemblies ordered under D.O. No. 0003, other than the alleged delivery of 90 assemblies and there was nothing in this letter to the contracting officer regarding the reasons for appellant's failure to deliver the remaining units ordered under D.O. 0003, as required by the contracting officer's letter of 6 December 2000. Although appellant did contest the termination for default in its complaint, it focused its complaint on the alleged shipment of 90 assemblies, and did not assert that it had produced or shipped any additional assemblies as required by D.O. No. 0003 (complaint). Moreover, there is nothing in the record tending to demonstrate that appellant delivered any more than the 90 units it claimed to deliver. We find that appellant had delivered, at most, 90 of the required 367 assemblies by the last due date of 13 October 2000.

7. By letter dated 15 February 2001, the Government demanded return of $948.20 (R4, tab 6). The amount represented the difference between the price of the 90 assemblies for which appellant invoiced and was paid, and the price of 68 assemblies, which the Government insisted was the number finally received.

8. The contracting officer terminated the contract for default by contract Modification No. 01, dated 21 February 2001, for appellant's failure to deliver the required assemblies ordered under D.O. No. 0003, stating that appellant's failure to meet the required delivery dates was not excusable (R4, tab 8). According to this contract modification terminating the contract for default, appellant's right to proceed with delivery of CLIN 0001 (134 each post assemblies), CLIN 0002AA (153 each post assemblies), and CLIN 0002AB (12 each post assemblies) was terminated effective on the date of the modification. This modification stated that two shipments under CLIN 0001 had been made, 36 each assemblies on 29 September 2000, and 32 each on 28 December 2000 for a total shipment of 68 each assemblies under CLIN 0001.

DECISION

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,*

477 U.S. 317, 323-24 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In a summary judgment motion where the burden is on the movant, as here, its showing must be sufficient to support a holding that no reasonable trier of fact could find for the non-movant. *Calderone v. United States*, 799 F.2d 254 (6th Cir. 1986). At this point in the proceedings, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *See, e.g., General Dynamics Corp*., ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851; *ITT Federal Services Corp*., ASBCA No. 46146, 97-1 BCA ¶ 28,655, *aff'd*, 132 F.3d 1448 (Fed. Cir. 1997).

While the Government's motion focuses primarily on the default termination, it does state that "[t]here was a dispute between the parties concerning whether or not [a]ppellant delivered 90 items it claimed to have shipped under CLIN 0001 of delivery order 0003." (Gov't mot. at 3) The Government insisted that it never received the 90 assemblies and, on that basis, demanded return of $948.20. Appellant's complaint specifically addresses in some detail the Government's demand for $948.20, but only challenged broadly the termination for default without alleging any facts relevant to the propriety of the termination for default, including whether or not appellant delivered, or attempted to deliver the quantities in excess of 90 assemblies required under D.O. No. 0003.

According to FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984), the Government may terminate the contract for default when the contractor, without excuse, does not timely deliver the supplies required. Because termination for default is a drastic sanction tantamount to a forfeiture, it must be strictly construed. *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969). The Government bears the burden of proving by a preponderance of the evidence that its actions were justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). It is well established that a contract may be terminated pursuant to the default clause where a contractor fails to comply with contract delivery schedules. *Churchill Chemical Corp. v. United States*, 602 F.2d 358, 362 (Ct. Cl. 1979); *Laumann Manufacturing Corp.,* ASBCA No. 51249, 01-2 BCA ¶ 31,517 at 155,593. Once the Government proves that a delivery date has not been met, the burden of proof shifts to the appellant to prove the termination was not justified. The contractor must prove its default was "excused by circumstances beyond the control and without the fault or negligence of appellant." *FDL Technologies, Inc.*, ASBCA No. 41515, 93-1 BCA ¶ 25,518 at 127,098. More than conclusory and generalized allegations unsupported by specific proof and probative evidence are required to meet a party's burden of proof. *Fred A. Arnold, Inc.*, ASBCA Nos. 20150, 22154, 84-3 BCA ¶ 17,624 at 87,843 (and cases cited therein).

The Government established a *prima facie* case of appellant's default by showing that appellant did not meet the delivery schedule dates for D.O. No. 0003. The burden then shifted to appellant to prove its default was excused by circumstances beyond its control and without its own fault or negligence. FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). Appellant did not deny its failure to perform timely. Indeed, there are no allegations, in either its correspondence in response to the contracting officer's notice to appellant that the Government was considering terminating the contract for default for failure to deliver all of CLINs 0001, 0002AA, and 0002AB under D.O. No. 0003, or in its appeal and complaint that it delivered more than 90 assemblies. Appellant has not shown any excuse for that failure, nor has it offered any evidence that the failure was not due to its own fault or negligence. In the absence of appellant providing any justification for setting aside the termination, the Government's motion for summary judgment as to the termination for default is granted.

The Government's demand for return of the $948.20 is predicated upon its insistence that it never received all 90 assemblies, which appellant equally insists it shipped and were ultimately delivered. Obviously, the number of items received is a material fact, and that fact is genuinely in dispute. Therefore, the issue is not ripe for summary judgment. The Government's motion as to the demand for return of $948.20 is denied.

Accordingly, as to the default termination, the Government's motion for summary judgment is granted. As to the Government's demand for refund, the motion is denied.

Dated:

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMPLER Administrative Judge Acting Chairman Armed Services Board of Contract Appeals	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. 53317, Appeal of Lawrence Fabricating Co., Inc. rendered in conformance with the Board's Charter.

Dated:

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