ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Aerometals, Inc.	)	ASBCA No. 53688
	)	
Under Contract Nos. USZA95-00-C-0011	)	
USZA95-01-C-0010	)	
USZA95-01-C-0021	)	

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APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
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Supervisory Trial Attorney
CPT Jennifer S. Zucker, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON APPELLANT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT AND ON THE PARTIES' CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

This appeal arises from a contracting officer's final decision terminating appellant's three contracts for default for the delivery of allegedly defective supplies. Appellant has moved for judgment on the pleadings or, alternatively, for summary judgment on the ground that the Government improperly failed to provide it with a 10-day cure period prior to terminating the contracts. The Government opposes the motion, which we treat as for summary judgment. The parties have also both moved for partial summary judgment on the contract interpretation issue of the meaning of the words "Aircraft Manufacturer approved." We deny all three motions.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. The MD 500 family of helicopters was first designed in the 1960s by the Hughes Helicopter Company. Since the original design, ownership of the prime contractor has gone through many changes and the aircraft manufacturer is now known as MD Helicopters, Inc. (MDHI). Over the lifetime of the MD 500 family of helicopters, various

manufacturers of MD 500 helicopters, licensees, and Government procurement agencies have supplied manufacturing drawings for MD 500 parts to various vendors and subcontractors. (Kamphefner decl., ¶¶ 7, 9, 11)

2. Aerometals, Inc. (appellant) manufactures spare and repair parts for the variants of the MD 500 Series helicopter and supplies the parts to civilian and government customers. Appellant has acquired approximately 3,000 original equipment manufacturer (OEM) drawings for parts for the variants of the MD 500 Series helicopter from Government and commercial sources. (Kamphefner decl., ¶¶ 6, 11)

3. In January 1997, representatives of the U.S. Army Special Operations Command (SOCOM or the Government) visited appellant's facility. The Government representatives included the contracting officer, Mr. Richard Cooney; Mr. Edwin J. Soteropoulos, an aerospace engineer; and CW3 Robin Vozar, an aviation maintenance technician. (Kamphefner decl., ¶ 18; Soteropoulos decl., ¶¶ 1-2; Vozar decl., ¶¶ 1-2) Mr. Rex Kamphefner, appellant's general manager, gave the Government representatives a tour of appellant's facility (Kamphefner decl., ¶¶ 1, 18).

4. Mr. Kamphefner stated in a declaration that he showed Mr. Cooney appellant's production board which listed the part number of each part currently in production and the name of the customer for whom it was being produced. Mr. Kamphefner stated that the production board showed that parts were being made for SOCOM at that time. According to Mr. Kamphefner, when he inspected the board, Mr. Cooney asked, "you have the drawings for all of these?" to which Mr. Kamphefner replied that appellant did and that it had acquired many of the prints being used to manufacture the parts directly from the Government's technical data repository. Mr. Kamphefner stated that Mr. Cooney encouraged him to obtain additional drawings. Mr. Kamphefner further stated that, in working closely with Mr. Cooney during the performance of 20 other contracts for SOCOM, Mr. Cooney never stated any concern with appellant's use of OEM drawings in its manufacturing process. (Kamphefner decl., ¶¶ 19-22)

5. CW3 Vozar stated in a declaration that during discussions with Mr. Cooney after the visit to appellant's facility, CW3 Vozar did not recall Mr. Cooney saying that he and Mr. Kamphefner had discussed appellant's drawings or that appellant would produce parts for SOCOM that were not FAA certified (Vozar decl., ¶ 3). Mr. Soteropoulos stated in a declaration that he did not recall any discussion at appellant's facility that indicated that appellant was producing parts for SOCOM that were not FAA certified (Soteropoulos decl., ¶ 3).

6. Mr. Kamphefner stated in his declaration that after his visit to appellant's facility, Mr. Cooney expressed concern to Mr. Kamphefner about the reliability of MDHI, the principal supplier of spare parts for SOCOM's MD 500 Series helicopters. According to

Mr. Kamphefner, Mr. Cooney said he was particularly interested in finding a second source for the manufacture of parts. (Kamphefner decl., ¶ 23)

7. On 28 March 2000, the Government issued Solicitation No. USZA95-00-R-0010 for stock replenishment of repair and spare parts for the MD 500 Series helicopter (R4, tab 15). The solicitation's Statement of Work provided, in relevant part: "All supplied parts shall be FAA certified, Original Equipment Manufacturer (OEM), or manufactured in accordance with Government specifications and drawings" (R4, tab 15 at 4).

8. An amendment to the solicitation dated 8 June 2000 revised the Statement of Work, to provide: "All supplied parts shall be either FAA certified or Aircraft Manufacturer approved" (R4, tab 1). Mr. Kamphefner stated that he discussed this new language with Mr. Cooney over the phone and that Mr. Cooney indicated that appellant could use the drawings it had in its possession instead of getting the drawings from the Government. Mr. Kamphefner stated that, based on this conversation, he interpreted the language to mean that appellant could use the OEM drawings in its possession to manufacture parts. (Kamphefner decl., ¶¶ 35-38)

9. Ms. Shirley Powell, a contract specialist who worked with Mr. Cooney on this procurement, stated in a declaration that Mr. Cooney never told her about this alleged conversation between Mr. Cooney and Mr. Kamphefner and that Mr. Kamphefner never made such statements to her (Powell decl., ¶¶ 2-3). Mr. Cooney died in 2001 (Kamphefner decl., ¶ 41).

10. On 19 July 2000, the Government awarded Contract No. USZA95-00-C-0011 (contract 0011) to appellant for stock replenishment of specified repair and spare parts for the MD 500 Series helicopter. The contract's base period was from 20 July 2000 through 30 September 2000. There were four consecutive one-year option periods. (R4, tab 1)

11. On 23 March 2001, the Government awarded Contract No. USZA95-01-C-0010 (contract 0010) to appellant for the initial purchase and stock replenishment of specified repair and spare parts for the Mission Enhanced Little Bird (MELB) helicopter. The contract's base period was from 23 March 2001 through 30 September 2001. There were four consecutive one-year option periods. (R4, tab 2)

12. On 22 August 2001, the Government awarded Contract No. USZA95-01-C-0021 (contract 0021) to appellant for the initial purchase and stock replenishment of specified repair and spare parts for the MELB helicopter. The contract's base period was from 23 August 2001 through 30 September 2001. There were four consecutive one-year option periods. (R4, tab 3)

13. Each of the contracts incorporated by reference FAR 52.233-1 DISPUTES (OCT 1998) ALTERNATE I (DEC 1991) (R4, tab 1 at 13, tab 2 at 17, tab 3 at 12). Contract 0010 contained the following provision:

> The Contractor shall maintain a minimum balance (M/B) of each part listed . . . . The parts shall be shipped to and stored at the warehouse located in Lexington, KY. Minimum balance (M/B) [sic] at the time of award is defined as the total quantity required. Once a demand history is established, however, the minimum balance may be adjusted by the Contracting Officer.

Contracts 0011 and 0021 contained similar provisions. (R4, tab 1 at 4, tab 2 at 9, tab 3 at 4)

14. Each of the contracts also incorporated by reference FAR 52.246-2 INSPECTION OF SUPPLIES—FIXED-PRICE (AUG 1996) which provided, in relevant part:

> (k) Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.
>
> (l) If acceptance is not conclusive for any of the reasons in paragraph (k) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace the defective or nonconforming supplies . . . , or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the contract as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. . . . If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of 10 days . . . after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby.

(R4, tab 1 at 7, tab 2 at 11, tab 3 at 7)

15. Each of the contracts also incorporated by reference FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) which provided, in relevant part:

> (a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
>
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).
>
> (2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(R4, tab 1 at 13, tab 2 at 17, tab 3 at 12)

16. Each contract's Statement of Work provided, in relevant part:

> I. REQUIREMENTS:
>
> a. All supplied parts shall be either FAA certified or Aircraft Manufacturer approved.

(R4, tab 1 at 4, tab 2 at 9, tab 3 at 4)

17. For all three contracts, the Government issued modifications to exercise the option period of 1 October 2001 through 30 September 2002 (R4, tabs 77-79).

18. Between September 2001 and February 2002, appellant shipped parts to respondent under the contracts at issue which were accepted by respondent (R4, tab 118 at 1). By e-mail dated 17 January 2002, the Government sent appellant a list of the parts shipped by appellant and asked appellant to identify the parts it manufactured and the parts

appellant procured from outside sources, and to indicate whether each outside source was a qualified source (R4, tab 101).

19. Appellant responded by e-mail dated 18 January 2002. Appellant's response indicated that some of the parts had been procured from outside sources and that some of those outside sources were not qualified (R4, tab 102).

20. By letter dated 25 January 2002 which referenced all three contracts, the contracting officer stated that it was the Government's position that "those parts which you have manufactured without FAA authority or which were purchased from unqualified or unauthorized sources, are nonconforming." The contracting officer included a list of the alleged nonconforming parts and, citing FAR 52.246-2(f)(1) [sic], directed appellant to replace those parts at no increase in contract price. The contracting officer identified 22 flight critical parts which were to be replaced within 5 days and directed appellant to replace the remaining identified parts not later than 30 days after receipt of this letter. (R4, tab 103)

21. By letter dated 1 February 2002, the contracting officer revoked her 25 January 2002 letter and directed appellant "to immediately cease all effort required thereunder" (R4, tab 108).

22. By final decision dated 5 February 2002, the contracting officer terminated all three contracts for default stating, in relevant part:

> You are hereby notified that, effective upon your receipt hereof, subject contracts are terminated in whole for default under the contract clause FAR 52.249-8 - Default (Fixed-Price Supply and Service) (APR 1984) due to latent defects and fraud.
>
> The Government hereby revokes its acceptance of those parts listed in Attachment 1 hereto (List of Aerometals Revoked Parts) whereas those parts have been determined to contain latent defects and fraud in accordance with the terms and conditions of the contract.

(R4, tab 110)

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387 (Fed. Cir. 1987).

> The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.

Id. at 1390.

Appellant's Summary Judgment Motion

Appellant contends that it is entitled to summary judgment because the Government did not provide it with a ten-day period to cure any alleged defects before terminating the contracts for default. Appellant argues that because there were no delivery dates specified in the contracts, any termination decision could not have been based on an alleged failure to deliver conforming supplies "within the time specified in this contract" as required by subparagraph (a)(1)(i) of the contracts' Default clauses. Rather, according to appellant, any termination decision had to have been made under subparagraphs (a)(1)(ii) or (a)(1)(iii) of the Default clauses to be valid. Both of these subparagraphs require the Government to afford a contractor a ten-day cure period prior to termination.

The Government maintains that it properly terminated the contracts for default without a cure notice under the Default clauses' subparagraph (a)(1)(i). The Government contends that appellant delivered latently defective supplies and that the contracts' Inspection clauses allowed the Government to revoke acceptance for latent defects and to then avail itself of "any other rights and remedies provided by law, or under other provisions of this contract," which the Government did by electing to terminate the contracts for default.

A latent defect is a defect which cannot be discovered by observation or inspection made with ordinary care. *Munson Hammerhead Boats*, ASBCA No. 51377, 00-2 BCA ¶ 31,143 at 153,805. We must afford to the non-moving party the benefit of all reasonable inferences. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. We believe it is reasonable here to infer there is a genuine issue as to (1) whether the accepted parts conformed to the contract requirements (finding 19), and (2) whether the non-conforming pedigree of the accepted parts could have been discovered by ordinary diligence (findings 18, 19). As to this latter point, we note that appellant has not argued that the alleged defect could have been discovered by ordinary diligence.

A genuine issue having been established as to the existence of a latent defect, we turn now to the Government's rights under the contract. Under paragraph (k) of the contracts' Inspection clauses, the Government was entitled to revoke its acceptance of supplies for, among other reasons, latent defects. *Munson Hammerhead Boats*, *supra*. The Government revoked its acceptance (finding 20). After revocation of acceptance,

paragraph (l) of the Inspection clauses allowed the Government to require the contractor to correct or replace the defective or nonconforming supplies or to repay a portion of the contract. However, paragraph (l) also provided that these options were in addition to any other rights or remedies provided to the Government by law or other provisions of the contract. The remedy which the Government elected was to terminate the contracts under the contracts' Default clauses for "latent defects and fraud" (finding 22).

Appellant premises much of its motion on its argument that a 10 day cure notice was required because there was no delivery date in the contracts, merely a requirement for stock replenishment. However, we have held that tender of delivery establishes a new delivery date even after the contract delivery date was foregone by waiver, a circumstance sufficiently similar to the facts here as to be analogous. *Ralbo, Inc.*, ASBCA No. 43548, 93-2 BCA ¶ 25,624.

Moreover, we have held that neither waiver nor timely delivery precludes summary termination if the delivered supplies are substantially non-conforming. *Louisiana Lamps and Shades*, ASBCA No. 45294, 95-1 BCA ¶ 27,577 at 137,435*; Northeastern Manufacturing and Sales*, ASBCA Nos. 35493, 35557, 89-3 BCA ¶ 22,093 at 111,106. *See also Appli Tronics*, ASBCA No. 31540, 89-1 BCA ¶ 21,555. As we stated in *Louisiana Lamps and Shades*, 95-1 BCA at 137,435: "[T]here can be no valid delivery when the supplies tendered fail to comply substantially with the specification." Further, in *Appli Tronics*, 89-1 BCA at 108,519, despite expressly finding there was no cure notice issued, we said:

> The . . . effect of the failure to update the delivery date was to render the actual tenders of delivery . . . timely, thereby precluding default termination on the ground of late tender. Appellant, however, had a separate and additional obligation to then tender *conforming* supplies. If it failed to do so, the contract was subject to summary termination under para. (a)(i). [Emphasis in original].

As there is a genuine issue here regarding whether the parts were conforming, summary judgment is inappropriate.*

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* The Government relies heavily upon *Cross Aero Corp.*, ASBCA No. 14801, 71-2 BCA ¶ 9075. In that appeal, there was a specific date for commencement of deliveries. Appellant timely delivered supplies in August 1969, which were accepted. Anomalies were thereafter uncovered, of which appellant was informed, and the contract terminated on 2 December 1969 without issuance of a cure notice. The Board sustained the default termination, finding there were latent defects and holding that the Government was not bound by its earlier acceptance in light of the latent defects. Appellant has not attempted to distinguish the decision. We note

Cross Motions On The Meaning of the Words, "Aircraft Manufacturer approved"

Both parties have moved for partial summary judgment on the contract interpretation issue of the meaning of the words, "Aircraft Manufacturer approved." The Statement of Work in each contract required that the parts to be supplied by appellant be either FAA certified or Aircraft Manufacturer approved. As the parties agree that the aircraft manufacturer at issue here is MDHI, the word left for interpretation is "approved."

The Government argues that this word is clear and unambiguous, and that the only reasonable interpretation is that "Aircraft Manufacturer approved" required some contemporaneous, affirmative act by MDHI indicating that it approved appellant's parts. The Government further states that if the Board finds this language to be ambiguous, then the Government desires the opportunity to present extrinsic evidence to explain the language.

Appellant argues that the only reasonable interpretation of the words, "Aircraft Manufacturer approved," is that the contractor could satisfy the contract by building parts to the original engineering drawings which represent the parts designed and approved by the aircraft manufacturer. Appellant maintains that not only did the Government share its interpretation of "Aircraft Manufacturer approved" but that it drafted the language precisely so that appellant and other bidders would have a fair opportunity to compete against MDHI to supply the required parts and that no bidder other than MDHI could have hoped to win the contract award if it was required to obtain MDHI's approval of its production systems. Appellant further argues that it is entitled to summary judgment even if the Board finds that "Aircraft Manufacturer approved" is ambiguous since the extrinsic evidence on which it relies, primarily the declaration of Mr. Kamphefner, is uncontroverted.

The first step in determining the meaning of "Aircraft Manufacturer approved" is to determine whether the term is ambiguous. However, we think this issue is not yet ripe for decision on summary judgment. In *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999), the Federal Circuit stated:

> This court adheres to the principle that "the language of a contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Mfg. Corp. v. United States*, 169 Ct.Cl. 384, 351 F.2d 972, 975 (1965). Thus, to interpret disputed contract terms, "the context

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there is no mention that the parties argued the cure notice issue and it is not part of the Board's deliberations.

> and intention [of the contracting parties] are more meaningful than the dictionary definition." *Rice v. United States*, 192 Ct.Cl. 903, 428 F.2d 1311, 1314 (1970); *see also Western States*, 26 Cl.Ct. at 825; *Corman v. United States*, 26 Cl.Ct. 1011, 1015 (1992). Trade practice and custom illuminate the context for the parties' contract negotiations and agreements. Before an interpreting court can conclusively declare a contract ambiguous or unambiguous, it must consult the context in which the parties exchanged promises. Excluding evidence of trade practice and custom because the contract terms are "unambiguous" on their face ignores the reality of the context in which the parties contracted. That context may well reveal that the terms of the contract are not, and never were, clear on their face. On the other hand, that context may well reveal that contract terms are, and have consistently been, unambiguous.

To determine the meaning of "Aircraft Manufacturer approved," we must examine the events leading up to contract award. Appellant asserts that the Government was aware that it built parts for SOCOM using OEM drawings, that it encouraged appellant to procure more drawings, and that it anticipated that appellant would use OEM drawings to build the parts at issue in these three contracts. In support of its position, appellant primarily relies on the declaration of Mr. Kamphefner and, in particular, his recollection of various conversations he allegedly had with the Government's contracting officer, Mr. Cooney. However, Mr. Cooney is deceased. The Government has submitted the declarations of three people who, although they do not directly contradict Mr. Kamphefner's declaration, indicate that Mr. Cooney never told them about any of these conversations.

We think the context in which the parties executed these contracts must be more fully developed in the record. In particular, the Board must have the opportunity to assess the credibility of, and the Government must have the chance to cross-examine, Mr. Kamphefner at a hearing.

Appellant's motion for summary judgment and the parties' cross-motions for partial summary judgment are denied.

Dated: 25 June 2003

CARROLL C. DICUS, JR.
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. 53688, Appeal of Aerometals, Inc., rendered in conformance with the Board's Charter.

Dated:

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