ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Atlas Headwear, Inc.	)	ASBCA No. 53968
	)	
Under Contract No. SPO100-94-D-1103	)	

APPEARANCE FOR THE APPELLANT: Marc Lamer, Esq.
Kostos & Lamer, P.C.
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: Sharif T. Dawson, Esq.
Trial Attorney
Defense Supply Center (DLA)
Philadelphia, PA

OPINION ON CROSS MOTIONS FOR SUMMARY JUDGMENT
BY ADMINISTRATIVE JUDGE PEACOCK

This appeal arises from a determination that Atlas Headwear, Inc. (Atlas or appellant) is indebted to the government based on a reconciliation of the quantity of government furnished cloth used by appellant under the referenced supply contract for camouflage hats. Both parties have filed cross motions for summary judgment.[1] We deny both motions.

[1] Appellant filed its motion for summary judgment accompanied by proposed findings of uncontroverted facts and memorandum of law on 20 March 2003. In April 2003, appellant filed a voluntary petition under the provisions of Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Arizona. In April 2004, the Bankruptcy Court lifted the automatic stay and permitted this appeal to go forward. The government then filed an opposition to appellant's motion for summary judgment (gov't opp'n) along with a cross motion for summary judgment on 20 April 2004. On 20 May 2004, appellant filed a reply to the government opposition and cross motion. The government filed a response to appellant's reply on 7 July 2004. On 16 July 2004, appellant filed a surreply (app. surreply) to the government response and on 9 August 2004, the government filed a reply to appellant's surreply.

STATEMENT OF FACTS FOR PURPOSES OF MOTIONS

1. Appellant was awarded the referenced indefinite quantity/indefinite delivery contract by the Defense Logistics Agency, Defense Personnel Support Center (DPSC or government)[2] on 25 August 1994 for the manufacture and delivery of desert camouflage hats (R4, tab 11 at 1).

2. The contract provided for a base and one option year with a guaranteed minimum order quantity of 140,976 hats and a maximum order quantity of 169,171 hats per year. The price per hat for both periods was $4.37. (R4, tab 11 at 2)

3. The contract initially called for DPSC to supply basic material for the hats as Government-Furnished Material (GFM) at a price of $3.13 per yard (R4, tab 2) and incorporated the following clause (hereinafter the GFM clause) concerning the GFM (R4, tab 183):

> 52.245-9PO3 PROVISIONS RELATING TO MATERIAL TO BE FURNISHED BY THE GOVERNMENT (C&T BAILMENT SYSTEM) (JAN 1992) DPSC
>
> . . . .
>
> (a) Material to be Made Available by the Government:
>
> (1) The Government will make available to the contractor, for use in connection with and under the terms of this contract, the materials set forth below (hereinafter referred to as Government Material) and the contractor shall utilize such materials in the furnishing of supplies or services hereunder. . . . Price for cloth is based on gross yardage with no allowance for imperfections. Material furnished shall be charged to the contractor's account in multiples of one yard. . . .
>
> (2) THE OFFEROR SHALL DETERMINE THE QUANTITY OF GOVERNMENT MATERIAL IT WILL REQUIRE IN THE PERFORMANCE OF THE CONTRACT AND SHALL INCLUDE THE VALUE OF SUCH MATERIAL IN ITS OFFERED PRICE(S). TO CALCULATE THE VALUE OF THE GOVERNMENT

[2] DPSC has since been renamed the Defense Supply Center Philadelphia. For purposes of this decision, the identity of the government party at the time of award (DPSC) is retained.

MATERIAL, THE OFFEROR SHALL MULTIPLY THE QUANTITY OF GOVERNMENT MATERIAL IT WILL REQUIRE PER UNIT, BY THE UNIT PRICE OF THE MATERIAL SET FORTH IN PARAGRAPH (a)(1) OF THIS CLAUSE. [Uppercase in original]

. . . .

(c) Contractor's Request for Government Material: It shall be the responsibility of the contractor to request its requirements of the government material, pursuant to the provisions of this clause, in sufficient time to comply with the delivery schedule of the contract.

. . . .

(e) Payment: Upon delivery of end items, $ * per unit will be deducted from the contract price and applied to cover the value of the government material. (THIS IS AN ADMINISTRATIVELY DETERMINED RATE TO BE OFFSET AGAINST THE VALUE OF THE GOVERNMENT MATERIAL FURNISHED THE CONTRACTOR, AND SHOULD NOT BE USED BY THE OFFEROR TO DETERMINE ITS MATERIAL REQUIREMENTS ON WHICH TO BASE ITS OFFER PRICE.) The balance of the contract price, less discounts computed on the basis of the amount remaining payable, shall be paid to the contractor. THE CONTRACTOR SHALL BILL AT THE CONTRACT UNIT PRICE, AND SHALL ALSO REFLECT DEDUCTION FOR THE ADMINISTRATIVELY DETERMINED RATE PER UNIT. Subsequent to final delivery, the Government shall issue a unilateral modification to the contract for the purpose of adjusting and finalizing the government material account. Adjustments to the account shall be made as follows:

(1) if the total amount deducted from the contract price to cover the value of the government material exceeds the value of all such material furnished the contractor, the contractor shall receive payment of the excess amount; or,

(2) if the total value of government material furnished the contractor exceeds the amount deducted from the contract price to cover the value of the government

material, the contractor shall reimburse the Government for the value of such material for which sufficient deductions were not taken. Regardless of the amount of government material consumed, the unit cost to the Government of each item accepted including government material shall not exceed the contract unit price for the item. (See notice requirements contained in paragraphs (k)(2) and (k)(3) below.) Should the contractor take exception to any portion of the data contained in the modification, such exception, with supporting data, must be presented in writing to the contracting officer within 30 calendar days of the contractor's receipt of the modification in order to be considered. [Uppercase in original]

(f) Value of Government Material Furnished Contractor: To determine the total value of government material furnished the contractor, the contractor will be charged for the total value of materials furnished at unit prices stated in (a) above less $ * per rejected end item purchased by the contractor and will receive credit at the unit price specified in (a) above for government material unconsumed and returned by him in an undamaged condition to the Government.

(g) Contractor Inventory:

. . . .

(3) Return or Disposition of Other Government Material:

(i) All government material other than irreparable rejects, scrap and ends, will be returned to the Government at contractor's expense, or disposed of by the contractor as otherwise directed by the contracting officer within 30 days after completion of deliveries.

. . . .

(i) Purpose of Government Material: The contractor warrants that any material obtained from the Government is required for use in connection with the supplies or services to be furnished under this contract.

(j) Responsibility for Government Material: The contractor assumes the risk of, and is responsible, for any loss

or damage to government material from the time the material is delivered to the carrier at the originating location to the time it is re-delivered by the contractor to the Government.

(k) Deficiency or Delay in Furnishing Government Material:

(1) In the event the government material is not available for delivery to the contractor . . . the contracting officer shall, if requested by the contractor, make a determination of the delay occasioned the contractor thereby. If the contractor does not make such request of the contracting officer within 7 days after the 21 days allowed for the Government to make the material available . . . no equitable adjustment will be made to the delivery or performance dates, or the contract price.

(2) In the event the contractor believes that damaged, defective, or incorrect government material has been furnished, EXCLUSIVE OF THE DEFICIENCIES ALLOWED BY THE ACCEPTABLE QUALITY LIMITS OF THE APPLICABLE FABRIC SPECIFICATION, or in the event of shortages, either within individual pieces or in the entire shipment, narrow widths, or other discrepancies, the contractor shall immediately examine the material in question, thoroughly documenting the type, location and extent of the deficiencies being alleged. . . . Upon completion of the examination, the contractor shall immediately provide the QAR and the cognizant DCMAO property administrator with a written notification of the alleged deficiencies, including the findings of its own examination of the material . . . . [Uppercase in original]

. . . The QAR shall verify the damage, defect, shortage, narrow width or discrepancy as documented in the contractor's notification, and will report the findings of the verification to the contracting officer and cognizant DCMAO property administrator. . . . In the absence of a government QAR, the contractor shall immediately so notify the contracting officer of the damage, defect, shortage, narrow width, or discrepancy. . . . If the contractor fails to notify either the cognizant government QAR or the contracting officer within 5 days of discovery of any damage, defect, shortage, narrow width or discrepancy in the government

material, no equitable adjustment will be made in the delivery or performance dates or the contract price.

. . . .

(4) In no event may the contractor assert a defense against an assessment of additional monies due under (e) above, nor shall the contractor claim refund of shortages, narrow width, or other discrepancies in the government material unless the 5-day and the 30-day notices in paragraphs (k)(2) and (k)(3) above shall first have been given as provided therein.

. . . .

(m) Retention of Essential Records: The contractor shall retain the original government piece tickets on the pieces until spread for cutting. *The contractor shall also retain in its possession for a period of 12 months subsequent to completion of performance of this contract, all piece tickets removed from government material*. The contractor shall assemble all piece tickets from a particular lay in one bundle, and all bundles shall be consecutively numbered so as to indicate the order in which the lays were cut. All piece tickets retained by the contractor shall be returned to the Government upon the Government's request. *In addition, the contractor shall retain cutting records and any fallout records for each lay (section) for the above stated 12-month period*. [Emphasis added]

. . . .

(o) Final Shipment Notice and Contractor's Representation: Simultaneous with release of the final shipment, the contractor shall provide information copies of the final shipping document to the cognizant DCMAO property administrator and to the Material Accountability Section, Defense Personnel Support Center, ATTN: DPSC-FODM. After disposition of any excess Government material in accordance with instructions contained in paragraph (g)(3) of this clause, but not later than 45 days after completion of contract deliveries, the contractor shall execute

> the following representation contained on DPSC Form FL 195, Return of Property Representation, and return same to the Material Accountability Section, Defense Personnel Support Center, ATTN: DPSC-FODM. The representation reads as follows: "It is represented that, with respect to the type(s) of material which the contract provides shall be furnished solely by the Government, all material of said type(s) used in the performance of this contract was furnished by the Government for the performance of this contract; that property furnished by the Government under this contract has been returned to the designated depot(s) or installation(s) and/or disposed of or transferred as authorized by the contracting officer, or its authorized representative, in the form of finished articles, or otherwise; and that this representation is made with full knowledge and understanding of the penalty imposed by Section 1001, Title 18, U.S. Code, for so representing falsely." The cognizant DCMAO property administrator shall monitor the contractor's adherence to the time frames specified for the disposition of excess government material (paragraph (g)(3)) and for the execution of the above referenced representation. In the event the contractor fails to comply with these time frames, the Government reserves the right to initiate the final adjustment to the contractor's government material account based on the data contained in the government's official property records.
>
> (p) Records of Government Property:
> Notwithstanding (m) above, the Defense Personnel Support Center will maintain the Government's official government property records for the government material provided.

4. The contract price per yard for fabric in ¶ (a)(1) of the GFM clause was $3.13. The "ADMINISTRATIVELY DETERMINED RATE" to be deducted per hat under ¶ (e) of the GFM clause as the hats were delivered was $.9004. (R4, tab 2 at 37, tab 10 at 2; Goodman decl. at 4)

5. As the contractor requested fabric, DPSC would send the fabric with an attached tag referred to as the "piece ticket" showing DPSC's calculation of the total yardage in the shipment. The quantity of fabric shipped would be added to a total yardage count maintained by the government. The contractor's retention of the piece tickets and its cutting records also permitted it to maintain its own account of the

quantities of GFM fabric used. Appellant paid for the GFM as the hats were delivered by deducting the amount of "THE ADMINISTRATIVELY DETERMINED RATE PER UNIT" of $.9004 from the price of each hat calculated based on an estimate by DPSC of the average usage of the material per hat. If the contractor used less fabric than the government's estimated average, the deduction per hat was too high and appellant would be entitled to a refund of the excess amount deducted. If the contractor used more than the estimated fabric per hat, the $.9004 deduction was insufficient and appellant was to pay for the excess yardage used in the manufacturing process. (Goodman decl. at 2-5)

6. DPSC issued three orders for a total of 169,056 hats to Atlas during the base year (R4, tabs 12, 40, 60).

7. On 21 August 1995, the government timely exercised the option through the issuance of Modification No. P00003 (R4, tab 70).

8. Pursuant to bilateral Modification No. P00004, dated 13 December 1995, the parties agreed to delete GFM fabric from the contract requiring Atlas to furnish the material (R4, tab 94). The unit price was increased to $4.5925 per delivered hat, without deduction for the "ADMINISTRATIVELY DETERMINED" $.9004 per hat applicable if government-furnished cloth was supplied. The modification also decreased the GFM account by $152,321.57. (*Id*.)

9. Atlas made the final shipment of base year quantities, *i.e.*, the last hats manufactured with GFM, on 15 February 1996 (R4, tab 113; Goodman decl. at 9).

10. The final shipment of option year quantities was made on 31 March 1997 (R4, tab 171). There is no evidence regarding appellant's compliance with the provisions of paragraph (k) or (o) of the GFM clause, *supra*, relating to notices and representations during performance and at the time of final shipment.

11. Following appellant's final shipment, an Administrative Contracting Officer (ACO) at the Defense Logistics Agency, Defense Contract Management Command, Phoenix reviewed the status of the contract "for [contract] close-out purposes" (R4, tab 173). By letter dated 1 October 1997 to DPSC entitled "Request Authorization to Deobligate Funds and Close Contract," the ACO noted a shortage in one of the shipments exceeding the variation in quantity limits of the contract in the amount of $742.90. The DPSC Procuring Contracting Officer (PCO) was asked to select one of three optional courses of action to resolve the discrepancy "[i]n order that this contract may be closed" and sign the letter in a space provided. (*Id.*)

12. DPSC's subsequent review, however, concluded that Atlas had, in fact, shipped a sufficient quantity of hats. Accordingly, the DPSC PCO advised the ACO in a

letter dated 5 November 1997 that no remedial action was necessary prior to closing out the contract. (R4, tab 174 at 3) Thereafter, on 18 December 1997, the PCO signed the ACO's 1 October 1997 "close out" letter (R4, tab 173). The record on the motions does not indicate whether copies of the "close out" correspondence between the PCO and ACO were provided to appellant at any time prior to this appeal.

13. There is no correspondence or other evidence in the record regarding the contract between 18 December 1997 and 23 May 2002. On the latter date, the contracting officer (CO) issued Modification No. 02 to Delivery Order No. 0001 (DO 1/Mod. 2) and Modification No. P00006 (Mod. 6) to the contract. The effect of these two unilateral modifications was to decrease the delivery order and total contract price by $22,708.14. Mod. 6 purported to be "THE FINAL SETTLEMENT OF THE GOVERNMENT FURNISHED MATERIAL ACCOUNT" allegedly "[i]n accordance with the provisions of paragraph (e)" of the GFM clause with the decrease of $22,708.14 applied against DO 1/Mod. 2. Appellant was granted 30 days to take exception to the indebtedness reflected in these modifications. (R4, tabs 175, 176)

14. By letter dated 4 June 2002, appellant objected to the proposed GFM settlement stating, "Quite frankly this contract has been delivered 7 years ago. It would be nearly impossible to go back and reconstruct records from that period of time" (R4, tab 179).

15. Atlas' standard practice is to retain its cutting records, receiving reports and "piece tickets" for a period of at least two years after completion of performance, although ¶ (m) of the GFM clause only required that "piece tickets" and "cutting records" be retained for one year (Goodman decl. at 4-5). The contractor disposed of records, reports and tickets related to GFM under the instant contract "sometime in the year 2000 or 2001 (since to our knowledge there were no outstanding claims or disputes under the Contract)" (Goodman decl. at 5).

16. The CO responded to appellant's objections to the modifications in a letter to Atlas dated 13 June 2002. The CO stated that the contract "was considered complete effective December 18, 1997" and noted the last shipment was made on 31 March 1997, but proceeded to recompute the amount of appellant's alleged indebtedness. Based on his recalculation, the CO concluded in the letter that Atlas in fact owed the government $33,512.94 instead of the $22,708.14 reflected in Mod. 6 and DO 1/Mod. 02. (R4, tab 180) Thereafter, the CO cancelled both of the modifications and issued Modification No. P00007 to the contract and Modification No. 03 to Delivery Order No. 0001 to recoup the revised amount of the alleged debt (R4, tabs 177, 178, 180).

17. On 26 June 2002, appellant submitted its objections to the modifications (R4, tab 181). When appellant received no response from the government, it submitted a claim and requested a final decision.

18. The government did not respond to the letter and no final decision was issued. On 7 October 2002, appellant filed the present appeal from the CO's failure to issue a decision.

19. Without its own records, appellant, five years after the "final delivery," is unable to verify the accuracy and completeness of the government's records. (Goodman decl. at 7-10, Goodman supp. decl. at 1-8; Luna decl. at 1-2; app. surreply at 3-4)

20. The government alleges in general terms a course of dealing between itself and appellant involving long delays in issuance of reconciliation modifications on clothing contracts. The government cites seven contracts awarded between 1983 and 1993. There is no evidence indicating *inter alia*, (i) whether the GFM clause for the first six of the cited contracts contained the same relevant terms as the clause in the present contract; or (ii) the date of final delivery under any of those six that were allegedly performed between 1983 and 1990. There is also very little evidence, *inter alia*, regarding correspondence, disputes, or other contract administration matters between final delivery and issuance of the reconciliation modifications under any of the seven contracts (R4, tab 27).

DECISION

Summary judgment is appropriate where there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Elekta Instrument S.A. v. O.U.R. Scientific International, Inc.*, 214 F.3d 1302, 1307 (Fed. Cir. 2000); *Information Systems and Networks Corp.*, ASBCA No. 46119, 96-1 BCA ¶ 28,059. A material fact is one that may affect the outcome of the appeal and a genuine issue exists concerning such a fact where sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 849-50 (Fed. Cir. 1992). Under FED. R. CIV. P. 56(e), "an adverse party may not rest upon the mere allegations or denials . . . but [his] response . . . must set forth specific facts showing that there is a genuine issue for trial." *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Mid-America Officials Ass'n*, ASBCA No. 38678, 89-3 BCA ¶ 22,231 at 111,776. Each party's motion must be evaluated on its own merits and all reasonable inferences must be drawn against the party whose motion is under consideration. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

Appellant argues that the government's claim is barred by laches. Atlas points to the approximate five-year delay between its final delivery under the contract and issuance of unilateral reconciliation modifications alleging indebtedness related to GFM supplied under the contract. Appellant emphasizes that the contract expressly required maintenance of pertinent GFM records for only one year after completion of performance. It disposed of them in accordance with its normal practice prior to issuance of the reconciliation modifications well after expiration of the one-year period.

The government contends that appellant was not prejudiced by any late assertion of its claim because the government maintains its own allegedly complete records that should be accepted by the Board to establish the amount of the indebtedness. According to the government, appellant knew that the contract required GFM reconciliation and it was the parties' well-established practice to reconcile the GFM account long after the one-year record retention period set forth in the clause. Therefore, the government contends that appellant should have maintained the records until reconciliation occurred and its failure to do so was unreasonable, poor business judgment, and contrary to "plain old common sense" (gov't resp. at 5).

We conclude that the appeal is not appropriate for resolution by summary judgment. There are disputed issues of material fact, as a minimum with respect to the parties' course of conduct under the prior contracts. These include: the length of time between final delivery and the final GFM reconciliation modification under the prior contracts; what GFM clause was included in the contracts; whether GFM modifications were issued in all instances; whether correspondence or other documentation provided notice after completion regarding the pendency of future GFM reconciliation; whether contract "close out" actions were taken prior to GFM reconciliation; whether notices of deficiencies/discrepancies were provided to the government as addressed in ¶ (k) of the instant contract; the parties' practices regarding ¶ (k) deficiency/discrepancy notices under prior contracts where appellant received payment pursuant to reconciliation modifications; the parties' practice generally with respect to the contractor's "representation" under ¶ (o) of the GFM clause and whether such "representation" was executed in this case; and, generally the parties' prior conduct regarding the interplay and interpretation of ¶¶ (k), (m) and (o) of the GFM clause. In addition, there are factual issues concerning the specific details of the alleged prejudice resulting from the destruction of appellant's GFM records, in particular, the "piece tickets," "cutting records" and "fallout records" specifically mentioned in ¶ (m) of the GFM clause. The adequacy, accuracy and completeness of the government records supporting its claim are also disputed.

Because genuine issues of material fact are present, both motions for summary judgment are denied.

Dated: 7 March 2005

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

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. 53968, Appeal of Atlas Headwear, Inc., rendered in conformance with the Board's Charter.

Dated:

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