ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
DCX-CHOL Enterprises, Inc.	)	ASBCA No. 54707
	)	
Under Contract No. SPO750-00-D-7821	)	

APPEARANCES FOR THE APPELLANT: Richard D. Lieberman, Esq.
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APPEARANCE FOR THE GOVERNMENT: Vasso K. Monta, Esq.
Trial Attorney
Defense Supply Center,
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OPINION BY ADMINISTRATIVE JUDGE YOUNGER

Both parties have moved for summary judgment in this appeal regarding the no cost termination of delivery orders issued under an indefinite delivery/indefinite quantity contract for electrical control boxes. Appellant contends that it tried to deliver conforming product but could not because respondent wrongly suspended inspection and acceptance. Respondent urges that cancellation was appropriate because it had purchased the minimum quantity and appellant was delinquent on deliveries. We deny both motions.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. By date of 13 December 2000, respondent awarded Contract No. SPO750-00-D-7821 to appellant for the supply of electrical control boxes for armament systems (R4, tab 1 at 1 of 5; 4 of 5; 5 of 21). Each electrical control box contained electrical connectors and switches to be used in launchers employed in mine clearing equipment. (Declaration of Alan Swanson (Swanson decl.), ¶ 7; Affidavit of Charlene Nesbitt-Strickland (Nesbitt-Strickland aff.), ¶ 10)

2. The contract was an indefinite delivery, indefinite quantity type contract that contained various standard clauses, including clause I29, CONTRACT LIMITATIONS (DSSC 52.216-9C06) (MAR 1998). It provided in part that "[t]he Government is

obligated to order only the minimum quantity" of nine electrical control boxes. (R4, tab 1 at 15 of 21)

3. The contract also contained clause E02, INSPECTION OF SUPPLIES – FIXED PRICE (AUG 1996), as prescribed in FAR 52.246-2; clause I01, CLAUSES INCORPORATED BY REFERENCE (FEB 1998), as prescribed in FAR 52.252-2, which incorporated clauses contained in respondent's June 1999 Master Solicitation, including DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984), as prescribed in FAR 52.249-8. The contract also contained clause I09, INDEFINITE QUANTITY (OCT 1995), as prescribed in FAR 52.216-22, with insertions not relevant here made to paragraph (d); and clause I33a, ORDERING (OCT 1995), as prescribed in FAR 52.216-18, with paragraph (a) adapted to read in part that "[a]ny supplies and services to be furnished under this contract shall be ordered by unilateral delivery orders." (*Id*., at 14, 15 of 21; letter of appellant's counsel to Recorder of 3/3/05 at 1)

4. The contract also contained drawings. It is undisputed that two drawings -- drawing no. 82A5052A2112 and drawing no. 82A5052A2115 -- required component parts from a Qualified Parts List (QPL). The record contains an affidavit from the chief of respondent's sourcing and qualification unit, stating that such parts:

> are used in critical applications, and must provide superior performance, quality and reliability. They must be manufactured by a DoD qualified manufacturer and assembler. Only an item that is manufactured or assembled by the listed company at the listed location as shown on the QPL is acceptable to the government.

(Affidavit of Robert P. Evans, ¶ 9)

5. During the first period of performance, respondent issued ten delivery orders under the contract, designated as delivery orders 0001, 0002, 0003, 0004, 0005, 0006, 0007, 1001, 1002 and 1003 (the prior delivery orders). Appellant produced and delivered a total of 315 electrical control boxes pursuant to the prior delivery orders. (Swanson decl., ¶¶ 16, 18) This amount far exceeded the minimum quantity specified in clause I29 (*see* finding 2).

6. In early 2003, respondent became concerned about appellant's quality management system. By letter to appellant dated 19 February 2003, respondent issued a Level III Corrective Action, asserting that "[e]vidence exists that the documented quality management system established by [appellant] has neither been fully deployed nor consistently followed" (R4, tab 9 at 1). Appellant was requested to supply a written action plan to "correct specific system deficiencies" and to prevent recurrence (*id*. at 2).

7. Between 1 April 2003 and 17 August 2003, respondent also issued the seven delivery orders to appellant that are at issue here (the disputed delivery orders). These orders were for a total of 278 electrical control boxes, as follows:

Delivery Order	Number of Units	Original Delivery Date(s)
0008	76	30 Jul 03 – 28 Oct 2003
1004	50	5 Aug 2003
1005	27	5 Aug 2003
1006	50	31 Oct 2003
1007	25	31 Oct 2003
1008	25	16 Dec 2003
1009	25	16 Dec 2003

(R4, tab 2 at 1, 4-6, tab 3 at 2, tab 4 at 2, tab 5 at 2, tab 6 at 2, tab 7 at 2, tab 8 at 2) Delivery orders 1004, 1005, 1006, 1007, 1008, and 1009 each provided that "[t]erms and conditions are in accordance with Basic Contract" (R4, tab 3 at 1, tab 4 at 1, tab 5 at 1, tab 6 at 1, tab 7 at 1, tab 8 at 1). With respect to delivery orders 0008, 1004, 1005, and 1007, respondent changed the original delivery dates for some or all contract line items (CLINs) (*id*., tab 2 at 9, tab 3 at 3, tab 4 at 8, tab 6 at 3). With respect to delivery order 0008, appellant had delivered, and respondent had accepted, a partial shipment of 32 units by 7 August 2003 (Swanson decl., ¶ 19). Respondent had accepted none of the units called for in the remainder of delivery order 0008, or in the other delivery orders, by 23 January 2004, the date of cancellation (*id*., ¶ 20; *see* finding 10).

8. In October 2003, during the inspection of a shipment under delivery order 0008, the government's quality assurance representative requested that appellant produce documentation regarding QPL components (*see* finding 4) in the electrical control boxes. Appellant produced documentation that, in her judgment, showed that it "purchased the QPL parts from a surplus dealer, . . . and could not provide traceability to the original manufacturer." She refused to accept the shipment. (Declaration of Kathy Mannion (Mannion decl.), ¶ 8)

9. Respondent thereafter escalated the previously-imposed Level III Corrective Action (*see* finding 6). By letter to appellant dated 13 November 2003, respondent issued a Level IV Corrective Action, asserting that there had been a "breakdown of [appellant's] quality program" since imposition of the Level III Corrective Action (R4, tab 14 at 1). Respondent advised appellant that, as a result of the escalation from Level III to Level IV, "[a]cceptance of all products ordered under Government prime contracts

citing [appellant's facility] as the place of inspection and acceptance is hereby suspended" (*id*. at 2).

10. By date of 23 January 2004, the PCO issued seven unilateral modifications regarding each of the disputed delivery orders. Each modification by its terms "[c]ancel[led] the [relevant] CLIN(s) to the extent indicated below at no cost or liability to the Government or the Contractor" (R4, tab 2 at 11-12, tab 3 at 7-8, tab 4 at 4-5, tab 5 at 4-5, tab 6 at 5-6, tab 7 at 5-6, tab 8 at 3-4). The procuring contracting officer (PCO) has submitted an affidavit attesting that, based upon information from respondent's field activity regarding the suspension of inspection and acceptance on appellant's contracts,

> and due to the fact that the government's minimum obligation of 9 units under the contract had been satisfied, I decided to cancel the delivery orders at no cost to either party in January 2003 [sic]. By that time, all the orders had become delinquent. I needed to cancel these orders so I could reprocure the material from other sources to satisfy the urgent demand for the material by our military customers. I could have terminated the orders for default, but chose to terminate at no cost.

(Nesbitt-Strickland aff., ¶ 6)

11. By date of 25 June 2004, appellant submitted a certified claim to the contracting officer for $193,000 arising from respondent's "refusal to accept goods tendered for [the] seven [disputed delivery] orders that conformed to the Contract" (R4, tab 31 at 1). By decision dated 11 August 2004, the contracting officer denied the claim (*id*., tab 32). This timely appeal followed.

12. The record contains conflicting evidence regarding the conformity of appellant's product to contract requirements. Appellant has submitted the declaration of the general manager of its production facility, stating in part that:

> When [appellant] tendered to [respondent] the 246 control boxes at issue in this Appeal, each assembly had been subject to the QA process at [appellant's facility]. This process included close inspection of all components to ensure that they all met the specifications of the Contract, and particularly, that only QPL items were used for the required QPL components specified in the Contract.

> . . . When [appellant] tendered the items to [respondent], [appellant's] Standard Certificate-of-Conformance was presented stating that the assemblies conformed to all the Specifications and Requirements of the Contract.
>
> . . . [Appellant's] parts, as tendered to DCMA, fully met all of the requirements of the Contract.

(Swanson decl., ¶¶ 22-24) Respondent has submitted a declaration from its quality assurance representative who inspected units under delivery order 0008. She attests that she found "deficiencies" in the remaining shipments under that delivery order, consisting of documentation showing that appellant "purchased the QPL parts from a surplus dealer, . . . and could not provide traceability to the original manufacturer." (Mannion decl., ¶ 8) She also attests that, when a later review indicated that appellant "had not cured the deficiencies, appellant produced "Certificates of Conformance" that she did not consider to be "objective quality evidence that the QPL parts were from a QPL manufacturer." (*Id*., ¶ 9) In addition, respondent has submitted a declaration from the administrative contracting officer attesting that a review of appellant's corrective action on 5 January 2004 revealed that it was "uncertain if Appellant would be able to correct the [previously noted] deficiencies [in its quality management system], and if so, when [appellant] could deliver conforming product under the pending delivery orders." (Declaration of Annie West, ¶ 8)

DECISION

In their respective motions for summary judgment, both parties ultimately turn to the issue of whether the control boxes produced by appellant under the disputed delivery orders conformed to contract requirements. Thus, the majority of appellant's motion is devoted to arguments to demonstrate that appellant produced conforming control boxes. Appellant contends that respondent rejected control boxes under the disputed delivery orders by wrongly insisting that appellant provide traceability of the QPL components to the original manufacturer or objective quality evidence of compliance with contract requirements. Appellant insists that, based upon these new demands, respondent "improperly rejected the . . . control boxes [produced under the disputed delivery orders], which met all of the requirements and specifications of the Contract" (Motion for Summary Judgment at 8).

In its motion, respondent asserts that the contracting officer "cancelled [the] seven [disputed] delivery orders . . . for the reason that Appellant had failed to meet the delivery dates and it was uncertain whether Appellant would be able to deliver conforming material at any delivery date." (Respondent's Motion for Summary Judgment (resp.

mot.) at 1) Respondent tells us that the only material that appellant provided for inspection related to delivery order 0008, and that it "did not conform to the requirements of the contract." (Resp. mot. at 6)

We consider these contentions in light of familiar principles. That is, "[t]he fact that both parties have moved for summary judgment does not mean that [we] must grant judgment as a matter of law for one side or the other; summary judgment in favor of either side is not proper if disputes remain as to material facts." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). "Our task is not to resolve factual disputes, but to ascertain whether material disputes of fact – triable issues – are present." *John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969. A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

After considering the motion papers, the pleadings and the other documents in the record, *see* Fed. R. Civ. P. 56(c), we conclude that both parties' motions should be denied because both present a triable issue of fact.

That triable issue is whether appellant unsuccessfully tendered conforming product for inspection and acceptance. The issue is material because, if respondent's suspension of inspection and acceptance of appellant's product (*see* finding 9) caused appellant to be delinquent on the disputed delivery orders, then the delinquency cannot be ascribed to appellant's fault or negligence. Accordingly, both parties submit affidavits or declarations reflecting their positions regarding product conformity. As we have found, however, these affidavits and declarations posit diametrically opposite positions. Thus, appellant's general manager declares that, with respect to the control boxes produced under the disputed delivery orders, "only QPL items were used for the required QPL components" and that the parts, "as tendered to [respondent], fully met all of the requirements of the Contract" (finding 12). By contrast, in their declarations, respondent's quality assurance representative refers to product "deficiencies," and the administrative contracting officer states that, shortly before cancellation, appellant had not "deliver[ed] conforming product under the pending [disputed] delivery orders" (*id.*). We cannot conduct a "trial by affidavit" on these cross motions. *E.g., John C. Grimberg Co., supra*, 99-2 BCA at 150,970. The issue must accordingly be resolved at trial.

Apart from the triable issue of fact, neither party's motion papers address the legal basis for unilateral cancellation of delivery orders "at no cost or liability to the Government or the Contractor" after deliveries had begun. Hence, even if there were no triable issue of fact, we could not say that either party has demonstrated that it "is entitled to a judgment as a matter of law" on the cancellation issue. Fed. R. Civ. P. 56(c).

CONCLUSION

Appellant's motion for summary judgment, and respondent's motion for summary judgment, are each denied.

Dated: 7 April 2005

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. 54707, Appeal of DCX-CHOL Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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