

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Solid State Electronics Corporation) ASBCA No. 56485
)
Under Contract No. SPM7MO-08-M-1365)

APPEARANCE FOR THE APPELLANT: Mr. Edward Y. Politi
President

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
DLA Chief Trial Attorney
Vasso K. Monta, Esq.
Senior Counsel
Defense Supply Center,
Columbus

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

Appellant timely appealed a contracting officer’s decision which partially denied its claim in the amount of \$655.89 based on costs appellant claimed were incurred for expedited shipping. In its final decision, the contracting officer allowed \$168.14 for the overnight shipping costs, but disallowed the remaining \$487.75 claimed. The government moves for summary judgment on the basis that the undisputed facts show that the government is entitled to summary judgment as a matter of law except with respect to \$168.14. Appellant opposes the government’s motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 11 January 2008, the Defense Supply Center, Columbus (DSSC) issued a unilateral purchase order, SPM7MO-08-M-1365, to appellant for the supply of a “COMMERCIAL OFF-THE-SHELF” electromagnetic relay in the purchase amount of \$5,271. The purchase order schedule provided: “DELIVER FOB: ORIGIN BY: 2008 FEB 10.” The purchase order further provided that shipment by parcel post was not permitted, that shipment was to be by the “FASTEST TRACEABLE MEANS POSSIBLE,” and that “EARLY SHIPMENT IS ACCEPTABLE AT NO ADDITIONAL CHARGE TO THE GOVERNMENT.” However, the purchase order also provided: “FOB ORIGIN = PRE PAY AND ADD SHIPPING TO INVOICE.” According to the purchase order, standard commercial packaging was acceptable. The purchase order

required appellant to contact the transportation office for shipping instructions if necessary and for the freight shipping address prior to shipment. (R4, tab 1)

2. The contract incorporated by reference FAR 52.233-1, DISPUTES (JUL 2002) and FAR 52.243-1, CHANGES – FIXED PRICE (AUG 1987) (R4, tab 1). The contract also incorporated FAR 52.247-29, F.O.B. ORIGIN (FEB 2006), which provided in pertinent part:

(a) The term “f.o.b. origin,” as used in this clause, means free of expense to the Government delivered –

(1) On board the indicated type of conveyance of the carrier...at a designated point in the city, county, and State from which the shipment will be made and from which line-haul transportation service...will begin;

....

(b) The Contractor shall –

(1)(i) Pack and mark the shipment to comply with contract specifications;...

....

(3) Deliver the shipment in good order and condition to the carrier....

(4) Be responsible for any loss of and/or damage to the goods –

(i) Occurring before delivery to the carrier;...

(R4, tab 1)

3. Although there are some conflicts in the details set out in this appeal, what is clear is that there were discussions in late January 2008 between Ms. Pamela Northern-Eley, a customer support representative from Commander Submarine Force in Norfolk, Virginia and appellant’s President, Mr. Edward Politi, with respect to the status of the order and as to whether appellant could expedite the delivery of the relay (compl. ¶ 3; app. supp. R4, tab 6; gov’t mot., declaration of Pamela Northern-Eley (Northern-Eley decl.); app. opp’n, declaration of Edward Politi

(Politi decl.)). Appellant received the electromagnetic relay at its place of business on Friday morning, 25 January 2008, and immediately telephoned the government for shipping instructions. Mr. Politi told the government support representative that he had the relay, that it was ready to be shipped, and that he could expedite the delivery of the item. He also asked the government support representative to provide him with the shipping address so that he would not have to call the transportation office for the address as provided in the purchase order. There is no evidence in the record that Mr. Politi informed the government's customer support representative that he planned to personally deliver the electromagnetic relay to the shipping company in response to her question as to whether the shipment of the relay could be expedited.

4. By facsimile dated 25 January 2008, the government customer support representative provided appellant the government address to which the item was to be delivered in Norfolk, Virginia (app. supp. R4, tab 6c). This facsimile provided in part:

Regarding: Shipping Address for Contract SPM7MO-08-M-1365

Comments: Please ship material for contract SPM7MO-08-M-1365 via Overnight/Saturday Delivery to the following address:

The facsimile provided the complete shipping address. The government's customer support representative was not a contracting officer nor was she authorized to make any changes to the contract. (App. supp. R4, tab 6c; Northern-Eley decl. ¶¶ 2, 5-7)

5. According to appellant, since scheduling pickup from the shipping company, PPI (Preferred Packaging Inc.) usually required several days, there was no one else available except appellant's president to personally deliver the item to the shipping company on Friday, 25 January 2008, so that it could be shipped to arrive at the designated address in Norfolk the next day on Saturday, 26 January 2008 (Politi decl.). The electromagnetic relay was shipped on Monday, 28 January 2008, and received by the government on or about 30 January 2008 (app. supp. R4, tab 8).

6. The contracting officer did not know of the contact between the government's customer service representative and appellant, and did not approve either prior to the exchange or after, any change in the contract delivery requirements. Upon appellant's presentation of proof of the shipping costs, the contracting officer determined to allow the \$168.14 as costs for overnight shipping. (Gov't mot., declaration of Richard Bebel (Bebel decl.) ¶¶ 3-6)

7. On 31 January 2008, appellant invoiced the government for payment of \$5,520.99. The invoice was created through the government's "INVOICE-FAST PAY" electronic system and included \$5,271 for the relay and \$249.99 for shipping as

“Miscellaneous amount.” Appellant’s contract administrator noted that the government’s website provided for the “INVOICE-FAST PAY” and allowed only \$249.99 as the maximum amount authorized for shipping cost, and so informed Mr. Politi (Golob decl.). Mr. Politi then instructed her to increase the amount of \$168.14 which was the freight cost invoiced by PPI to appellant for the shipping and next day delivery, to \$249.99 which according to appellant, was the maximum “Miscellaneous” amount the electronic system would accept. (Compl. ¶ 6; R4, tab 2, ex. C)

8. On 4 March 2008, appellant submitted a claim to the contracting officer, received on 5 March 2008, requesting a total of \$655.89 for the shipping costs and for costs allegedly incurred in expediting the shipping of the relay. The amount represented \$168.14 charged by the shipping company PPI Industrial Corp; and \$487.75 asserted to be Mr. Politi’s “Straight time” and “Over-time” (\$139.00), overhead (\$166.80), G&A (\$137.61), and profit (\$44.34). (R4, tab 2, ex. D) However, we note that the final PPI Industrial Corp. invoice dated 29 January 2008 was in the amount of \$230.64 which included the \$168.14 freight charges and \$62.50 for materials and labor, DD250 preparation fee, and distribution fee (app. supp. R4, tab 9).

9. The contracting officer, by final decision dated 30 April 2008, granted \$168.14 for the PPI overnight shipping charge and denied the remainder of the claim. The contracting officer stated in his declaration:

Although the government computer system allowed a maximum of \$249.99 for shipping costs, that is only an estimate. The government will only pay the exact amount incurred after the contractor provides proof of those costs.

(R4, tab 3; Bebel decl. ¶ 5)

10. Appellant timely appealed to this Board. In its complaint, appellant requested a total of \$17,137.14 consisting of \$230.64 for “total PPI invoice” in shipping costs, \$487.75 for time in shipping the materials, and an additional \$16,418.75 for “efforts to secure Respondent payments” of the claim. The government, in its motion, conceded, as did the contracting officer, that appellant should be granted \$168.14 for shipping costs. (Compl. ¶ 13; app. supp. R4, tab 16)

DECISION

Appellant, in its complaint, requests \$17,137.14, consisting of \$230.64 for PPI shipping costs, \$487.75 for time and materials, and an additional \$16,418.75 for “efforts to secure respondent payments.”

The government moves for summary judgment on the ground that there was no change to the contract and that appellant is not entitled to extra costs claimed for shipping the relay. Appellant claims that the facsimile from the government’s customer representative changed the terms of the purchase order by accelerating the delivery date, changing the method of shipment, and changing the FOB origin provision. As a result, appellant claims it is entitled to additional costs incurred to expedite the delivery of the relay.

Summary judgment may be granted where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Board resolves all inferences in favor of appellant, as the party against whom the motion is directed. *JT Construction Co.*, ASBCA No. 54352, 06-1 BCA ¶ 33,182 at 164,464.

Here, the material facts can be simply stated. Appellant had a unilateral purchase order, an offer by the government which a contractor can accept by delivering the requested supplies, a commercial off-the-shelf electronic relay, in accordance with the terms and conditions specified in the order. *Klass Engineering, Inc.*, ASBCA No 22052, 78-2 ¶ 13,236, *mod. and aff’d*, 78-2 BCA ¶ 13,463. Pursuant to Ms. Northern-Eley’s request, appellant agreed to expedite the delivery of the relay. Ms. Northern-Eley had no contracting officer authority to change the terms of the purchase order. Appellant had received the electronic relay at the time of Ms. Northern-Eley’s request for expedited delivery. Appellant’s president personally delivered the electronic relay to the shipping company, PPI, on Friday, 25 January 2008. The electronic relay was shipped on Monday, 28 January 2008, and delivered to the government on 30 January 2008.

The government contends that the message included in the facsimile from Ms. Northern-Eley to ship “via Overnight/Saturday Delivery” is simply another way of phrasing the contract requirement that appellant ship the “FASTEST TRACEABLE MEANS POSSIBLE.” While we grant that the wording used in the facsimile from Ms. Northern-Eley may have been confusing, it was not, however, binding on appellant nor did it constitute a change in the terms of the contract made by the contracting officer. “The Government agent must have actual authority, as opposed to apparent authority, to bind the Government. The burden is on the one seeking to bind the Government to show

the agent's authority." *Reliable Disposal Co.*, ASBCA No. 40100, 91-2 BCA ¶ 23,895 at 119,717. Assuming as claimed by Mr. Politi that he delivered the relay to PPI in an effort to achieve Saturday delivery, this was his business decision, not a contract requirement. There was no change to the contract directed by the contracting officer. "[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop. Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

The purchase order clearly stated that the delivery was to be "FOB: ORIGIN" by 10 February 2008, as defined in the contract which meant that it was to be "free of expense to the Government delivered...On board the indicated type of conveyance of the carrier...at a designated point...from which the shipment will be made and from which line-haul transportation service...will begin." The latest authorized delivery date remained 10 February 2008. Appellant was required to deliver the relay by the "FASTEST TRACEABLE MEANS POSSIBLE," where the contract provided that "EARLY SHIPMENT IS ACCEPTABLE AT NO ADDITIONAL CHARGE TO THE GOVERNMENT," but not later than 10 February 2008.

According to the "FOB-ORIGIN" clause, paragraphs (a)(1) and (b), appellant is responsible for all costs associated with the delivery of the electronic relay to the government, except the freight charges for the shipment of the item, which costs were to be reimbursed by the government. There was nothing in the facsimile communication from the government's customer support representative which altered the terms of the clause in any respect.

Accordingly, we grant the government motion for summary judgment. The government does not dispute that SSEC is entitled to \$168.14 for the shipping cost. Therefore, we sustain the appeal to that extent together with CDA interest on that amount from 5 March 2008, and deny the appeal as to the remaining \$487.75 amount asserted in appellant's claim, and as to the additional \$16,481.25 asserted in its complaint, which amounts do not relate to the actual costs of shipment.

Dated: 16 March 2010

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

(Signatures continued)

I concur

I concur

MARK N. STEMLER
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. 56485, Appeal of Solid State Electronics Corporation, rendered in conformance with the Board's Charter.

Dated:

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