ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Sharp Electronics Corporation	)	ASBCA No. 57583
	)	
Under Contract No. GS-25F-0037M	)	

APPEARANCES FOR THE APPELLANT: Andrew J. Mohr, Esq.
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APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ James William Nelson, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE THRASHER

On 8 April 2011, Sharp Electronics Corporation (Sharp) appealed from a deemed denial of its claim filed with an Army contracting officer (CO) on 14 January 2011. Sharp seeks $67,928.63 in early termination fees under the terms of General Service Administration (GSA) Multiple Award Schedule (MAS) Contract No. GS-2SF-0037M (Schedule Contract). Sharp elected the Board Rule 12.3 accelerated procedure on 8 June 2011. The parties elected to have the appeal decided upon the written record under Board Rule 11. We dismiss the appeal for lack of jurisdiction because the claim must be submitted to the Schedule Contract CO rather than the Army CO.

SUMMARY FINDINGS OF FACT

1. On 1 December 2005 the Army Contracting Command, Aberdeen Proving Ground, Maryland (government) awarded Delivery Order No. W91ZLK-06-F-0028 (DO) to Sharp under the Schedule Contract, awarded 18 September 2001 (R4, tabs 1, 2).

2. In conformance with the Statement of Work (SOW), the DO is for the lease, maintenance and service of copier and multifunctional equipment for the U.S. Army Research Development and Engineering Command (RDECON), Corporate Information Office, Mission Staff Support, Aberdeen Proving Ground, Maryland (R4, tab 2 at 2).

3. Sharp's Schedule Contract as modified on 18 May 2005 includes Operating Lease terms under Special Item Number (SIN) 51-58a (app. supp. R4, tab 26 at 21).

4. Block 16 on DD Form 1155 states that the DO incorporates the Schedule Contract terms and conditions (R4, tab 2). The Schedule Contract terms and conditions, at paragraph 21 A, Statement of Government Intent, established a lease period not to exceed 60 months with the actual lease period to be established by the terms of the DOs issued under the Schedule Contract (app. supp. R4, tab 26 at 10). The DO provided for a base year from 1 December 2005 through 1 December 2006 and three option years – 2 December 2006 through 1 December 2007, 2 December 2007 through 1 December 2008, and 2 December 2008 through 1 December 2009 (R4, tab 2 at 2-5). In addition, the DO included FAR 52.217-8, OPTION TO EXTEND SERVICES (NOV 1999), which provided the government the unilateral right to extend contract performance (R4, tab 2 at 40).

5. Schedule contracts require all schedule contractors to publish an "Authorized Federal Supply Schedule Pricelist" (pricelist). The pricelist contains all supplies and services offered by a schedule contractor. In addition, each pricelist contains the pricing and the terms and conditions pertaining to each SIN that is on schedule at the time an order is placed against the schedule contract. FAR 8.402(b). The pricelist in place at the time of award of the DO was "SHARP OFFICE IMAGING & DOCUMENT SOLUTIONS COPIER, COPIER/PRINTER AND SOFTWARE SOLUTIONS" for the contract period 1 October 2001 through 30 September 2006 (app. supp. R4, tab 26).

6. Pricelist paragraph 21, "SHARP FAIR MARKET VALUE LEASE PLAN/OPERATING LEASE PLAN" (SIN 51-58a) states:

> **A. Statement of Government Intent.**
>
> All agencies issuing Delivery Orders for a Fair Market Value ("FMV") Lease under this Special Item Number ("SIN") understand that this is an FMV Lease which provides for use of the Equipment and accessories without automatic title and ownership transfer at the conclusion of the FMV Lease. Further, the parties agree that the Equipment is leased under Federal Supply Schedule Contract GS-25F-0037M (the "FSS Group 36") and that such lease of the Equipment shall have a term of 24 to 60 months (the "Lease Term") beginning upon the Acceptance Date of the relevant Equipment. The total Lease Term shall be specified in each Delivery Order, including any relevant renewal options. In this regard, **the Government intends to exercise the renewal options contained herein and lease the Equipment for the entire Lease Term**....

....

N. Discontinuance

....

2. Premature Discontinuance Provisions. If the Government terminates a FMV Lease prior to its expiration or requires that a unit of Equipment be removed, the Government shall pay all amounts due the Contractor as of that date and a "Premature Discontinuance Fee" ("PDF"). The PDF is the monthly equipment component, for each unit/accessory being terminated times the number of months remaining in the FMV Lease. In addition, the Government agrees to return the Equipment in accordance with paragraph 11 above. The PDF is calculated as follows [followed by a formula to calculate the PDF]....

(App. supp. R4, tab 26 at 10-14)

7. Modification No. P00009 exercised Option Year Two on 27 November 2007 (R4, tab 12).

8. As early as September 2008 the command Corporate Information Officer, Ms. Diana Armstrong, became concerned with continuity of services through December 2009. Sharp addressed Ms. Armstrong's concerns in an email on 2 September 2008 by reminding her the DO included option three that, if exercised, would provide services through 1 December 2009. (R4, tab 14) However, when Ms. Armstrong contacted the contracting activity to initiate the exercise of option three, she was informed that "[t]he most we can exceed the value of the order is by 25%. Because of this we [cannot] exercise the final option. We can extend the services a couple of months if necessary. This should give us time to either compete a new order or have the DOIM contract set up." (*Id.*)

9. On 20 November 2008, the parties bilaterally executed Modification No. P00011 (Mod. P00011) which stated the purpose of the modification was to "partially exercise option year three for a six-month period from 02 December 2008 through 31 May 2009" (R4, tab 15). Mod. P00011 was signed on 24 November 2008 by Mr. Allan Essenfeld, appellant's National Program Manager (*id.* at 1).

10. Mod. P00011 changed the period of performance for CLIN 0004 (Option Year Three) from "02 Dec 2008 through 01 Dec 2009" to "02 Dec 2008 through 31 May 2009" (R4, tab 15 at 2). Reflective of this six-month period of performance, CLIN 0004 also stated "[t]he pricing detail quantity has decreased by 6.00 [months] from 12.00 [months] to 6.00 [months]" and under Section F of Mod. P00011 the following delivery schedule was added to CLIN 0004, "DELIVERY DATE POP 02-DEC-2008 TO 31-MAY-2009" (*id.* at 3). The language of Mod. P00011 was silent as to reservation or release of claims associated with the modification (R4, tab 15).

11. The Army CO sent an email to Ms. Debra Daniel and Mr. Timothy Schmidt at Army Material Command on 12 June 2009 informing them that they were taking a new approach to handle the old Sharp copier Contract No. W91ZLK-05-F-0028 and that the contract would be extended until 31 August 2009 (R4, tab 17).

12. Although the lease extension expired on 1 June 2009, the government continued to use the copiers until August 2009. Appellant invoiced for payment under invoice numbers 14299897, 14528657 and 14752808 for copier services provided to the government from June 2009 through August 2009 and was paid in the amount of the invoices. (R4, tab 24)

13. Modification No. P00012 (Mod. P00012) obligated funding in the amount of $107,502.90 for performance through 31 August 2009 on 6 September 2009 (R4, tab 19).

14. Sharp requested a formal modification indicating the termination of the DO by email dated 9 December 2009. The Army CO replied on 10 December 2009 by return email indicating that no modification was required to indicate the end of the DO because the period of performance was clearly identified in the last modification. (R4, tab 20)

15. The Army did not notify Sharp to remove its equipment from Army facilities until 5 January 2010 (R4, tab 20). Mr. Essenfeld responded to the Army's direction by email dated 5 January 2010 as follows:

> Sharp understands that Army has early terminated all of the leases issued under Delivery Order W91ZLK-06-F-0028 issued on December 1, 2005, as subsequently modified, for the acquisition of copier equipment from Sharp Electronics Corporation. The Army's Delivery Order was issued under the leasing provisions of the Sharp GSA Contract GS-25F-0037M. The lease term for the initial acquisition was 48 months and was co-terminus term for equipment ordered later.

> In line with your request for termination of the leases and removal of the equipment, Sharp requests a formal Modification to the Delivery Order evidencing the Army's Termination for the Government's Convenience in accordance with FAR 52.212-4, included in the provisions of Sharp's GSA Contract.

(R4, tab 20)

16. Sharp submitted a request and invoice for early termination fees in the amount of $68,317.40 by letter dated 6 April 2010 under the provisions of Sharp's Schedule Contract (R4, tab 21).

17. Sharp filed a formal claim under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109, with the Army CO requesting a decision within sixty days on their entitlement to payment of $67,928.63 in termination charges under the terms and conditions of the Schedule Contract on 14 January 2011 (R4, tab 23).

18. The CO did not respond within sixty days and Sharp appealed a deemed denial of its claim with the Board on 8 April 2011.

DECISION

This appeal involves a dispute arising following performance of an Army DO under a GSA schedule contract for the lease of copiers. Appellant asserts the government constructively terminated the lease for the convenience of the government three months before the end of the lease term. Appellant does not dispute the government's right to terminate the lease but asserts that termination charges, calculated pursuant to the terms of the Schedule Contract, are due and payable as a result of the government's actions. (App. reply br. at 7, 8) The government counters that appellant is not entitled to termination charges because it did not terminate the lease. Instead, the Army asserts the parties mutually agreed to end the lease term three months early. (Gov't resp. at 13, 14)

Appellant's claim is before the Board pursuant to a deemed denial from the ordering agency's CO who failed to act upon appellant's claim within sixty days (finding 18). The Board, *sua sponte*, raised the issue of its jurisdiction to decide this appeal based upon whether the claim was properly submitted to a CO with authority to decide the claim. The Board's jurisdiction to hear this appeal, if any, is based upon FAR 8.406-6, Disputes which states in pertinent part:

> (a) Disputes pertaining to the performance of orders under a schedule contract. (1) Under the Disputes clause of

> the schedule contract, the ordering activity contracting officer may—
>
> (i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or
>
> (ii) Refer the dispute to the schedule contracting officer.
>
> (2) The ordering activity contracting officer shall notify the schedule contracting officer promptly of any final decision.
>
> (b) Disputes pertaining to the terms and conditions of schedule contracts. The ordering activity contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.
>
> (c) Appeals. Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims.

Pursuant to FAR 8.406-6(b), the Board's jurisdiction to decide this appeal turns upon whether or not this dispute pertains to the contract terms and conditions of the Schedule Contract or arises from performance of the DO.

The parties were asked to brief the issue of jurisdiction in light of FAR 8.406-6(b) and the Board's decision in *Sharp Electronics Corp.*, ASBCA No. 54475, 04-2 BCA ¶ 32,704, where we held we did not have jurisdiction under very similar facts. Both parties assert the Board has jurisdiction and that *Sharp* is distinguishable from the facts of this case. Specifically, the government asserts that the terms and conditions of the Schedule Contract are not at issue because those provisions were never triggered as there factually was no "early termination" under the terms and conditions of the Schedule Contract and the key dispute at issue is whether appellant is bound by the terms of bilateral Mod. P00011 not the Schedule Contract. (Gov't supp. br. at 2) Appellant asserts its claim is based upon the fact that the terms and conditions of the Schedule Contract were incorporated into the DO and the government's refusal to pay the termination charges constitutes a failure to perform and a breach of the DO not the

Schedule Contract (app. supp. br. at 3). We disagree with the parties' characterization of the issues in this appeal. The fundamental issue under this appeal is the applicability of the terms and conditions of the Schedule Contract, not performance under the DO. Both parties agree the lease period ended three months earlier than if the last option had been exercised. Furthermore, appellant does not question the government's right or the propriety of the government's actions to shorten the lease period. The key issue before us is an interpretation of the scope of the termination provisions of the Schedule Contract. Are termination charges only due as a result of unilateral action by the government or do these provisions impose termination charges on the government if the lease period is reduced, even as here, by bilateral agreement of the parties?

The record supports the conclusion appellant's claim is grounded in the applicability of the terms and conditions of the Schedule Contract not the performance of the DO. Appellant consistently framed the issues in both its communications with the government and its claim in terms of its entitlement pursuant to the termination provisions of the Schedule Contract not its rights under the DO. (Findings 15, 16, 17) To now accept the appellant's assertion that the DO is at issue because all the terms and conditions of the Schedule Contract are incorporated into the DO would render the provisions of FAR 8.406-6(b) a nullity because any dispute during contract performance could be characterized as an issue pertaining to performance of the DO not the applicability of the Schedule Contract. Likewise, the government's assertion that the provisions of the Schedule Contract were never triggered because factually there never was an "early termination" logically calls into question the applicability of the Schedule Contract provisions, putting those provisions at issue.

We also disagree with the parties' reading of our precedent on this issue. The facts of the *Sharp* case were very similar to the facts of this appeal. That case involved a Navy lease of copiers pursuant to a DO under the same GSA schedule contract. The GSA schedule contract contemplated a multi-year commitment by the Navy with termination charges payable if the lease period was terminated early. When the Navy did not renew the lease for the full term, Sharp claimed termination charges. The Navy refused to pay asserting the termination provisions of the schedule contract were invalid because they violated the Antideficiency Act. We held in *Sharp* that we do not have jurisdiction to hear appeals from ordering activity COs where "the dispute, as framed by that claim and the CO's position, is related solely to the validity and/or applicability of the terms and conditions of the" schedule contract, not performance of the DO. *Sharp*, 04-2 BCA ¶ 32,704 at 161,796.

The government distinguishes *Sharp* on the basis that decision held the issues involved in that claim were based upon "alleged illegality" of the terms in the schedule contract (gov't supp. br. at 2). Appellant also distinguishes our holding in *Sharp* for the same reason, i.e. that the legality of the schedule terms and conditions was "solely" at

issue, not performance under the delivery order (app. supp. br. at 3). Our decision in *Sharp* was broader than both parties' reading of the decision, encompassing not only issues "related solely to the validity" of but also the "applicability of the terms and conditions of the" schedule contract. The parties here have clearly framed the issues in terms of the applicability of the terms and conditions of the Schedule Contract.

Appellant also cites the Board's decision in *Spectrum Resources, Inc.*, ASBCA No. 55120, 06-2 BCA ¶ 33,377, to support its contention that the Board possesses jurisdiction to hear this appeal. Unlike this appeal, the DO in *Spectrum* was issued by the Navy under a Veteran Affairs (VA) FSS contract. The terms of the DO required performance of services 24/7 but, arguably contrary to the terms and conditions of the DO, the Schedule Contract allowed for excusable delay. The Navy CO terminated the DO for cause alleging the contractor's failure to meet the stated 24/7 performance on three occasions. The contractor requested the Navy CO withdraw the termination asserting the contract did not require "100% perfect performance" 24/7. *Spectrum*, 06-2 BCA ¶ 33,377 at 165,467. The contractor then simultaneously appealed to both the ASBCA and the VABCA. The VABCA dismissed the appeal based upon a stipulation between the contractor and the VA that the appeal related solely to the DO not the terms and conditions of the VA schedule contract. *Id.* Appellant characterizes our decision in *Spectrum* as finding jurisdiction despite the fact the dispute required our interpretation of both the terms of the DO and the excusable delay provisions of the schedule contract and that we distinguished the *Spectrum* decision from the *Sharp* decision based upon the fact the dispute in *Sharp* related "solely to the validity and/or applicability of the terms and conditions of the GSA [FSS] contract" (app. supp. br. at 3).

Appellant is correct that we did distinguish the *Sharp* decision from the issues in *Spectrum* to arrive at our decision. In our *Spectrum* decision we not only found that the appeal related to the DO but also that the FAR and the Termination clause had been changed to specifically delegate the ordering agency CO the authority to not only terminate the DO, but also to determine the effect of the FSS terms and conditions to the extent they relate to excusability. *Spectrum*, 06-2 BCA ¶ 33,377 at 165,469. The facts of this appeal are similarly distinguishable from *Spectrum* and more analogous to *Sharp.*

We find that this appeal pertains to the applicability of the terms and conditions of the Schedule Contract within the meaning of FAR 8.406-6(b). As a result, the ordering activity CO lacked authority to resolve this dispute and the deemed denial from that CO provides no jurisdictional basis for the merits of this appeal to be before this Board.

CONCLUSION

The appeal is hereby dismissed without prejudice to the proper disposition of the claim as required by the FAR.

Dated: 6 December 2011

JOHN J. THRASHER
Administrative Judge
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. 57583, Appeal of Sharp Electronics Corporation, rendered in conformance with the Board's Charter.

Dated:

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