ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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Free & Ben, Inc.	)	ASBCA No. 56129
	)	
Under Contract No. W91GY0-07-C-0056	)	

APPEARANCE FOR THE APPELLANT: Mr. Ben Emosivbe
President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
Robert T. Wu, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING
ON APPELLANT'S MOTION FOR RECONSIDERATION

Free & Ben, Inc. (F&B) moves for reconsideration[1] of our decision in *Free & Ben, Inc.*, ASBCA No. 56129, 11-1 BCA ¶ 34,719. It contends that we erred in concluding that the cargo trucks procured were not troop carriers or military vehicles. It contends that the designated contracting officer (CO) failed to exercise his discretion in connection with issuing an End Use Certificate (EUC), and it contends that various government officials usurped the CO's authority.

Background

So that F&B's motion[2] is viewed in proper context, we provide this brief background: F&B entered into Contract No. W91GY0-07-C-0056 (Contract 0056) with Joint Contracting Command-Iraq/Afghanistan (JCC-I/A or government) to deliver 126 cargo trucks to Iraq. After award of the contract, F&B requested that the government issue an EUC because its Japanese supplier needed one as a condition for exporting the trucks. Signing an EUC would limit the government's ability to use or transfer the

[1] We held F&B's motion was timely. *Free & Ben, Inc.*, ASBCA No. 56129, 11-2 BCA ¶ 34,802.

[2] F&B's 27 April 2011 15-page motion for reconsideration (mot.) is unnumbered. For ease of reference, we have manually numbered the pages 1 through 15 and cited to the relevant pages accordingly. The government filed its opposition (gov't opp'n) on 17 August 2011. F&B filed its reply (app. reply) on 19 September 2011.

procured trucks (finding 17[3]). When the government refused to provide an EUC, F&B let the government know that delivery of the trucks could not be fulfilled. This led the government to terminate the contract for cause. Based on our conclusion that the trucks procured were "commercial items," we decided the government was not obligated to issue an EUC. We held that the government properly terminated F&B's contract for cause after it anticipatorily repudiated the contract. We held also that F&B's inability to perform the contract as written was not excusable because it failed to ascertain its supplier's willingness to deliver the trucks before submitting its offer, before confirming the offer, and before signing the contract.

The Trucks Procured Were Not "Troop Carriers or Military Vehicles"

F&B contends that we erred in not finding the trucks procured to be "Troop Carriers or Military Vehicles" (app. reply at 4). Its argument is based on (1) its reading of the specifications (*id.* at 8); (2) its understanding that the trucks were "destined for use by the Iraqi Armed Forces" (*id.* at 9); and (3) the dictionary definition of "Troop Carriers or Military Vehicles" (*id.* at 4).

Although a section of the specification provided for "TROOP SEATING," it required the seats to be removable and be able to be stowed when not in use. The specification also provided that the seating was for "personnel" not troops. (R4, tab 21) Given that the procurement was undertaken pursuant to FAR 52.212-4 (for commercial items) (finding 8), and given that the trucks were not required to be specifically designed, modified, or equipped to mount or carry weapons as listed in Category VII of the U.S. Munitions List (*see* 11-1 BCA ¶ 34,719 at 170,954), we are not persuaded that the trucks procured were "Troop Carriers or Military Vehicles." The fact that they were destined for use by the Iraqi Armed Forces is not conclusive that they should be classified as "Troop Carriers or Military Vehicles." Moreover, Contract 0056 and the specification characterized the trucks procured as "CARGO TRUCK[S]." (R4, tabs 1, 21) The terms "Troop Carriers" or "Military Vehicles" were not used. Dictionary definitions of these terms are not therefore useful or determinative of the nature of the trucks procured. Despite F&B arguments, we still believe the government was not obliged to offer to sign an EUC in its solicitation, or sign an EUC after Contract 0056 was awarded.

Government Officials Did Not Exceed Their Authorities in Administering or Terminating Contract 0056

F&B's motion contends that various government officials either exceeded their authority to act or failed to act in violation of FAR 1.602-1. To put F&B's contentions in context, we provide the following timeline leading to the termination.

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[3] Our citation to a finding or findings in this decision is to the numbered finding or findings in our 22 March 2011 decision.

After having been awarded Contract 0056 on 23 June 2007, Ben Emosivbe (Emosivbe), F&B's president, for the first time called its supplier in Japan. Based on his own description of "a military truck" destined for Iraq, Emosivbe was told by the supplier that a license, which he interpreted to be an EUC, would be required. (Finding 31) Emosivbe then e-mailed 1Lt Robert S. Lady (1Lt Lady)[4] on 2 July 2007 and asked for an EUC (finding 33). 1Lt Lady's 4 July 2007 e-mail replied that the contract did not require an EUC (finding 34). Emosivbe's 5 July 2007 e-mail offered to substitute Tata trucks for the contracted Mitsubishi Fuso trucks (finding 35). On 6 July 2007, Emosivbe sent the CO, Lt Col Bradley T. Riddle (Lt Col Riddle) an e-mail stating delivery of the contract for trucks "cannot be fulfilled" without an EUC, and requesting that the CO "either provide an EUC...or approve the TATA trucks" (finding 36).

After checking with Capt Daniel Currie (Capt Currie) of J4 (MNSTC-I Support Division's (MSD's) customer), 1Lt Lady reported to his immediate supervisor LCDR Jadon Lincoln (LCDR Lincoln) that the customer was willing to have the contract awarded to the next qualified offeror (findings 37, 57). 1Lt Lady advised F&B on 7 July 2007 that "[w]e will not issue an EUC for this requirement," and "accepting a product other than what has already been evaluated and contracted for is not an option" (finding 38). On the same day, LCDR Lincoln instructed 1Lt Lady to draft a show cause letter affording F&B an opportunity to explain its inability to perform and to draft a Commander's Critical Information Report (CCIR) to alert the commanding general of terminating Contract 0056 and awarding the contract to the next qualified offeror so that he could assess any "mission impact" (findings 39, 46, 47).

On 10 July 2007, Emosivbe notified LCDR Lincoln that its supplier had "call[ed] off the deal" because the government was unwilling to certify that the trucks would not be re-exported by the Iraqi troops (finding 43). After consulting with LCDR Lincoln and legal counsel, 1Lt Lady issued a show cause letter (finding 49). On 12 July 2007, Emosivbe had the Embassy of Japan forward directly to LCDR Lincoln, 1Lt Lady and legal counsel an unsolicited e-mail purportedly as proof that an EUC would be required to export the trucks (findings 50, 52). F&B responded to the show cause letter on 18 July 2007 (finding 53). In the meantime, Lt Col Riddle left Iraq, and LCDR Lincoln replaced him as CO (findings 4, 5). On 24 July 2007, MSD received "the green light to go" from the commanding general's staff on the CCIR (finding 54). On 25 July 2007, LCDR Lincoln, as CO, terminated Contract 0056 for cause (finding 55).

[4] 1Lt Lady had since been promoted. For consistency, we use his rank at the time the events in this appeal took place. We do the same for other military officers involved in this appeal.

J4 Did Not Usurp the CO's Authority

F&B's motion says Capt Currie was "a J4 representative responsible for technical evaluation" of Contract 0056. According to F&B, Capt Currie was the individual with whom 1Lt Lady discussed "the reaward to the next contractor." (Mot. at 8) F&B says 1Lt Lady "claimed" Capt Currie "told him to proceed with the re-award to the next contractor" (*id.* at 7). F&B contends that we erred "not to have...found that J4 decision contravenes FAR 1.602-1(a) [and (b)]" (*id.* at 7-8).

FAR 1.602-1 provides:

> (a) Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the Government only to the extent of the authority delegated to them. Contracting officers shall receive from the appointing authority (see 1.603-1) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.
>
> (b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

J4 was a section in MNSTC-I (tr. 3/20). Capt Currie was the vehicle procurement officer in MNSTC-I responsible for coordinating the cargo truck procurement with the CO, the finance officer, and others (tr. 3/18). 1Lt Lady testified that he spoke with Capt Currie sometime prior to 6 July 2007 (tr. 2/135). Since F&B had not furnished any specification, Capt Currie could not evaluate the proposed Tata trucks (tr. 2/133). As indicated in his e-mail to LCDR Lincoln, 1Lt Lady consulted with Capt Currie because the only other acceptable offer came at a higher price, and he wanted J4's input as to whether awarding to the next qualified offeror would be acceptable (finding 37).

Consulting with J4 was a part of the CO's responsibilities under FAR 1.602-1(a) in ensuring "clearances and approvals" for awarding the cargo trucks to the next qualified offeror. We do not interpret FAR 1.602-1 to prohibit the CO from delegating his contract administration responsibilities to his team members. Neither J4 nor Capt Currie made contracting decisions that properly belonged to the CO.

Sending F&B a Show Cause Letter Signed by the Contracts Manager Did Not Usurp the CO's Authority

F&B's reply motion contends that we erred in finding 1Lt Lady "had the authority to issue a show cause notice, in his capacity as contract manager...and...LCDR Lincoln lack[ed] the authority to ratify this unauthorized action by [1Lt] Lady prior to 19th July 2007" (app. reply at 12). Elsewhere in its motion, F&B characterized 1Lt Lady's 12 July 2007 show cause letter as a cure notice and contends that "since a cure notice is an integral part of a termination process" 1Lt Lady "violated" the termination clause and FAR 1.602-1 as a part of his administrative duties (mot. at 2).

In our earlier decision, we found that 1Lt Lady wrote the 12 July 2007 show cause/cure letter with input from LCDR Lincoln and legal counsel. We found also that in connection with Contract 0056, 1Lt Lady's role was that of a "contracts manager" and even though he used his other title of CO in the show cause/cure letter, he sent the letter in his "administrative function in managing the existing contract and relaying information to the contractor." (Findings 6, 49) We do not interpret FAR 1.602-1 to require the CO to personally sign the show cause/cure letter. The fact that 1Lt Lady (with $1 million warrant) and LCDR Lincoln (with $5 million warrant prior to 19 July 2007) (*see* findings 5, 6) had warrant amounts less than Contract 0056's contract amount ($6.1 million) was inconsequential. In any event, in the context of this case, sending the 12 July 2007 show cause/cure letter would not have been legally required.

We found in our 22 March 2011 decision that F&B's 6 July 2007 e-mail was its "positive, definite, unconditional and unequivocal expression of intent that unless the government signed an EUC or accepted a different truck," F&B would not be able to perform Contract 0056 as written. We concluded that F&B repudiated the contract and the government's termination for cause was proper. *Free & Ben*, 11-1 BCA ¶ 34,719 at 170,955. Once a contractor repudiates its contract, the government is entitled to terminate the contract "forthwith." The government is not required to issue a show cause letter or a cure letter because to do so would be a useless act. *Mission Valve and Pump Co.*, ASBCA Nos. 13552, 13821, 69-2 BCA ¶ 8010 at 37,243 ("the contracting officer is not required to go through the useless motions of issuing a preliminary '10-day cure' notice even though the time for performance has not yet arrived, but may terminate the contract forthwith on the ground of anticipatory breach"); *Fairfield Scientific Corp.*, ASBCA No. 21151, 78-1 BCA ¶ 13,082 at 63,908, *aff'd on recon.*, 78-2 BCA ¶ 13,429; *Bogue Electric Mfg. Co.*, ASBCA Nos. 25184, 29606, 86-2 BCA ¶ 18,925. Accordingly, we conclude that the fact that 1Lt Lady signed the 12 July 2007 show cause/cure letter was inconsequential.

The Commanding General's "Green Light to Go" Pronouncement to the CCIR Did Not Usurp the CO's Authority

F&B's motion contends that the Board "misapprehends the purpose of the CCIR." According to F&B, the Army manual provides "CCIR are tied to the decision commanders expect to make" (app. reply at 7). F&B contends "the 'greenlight to go' decision violates the independent decision of the contracting officer" (*id.*).

In our decision we found "[a] CCIR was used for informational purposes (tr. 1/212). It was sent up the chain of command to the flag officer or the commanding general (tr. 1/79, 214) so that he could assess any 'mission impact' of military operations (tr. 2/92, 114-15)" (finding 46). This finding was based upon sworn testimony. We do not consider this finding to be inconsistent with what is set out in the Army manual.

The CCIR LCDR Lincoln sent up on 10 July 2007 reported that F&B requested an EUC, that the contract did not provide for issuing an EUC, that F&B had not provided proof that an EUC was requested by the exporting country, that F&B would not be able to deliver in accordance with the terms and conditions of its contract, and that the contract would be awarded to the next qualified offeror with no negative mission impact (finding 47). LCDR Lincoln's proposed course of action was exactly what ultimately occurred. The commanding general's 24 July 2007 "green light to go" message did not affect the decision ultimately made by the CO.

F&B continues to argue that the e-mail from the Embassy of Japan constituted proof that an EUC was required by the exporting country and LCDR Lincoln should have updated the CCIR to the commanding general (mot. at 13-14). Finding 51 of our decision fully addressed why the Embassy e-mail did not amount to such proof. *Free & Ben*, 11-1 BCA ¶ 34,719 at 170,949. Since F&B agreed to the terms and conditions of Contract 0056 as awarded, and since the government did not agree to modify the contract to issue an EUC, whether the Japanese government provided proof would not alter F&B's obligation to perform the contract as written.

The Successor CO Properly Terminated the Contract for Cause

F&B's motion contends that because Lt Col Riddle was due to leave Iraq, he left 1Lt Lady and LCDR Lincoln to make decisions "relating to the denial of Appellant's claim and the termination of the subject contract on his behalf without his inputs" (mot. at 6-7). F&B contends that 1Lt Lady usurped the CO's authority in failing to inform Lt Col Riddle about the EUC request, and consequently "no one knows for sure how...Riddle could have applied his discretion if he had been told about Appellant's EUC request and about the [6 July 2007] email" (mot. at 2).

When Contract 0056 was awarded on 23 June 2007, Lt Col Riddle signed as CO (finding 29). Lt Col Riddle served in Iraq from January to July 2007 (finding 4). As chief of MSD he worked in the same office and in close proximity with 1Lt Lady and LCDR Lincoln (findings 4, 5, 6). When the EUC issue first surfaced on 4 July 2007, Lt Col Riddle was about two weeks from leaving his post in Iraq on 17 July 2007 (tr. 1/79). During his last week in Iraq, Lt Col Riddle did not "sit in the chief's desk," and his replacement, Lt Col Fred M. Kmiecik, was "in place" (tr. 1/79).

Although Lt Col Riddle did not recall when the hearing took place in April 2010 "the EUC being – the driving reason to change the delivery to another truck" (tr. 1/88), he did recall that LCDR Lincoln told him "Free and Ben may not be able to deliver" (tr. 1/87). Lt Col Riddle testified that he asked LCDR Lincoln to compare F&B's proposed truck to the RFP and to "make sure the customer could agree to something like that" (tr. 1/88). While F&B provided on 10 July 2007 a sketch of the proposed Tata, Leyland and Kamaz trucks as possible substitutes, it did not follow up and present the actual specifications for these trucks so that the government could evaluate them (finding 45). In the meantime, 1Lt Lady had sent F&B a show cause letter on 12 July 2007 giving F&B ten days to present written evidence bearing on the question of whether its failure to perform was excusable (finding 49). Thus, until these events had run their course, Lt Col Riddle would not be, and was not, in a position to exercise his discretion before he left Iraq. We conclude it was entirely appropriate for the government to wait for LCDR Lincoln, who succeeded Lt Col Riddle as CO, to decide whether to terminate Contract 0056. LCDR Lincoln was directly involved in all aspects on the EUC controversy and had all the facts and the authority before he terminated Contract 0056 on 25 July 2007.

For reasons stated, the motion for reconsideration is denied.

Dated: 9 March 2012

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 56129, Appeal of Free & Ben, Inc., rendered in conformance with the Board's Charter.

Dated:

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