

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
ACR Machine, Inc.) ASBCA No. 57762
)
Under Contract No. SPM7L4-10-M-0956)

APPEARANCES FOR THE APPELLANT: Mr. Steve Tury
General Manager

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
DLA Chief Trial Attorney
Matthew O. Geary, Esq.
Trial Attorney
DLA Land and Maritime
Columbus, OH

OPINION BY ADMINISTRATIVE JUDGE CLARKE
ON THE GOVERNMENT'S MOTION TO DISMISS

The government moves to dismiss this appeal for lack of jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109, because ACR Machine, Inc. (ACR) allegedly failed to submit a claim to the contracting officer (mot. at 4). ACR contends that its delivery order was “cancelled” and requests a termination for convenience. For the reasons stated herein, we deny the government’s motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The Defense Logistics Agency, Defense Supply Center Columbus, Land Supply Chain (DLA) awarded Contract No. SPM7L4-10-M-0956 (Contract M-0956) to ACR on 19 January 2010 (R4, tab 1). Contract M-0956, CLIN 0001, ordered 35 each operating slide cams at a unit price of \$540.00 with a delivery date of 30 August 2010 (R4, tab 1 at 1, 5). The purchase order was issued unilaterally and not signed by ACR (*id.*). The purchase order incorporated FAR 52.233-1 DISPUTES (JUL 2002) and FAR 52.249-1 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SHORT FORM) (APR 1984) (R4, tab 1 at 11). It does not include or incorporate a termination for default clause.

2. By e-mail dated 17 December 2010, almost four months after the required delivery date, Ms. Linda Givens, DLA Customer Account Specialist, requested delivery status, “Subject contract is delinquent with expired delivery date 8/30/2010. Please

provide future delivery date for contract. This information is needed for the customer inquiry.” (R4, tab 3)¹

3. ACR responded on 17 December 2010 with the following:

In reply to your e-mail ACR Machine must request a delivery extension until March 18th, 2011. ACR Machine had to rework the production quantity due to a CNC Machine breaking an insert and a dimension was oversize. The parts are in final machining and the [sic] must be heat treated and then ground to finish size. The parts must then be submitted to the government inspector and then sent for plating. ACR Machine offers a \$300.00 monetary consideration to have the date modified into this order.

(R4, tab 4) There is nothing in the record indicating a response to this e-mail or a change to the delivery date.

4. By e-mail dated 18 March 2011 to Ms. Givens, ACR stated:

Regarding the above referenced order, ACR Machine is in final stages of machining and needs engineering assistance. Can you tell me who I can send correspondence to in order to get some technical questions answered. If you prefer I will send all correspondence to you and [sic] you can forward it. Please let me know.

(R4, tab 6) In an 11 May 2011 e-mail to ACR the contracting officer stated, “The material is no longer needed for this contract. Due to it being late this award will be withdrawn. You should see a modification soon” (R4, tab 7). There followed a series of e-mails relating to the status of Contract M-0956 through 28 June 2011 (R4, tabs 8-15). At some point it appears that ACR sent pictures of one of the cams (R4, tab 11). Nothing in the record indicates that any change was made to Contract M-0956 during this time period.

5. On 28 June 2011, DLA issued unilateral Modification No. P00001, signed by contracting officer Daniel Law, making the following change:

The above cited purchase order was an offer to purchase the supplies described therein provided that delivery was made by 08/30/2010. Since that date was not met, the

¹ This is the first document in the record after the award of Contract M-0956.

Government's offer to purchase has lapsed. No deliveries will be accepted by the Government under this order for the following CLIN(s).

(R4, tab 2) The modification listed CLIN 0001 and changed the quantity of cams from 35 to 0 (*id.*).

6. By e-mail dated 29 June 2011 to Mr. Law, ACR stated in pertinent part:

SPM7L4-10-M-0956 cancelled per Modification P00001 of which ACR Machine cannot accept due to unanswered correspondence of 3-18-2011. ACR Machine will accept a Termination for Convenience. Due to delays of both parties the cancellation is not valid and ACR Machine will protest the cancellation. Reply to our questions and add 120 days from date of reply, rescind Modification P00001 and extend final delivery.

I am definitely not new to government contracting and will go through ASBCA if needed. The following names have been associated with this order: Christina Compson/DSCC-FLDA, Linda Givens/DLA CIV AVIATION, Mary McKee/PLCLSA8, Brandon Collins and now you. Cannot keep up with the administrator changes. Please review or have your legal department review and advise me of your final decision.

(R4, tab 16)

7. By e-mail dated 27 July 2011 to DLA, ACR stated, "I have not received a response to my email dated 6-29-2011. Please reply." (R4, tab 18) DLA's Mr. Law responded on the same day in pertinent part, "I'm unsure what response you're looking for – the purchase order was delinquent and withdrawn. You were advised of this action May 11, 2011, so it should have been no surprise." (*Id.*)

8. By letter dated 31 August 2011 to the Board, ACR included a chronology of communications between ACR and DLA and stated, "ACR Machine received a cancellation per modification P00001 on 6-28-2011 for the above referenced order. ACR Machine would like the order re-instated or Terminated for Convenience...." (Bd. corr. ltr. dtd. 31 August 2011) Based on this letter, the Board docketed the appeal as ASBCA No. 57762 on 6 September 2011.

9. DLA filed its Motion to Dismiss for Lack of Jurisdiction on 5 October 2011. ACR filed its response to the Motion on 16 December 2011 stating:

ACR Machine prefers the Board review all correspondence and possibly convert the cancellation to Termination for Convenience. The units in question are 90% complete and being a Small Business cannot afford to take such a loss. If our question was answered the units would have been completed and shipped. The question we had regarding a dimension on the drawing was never answered. Please advise if further information is needed for your decision. Thank you.

DLA chose not to respond to this letter.

DECISION

Contract M-0956 was awarded to ACR on 19 January 2010 for the production of 35 operating slide cams to be delivered no later than 30 August 2010 (SOF ¶ 1). On 28 June 2011, DLA issued unilateral Modification No. P00001 stating that Contract M-0956 had lapsed and that no deliveries would be accepted (SOF ¶ 5). In a 29 June 2011 e-mail to the contracting officer, ACR stated that it could not “accept” cancellation of M-0956 because it had not received a response to its correspondence dated 18 March 2011 (SOF ¶ 6). ACR stated it would accept a termination for convenience and said it would “protest” the cancellation (*id.*). ACR demanded that DLA, “[r]eply to our questions and add 120 days from date of reply, rescind Modification P00001 and extend final delivery” (*id.*). It requested a final decision (*id.*). Characterizing Modification No. P00001 as a “cancellation,” ACR sent a notice of appeal to the Board and this appeal was docketed (SOF ¶ 8).

Order M-0956 included the Disputes clause, FAR 52.233-1 (R4, tab 1). This clause defines a claim as, “[c]laim, as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract.” The question therefore is if ACR’s 29 June 2011 e-mail to the contracting officer requesting a final decision qualifies as a “claim.” It does not identify itself as a claim and contains no demand for money. However, it does ask for an extension of 120 days, from date of reply, to the delivery schedule. This is a request for an adjustment in contract terms and thus is a claim under the CDA. *Friedman Enterprises, Inc.*, ASBCA No. 54886, 05-2 BCA ¶ 32,991 at 163,520.

CONCLUSION

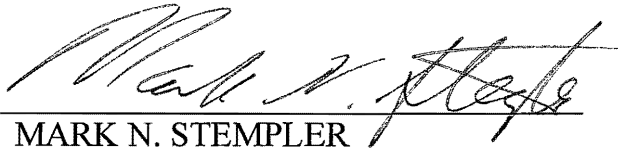
ACR's 29 June 2011 e-mail presented a claim to the contracting officer. The contracting officer did not issue a final decision. Therefore, we have jurisdiction based on a deemed denial pursuant to 41 U.S.C. § 7103(f)(5). The government's motion is denied.

Dated: 2 February 2012



CRAIG S. CLARKE
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. 57762, Appeal of ACR Machine, Inc., rendered in conformance with the Board's Charter.

Dated:

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