

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Lavender Co. ) ASBCA No. 62163  
)  
Under Contract No. M00146-18-D-X501 )

APPEARANCE FOR THE APPELLANT: Mr. Hong Sup Kim  
President

APPEARANCES FOR THE GOVERNMENT: Craig D. Jensen, Esq.  
Navy Chief Trial Attorney  
Pamela Jean Castellano, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE KINNER

Appellant, Lavender Co., requests summary judgment. The United States Marine Corps (USMC) opposes Lavender's request. Lavender's motion is denied.

Background

In October 2017 Lavender responded to a solicitation from the USMC for pickup, laundering, and delivery of red shop rags to support maintenance work at the Marine Corps Air Station New River (R4, tab 14 at 2)\*. After verifying Lavender's bid, on November 7, 2017, the government sent its proposed commercial items requirements contract (R4, tab 2, tab 5 at 2-5). Lavender confirmed receipt of the contract award and accepted its terms and conditions including the termination for convenience clause in Federal Acquisition Regulation (FAR) 52.212-4, Contract Terms and Conditions-Commercial Items (R4, tab 2 at 10, tab 13 at 6).

The government emailed Lavender the first Delivery Order November 23, 2017 for Marine Aviation Logistics Squadron (MALS)-29 (R4, tab 3, tab 5 at 6-7). Lavender appeared to experience some confusion initiating performance and the government became concerned that Lavender had not commenced delivery of shop

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\* The government submitted a Rule 4 file consisting of 13 documents. It then supplemented its submission with two additional documents not available for its initial submission. The government's combined submissions are referred to as the Rule 4 file. Reference to a page number within a Rule 4 document is to the pagination added to the top of each page rather than the Bates number if available.

rags (R4, tab 13 at 7-11). Once Lavender made its first delivery it began to identify problems with its access to the base (R4, tab 13 at 13-14). In its correspondence, Lavender complained of an inability to connect with the USMC units because it could not get onto the base. It was also unable to locate the building to make its delivery or reach the USMC delivery contact by telephone (*id.*). Lavender also proposed changing the terms for delivery and pick up of the rags (*id.*). Although no additional deliveries were provided during December, the USMC paid for an entire month of service (R4, tab 9 at 21).

In January 2018, Lavender asked the USMC to discard rags that contained any solid substances (R4, tab 13 at 16). The USMC refused because it had contracted for laundering and delivery of the rags. The government would not pay to replace more than the 10 percent allowed in the contract (R4, tab 2 at 5, tab 13 at 16-17). The USMC asserts that beginning in February 2018, and for the remainder of that year, the intended recipients of shop rags from Lavender complained that they did not receive rags regularly, that rags were not adequately cleaned, and that deliveries regularly contained an insufficient amount of rags (R4, tab 12). Despite the complaints from the units receiving the service, USMC issued the second Delivery Order to Lavender March 21, 2018 to support MALS-26 (R4, tab 4).

On May 24, 2018, the USMC sent Lavender a cure notice detailing numerous performance issues (R4, tab 7 at 2). In Lavender's response it described its delivery of 32,000 rags to establish the amount to be cycled through laundering and redelivery to the six USMC units covered by the contract. It explained that the USMC units were returning less than half of the rags each week, which made it impossible for Lavender to provide the number of rags required by each unit under the contract. Lavender explained that discoloration did not necessarily mean that the rag was not clean. It acknowledged that it had difficulty cleaning "excessive grease substances or ste[e]l/iron fragments on rags" (R4, tab 8 at 2-3). The excessive contamination substantially increased the number of unserviceable rags which negatively affected its ability to meet the amount of rags required by the contract. Lavender requested that the USMC units try to avoid excessive solid contamination to minimize destroying/wasting the rags. (*Id.*)

Lavender also acknowledged that it was responsible for rags that were delivered wet due to combination of the rags in laundry bags after cleaning. And it described that it had not taken steps to secure access to the base promptly after receiving notice that the USMC had changed its access requirements. Without a regular entry pass, Lavender had to rely upon Marine contacts to provide escort to the delivery locations. Lavender missed deliveries when it failed to connect with a Marine contact to gain access to the base. Lavender assured the USMC that it would no longer encounter access problems because it had obtained a contractor pass onto the base. (R4, tab 8 at 2-3)

The USMC began collecting documentation of rag deliveries from the units to validate the Lavender invoices. The compilation of unit reports reflects the number of red shop rags delivered (R4, tab 9). The Delivery Order for MALS-29 expired on November 26, 2018 (R4, tab 3 at 4). Notwithstanding that the Delivery Order for MALS-26 continued through March 20, 2019, Lavender stopped deliveries for both MALS-29 and MALS-26 December 6, 2018 (R4, tab 4 at 5, tab 9). Rather than issue further Delivery Orders under the base contract, the contracting officer offered Lavender a no-cost termination for the convenience of the government (R4, tab 13 at 23). The parties discussed the contractual framework for the proposed termination for convenience (R4, tab 13 at 23-24). Lavender responded that it would make a settlement proposal in accordance with FAR 49.206 (R4, tab 13 at 24-25). On February 14, 2019, a USMC contract specialist explained to Lavender that the government had chosen to pursue a commercial items termination for convenience as provided in FAR 52.212-4 (l), rather than default under FAR 52.249-4 (R4, tab 2 at 10, tab 13 at 26). Lavender was informed that it could submit unpaid invoices with documentation to substantiate any costs that were a direct result of the termination (R4, tab 13 at 26).

In March 2019, Lavender sought assistance to re-submit its invoices for August-December 2018, which had been rejected by the Defense Finance and Accounting Service (R4, tab 13 at 28). The invoices were rejected because they were submitted without supporting documentation (R4, tab 13 at 29). After discussion with the USMC contract specialist, the invoices were re-submitted with delivery receipts (R4, tab 13 at 29-34). The invoices were again rejected because they did not reflect charges for the actual deliveries despite the advice to Lavender that invoices required documentation of its deliveries to be paid (R4, tab 13 at 35). Lavender then submitted a Settlement Demand requesting \$173,634.92 for lost income, legal fees, and damages (R4, tab 10 at 5). The USMC did not consider that submission to be a claim pursuant to the CDA because it exceeded \$100,000 and had not been certified. On May 20, 2019, Lavender submitted a certified claim for \$95,509.20 plus fees and other charges (R4, tab 11 at 5). The contracting officer issued a final decision August 20, 2019 granting \$2,648.10 of the claim (R4, tab 1 at 4-10). Lavender appealed that decision to this Board on September 3, 2019 (R4, tab 1 at 2-3).

*Appellant's motion*

Lavender correctly states that, pursuant to FED. R. CIV. P. 56, disposition of this appeal by summary judgement may only occur if no material facts are in dispute (app. mot. at 4). To meet that standard, Lavender has an evidentiary obligation to demonstrate there is sufficient and uncontroverted evidence supporting its position. *Kellogg Brown & Root Services, Inc.*, ASBCA Nos. 58518, 59005, 16-1 BCA

¶ 36,408 at 177,524 (citing *Osborne Construction Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083 at 168,512). Lavender has not met that requirement.

Though Lavender asserts 20 contentions of fact (app. mot. at 1-3), they are not supported by any record evidence, whatsoever. Moreover, these contentions are primarily marshalled to support Lavender's view of an issue of contract interpretation--whether the intent of the contract is to procure laundering of the shop rags or rental of the shop rags (app. mot. at 2 ¶ 9) -- which Lavender has not linked to its entitlement to judgment in its favor. Lavender states that this dispute was resolved (*id.* at 3 ¶¶ 17-18). Based upon that, without showing any evidence in support of its position, Lavender argues that there is a mutual agreement regarding the technical terms of the contract and this appeal may be resolved upon summary judgment (*id.* at 4). Lavender primarily relies upon that argument as grounds for summary judgment, to the exclusion of every factual issue upon which its motion must rest.

In fact, Lavender has not identified any evidence to support the factual premise of its motion. It claims that, under the terms of the contract as it would have us interpret them, it fully performed the two Delivery Orders and that it is entitled to further payment for that performance. Yet, even if we were to agree with Lavender on the contract interpretation issue (which we do not decide), we could not grant judgment in its favor because Lavender offers no affidavits, deposition testimony or additional documents to support these contentions or its arguments that this interpretation would lead to its entitlement to the money it seeks. Lavender has not submitted a supplement to the Rule 4 documents filed by the government. Nor have the parties conducted discovery from which Lavender may gain such evidentiary support.

In contrast, utilizing record evidence the government challenges many aspects of Lavender's performance, and specifically its entitlement to further compensation through its termination for convenience settlement proposal. The government has established that genuine issues of material fact exist. Lavender has not filed a response to the government's opposition to its motion. Lavender has failed to come forward with evidence from this limited record to support its motion or to demonstrate an absence of evidence to support the government's position. Lavender's motion fails, first because judgment may not be reached upon this wholly undeveloped record. *TEKKON Engineering Co., Ltd.*, ASBCA No. 56831, 11-2 BCA ¶ 34,872 at 171,530 (citing *Kaman Precision Products, Inc.*, ASBCA Nos. 56305, 56313, 10-2 BCA ¶ 34,529 at 170,286 and *Advanced Technologies & Testing Laboratories, Inc.*, ASBCA No. 55805, 08-2 BCA ¶ 33,950 at 167,976). Second, Lavender has simply failed to identify any basis for summary judgment in its favor. *AM General LLC*, ASBCA Nos. 53610, 54741, 06-1 BCA ¶ 33,190 at 164,544.

CONCLUSION

Lavender's motion for summary judgment is denied. The parties shall file a joint status report within 60 days of this decision to propose a schedule for pre-hearing activities.


Dated: July 29, 2020



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DONALD E. KINNER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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RICHARD SHACKLEFORD  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



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J. REID PROUTY  
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. 62163, Appeal of Lavender Co., rendered in conformance with the Board's Charter.

Dated: July 29, 2020



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PAULLA K. GATES-LEWIS  
Recorder, Armed Services  
Board of Contract Appeals