

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
KAMP Systems, Inc.) ASBCA No. 54253
)
Under Contract No. F41608-97-D-0862)

APPEARANCE FOR THE APPELLANT: Mr. Mel McCullough
Secretary/Treasurer

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiapas, Esq.
Chief Trial Attorney
Carol L. Matsunaga, Esq.
Senior Trial Attorney
Srikanti Dixit, Esq.
Trial Attorney
Defense Contract Management Agency
Carson, CA

OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON GOVERNMENT'S MOTION TO DISMISS WITH PREJUDICE

The government has moved to dismiss with prejudice appellant KAMP Systems Inc.'s (KAMP's) subject appeal from the administrative contracting officer's (ACO's) final decision asserting a government claim for repayment of alleged overpaid progress payments. The motion is based upon the fact that the ACO has rescinded that decision and has avowed that she does not intend to reinstate it, thereby voluntarily granting the relief at issue. Appellant did not respond to the motion by the time set by the Board and its representative, Mr. Mel McCullough, advised upon the Board's inquiry that it will not respond. We grant the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

The facts underlying this appeal are more fully set forth in the Statement of Facts for Purposes of the Motion contained in our 22 September 2008 decision in *KAMP Systems, Inc.*, ASBCA No. 54253, 08-2 BCA ¶ 33,980, which granted in part the government's motion to strike appellant's revised complaint. In brief, on 18 November 1997 the Department of the Air Force awarded the subject 100% small business set-aside firm-fixed-price requirements contract to KAMP, to supply munitions trailers (R4, tab 1). KAMP requested and was paid progress payments (*e.g.*, R4, tab 3). On 9 August 2002 the contracting officer issued a notice to KAMP of termination of the contract for convenience (R4, tab 9). On 2 May 2003 the Defense Contract Audit Agency (DCAA)

issued an audit report concerning KAMP's progress payment requests. DCAA examined \$3,782,761 in total progress payments and concluded that KAMP's progress payment requests had been overstated by \$1,293,230. (R4, tab 12) On 10 July 2003 ACO Deborah T. Pattengell issued a final decision and demand for payment in the amount of \$643,915.74, based upon the government's alleged overpayment of progress payments to KAMP (R4, tab 21). The Board docketed KAMP's 16 July 2003 appeal as ASBCA No. 54253, the subject appeal.

On 7 August 2003 KAMP submitted a termination settlement proposal to the termination contracting officer (TCO) seeking a settlement of \$5,299,657 and a net payment, after deduction of previously paid amounts, of \$2,130,512 (ASBCA No. 55317 (55317), R4, tab 9 at cover ltr. and 40-23). On 7 October 2005 the TCO issued his final decision/unilateral determination that KAMP was due \$1,418,881 as the result of the contract's termination for convenience, less \$3,049,702 in unliquidated progress payments, resulting in a net amount due the government of \$1,630,821. The TCO noted that the ACO had demanded repayment of \$643,915.74 in progress payments in her 10 July 2003 final decision, and the TCO demanded payment of the \$986,905.26 balance. (55317, R4, tab 17 at 6) KAMP appealed from the TCO's decision. The Board docketed the appeal as ASBCA No. 55317 but ultimately granted the government's motion to dismiss that appeal as untimely. *KAMP Systems, Inc.*, ASBCA No. 55317, 08-1 BCA ¶ 33,748. The government avers that the TCO's demand for \$986,905.26 remains outstanding (gov't mot. at 2). That demand is unaffected by the instant decision.

The government supports its motion with the declaration of ACO Pattengell, who declares that, based upon Mr. McCullough's deposition testimony that KAMP is no longer in business and has no assets, she determined that it would waste the government's resources to pursue the matter any further and, on 9 June 2009, she rescinded her final decision and notified KAMP that she does not intend to reinstate it (gov't mot., ex. 1, Pattengell decl., ¶¶ 5, 6). By letter dated 9 June 2009 to KAMP, via Mr. McCullough, the ACO stated:

I hereby rescind the Final Decision and Demand for Payment dated July 10, 2003 issued to KAMP Systems Inc. requesting payment of \$643,915.74 plus applicable interest for overpayments of progress payments on [the subject contract], Orders 0003 and 0007. I am taking this action, not because I believe that KAMP was not overpaid on progress payments under Delivery Orders 0003 and 0007, but rather because, I believe that monetary recovery for these overpayments is unlikely due to KAMP's non-operating status and lack of assets, and it is in the government's best interest to not pursue this matter any further. The

Government has no intention to reinstitute a demand letter for these overpayments.

(Gov't mot., ex. B) There is no evidence that the ACO was acting other than in good faith when she rescinded her decision seeking \$643,915.74 plus interest from appellant and when she declared that the government does not intend to reinstitute the demand.

DISCUSSION

When a contracting officer, as here, unequivocally rescinds a government claim and the final decision asserting that claim, with no evidence that the action was taken in bad faith, there is no longer any claim before us to adjudicate. The government has voluntarily provided the relief sought in the appeal, which is properly to be dismissed with prejudice. *Lasmer Industries, Inc.*, ASBCA No. 56411, 09-1 BCA ¶ 34,115, *appeal docketed*, No. 09-1316 (Fed. Cir. April 23, 2009) *See also, Chapman Law Firm Co. v. Greenleaf Construction Co.*, 490 F.3d 934 (Fed. Cir. 2007).

DECISION

The appeal is dismissed with prejudice. The hearing set to begin on 4 August 2009 is cancelled.

Dated: 2 July 2009

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

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. 54253, Appeal of KAMP Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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