

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of)
)
Mil-Spec Industries Corp.) ASBCA No. 56070
)
Under Contract No. W52P1J-07-C-3004)

APPEARANCE FOR THE APPELLANT: Ms. Ayse Erguner
Corporate Officer

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT Charles D. Halverson, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
UNDER BOARD RULE 11

This dispute arose from the 27 March 2007 default termination of the captioned Army contract, which appellant (Mil-Spec) timely appealed to this Board. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. Pursuant to Board Rule 11, the parties elected to submit the appeal on the record, which includes respondent's Rule 4 file (7 tabs), respondent's supplemental Rule 4 file (tabs G-8 - G-24), appellant's supplemental Rule 4 file (tabs A-1 - A-29¹) and the parties' briefs and reply briefs. The sole issue to be decided is the validity of the default termination.

FINDINGS OF FACT

1. In Solicitation No. W52P1J-06-R-3017 (the RFP), issued 22 June 2006: (a) Section A provided in pertinent part:

Notice of award to the awardee will be issued only via electronic mail. Vendors who wish to be notified if they receive an award as a result of this solicitation must provide their electronic mail address in the space provided below....

¹ Respondent objected to tab A-30, excerpts from Ms. Erguner's passport. We suggested resubmitting the entire passport by 26 February 2009, but it was not done. In any event, whether Ms. Erguner entered Istanbul in December 2006 is not material to our findings and holdings.

....

VENDOR’S ELECTRONIC MAIL (E-MAIL) ADDRESS:....

(b) Section B required 100,000 pounds of potassium chlorate to be delivered to the Army for use in manufacturing smoke grenades, in accordance with specification MIL-P-150D and “Tri-Calcium Phosphate [TCP], in a qty not exceeding 0.25% of weight of the potassium chlorate, shall be mixed with potassium chlorate prior to packaging”;

(c) Section F, “DELIVERY INFORMATION” required delivery to Pine Bluff Arsenal (PBA) by “01-Nov-2006” and its FAR 52.211-8 TIME OF DELIVERY (JUN 1997) clause required delivery “90 Days After Date of award”² and which allowed offerors to propose an earlier delivery schedule. However, if the offeror did not propose a different delivery schedule, the 90-day requirement would apply; and (d) Section L, FAR 52.215-1 INSTRUCTIONS TO OFFERORS—COMPETITIVE ACQUISITION (JAN 2004) clause, ¶ (f)(10), stated: “A written award or acceptance of proposal mailed or other wise furnished to the successful offeror within the time specified in the proposal shall result in a binding contract without further action by either party.” (Supp. R4, tab G-9 at 1, 2, 5, 8, 13, 15, 33, 36).

2. On 19 July 2006 Mil-Spec submitted an offer to U.S. Army Sustainment Command (USASC), including the RFP in its entirety, signed by Mil-Spec’s “Ayse Erguner – Marketing Manager” for 100,000 pounds of potassium chlorate, Grade B, Class 7, with the following line item quantities, prices and amounts:

<u>CLIN</u>	<u>Quantity</u>	<u>Unit Price</u>	<u>Amount</u>
0001	25,000 lbs	\$0.944/lb	\$23,600.00
0002	15,000 lbs	\$0.944/lb	\$14,160.00
0003	40,000 lbs	\$0.944/lb	\$37,760.00
0004	20,000 lbs	\$0.944/lb	\$18,880.00
Total: 100,000 lbs			\$94,400.00

Under VENDOR’S ELECTRONIC MAIL (E-MAIL) ADDRESS, the offer stated “AYSE @ MIL-SPEC-INDUSTRIES.COM.” (Supp. R4, tab G-9 at 1, 2, 5-7) Mil-Spec did not take exception to the “90 Days After Date of Award” delivery schedule as set forth in the RFP.

3. Specification MIL-P-150D, for potassium chlorate, in Table I for Grade B, Class 7, required “Sodium max. 0.04” (supp. R4, tab G-8 at 18).

² Mil-Spec’s Mr. Naane deposed that whatever the RFP said about November delivery, “what really relates is really 90 days after award” (supp. R4, tab G-19 at 15).

4. On 27 October 2006 Mil-Spec sent USASC the FAR 52.215-6 PLACE OF PERFORMANCE (OCT 1997) clause in which Mil-Spec entered, “5 DAVID ELAZAR ST. GIVAT SHEMUEL 54032 ISRAEL...A. M. ENGINEERING LTD” (R4, tab 1 at 32).

5. On 10 November 2006 Mil-Spec confirmed its \$0.944/lb. price to USASC and confirmed that “delivery is within 90 days after date of contract award” (app. supp. R4, tab A-1).

6. USASC’s 7 December 2006 e-mail to Mil-Spec stated, “As Pine Bluff is running low on this, delivery at the earliest possible time would be greatly appreciated,” and enclosed a Standard Form 26 Award/Contract of Contract No. W52P1J-07-C-3004 (the contract) signed by CO Marianne Whitmer on 6 December 2006 accepting Mil-Spec’s offer on four CLINs for the fixed price of \$94,400.00, although the award set forth an erroneous “\$0.94” unit price (R4, tab 1 at 1, 4-6 of 24, tab 2 at 3-4).

7. The contract incorporated by reference the FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (MAY 2004) and 52.249-8 DEFAULT (FIXED PRICE SUPPLY & SERVICE) (APR 1984) clauses (R4, tab 1 at 20 of 24).

8. Contract Section F stated the delivery date for each line item as “13-FEB-2007,” and its FAR 52.211-8 TIME OF AWARD (JUN 1997) clause stated: “Within 90 Days after Date of award” for all items (R4, tab 1 at 12, 14 of 24). Ninety days after the date of award was 6 March 2007 (compl. & answer, ¶ 3).

9. Ms. Erguner’s 19 December 2006 e-mail to USASC contract specialist Barba Drebenstedt asked her to modify the 13 February 2007 delivery date on the contract’s page 12 to “90 days after the issue date of this modification” and to amend the packing requirement “from 250 lb drums to 210-300 lb drums.” She repeated her request on 23 and 27 December 2006. (Supp. R4, tab G-10 at 1; R4, tab 2 at 2-3)

10. Ms. Drebenstedt’s 3 January 2007 e-mail advised Ms. Erguner that USASC had requested “input by customer” (PBA) to Mil-Spec’s drum packaging request before a modification could be issued (R4, tab 2 at 1-2).

11. On 16 January 2007: (a) the 8:05 a.m. e-mail from PBA’s Sandra Smith to Ms. Drebenstedt stated: “The changes detailed in Mil-Spec’s [23 December 2006] message are acceptable to PBA...” (R4, tab 2 at 1); (b) Ms. Drebenstedt’s 8:08 a.m. e-mail to Ms. Erguner stated: PBA “is agreeable to the below changes. I will prepare the modification ASAP...” (supp. R4, tab G-10 at 25); (c) CO Whitmer’s 9:11 a.m. e-mail to Ms. Drebenstedt stated that she (Whitmer) was not willing to extend the delivery date another 90 days (supp. R4, tab G-10 at 29); (d) Ms. Drebenstedt’s 12:36 p.m. e-mail sent to Mil-Spec unsigned, bilateral Modification No. P00001 to revise the Section F delivery date from 13 February to 9 March 2007 and to allow packaging in 210-300 pound drums,

and requested the signature of an authorized officer of Mil-Spec thereon (supp. R4, tab G-11 at 1-5); and (e) 7:00 p.m. e-mail from Mil-Spec's President, Mr. Ron Naane, told Ms. Drebenstedt of "a problem with your modified contract" and requested that "delivery...should be 16 April 2007 (90 days from today)" (supp. R4, tab G-11 at 6).

12. On 18 January 2007 CO Whitmer told Mr. Naane by telephone that Mil-Spec had a contract with the government despite the mistaken delivery date, and asked him to check for a possible shorter delivery time for 10,000 pound partial delivery (supp. R4, tab 19 at 23-24, tab 21 at 2).

13. On 23 January 2007 Mr. Naane informed the CO that a partial delivery was not possible and that Mil-Spec could not guarantee delivery on 9 March 2007, but would try to speed up delivery as much as it could (supp. R4, tab G-21 at 2).

14. On 24 January 2007: (a) CO Whitmer signed and issued unilateral contract Modification No. P00001 with a corrected 9 March 2007 delivery date and packaging in 210-300 pound drums (R4, tab 3); and (b) Mil-Spec issued Purchase Order No. P/O-C-0561 to Amit Michael Ltd. Engineering, 5 David Elazar St., Givat Shemuel, Israel, for 49,800 kg. (109,189 lbs.) of potassium chlorate to specification MIL-P-150D, Grade B, Class 7, with TCP, to be delivered "APPROX. 75 DAYS ARO [*i.e.*, by about 9 April 2007]. HOWEVER...WE WILL APPRECIATE EARLY DELIVERY AROUND MARCH 2, 2007" (supp. R4, tab G-13).

15. The 26 January 2007 e-mail of CO Whitmer to Mil-Spec included a letter stating (R4, tab 4):

Mil-Spec Industries will be held to the delivery date which was agreed to in your proposal [delivery is within 90 days after date of contract award] and...the obvious mistake in the delivery schedule does not relieve you of this responsibility. Any confusion on Mil-Spec's part does not afford your firm any additional time.

16. On 23 February 2007 USASC awarded "reprocurement purchase order" No. W52P1J-07-M-3002 to Interstate Chemical Co., Hermitage, PA, for 84,712 pounds of potassium chlorate in accordance with specification MIL-P-150D for delivery by 5 March 2007 (supp. R4, tab G-14 at 1, 3-6, 12 of 23, tab G-21 at 3).

17. The 1 March 2007 e-mail from Ms. Drebenstedt requested Mil-Spec to advise on the delivery status of the contract. Mil-Spec's e-mail of the same date promised a reply by 5 March 2007. (App. supp. R4, tabs A-12, A-13)

18. Ms. Drebenstedt told Mil-Spec to put its 2 March 2007 oral request for more time to deliver the contract material in writing (app. supp. R4, tab A-14). On 5 March 2007 Mil-Spec's supplier Amit Michael advised Mr. Naane of a "small delay" due to its inability to perform the hazardous "extra process" for the potassium chlorate (supp. R4, tab G-19 at 20-21, 27). Ms. Erguner's 5 March 2007 e-mail to Ms. Drebenstedt stated (app. supp. R4, tab A-15):

[T]he production of Potassium Chlorate specifically with the special requirement for TCP and Sodium level of 0.04% required a longer process to manufacture it. If you recall, we asked for additional 90 days from the day that you will amend the contract. Unfortunately you did not agree for it and we tried to do our best to speed the process of the production, which eventually caused us to fail to produce the material properly. We will need approx. 90 days additionally to deliver this material to you under this contract and accordingly we will appreciate if you will extend the delivery time in 90 days. In case you want us to compensate you for the administrative fees for the amendment, we will be ready to do so.

19. After several communications between 7 and 23 March 2007 between Ms. Erguner and Ms. Drebenstedt and CO Whitmer regarding Mil-Spec's 5 March 2007 delivery extension request (app. supp. R4, tabs A-16 to A-19; R4, tab 5), CO Whitmer sent an e-mail to Mil-Spec on 26 March 2007 stating in pertinent part (supp. R4, tab G-15 at 1-2):

When we spoke on Monday, 19 March you had asked about the status of Mil-Spec's request for a 90 day extension to the delivery schedule. At that time, I very clearly stated that the Government would not be granting Mil-Spec's request for an additional 90 day extension to the contract. I stated that I was not at liberty to discuss the issue further and that Barba [Drebenstedt] or myself would be in contact with Mil-Spec in the near future.

20. CO Whitmer's 27 March 2007 letter to Mil-Spec terminated the contract for default for the contractor's failure to deliver 100,000 pounds of potassium chlorate by 9 March 2007. That letter stated that it was the final decision of the CO that such default was solely the fault of Mil-Spec and was not excusable, and notified Mil-Spec of its appeal rights. (R4, tab 6, supp. R4, tab G-16 at 1) The Board received Mil-Spec's timely notice of appeal on 18 June 2007, which was docketed as ASBCA No. 56070 (Bd. corr. file).

21. The appeal record contains no evidence that Mil-Spec ever delivered any potassium chlorate under the contract at any time and that either USASC's contract specialist Drebenstedt or PBA's Sandra Smith had CO authority.

DECISION

I.

Respondent argues that by 9 March 2007 Mil-Spec failed to deliver any potassium chlorate, so respondent had the right to terminate the contract for default, it did not waive such termination right from 9 to 27 March 2007, and because the required delivery date was 90 days after date of award, the erroneous and earlier 13 February 2007 delivery date stated in Section F "became a legal nullity" and did not invalidate the contract (gov't br. at 13-17).

Mil-Spec argues that the 13 February 2007 contract delivery date "was incorrect," so the contract was "unacceptable, unenforceable and null" (app. br. at 3, 5); Mil-Spec never signed any contract modification, so "there was never a legally binding contract between the Government and Mil-Spec" (*id.* at 6); Ms. Drebenstedt's 16 January 2007 e-mail to Mil-Spec stated that "Pine Bluff Arsenal is agreeable to the changes" in Mil-Spec's 19 December 2006 e-mail, so "[t]he Government indeed agreed to both Mil-Spec's request for modifications" (*id.*), though later on the same date CO Whitmer told Ms. Drebenstedt that she (Whitmer) was not willing to allow Mil-Spec another 90 days to deliver (*id.* at 2); and since the government "issued a new purchase order to a new vendor" on 23 February 2007 for potassium chlorate, it "knew that Mil-Spec actually did not have any legal binding contract" with the government (*id.* at 7).

II.

Respondent has the burden to prove that its default termination was justified. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). There is no record evidence that Mil-Spec ever delivered any potassium chlorate under the contract. (Finding 21) Therefore, respondent has met its burden of proving a *prima facie* case for default termination.

III.

A defaulted contractor has the "burden of proving that its nonperformance was excusable." *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir.), *cert. denied*, 519 U.S. 992 (1996). Under ¶ (c) of the FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE)

(APR 1984) clause, an excusable “failure to perform arises from causes beyond the control, and without the fault or negligence of the Contractor.”

Mil-Spec argues that its failure to perform was justified (if not “excusable”) because the parties did not agree on the delivery date for potassium chlorate at contract award, or as amended by Modification No. P00001; agreement on a delivery date is critical to the formation of a contract; and hence there was no valid contract. We find this argument unpersuasive.

LAI Services, Inc. v. Gates (Fed. Cir., July 24, 2009), summarizes the initial rules to resolve contract ambiguities and conflicts (slip op. at 13-14):

“In resolving disputes involving contract interpretation, we begin by examining the plain language of the contract.” *M.A. Mortenson v. Brownlee*, 363 F.3d [1203, 1207 (Fed. Cir. 2004)]... We construe a contract “to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract.” *Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002). The threshold question... is whether the plain language of the contract “supports only one reading or supports more than one reading and is ambiguous.” *NVT Technologies, Inc. v. United States*, 370 F.3d [1153, 1159 (Fed. Cir. 2004)].

Metric Constructors, Inc. v. NASA, 169 F.3d 747, 751 (Fed. Cir. 1999), amplifies:

When a contract is susceptible to more than one reasonable interpretation, it contains an ambiguity. *See Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992). To show an ambiguity it is not enough that the parties differ in their respective interpretations of a contract term. *See Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1578 (Fed. Cir. 1993). Rather, both interpretations must fall within a “zone of reasonableness. *See WPC Enters., Inc. v. United States*...323 F.2d 874, 876 (Ct. Cl. 1963). If this court interprets the contract and detects an ambiguity, it next determines whether that ambiguity is patent. *See Newsom v. United States*...676 F.2d 647, 649-50 (Ct. Cl. 1982). The doctrine of patent ambiguity is an exception to the general rule of *contra proferentem*, which courts use to construe ambiguities against the drafter...*See id.*; *Sturm v. United States*...421 F.2d 723 (Ct. Cl. 1970). An ambiguity is patent if [it is] “so glaring as to raise a duty to inquire[.]” *Newsom*,

676 F.2d at 650. If an ambiguity is not patent but latent, this court enforces the general rule. See *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988).

With respect to patent ambiguities, *Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1381 (Fed. Cir. 2000) stated:

A patent ambiguity is present when the contract contains facially inconsistent provisions that would place a reasonable contractor on notice and prompt the contractor to rectify the inconsistency by inquiring of the appropriate parties.

Blue & Gold, Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007), added:

[W]here a government solicitation contains a patent ambiguity, the government contractor has “a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation” in a subsequent action against the government. *Stratos*, 213 F.3d at 1381 (quoting [*Statistica Inc. v. Christopher*, 102 F.3d 1577, 1582 (Fed. Cir. 1996)]).

With respect to latent ambiguities and the rule *contra proferentem*, *Gardiner, Kamy & Associates, P.C. v. Jackson*, 467 F.3d 1348, 1352-53, 1354 (Fed. Cir. 2006) stated:

[T]he doctrine of *contra proferentem* is applied only when other approaches to contract interpretation have failed. Accordingly...“if ambiguity cannot be cleared up by reading the contract as a whole...the ambiguity should be resolved against the party who drafted the contract...[Thus] *contra proferentem* is a “rule of last resort” that “is applied only where there is a genuine ambiguity and where, after examining the entire contract, the relation of the parties and the circumstances under which the executed the contract, the ambiguity remains unresolved [citations omitted]. We recently recognized that the doctrine is inapplicable if “the intention of the parties...otherwise appear[s]. [*HPI/GSA-3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004)].

....

When a contract is ambiguous, before resorting to the doctrine of *contra proferentem*, “we may appropriately look to extrinsic evidence to aid in our interpretation of the contract. *Metro. Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006) [citations omitted]

HPI/GSA-3C, LLC v. Perry, 364 F.3d 1327, 1334, 1335 (Fed. Cir. 2004) explained, and stated the elements of proof of, *contra proferentem*:

Before a court may enforce the general rule of *contra proferentem* against the drafter of an ambiguity, the contractor’s interpretation of that ambiguity must be reasonable. [*Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992)]....As explained by our predecessor, the Court of Claims:

The essential ingredients of the rule are: (1) that the contract specifications were drawn by the Government; (2) that language was used therein which is susceptible of more than one interpretation; (3) that the intention of the parties does not otherwise appear; and (4) that the contractor *actually and reasonably construed the specifications* in accordance with one of the meanings of which the language was susceptible.

W. Contracting Corp. v. United States, 144 Ct. Cl. 318, 326 (1958) (emphasis added).

....

Perry & Wallis, Inc. v. United States, 192 Ct. Cl. 310, 427 F.2d 722 (Ct. Cl. 1970) [stands] for the proposition that a party that enters without objection into a contract with knowledge of the other party’s reasonable interpretation is bound by that reasonable interpretation....

There were two inconsistencies in Mil-Spec’s offer and its “final proposal revision” and the contract award pertinent to this dispute. RFP Section F stated a delivery date of “01-Nov-2006” and “90 Days After Date of Award” (finding 1(c)). Mil-Spec’s offer and “final proposal revision” repeated those RFP delivery terms (findings 2, 5). The contract stated a delivery date of “13-FEB-2007” and “90 Days After Date of Award” (finding 8).

We hold that the 13 February 2007 and “90 Days After Date of Award” delivery dates are “facially inconsistent.” *See Stratos, supra*. The parties, however, do not advance different interpretations of those provisions. They both interpret the “90 Days After Date of Award” provision as controlling, or in appellant’s words, what “really relates” (finding 1(c), n.2, findings 11(d), 12). Since the parties have a single interpretation of these inconsistent provisions, the *contra proferentem* rule is inapplicable. *See HPI, supra* (*contra proferentem* elements 2 and 3 are not shown).

Moreover, Mil-Spec was unconcerned about the discrepancy between the 1 November 2006 delivery and “90 Days After Date of Award,” because “90 days after award” was what “really relates” (finding 1(c), n.2), *i.e.*, was the real delivery date. Since the “90 days after award” term resolved the discrepant 1 November 2006 delivery date in the RFP and Mil-Spec’s offer, using Mil-Spec’s criterion, it follows that such term must resolve the discrepant 13 February 2007 delivery date in the contract award.

Accordingly, we hold that the contract was not null and unenforceable, but rather was valid. Our holding is supported by Mil-Spec’s 24 January 2007 PO (finding 14(b)). Mil-Spec’s assertion that it issued such PO as a “courtesy” to USASC (app. reply br. at 5) is not credible.

Further, we reject Mil-Spec’s contention that since Ms. Drebenstedt’s 16 January 2007 e-mail stated that Pine Bluff Arsenal was agreeable to the “changes” in Mil-Spec’s 19 December 2006 e-mail (finding 11(b)), respondent agreed to the 90 additional days for delivery that Mil-Spec requested (findings 9, 11(e)). The appeal record contains no evidence that either USASC’s contract specialist Drebenstedt or PBA’s Sandra Smith had CO authority (finding 21).

We deny the appeal.

Dated: 6 August 2009

DAVID W. JAMES, JR.
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

OWEN C. WILSON
Administrative Judge
Acting 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. 56070, Appeal of Mil-Spec Industries Corp., rendered in conformance with the Board's Charter.

Dated:

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