

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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HGI Skydyne) ASBCA Nos. 56108, 56664
)
Under Contract No. DAAH03-02-P-0118)

APPEARANCE FOR THE APPELLANT: Ansley R. Van Epps, Esq.
Camardo Law Firm, P.C.
Auburn, NY

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

OPINION BY ADMINISTRATIVE JUDGE TING

HGI Skydyne, a Hornet Group, Inc. Company (appellant or HGI Skydyne) was awarded two purchase orders by the U.S. Army Aviation and Missile Command (USAMC) in Redstone Arsenal, Alabama (government). The first purchase order was for a research and development project to fabricate 15 Frozen Specimen Shipping Units (FSSU-24s or insulated shipping units) to transport infectious substances. The second purchase order was for 18 production units awarded after appellant's prototype units had been tested and accepted by the government.

A dispute arose between the parties on whether a government representative committed the government to buy 600 production units of the insulated shipping units. Appellant submitted two claims. The first claim was submitted under the production purchase order. The contracting officer (CO) denied the claim, and appellant did not appeal. Appellant then submitted the same claim under the research and development purchase order. The CO declined to address this claim on the basis that he had already denied the claim. Appellant timely appealed the CO's refusal to decide the claim pursuant to 41 U.S.C. § 605(c)(5).

The government moves for summary judgment, contending that appellant's claim is time barred because it is the same as the first claim, which was not appealed, and therefore we lack jurisdiction under 41 U.S.C. § 606 which requires that appeals to the Board be taken within 90 days. The government also contends that appellant's claim is barred as a matter of law because the government had made final payments under both

purchase orders¹. With respect to the alleged promise by a government representative to buy 600 insulated shipping units, the government takes the position that even if there was such a promise it was made by someone without the necessary contracting authority to do so. Appellant opposed the motion. To the extent the motion for summary judgment raises a jurisdictional question, we treat it as one to dismiss the appeal for lack of jurisdiction.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. In 1995, National Institutes of Health, National Institute of Allergy and Infectious Diseases (NIH-DAIDS) required a transport system that could be used to ship infectious substances that complied with federal regulations. The Army developed the FSSU that could ship 21 freezer boxes (FSSU-21) for NIH-DAIDS' use. By 2000, NIH-DAIDS needed an updated FSSU. (Compl. and answer, ¶ 1)

2. In May 2002, the USAMC Acquisition Center at Redstone Arsenal, Alabama, issued a solicitation for the fabrication of an inner insulated shipping unit for the government furnished outer cases. The Statement of Work (SOW) states that the government would furnish 15 (outer) cases to the contractor for the project. The SOW required the 15 completed insulated cases be delivered to Logistics Support Activity (LOGSA) at Tobyhanna, Pennsylvania, for evaluation, inspection and testing, acceptance or rejection. The contractor was told that the first case was to be delivered within 60 calendar days after award, and the contractor was not to initiate fabrication of the 14 remaining cases until after visual inspection of the configuration had been successfully completed. The SOW contained this note:

Note: The solicitation is for a quantity of fifteen (15) insulated shipping cases with receptacles for holding packaged infectious specimens. After testing and final acceptance of the fifteen (15) cases, an order may be placed from the same contractor for an additional quantity up to fifty (50) providing funding is available. Title 49 CFR requires the production be from the same manufacturer as the units that were tested.

(R4, tab 2; compl. and answer, ¶ 2)

¹ In their motion papers, the parties argue extensively whether FAR 52.243-1, CHANGES-FIXED PRICE (AUG 1987), should be incorporated into the prototype purchase order (PO 0118) by the *Christian* doctrine (see opp'n at 7-10; reply at 5-7). In view of our disposition granting the government's motion for summary judgment, we need not consider whether final payment constitutes a separate basis for summary judgment.

3. On or about 22 August 2002, Lee Gordon (Gordon) and Steve Quick (Quick) of HGI Skydyne made a sales call at USAMC's LOGSA, Packaging Storage Containerization Center (PSCC). During the visit, Gordon and Quick asked Charlotte A. Lent (Lent) about the development of the FSSU-24. Appellant alleges that Lent represented that "if HGI could supply a successful product, the Government would order 600 cases from HGI in the first year" (compl., ¶ 15). The government denies that Lent made this representation (answer, ¶ 15). In moving for summary judgment, the government states that Lent was a HAZMAT Testing Team Leader and implies that even if she had made the alleged promise, such promise would be inconsequential. The government says it "will assume that Ms. Lent made the statement as Appellant alleges." (Mot. at 2, ¶ 3) In opposing the motion for summary judgment, appellant has not come forward with evidence that Lent had actual contracting authority (opp'n at 1-2, ¶ 3).

4. There is in the record an Interagency Agreement between the NIH-DAIDS of the Public Health Service of the Department of Human Services and PSCC of USAMC-LOGSA of the Department of Defense for LOGSA PSCC to "engineer, design, fabricate, and assemble the components of a long-life maximum quantity...(FSSU-24)." This agreement listed Dale N. Lawrence, M.D. (Dr. Lawrence) as DAIDS' Project Officer at NIH, Bethesda, Maryland, and Lent, an Industrial Engineer at Logistics Testing and Application Division, as the Project Officer at LOGSA PSCC, Tobyhanna, Pennsylvania. (R4, tab 5 at 6)

5. Bidding on the solicitation to develop the FSSU-24 internal shipping unit had closed when Gordon and Quick visited PSCC. At Lent's request, the USAMC contract specialist agreed to let appellant submit a bid. (R4, tab 8; compl. and answer, ¶ 4)

6. On 27 September 2002, the government issued Purchase Order No. DAAH03-02-P-0118 (PO 0118) to appellant to fabricate 15 insulated shipping units in accordance with the attached SOW. At \$915.00 per unit, PO 0118 was in the amount of \$13,725.00. Ruth H. Easley signed as "Contracting/Ordering Officer." (R4, tab 1)

7. On or about 10 April 2003, appellant delivered 15 prototype cases to the government. The government conducted a series of tests and accepted these cases. (Mot. and opp'n, ¶ 12). On 14 April 2003, appellant submitted an invoice (#1508) for the full amount of PO 0118 -- \$13,725.00 (R4, tab 16). Defense Finance and Accounting Service (DFAS-Indianapolis) paid the invoice in full on 9 May 2003 (mot. attach.1).

8. On 31 July 2003, Dr. Lawrence sent an e-mail to a large number of government recipients. The e-mail notified them that the new FSSU-24 "is now certified...and will be started into production in the next few weeks for subsequent distribution in accordance with the orders placed. No equivalent unit is available to our knowledge in the commercial world." The e-mail told recipients that to obtain the government preferred price, "grantees/contractors, Centers, Institutes and other agencies...should indicate their

interests and place orders by September 15, 2003.” The e-mail said that “[t]he purchaser must do so in accordance with their grant/contract/institute procedures and/or at least the concurrence of the appropriate government Program/Project Officer.” The e-mail recipients were told “[t]hese units may not be used for grantees performing commercially support, non-governmental research and shipments. An estimated optimal cost at this time will be about \$2000 per unit; freight charges for delivery may be extra.” (R4, tab 18)

9. On 9 September 2004, the government issued PO W9124P-04-P-0089 (PO 0089) to appellant for 18 insulated shipping units for \$44,586.00 or \$2,477.00 each. Barry J. Howard (CO Howard) signed as “Contracting/Ordering Officer.” The SOW required the 18 FSSU-24 insulated shipping units to be fabricated in accordance with HGI Skydyne drawing No. 74130-001 and associated parts list. The FSSU-24 insulated shipping units were required to be “of the exact design and be constructed of exactly the same materials as used for the tested insulated shipping units (FSSU-24s), the design for which was competed under the solicitation for and ultimately delivered under contract DAAH03-02-P-0118.” Note 3 of the SOW states that “the testing certification of the FSSU-24 production runs expires 1 April 2005, after which no FSSU-24s can be produced.” (R4, tab 25; mot. and opp’n, ¶ 13)

10. The government accepted the 18 FSSU-24 insulated shipping units on 7 December 2004. Thereafter, appellant submitted an invoice (#10840) for the full amount of PO 0089 -- \$44,586.00 (R4, tab 26). DFAS-Indianapolis paid the invoice on 6 January 2005 (mot. attach. 2).

11. In a letter dated 9 February 2005 to Lent, Gordon writing as Vice President of HGI Skydyne, advised that it had incurred costs of \$92,000 “for outside research and development and customization of tooling.” The letter said that HGI Skydyne expected “to recover the \$92,000.00 over 1 year” in anticipation that the government would order 600 units. Inasmuch as the government had only purchased 38 units, Gordon requested an order for 62 units at \$3,714.00 each in order to recover “the balance of \$86,186” in research and development and tooling costs. (R4, tab 27) HGI Skydyne’s Chairman, Dr. J. R. Benson (Dr. Benson), wrote a separate letter on 9 February 2005 to the same effect. He stated “Lee has explained to me that although the expectations for the first year were 600 units that only 100 units were guaranteed.” (R4, tab 28)

12. Sometime between February and June 2005, Gordon left HGI Skydyne. His duties were taken over by others, among them, Horst Rudolph (Rudolph), Corporate Vice President of Customer Satisfaction of Hornet Group, Inc./Skydyne (R4, tab 34). In his 23 September 2005 letter to Rudolph, CO Howard addressed several issues the parties had been discussing since the government accepted and paid for the 18 FSSU-24 insulated shipping units ordered under PO 0089 (*id.*). With regard to ordering 600 insulated shipping units, CO Howard stated “The Government has never contracted for

this amount. We have never contracted for more than 50. The original solicitation for the design clearly stated the design was for a limited production ‘and subject to the availability of funds.’ This is why we had minimal bidders respond, because there was no exorbitant production expected.” CO Howard also took exception to appellant’s contention that the government “subsequently committed for [sic] 100 units” (*id.*).

13. By letter dated 1 November 2005, Rudolph, on behalf of HGI Skydyne, submitted a certified claim to CO Howard. The letter stated that the claim was filed “against” PO 0089, the production purchase order, and was based on “the Government’s failure to contract the quantities [600 units] agreed on by Ms. Lent/Government and HGI Skydyne.” The claim asserted:

[W]e offered a unit price of \$2,477.00 for the subject Purchase Order which was based on the Government contracting for the projected quantity of 600 units for the first year. [\$2324 base + \$153 for the first 600 units.] This would have covered our \$92,000 outlay.

(Brackets in the original) The claim sought “the balance of the costs of \$92,000 incurred for outside tooling, research and development.” (R4, tab 35)

14. CO Howard issued his decision on appellant’s “Claim against Purchase Order W9124P-04-P-0089” by letter dated 27 January 2006. The decision said that inasmuch as appellant was awarded two purchase orders it was “appropriate to review both of them” in connection with the CO’s consideration of the claim. (R4, tab 41 at 1) With respect to the 2002 prototype purchase order (PO 0118), the CO quoted from the SOW which stated the solicitation was for 15 insulated shipping cases, and “[a]fter testing and final acceptance of the fifteen (15) cases, an order may be placed from the same contractor for an additional quantity up to fifty (50) provided funding is available.” CO Howard took the position:

This provision does not obligate the Government to purchase any additional containers, only that if additional containers are needed, the Government intends to purchase them from the same source as the successfully tested containers, and then only if funds are available for the purchase.

(R4, tab 41 at 2) With respect to HGI Skydyne’s claim of \$92,000 under the 2004 production purchase order (PO 0089), CO Howard stated that he had “not found any information that would substantiate that such a quantity was ever discussed, or represented to your company.” CO Howard’s decision went on to say:

On the contrary, there is sufficient documentation, including the provision in the statement of work for Contract DAAH03-02-P-0118 that any future orders would be limited to no more than fifty (50) containers, and even that quantity was conditioned on funding being available for such. Even if it could be established that you were told by a technical representative of the Government that your company would receive future orders for the shipping container, the individual making such a statement did not have the authority to obligate the Government for such a purchase. Finally, since there was no authority to obligate the Government, and funds were not available for such a commitment at the time, this claim does not meet the requirements for ratification of an unauthorized commitment under the provision of FAR 1.602-3.

The decision included a notice of appeal rights to the agency board of contract appeals or United States Court of Federal Claims (R4, tab 41).

15. Appellant apparently received CO Howard's decision on or before 6 February 2006. In his 6 February 2006 e-mail to CO Howard, Rudolph asked for specific information on the agency board of contract appeals which was mentioned in the CO decision. By e-mail sent on the same day, CO Howard provided Rudolph the address and telephone numbers of the Armed Services Board of Contract Appeals. (R4, tab 42)

16. HGI Skydyne admits and does not dispute that it never appealed the CO's 27 January 2006 decision (*see* SOF ¶ 22, *infra*).

17. Over the next few months, there were discussions between Rudolph and CO Howard on matters outside appellant's claim such as who owned the rights to the concept of the project. Dr. Benson was apparently upset when CO Howard told Rudolph to contact the government's attorneys. In his 19 September 2006 letter to CO Howard, Dr. Benson stated "We are not challenging your decision not to grant the monetary payment we believed was promised, however we believe with your decision that the Government is totally abdicating all rights, not only to the project but also to any concepts or future involvement. We require absolute clarification on these points from your office or direction on where we should go to resolve these open issues." (R4, tab 43)

18. In his 3 October 2006 response to Dr. Benson's 19 September 2006 letter, CO Howard wrote:

The referenced letter addresses issues that are outside the claim previously asserted under Purchase Order W9124P-04-P-0089. My final decision on that claim was issued to you on January 27, 2006. That decision stands as issued. Said date and the appeal rights set forth in that letter remain in effect and unchanged for this matter.

CO Howard's letter went on to say that "[y]ou should confer with legal counsel of your own choosing concerning any rights you may have in your products." (R4, tab 44)

19. By letter dated 7 March 2007, Rudolph, as Vice President of HGI Skydyne, submitted a certified claim to CO Howard. Unlike the 1 November 2005 claim which was submitted under PO 0089, the claim was submitted under PO 0118, the prototype purchase order. Like the claim submitted under PO 0089, the claim was also based on "the Government's failure to contract the quantities agreed on by Ms. Lent/Government Representative and HGI Skydyne." The claim further explained:

As stated we offered a unit price of \$2,477 for subject purchase order which was based on the Government contracting for the entire committed quantity of 600 units for the first year. [\$2324 base + \$153 for the first 600 units.] This would have covered our \$92,000 outlay.

The claim sought "compensation for the balance of the \$92,000 owed for tooling" plus \$100,000 in lost profits "because of the Government's failure to contract for the entire committed quantity." (R4, tab 49)

20. In support of its claim, HGI Skydyne submitted an affidavit from Dr. Benson. He states in the affidavit that he was the founder and chairman of HGI, that a meeting took place between him and Lent when Lent visited the Skydyne facility. At this meeting, Lent was said to have told him that the government was behind schedule and out of money on the FSSU-24 program, and that "if HGI could supply a successful product...they would order 600 cases from HGI in the first year." Dr. Benson also states "Because they were out of money to fund new tooling, and prodded by Ms. Lent for HGI to participate, and based on Ms. Lent's verbal commitment to procure 600 cases from HGI, I reluctantly acquiesced and agreed to amortize the needed new tooling over the first 600 cases at \$153.00 per case to cover the \$92,000.00 cost." (R4, tab 50)

21. In response to appellant's 7 March 2007 claim, CO Theresa Weigartz's (CO Weigartz) 20 June 2007 letter states:

This claim is essentially a duplicate of the claim that you submitted to this agency under Purchase Order W9124P-04-P-0089 in November 2005. Your claim was thoroughly reviewed by the Contracting Officer at that time and was denied by final decision of the Contracting Officer on January 27, 2006. You were advised of your right to appeal that final decision in that letter. The final decision stands as issued. Your time for appeal of that decision expired on January 28th, 2007. I do not anticipate any further consideration of this matter.

(R4, tab 51)

22. By letter dated 10 July 2007, HGI Skydyne appealed “the deemed denial of its claim” because the CO decision did not respond “to our claim regarding the above purchase order [PO 0118], filed 7 March 2007.” The appeal stated that the Army purchased 15 cases under PO 0118, 18 cases under PO 0089, and HGI Skydyne sold 10 cases to BBI Biotech Research Laboratories, Inc. The appeal contends that “[t]hese orders fell short, by 577 cases, from the promised 600 cases, causing Skydyne a financial loss of \$92,000 dollars in developmental and research costs.” With respect to the claim in connection with PO 0089 it did not appeal, and with respect to whether its claim under PO 0118 was a duplicate of the earlier claim, HGI Skydyne’s notice of appeal states:

...Skydyne will admit it failed to elevate its claim to ASBCA in response to the first denial of our claim against Purchase Order 04-P-0089. The reason for failing to file the first claim to the ASBCA is simply we felt obligated as a Veteran Owned Small Business to make a strong good faith effort to resolve the matter between the two parties versus going through costly litigation.

....

Skydyne is partially in agreement with the comment that the claim duplicated much of the same information provided under Purchase [Order] 04-P-0089, except there is a new documentation that has been added. The Contracting Office in effect is denying our claim against the Purchase Order 02-P-0118 a separate contract instrument from Purchase Order 04-P-0089.

(R4, tab 52)

23. The Board docketed that appeal as ASBCA No. 56108 on 12 July 2007.

Because the copy of appellant's 7 March 2007 certified claim in the Rule 4 file (R4, tab 49) did not bear a signature, the Board by letter dated 16 June 2008 directed the government to provide a copy of the 7 March 2007 claim as received by the CO.

24. Appellant's counsel advised the Board by letter dated 30 June 2008 that he had queried his client and "they believe that they did transmit a signed claim to the contracting officer," but appellant was "unable to locate a copy of the signed claim." Appellant's letter forwarded a copy of a new claim certification executed on 25 June 2008 by Donald Paris, president of HGI Skydyne. The certification, referred back to "the claim of HGI Skydyne made under the above contract [PO 0118] on March 7, 2007." The government's letter of 9 July 2008 notified the Board that its attempt to locate a signed copy of the 7 March 2007 certified claim was also unsuccessful. The letter advised that "[i]n light of Appellant's assurance that the claim was originally certified, and the fact that this appeal seems to be within the statutes of limitations, the Government is willing to accept the newly certified claim dated June 25, 2008."

25. According to the Board's 9 September 2008 letter, the parties agreed that ASBCA No. 56108 would be stayed to allow HGI Skydyne to file a certified claim with the CO. By letter dated 7 October 2008, HGI Skydyne's counsel sent government counsel a new claim certification which referred to and was attached to the claim HGI Skydyne submitted on 7 March 2007. This new certification was signed by Bob Fitch, Executive Vice President for HGI Skydyne.

26. In response, CO Weigartz again took the position in his letter dated 15 October 2008 that CO Howard's decision issued on appellant's claim under PC 0089 "stands as issued." Appellant appealed by notice dated 28 November 2008. The Board docketed this new appeal as ASBCA No. 56664, and notified the parties by letter dated 2 February 2009 that "the two appeals will be consolidated."

DECISION

In the 2005 to 2007 time frame, appellant submitted two certified claims to the CO. The first certified claim was submitted by letter dated 1 November 2005. This claim, which was submitted under PO 0089, the production purchase order, was denied by CO decision issued on 27 January 2006 (SOF ¶¶ 13, 14). It is undisputed that appellant did not appeal the 27 January 2006 CO decision (SOF ¶ 16). Appellant's second certified claim was submitted to the CO by letter dated 7 March 2007. The CO refused to address this claim on the basis that the claim was "essentially a duplicate" of the November 2005 claim submitted under PO 0089 which was denied by the CO's 27 January 2006 decision (SOF ¶ 21).

In the parties' motion papers, they argue whether the claim arose out of the production purchase order (PO 0089) (mot. at 8-9) or the prototype purchase order

(PO 0118). Appellant argues that “[t]he breached promise pertains directly to PO 0118 [the prototype purchase order] and “[t]he idea that a claim on another related purchase order [the production purchase order] should eliminate the Appellant’s right to appeal on PO 0118 [the prototype purchase order] is completely erroneous” (opp’n at 6).

We need not focus on whether appellant’s claim arose out of the prototype purchase order (PO 0118) or the production purchase order (PO 0089). As appellant itself recognized, the claim “should be considered as [one] relating to a separate implied in fact contract between HGI and the Government” (opp’n at 6). In this connection, the basis of appellant’s claims, as articulated in November 2005 and again in March 2007 centered around the alleged promise by Lent, an industrial engineer at the Army’s PSCC in Tobyhanna, Pennsylvania, that if appellant was able to produce a prototype FSSU-24 insulated shipping unit successfully, “the Government would order 600 cases from HGI in the first year” (SOF ¶ 3). This alleged promise was made in August 2002, before the government issued the prototype purchase order (PO 0118) in September 2002 and two years before the government issued the production purchase order (PO 0089) in September 2004 (SOF ¶¶ 6, 9).

The appeals before us are governed by the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. Under the CDA, “All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 605(a). Once the CO issues a decision, and if the contractor elects to appeal to an agency board, the CDA requires the contractor to appeal the decision “[w]ithin ninety days from the date of receipt of a contracting officer’s decision.” 41 U.S.C. § 606. Once a CO decision is issued, the governing law provides that decision “shall be final and conclusive and not subject to review by any forum, tribunal or Government agency, unless an appeal or suit is timely commenced.” 41 U.S.C. § 605(b); *see Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982) (holding the 90-day appeal period a part of a statute waiving sovereign immunity and thus must be strictly construed).

In this case, appellant’s 1 November 2005 claim was based upon Lent’s alleged breach of promise to order 600 FSSU-24 insulated shipping units conditioned upon HGI’s

successful development of a prototype² (SOF ¶¶ 3, 13). According to appellant's claim, the production purchase order unit price of \$2,477.00 included \$153 as the unit's share of "outside tooling, research and development" costs which when projected over 600 units resulted in \$92,000 in damages (SOF ¶ 13). Appellant's 7 March 2007 claim was based on the same operative facts and damages. Even though the 7 March 2007 claim added \$100,000 in lost profit, that amount was claimed to have arisen out of "the Government's failure to contract for the entire committed quantity." (SOF ¶¶ 3, 19, 20)

Since it is undisputed that appellant did not appeal the CO's decision on its 1 November 2005 claim, we conclude that the CO's 27 January 2006 decision became, as a matter of law, final and conclusive, and not subject to review by this Board. It follows that appellant's 7 March 2007 claim, based on the same operative facts as its 1 November 2005 claim, has to be barred from review by this Board as well. *Santa Fe Engineers, Inc.*, ASBCA No. 26883, 82-2 BCA ¶ 16030 at 79,439 (holding an appeal from a CO decision was untimely even though it was filed within 90 days because the same claim had been the subject of an earlier CO decision which was never appealed.).

CONCLUSION

Because appellant failed to timely appeal the CO's decision on its earlier claim, we hold the CO's decision on that claim has become final and conclusive, and appellant's new claim based upon the same operative facts is barred as untimely. The government's motion for summary judgment which we treat as a motion to dismiss for lack of jurisdiction in this respect is therefore granted.

Accordingly, the appeals are dismissed for lack of jurisdiction.

Dated: 3 November 2009

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

(Signatures continued)

² For purposes of its motion for summary judgment, the government is willing to assume that "Ms. Lent made the statement as Appellant alleges" (mot. at 2, ¶ 3).

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 Nos. 56108, 56664, Appeals of HGI Skydyne, rendered in conformance with the Board's Charter.

Dated:

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