

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Lasmer Industries, Inc.) ASBCA Nos. 56946, 56966
)
Under Contract No. SPO750-02-D-7917)

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Columbus, OH

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT’S MOTION TO DISMISS

In these consolidated appeals, Lasmer Industries, Inc. (Lasmer) appeals the deemed denial of its claim for a no-cost termination “because of the impossible specification,” and that government records “be updated to reflect this satisfactory completion of the [captioned] contract.” Prior to filing its answer, the government has moved to dismiss both appeals on the alternative grounds (i) Lasmer was offered and rejected the claimed relief, and (ii) a decision is unlikely to resolve any remaining dispute. We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The captioned contract (hereinafter Contract 7917) was an indefinite quantity contract for delivery of specified automotive parts if and when ordered. The contract was awarded to Lasmer by the Defense Supply Center Columbus (DSCC) on 23 September 2002. (Ex. A at 1, 2)¹ Contract 7917 incorporated by reference the DSCC Master Solicitation Section I01, which in turn incorporated by reference the FAR 52.233-1, DISPUTES (DEC 1998), ALTERNATE I (DEC 1991) clause, and various FAR Termination

¹ All cited exhibits (“ex.”) are exhibits to the complaint in ASBCA No. 56966.

for Convenience of the Government clauses (52.249-1, 52.249-2, and 52.249-4) (ex. A-1 at 34, Bd. corr. file, email 1 March 2010, 2:57 PM, attach. at 6 and 7 of 10).

2. On 12 January 2004, DSCC issued Delivery Order 0015 under Contract 7917 for 3,800 Idler Arm Assemblies (hereinafter “idler arms”) for HMMWV trucks (ex. B at 1-3). The order required delivery of 700 idler arms by 11 February 2004, and the remaining 3,100 idler arms by 10 June 2004 (ex. B at 4-5). The contract drawing and associated Quality Assurance Provisions (QAP) 12340016 required, among other things, that the idler arms pass a 500,000 cycle endurance test and meet deflection, material composition and hardness requirements (gov’t mot., attachs. 1, 2 at 560).

3. Lasmer delivered to the government 700 idler arms under Delivery Order 0015. A total of 3,100 idler arms remain undelivered (compl. ¶ 3).²

4. In April 2004, Lasmer contracted with an independent test agency to test two of its idler arms and one idler arm of the OEM (original equipment manufacturer). The 23 April 2004 report of the testing agency stated, among other things, that none of the idler arms passed the 500,000 cycle endurance test and that both of the Lasmer idler arms failed the material hardness requirement. (Ex. G at 1)

5. In June 2004, the Lasmer contract administrator sent an email to DSCC stating that the endurance test for the idler arms in contract drawing 12340016 “cannot be met as written due to inadequacies, errors and/or omissions.” He further stated that:

We are requesting guidance from DSCC for the clarification of the endurance requirement in question. We have already incurred considerable expenses of time and money (in excess of \$35,000). The sharing of all current and future costs is imperative before we can proceed due to inadequate data cited and the resulting inability to pass required, yet unattainable tests.

(Ex. F)

6. DSCC replied to Lasmer’s request by forwarding the comments of its mechanical engineer. The DSCC mechanical engineer agreed that the oscillation requirement in the specified endurance test “should have been [removed] and will be in the future.” However, he also stated that: “In view of the fact that Lasmer did not use the correct material for the bracket or the forging, passing the endurance test is moot. I would recommend they not spend anymore [sic] money on testing until they resolve the material issues.” (*Id.*)

² All citations to “compl.” are to the complaint in ASBCA No. 56966.

7. In August 2004, DSCC tested 13 of the idler arms delivered by Lasmer under Delivery Order 0015. DSCC alleges that all 13 failed to meet the material composition, deflection and hardness requirements of contract drawing 12340016. Further use of the Lasmer idler arms was suspended as a result of these alleged test failures. (Gov't mot., attach. 5)

8. From 1 February 2005 through 31 July 2008, Lasmer was debarred from contracting with the federal government for shipping non-conforming parts to the government. Lasmer contested the validity of this debarment and that issue is presently before the United States District Court for the Southern District of Ohio. *See Lasmer Industries, Inc. v. Defense Supply Center Columbus*, 2009 U.S. Dist. LEXIS 88843 (S.D. Ohio, Sept. 25, 2009).

9. On 22 April 2009, Lasmer's counsel sent the following letter to DSCC:

**Re: Contract No. SPO750-02-D-7917
Request for Final Decision**

Ms. Spradlin:

This is a request for a final decision on the subject contract between the Government and Lasmer Industries, Inc. There is an outstanding delivery order for 3800 idler arms under that contract. Lasmer has delivered 700 idler arms under that delivery order, Delivery Order 15. The remaining 3100 are still shown as an outstanding order on the Automated Bid Board System. The Government has previously offered to terminate the subject contract and the delivery order, but has never done so. *Lasmer hereby requests a no-cost termination of the subject contract and Delivery Order 15 because of the impossible specification.* Lasmer also requests that the Government's paper and electronic records for this contract, including the ABBS and DIBBS systems, be updated to reflect this satisfactory completion of the contract. If the Government is not willing to grant these requests, please issue a final decision without delay. [Emphasis added]

(Gov't mot., attach. 6)

10. On 9 June 2009, DSCC replied to Lasmer's 22 April 2009 letter in relevant part as follows:

Your [22 April 2009] letter now requests a no cost termination of the contract and Delivery Order 0015. The basic contract has expired and only Delivery Order 0015 is outstanding. Although you state in your letter that you want the delivery order terminated because of an “impossible specification,” you do not identify what you mean by this term. As you are aware, DSCC found the idler arm assemblies supplied by Lasmer to be non-conforming because Lasmer failed to meet the deflection requirement of note 13, the material composition requirement of note 4, and the hardness requirement of note 20. None of these requirements was an “impossible specification” to meet.

DSCC is willing to terminate the delivery order at no cost to the government because of the age of this contract. We will not, however, change the ABVS or DIBBS records to reflect satisfactory completion of the contract by Lasmer.... If there are other records not covered here which you wish addressed, please bring those to our attention immediately.

(Gov’t mot., attach. 7)

11. On 14 July 2009, Lasmer replied to the DSCC letter of 9 June 2009 with a letter that discussed only the endurance test specification and concluded with the following request: “Please issue a final decision on Lasmer’s claim that the idler arm specification performance test is defective” (gov’t mot., attach. 10).

12. On 16 September 2009, Lasmer appealed “the [deemed] decision of the Defense Logistics Agency to deny its request to modify the Endurance Test...or to terminate the contract for convenience of the government.” That appeal was docketed as ASBCA No. 56946.

13. On 16 October 2009, Lasmer appealed the deemed denial of “its April 22, 2009 Request for Final Decision for a termination for convenience of the above referenced Contract and Delivery Order 0015 due to impossible specifications, and its July 14, 2009 clarification of that request noting that the Endurance Test specification...incorporated in the subject contract is defective.” This appeal was docketed as ASBCA No. 56966. The appeals were consolidated.

14. By letter dated 5 November 2009, the contracting officer replied to Lasmer’s 22 April 2009 request for a final decision with an offer of a bilateral modification derived from FAR 49.603-6 (“No-cost settlement agreement - complete termination”). The proposed modification stated in relevant part:

Cancel the following CLIN(s) to the extent indicated below at no cost or liability to the Government or the Contractor.

CLIN
3002 [3100 idler arms]

The Contractor unconditionally waives any charges against the Government because of the termination of the contract and releases it from all obligations under the contract or due to its termination. The Government agrees that all obligations under the contract are concluded.

(Gov't mot., attach. 12)

15. The contracting officer's 5 November 2009 letter also stated that "because of the age of the contract, ABVS data has already been removed from the system," and that "[o]nce Lasmer has signed [the no-cost termination modification], government contracting records (DIBBS) will be updated to reflect the no-cost termination of the delivery order." However, neither the letter nor the offered modification stated that the modification was being made "because of the impossible specification." (*Id.*)

16. By letter dated 24 November 2009, Lasmer rejected the contracting officer's offer of a bilateral no-cost termination modification stating in relevant part:

Lasmer's April 22, 2009 letter requested a no-cost termination of [Contract 7917] and Delivery Order 15 "because of the impossible specification." It is the government's acknowledgement of the impossible specification and the termination of the Contract and Delivery Order based thereon that is the key issue. Sadly, after all these years, the government is still unwilling to admit that the idler arm specification, particularly the endurance test, was impossible to meet.

Further, by signing the proposed modification 00155, Lasmer would be waiving its rights under the Equal Access to Justice Act (EAJA) to recover the costs and attorneys' fees incurred solely due to the government dragging its feet in refusing to issue a determination that the idler arms specification underlying Delivery Order 15 is impossible to satisfy. Lasmer cannot and will not waive its rights under EAJA.

(Gov't mot., attach. 13)

DECISION

The appeals before us are for the deemed denial of a claim for a contracting officer's decision finding that Lasmer was entitled to a no-cost termination "because of the impossible specification." The government moves to dismiss on two grounds. First it argues that the appeals are "moot" because Lasmer was offered a no-cost termination and refused it (gov't mot. at 1). We do not agree. The no-cost termination offered to Lasmer in the contracting officer's letter of 5 November 2009 did not state that the reason for the termination was the impossible specification. The offered modification did not grant the full relief requested. Accordingly, the claim is not moot on that ground.

The second ground for dismissal argued by the government is that the Board "should exercise its discretion not to decide a contract interpretation matter which is unlikely to resolve any remaining dispute" (*id.*). See *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271, *reh'g denied*, 186 F.3d 1379 (Fed. Cir. 1999). On the record before us on the motion, it appears that the government does not dispute that the endurance test specification was impossible to pass. However, it also appears that while the government did not require Lasmer to pass that test and did not reject any delivered idler arms for failure to pass the test, Lasmer's idler arms did not comply with other specification requirements. (See SOF ¶¶ 6, 7)

Implicit in Lasmer's claim for a no-cost termination "because of the impossible specification" is a claim that the impossible endurance test specification was the cause of its failure to deliver the remaining 3,100 idler arms under Delivery Order 0015. That

claim is not entirely academic and Lasmer is entitled to have that claim heard and determined on the merits.

The motion to dismiss is denied.

Dated: 26 April 2010

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeal

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. 56946, 56966, Appeals of Lasmer Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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