

DOTCAB

MONSTER GOVERNMENT SOLUTIONS, INC., APPELLANT
v.
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER
PROTECTION, RESPONDENT

Contract No. GS-15F-0075K

March 8, 2006

Jacob B. Pankowski, Esq. Washington, D.C. for the Appellant

Carmody A. Gaba, Esq., Washington, D.C. for the Respondent

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE FENNESSY ON APPELLANT'S MOTION TO
VACATE THE CONTRACTING OFFICER'S DECISIONS AND DISMISS FOR LACK OF JURISDICTION

Monster Government Solutions, Inc. (Monster) has appealed a final decision of a contracting officer of the U.S. Customs and Border Protection (CBP), Department of Homeland Security, terminating a task order for cause. The appeal was docketed as No. 4532. CBP had issued the order to Monster pursuant to a General Services Administration (GSA) Federal Supply Service (FSS) contract. The CBP contracting officer issued another decision assessing \$1,281,037.64 in procurement costs against Monster. Monster has appealed that decision and it was docketed as No. 4552. Before us is Monster's motion to vacate the contracting officer's decisions and dismiss the appeals for lack of jurisdiction.

Background [FN1]

Contracting officers of the GSA issue FSS contracts containing information necessary for Federal agencies to order, pursuant to indefinite delivery contracts, commercial items and services at stated prices for given periods of time. Contracting officers of Federal agency ordering offices issue delivery orders against the FSS contracts directly with the Schedule contractors.

Monster offered its Quick Hire system on the GSA FSS. The system allows employers to describe and post openings for positions on the internet. It also sorts and ranks applications and performs other tasks traditionally performed by the human resource department of an organization.

CBP's predecessor, the U. S. Customs Service, had contracted annually for the QuickHire product since 1999.

On July 13, 2004, CBP issued Task Order No. HSBP 1004F04442 (the order) for the QuickHire system against GSA FSS No. GS-15F-0075K (the contract). The order included, for the first time, the requirements for not only CBP but also for other agencies which, like CBP, had become part of the Department of Homeland Security. [FN2]

The contract contained FAR clause 52.212-4, "Contract Terms and Conditions--Commercial Items (April 1998)." That clause gave the Government the right to terminate the contract for default.

The contract also contained clause I-FSS-249-B which provided:

In addition to any other clause contained herein related to termination, the following is applicable to orders placed under Federal Supply Schedule contracts.

Any ordering office may, with respect to any one or more delivery orders placed by it under the contract, exercise the same right of termination, acceptance of inferior articles or services, and assessment of excess costs as might the Contracting Officer, except that when failure to deliver articles or services is alleged by the contractor to be excusable, the determination of whether the failure is excusable shall be made only by the Contracting Officer of the General Services

Administration, to whom such allegation shall be referred by the ordering office and from whose determination an appeal may be taken as provided in the clause of this contract entitled "Disputes."

Appeal File, Tab 4.

Similarly, the applicable Federal Acquisition Regulation provisions in effect when the CBP issued the task order contained the following applicable requirements:

(a) (1) An ordering office may terminate any one or more orders for default in accordance with Part 49, Termination of Contracts. The schedule contracting officer shall be notified in of all cases where an ordering office has declared a Federal Supply Schedule contractor in default or fraud is suspected.

(2) Should the contractor claim that the failure was excusable, the ordering office shall promptly refer the matter to the schedule contracting office. In the absence of a decision by the schedule contracting officer . . . excusing the failure, the ordering office may charge the contractor with excess costs resulting from the reprocurement.

48. C.F.R. § 8.405-5.

In January 2005, CBP began experiencing system failures with the QuickHire System. By a letter dated February 25, 2005, Monster apologized for the problems and stated that they were caused by a "tremendous increase" in customer usage. AF Tab 25.

In a memorandum for the record CBP characterized the problem as follows:

This problem is multi-faceted, consisting of the ability to handle a large volume of traffic on the system, slow operating times, and a large number of announcements that exceeded estimates.

AF Tab 8 (emphasis added).

An April 28 internal CBP email also demonstrates that CBP understood that Monster's explanation for the system failure was CBP's increased volume:

The volume seems to be the issue. We need a system that can accommodate our needs. No restrictions or caveats were communicated to us by the company on the number of questions, or the number of HR users when we purchased the system.

* * * *

What we need as a cure is a system that will allow us to announce all of our vacancies without limits....

AF Tab 26, p. 9.

On April 29, 2005, the CBP ordering contracting officer issued a cure notice to Monster stating:

Monster. .. has attributed the System failure to various factors. MGS has suggested the cause may be applicant load, design and/or volume of assessment questions, number of records in the data base, and/or a memory leak None of these reasons is sufficient to excuse performance.

AF Tabs 12 and 13 (emphasis added). CBP observed that certain of the approaches Monster had employed to fix the problems had not worked. CBP requested that Monster cure the situation by May 6 by performing certain tests to ensure functionality in accordance with an attached "Load Testing Requirements Plan." CBP also directed Monster to provide a fully operational system without load limitations by May 13, 2005.

In a May 4 response to the cure notice Monster took issue with CBP's load testing requirements, stating that they were not reasonable and that the contract did not specify minimum system load volumes. AF Tab 14.

By a letter dated May 18, 2005, Monster again observed that the cure notice established performance requirements that were not in the contract. AF Tab 18.

CBP did not refer this dispute to the schedule contracting officer. Instead, on May 19, 2005, the CBP contracting officer terminated the order for cause. AF Tab 3. Monster timely appealed the termination and filed a complaint. (Docket No. 4432).

On November 2, 2005, the CBP contracting officer issued another decision assessing procurement costs in the amount of \$1.2 million against Monster. Monster has timely appealed that decision. (Docket No. 4452).

In its answer to Monster's complaint, CBP asserted two counterclaims: One for the \$1.2 million excess procurement costs and one assessing \$1.2 million in damages for breach of the implied warranty of fitness for a particular purpose. The second counterclaim was not the subject of a contracting officer's decision.

Discussion

Monster argues that we must dismiss these appeals for lack of jurisdiction. It states that, because it asserted to CBP that the system failure was excusable due to a tremendous increase in volume, the CBP contracting officer did not have authority to terminate the order for cause or to assess procurement costs. According to Monster, those decisions did not create rights of appeal to this Board. In response, CBP alleges that the appeals are within the Board's jurisdiction because Monster never claimed that the system failure was excusable and therefore, the CBP contracting officer did possess authority to render decisions terminating the order for cause and assessing procurement costs.

It is well settled that, pursuant to the Contract Disputes Act, 48 U.S.C. § 601 et. seq., a contracting officer's decision is "the very linchpin and necessary prerequisite for the board's jurisdiction." *McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 379 (Fed. Cir. 1985) citing *Paragon Energy Corp. v. United States*, 645 F.2d 966, 967 (Ct. Cl. 1981). Absent a valid contracting officer's decision, there can be no valid appeal. *Paragon Energy Corp. v. United States*, 645 F.2d at 967.

Here, the applicable contract provisions and related regulations required the CBP

contracting officer to refer Monsters assertions that its performance failures were excusable to the GSA schedule contracting officer for a decision from which Monster could appeal. The record before us demonstrates that Monster asserted from the time the problems arose that they were caused by the tremendous increase in volume of system users as compared to the volume experienced during previous contracts with CBP and its predecessor. Potentially, the vast volume increase could excuse the default. Further, Monster asserted that CBP's cure notice imposed requirements not included in the contract, a fact that may also excuse its default. CBP acknowledged Monster's assertion that the increase in volume excused the system failures in its cure notice and other internal documents. Nevertheless, the CBP contracting officer failed to refer the matter to the GSA FSS contracting officer and instead, terminated the order for cause and issued a decision seeking reprourement costs.

Because Monster asserted that its performance failures were excusable, only the GSA schedule contracting officer possessed authority to issue an appealable decision on the excusability of the performance failures. *United Partition Systems, Inc.*, 03-2 BCA ∂ 32,264 (ASBCA 2003); *Grant Communications Inc. v. Social Security Administration*, 99-1 BCA ∂ 30,281 (GSBCA 1993). The CBP's failure to refer the dispute to the GSA schedule contracting officer renders CBP's termination and excess reprourement decisions nullities. Therefore, we lack jurisdiction of the appeals from them. *Id.*

Monster argues that we also lack jurisdiction over CBP's counterclaim seeking \$1.2 in damages for Monster's breach of the warranty of fitness for a particular purpose. CBP responds that proceedings before the Board are *de novo* and the Board is not limited by the factual and legal findings of a contracting officer.

There is no dispute that the contracting officer did not render a decision seeking \$1.2 million in damages for Monster's breach of the warranty of fitness for a particular purpose. As stated above, we lack jurisdiction over claims that are not the subject of a contracting officer's decision. However, even if this counterclaim is simply an alternate legal theory for recovering the same damages sought by the reprourement costs counterclaim, we lack jurisdiction over it because the contracting officer's decision asserting the reprourement costs claim was a nullity and did not give rise to an appeal.

DECISION

The appeals are dismissed without prejudice for lack of jurisdiction.

Eileen P. Fennessy

Deputy Chief Administrative Judge

Vice Chair

James L. Stern

Chief Administrative Judge

Chairman

Jeri Kaylene Somers

Administrative Judge

FN1. The facts below are set forth solely for the purpose of resolving appellant's motion and are not binding in any subsequent proceedings.

FN2. These other agencies included Immigration and Customs Enforcement and Citizenship and Immigration Services.

DOTCAB No. 4532