89-1 BCA ¶ 21207, ASBCA No. 33007

ASBCA

Appeal of
F & F Laboratories, Inc.

Under Contract No. DLA13H–86–C–Z023

September 14, 1988

APPEARANCES FOR THE APPELLANT:

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OPINION BY ADMINISTRATIVE JUDGE BRADY ON CROSS–MOTIONS FOR SUMMARY JUDGMENT

The contract called for the delivery of starch jelly bars to be used as components of operational rations to be assembled under a different contract. Appellant delivered some of the bars and the assembly contractor found that the bars were too long to fit into the ration bag provided for them. A dispute arose as to whether or not the bars met the contract requirements and the contracting officer eventually terminated the contract for default.

Shortly before the contract was terminated, appellant filed a certified claim for $171,143.97 which was denied by the contracting officer in a letter dated 9 May 1986. That claim is not properly before us and we will decide the propriety of the termination for default only.

FINDINGS OF FACT

1. Mr. Steven Bollendorf has been employed at Defense Personnel Support Center (DPSC) in Philadelphia since 7 November 1983 as a purchasing agent. In the 3 and 1/2–years prior to his deposition on 12 May 1987, Mr. Bollendorf's main function had been procuring food for rations, the majority of which were the “meal, ready-to-eat” which is the combat ration. (Bollendorf dep. at 11, 12, 14, 25). He also recalls buying other ration items, including toilet paper, candy bars, and matches (ibid. at 14). Sometime in June 1985, Mr. Bollendorf received a requisition to purchase all of the items used in the “abandon ship ration.” (Ibid. at 47) One of the items to be purchased was the “starch jelly bar” and as the candy buyer for the rations program, that item was delegated to Mr. Bollendorf for procurement (ibid. at 29, 47). The last purchase of the abandon ship ration by DPSC was in 1982 (ibid. at 36)

2. Mr. Bollendorf noted from the item history card for the jelly bar that only one firm had submitted an offer on the last procurement in 1982 (ibid. at 36). The firm submitting that offer, Nabisco, Chuckles Division, had received the contract in 1982. However, when contacted by Mr. Bollendorf before the issuance of the new solicitation, Nabisco indicated that it was not interested and did not want to submit an offer. (Ibid. at 43, 44)

3. One day in early October, 1985, while on a break from work, Mr. Bollendorf noticed a starch jelly bar in the vending machine in the breakroom (ibid. at 41, 43). He bought one of the bars and saw that it was manufactured by appellant, **F & F Laboratories**. He took down the name and address and called F & F. In that initial phone call he spoke to Mr. David Barnett, Marketing Director for F & F and to Mr. Bernard Stern, Assistant Technical Director for F & F. Mr. Bollendorf told them about the purchase of jelly bars, how many were being purchased [1,316,044] and asked if F & F would be interested in submitting an offer. Mr. Barnett said he was interested. (Ibid. at 41, 42, 70, 71)

4. In further discussions between the parties in late October and early November, 1985, Mr. Barnett advised Mr. Bollendorf that F & F could not make a 2–ounce bar and was told that the contract was negotiable and to put this in the technical qualifications page as an attachment to the contractor's offer. (Barnett affidavit) The bar required by the solicitation which Mr. Bollendorf sent to appellant is about 3 and 1/8–inches long, contains four pieces of jelly candy and weighs a minimum of two ounces (R4, tab 3).

5. In October, 1985, Mr. Bollendorf did not know that the jelly bar made by F & F was would not fit into the bag provided for jelly bars in the abandon ship ration.

6. Appellant only makes a commercial, five piece, 2.125 ounce, 6 and 1/4–inch long, starch jelly bar. Appellant's staff understands the term "packaging" to mean every aspect of the material used to contain a product including the type(s) of material, shape, size and printing. After receiving the solicitation, appellant knew that it could not produce the size bar listed in the specification. However, based on its understanding that the Government knew this and that the contract was negotiable, appellant purchased acetate labels with the printing it would use on the jelly bars, placed the labels on two of its commercial jelly bars and sent them to the Government as "mock-ups." (Affidavits, Stern, Thomas Peknik)

7. Appellant submitted its offer dated 13 November 1985 to DPSC and attached this statement:

F & F LABORATORIES, INC.—TECHNICAL QUALIFICATIONS

The enclosed bid is made on the basis of the following technical qualifications.

—Bar will consist of 5 (five) pieces for a total weight of 2.125 oz.

Flavors will be: 2 Lemon, 1 Lime, 1 Orange and an additional flavor for any one of the above. We can also make the fifth flavor either Cherry or Licorice.

—Packaging as submitted will be used. Although the 16 lbs are not packed in the actual printed film, it will be printed as done on the mock-up sent with this packet.

—F & F will commit to a delivery date of 2–1–86 due to the lead times required in the procurement and printing of cello material.

ATTACHMENT NO[.] I

Page 3 of appellant's offer includes this statement:

See Attachment I for technical qualifications.

The above offer is accepted on the basis of these

technical qualifications.
(R4, tab 2)

8. The reference to "the 16 lbs." in the previous paragraph refers to 16 pounds of the candy sent in by appellant as a bid sample. This was done in accordance with the solicitation requirement that samples of the candy be submitted with the offer to be tested for "palatability."

9. Appellant's bid sample was forwarded to Natick Research and Development Laboratories (Natick), in Natick, Massachusetts by DPSC on 15 November 1985 (Harris dep. at 46, 48) The Natick laboratory tested the samples for palatability and found them acceptable (Bollendorf dep. at 154; dep. exh. 29).

10. Following the acceptance of the bid samples for taste, the parties continued to negotiate, and appellant's telegram of 12 December 1985 and its letter of 15 January 1986 covered further changes suggested or agreed to by appellant (R4, tabs 8, 15). Award of the full quantity of 1,316,016 starch jelly bars at $.15 per bar, was made to appellant on 16 January 1986 (R4, tab 1). The first page of the award/contract document issued on 16 January 1986 stated, in part:

> Your offer on Solicitation Number DLA13H–86–R–7765 *, including the additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the items listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary. * Contractor's offer dated 13 Nov 85 and wire dated 12 Dec 85, and letter dtd 15 Jan 86

(R4, tab 1) Page 4 of the same document lists a number of "technical changes" to the contract "being made per the contractor's request and ... incorporated for use in this contract." These changes do not refer to any change in the dimensions of the bar (ibid.).

11. Federal Specification Z–C–2104 is titled "Candy and Chocolate Confections" and it covers the requirements for Type II starch jelly candies (R4, tab 3). Paragraph 3.5.1 of the specification states that the finished, wrapped bars for operational rations of all classes under Type II shall be:

> 3 1/8 ± 3/16 inches long
> 1 1/4 ± 3/16 inches wide
> 3/4 ± 3/16 inches thick

(R4, tab 3) These dimensions for the wrapped bar are also shown in Table II of the specification (R4, tab 3). Table VIII "Examination of Package" states that if the size of the package is not as shown in ¶ 3.5, it is a major defect (R4, tab 3).

12. The contract provided for inspection by the U.S. Department of Agriculture (USDA) at origin, appellant's plant, and acceptance at destination. The FOB Point was the Oklahoma League For The Blind in Oklahoma City, Oklahoma. (R4, tabs 1, 2)

13. The USDA inspected four lots at appellant's plant on 20 February 1986, 26 February 1986, 3 March 1986, and 12 March 1986. Each of the first three lots involved 199,584 bars (1,386 cases) and the fourth lot contained 100,656 bars (699 cases) (dep. exh. 17). The inspection forms used are DD Form 250s and all show that the goods were inspected and accepted at origin (Bollendorf dep. at 179, 180; dep. exh. 17). The Oklahoma League For The Blind received the first lot and accepted it. However, on 25 February 1986 when it attempted to put the 6 and 1/4–inch bars into the 5 and 1/2–inch bags it found that they would not fit (R4, tab 24). The League immediately notified DPSC in writing and by phone (dep. exh. 18; Bollendorf dep. at 169).

14. On 27 February 1986, DPSC sent appellant a telegram stating that jelly bars produced under the contract were nonconforming and did not meet the dimensions of Table II of Specification Z–C–2104.

The telegram pointed out that the 6 and 1/4–inch bar would not fit in the approximately 5 and 1/2–inch ration bag. Appellant was told to discontinue production, stop shipments and arrange for return of Lot 1 from Oklahoma City. (R4, tab 16) Appellant did stop shipments but the USDA accepted Lots 3 and 4 after this date as found above (finding 13). As of 26 February 1986, appellant had in-process or completed, 739,584 bars, about 56 percent of the total contract quantity. (App. R4, tab 13)

15. The Government's telegram of 27 February 1986 outlined some possible solutions which it thought the contractor might propose. However, appellant responded by letter of 3 March 1986 stating that it had "fulfilled all requirements of the contract" and suggested that DPSC "come up with the solutions." (R4, tab 17)

16. By letter of 12 March 1986, appellant's president advised the contracting officer that all 1,316,016 candy starch bars had been made to the Government specifications and that the Government's telegram of 27 February 1986 and its refusal to accept the jelly bars constituted an "anticipatory breach" of the contract by the Government (R4, tab 18).

17. In letters dated 14 March and 17 March 1986, the contracting officer gave appellant 10 days to indicate in writing that it intended to furnish bars meeting the Table II dimensions. He also invoked Option (c)[(2)](v) of the Warranty of Supplies clause (Clause 161) which requires the contractor to pick up nonconforming supplies already delivered. (R4, tabs 19, 20) Appellant responded on 27 March 1986, labeling the Government's actions a "termination" or "a termination for convenience" and asked for a "continuance" until 28 April 1986 so that it could file a certified claim (R4, tab 22). Appellant did file a certified claim by letter of 22 April 1986 in the amount of $171,143.97. By telegram of 30 April 1986, the contracting officer terminated the contract for default in its entirety (R4, tab 23). Appellant sent a truck for the supplies delivered to Oklahoma City.

18. In a final decision dated 30 April 1986, the contracting officer confirmed his telegram of the same date, and noted that the contract had required complete delivery of conforming product by 10 March 1986 and was now delinquent (R4, tab 24).

19. The term "mock-up" is defined as

> A full-sized model built accurately to scale chiefly for study, testing or display

(Webster's New Collegiate Dictionary at 732)

DECISION

Appellant says there is no genuine issue as to a material fact. Respondent says that the facts and statements it disputes concern pre-award events and negotiations which are not necessarily material to the resolution of the dispute and, in any event, were superseded by the fully integrated unambiguous contract awarded to appellant. We agree and find that there is no genuine dispute as to a material fact and that the case may be decided under summary judgment procedures.

It is undisputed that the starch jelly bars submitted to the Government as bid samples were 6 and 1/4–inches long, about twice the length for bars as stated in ¶ 3.5.1 and in Table II of the specifications. It is also undisputed that appellant did not call out the size of the starch jelly bar in Attachment No. 1. Appellant points out however, that it did say in that document, that "[p]ackaging as submitted will be used" meaning, says appellant, the entire configuration of the bar in the package and not just the cellophane wrapper.

Also, says appellant, it referred to the sample bars in attachment No. 1 as a "mock-up" meaning it was sending the Government a full-scale model of the starch bars it intended to deliver under the contract.

It is respondent's position that the contract's dimensional requirements for the starch jelly bar were not changed and that this was clear notice to appellant that no size change was approved. Second, says respondent, even if we accept appellant's construction of attachment No. 1, the failure of the Government to change the bar dimensions was a patent ambiguity creating a duty in appellant to seek clarification. Having failed to do that, says respondent, the ambiguity must be construed against the contractor. In any event, according to respondent, because attachment No. 1 is ambiguous, it must be construed against the drafter under the rule of contra proferentem.

Respondent's main reason for the assertion that attachment No. 1 is ambiguous is because it does not state clearly that a dimensional change is being requested. However, while the document does not state specific numbers, it does show clearly appellant's intent to offer a bar of the dimensions in the sample. The sample was over the minimum prescribed weight, had 5 pieces instead of four and was much longer than the bar described in the specification. Attachment 1 was made a part of appellant's offer and, as such, was included in the contract.

In Barry L. Miller Engineering, Inc., ASBCA No. 20554, 75–2 BCA ¶ 11,567, the contract called for 3 percent escalation on material costs. The contractor sent in a letter with its proposal stating that the prices in the proposal were based on the "present costs of raw material" and if they should rise, the contract price should also be increased. The costs for each component were stated and appellant added that these things were "negotiable." There were no negotiations but the letter was made part of the contract.

In the Miller case, the Government argued that the contractor's letter was incorporated into the contract only for the limited purpose of showing the basic costs of the raw material. We found the argument without merit because there was nothing in the contract or award to manifest that intention. We said it would have been simple to include the material cost information in the contract without including the entire letter, if that was the intent, and allowed escalation based on the contractor's cost.

In the present case, the Government argues that because it did not change the dimensions of the bar in the specifications, it rejected appellant's proposals for a different size bar. However, if this were true, the best expression of the Government's intent would have been to exclude attachment No. 1 from the contract.

Respondent also argues here that appellant's attachment No. 1 is ambiguous and should be construed against the drafter. In respondent's view, the Government accepted the portions of appellant's offer that could be accepted, the overweight and the 5 pieces but could not accept a 6 and 1/4–inch bar because it would not fit into the ration bag. The changes in weight and number of pieces were made but the size was not changed and this should have been patently obvious. Appellant argues, of course, that the reason why the bar was overweight and had 5 pieces was because it was 6 and 1/4–inches long and this should have been obvious to the Government.

In the Miller case, the Government argued that the contractor's letter was ambiguous for much the same reasons advanced here. We disagreed in Miller on the basis that the Government's interpretation would render meaningless the contractor's statement that its proposal was "negotiable." Although on notice that the contractor was not basing his offer on the 3 percent escalation ceiling in the contract, we pointed out, the contracting officer made the award without discussing it. We held that, having included appellant's letter in the contract without seeking clarification or asking for the contractor's interpretation, the Government could not claim ambiguity or the application of the contra proferentem rule and that the 3 percent escalation ceiling was inoperative.

Here, appellant's attachment No. 1 was included in the contract and the Government did not inquire as to what it meant nor did it tell appellant that portions of it were unacceptable. Because it did not do what it should have done, the Government cannot now claim that attachment No. 1 is ambiguous or that it does not mean what appellant says it means.

Respondent points out that all of the bars were to be delivered by 10 March 1986 and that appellant failed to deliver them. We have held that a failure to perform is excused where the Government is guilty of a material breach of contract. Seven Sciences, Inc., ASBCA No. 21079, 77–2 BCA ¶ 12,730.

This principle was recently affirmed by the Court of Appeals for the Federal Circuit in Emily Malone d/b/a Precision Cabinet Company v. United States, 849 F.2d 1141 (Fed.Cir.1988). In the Emily Malone case, the contract required painting and refurbishing of several hundred houses at Warner Robins Air Force Base. The contracting officer procrastinated over a decision whether to accept the first article house as a standard of workmanship for all the houses and let the contractor complete 70 percent of the work before finding the standard unacceptable. The court found the Government's conduct a material breach of contract.

In the present case, the Government was charged with the responsibility of accepting or rejecting appellant's offer but failed to do so until appellant had manufactured over 50 percent of the supplies and had shipped the first lot. We find that the Government was obligated to reject appellant's offer prior to award and that its failure to do so until appellant manufactured over half the supplies after award was a material breach of the contract. Because of the breach, appellant's duty to perform is discharged and it is relieved of the termination for default and its consequences. Emily Malone, supra. In accordance with the default clause of the contract, the termination for default is converted to a termination for the convenience of the Government. The appeal is remanded to the parties for further proceedings in accordance with the Termination for Convenience of the Government clause.

Appellant's Cross–Motion for Summary Judgment is granted and respondent's Motion for Summary Judgment is denied.

In view of this conclusion, it will not be necessary to consider appellant's monetary claim, which is accordingly dismissed without prejudice.

The appeal from the termination for default is sustained.

JOHN M. BRADY

Administrative Judge

Member of the Armed Services

Board of Contract Appeals

I concur
WILLIAM J. RUBERRY

Administrative Judge

Acting Chairman, Armed Services

Board of Contract Appeals

I concur
V. JOHN RIISMANDEL

Administrative Judge

Vice Chairman, Armed Services

Board of Contract Appeals

I certify that the foregoing is a true copy of the opinion and decision on Cross–Motions for Summary Judgment of the Armed Services Board of Contract Appeals in ASBCA No. 33007, Appeal of **F & F Laboratories**, Inc., rendered in conformance with the Board's Charter.

JOE D. MILLER

Recorder, Armed Services

Board of Contract Appeals