



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 4, 2010

CBCA 1659

SILVER SPRINGS CITRUS, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Carolann A. Swanson, Miami, FL, counsel for Appellant.

Michael Gurwitz, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **DRUMMOND**.

DRUMMOND, Board Judge.

This appeal arises out a dispute between appellant, Silver Springs Citrus, Inc. (SSCI), and respondent, the Department of Agriculture (USDA), under seven separate contracts for the purchase of canned fruit juice for use in the USDA's domestic food assistance programs. SSCI disputes the manner in which deductions were taken when it failed to make specific deliveries on time. It seeks recovery of the monies withheld from payment under these contracts.

The Government has filed a motion for summary relief which appellant opposes. For the reasons discussed below, we grant the Government's motion and deny the appeal.

Background

The USDA, under announcement FV-305 (announcement), solicited offers for the purchase of canned juice products for use in its domestic food assistance programs. Appeal File, Exhibits 14, 15; Respondent's Statement of Uncontested Facts (RSUF) ¶ 1. The announcement included a "Liquidated Damages" provision which made clear the importance of timely deliveries. According to this provision, if the contractor fails to ship/deliver the supplies "during the delivery period, for reasons other than causes beyond the control and without the fault and negligence of the [contractor, then the contractor shall, in place of actual damages, pay to the Government] liquidated damages [of fifteen cents per hundredweight per calendar day not to exceed forty-five days of delay]." Appeal File, Exhibit 14 at 14. The liquidated damages cannot be assessed, according to this provision, if the delay in delivery was beyond the control and without fault or negligence of the contractor, as defined in the Default (Fixed-Price Supply and Service)(Deviation) clause in the General Terms and Conditions for the Procurement of Agricultural Commodities or Services (USDA-1). *Id.*, Exhibit 16 at D-23, D-24. As defined in that provision, a contractor's delays may be excused when caused by: "(1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather." *Id.* at D-24. This provision mirrors the Federal Acquisition Regulation (FAR) clause 52.249-14, Excusable Delays (Apr. 1984).

Article 67 of USDA-1, entitled Late Shipment/Liquidated Damages, states in section (a) that:

If Contractor determines that it will not be able to make shipment of a quantity of commodity by the final shipment date under the contract, or if it does not make shipment of a quantity of the commodity by the final shipment date, contractor shall inform Contracting Officer (CO) as soon as feasible

Appeal File, Exhibit 16 at D-22. This provision, however, did not say liquidated damages would be excused upon informing the Contracting Officer (CO) that a shipment would be late.

The USDA awarded contracts 120285236, 120285327, 120285332, 120285422, 120285519, 120285524, and 120285610 to SSCI on March 7, 2008, May 22, 2008, May 22, 2008, July 11, 2008, August 22, 2008, August 22, 2008, and September 5, 2008, respectively.

Appeal File, Exhibits 6-12. The contracts incorporated by reference the announcement, USDA-1, and FAR clause 52.249-14. *Id.*, Exhibit 14 at 14; RSUF ¶ 3. The delivery dates specified in the contracts ranged from April 1, 2008, through mid-November 2008. Appeal File, Exhibits 6-12. The USDA considers the timely distribution of the canned juice important to its domestic food assistance programs. *Id.*, Exhibits 1 at 1, 14.

During contract performance, SSCI experienced delays completing deliveries in a timely manner. Appeal File, Exhibits 2, 13; Complaint ¶ 5; RSUF ¶ 11. By letter dated October 16, 2008, SSCI wrote to the CO requesting new delivery dates, citing, *inter alia*, as reasons for its request: (1) equipment issues which caused “sporadic problems with swollen cans” in May and June, (2) problems with the filler and a two week shut down for maintenance in July, (3) extensive repairs to the terminal controls and diverter valves in July and August, and (4) repairs to the processing and mechanical systems in August. *Id.*, Exhibit 5 at 21c, 21d. SSCI asked the CO not to impose liquidated damages for any late deliveries. *Id.*

The CO did not accept SSCI’s revised schedule and on November 18, 2008, wrote to SSCI stating that “liquidated damages will be assessed for all loads that were late” under the contracts. Appeal File, Exhibit 5 at 25. The CO assessed and withheld liquidated damages totaling \$195,787.41, based on the delivery dates specified in the contracts. Joint Stipulation, Exhibit 1 at 9. There is no dispute concerning delivery dates specified in the contracts and the actual delivery dates, nor how the liquidated damages were calculated.

For contract 120285236, the CO determined that twelve deliveries were late and withheld liquidated damages totaling \$12,370.05. Joint Stipulation, Exhibit 1 at 3.

For contract 120285327, the USDA determined that seventeen deliveries were late and withheld liquidated damages totaling \$28,702.88. Joint Stipulation, Exhibit 1 at 4.

For contract 120285332, the USDA determined that three deliveries were late and withheld liquidated damages totaling \$3000.79. Joint Stipulation, Exhibit 1 at 1.

For contract 120285422, the USDA determined that fifteen deliveries were late and withheld liquidated damages totaling \$34,348.73. Joint Stipulation, Exhibit 1 at 5.

For contract 120285519, the USDA determined that fifty-three deliveries were late and withheld liquidated damages totaling \$77,720.09. Joint Stipulation, Exhibit 1 at 6, 7.

For contract 120285524, the CO determined that six deliveries were late and withheld liquidated damages totaling \$9174.05. Joint Stipulation, Exhibit 1 at 2.

For contract 120285610, the CO determined that nineteen deliveries were late and withheld liquidated damages totaling \$30,470.02. Joint Stipulation, Exhibit 1 at 8.

By letter dated March 30, 2009, SSCI requested that the USDA forgive \$155,992.50 which had been assessed as liquidated damages under the contracts. Appeal File, Exhibit 2 at 10. SSCI regarded the delays as beyond its control and excusable. *Id.* at 9. SSCI also asserted that the delays were excusable because it had informed the CO in October 2008 of the delivery problems. *Id.*

On April 21, 2009, the CO issued a final decision. Appeal File, Exhibit 1 at 1. The CO concluded that the late deliveries were not excusable. The CO asserted that:

[SSCI] had failed to comply with the requirements of the . . . contracts; specifically, with regard to timely delivery. As noted . . . late deliveries cause serious and substantial damages to USDA and the recipient agencies Production problems cited by [SSCI], such as equipment issues and bulging or swollen cans, were not a valid excuse for failing to deliver the product on time. [SSCI] could have complied with the performance of the contracts by subcontracting or making other arrangements with other suppliers to deliver on time.

Id. The CO rejected the claim by SSCI that it had timely notified the USDA of the delays, stating that SSCI had failed to timely notify the correct person, and even if it had, the notice would not waive the assessment of liquidated damages, as the delays were caused by SSCI. *Id.*

Discussion

Motion for summary relief

The Government moves the Board to grant summary relief, asserting that the delays here were caused by mechanical failures and therefore were not excusable under the contract. SSCI contends that the delays in shipment were excusable because they arose out of causes beyond the control and without the fault or negligence of SSCI. SSCI concedes that generally it, not the Government, is responsible for delays caused by equipment failures. However, SSCI argues that because the problems were sporadic and difficult to resolve, and given its past performance on other, unrelated contracts and notice of the delays, the late deliveries should be excusable.

The Government counters that in order for a delay to be excusable, it must be similar to those excusable delays listed in FAR 52.249-14(a). The delay must be from a cause extraneous to the contract and independent of the actions and exertions of the contractor, such as fire, epidemics, and weather.

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, to defeat a motion for summary relief, the non-moving party must come forward with specific facts showing the existence of a genuine issue for trial. “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In this case, the contractor has contested none of the material facts noted by the agency.

An excusable failure to deliver timely occurs when the failure is caused by an occurrence beyond the reasonable control of the contractor and without its fault or negligence. *C-Shore International, Inc. v. Department of Agriculture*, CBCA 1696, 10-1 BCA ¶ 34,379, at 169,740. SSCI’s delays were ascribed to equipment and mechanical malfunctions. Neither an equipment malfunction nor a mechanical malfunction is a valid excuse for delay.

The ability to make timely deliveries within a short time frame is the essence of this contract. The inability to do so because of equipment and mechanical malfunctions is not extraneous to the contract, and it is therefore not an excusable delay. A contractor is responsible for providing the equipment and labor necessary to perform the tasks required within the time frame in the contract. *Paris Brothers, Inc. v. Department of Agriculture*, CBCA 932, 08-2 BCA ¶ 33,991. SSCI has not given us a reason to depart from that rule.

SSCI argues that the delays are excusable because it informed the CO that certain deliveries would be late as required by the contract. SSCI asserts that Article 67 of USDA-1 supports its argument. We can find no contract provision which supports SSCI’s assertion, nor has SSCI shown that its interpretation of the notice provision is reasonable. While Article 67 requires the contractor to inform the CO if a delivery is late, it says nothing about the implication of a late delivery. Other provisions of the contract speak to that subject.

SSCI also argues that the delays are excusable based on its past history of good performance on other contracts. SSCI asserts that the USDA should have considered its past performance and excused the liquidated damages on this contract. Again, we can find no contract provision which supports SSCI's argument. Simply put, SSCI has failed to show that the delivery delays were excusable.

Decision

We grant the Government's motion for summary relief, and conclude that the Government is entitled to retain the liquidated damages it previously collected. This appeal is **DENIED**.

JEROME M. DRUMMOND
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ANTHONY S. BORWICK
Board Judge