



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR SUMMARY RELIEF ON ENTITLEMENT
GRANTED; RESPONDENT'S CROSS-MOTION FOR SUMMARY RELIEF
ON ENTITLEMENT DENIED: September 23, 2010

CBCA 1834

CHARLESTON MARINE CONTAINERS, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Grace Bateman, Michael B. Hubbard, and Daniel P. Wierzba of Seyfarth Shaw LLP, Washington, DC, counsel for Appellant.

Jennifer L. Howard, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **POLLACK**.

SOMERS, Board Judge.

In this appeal, Charleston Marine Containers, Inc. (CMCI) contends that the Government failed to provide notice that it would interpret Federal Acquisition Regulation (FAR) 52.247-64 and Department of Defense Federal Acquisition Regulation Supplement (DFARS) 252.247-7023 to require the use of a combination of U.S.-flag vessels and foreign-flag vessels to transport equipment under the contract if U.S.-flag vessels were not available. The Government contends that CMCI should have known of this interpretation and should have prepared its bid accordingly. We find that nothing in the contract requires the use of

a combination of U.S.-flag vessels and foreign-flag vessels to transport equipment. We grant appellant's motion for summary relief on entitlement and deny respondent's cross-motion.

Findings of Fact

On June 11, 2008, the General Services Administration (GSA) issued a request for quotations (RFQ) to provide containers to the United States Air Force. The RFQ required delivery of these containers to Air Force locations in the United States, Oman, Qatar, Luxembourg, Kuwait, and South Korea. The RFQ sought firm fixed-price quotes for the containers which were based upon a discount from offerors' GSA schedule prices for the containers. Offerors were also required to include prices for shipping and handling charges as an "open market" item.

Because the contract would require the transportation of some of the goods by sea, the RFQ incorporated by reference several regulations, including FAR 52.247-64, entitled "Preference for Privately Owned U.S.-Flag Commercial Vessels." This regulation provides in part:

(a) Except as provided in paragraph (e)^[1] of this clause, the Cargo Preference Act of 1954^[2] (46 U.S.C. App. 1241(b)) requires that Federal departments and agencies shall transport in privately owned U.S.-flag commercial vessels at least 50 percent of the gross tonnage of equipment, materials, or commodities that may be transported in ocean vessels (computed separately for dry bulk carriers, dry cargo liners, and tankers). . . .

(b) The Contractor shall use privately owned U.S.-flag commercial vessels to ship at least 50 percent of the gross tonnage involved under this contract (computed separately for dry bulk carriers, dry cargo liners, and tankers) whenever

¹ The requirements set forth in paragraph (e) do not apply here.

² The primary cargo preference laws in effect today are (1) the Cargo Preference Act of 1904, 33 Stat. 518 (1904) (current version codified at 10 U.S.C. § 2631 (2006)), which generally requires that only U.S.-flag vessels be used to transport supplies by sea for the United States armed forces and (2) the Merchant Marine Act of 1936 (49 Stat. 2016), as amended by the Cargo Preference Act of 1954 (46 U.S.C. App. 1241(b)), which generally requires that at least fifty percent of any government-controlled cargo shipped by sea be carried on privately owned U.S.-flag vessels. 46 U.S.C. § 55305 (2006).

shipping any equipment, materials, or commodities under the conditions set forth in paragraph (a) of this clause, to the extent that such vessels are available at rates that are fair and reasonable for privately owned U.S.-flag commercial vessels.

48 CFR 52.247-64 (2008).

CMCI submitted its proposal to GSA on October 9, 2008. In its proposal, CMCI stated that it would produce some of the containers in South Korea, and these containers would be shipped from Pusan, South Korea, to those Air Force locations situated outside the United States. CMCI used publicly available shipping schedules and rates to calculate its shipping charges for deliveries from Pusan. After discovering that no U.S.-flag vessels provided service from Pusan to four of the Air Force destinations, CMCI calculated its quote for transportation using rates for foreign-flag vessels.

On November 5, 2008, GSA amended the RFQ to add DFARS 252.247-7023, entitled “Transportation of Supplies by Sea” (May 2002), Alternate I (Mar 2000). This regulation provides, in pertinent part, as follows:

(b)(1) The Contractor shall use U.S.-flag vessels when transporting any supplies by sea under this contract. . . .

(c) The Contractor and its subcontractors may request that the Contracting Officer authorize shipment in foreign-flag vessels, or designate available U.S.-flag vessels, if the Contractor or subcontractor believes that –

(1) U.S.-flag vessels are not available for timely shipment;

(2) The freight charges are inordinately excessive or unreasonable;

or

(3) Freight charges are higher than charges to private persons for transportation of like goods.

(d) The Contractor must submit any request for use of other than U.S.-flag vessels in writing to the Contracting Officer at least 45 days prior to the sailing date necessary to meet its delivery schedules. The Contracting Officer will process requests submitted after such date(s) as expeditiously as possible, but the Contracting Officer’s failure to grant approvals to meet the shipper’s

sailing date will not of itself constitute a compensable delay under this or any other clause of this contract.

48 CFR 252.247-7023. The amendment stated that all other terms and conditions of the procurement remained the same.

GSA provided offerors an opportunity to submit revised price proposals in light of the insertion of DFARS 252.247-7023 into the RFQ. CMCI elected not to revise its price proposal.

On November 25, 2008, the contracting officer asked CMCI to provide additional information about its proposed shipping and handling charges. CMCI explained in an e-mail message that its policy was “to only charge the government exactly what the carrier(s) charges us for shipping.” The contracting officer did not ask CMCI to indicate whether it had based its shipping prices on U.S.-flag vessels or foreign-flag vessels, nor did CMCI provide those details to the contracting officer in its proposal.

The contracting officer awarded the contract to CMCI on December 12, 2008. At a post-award meeting held on February 2 and 3, 2009, CMCI notified GSA that when it prepared its proposal, no U.S.-flag vessel service was available to four of the Air Force overseas destinations. CMCI planned to deliver the containers using foreign-flag vessel service should it be unable to obtain U.S.-flag vessel service. The contracting officer asked CMCI to document the nonavailability of U.S.-flag vessel service so that GSA could submit the information to the Military Surface Deployment and Distribution Command (SDDC) for confirmation.

On February 27, 2009, CMCI submitted the first of several requests for a waiver of the U.S.-flag vessel requirement. The contracting officer forwarded these waiver requests to the Maritime Administration (MARAD), a bureau within the Department of Transportation. On April 8, 2009, the contracting officer informed CMCI that, pursuant to MARAD’s direction, GSA had decided to deny CMCI’s request for a waiver to ship the containers using foreign-flag vessels. Instead, the contracting officer advised CMCI that because MARAD objected to the use of foreign-flag vessels, CMCI would be required to use a form of service called Priority Two³ (P2) service, which required CMCI to ship the

³ Priority One (P1) service is defined as all U.S.-flag service from origin to destination. A combination of U.S.-and foreign-flag vessels is Priority Two (P2) service. *See Respondent’s Response to Appellant’s Motion for Summary Relief on Entitlement and Respondent’s Cross-Motion for Summary Relief at 10, citing Appendix E to the Statement*

containers via foreign-flag vessels for one segment of the trip and U.S.-flag vessel service for the other segment of the trip. The contracting officer had been unaware of the existence of P2 service until the previous day, i.e., April 7, 2009. The contracting officer told CMCI that a MARAD representative stated that traditionally P2 service requires the starting vessel to be a U.S.-flag vessel, with the cargo transferred to a foreign-flag service at some point. The contracting officer told CMCI that it would need to apply for a waiver for each shipment.

CMCI objected because the RFQ did not provide any information about the P2 service requirement. None of the transportation services CMCI contacted for price quotes advised it about the possibility of using P2 service to meet the Government's requirements. CMCI noted that the P2 service was significantly more expensive than the foreign-flag service. Nonetheless, CMCI complied with the instructions it had received from the contracting officer, and planned P2 service for the remainder of the shipments.

On May 18, 2009, the contracting officer revised his instructions to CMCI based upon additional information from MARAD. MARAD told the contracting officer that the longest leg of the journey must be provided by a U.S.-flag vessel. Thus, the remainder of the shipments could begin on foreign-flag vessels, so long as the majority of the transportation occurred on a U.S.-flag vessel. CMCI revised the proposed routes as necessary to comply with the new instructions.

During contract performance, CMCI submitted eight requests to the contracting officer for waiver of the requirement to use U.S.-flag vessels on the grounds of unavailability. The contracting officer denied the requests and required CMCI to use P2 service. Accordingly, in each instance, CMCI arranged for P2 service for the shipments.

On June 15, 2009, CMCI submitted a request for equitable adjustment for \$188,174.75 in additional costs it incurred as a consequence of the contracting officer's direction to use P2 service.

On August 8, 2009, MARAD posted an undated two-page document on its website entitled "Prioritization of U.S.-Flag Shipping Services for Compliance with the Cargo Preference Requirements of the Cargo Preference Act of 1954." The document sets forth MARAD's interpretation of the requirements of the Cargo Preference Act, including MARAD's view that contractors should use P2 service if U.S.-flag ship service is not

available for the delivery. The document had apparently been created on June 15, 1986, but had not been posted on the website until 2009.

On August 13, 2009, the contracting officer denied CMCI's request for equitable adjustment. On September 4, 2009, CMCI submitted a claim for \$188,174.75 for increased costs, which it certified on September 11, 2009. On November 9, 2009, the contracting officer denied the claim. CMCI contends that as of the date of the appeal, December 16, 2009, it had completed all container deliveries and ultimately incurred a total of \$423,899.58 in additional costs resulting from the requirement to use P2 service for the deliveries.

Discussion

The parties have cross-moved for summary relief. Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based upon undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justiciable inferences must be drawn in favor of the non-movant. *Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955, at 167,990-91 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

When, as here, both parties have moved for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 181-ISDA, et al., 09-2 BCA ¶ 34,307, at 169,466; *Government Marketing Group*, 08-2 BCA at 167,991. The mere fact that both parties have moved for summary relief does not impel a grant of one of the motions. *Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316, at 169,505 (2009).

Contract interpretation is a question which is properly resolved through summary relief. *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002). Similarly, the interpretation of regulations which are incorporated into government contracts is a question of law appropriate for resolution by the Board. *Rumsfield v. United Technologies Corp.*, 315 F.3d 1361, 1369 (Fed. Cir. 2003); *Perry v. Martin Marietta Corp.*, 47 F.3d 1134, 1137 (Fed. Cir. 1995), citing *Riverside Research Institute v. United States*, 860 F.2d 420, 422 (Fed. Cir. 1988); *United States v. Boeing Co.*, 802 F.2d 1390, 1393 (Fed. Cir. 1986). Contract interpretation begins with the plain language of the contract. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). The threshold issue presented for resolution, therefore, is whether the plain language of either FAR 52.247-64

or DFARS 252.247-7023 requires the use of P2 service in the event that U.S.-flag service is unavailable. We will examine each regulation in turn.

As noted previously, FAR 52.247-64 requires that federal departments and agencies transport in privately owned U.S.-flag commercial vessels at least fifty percent of the gross tonnage of equipment, materials, or commodities that may be transported in ocean vessels if it is “available at rates that are fair and reasonable for privately owned U.S.-flag commercial vessels.” The plain language of the regulation requires, at a minimum, transportation of fifty percent of the goods in U.S.-flag vessels (if such transportation is available at reasonable rates), but says nothing that could be construed as requiring the use of 100 percent U.S.-flag vessels.⁴

DFARS 252.247-7023 requires that the contractor use U.S.-flag vessel service to ship 100 percent of the supplies for delivery to the Government via ocean transportation, provided that U.S.-flag service is available for timely delivery and the charge is not excessive, unreasonable, or higher than rates offered to private persons. The clause does not reference the possibility of using a combination of U.S.-flag vessel service and foreign-flag service.

GSA asserts that the plain language of the regulations allows for a waiver from the requirement to ship by all U.S.-flag vessels if U.S.-flag vessels are not available or the prices are unreasonably excessive. GSA contends that the waiver provision should be interpreted to mean that the contracting officer can deny the waiver request, authorize shipment on foreign-flag vessels, or, alternatively, authorize a combination of foreign-flag and U.S.-flag service. GSA disputes CMCI’s claim that it did not know about the existence of the P2 service option, stating that the use of P2 service “has been around for decades and is known throughout the shipping industry.”

CMCI counters that neither FAR 52.247-64 nor DFARS 252.247-7023 directs the contractor to use P2 service should U.S.-flag service be unavailable. CMCI asserts that the contract, through these clauses or otherwise, did not provide adequate information concerning the basic requirements to use to determine when to ship using U.S.-flag vessel

⁴ GSA could have included Alternative I to FAR 52.247-1, which provides that “the Contractor shall use privately owned U.S.-flag commercial vehicles, and no others,” in transporting supplies under the contract. Even this clause, however, provides that if no U.S.-flag commercial vehicles are available, the contractor can request the contracting officer to authorize shipment in foreign-flag vessels, or the contracting officer can designate available U.S.-flag vessels.

service. Thus, CMCI interpreted these clauses as providing only two choices: shipment by U.S.-flag vessel service, or shipment by foreign-flag service.

We find that the plain language of these regulations does not give a contractor any notice that it would be required to use P2 service in the event that U.S.-flag service was not available. The clauses reference “foreign-flag vessels” and “U.S.-flag vessels” in terms that make them appear to be alternative choices. P2 service is not mentioned or defined in either of the clauses or anywhere else in the contract.

In addition, although DFARS 252.247-7023 allows for a waiver of the U.S.-flag requirement, nothing would indicate that the possibility exists that the contracting officer could grant a waiver with the contingency of using P2 service. GSA asserts that the clause should be interpreted to allow the contracting officer to authorize P2 service; we do not find GSA’s analysis to be persuasive. While an agency’s interpretation of its own regulations is normally entitled to considerable deference, *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), such deference is not required here because the DFARS regulation is a regulation of the Department of Defense, not of GSA. *See Perry v. Martin Marietta Corp*, 47 F.3d at 1137, citing *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1551 (Fed. Cir. 1993). In any event, the regulation does not state that a contractor could be required to use P2 service, and we find nothing in the record that indicates that the Department of Defense interprets its regulation to include that requirement.

GSA argues that CMCI should have known that the regulations would have been interpreted to mandate a preference for the use of P2 service, as this preference has been revealed publicly through various sources. GSA refers to the policy letter issued by MARAD on June 16, 1986, which, although not posted on MARAD’s website until May 2009, was allegedly widely distributed when issued and has been referenced, although not published, in the Federal Register and in a 2008 article published in the Journal of Maritime Law and Commerce. GSA then points to a legal opinion issued in November 1991 by the chief counsel of MARAD, which concluded that preference must be given to the service that maximizes the use of U.S.-flag vessels. Finally, GSA points to unpublished opinions issued by the United States District Court for the District of Columbia and the United States District Court for the Western District of Washington in support of its contention that CMCI should know that the cargo preference priority policy of MARAD includes the use of P2 service.

Though it may be the case that MARAD interprets the cargo preference priority policy to include the use of P2 service, and MARAD’s interpretation has been widely distributed, we find nothing in the contract that makes this interpretation binding upon the contractor.

In the absence of evidence to the contrary, the traditional maxims of contract interpretation must apply.

Decision

For these reasons, we find that nothing in the contract informs a potential contractor that P2 service would be required for shipment of the goods under this contract. Accordingly, we **GRANT** appellant's motion for summary relief on entitlement and **DENY** the Government's cross-motion. The parties will be contacted to schedule a status conference to discuss future proceedings in this appeal.

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

HOWARD A. POLLACK
Board Judge