



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: March 26, 2012

CBCA 2445

NATIONAL FRUIT PRODUCT COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Daniel J. Troup of National Fruit Product Company, Inc., Winchester, VA, appearing for Appellant.

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

Before Board Judges **SOMERS**, **BORWICK**, and **ZISCHKAU**.

ZISCHKAU, Board Judge.

Appellant, National Fruit Product Company, Inc. (NFPC), appeals from a United States Department of Agriculture (USDA) contracting officer's final decision assessing \$526,931 in liquidated damages for the period July 2010 to February 2011 under three contracts for supplying canned applesauce and apple slices for the national school lunch program and other nutrition programs. NFPC argues that liquidated damages should not have been assessed because NFPC's delays in delivering products were excusable and resulted from unusually severe weather in 2010 and a stinkbug epidemic that damaged apple crops in the East and Midwest. NFPC argues alternatively that the USDA incorrectly computed the amount of liquidated damages and that it should have assessed only \$33.53 based on the formula stated in the liquidated damages clause of the contracts, namely,

“\$0.0025 per calendar day of delay.” The USDA argues that the Board lacks jurisdiction because NFPC never filed a certified claim, and that on the merits the liquidated damages assessment should be sustained because NFPC failed to seek alternative sources for apple supplies until long after it was aware of apple shortages in the 2010 apple crop. The USDA asserts that although the liquidated damages formula in the contracts mistakenly omitted the words “per pound” based on a typographical error which was not corrected until April 2011 in a new master solicitation, the Board should enforce the liquidated damages formula as intended by the USDA.

The Board concludes that it has jurisdiction over this appeal because NFPC appeals a government claim and NFPC did not have to file or certify any claim in defending against the government’s claim. On the merits, we conclude that the USDA has met its burden for assessing liquidated damages and that NFPC has not shown that its late deliveries were caused by factors outside its control. We agree with NFPC that the amount of liquidated damages calculated by the USDA was in error. NFPC should have been assessed liquidated damages at a rate of \$0.0025 per hundredweight (cwt), not \$0.0025 per pound, of the apple product per calendar day of delay since the “per hundredweight” rate was the interpretation communicated by the USDA and understood by NFPC from May 2009 through the time of award. Accordingly, we grant in part NFPC’s appeal regarding the amount of the liquidated damages assessment. The USDA shall pay NFPC \$517,281 (the amount of excess liquidated damages withheld by the USDA) within thirty days of the issuance of our decision.

Background

NFPC is a manufacturer of canned fruit products located in Winchester, Virginia. On April 2, 2010, the USDA issued invitation 060, under announcement FV-400 (per the Master Solicitation for Commodity Procurements effective March 2009), requesting bids for canned apple slices and canned applesauce; deliveries were to be from July 15, 2010, to November 15, 2010. Joint Stipulation of Facts (Revised) (Mar. 8, 2012) (JS) ¶ 1. On June 1, 2010, the USDA issued invitation 061, under announcement FV-400, requesting bids for canned apple slices and canned applesauce; deliveries were to be from November 16, 2010, to June 30, 2011. JS ¶ 2. On September 2, 2010, the USDA issued invitation 096, under announcement FV-400, requesting bids for canned applesauce; deliveries were to be from January 1, 2011, to February 28, 2011. JS ¶ 3.

The first sentence of each invitation stated: “The Department of Agriculture (USDA) invites offers to sell canned fruit as indicated below and per the Master Solicitation for use in child nutrition and other domestic food assistance programs.” Appeal File, pt. B, at 1, 31, 61. Bidders were to provide pricing on delivering specified quantities (cases) of canned applesauce and apple slices, each case containing six #10 size cans (060 and 061) or twenty-

four #300 size cans (096). For invitation 060, the bidder was to supply 91,200 cases of apple slices and 286,368 cases of applesauce under 370 line items, each of which identified the lot size (*e.g.*, 912 cases), the destination city and state, and the delivery period.

The “Master Solicitation for Commodity Procurements” cited in each invitation referred to the USDA Agricultural Marketing Service Master Solicitation for Commodity Procurements, with an effective date of March 2009. Appeal File, pt. A, at 1. The Master Solicitation provides:

This solicitation, called the Master Solicitation, is used by the U.S. Department of Agriculture (USDA), Agricultural Marketing Service (AMS) to procure commodities for the National School Lunch Program and other Federal Food and Nutrition Programs. The Master Solicitation will provide the general guidance to potential bidders and/or offerors.

I. INSTRUCTIONS TO BIDDERS

A. USDA will periodically issue Solicitations/Invitations for Bid (IFB) under this Master Solicitation for various commodities under domestic food nutrition assistance programs. Specifications and program requirements will be further defined in the appropriate commodity supplement to this Master Solicitation and are incorporated herein

Appeal File, pt. A, at 3.

Section IX (Clauses Incorporated by Reference), subsection B (FAR Clauses), contains a provision entitled “Liquidated Damages – Supplies, Services, or Research and Development (52.211-11),” which provides:

(a) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, the Contractor shall, in place of actual damages, pay to the Government liquidated damages of \$0.0025 per calendar day of delay, not to exceed 45 days of delay.

(b) If the Government terminates this contract in whole or in part under the Default – Fixed-Price Supply and Service clause, the Contractor is liable for liquidated damages accruing until the Government reasonably obtains delivery or performance of similar supplies or services. These liquidated damages are in addition to excess costs of repurchase under the Termination clauses.

(c) The Contractor will not be charged with liquidated damages when the delay in delivery or performance is beyond the control and without the fault or negligence of the Contractor as defined in the Default – Fixed-Price Supply and Service clause of this contract.

Appeal File, pt. A, at 16. The parties agree that this is the contractual provision for liquidated damages governing the three contracts at issue. JS ¶ 20. Prior contracts issued by the USDA had used a formula of “15 cents per hundredweight (\$0.0015 per pound) net per calendar day.” USDA Reply Brief (Nov. 8, 2011), Exhibit 3; Second Affidavit of Felicitas C. Lofton ¶ 3 (Nov. 8, 2011). The USDA’s contracting officer, Ms. Lofton, states:

The March 2009 Master Solicitation contained a flawed liquidated damages clause. Whereas before, AMS’ liquidated damages clauses (in its old Announcements) utilized a formula based on a monetary rate of payment per pound per day of delay, the new, flawed clause omitted the “per pound” factor of the formula. This flaw was the result of a clerical mistake. AMS personnel were supposed to update the Master Solicitation; however, because of the involvement of the AMS personnel in the development of the new procurement system, the Web Based Supply Chain Management (WBSCM), and attending various related meetings, training, testing, and so on, the clerical error in the Master Solicitation was overlooked. . . . [T]he corrected liquidated damages formula of “\$0.0025 per pound per calendar day of delay” was not issued until April 2011.

Second Lofton Affidavit ¶¶ 5-8.

Ms. Lofton also averred that “[b]y May 2009, AMS had discovered its clerical error regarding the formula for liquidated damages, and at an annual industry conference announced the corrected formula of \$0.0015 per cwt (hundred weight) to be increased to .0025 per cwt per day.” *Id.* ¶ 6. The parties have stipulated that a “presentation explaining the change in the liquidated damages rate in the Master Solicitation effective March 2009 was made at the USDA Annual Industry Conference held on May 18, 2009.” JS ¶ 21. The “Contracting Updates” presentation at the conference was by Ms. Lofton and the USDA procurement supervisor. The sixth slide of this presentation (entitled “Late Charges”) provides: “.0015 per cwt per day - .0025 per cwt per day.” Appellant’s Reply to Respondent’s Defenses (Aug. 23, 2011), Tab C, at 6. The abbreviation “cwt” means “hundredweight” which in turn means 100 pounds. Thus, the USDA AMS announced at the USDA annual industry conference two months after the effective date of the March 2009 Master Solicitation that the correct formula for liquidated damages under the Master Solicitation was \$0.0025 *per hundredweight (one hundred pounds)* of product per calendar

day of delay (not to exceed forty-five calendar days), or \$0.000025 *per pound* per calendar day of delay.

On April 16, 2010, NFPC timely submitted a bid in response to invitation 060. On April 30, 2010, NFPC was awarded contract number 120205421 under invitation 060. On June 15, 2010, NFPC timely submitted a bid in response to invitation 061. On July 1, 2010, NFPC was awarded contract number 120205614 under invitation 061. On September 10, 2010, NFPC timely submitted a bid in response to invitation 096. On September 16, 2010, NFPC was awarded contract number 120205801 under invitation 096. At the time of the award of these contracts, the USDA and NFPC understood the formula for liquidated damages as being \$0.0025 per hundredweight (one hundred pounds) of product per calendar day of delay, based on the USDA industry day presentation regarding the late charges under the liquidated damages clause.

NFPC made a substantial number of deliveries under contract numbers 120205421 and 120205614. Appeal File, pt. E, at 42-71. However, the 2010 apple crop in the eastern and midwestern portions of the United States was the worst in many years due to: (1) the unusually severe weather in 2010 (a summer drought in the East and late freezes in the East and Michigan); and (2) a widespread infestation of the brown marmorated stinkbug, causing significant damage to apples on trees as well as stored apples, particularly in the mid-Atlantic region of the East. Appeal File, pt. E, at 99, 107, 112, 126-190. Based on a USDA apple crop estimate in October 2010, the apple crop in the eastern states showed a 10% decrease over 2009 and the midwestern states showed a 39% decrease, but the western states showed a 5% increase. Appeal File, pt. E, at 126. The eastern states were forecasted to produce 55,707 bushels (forty-two pounds per bushel), the midwestern states were forecasted at 20,780 bushels, and Washington State was forecasted at 134,524 bushels (of the western states' total of 147,643 bushels). *Id.* A USDA report dated January 20, 2011, states that Washington State apple "offerings to processors remain light. Excellent fresh pack outs and demand continue to limit offline offerings to processors." Appeal File, pt. E, at 189.

Starting in October 2010, NFPC began experiencing problems acquiring apples of sufficient quality to process into finished products meeting the USDA Grade A standards required under the contracts. Appellant's Memorandum of Law (Oct. 31, 2011) at 3. With inadequate supply in its primary sourcing areas, NFPC was forced to obtain apples from Washington State and purchased over 600,000 bushels (the record does not indicate when), but those apples did not meet USDA quality requirements and thus were used for other NFPC customers. Affidavit of Robert Patterson, Jr. ¶ 5 (Oct. 31, 2011), Appellant's Memorandum of Law (first attachment). Because of apple quantity and quality problems in NFPC's main sourcing areas caused by the unusually severe weather and the stinkbug infestation, NFPC states that it ran 41% more production shifts than would have been required to fully complete

the contracts just to produce the product that was actually delivered. Beginning on November 15, 2010, the intended recipients of canned fruit under all three contracts started complaining to the USDA about late and unshipped deliveries. JS ¶ 11; Appeal File, pt. E, at 191-206. During the period of November 16, 2010, to January 29, 2011, the USDA and NFPC engaged in telephone and email conversations regarding the late and unshipped deliveries. JS ¶ 12; Appeal File, pt. E, at 198-205.

The USDA began assessing liquidated damages by withholding amounts from invoice payments at a rate of \$0.0025 *per pound* per calendar day of delay. There is no indication in the record that NFPC took any measures during the period October through December 2010 to secure the quantities of apples it needed in light of the shortages being experienced at its usual sources. NFPC visited two apple processing companies in Washington State during the week of January 3, 2011, and purchased finished goods from one of them, but the purchased product did not meet USDA Grade A quality standards. NFPC also contacted two Michigan processors in January 2011, but both processors were unable to assist NFPC. During February 2011, NFPC states that it contacted every other canned apple processor in the United States but none was able or willing to assist NFPC in providing the finished product.

In a letter dated February 3, 2011, NFPC requested that the USDA partially cancel the contracts on the unshipped quantities of products, and requested relief from penalties associated with the late and undelivered quantities. NFPC claimed that crop shortages due to severe weather and the stinkbug infestation were the reasons for its late and undelivered shipments, and included documentation to support its position. In a letter dated March 22, 2011, the USDA responded to NFPC's letter of February 3, 2011, by issuing a cure notice denying NFPC's request for relief on the basis of crop shortage, and advising that NFPC must either cure its failure to complete deliveries or be subject to a termination for default on all three contracts. The USDA's Agricultural Marketing Service was not convinced by NFPC's argument that it was unable to timely fulfill its delivery obligations because other apple product suppliers that were awarded contracts for the same delivery periods did not have any problems delivering their product on time. Affidavit of Felicitas C. Lofton (Oct. 18, 2011) ¶ 6. AMS also concluded that NFPC had not done anything during the July 2010 through January 2011 delivery period to find another supplier to produce and deliver the product for NFPC.

In a letter dated April 11, 2011, NFPC responded to the March 22 cure notice, disputing the USDA's assertion that the crop shortage would not relieve it from its contractual obligations, and again claiming that conditions beyond its control ought to relieve it from any penalties under the contracts.

In a final decision dated April 29, 2011, the USDA's contracting officer terminated in part the three subject contracts for the convenience of the Government and at no cost to either party. The contracting officer's final decision also informed NFPC that it would not be relieved of the liquidated damages for late deliveries for the period of July 2010 to February 2011; the contracting officer stated that she was not persuaded by NFPC's claim that the late deliveries were due to causes beyond its control. In the final decision, the contracting officer notified NFPC that it "may appeal this decision to the Civilian Board of Contract Appeals."

On June 1, 2011, NFPC timely filed a notice of appeal, challenging the contracting officer's final decision and seeking repayment of liquidated damages totaling \$526,930. The parties have recently stipulated that the amount of liquidated damages assessed and withheld by the USDA equals \$526,931. JS ¶ 19. The parties agreed to submit the case for a decision on the record which would be supplemented with additional filings. The parties filed a joint stipulation of facts on September 28, 2011, and additional briefing, exhibits, and affidavits in October and November 2011. The parties supplemented and corrected the original joint stipulations in a filing of March 8, 2012.

Discussion

Jurisdiction

Citing the Contract Disputes Act (CDA), 41 U.S.C.A. §§ 7101-7109 (West Supp. 2011), the Federal Acquisition Regulation, 48 CFR ch. 1 (2009), and our decision in *Red Gold, Inc. v. Department of Agriculture*, CBCA 2259, 12-1 BCA ¶ 34,921 (2011), the USDA argues that NFPC's failure to submit a valid claim, specifically, its failure to include the proper claim certification in its letter to the contracting officer of April 11, 2011, violates the CDA's certification requirements and thus precludes the Board from exercising jurisdiction over the dispute. We do not agree.

Our decision in *Red Gold* involved a contractor seeking to recover based on a mistake it had made in its bid pricing. Clearly, the case involved a contractor claim for reformation of its contract. Because the contractor had never filed a valid claim with the contracting officer, we correctly dismissed the appeal. An analogous case to the present matter is *Silver Springs Citrus, Inc. v. Department of Agriculture*, CBCA 1659, 10-2 BCA ¶ 34,537, at 170,338-39, where we exercised jurisdiction over an appeal of a contracting officer's final decision rejecting the contractor's request that the USDA forgive the liquidated damages assessment. See *Midwest Properties, LLC v. General Services Administration*, GSBCA 15822, *et al.*, 03-2 BCA ¶ 32,344, at 160,037-38 (2002) (denying agency's motion to dismiss where contracting officer's final decision assessed liquidated damages). In the present

matter, we have a government claim for liquidated damages based on NFPC's failure to make certain deliveries in a timely manner. NFPC's April 11, 2011 letter was a response to the USDA's cure notice, not a "claim." NFPC was not required to file any claim as a predicate for our jurisdiction because NFPC is disputing the USDA's imposition of liquidated damages, not seeking a compensable change or a contract modification. Thus, our jurisdiction rests on NFPC's timely appeal from a government claim which was asserted by the USDA's contracting officer in a final decision. There is no dispute that the contracting officer's final decision was truly "final" in asserting NFPC's liability for liquidated damages and refusing to remit the withheld amounts. The government does not have to "certify" its own claim against a contractor. It is sufficient for our jurisdiction that the contracting officer made a final decision on the government claim asserting liquidated damages and the contractor timely appealed from that final decision. *Placeway Construction Corp. v. United States*, 920 F.2d 903, 906-07 (Fed. Cir. 1990); *cf. M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010) (contractor's separate claims for time extensions and related contract modifications had to be certified); *Sikorsky Aircraft Corp. v. United States*, 102 Fed. Cl. 38, 47-48 (2011). We properly exercise jurisdiction over the contracting officer's final decision sustaining liquidated damages against NFPC. The other portion of the final decision, the termination of the contracts for the convenience of the government, at no cost to either party, has not been appealed and thus is not at issue.

Merits

NFPC does not dispute that it made late deliveries of applesauce and sliced apple products. It alleges that the late deliveries were due to causes beyond its control and without its fault or negligence. NFPC points to unusually severe weather and an epidemic of brown marmorated stinkbugs that made impossible its obtaining sufficient quantities of processing grade apples from its normal sources. The USDA does not dispute that, but argues that there were adequate sources of apples from the Pacific Northwest, and Washington State in particular (which produces roughly 40% of the annual apple crop in the United States). According to the USDA, other suppliers of processed apple products were able to make their deliveries during the same period that NFPC states it could not. The USDA also points to NFPC's failure to anticipate the shortages and begin finding other sources until February 2011 – months after the shortages became known to NFPC. We have carefully considered the entire record and are unable to conclude that NFPC's delays in deliveries were due to causes beyond its control. The facts show that NFPC became aware of its apple shortage problem by no later than October 2010, but the record indicates that NFPC took no steps to find alternative sources of apples or finished product until January and February 2011. Because it did not take prudent steps during that crucial three-month period of October through December 2010, we cannot conclude that NFPC's delays were due to causes beyond its control. Accordingly, the USDA had a valid basis to assess liquidated damages.

The USDA states that it computed the amount of liquidated damages using its traditional formula, which it claims is \$0.0025 per pound per calendar day of delay times the number of pounds that were delayed up to a maximum of forty-five calendar days, citing the formula used in a prior master solicitation having a rate of \$0.15 per hundredweight per calendar day of delay. NFPC argues that the rate of \$0.0025 should be applied per calendar day of delay of each delivery lot.

We cannot agree with either approach. The March 2009 master solicitation applicable to the three contracts at issue here contains a liquidated damages clause stating simply “\$0.0025 per calendar day of delay.” There is no mention of “per pound,” and we see no basis for reading that language into the clause. The USDA interpreted the language of the clause as meaning \$0.0025 per hundredweight per calendar day of delay and presented that interpretation to the industry at the Annual Industry Day presentation on May 18, 2009. At the time of the awards of the three contracts, we find that the USDA and NFPC understood the language of the liquidated damages clause to mean just that. Thus, we agree with the alternate calculation presented by NFPC using the rate of \$0.0025 per hundredweight of product per calendar day of delay (not to exceed forty-five calendar days), and conclude that liquidated damages totaling \$9650 should have been assessed by the USDA for the late deliveries. Because the USDA actually withheld \$526,931 from payments to NFPC, the USDA must repay NFPC the excess withholdings totaling \$517,281.

Decision

We **GRANT IN PART** the appeal. Although we conclude that NFPC’s delay in deliveries of applesauce and apple slices was not due to causes beyond its control, the USDA erroneously computed the liquidated damages and is liable to NFPC for its excess withholding of \$517,281. The USDA shall pay NFPC \$517,281 within thirty days of the issuance of our decision.

JONATHAN D. ZISCHKAU
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

ANTHONY S. BORWICK
Board Judge