

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: August 8, 2003

GSBCA 16093

KEVIN J. LeMAY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Daniel H. Byrne and Cynthia W. Veidt of Fritz, Byrne, Head & Harrison, LLP, Austin, TX, appearing for Appellant.

Kelly A. Gillin, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **NEILL**, and **HYATT**.

BORWICK, Board Judge.

Respondent, the General Services Administration (GSA), moves to dismiss, for lack of jurisdiction, this appeal, challenging cancellation of a sales contract. Respondent maintains that appellant failed to submit a claim to the contracting officer as required by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (2000) and the implementing regulation, the Federal Acquisition Regulation (FAR). We disagree with respondent and deny respondent's motion.

Background

GSA conducted an auction on its web site, "www.GSAAuctions.gov." Appeal File, Exhibit 3. GSA auctioned seventy-two lots of goods, id., Exhibit 1, including lot sixty-four, which was described as follows on the computer-generated invitation for bids:

ONE LOT OF GOODYEAR WRANGLER TIRES RT/S, P 215/75 R 15, STANDARD LOAD, 2 POLYESTER CORD - 2 STEEL CORD, MADE IN THE USA, TIRES HAVE 0-20 MILES (APPROX), EST 200 (1574C223470001) UNUSED/USED.

Id.

Respondent displayed three photographs of the tires that were auctioned under lot sixty-four on its web site. One photograph showed about seven tires stacked in a pyramid on a pallet. Appeal File, Exhibit 2. Another showed five tires in a tower with two tires leaning against the tires on a pallet. Id. The third photograph showed a large number of tires stacked in the back of a substantially-sized truck. Id.

The sale was subject to the GSA "Sale of Government Property Online Sale Terms and Conditions" (Online Sale Terms and Conditions). Appeal File, Exhibit 3. One of the terms and conditions was that in the case of a dispute, contracts resulting from the sale would be subject to the CDA. Id. at 1. The Online Sale Terms and Conditions contained a Description Warranty clause. Id. The offering was also subject to the GSA Federal Supply Service's "General Sales Terms and Conditions." Id. at 4. The General Sales Terms and Conditions contained a "Withdrawal of Property After Award" clause. Id., Exhibit 4 at 3 (¶ 22).

Appellant bid \$5400 for lot sixty-four, Appeal File, Exhibit 5, and, on or about February 13, 2003, appellant's bid was accepted as the highest one. Id., Exhibit 11 at 5. Appellant was required to remove the property on or before February 28. Id., Exhibit 6. On February 20, appellant paid the bid amount.

According to appellant, on February 21, appellant drove to the site--a Federal Prison Industries (FPI) facility at Bastrop, Texas--where the tires were located. Appeal File, Exhibits 7, 10. The custodian of the tires, whom appellant described as a "guard," told appellant that his 200 tires were ready for removal. Appellant replied that he had purchased "the whole lot" of tires. Id., Exhibit 7. The custodian told appellant that he would only be allowed to remove 200 tires. Id. According to appellant, he contacted the contracting officer and the "Government Fraud Department" in Washington, D.C., and was told by the contracting officer to submit a written statement. Id. The appellant then had a discussion with another person at the FPI site concerning the amount of tires for which appellant had submitted a bid, with the FPI person insisting that appellant had purchased 200 tires and appellant insisting that he had purchased the whole lot. Id.

In his written statement to the contracting officer, appellant related these circumstances. Appellant also quoted the item description of the contract, and at the end of the letter told the contracting officer:

As you can plainly see by reading the item description for the auction and looking at the pictures, that the estimate should have been for an estimate[d] 200 sets. At this time I would like to pick up my lot of tires if any assistance you can give, will be greatly appreciated [sic].

Appeal File, Exhibit 7.

Upon receipt of the letter, the contracting officer cancelled the contract on the grounds of misdescription. The contracting officer advised appellant that she was instructing respondent's Finance Office to refund the \$5400 appellant had paid for the tires and advised appellant that he could receive the refund check within four to six weeks. Appeal File, Exhibit 8. The notice of cancellation did not advise appellant that the notice was the final decision of the contracting officer, nor did the notice advise appellant of his appeal rights. Id.

On March 10, after receiving the contracting officer's notice of cancellation, appellant wrote the contracting officer and stated in pertinent part:

When I bid on the tires, I knew that I was bidding on the lot whether it contained [two] or 200 tires. If what the guard told me is true and that there are 1400 tires in the trailer, then I should be able to pick up the whole lot. Furthermore, I do not think GSA has the right to cancel my contract for [their] own advantage. I feel that the GSA according to the terms and conditions of the sale, which I agreed to prior to the award of the lot, would be in breach of contract. So at this time, I am asking for alternative dispute resolution.

Appeal File, Exhibit 10. On March 12, appellant sent e-mail messages to the GSAAuctions.gov web site asking whether, having bid on a lot, appellant was entitled to the whole lot or just the estimated amount. The answer appellant received was that appellant was entitled to the lot, not a portion of the lot. Id., Exhibit 12.

By notice of appeal dated March 17, 2003, appellant filed an appeal at this Board. Appellant stated that he was appealing the final decision of the contracting officer dated March 7, 2003. The appeal was docketed on March 25, 2003.

Discussion

The CDA provides that "all claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). The CDA does not define a claim. The FAR, however, defines a claim as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising or relating to the contract." 48 CFR 2.101 (2002).

The requirements for the submission of a CDA "claim" are well-summarized in J & E Salvage Co. v. United States, 37 Fed. Cl. 256, 260-61 (1997), aff'd, 152 F.3d 945 (Fed. Cir. 1998):

Simply referring to a communication as a claim pursuant to the CDA does not guarantee compliance with the statute. Mingus Constructors Inc. v. United States, 812 F.2d 1387, 1394 (Fed. Cir. 1987). To serve as a valid claim, there is "no requirement in the Disputes Act that a 'claim' must be submitted in any particular form or use any particular wording." Contract Cleaning

Maintenance, Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987). The submission only need provide the contracting officer "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Id.* The contractor must also request a sum certain or other form of contractual relief. Reflectone, Inc., 60 F.3d at 1576. Finally, the contractor is required to seek a final decision. Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992) overruled in part on other grounds by Reflectone, Inc., 60 F.3d 1572 (Fed. Cir. 1995). This desire need not be expressed explicitly and may be implied. Heyl & Patterson Inc. v. O'Keefe, 986 F.2d 480, 483 (Fed. Cir. 1993) overruled in part on other grounds by Reflectone, Inc., 60 F.3d at 1572.

See also Rex Properties v. Cohen, 224 F.3d 1367, 1371-72 (Fed. Cir. 2000); Midwest Properties LLC v. General Services Administration, GSBCA 15822, 2002 WL 1813668, at 3 (Aug. 1, 2002).

Here, our task is to determine whether appellant's letter of February 21, 2003, constituted a valid CDA claim upon which the contracting officer could issue a final decision. If appellant's letter was not a claim, then the contracting officer could not issue an appealable final decision on the contractor's claim and the cancellation letter cannot be viewed as an appealable final decision. Skelly & Loy v. United States, 685 F.2d 414, 419 (Ct. Cl. 1982); Maritime Equipment & Sales Inc. v. General Services Administration, GSBCA 15266, 00-2 BCA ¶ 30,987, at 152,933.

Whether a communication is deemed a claim sufficient to invoke the Board's jurisdiction depends on an evaluation of the relevant contract language, the facts of the case, and the regulations implementing the CDA. Midwest Properties, 2002 WL 1813668, at 3 (citing Reflectone Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc)). The intent of the communication governs, and we must use a common sense analysis to determine whether the contractor communicated its desire for a contracting officer's decision. Kanag'iq Construction Co. v. United States, 51 Fed. Cl. 38, 43-44 (2001).

We conclude that the letter of February 21 does constitute a claim, since the letter cited a contractual basis for relief--the item description--which appellant maintains gives him a right to what he considered a "lot" of tires. Appellant also sought non-monetary relief from the contracting officer, i.e., an order to FPI personnel to deliver what claimant thought was his contractual right to the "lot" of tires. In response to appellant's request, the contracting officer immediately cancelled the contract. This indicates to us that the contracting officer was well aware that appellant had sought contractual relief.

The fact that the contracting officer failed to style her cancellation notice as the "final decision" of the contracting officer does not deprive the Board of jurisdiction. When a contracting officer issues a decision, that decision is no less final because it fails to include boilerplate language usually present for the protection of the contractor. Placeway Construction Corp. v. United States, 920 F.2d 903, 907 (Fed. Cir. 1990); Midwest Properties, 2002 WL 1813668, at 2 (citing Sprint Communications Co. v. General Services Administration, GSBCA 13182, 96-1 BCA ¶ 28,068). A contracting officer's response

which conclusively states the Government's position regarding entitlement is considered a contracting officer's final decision even in the absence of the usual boilerplate language. See Placeway, 920 F.3d at 907; Scan-Tech Security, L.P. v. United States, 46 Fed. Cl. 326, 334 (2000).¹ Here the contracting officer, relying on the misdescription clause of the contract, denied claimant the relief he sought--a delivery of a "lot" of tires--and only granted partial relief--the return of the bid deposit.

In short, our common sense analysis leads us to conclude that appellant filed a proper claim with the contracting officer seeking complete relief and the contracting officer responded through a contracting officer's decision cancelling the contract and offering only partial relief.

Respondent argues that the only relief appellant now seeks is specific performance, and the appeal should be dismissed for that reason. Respondent's Motion at 7. It is true that we lack jurisdiction over claims for specific performance. See Maritime Equipment & Sales, 00-2 BCA at 152,933-34. Appellant, however, replies that he does not seek specific performance, but a decision as to whether respondent breached the contract and an interpretation of the contract term "lot." Appellant's Reply at 7 n.6. We take appellant at his word. We have jurisdiction to determine whether respondent breached the contract. Id.

We therefore must deny respondent's motion for lack of jurisdiction. On June 17, 2003, the Board suspended proceedings pending a decision on respondent's motion to dismiss. The suspension of proceedings is vacated. Within ten days of this decision, respondent is to file its answer to appellant's complaint. After submission of respondent's answer, the Board will then schedule a telephone conference to develop a discovery plan and schedule further proceedings which will lead to a resolution of this case.

Decision

Respondent's motion to dismiss for lack of jurisdiction is **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

CATHERINE B. HYATT
Board Judge

¹ Of course, similar cancellations of personal property sales contracts have been issued as final decisions with the requisite formality. See Maritime Equipment & Sales, GSBCA 15266, 00-2 BCA ¶ 30,987.