



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS OR FOR SUMMARY
RELIEF DENIED: February 3, 2011

CBCA 2115

OCÉ NORTH AMERICA, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

James D. Bachman and Ron R. Hutchinson of Doyle & Bachman LLP, Arlington, VA, counsel for Appellant.

Richard L. Routman, Office of the General Counsel, Department of Health and Human Services, Kansas City, MO, counsel for Respondent.

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

BORWICK, Board Judge.

This case involves a claim of appellant, Océ North America, Inc. (appellant or Océ) for breach or termination for convenience charges involving a purchase order for the lease of copiers. The purchase order was issued by respondent, the Department of Health and Human Services, and its cooperative administrative support unit (CASU). Respondent issued a no-cost termination for non-appropriation, which appellant argues should be treated as a termination for convenience with termination charges due. Appellant also claims sums for breach in that there has been copier use and maintenance for which appellant has not been paid under the purchase order.

Respondent moves for dismissal for failure to state a claim, or in the alternative for summary relief. Respondent disclaims responsibility for one of the principal users of the CASU, the Department of the Navy (Navy). Appellant opposes the motion. For the reasons stated below, we deny respondent's motion.

Background

On November 24, 2010, respondent filed its motion to dismiss or for summary relief, which included a statement of undisputed facts. On December 29, 2010, appellant filed a statement of genuine issues in response. We paraphrase each of respondent's un-numbered statements of undisputed facts, with appellant's un-numbered response after each statement:

In its first statement of undisputed facts, respondent states that in 2007, respondent and the Department of the Navy entered into an agreement for respondent's services in procuring equipment for the Department of the Navy, citing Appeal File, Exhibit 30. We expand on this statement to note that the agreement was a purchase order entered into between respondent, through its mid-Atlantic CASU, and appellant. Appeal File, Exhibit 30.

Appellant agrees with respondent's statement of undisputed facts, but also notes that the interagency agreement comprises more than exhibit 30 of the appeal file, and maintains that the bona fide need and the appropriated funds used for the leased copiers were those of the Navy. *See* Appeal File, Exhibits 1, 4, 29-30; Complaint ¶ 2; Answer ¶ 2.

In its second statement of undisputed facts, respondent states that in 2007, a delivery order for leased copiers was entered into between appellant and respondent for 196 copiers to be delivered to the Navy. Appellant disputes the number of copiers delivered and states that the number is not 196, but actually 185.

In its third statement of undisputed fact, respondent states that on September 30, 2008, the contract was renewed. Appellant agrees with this statement, but also notes that respondent renewed the purchase order on September 30, 2009, based on affirmative actions of respondent. Whether the purchase order was in fact renewed on September 30, 2009, apparently is disputed.

In its fourth statement of undisputed facts, respondent states that on September 22, 2009, the Department of the Navy notified respondent that it no longer wanted the copiers. Appellant does not disagree with that statement, but disagrees with its

implications. First, appellant states that it did not receive a copy of the notification in the normal course of contract administration and that it received the notification only during discovery in this litigation. Further, appellant disputes that the Navy had no bona fide need for copiers, but maintains that the notification states that the Navy no longer needed the copiers purchased through the mid-Atlantic CASU.

In its fifth statement of undisputed facts, respondent states that respondent advised appellant that the Navy intended to terminate the agreement, citing Appeal File, Exhibit 25. Appellant disputes this statement of fact. Appellant says that the e-mail message in Appeal File, Exhibit 25 only states that respondent received notification from the Naval District of Washington “regarding termination of their agreement” and did not explicitly state that the Navy intended to terminate the agreement or that the mid-Atlantic CASU intended to terminate the purchase order.

In its sixth statement of undisputed facts, citing Appeal File, Exhibit 25, respondent states that appellant acknowledged the cancellation to respondent and requested serial numbers of the units being canceled. Appellant disputes that it acknowledged that either the Navy or the mid-Atlantic CASU intended to cancel the entire purchase order. Appellant implies, based upon the wording of the cited e-mail message, that appellant thought the message involved a partial cancellation, in that appellant asked for a list of the model and serial numbers being canceled.

In its seventh statement of undisputed facts, respondent, again citing Appeal File, Exhibit 25, states that on September 30, 2009, respondent advised appellant that the entire agreement was being canceled. Appellant disputes this statement. Appellant states that the exchange of e-mail messages shows that respondent did not know whether the agreement was canceled for some or all of the machines. Appellant maintains that the list of serial numbers provided did not include all of the leased copiers that were leased under the purchase order.

Appellant maintains that the Navy never provided a reason for the termination, but understood that complete cancellation would involve a small fortune of expense. Appellant also cites material in the present record which it maintains shows that respondent let the Navy keep all of the leased equipment after the purported termination and that the Navy made about 1.6 million copies from the leased copiers after October 1, 2009. Appellant’s Opposition to Respondent’s Motion for Summary Relief, Exhibit E.

Appellant maintains that evidence shows that as late as February 2, 2010, both respondent and appellant understood the purchase order had been renewed and that the only issue was for the Navy to provide funding to respondent for the lease payments and

that respondent had advised appellant that the Navy had received 2010 funding in December 2009 or January 2010.

In its eighth and ninth statements of undisputed facts, respondent maintains that respondent's contracting officer terminated the purchase order for non-appropriation and that on March 24, 2010, appellant submitted a certified claim to the contracting officer. Those facts are undisputed by appellant.

At this point in the opinion we note that the purchase order was issued under the General Services Administration's (GSA) Multiple Award Schedule Contract GS-2F-0060M (MASC) for copiers. Complaint ¶ 1; Answer ¶ 1. The complaint and answer show many other disputed issues of material fact. The parties agree that the purchase order is governed by the MASC terms and conditions, but the parties disagree as to whether supplemental conditions contained in Océ's proposal were included in the purchase order. Complaint ¶ 3; Answer ¶ 3. The MASC terms and conditions established a lease period not to exceed sixty months, with the actual lease period to be established by the purchase order. *Id.* The MASC terms and conditions also provide that the ordering agency intends to use the equipment so long as the needs of the ordering agency continue to exist for the same or functionally equivalent equipment and adequate funds are appropriated. *Id.*

Appellant alleges that Océ's supplemental conditions incorporated into the purchase order established the base period and four renewal periods for a sixty-month lease, with the base period running from August 14, 2007, through September 30, 2007, with renewals every succeeding fiscal year, and with specified lease payments for each period. Complaint ¶¶ 7-8. Respondent denies receiving, reviewing, or agreeing to the supplemental conditions or the lease payment schedule for those periods. Answer ¶¶ 7-8.

Discussion

In its claim and subsequent appeal, appellant maintains that respondent owes appellant \$775,173.28 for breach damages, or alternatively \$755,172.98 for (1) \$652,417.91 in termination charges, (2) \$100,045.48 in past due lease payments, and (3) \$2709.59 in past due excess copying charges.

The relevant renewal periods are renewal period two, which, ran from October 1, 2008, through September 30, 2009, and renewal period three, which allegedly commenced on October 1, 2009, and would have ended on September 30, 2010, had the purchase order not been terminated on February 3, 2010.

Appellant's complaint contains four counts. Count I alleges that respondent breached the contract because the non-substitution provision in the purchase order provides that if there is a termination for non-appropriation, the Government agrees not to replace the leased equipment with functionally similar property or outsourced services and that, contemporaneously with the CASU's termination of the purchase order for the leased Océ copiers, the Navy replaced the copiers with functionally equivalent copiers leased from Canon USA. This paragraph also alleges that the Government includes both the CASU and the Navy. Complaint ¶ 19. Appellant quotes a non-substitution provision it maintains was in the purchase order. *Id.* ¶ 7. Appellant seeks as material breach damages the full unpaid contract price provided for in the term of the purchase order. *Id.* ¶ 21. Respondent denies it agreed to any non-substitution provision in the purchase order and denies liability for any such breach.

Count II alleges that even if the termination for non-appropriation was valid, it came too late as the termination for non-appropriation could only issue at the end of renewal period three, i.e., on September 30, 2010, and not on February 3, 2010, when it was issued. Consequently, appellant alleges that respondent's termination amounts to a constructive termination for convenience and that respondent owes appellant \$652,417.91 in termination charges calculated according to the formula specified in the purchase order. Complaint ¶¶ 26-35. Appellant quotes from the MASC provision incorporated into the purchase order concerning early termination charges. The provision states that the purchase order for the equipment leased under the agreement may be terminated at any time during a fiscal year by the ordering office as a termination for convenience under the termination for convenience formula specified in the clause. *Id.* ¶ 5. Appellant also quotes from the MASC provision concerning termination for non-appropriation. That provision states that a termination for non-appropriation may be issued by the ordering agency contracting officer at the end of a renewal period if it no longer has a bona fide need for the equipment or functionally similar equipment or if there is a continuing need, but that adequate funds have not been appropriated to the ordering agency in an amount sufficient to continue to make the lease payments. If this occurs, the equipment lease will be canceled at the end of the last fiscal year for which funds have been appropriated. *Id.* ¶ 6.

In count III of the complaint, appellant alleges that respondent's termination of the purchase order for non-appropriation was improper because respondent entered into the purchase order for the benefit of the Navy and the Navy had a continuing bona fide need for the equipment or functionally similar equipment and there were sufficient appropriations to support the need. Appellant alleges that because the termination for non-appropriation was improper, the Board should rule that the termination was a

constructive termination for convenience, with termination charges of \$652,417.91 owed to appellant. Complaint ¶¶ 36-44.

In count IV of the complaint, appellant claims breach because respondent failed to pay appellant for amounts due and owing for copier use from November 1, 2009, through February 1, 2010, prior to the issuance of the termination order. Those amounts are \$85,195.68 in past due lease payments, \$14,849.80 in past due maintenance payments, and \$2709.59 in past due excess copy charges. Complaint ¶¶ 45-50.

Respondent moves to dismiss counts I and III of the complaint for lack of jurisdiction, alleging that the allegations of those counts refer to acts of a non-party, the Navy, over which this Board lacks jurisdiction. Respondent's Motion at 2-3. Respondent also moves to dismiss counts I and III for failure to state a claim because the factual basis for those counts relates to the Navy, not to respondent or its CASU. *Id.* at 5. Respondent moves to dismiss counts I, III, and IV because of "fundamental unfairness" in that those counts charge respondent with the acts of the Navy, over which "it had and has no control, oversight or knowledge." *Id.* at 6. Further, respondent states that the "CASU is not alleged in the complaint to have a bona fide need or appropriations [for the copiers], the complaint states that the Navy had the need and the funds." *Id.* at 5.

Jurisdiction

We first address the matter of jurisdiction. The Contract Disputes Act establishes this Board's jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than Department of Defense agencies, the National and Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) "relative to a contract made by that agency." 41 U.S.C. § 7105(e)(1)(B).¹ The purchase order at issue here was made by respondent, not by the Navy. The appeal is from a deemed denial of a claim of March 24, 2010, submitted to respondent's contracting officer. *Id.* §§ 7103(f)(5), 7104. Consequently, regardless of the actions or non-actions of the Navy, this Board has jurisdiction over all counts of the complaint. Respondent's motion to dismiss for lack of jurisdiction is denied.

¹ The alert reader will note the new citation to the Contract Disputes Act. For those of us who, for over thirty-three years, were used to citing the Contract Disputes Act as 41 U.S.C. §§ 601-613, our world has changed. The Contract Disputes Act now is cited to 41 U.S.C. § 7101-7109, as codified by Pub. L. No. 111-350, 124 Stat. 3677, 3816-3826 (2011).

Respondent's motion to dismiss for failure to state a claim, or alternatively for summary relief

A motion to dismiss for failure to state a claim will be granted only when the facts asserted by the appellant do not entitle it to a legal remedy. We must assume that all well-pled factual allegations plausible on their face are true and indulge in all reasonable inferences in favor of the non-movant. *Aschcroft v. Iqbal*, _____ U.S. _____, 129 S. Ct. 1937, 1949 (2009); *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770. 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 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)).

Assuming all facts in the complaint to be true, appellant makes at least a cogent case for recovery. The purchase order at issue here provides for two types of terminations, for non-appropriation or convenience. As pled by appellant, under the language of the purchase order, a termination for non-appropriation may be made only at the end of a renewal period. A termination at any other time is a termination for convenience with associated termination charges owing. If the facts as pled by appellant are true and renewal period three would have ended on September 10, 2010, respondent has not shown why the earlier termination of February 3, 2010, should not have been treated as a termination for convenience. Respondent seeks to place all the blame for potential liability on the Navy, but it was respondent who issued the termination for non-appropriation.

Furthermore, respondent has not established why the Navy's appropriations and bona fide needs are irrelevant. It is undisputed that the Navy used the CASU to satisfy its copier needs. The Comptroller General has ruled that in administering appropriations in interagency transactions such as those involving a CASU, the needs of the using agency, as well as those of the ordering agency are relevant. The Comptroller General has also ruled that proper use of appropriations involving a Department of the Interior franchise fund, similar to a CASU in this case, was a shared responsibility between the fund and the using agency. *Expired Funds and Interagency Agreements Between GovWorks and the Department of Defense*, B-308944, 2007 CPD ¶ 157 (July 17, 2007). Respondent has not established that purchase order clauses involving appropriations and bona fide needs should not be construed in the same manner. In short, respondent has not demonstrated that appellant's case should be dismissed on the pleadings.

As for respondent's motion for summary relief, almost every material fact is contested, including the length of the purchase order, the number of renewal periods of the purchase order, the number of copiers leased, and whether the Navy intended to end its use of some or all of the leased copiers. Respondent's alternative motion for summary relief is denied.

Decision

Respondent's motion is **DENIED**.

ANTHONY S. BORWICK
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JEROME M. DRUMMOND
Board Judge