UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 23, 2008

CBCA 932

PARIS BROTHERS, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Anthony S. Paris, Kansas City, MO, counsel for Appellant.

David W. Schaaf, Office of the General Counsel, Department of Agriculture, Kansas City, MO, counsel for Respondent.

Before Board Judges **McCANN**, **STEEL**, and **SHERIDAN**.

STEEL, Board Judge.

This appeal arises out of a dispute between appellant, Paris Brothers, Inc., and respondent, the Department of Agriculture (USDA), under firm fixed price contract number AGDPDVC070001. This contract is a national warehouse contract for commercial storage and food distribution services within the United States. Appellant disputes the manner in which deductions were taken when it failed to make specific deliveries on time. It seeks to recover monies withheld from payment of its April 2007 invoice. We have before us the parties' cross-motions for summary relief.[1] For the reasons discussed below, we deny appellant's motion for summary relief and grant respondent's motion for summary relief.

[1] Appellant titled its motion a "motion for summary judgment." The Board's Rule 8(c)(3) refers to this type of dispositive motion as a motion for summary relief. Therefore, appellant's motion shall herein be referred to as a motion for summary relief.

The record considered by the Board in issuing this decision consists of the pleadings and attached exhibits, the appeal file (books A-D), appellant's supplement to the appeal file, the parties' cross-motions for summary relief and accompanying memoranda and exhibits, and their responses thereto.

Background

In June 2006, the USDA issued solicitation KCCO-DDOD-06-RFP-0002, to provide services for various national food supplement programs for the needy. These services included food storage and distribution for the USDA's Commodity Supplemental Food Program (CSFP) and the Food Distribution Program on Indian Reservations (FDPIR). The term of the contract was to be one year, with four annual option periods. Complaint ¶¶ 2, 3; Answer ¶¶ 2, 3; Appeal File, Book B at 000063.

Originally, the request for proposal mandated that the contractor meet an acceptable quality level (AQL) of 100% on-time deliveries pursuant to the approved schedule, or be charged 100% of the applicable transportation costs for each late delivery and $300 for each day late. Appeal File, Book B at 000428, sec. C, Indicator 5, Delivery of Commodities to Recipients, Performance Standard 5B (performance standard 5B). On July 7, 2006, the AQL for performance standard 5B was changed by solicitation amendment 0004. Appeal File, Book A at 000003; Book B at 000968. The schedule of deductions at issue now provides:

PERFORMANCE STANDARD	**DEDUCT**	**DEDUCT IF PATTERN**	**OTHER ACTIONS**
5B Delivery shall be made in accordance with the negotiated delivery schedule in the most cost efficient manner in terms of consolidation and transportation mode.	Late Deliveries 98% timely – $150 per location per day late.	Late Deliveries less than 98% timely – All late deliveries for the *month*, 50% of applicable transportation charges deducted regardless of number of days late +$150 per day each delivery location per day late.	Cure Notice

Appeal File, Book B at 000968 (emphasis added).

Following the issuance of amendment 0004, appellant submitted its proposal and on December 21, 2006, was awarded the contract for services covering Zone A.[2] Appeal File, Book B at 000002. Thereafter, Paris submitted its annual schedule of delivery dates for the initial year of the contract and began making deliveries.

In May 2007, Paris submitted its monthly transportation invoice for April 2007 for review and payment. Complaint ¶ 16; Answer ¶ 16. The invoice showed a number of late deliveries. The contracting officer (CO) evaluated the April invoice, determined that on-time deliveries were below the 98% figure set by performance standard 5B, and assessed deductions against appellant for those late deliveries which brought on-time deliveries below the 98% AQL. Complaint ¶¶ 19, 20; Answer ¶¶ 19, 20. Deductions were not made on the first 2% of late deliveries which, by themselves, would not have resulted in an AQL of below 98%.

Following the deductions, appellant submitted a claim to the CO on June 8, 2007. It argued that some of the delivery dates had been renegotiated, that the AQL of 98% timely delivery should be evaluated on an annual rather than monthly basis, and that some of the late deliveries were excusable because the failure to perform was due to truck mechanical failures beyond the control of appellant or its subcontractor. Complaint, Attachment 2. The CO agreed with some of appellant's points on renegotiated dates, but otherwise denied the claim, and upheld the April 2007 deductions for five late delivery shipments, totaling $8033.70. Appeal File, Book A at 000031.

Appellant timely appealed the CO's decision to this Board.

Discussion

Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Where, as here, both parties move for summary relief, each party's motion must be reviewed on its own merits, and all reasonable inferences must be resolved in favor of the non-moving party. *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). The fact that cross-motions have been filed does not require the granting of one of the motions. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

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[2] Zone A consisted of the western states of Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Wyoming, and Washington.

Appellant moves for summary relief arguing that the contract is latently ambiguous and inconsistent and that the Government erred by evaluating late deliveries on a monthly rather than an annual basis. In arguing that deductions for late deliveries should be made annually rather than monthly, appellant points out that the initial period of the contract is twelve months; that the contractor must submit a twelve-month delivery schedule before commencing work; and that evaluation of the contractor for public recognition and possible contract award for the option years is performed for a twelve-month period. Appellant notes that the contract also references items intended to be evaluated on a monthly basis, such as monthly inventory reports, storage and handling invoices, invoices for miscellaneous charges, and transportation invoices, but that this list does not include deductions for less than 98% AQL. Appellant proffers that the CO improperly applied performance standard 5B as a basis for her monthly evaluation and deductions for late delivery, and that the contract is ambiguous with regard to when deductions for late deliveries are to be taken.

The Government avers that performance standard 5B is clear on its face and, in fact, anticipates monthly deductions for late deliveries. The Government asserts that there are no provisions in the contract that negate or make ambiguous the Government's right to make such deductions, and thus summary relief must be granted in its favor.

Clearly, there are provisions in the contract which relate to actions to be taken on an annual basis, such as whether the contractor is entitled to public recognition. Equally so, the contract explicitly provides for actions which are to be taken on a monthly basis, including monthly AQL deductions. Performance standard 5B explicitly states that evaluation of the 98% AQL relates to a monthly timetable:

> Late Deliveries less than 98% timely – All late deliveries for the *month*, 50% of applicable transportation charges deducted regardless of number of days late + $150 per each delivery location per day late.

Appeal File, Book B at 000968 (emphasis added). Further, the monthly performance standard 5B deductions contemplated in Section J, Attachment L, are referenced throughout the contract and schedule. *See* Appeal File, Book B at 000085 (§ E.3), 000091 (§ F.7), 000092 (§ F.12), 000100 (§ G.12). Terms referring to annual time frames go to schedules and rewards for excellent performance, not deductions for failure to perform. Appellant's argument that the contract is ambiguous in this regard lacks merit and strains the well-established rules of contract interpretation.

Appellant next argues that Paris should be excused from liability for those late deliveries which resulted from truck breakdowns since the failure "arises from causes beyond the control and without the fault or negligence of the Contractor." Respondent moves the

Board to grant summary relief, asserting that the mechanical failures which occurred in this case are not excusable delays under Federal Acquisition Regulation (FAR) 52.249-14.

It appears that four of the five April 2007 late delivery deductions at issue resulted from mechanical breakdowns of subcontractor trucks, with the most specific explanation being "transmission failed." Complaint, Exhibit 1. Appellant urges that these four delays are excusable and should not be charged against it, pursuant to FAR 52.249-14 -- Excusable Delays (Apr 1984). Section (b) of this provision states,

> If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the contractor shall not be deemed to be in default. . . .

48 CFR 52.249-14(b) (2006).

Examples of causes beyond the control of the contractor are given in section (a):

> (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.

48 CFR 52.249-14(a).

Appellant admits that generally the contractor, not the Government, is responsible for delay caused by mechanical breakdowns even when the transportation is in the control of subcontractors. However, appellant argues here that since breakdowns are typical and unavoidable in the trucking industry, they should be excusable under FAR 52.249-14.

The Government counters that in order for the 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 parties, such as fire, epidemics, and weather.

The ability to make lengthy deliveries within a short time frame is the essence of this contract. The inability to do so because of equipment breakdown is not extraneous to the contract, or independent of the actions and exertions of the parties to the contract, and therefore is 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. *D.C.*

Proctor and Associates, GSBCA 3736, 73-2 BCA ¶ 10,031. The Government may deduct transportation charges pursuant to performance standard 5B when a delivery is late because of a truck breakdown.

Lastly, appellant argues that performance standard 5B permitting the 50% deductions should be stricken from the contract since it is a penalty clause. The Board lacks jurisdiction to consider this new assertion because the argument was not made to the contracting officer. *Earl C. Wilson v. General Services Administration*, GSBCA 13152, 96-1 BCA ¶ 28,266.[3] The Board has considered all other arguments made by appellant and deems them without merit.

The Government seeks summary relief asserting it was entitled to subtract $8033.70 from the April 2007 invoice payment for those late deliveries which caused appellant to fall below the "late delivery" 98% AQL. For the reasons discussed above, the Board agrees that the $8033.70 deduction was appropriate.

Decision

Appellant's motion for summary relief is denied, and respondent's motion for summary relief is granted. Therefore, the appeal is **DENIED**.

CANDIDA S. STEEL
Board Judge

We concur:

R. ANTHONY McCANN
Board Judge

PATRICIA J. SHERIDAN
Board Judge

[3] Similarly, appellant states that additional adjustments for late deliveries have been made to Paris' monthly transportation invoices for May to September 2007 on the same basis as those made for April 2007, and asks that the Board restore $16,186.27 for those deductions applied in subsequent months. The claim submitted to the contracting officer only addressed the deductions taken for April 2007. The Board does not have jurisdiction to review claims not submitted to the CO. 41 U.S.C. § 606 (2000).