

COMMONWEALTH OF PENNSYLVANIA

CYBERNETIC SERVICES, INC. : BEFORE THE BOARD OF CLAIMS
:
VS. :
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF GENERAL SERVICES : DOCKET NO. 1862

FINDINGS OF FACT

1. Claimant, Cybernetic Services, Inc. (formally known as Silent Radio, Inc.), is a Delaware corporation located at 20732 Lassen Street, Chatsworth, CA 91311.
2. Respondent, Commonwealth of Pennsylvania, Department of General Services, is an agency of the Commonwealth of Pennsylvania charged with responsibility for procurement of goods on behalf of other Commonwealth agencies, including the Department of Labor and Industry (hereinafter "L&I").
3. Jurisdiction of this claim is in the Board of Claims pursuant to the Act of May 20, 1937, (P.L. 728, No. 193), as amended, 72 P.S. §4651-1 et seq.
4. On December 17, 1993, Respondent solicited bids on behalf of L&I for procurement of 100 indoor electronic message boards (hereinafter "message boards").
5. Claimant, in response to Respondent's solicitation for bids, submitted a bid in the amount of \$115,700.00, which bid was accepted and an award to Claimant made by Respondent.
6. On March 10, 1994, Respondent executed Purchase Order No. 2548123-01-00-0 (hereinafter the "Purchase Order") for 100 message boards.
7. Respondent's issuance of the Purchase Order to Claimant formed a valid and binding contract (hereinafter "Contract").
8. The Contract incorporated the terms and conditions contained in the General Conditions and Instructions to Bidders.
9. The Purchase Order was received by Claimant on March 20, 1994.
10. The Contract initially required performance by Claimant on or before July 20, 1994, approximately 120 days after receipt by Claimant.
11. On May 26, 1994, William J. Lalley, Director of L&I Office of Job Center Field Operations, wrote a memorandum to George Fields, Deputy Secretary of Respondent, indicating that information had been received that Claimant could not meet the original delivery date.

12. Matthew J. McGuinness (hereinafter "McGuinness") was at all times relevant to this matter, employed as a Buyer in the Respondent's Bureau of Purchases, and acted within the scope of his employment as an agent of Respondent.

13. On June 15, 1994, McGuinness wrote to Jerry Boshear of Claimant, requesting information concerning ability to deliver the message boards prior to July 20, 1994.

14. On June 15, 1994, McGuinness wrote to Gene Mallone, President of Claimant, requesting confirmation on ability to deliver message boards prior to July 20, 1994.

15. On June 17, 1994, Max Fox ("Fox") of Claimant, wrote to McGuinness stating that delivery for the total order was expected by approximately September 6 - 10, 1994.

16. On June 21, 1994, the Director of Bureau of Purchases of L&I responded in writing to the May 26, 1994 memorandum of a representative of the Department of General Services suggesting that they should work with Claimant to effect delivery as soon as possible.

17. On July 27, 1994, McGuinness wrote to Terry Signor of L&I requesting a decision on whether to extend the delivery date under the Contract.

18. On July 28, 1994, McGuinness participated in a telephone conversation with John Hulstine, President of Chadmark Associates, the second lowest bidder for message boards, concerning pricing and delivery schedule for message boards from Chadmark Associates.

19. On July 28, 1994, Chadmark Associates wrote to McGuinness indicating that if awarded the Contract, they could deliver all units within 8 to 10 weeks.

20. On August 4, 1994, McGuinness wrote to Claimant requesting confirmation that all units could be delivered by September 10, 1994.

21. On August 8, 1994, Claimant responded in writing to the August 4, 1994 correspondence from McGuinness and requested approximately one week to respond fully to their request.

22. On August 9, 1994, Chadmark Associates again wrote to Respondent suggesting that Claimant was not planning to deliver UL approved equipment.

23. On August 10, 1994, Respondent wrote to Claimant requesting confirmation of delivery by September 10, 1994 and that all units would be UL approved.

24. On August 12, 1994, Claimant wrote to Respondent confirming delivery date and UL approval of units.

25. On August 18, 1994, Fox wrote to McGuinness indicating shipping of 25 units by September 10, 1994, with the balance shipped by September 30, 1994.

26. On August 29, 1994, McGuinness responded in writing to Claimant's correspondence dated August 18, 1994, indicating delivery of all units bid to be completed by September 30, 1994.

27. On September 6, 1994, Respondent representatives Matthew J. McGuinness, Jane F. Doyle and Connie Simmons, and L&I representatives, William W. Lalley and George Rice met with Scott Burke, a representative of Claimant, to discuss Respondent's concern about Claimant's adherence to specifications for the message boards, and the date of performance anticipated by Claimant.

28. On September 9, 1994, DGS representative McGuinness wrote to Claimant setting forth the list of Commonwealth offices where the boards were to be delivered.

29. On September 15, 1994, Claimant wrote to Respondent stating that Motorola would not be shipping product to Claimant on time and that delivery under the Contract could be delayed until October 19, 1994.

30. On September 20, 1994, McGuinness wrote to Fox stating that delivery of all units must be accomplished by September 30, 1994.

31. All units were shipped by Claimant on or before September 30, 1994.

32. On Friday, September 30, 1994, Claimant reportedly sent a facsimile letter to Respondent stating that shipment of all product had been completed as of September 30, 1994.

33. Respondent's files did not reveal a copy of Claimant's facsimile letter dated September 30, 1994.

34. On September 30, 1994, William J. Lalley, Director of L&I, wrote to Respondent stating that none of the electronic message boards had been received.

35. Between October 3, 1994 and October 10, 1994, some message boards shipped by Claimant arrived at the locations specified by L&I.

36. On October 3, 1994, at 9:34 a.m., Claimant sent a facsimile message to Respondent stating that shipment was completed by September 30, 1994.

37. On October 3, 1994, Respondent telephoned Chadmark Associates to confirm that Respondent would re-award the Purchase Order to Chadmark Associates.

38. On October 3, 1994, Chadmark Associates wrote to McGuinness confirming pricing and delivery of the electronic message boards.

39. On October 3, 1994, Respondent wrote to Claimant canceling the Purchase Order due to non-compliance.

40. On October 4, 1994, Edward Pearlman, Chief Financial Officer of Claimant, wrote to the Secretary of Respondent, indicating that Claimant delivered shipment by September 30, 1994, and complied with the terms of the Contract.

41. On October 4, 1994, Jane F. Doyle, Director of Bureau of Purchases for the Department of General Services, wrote to William J. Lalley of L&I, restating the position of the Department concerning delivery of message boards and re-awarding the Contract.

42. On October 12, 1994, Respondent executed an Advise of Change to cancel the Purchase Order and re-award a purchase order to Chadmark Associates, the second low bidder, for the sum total of \$174,656.00 or \$58,956.00 more than Claimant's bid of \$115,700.00.

43. On October 13, 1994, Edward Pearlman of Claimant wrote to McGuinness restating their position that the Contract terms had been met.

44. On or about October 20, 1994, Respondent mailed Purchase Order 2548123-01-00-1 to Chadmark Associates for 100 message boards.

45. On October 27, 1994, Secretary David L. Jannetta of Defendant responded to Claimant's letter of October 4, 1994, refusing to reconsider the decision to cancel Claimant's Purchase Order.

46. After October 11, 1997, L&I returned all message boards shipped by Claimant to the place of shipment at an additional expense to Claimant of \$451.52.

47. After Respondent's purported cancellation of the Purchase Order, Claimant performed substantial alterations to make the returned message boards marketable to other customers, at an additional cost and expense to Claimant of \$32,060.65.

48. Claimant has recovered \$94,368 from resale of reworked message boards.

49. Claimant has not received any payment from the Respondent for costs, expenses, or damages incurred as a result of Claimant's performance or non-performance under the Contract.

50. Respondent has not received any payment from Claimant for any costs, expenses or damages incurred as a result of Claimant's performance or non-performance under the Contract.

CONCLUSIONS OF LAW

1. Jurisdiction of this claim is in the Board of Claims pursuant to the Act of May 20, 1937 (P.L. 728, No. 193, as amended, 72 P.S. §4651-1, et seq.
2. All documents submitted by the parties are deemed authentic by the Joint Stipulation of Facts.
3. Respondent's issuance of the Purchase Order to Claimant formed a valid and binding contract between the parties.
4. The wording in the Purchase Order, stating on the face sheet that the delivery date is to be "120 days ARO", and stating on Page 2 of the Purchase Order, that "Shipment must be made by the date specified", created an ambiguity in the Contract.
5. The ambiguity in the Contract was patent and thus Claimant was under a duty to inquire and to try to resolve the problem before entering into the Contract.
6. The subsequent actions of Respondent as contained in numerous communications with Claimant made it clear that delivery was to be made by a date certain and not merely shipment.
7. The parties mutually agreed to extend the time of performance of Claimant's obligation under the Contract to September 30, 1994.
8. The change in time for performance of Claimant's responsibilities did not alter the requirement under the Contract that delivery of all message boards was to be completed by September 30, 1994.
9. Claimant did not comply with the terms of the Contract in that no message boards were received by Respondent by September 30, 1994.
10. Respondent properly canceled the Contract by notice to Claimant dated October 3, 1994.
11. The re-award of the Purchase Order was in accordance with the General Conditions and Instructions to Bidders received by Claimant and made part of, and incorporated into, the Contract.
12. Action on Respondent's Counterclaim is stayed under the provision of the Federal Bankruptcy Act Section 11 USC 362(a).

OPINION

Claimant, Cybernetic Services, Inc., after bidding upon Respondent's, Commonwealth of Pennsylvania, Department of General Services, solicitation for bids for procurement of 100 indoor electronic message boards, entered into a Purchase Order Contract dated March 10, 1994.

The contract initially required performance by Claimant on or before July 20, 1994. By agreement of the parties, performance was extended to September 30, 1994. Respondent, not having received any of the units by September 30, 1994, canceled the Purchase Order and re-awarded the Purchase Order to Chadmark Associates, the second low bidder. Claimant contends that the Contract terms were fulfilled by shipment of all units on September 30, 1994. Respondent contends that delivery of all units and not mere shipment was a necessary contractual obligation. An examination of the wording of the Purchase Order in its entirety creates an ambiguity in its terms. On the face sheet, it is stated that delivery is to be "120 days ARO". However, Page 2 contains certain so-called "boiler plate" provisions. One of these provisions states "Shipment must be made by the date specified".

The general rule in resolving ambiguities within a contract is that the ambiguity must be construed against the drafter of the contract, which in this case would be the Respondent. Commonwealth of Pennsylvania, Department of Transportation v. Mosites Construction Company, 90 Pa. Commw. 33, 494 A.2d 41 (1985); Commonwealth of Pennsylvania, Department of Transportation v. Cramer Construction Company, 71 Pa. Commw. 481, 454 A.2d 1205 (1983).

However, it is evident that the ambiguity in the Purchase Order is apparent from a reading of its terms, and thus, is patent. The courts have created an exception to the general rule

where a government construction contract contains an obvious ambiguity. In such a case, the private contractor is under a duty to resolve the problem before entering into the contract. Department of Transportation v. Bracken Construction Co., 72 Pa. Commw. 620, 457 A.2d 995 (1983); James D. Morrissey, Inc. v. Commonwealth of Pennsylvania, Department of Transportation, Board of Claims Docket No. 1295. Accordingly, Claimant should have attempted to clarify any ambiguity before the Purchase Order was executed by Respondent.

Rather than attempting to clarify any ambiguity, the facts overwhelmingly indicate that Claimant should have been aware and known that Respondent was relying on actual delivery as an essential contractual condition of the Contract.

From the period commencing with Claimant's first request for an extension of time, and up until September 30, 1994, Respondent continued to use the term "deliver" in correspondence between the parties. Claimant never sought a clarification during this time period as to whether "shipment" would in fact comply with the term "delivery".

As an example, on August 10, 1994, Respondent sought assurance as to when Claimant would deliver all 100 message boards. Two days later, Claimant replied that it planned to deliver all message boards by September 10, 1994. Further, on September 15, 1994, Claimant once again sought to extend the performance date. In reply, Respondent informed Claimant that the proposed schedule was unacceptable and that complete delivery of all message boards must be accomplished by September 30, 1994.

An examination of the Contract and a review of the correspondence between the parties establishes that mere shipment of the message boards did not comply with the terms of the

Contract. Accordingly, Respondent was justified in canceling Claimant's Purchase Order and re-issuing the Contract.

Claimant further alleges that Respondent failed to give them 10 days notice of intention to terminate in violation of Paragraph 24 of the General Conditions and Instruction to Bidders. This provision provides that the 10-day cure period runs from the date of written notice of non-performance. Again, it is emphasized that the actual delivery requirement was received by Claimant in writing on numerous occasions. Claimant cannot now allege that they were entitled to another 10 days under the circumstances where actual delivery was repeatedly emphasized.

By way of counterclaim, Respondent seeks recovery for additional costs and expenses incurred in purchasing replacement product. Although not set forth in the Stipulation of Facts, the parties, in their Briefs filed with the Board, set forth the fact that Claimant was subsequently adjudicated Bankrupt under the provisions of the Federal Bankruptcy Act. The issue then arises as to the effect of the Automatic Stay provisions of the Bankruptcy Code as set forth in Section 362(a). Under such provision, a petition filed under the provisions of the Bankruptcy Code stays all actions against the debtor that arose before the filing. Such is the case concerning Respondent's counterclaim. Our Board has no jurisdiction to proceed on such a claim at this time. Respondent's argument that the Board should proceed on such claim at this time, in the interest of not bifurcating such claim, is without merit, as to so proceed at this time would violate Federal Law.

ORDER

AND NOW, this day of , 1998, on the basis of the submissions of the parties and the pleadings, it is **ORDERED** and **DECREED** that judgment is entered in favor of the Respondent, Commonwealth of Pennsylvania, Department of General Services, and against the Claimant, Cybernetic Services, Inc., on Claimant's Complaint and claim for damages. It is further **ORDERED** and **DECREED** that any action on Respondent's Counterclaim is stayed pursuant to Section 362(a) of the Federal Bankruptcy Act.

Each party to bear its own costs and attorney's fees.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Louis G. O'Brien, P.E.
Engineer Member

James W. Harris
Citizen Member

Opinion Signed

April 6, 1998