

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CREATIVE LITHO  
SYSTEMS, INC.

Under DGS Contract No.  
P.O. #B11325

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) Docket No. MSBCA 1448  
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September 13, 1989

Termination for Default - The State is not liable for payment for materials that are properly rejected and may properly terminate for default the contract pursuant to which the goods are to be provided.

APPEARANCE FOR APPELLANT:

None

APPEARANCE FOR RESPONDENT:

Michael P. Kenney  
Assistant Attorney General  
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the final decision of the Department of General Services (DGS) to terminate its contract for default.

Findings of Fact

1. On January 30, 1989 DGS issued Purchase Order #B11325 on behalf of the Department of Health and Mental Hygiene for the production of 24,000 booklets on breast cancer.
2. Appellant was awarded the contract on February 21, 1989.
3. On April 14, 1989, the Chief of the Division of Cancer Control of the DHMH sent a memorandum to the DGS buyer responsible for the procurement advising that the booklets as delivered were unacceptable under the terms of the specifications due to poor print quality, substitution of different paper for the cover and use of different color ink.
4. By letter dated April 17, 1989, confirming previous oral discussions, Ms. Evelyn Rosenbach, the DGS buyer for the procurement, advised Mr. Michael Kellett, Appellant's President, that DHMH had rejected the booklets

because "of poor print quality and substitutions from the original specifications made in ink colors and cover stock". This letter further advised Appellant that it was to pick up the rejected books by no later than April 18, 1989 and to advise DGS whether it would rerun and correct the job by no later than April 28, 1989.

5. On April 18, 1989, Mr. Richard Larmore, the Supervising Buyer at the DGS Purchasing Bureau, sent Appellant an unsatisfactory Vendor Report. The report noted that Appellant did not follow specifications in the purchase order as follows:

- "1. Used different color ink (brown instead of black).
2. Used light weight paper.
3. In illustrations, did not provide for the contrast indicated in the specifications."

5. On April 18, 1989, Mr. William Culen, Manager of the DGS Purchasing Bureau, sent Mr. Kellett a letter by overnight express mail. This letter stated the following:

On April 14, you met with our buyers to discuss actions required of your firm to rectify a rejected shipment of booklets to the Department of Health and Mental Hygiene under Purchase Order #B11325. The basis for rejection was specified by Evelyn Rosenach, Printing Buyer, in her letter to you of April 17, 1989. Additionally you were requested by Mrs. Rosenbach, to specify what action you were going to take to correct the deficiencies and when you were going to redeliver.

In phone conversations with both of our buyers today, April 18, 1989, you have stated that you do not intend to reprint the booklets to the required specifications and you do not intend to return the State's negatives.

As a result of your decision, I will find your firm in default of this contract if I do not hear to the contrary from you by 4:00 p.m. April 19, 1989.

7. By letter dated April 18, 1989, Mr. Kellett wrote Ms. Rosenbach and defended the acceptability of the booklets. He alleged that the principal reason for rejection of the booklets was personal animosity toward him on the

part of Mr. Culen and Mr. Larmore. However, Mr. Kellet acknowledged that there had been substitution of different paper for the cover page by the Appellant's printer and that this printer would not return the State's negatives<sup>1</sup> until Appellant and the printer were paid. Mr. Kellett also stated his willingness to accept less than the bid price and that any agreement on the price to be paid him would include a provision that he and Appellant would agree to never do business with the DGS Purchasing Bureau again.

8. By letter dated April 28, 1989, Mr. Culen, advised Mr. Kellett that DGS was terminating Appellant's contract for default. Mr. Culen's letter stated, in pertinent part, as follows:

Pursuant to my last letter of April 18, 1989, this notice will serve to advise you and your firm that Purchase Order #B11325 dated February 21, 1989 is hereby terminated by reason of default.

On April 14, 1989 you met with your buyers to discuss actions required of your firm to rectify the shipment of booklets produced under this purchase order which were rejected by the Department of Health & Mental Hygiene. The basis for rejection of the booklets was that they were not produced to the specifications; inferior paper was substituted for the cover and ink colors specified were not utilized. Mrs. Rosenbach confirmed these discrepancies in her letter of April 17, 1989 to you and asked you to confirm by noon of that date that you would rerun the job to the correct specifications and make delivery by April 28, 1989. You were also directed to pick up the rejected books by April 18, 1989.

On April 18th I heard from Ms. Rosenbach that you had called and stated you would not rerun the booklets to the proper specification, you would not return the negatives, nor would you pick up the rejected shipment. Your positions were subsequently confirmed by a telephone call to you from Mr. Larmore.

The same day I wrote to you, via overnight express mail service, setting forth the facts stated above and allowing you opportunity to rescind or modify your position up to 4:00 P.M. of April 19, 1989. You did not do so. As of this date I still have not heard from you.

Therefore, this contract is terminated for default and the contractor is not entitled to recover any costs incurred up to the date of this letter. Additionally, the State's right to replace lawfully

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<sup>1</sup>The negatives for this purchase order were available from a previous printing of the booklet and had been given to Appellant to prosecute the work.

rejected goods does not relieve your firm of potential liability for any excess price paid for the replacement plus applicable expenses, if any.

The booklets delivered under the subject contract are to be removed without any further inconvenience to the Department of Health & Mental Hygiene.

9. By letter dated May 1, 1989, Mr. Kellett wrote Mr. Larmore concerning the Unsatisfactory Vendor Report that had been sent to Appellant on April 18, 1989. Mr. Kellett admitted that the wrong ink color had been used, but defended such result on the basis of such different color appearing on the blueprint prepared by his printer and the absence of comment on the blueprint when Mr. Kellett picked up the negatives from DGS. Mr. Kellett claimed that the different cover paper used was heavier and not lighter than that called for in the specifications. He did admit, however, that the paper used for the covers had less stiffness. Mr. Kellett blamed the lack of contrast as called for in the specifications on a failure of communication by DGS.

10. Appellant appealed the termination of its contract for default to this Board on May 5, 1989.

11. The following provisions of the DGS Terms and Conditions for Purchase Orders are applicable to this appeal.

4. Specifications.

All materials, equipment, supplies or services shall conform to...the specifications....

5. Delivery.

Delivery shall be made in accordance with the bid specifications. The State reserves the right to test any materials, equipment, supplies, or services delivered to determine if the specifications have been met. The materials listed in the bid shall be delivered FOB the point or points specified prior to or on the date specified in the bid. Any material that is defective or fails to meet the terms of the bid specifications shall be rejected. Rejected materials shall be promptly replaced. The State reserves the right to purchase replacement materials in the open

market. Vendors failing to promptly replace materials lawfully rejected shall be liable for any excess price paid for the replacement, plus applicable expenses, if any.

**19. Termination for Default.**

When the contractor has not performed or has unsatisfactorily performed the contract, payment shall be withheld at the discretion of the State. Failure on the part of a Contractor to fulfill contractual obligations shall be considered just cause for termination of the contract and the Contractor is not entitled to recover any costs incurred by the Contractor up to the date of termination.

12. Appellant elected to proceed under the provisions of Board Rule 12 for expedited consideration of its appeal.<sup>2</sup> Neither party requested a hearing. The Rule 4 File as supplemented by the Appellant on August 31, 1989 and September 11, 1989 and by DGS on September 7, 1989 constitutes the record.

Decision

Appellant asserts that DGS wrongfully rejected the booklets and that it is entitled to be paid its bid price of \$4,699.92. DGS asserts that the booklets were properly rejected as nonconforming to the specifications and that the default termination was proper. COMAR 21.06.08 provides in relevant part:

**Chapter 08 Inspection, Acceptance, Replacements, Revocation, and Rejection**

**.01 Inspection**

A. Right to Inspect. The procurement agency may, before payment or acceptance, inspect at the time and the place of delivery labor performed or goods delivered pursuant to the contract.

B. Right to Reject and Notice of Rejection.

<sup>2</sup>Board Rule 12 provides as to appeals processed under the expedited procedure that written decisions will be rendered for the Board by a single member and that such decisions will be short and contain only summary findings of fact and conclusions. Decisions issued under the expedited procedure have no value as precedent.

(1) The procurement agency shall inform the contractor of rejection of labor or goods within a reasonable time after delivery. The contractor shall be responsible for the labor or goods so rejected and any expenses once a rejection occurs. The procurement agency shall assume no responsibility for rejected labor or goods. After inspection, the procurement agency may, at its option:

(a) Return rejected goods to the contractor and forward along with the damaged goods the consignee's copy of the bill, if any, and the inspection report;

(b) Request removal of the goods; or

(c) Reject labor performed.

(2) If the contractor fails to remove rejected items from the using agency's premises within a reasonable time, the procurement agency may take any action it deems appropriate, including but not limited to:

(a) Store the items at the contractor's expense;

(b) Reship them to the contractor and charge his account;

(c) Resell the items and retain a reasonable amount for its expenses.

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E. Reservation of Rights. Nothing contained in this chapter shall be construed in any way to limit the rights of the State under any law, including the Commercial Law Article, which may be applicable to any transaction governed by these regulations.

In harmony with COMAR 21.06.08, the contract provides for rejection of materials which do not meet the terms of the bid specifications. The State is not liable for payment for materials that are properly rejected and may properly terminate for default the contract pursuant to which the goods are to be provided. See COMAR 21.07.01.11; COMAR 21.07.03.15 and COMAR 21.07.03.04.

The documents contained in the Rule 4 file establish that the booklets were rejected for failure to meet the specifications. The conclusion by DGS that there was a material failure to meet the specifications at least as to the quality of the paper used for the cover and substitution of a different

color ink has not been shown by Appellant to have been unreasonable. See Adden Furniture, Inc., MSBCA 1219, 1 MSBCA ¶93 (1985). Further, the record does not support the suggestion by Appellant that DGS waived any deviation in the ink color required when it allegedly failed to comment on the blueprint prepared by Appellant's printer which allegedly showed a different color scheme.

Based on the record I find that DGS reasonably concluded that Appellant had delivered materials which failed to meet the specifications and reasonably rejected such materials. I further find that DGS timely communicated such rejection to Appellant and that upon Appellant's refusal to take corrective action properly exercised its right to terminate the contract for default without paying Appellant the price bid (or any part thereof) for the materials.

Accordingly, the appeal is denied.

After the day was over...  
The following day...  
The next day...  
The day after...

After the first...  
The first day...  
The second day...  
The third day...  
The fourth day...  
The fifth day...  
The sixth day...  
The seventh day...  
The eighth day...  
The ninth day...  
The tenth day...

Monday, the 1st of...