UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
TRANSPOWER CONSTRUCTORS INCORPORATED,	)	CASE NO. BK87-02464
	)	
DEBTOR.	)	A88-36
	)	
TRANSPOWER CONSTRUCTORS INCORPORATED, a corporation operating as Debtor-in-Possession,	)	CH. 11
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
FLORIDA POWER & LIGHT COMPANY, a corporation,	)	
	)	
Defendant	)	

MEMORANDUM

Hearing on a motion for summary judgment filed by plaintiff was held on September 6, 1988. Oral arguments were presented and the parties were requested to provide further legal authority for their positions. The parties have now provided supplemental briefs which the Court has considered. This memorandum contains the findings of fact and conclusions of law required by Bankr. R. 7052. Appearing on behalf of plaintiff, both at the hearing and on the briefs, were Edward H. Tricker and Joel D. Heusinger of Woods, Aitken, Smith, Greer, Overcash & Spangler of Lincoln, Nebraska, special counsel. Appearing on behalf of defendant was Frederick S. Cassman of Abrahams, Kaslow & Cassman, Omaha, Nebraska.

Plaintiff is a debtor-in-possession under Chapter 11 of the Bankruptcy Code in a case filed on August 10, 1987. Plaintiff's Chapter 11 case has been consolidated for purposes of administration only with the cases of related entities and affiliates. The operating case for administrative purposes is entitled In The Matter of Commonwealth Companies, Inc., No. BK87-02456.

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The Order entered by the Court which consolidated the various cases for administrative purposes only was entered after notice and hearing and is found at Exhibit 17 of the materials provided by plaintiff in support of its motion for summary judgment. That Order, entered in the handwriting of the presiding Judge, states: "Consolidated for Administration only - no substantive consolidation. All matters to be filed under 87-2456 Commonwealth Companies, Inc., with all other cases designated. However, claims shall be filed in specific case and Clerk will keep separate claim file and register." The Order was entered on November 23, 1987.

In the Bankruptcy case, the Court entered an Order setting a deadline for filing claims. The Order was dated March 3, 1988 and provided "that claims, except administrative claims, in these Chapter 11 cases should be filed on or before April 14, 1988, or be forever barred." The caption of the Order included the name "Commonwealth Companies, Incorporated" and identified the case number as 87-02456, Chapter 11 (consolidated cases). The proof of service of such Order was filed on March 17, 1988. It has the same heading, except that the debtor is identified as "Commonwealth Companies, Inc." The proof of service states that the attorney for the debtors-in-possession mailed copies of the March 3, 1988 Order to all creditors included on the mailing labels provided by the debtors-in-possession, creditor's committee and parties in interest who requested notice. The above listed facts are significant because defendant in this case, Florida Power & Light Company, did not file a proof of claim in this case on or before April 14, 1988.

This adversary proceeding was filed by this named debtor-in-possession in March of 1988 and an answer was filed by defendant prior to April 14, 1988. The complaint seeks a turnover of monies being held by defendant allegedly due to plaintiff for work performed pursuant to a contract between the parties. Defendant has filed an amended answer and counterclaim in which it alleges plaintiff has breached the contract between the parties by failing to complete work which had been assigned pursuant to the contract and for damages resulting from plaintiff's failure to be available to perform according to the contract through its term.

Plaintiff has filed a motion for summary judgment requesting the Court to make a finding as a matter of law that the contract between the parties was not a requirements contract, but was an agreement which is enforceable between the parties only to the extent of the work actually assigned by defendant to plaintiff. Furthermore, plaintiff requested the Court to find as a matter of law that defendant is barred from asserting a counterclaim for any damages, whether resulting from failure to complete jobs assigned, or resulting from excess costs incurred by defendant in finding other companies to complete work which defendant would have assigned to plaintiff had plaintiff been available for such work. The basis for this portion of the motion is the failure of defendant to file a claim on a timely basis.

From the facts as agreed by the parties, and as gleaned from the exhibits provided in support of the motion for summary judgment, the Court determines:

1. Plaintiff is a South Carolina corporation operating as debtor-in-possession in Lincoln, Nebraska, pursuant to 11 U.S.C. §§ 1107-1108.

2. Defendant is a Florida corporation with its principal place of business in Miami, Florida.

3. Plaintiff entered into two blanket purchase orders. They were No. B 00367-82188, which commenced on July 1, 1986 and was to continue for two years, and No. B 00367-82287, commencing on April 1, 1986, also continuing for a period of two years, under which Transpower agreed to supply crews and materials and to perform work for Florida Power & Light at established rates. (Exhibits 3 and 4) At least in the case of one of the blanket purchase orders, a secondary contractor also received a blanket purchase order.

4. Both blanket purchase orders listed above state that Florida Power & Light reserves the right to perform portions of the work under each purchase order with its own crews, and expressly states there was no guarantee of work load under either contract. (Exhibits 3 and 4) Prior to June 30, 1987, plaintiff undertook to perform work pursuant to specific Delivery or Work Authorization Orders (DWAs) which were issued by defendant under these blanket purchase orders. During the term of the blanket purchase orders, defendant performed, with its own crews, some of the work which could have been assigned to plaintiff, without offering the work to plaintiff.

5. Plaintiff completed certain work under the above described DWAs for which it claims defendant owes it specific amounts, and plaintiff may have failed to complete certain of the work provided to it by specific DWAs, leaving a factual dispute concerning the amount due and the damages suffered, if any, by defendant.

6. Subsequent to June 30, 1987 plaintiff neither performed any further work under previously issued DWAs, nor did it receive any further DWAs from defendant.

7. Plaintiff removed its crews from all projects undertaken for this defendant on June 30, 1987.

8. Within 10 days following the termination of work by plaintiff, defendant notified plaintiff that the contract was terminated and shortly thereafter defendant awarded new blanket purchase orders to other contractors for work to be performed after June 30, 1987 up to, including and beyond the original termination dates of plaintiff's blanket purchase orders.

9. The unit costs to defendant under the blanket purchase orders awarded following June 30, 1987 were in excess of the unit cost to defendant under the blanket purchase orders awarded to plaintiff.

10. Defendant employed other contractors to complete work that plaintiff had been assigned but failed to complete prior to June 30, 1987.

11. Plaintiff submitted invoices to defendant for work it performed through June 30, 1987.

12. On August 10, 1987, plaintiff filed for bankruptcy in the United States Bankruptcy Court for the District of Nebraska.

13. Plaintiff listed defendant on the schedule of unsecured creditors, and categorized its liability to defendant as contingent, unliquidated and disputed.

14. On March 3, 1988, the United States Bankruptcy Court for the District of Nebraska set April 14, 1988 as the bar date for filing all non-administrative claims in the Chapter 11 proceedings involving plaintiff. Any non-administrative claims not filed by this date were to be forever barred. (Exhibit 9 Court Order)

15. A copy of the Court Order setting April 14, 1988 as the claim bar date was mailed to defendant on a timely basis. (Exhibit 10 Proof of Service)

16. On March 28, 1988, defendant filed a Proof of Claim in the bankruptcy case of Commonwealth Companies, Inc., No. 87-02456, in an amount estimated at approximately one million dollars for indemnification for losses which may be incurred in a certain pending lawsuit. (Exhibit 11 Proof of Claim)

17. Defendant did not file a proof of claim in the Transpower Constructors Incorporated bankruptcy case number 87-02464 prior to the April 14, 1988 bar date.

18. On July 15, 1988, defendant submitted an application to the Court to file a formal proof of claim. (Exhibit 12 Application)

19. Defendant has asserted in its amended counterclaim in this adversary proceeding that it is entitled to recover the alleged extra costs that it incurred in completing work that plaintiff had commenced but failed to complete by June 30, 1987.

20. Defendant has asserted in its amended counterclaim that it is entitled to recover the alleged extra costs it paid to other contractors under new Blanket Purchase Orders for work which had not been assigned by defendant nor commenced by plaintiff as of June 30, 1987.

21. Plaintiff filed its motion for summary judgment on July 20, 1988 on the grounds that defendant has no claim for costs incurred for work which had not been awarded to and accepted by Transpower because the purchase orders are indefinite quantities contracts and because defendant's claims are barred due to its failure to file a timely proof of claim.

Discussion and Conclusions of Law

Bankruptcy Rule 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure in adversary proceedings. Fed. R. Civ. P. 56(c) provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In support of its motion, plaintiff has provided the Court with pleadings, depositions and affidavits. Defendant has elected to rest on its pleadings, its memoranda of law and the materials provided by plaintiff to show this Court there is a genuine dispute of material fact precluding the Court from granting the motion for summary judgment.

The Court will consider the matters raised by plaintiff in reverse order. Plaintiff argues that since defendant failed to file a proof of claim by April 14, 1988, it is precluded from arguing by counterclaim or claim of setoff that plaintiff owes it any money as a result of plaintiff's alleged breach of its contractual duties to defendant. This Court must deny plaintiff's motion concerning its allegation that defendant is barred from presenting evidence of damages. Bankruptcy Rule 2002(m) concerns notice to creditors and requires that the caption of every notice given under Bankr. R. 2002 shall comply with Bankr. R. 1005. Rule 1005 provides that "[t]he caption ... shall contain the name of the court, the title of the case, and the docket number. The title of the case shall include the name, social security number and employer's tax identification number of the debtor and all other names used by the debtor within six years before filing the petition."

The Order entered by this Court allowing consolidation for administrative purposes only (Exhibit 17) directs that all matters are to be filed under BK87-02456, Commonwealth Companies, Inc., "with all other cases designated." Neither the Order setting deadline for filing claims nor the proof of service related to such Order lists this debtor or its bankruptcy case. Therefore, the notice did not comply with the bankruptcy rules and defendant is not barred from filing a claim or from raising monetary damage or setoff issues by counterclaim in this adversary proceeding.

Even if the compliance with the rule is a "technical" matter, the failure to comply with the rule raises a material issue of fact. Since defendant did file a claim in the case designated as Commonwealth Companies, Inc., No. BK87-02456, which claim is totally unrelated to the matters at issue here, defendant has a right to present evidence on whether or not it actually received notice of the bar date and whether or not its employees knew or should have known that a notice of claims bar date in Commonwealth Companies, Inc., No. BK87-02456, included a claims bar date in plaintiff's case, which is entitled and numbered differently.

Plaintiff also urges the Court to find as a matter of law that plaintiff is not obligated under the agreement with defendant for any costs in excess of the unit price listed which defendant incurred by contracting with different contractors after June 30, 1987 for work which would be or was assigned during the remaining period of plaintiff's blanket purchase orders. This requires a detailed review of the agreement, including the bid document, the blanket purchase orders and the contract conditions.

Exhibit 14 of the materials provided by plaintiff in support of its motion for summary judgment states:

> It is anticipated that thirteen crews for the distribution work and one crew for the transmission work would be required. This is an estimate and not a guarantee of the number of crews required. A "back-up" contract may be awarded.
>
> ***
>
> It is our intention to award a major portion of the work to the most competitive bidder; however, FPL does reserve the right to perform portions of the work with FPL forces or to award a portion of the work to other bidders or to cancel an award if conditions such as service date obligations, FPL work load, or

> contractor performance suggest that it is in Florida Power & Light Company's best interest to do so.

(Emphasis added.)

Exhibit 3, blanket purchase order No. B 00367-82287, states:

> This order is your authority to perform overhead distribution and overhead transmission unit price work within Florida Power & Light Company's Eastern Division.
>
> This purchase order specifically authorizes:
>
> 1. Unit price work under $50,000.00 that cannot be defined for lump sum bidding.
>
> 2. Lump sum bid projects from $10,000.00 to $100,000.00.
>
> 3. Unit price bid projects from $50,000.00 to $100,000.00.
>
> Should the contractor be unable to meet the service requirements of the Eastern Division, Florida Power & Light Company reserves the right to distribute the work to other qualified contractors in order to meet their service obligations. Florida Power & Light Company further reserves the right to perform portions of the work with FPL crews. There is no guarantee of workload under this contract.

Exhibit 4 has exactly the same language except for the type of work that is to be done and the location of the work.

Exhibit 15 is the document entitled "General Conditions for Contract Work" (Form 456). It provides at Section 56.0 for termination for default and at Section 57.0 for termination by owner. Section 56.0 provides in relevant part:

> If Contractor should ... fail to perform in accordance with this Contract (including but not limited to failure to follow any change, as specified in Section 55.0 above), FPL may, upon Written Notice to Contractor and without prejudice to any remedy available to FPL under law, terminate this Contract and take possession of the Work without termination charge, penalty or further obligation.

Section 57.0 provides:

> In addition to Section 56.0, upon seven (7) days' Written Notice to Contractor, FPL may at its sole discretion and without prejudice to any other right or remedy, terminate this Contract. Such termination shall be effective in the manner specified in said notice. Should FPL elect to terminate this Contract as provided in this Section 57.0 complete settlement of all claims of Contractor arising thereunder shall be made as follows:
>
> (a) FPL shall compensate Contractor for such services incurred after the date of termination as are required and approved in advance by FPL.
>
> (b) FPL shall pay Contractor for that portion of the Work actually completed in accordance with the terms of this Contract.
>
> Prior to final settlement, Contractor shall furnish a complete general release of all claims by Contractor against FPL.

In addition, Section 59.0 provides a procedure for termination of the contract if work is abandoned by the contractor. It provides in pertinent part:

> If Contractor should abandon the Work or fail to comply with the terms of this Contract or the orders of the Company Representative, then FPL may give a Written Notice to the Contractor to resume the Work in accordance with this Contract. ... If the Contractor does not comply within ten (10) days after receipt of said notice, without prejudice to any other remedy, [sic] may make good such deficiencies, the cost of which shall be deducted from the Contract Price.
>
> Upon expiration of the ten (10) day period, or Contractor's express refusal to resume the Work, or to comply with the terms of this Contract, FPL may cease all performance under this Contract and may resort to any remedy under this Contract or law.

In summary, the "Contract" which includes all of the contract documents, informed plaintiff of an estimate of the number of crews which would be necessary; specifically stated

that there was no guarantee of any work or any minimum amount of work under the blanket purchase order; specifically stated that defendant reserved the right to give some or all of the work to defendant's crews or to others.

In addition, from the materials provided by plaintiff in support of its motion for summary judgment, it is clear that, at least in the case of one of the blanket purchase orders, a secondary contractor also received a blanket purchase order. The deposition material provided by plaintiff shows that there were times when defendant assigned work to plaintiff which plaintiff declined to perform. Defendant then awarded the work to the secondary contractor or put it out for bid. Defendant did not ask plaintiff for any penalty or damages resulting from such refusal to perform the work.

From the deposition materials, it appears that during the term of the blanket purchase orders, defendant performed, with its own crews, some of the work which could have been assigned to plaintiff, without offering the work to plaintiff.

The issue to be decided on this motion for summary judgment is whether the agreement between plaintiff and defendant represented by all of the contract documents is a "requirements contract" which is definite in all of its terms other than the exact amount of the "requirements" and, therefore, enforceable, or whether the contract is indefinite in one or more of its terms and, therefore, unenforceable except to the extent actual performance by the parties was tendered.

The essential element of a requirements contract is that the buyer promises to purchase exclusively from the seller either the buyer's entire goods or services requirements, or the buyer's requirements up to a specified amount. Without such a commitment by the buyer, there is insufficient consideration to bind the seller. Mid-South Packers, Inc., v. Shoney's, Inc., 761 F.2d 1117, 1120 (5th Cir. 1985); Harvey v. Farris Wholesale, Inc., 589 F.2d 451, 461 (9th Cir. 1979); Propane Indus., Inc., v. Gen. Motors Corp., 429 F.Supp. 214, 219 (W.D. Mo. 1977).

The court in Propane Indus., Inc., specifically defined a "requirements" contract. It said

> [a] "requirements" contract is generally defined as a contract in which the seller promises to supply all of the specific goods or services which the buyer may need during a certain period at an agreed price in exchange for the promise of the buyer to obtain his required goods or services exclusively from the seller. Although the buyer does not agree to purchase any specific amount, the requisite mutuality

> and consideration for a valid contract is found in the legal detriment incurred by the buyer in relinquishing his right to purchase from all others except from the seller.

Id. at 218 (citations omitted).

Mutuality is a necessity in a requirements contract because without it a buyer gives no consideration and incurs no legal detriment in exchange for a promise from the seller. Id. at 221. Consideration is furnished only when the buyer promises to turn to the seller for all requirements that do develop. Torncello v. United States, 681 F.2d 756, 761 (Ct. Cl. 1982). The Torncello court discussed the difference between requirements contracts and indefinite quantities contracts as did the court in Mason v. United States, 615 F.2d 1343 (Ct. Cl. 1982). In a footnote, the Mason court explained, "[a]n indefinite quantities contract is a contract under which the buyer agrees to purchase and the seller agrees to supply whatever quantity of goods the buyer chooses to purchase from the seller. It differs from a requirements contract in that under a requirements contract the buyer agrees to purchase all his requirements from the seller. Under an indefinite quantities contract, even if the buyer has requirements, he is not obligated to purchase from the seller. In an indefinite quantities contract, without more, the buyer's promise is illusory and the contract unenforceable against the seller." Id. at 1346, n. 5.

Defendant has cited a number of cases in support of its position that the agreement between these parties is a requirements contract. However, in each of the cases cited, the Court specifically found that the contract itself required the buyer to obtain all of its goods or services from the seller and, therefore, found that such contracts were requirements contracts. The cases then imposed a "good faith" standard upon the buyer and, in at least one of the cases, refused to force the seller to provide the buyer all of the buyer's needs because those needs had expanded tremendously over the years the contract was in force. These cases are not applicable to the matter under consideration here because the agreement between these parties does not put defendant in the position of contracting to obtain all of its requirements from plaintiff.

As recited earlier in this memorandum, it is clear from a review of the plain language of the contract documents that defendant was not required to award any work to plaintiff. It had the right to award work to its own crews, to award work to a secondary contractor, to rebid any work in its own discretion. It also had the right to terminate the contract in its sole discretion, without cause. This Court concludes that the agreement between the parties was not a requirements contract. However, this does not end the analysis.

Defendant argues that the contract was not only a requirements contract but that plaintiff was required to provide performance under the blanket purchase orders during the term of those orders at the price specified in the blanket purchase orders and is liable in damages for its failure to perform work that defendant would have assigned to it after June 30, 1987, had plaintiff been available to perform the work. Defendant claims that its damages are in an amount equal to the difference between the blanket purchase order price and the actual amount defendant was required to pay for the work awarded other contractors after June 30, 1987.

Shortly after June 30, 1987, defendant declared plaintiff to be in default on the contract concerning work that plaintiff had undertaken to perform and had failed to complete. Defendant, therefore, terminated the contract pursuant to its right of termination under Section 57.0. If the agreement between the parties was a requirements contract, it is at least arguable that defendant could have then obtained the services of another contractor during the remaining term of the blanket purchase order and looked to plaintiff for the excess costs involved in obtaining substitute contractors on work which was awarded after June 30, 1987. However, since the Court has found that the agreement between the parties was not a requirements contract, it follows that plaintiff had no contractual duty to perform any work that had not been offered to it and accepted by it. Therefore, defendant has no claim for costs incurred for work performed by another contractor after June 30, 1987, which had not been accepted by plaintiff prior to June 30, 1987. In other words, removing the work crews on June 30, 1987, while not a polite way of revoking acceptance of the purchase order and future opportunities to accept work, effectively terminated plaintiff's duties under the contract except as to work which it had previously agreed to perform.

Defendant also urges the Court to find that there is a material issue of fact with regard to the meaning of the contract. Defendant suggests the Court should take evidence on the course of conduct by the parties over the one or one and one-half years in which the parties performed pursuant to the agreement. Apparently defendant is suggesting that the course of conduct of the parties can make this agreement a requirements contract and, therefore, evidence should be permitted on the issue. The Court declines the opportunity to receive evidence on the course of conduct because the contract itself specifically prohibits consideration of "course of dealing or course of performance to explain or supplement the express terms of this Contract." (Section 65.0 of general conditions for contract work, Exhibit 15) The written documents speak for themselves and do not constitute a requirements contract.

Therefore, the motion for summary judgment is denied in part and sustained in part. Defendant is permitted to file a claim and to present evidence of damages resulting from the alleged default of plaintiff concerning work which it had accepted and performed as of June 30, 1987. Since the Court finds that the contract is not a requirements contract, partial summary judgment is granted to plaintiff and defendant is prohibited from presenting evidence concerning alleged damages resulting from excess costs incurred for the completion of work which had not been assigned to, or accepted by, plaintiff on June 30, 1987.

Separate journal entry shall be filed.

DATED: November 21, 1988.

BY THE COURT:

Timothy J. Mahoney
Chief Judge