

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Electronic Shop) ASBCA No. 51711
)
Under Contract No. DAAH03-98-C-0005)

APPEARANCE FOR THE APPELLANT: Lee A. Frison, Jr., Esq.
Ward & Frison, P.A.
Newnan, GA

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
MAJ Robert W. Clark, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal arises from a contracting officer's decision terminating the above-captioned contract for default. The underlying contract is for fabrication of mine recognition boards. The parties have submitted the appeal on the record pursuant to Board Rule 11. We deny the appeal.

FINDINGS OF FACT

1. Contract DAAH03-98-C-0005, between the Small Business Administration (SBA), the United States Army and appellant, Electronic Shop, a minority, disadvantaged small business, was awarded on 4 February 1998. The contract called for fabrication, trimming and painting 11,500 vacuum formed mine recognition boards at a fixed-price of \$230,000 (\$20 per unit). The contract called for completed boards to be delivered "in lots no smaller than 100 and no larger than 200." Appellant was required to purchase all raw materials. The contract required the Government to furnish 23 molds, each of which was to produce approximately 500 vacuum formed parts. The Government was required to issue 6 molds at contract award. The contract further provided "[a]dditional master molds will be readily available for the fastest possible completion of the contract." The molds were to be returned upon completion of the contract. (R4, tab 1)

2. The contract incorporated by reference, *inter alia*, the FAR 52.233-1 DISPUTES (OCT 1995), FAR 52.245-2 GOVERNMENT PROPERTY (FIXED-PRICE CONTRACTS) (DEC 1989), and FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND

SERVICES) (APR 1984) clauses. Delivery was to be completed by 29 May 1998. The contract did not require SBA approval before appellant commenced work. (R4, tab 1)

3. On 25 February 1998 Mary Townsend, contract specialist, telephoned appellant's owner, Lovell Willis, to check on the status of the contract. Mr. Willis represented that he had materials and would start producing boards the next day. Mr. Willis stated that he had 9 molds. Ms. Townsend stressed the importance of timely delivery. (R4, tab 3) Ms. Townsend and Mr. Willis communicated frequently between 9 March 1998 and 14 April 1998, with Ms. Townsend stressing the importance of timely delivery. Appellant fell behind in its planned deliveries. (R4, tabs 4-9, 11-15) There is no evidence that appellant requested additional molds during this period.

4. By letter of 21 April 1998 the contracting officer informed appellant that only 1,029 boards had been delivered. She requested information as to how appellant proposed to meet the delivery date. (R4, tab 16) Mr. Willis called Ms. Townsend on 23 April 1998 and promised a response by the next day. Ms. Townsend asked Mr. Willis when he would pick up additional molds. He first responded that he would pick up four the following Monday and then stated he did not know how many he would pick up. (R4, tab 18)

5. By FAX dated 23 April 1998 and received by the Government on 24 April 1998, Mr. Willis requested a six week extension. He explained that he had not been able to begin work until sometime in March due to difficulty "securing adequate, trainable staff through the Georgia State Employment Office." He proposed to deliver 1,000 boards per week commencing each week subsequent to 27 April 1998. (R4, tab 19) A cure notice was sent on 30 April 1998 in which appellant's request for an extension was denied. Appellant was asked to provide a detailed delivery schedule and to provide a response within 10 days. (R4, tab 22) Various telephonic communications ensued with little progress in resolving the situation (R4, tabs 23-26). By FAX of 11 May 1998 Mr. Willis submitted a schedule proposing delivery of 7,200 units by 29 May 1998 (R4, tab 27).

6. Ms. Townsend called Mr. Willis on 12 May 1998 to point out that only 2,606 units had been delivered at that point and delivery of an additional 7,200 units would leave a shortage of 1,694 units. Mr. Willis stated he did not have all the molds and that he did not think they were ready. This is the first time the availability of molds was raised by appellant. Mr. Willis said he would send a letter addressing Ms. Townsend's concerns about the 11,500 unit requirement. Ms. Townsend checked on availability. In the past there had been a plan to hold back one mold, but that was abandoned. The requiring activity expressed some concern about appellant retaining possession of all the molds in the event of a failure to deliver by 29 May 1998, but all the molds were made available.

When Ms. Townsend called Mr. Willis, he had already confirmed that the molds were available and he stated he would pick them up after his next delivery. (R4, tab 28)

7. Ms. Townsend was in communication with Mr. Willis regularly to check on deliveries (R4, tabs 29-33). By letter of 27 May 1998 the contracting officer stated:

This letter confirms telephone conversation this date between you and Mary Townsend, this command, in reference to Termination for Default against your contract. Modification will be forthcoming.

As of this date a quantity of 3,814 boards have passed inspection and been applied against the contract. This command will accept deliveries through 29 May 98, 4:30 pm. All government furnished property must be returned to Redstone Arsenal with your last delivery.

The letter was received by Mr. Willis on 28 May 1998. (R4, tab 34)

8. As of close of business 29 May 1998 appellant had delivered 4,449 boards that passed inspection. All molds were returned by appellant. (R4, tab 35)

9. Modification No. P00002, partially terminating the contract for default, was issued on 1 June 1998. In that modification, the quantity of boards was reduced by 7,051, from 11,500 to the 4,449 already delivered. The price of the contract was reduced to \$88,890 (4,449 x \$20). (R4, tab 36) There is no dispute that appellant had failed to deliver 7,051 boards by 29 May 1998 (Complaint). After appellant's request to convert the termination for default to a termination for convenience was denied, an appeal was filed on 25 August 1998 (R4, tabs 38, 39).

DECISION

Appellant argues that the Government's failure to timely provide molds was the reason for its failure to deliver. It is also argued that appellant was delayed because the SBA did not give approval for appellant to proceed until 25 February 2000. The Government argues that it met its contractual responsibility. We conclude that appellant has failed to establish that its failure was excusable.

The burden of proof is on the Government to show that a default termination is justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). In this instance, there is no contention by appellant that it met the contract's delivery schedule (finding 9). The burden, therefore, shifts to appellant to establish that its failure

to perform is justified. *Kingston Plastics Company*, ASBCA No. 47550, 96-1 BCA ¶ 28,152. Appellant argues that the Government failed to provide the necessary molds as required by the contract. Appellant has submitted no evidence to support this contention. Neither has it cited to pleadings or record documents provided by the Government for support. The record indicates that appellant did not raise any question about molds until 12 May 1998, that the molds were available for appellant's use and Mr. Willis planned to pick them up after his next delivery (finding 6). Appellant's argument is without merit.

Appellant also contends it was delayed because it did not receive SBA approval to proceed until 25 February 2000. Appellant does not cite to the record to support its argument and the contract does not require SBA approval before work can commence (finding 2). Accordingly, we cannot find that appellant has met its burden of proof. The appeal is denied.

Dated: 3 May 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51711, Appeal of Electronic Shop, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals