

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Protech Atlanta) ASBCA No. 52217
)
Under Contract No. SPO103-95-C-0022)

APPEARANCE FOR THE APPELLANT: Kevin M. Cox, Esq.
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Trial Attorneys
Defense Supply Center (DLA)
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Protech Atlanta (Protech) appeals the default termination of its contract to replace doors in a Government building. We find the termination proper because Protech failed to proceed with the work as directed by the contracting officer pending resolution of a dispute.

FINDINGS OF FACT

1. The captioned contract was awarded to Protech on 20 July 1995. It called for the replacement of 28 doors in Building 13 at the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania. (R4, tab 6 at 1, 2, 5, 47-48, 54, 57) The contract price of \$78,000 was approximately 14 percent lower than the Government estimate (\$89,041) and the next lowest bid (\$89,638). Before award, Protech was informed of these facts and given the opportunity to verify its bid or withdraw it on proof of mistake. Protech verified its bid. (R4, tabs 3, 4, 6 at 2)

2. The contract required the work to be completed within 120 days after receipt of notice to proceed (R4, tab 6 at 1). The contract included, among other provisions, the FAR 52.233-1 DISPUTES (MAR 1994) clause, the FAR 52.243-4 CHANGES (APR 1987) clause, and the FAR 52.249-10 DEFAULT (FIXED PRICE CONSTRUCTION) (APR 1984) clause (R4, tab 6 at 65).

3. Notice to proceed was not issued until 12 December 1995. Protech's submittals were not approved until January 1996. Protech did not begin the removal and installation work until on or about 29 November 1996. (R4, tabs 12, 20, 26, 29, 31, 33-35, 37; tr. 65, 68-69, 74) In removing the old door frames, Protech discovered that the jambs were filled with concrete in all but three of the 19 frames removed. This made the removal work more difficult and time-consuming than Protech had anticipated when it bid the contract. (Boyd Deposition at 16-20, 23-30; exs. A-16E, -16F, -16G, -16H)

4. On or about 21 January 1997, Protech stopped work with only 19 of the specified 28 new doors installed. It left the site and never returned to complete the contract. Protech's initial excuses for stopping work were a labor strike at the door manufacturer's plant, and then a delay by the Government in making payment for the completed doors. These problems were resolved by the end of March 1997, but several requests by the Government to Protech in April 1997 for a new completion date were not answered. (R4, tabs 41, 48, 50-52)

5. By letters dated 30 April and 2 May 1997, Protech's lawyers gave notice of claims for differing site conditions and "Change Order regarding required materials." These letters professed Protech's intention of "honoring its contractual obligations," but did not provide a date by which Protech would complete the work. The alleged differing site conditions were (i) the poured concrete in the old door frames, and (ii) deteriorating walls where the old frames were removed. The alleged change order was "[Protech] now being required to provide and install eight (8) inch door frames." (R4, tabs 53-54)

6. The old door frames had 8-inch wide jambs. They were readily observable and measurable on the pre-bid site visit, which Protech did not attend. Neither the contract nor the approved submittals required a specific width for the new door frames. Protech chose to procure and install frames with 5-3/4 inch jambs for the new doors which it installed. There is no credible evidence that Protech was at anytime "required" by the Government to provide new door frames with 8-inch jambs. The contract, however, did require Protech to finish the unfinished wall area that was exposed when the 5-3/4 inch jambs were installed where 8-inch jambs had previously been installed. (Boyd deposition at 56-58, 60-61, 67-68; R4, tabs 2, 6 at 26, 46, tabs 10, 15, 19, 22, 23, 25, 26; tr. 18-19, 21-23, 25-30, 68-69, 168-72)

7. Notwithstanding its stated intention of "honoring" its contractual obligations, Protech did not return to the site and complete installation of the doors. In a telephone conference with the Government on 18 November 1997, Protech admitted that the nine doors remaining to be installed had not yet been fabricated (ex. A-10). On 21 April 1998, Protech sent a subcontractor (Doorworks) to discuss a completion date with the Government. At this meeting, Doorworks stated that it would have to visit the site before estimating a completion date. (R4, tab 58; ex. A-13; tr. 135-38)

8. On 27 May 1998, Protech by its lawyers told the Government that: “According to what our subcontractors have told us, it will take a total of thirteen (13) weeks to complete the remaining Contract work. This period of time includes the necessary lead time for ordering the remaining doors, as well as the extra time required, due to differing site conditions, to install the remaining doors.” Protech did not allege in this letter that it had been directed to provide new or revised submittals for the remaining doors, nor did it disclose any intention to do so. (R4, tab 59)

9. On 31 August 1998, the contracting officer issued unilateral Modification No. P00003, extending the contract completion date to 8 January 1999. This extension allowed Protech 18 1/2 weeks to complete the contract – five more weeks than it had requested in its letter of 27 May 1998. (R4, tab 60) Protech, however, did not proceed with installation of the remaining doors to meet the new completion date (tr. 81). By letter dated 21 October 1998, Protech’s lawyer notified the Government that Protech was preparing a new submittal for Government approval “based on the Government’s discussion with Doorworks regarding this matter.” (R4, tab 61) Neither of the two contracting officers who dealt with Protech on this contract requested new submittals for the remaining doors or frames (tr. 84-85, 140).

10. By letter dated 10 November 1998, the contracting officer told Protech that “no further submittals are required,” that additional submittals were not discussed with Doorworks, and that “[y]ou are to proceed in accordance with submittals previously provided” (R4, tab 62). By letters of 10 and 13 November 1998, Protech provided a new submittal for the doors and requested approval of that submittal. The new submittal did not show the door frame or otherwise indicate the width of the jambs. (R4, tabs 63, 64) The contracting officer replied on 20 November 1998, again stating that no new submittals would be considered and that Protech was to proceed in accordance with the submittals previously provided (R4, tab 65).

11. Notwithstanding the two unequivocal directions by the contracting officer to proceed with the work in accordance with the original submittals, Protech continued to insist in a letter dated 11 December 1998 that it had been directed to provide a new submittal for the doors and door frames. Protech also alleged that it did not receive Modification No. P00003 setting the completion date at 8 January 1999 until 8 October 1998, and requested a further extension of time “equal to the length of that delay.” (R4, tab 66)

12. By letter dated 17 December 1998, the contracting officer issued unilateral Modification No. P00004 extending the contract completion date by 63 days from 8 January 1999 to 12 March 1999. This extension was more than the 38 days of alleged delay in Protech’s receipt of Modification No. P00003. This letter again stated that the Government would not consider any new submittals “including those forwarded on

November 10, 1998,” and again directed Protech “to proceed in accordance with the submittals originally provided.” (R4, tab 67)

13. In January and February 1999, there was a further exchange of argumentative letters in which Protech, for the first time, specifically requested approval of door frames with 8-inch jambs. The contracting officer again directed Protech to proceed “in accordance with the submittals originally provided.” These letters and the contracting officer’s testimony indicate that both parties believed at the time that the approved submittals required the 5-3/4 inch jambs. (R4, tabs 68-71; tr. 140) The approved submittals, however, do not indicate any particular width of the jambs. *See* Finding 6. As of 12 March 1999, the completion date set by Modification No. P00004, Protech had not started installation of any of the nine remaining doors (tr. 92). On that date, the contracting officer terminated the contract for default (R4, tab 74). This appeal followed.

DECISION

Protech argues that the termination was improper because (i) at the time of termination, “there was an undefinitized change order with respect to the size of door frames to install,” and (ii) the termination was motivated by bad faith (app. br. at 1-2). We find no merit in either contention.

At the time of termination and for at least four months before, the Government had refused to consider a new submittal by Protech. *See* Findings 10-13. Whether or not this refusal was a constructive change to the contract, Protech was not entitled to cease performance pending Government consideration and approval of a new submittal. Protech had already installed 19 new doors under the original submittal. There is no showing of impossibility or commercial impracticability with respect to installing the remaining nine doors in the same manner and in compliance with the contracting officer’s repeated directions to do so. Protech was obligated under the Disputes clause of the contract to proceed diligently with performance in compliance with the contracting officer’s directions pending final resolution of any claim for relief. *See* FAR 52.233-1(i). In failing to do so, Protech failed to meet the 12 March 1999 contract completion date for which summary termination was proper under the Default Termination clause of the contract. *See* FAR 52.249-10(a).

Protech’s assertion that the termination was motivated by bad faith is not supported by any evidence. To the contrary, the contracting officer’s repeated extensions of the contract completion date, and repeated directions to perform in accordance with the original submittals evidence exemplary patience and the utmost good faith in giving Protech every opportunity to perform the contract.

The appeal is denied.

Dated: 25 May 2001

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
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. 52217, Appeal of Protech Atlanta, rendered in conformance with the Board's Charter.

Dated:

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