

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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S.P.L. Spare Parts Logistics, Inc.) ASBCA Nos. 51118, 51384
)
Under Contract No. DAAE07-92-D-A006)

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OPINION BY ADMINISTRATIVE JUDGE TUNKS

S.P.L Spare Parts Logistics, Inc. (SPL or appellant) seeks \$2,210,417.90 in damages for breach of contract, alleging that the estimate in a requirements contract was negligently prepared and that the Government ordered from sources other than appellant during the contract period. ASBCA No. 51118 is an appeal from a contracting officer’s final decision granting appellant partial relief. ASBCA No. 51384 is an appeal from a second contracting officer’s final decision withdrawing the first decision and denying the claim in its entirety. The appeals were docketed under the name of appellant’s parent, A.V.S. Ltd. The caption is hereby amended to reflect the name of the contractor. Only entitlement is at issue.

FINDINGS OF FACT

I. TACOM’s Estimating System

1. The United States Army Tank-Automotive Command (TACOM) in Warren, Michigan, maintains a wholesale inventory system of new and rebuilt parts that it uses to manage and service tanks, armored vehicles, trucks and other types of ground equipment (tr. 1/72).

2. TACOM's inventory system is managed by item managers (IMs), whose primary responsibility is to make sure that TACOM has sufficient parts on hand to meet the needs of its customers (tr. 1/125).

3. Pursuant to the applicable version of DoD Directive 4140.1, the Army's policy was to repair existing assets before purchasing new assets whenever economically feasible (tr. 117-18, 2/12; SR4, tab 87 at 22).

4. Assets in the system were coded "repairable" or "consumable." A "repairable" asset was one that could be repaired and used again. A "consumable" asset was one that was more expensive to repair than to replace--"a throw away item." (Tr. 1/117-18)

5. In 1991, TACOM used the Requirements Determination and Execution System (RDES), an automated Department of Defense forecasting tool, as the basis for estimating its requirements. The RDES produced a Supply Control Study (SCS) which was used to estimate TACOM's requirements. The SCS compared the requirements objective ("the level you should have on hand or due in at any given time") to TACOM's asset position (the number of assets in stock or "due in") and generated a recommendation to buy new assets, repair existing assets, cut-back or do nothing. (Tr. 1/113-117, 142) TACOM automatically generated an SCS on every item in its inventory at least once a year (1/124). If an SCS was not available the IM could order one (tr. 1/127).

6. TACOM typically used a 12-month demand base in preparing its estimates, but it had the capability to use a 24-month base (tr. 1/129).

7. After obtaining an SCS, the IM adjusted the figures manually and/or by using automated programs for such variables as returns, program change factors, vehicle density, administrative lead time, production lead time, safety levels, reorder cycles and war reserve levels (tr. 1/114-15).

8. After adjusting the SCS figures, the IM ran them through an additional program called the Repair and Procurement Acquisition System (RAPAS) which generated a final procurement recommendation (tr. 1/120).

9. The recommendations produced by the SCS and/or RAPAS were the basis for all of TACOM's procurement decisions (tr. 1/142).

10. In deciding whether to purchase new or rebuilt assets, the IM compared the repair cost to the Maintenance Expenditure Limit (MEL). The MEL was "the amount of money you're allowed to spend to repair an item" expressed as a percentage of the replacement price. If the repair cost was higher than the MEL, the IM issued a procurement work directive to TACOM's Acquisition Center to initiate a procurement of new assets. If the repair cost was lower than the MEL, the IM initiated a procurement of rebuilt wheels

from its repair depot. (Tr. 1/121, 134-35) No documentation of this policy was included in the record.

11. TACOM's repair depot for roadwheels was the Red River Army Depot (RRAD) near Texarkana, Texas (R4, tab 103). Among other things, RRAD rebuilt and sold parts to other Army components. RRAD issued a price list for rebuilt parts to its customers every year. (Tr. 1/135, 149)

II. The Estimate

12. Ms. Thadine Kazmer, the IM for the roadwheel, prepared the estimate prior to June 1991 (1/99, 1/111-49).

13. At the time she prepared the estimate, Ms. Kazmer was aware of the Army's policy of using rebuilt assets whenever economically feasible (tr. 1/117-18).

14. The roadwheel was coded repairable at the time the estimate was prepared. However, Ms. Kazmer testified that she treated the wheel as a consumable in preparing the estimate because it was more economical to buy new wheels than to repair existing wheels at the time. (Tr. 1/132)

15. Ms. Kazmer knew that the price of rebuilt wheels fluctuated and that RRAD issued a price list for rebuilt parts every year (tr. 1/135, 149). She was also aware that the wheels had been coded repairable in the past and that they might be recoded repairable in the future (tr. 1/143).

16. Although TACOM had the capability to use a 24-month demand base, Ms. Kazmer used the standard 12-month demand base in preparing the estimate (tr. 1/129).

17. TACOM ordered an average of 8,306 wheels per year during the five fiscal years (FY) before this contract. During three of those years, FY 88, 89 and 90, TACOM filled all its requirements for wheels with rebuilt wheels. (R4, tab 85; ASR4, tab 130)

18. At the time she prepared the estimate, Ms. Kazmer knew that the Army was probably going to reduce the density of the M60 tank due to the M1 tank's outstanding performance during Operation Desert Storm which began in approximately January 1991. Ms. Kazmer did not adjust the estimate to reflect this contingency because only the major item IM was authorized to generate a program change factor and change the program density files (tr. 1/130-32).

19. Based on her calculations, Ms. Kazmer determined that TACOM had a three-year requirement for an estimated quantity of 31,361 new roadwheels (tr. 1/133).

20. Prior to award, the IM is usually asked to update the estimate. Ms. Kazmer could not recall whether or not she had been asked to update this estimate. (Tr. 1/128) The record does not indicate that she performed an update and we find that she did not.

21. Neither the contracting officer nor the contract specialist double-checked the estimate prior to issuance of the RFP (tr. 1/76, 98).

22. At the time the estimate was prepared, the Government was in the process of downsizing the military pursuant to the Defense Base Closure and Realignment Acts of 1988, Pub. L. No. 101-510, 104 Stat. 1808, and 1990, Pub. L. No. 100-526, 102 Stat. 2627.

III. The RFP

23. TACOM issued Request for Proposals (RFP) No. DAAE07-91-R-A270 for a three-year requirements contract on 4 November 1991. Contract Line Item Number (CLIN) 0006 was for a total estimated quantity of 31,361 wheels for FY 92, 93 and 94, broken down as follows: 11,488 wheels in FY 92, 10,264 wheels in FY 93 and 9,609 wheels in FY 94. The solicitation was restricted to domestic sources. (R4, tab 1)

24. The RFP contained the following clauses that are relevant to this dispute:

A-3 NOTICE OF REQUIREMENTS CONTRACT
TACOM (JUL 1987)

Offerors please note: THIS SOLICITATION IS FOR A 3-YEAR REQUIREMENTS CONTRACT, rather than the usual single-year contract. Under th[is] arrangement, TACOM guarantees to place all requirements arising during the contract term as delivery orders under the contract, so long as such requirements fall within the specified minimum and maximum order quantities described herein. . . .

....

H-2 ORDERING
52.216-18 (APR 1984)

(a) Any supplies . . . to be ordered under this contract shall be ordered by issuance of delivery orders Such orders may be issued from DATE OF CONTRACT AWARD through 3 YEARS FROM THE DATE OF CONTRACT AWARD.

....

H-3 DELIVERY ORDER LIMITATIONS

52.216-19

(APR 1984)

(a) Minimum Order - When the Government requires supplies . . . in any amount . . . less than . . . 200 each for CLIN 0006 . . . [t]he Government is not obligated to purchase, nor is the Contractor obligated to furnish those supplies

(b) Maximum Order - The Contractor is not obligated to honor . . . [a]ny order for a single item in excess of . . . [1,500] each for CLIN 0006

....

H-4 REQUIREMENTS

52.216-21

(APR 1984)

(a) . . . The quantities of supplies . . . specified . . . are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as estimated or maximum in the Schedule, that fact shall not constitute the basis for an equitable price adjustment [emphasis in original].

....

(c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies . . . specified . . . that are required to be purchased

....

H-15 ADDITIONAL RULES FOR REQUIREMENTS

CONTRACTS

TACOM

(MAY 1987)

....

(b)(2) The Government is not required to place any orders under this contract during periods when the Contractor is 30 or

more days delinquent in delivery under one or more current delivery orders

(R4, tab 1)

25. Before award, TACOM did not disclose to appellant that the Army's policy was to repair assets before purchasing new assets or that TACOM would stop ordering wheels from appellant if the price of rebuilt wheels fell below the price of new wheels. TACOM also failed to disclose the existence of RRAD or that the wheel had been coded repairable in the past and might be coded repairable in the future. (Tr. 1/43, 52, 55)

IV. Contract Award and Delivery Order 0001

26. The closing date for the RFP was delayed from 4 December 1991 until 31 March 1992 due to TACOM's elimination of the domestic source restriction for some of the CLINs, including CLIN 0006. The change triggered a Congressional investigation, which concluded TACOM had not violated any laws or regulations by lifting the restriction. (R4, tab 1, ASR4, tab 104)

27. Appellant submitted its proposal on 16 December 1991 (R4, tab 1).

28. In February 1992, the Defense Contract Management Administration Office (DCMAO) conducted preaward surveys at appellant's office in New York City and the manufacturing facility of its parent, A.V.S. Ltd., in Netanya, Israel. Neither company had previously performed a Government contract. The survey indicated that A.V.S. Ltd. had "5950 sq. ft. of additional manufacturing space under construction [in Netanya, Israel] . . . with an additional 13,300 sq. ft. of covered storage area to be added in the near future" and that it had acquired additional equipment and hired and trained more personnel to perform the work (R4, tab 66 at 47, 53, 70, 73-74; ASR4, tab 107). The contracting officer received a copy of the preaward survey (R4, tab 66 at 49).

29. By 2 March 1992, Ms. Kazmer had obtained a waiver of the MEL for FY 92 and ordered 3,259 rebuilt wheels from RRAD. Although Mr. Gary Kazmierczak, Ms. Kazmer's successor, indicated in a memorandum dated 28 June 1995 that TACOM ordered the wheels from RRAD due to late deliveries from Titan Wheel and Spare Parts, Ms. Kazmer's contemporaneous notation on the 2 March 1992 Change Request Approval Procedure sheet, which is used to initiate a procurement under the rebuild program, stated as follows: "[I]tem is being procured on a requirements contract which was delayed by a Congressional inquiry. Delivery will not be for 12 months due to FAT [first article test]. Extended PLT [production lead time] will make supply from procurement impossible." (ASR4, tabs 85, 101, 123; tr. 2/13, 25) We conclude that TACOM ordered the wheels from RRAD due to delays in the award of the contract.

30. On 4 March, appellant extended its offer until 31 March 1992 (R4, tab 1 at 4).

31. TACOM did not revise its estimate prior to award.

32. TACOM awarded Contract No. DAAE07-92-D-A006 for CLIN 0006 to appellant on 25 March 1992. The contract was for a three-year estimated quantity of 31,361 wheels at a price of \$158.15 per wheel (R4, tab 1).

33. On 8 April 1992, TACOM issued Delivery Order (DO) 0001 in the amount of \$1,383,654.30 for a quantity of 8,749 new wheels. The first article was due 15 October 1992, with deliveries of 1,000 wheels per month due from 15 April through 15 December 1993 (except for July). A final delivery of 749 wheels was due 15 January 1994. (R4, tab 2)

VI. Post-Award

34. On 24 June 1992, RRAD quoted a price of \$92.89 per wheel for rebuilt wheels for FY 93 (ASR4, tab 103). Based on the quotation from RRAD and its policy of repairing existing assets before buying new assets, TACOM decided not to order any more wheels from appellant (ASR4, tab 104 at 6; tr. 1/143-45).

35. In August and September 1992, TACOM's requirements for wheels decreased noticeably due to a reduction in the density of the M60 tank and the downsizing of the military world-wide (tr. 1/136-37, 2/8-9; R4, tab 81; ASR4, tabs 104 at 6, 122).

36. Ms. Kazmer could not remember when the wheels were recoded repairable, but it appears that this occurred in August or September 1992 (tr. 1/133, 135; R4, tab 81).

37. On 4 November 1992, Ms. Kazmer advised the contracting officer that she did not anticipate ordering any more roadwheels from appellant for the remainder of the contract period and requested him to cancel DO 0001 (tr. 1/143-44; SR4, tab 106).

38. On 6 November 1992, the contracting officer requested appellant to submit a termination settlement proposal for DO 0001 (R4, tab 5; ASR4, tabs 107, 108).

39. On 9 November 1992, the contracting officer advised Ms. Kazmer that "if there are no requirements anticipated for this item, a termination for convenience of the entire requirements contract may be in the Government's best interest" (SR4, tab 106).

40. On 10 November 1992, the contract specialist advised Ms. Kazmer as follows:

Your original estimate for [this] contract was in excess of \$5Million [sic]. The contractor has increased plant capacity,

bought tooling and [hired] additional labor to perform this contract.

We need ABSOLUTE assurance of what your intentions of procurement [are] for the remaining life of this contract. We are concerned that at the end of the contract the contractor [may] claim . . . that our estimates were so far off that they were made in bad faith.

(ASR4, tab 107)

41. Appellant submitted its termination settlement proposal on 18 November 1992. According to its proposal, appellant had expended \$1,298,615 for tools, machinery and fixtures, inspection tools, machinery, jigs and gauges, raw material and raw material in process, manufacturing facility, labor, and engineering as of 1 November 1992 (R4, tab 7). Although the record reflects that appellant expended a substantial amount of money in preparing for, and performing the contract, the hearing was limited to entitlement, and we do not determine to what extent the costs claimed are allowable or allocable.

42. Ms. Kazmer ran appellant's termination settlement proposal through TACOM's economic cut-back model and determined that it was not feasible to terminate the delivery order. Although Ms. Kazmer did not anticipate ordering any more roadwheels from appellant as long as RRAD did not increase its price, she did not notify appellant of that decision. (Tr. 1/145-49) TACOM advised appellant that it would not terminate DO 0001 on 30 November 1992 (R4, tab 8).

43. On the Change Request Approval Procedure sheet of 3 December 1992, Ms. Kazmer stated that she was ordering from RRAD because "[d]eliveries under Requirements contract [can]not begin until April 93" (ASR4, tab 110). By March 1993, TACOM had ordered 7,418 rebuilt wheels from RRAD (ASR4, tab 123).

44. TACOM approved appellant's first article on 29 March 1993 (R4, tab 14).

45. TACOM extended the delivery schedule for DO 0001 five times. Bilateral Modification Nos. P00001, P00003, P00004 and P00006 were initiated by appellant and supported by a reduction in the contract price. TACOM issued Modification No. P00002 on its own initiative to compensate appellant for time lost due to the Government's request for a termination settlement proposal. (R4, tabs 4, 12, 19, 23) The final delivery as of Modification No. P00006 was August 1994 (Stipulation; R4, tab 23).

46. On 28 September 1994, appellant asked TACOM when it planned to issue the next delivery order (R4, tab 24). TACOM replied by telephone that it did not expect to issue any more delivery orders under appellant's contract (R4, tab 25).

47. On 5 December 1994, appellant requested TACOM to spread out the remaining deliveries over the next three or four months so that it could continue to run its factory (R4, tab 25). TACOM refused the request (R4, tab 26).

48. Appellant completed delivery of DO 0001 in June 1995, 10 months after the adjusted delivery date (Stipulation).

49. Including the 3,259 wheels ordered from RRAD prior to award, TACOM ordered a total of 12,378 wheels from RRAD (tr. 2/17-29; ASR4, tabs 123).

50. On 13 January 1995, three months before the end of the contract, TACOM awarded an indefinite quantity contract to North American Molded Products (North American) for roadwheels at a price of \$48.93 per wheel. On the same date, TACOM issued a delivery order to North American for 1,788 wheels. (ASR4, tabs 75 at 2, 120)

VII. The Appeals

51. On 30 May 1995, appellant filed a claim for \$2,210,417.90, alleging that TACOM had breached the contract by ordering wheels from other sources. Alternatively, appellant asked that the contract be converted to a termination for convenience on the basis that the estimate was negligently prepared. (R4, tab 36) The claim was certified on 20 June 1995 (R4, tab 37).

52. After unsuccessfully attempting to settle the claim, appellant requested a final decision on 21 July 1997 (R4, tabs 46 - 57, 59 - 69, 71, 74).

53. By final decision dated 8 August 1997, the contracting officer admitted that TACOM had breached the contract and offered appellant \$340,039 in settlement of the claim (R4, tab 75).

54. Appellant timely appealed the contracting officer's final decision to this Board on 5 November 1997, where it was docketed as ASBCA No. 51118 (R4, tab 76).

55. On 27 January 1998, the contracting officer issued a "superceding" final decision withdrawing the earlier decision. As grounds, the contracting officer alleged that "rebuilt roadwheels are different than newly manufactured roadwheels" and that, under clause H-15(b)(2) of the contract, TACOM had no obligation to order any wheels from appellant because it was in default of the delivery schedule.

56. Appellant appealed the contracting officer's second final decision on 3 March 1998 and we docketed the appeal as ASBCA No. 51384.

DECISION

A requirements contract provides for filling all actual requirements of the Government for supplies or services during the contract period by purchasing from the awardee, who provides them at the agreed-upon price. *Datalect Computer Services, Ltd. v. United States*, 40 Fed. Cl. 28, 35 (1997), *aff'd in part, vacated in part and remanded*, 215 F.3d 1344 (Fed. Cir. 1999) (table), *cert. denied*, 529 U.S. 1037 (2000). In preparing the estimate of its requirements, the Government must exercise reasonable care. *Medart v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). Ordinarily, a variance between the estimated quantity and the quantity ordered will not entitle the contractor to an equitable adjustment. *Id.* However, where the variance is the result of the Government's failure to exercise reasonable care in preparing the estimate or where the Government fails to order all its actual requirements from the contractor during the contract term, the Government may be held liable for the resulting damages. *Id.* We conclude that the estimate for this contract was not prepared with reasonable care.

The applicable version of Federal Acquisition Regulation (FAR) 16.503(a)(1) requires the contracting officer to include a "realistic estimated total quantity" that is based "on the most current information available" in the solicitation and resulting contract. Since bidders rely on the estimate to prepare their bids, the Government is held to a standard of good faith and reasonable care in its preparation. While the Government does not have to be "clairvoyant" to meet this standard, it "is not free to carelessly guess at its needs." *Id.* at 581; *Womack v. United States*, 389 F.2d 793, 801 (Ct. Cl. 1968). Thus, where the Government knows prior to award that the estimate in the solicitation is significantly overstated and fails to take that fact into account in preparing the contract estimate, the Government may be liable for breach damages, including anticipatory profits. *Applied Companies, Inc.*, ASBCA Nos. 50749 *et al.*, 01-1 BCA ¶ 31,325 at 154,734; *Medart*, 967 F.2d at 581, quoting *Clearwater Forest Indus., Inc. v. United States*, 650 F.2d 233, 239 (Ct. Cl. 1981).

In our opinion, TACOM failed to meet the standard of reasonable care established by *Medart*. TACOM failed to take critical facts into account in preparing the estimate. In particular, TACOM failed to take into account the fact that the Army's policy was to repair existing assets before purchasing new assets whenever feasible, the fact that TACOM interpreted the Army's repair policy to mean it could stop purchasing from appellant anytime the price of rebuilt wheels dropped below the price of new wheels and the fact that TACOM's requirements were probably going to decrease significantly in the near future due to the reduction in density of the M60 tank. In addition, when the contract was awarded to appellant, TACOM had already purchased 3,259 wheels from RRAD. We consider TACOM's failure to reformulate the estimate prior to award in light of known changes in its requirements to be contrary to the standard of reasonable care.

Chief among these omissions was TACOM's failure to take into account the Army's policy of repairing existing assets before purchasing new assets. Ms. Kazmer interpreted this policy to mean TACOM could stop ordering new wheels from appellant and order rebuilt wheels from RRAD anytime the price of rebuilt wheels dropped below the price of new wheels. She also knew that the roadwheel had been coded repairable in the past, that the price of rebuilt wheels fluctuated and that the wheel might be recoded repairable in the future. In fact, Ms. Kazmer testified that the wheel was coded repairable at the time she prepared this estimate and that she had treated it as a consumable because the repair price exceeded the price of new wheels. If TACOM intended to order rebuilt wheels in lieu of new wheels from appellant anytime the price of rebuilt wheels dropped below the price of new wheels, it had a duty to take the Army's repair policy into account when preparing its estimate. There is no evidence that TACOM notified offerors of these contingencies prior to award.

The preparation of the estimate also failed to meet the standard of reasonable care because TACOM failed to take into account the fact that the density of the M60 tank was probably going to be reduced. As a result of Operation Desert Storm, which began in approximately January 1991, Ms. Kazmer was aware that the Army was considering replacing the M60 tank with the M1 tank. If the Army reduced the density of the M60 tank, TACOM's requirement for roadwheels would be significantly reduced over the next few years. Although Ms. Kazmer was not authorized to generate a program change factor and change the program density files, that does not excuse TACOM from making the necessary adjustments. Indeed, TACOM's requirements for roadwheels decreased noticeably by September 1992 due to the decreased density of the M60 tank.

When preparing estimates, TACOM cannot be held to strict accountability in taking into account the precarious nature of military plans and needs. However, when combined with the other factors used to evaluate the need for roadwheels, TACOM should have been aware that the estimated quantities were not reasonable. TACOM's failure to recognize that its estimate was unreasonable is even more vexing when one looks at the actual requirements for the prior five years. TACOM ordered an average of 8,306 roadwheels per year from FY 87 through FY 91, less than any of the estimated quantities for the three years covered by this contract.

We also find that TACOM failed to exercise reasonable care because it did not reformulate the estimate prior to award. Contract award was delayed until 25 March 1992 due to TACOM's partial elimination of the domestic source restriction and the resulting Congressional investigation. However, by 2 March 1992, Ms. Kazmer had obtained a waiver of the MEL and ordered 3,259 roadwheels from RRAD. On the Change Request Approval Procedure sheet, Ms. Kazmer justified this action by stating that the "[i]tem is being procured on a requirements contract which was delayed by a Congressional inquiry. Delivery will not be for 12 months due to FAT [first article test]. Extended PLT [production lead time] will make supply from procurement impossible." (ASR4, tab 101; tr.

2/13). By March 1993, Ms. Kazmer had ordered a total of 7,418 wheels from RRAD. In our view, the estimate at a minimum should have been reduced by the 3,259 wheels ordered from RRAD prior to award.

TACOM also breached the contract by ordering roadwheels from other sources during the contract period. The ordering period began on 25 March 1992, the date of contract award, and ended on 25 March 1995, three years later. TACOM ordered 1,788 wheels from North American on 13 January 1995, three months before the ordering period expired. We do not consider clause H-15 to be a defense to this breach.

We hold that TACOM breached the contract by failing to exercise reasonable care in preparing the estimate and that TACOM's administration of the contract exacerbated appellant's difficulties. In particular, TACOM failed to disclose that it had decided to resume its rebuild program and stop ordering new wheels from appellant. We further hold that TACOM breached the contract by ordering 1,788 roadwheels from North American during the contract period. The determination of the amount of damages is to be negotiated by the parties. In the event they are unable to reach agreement, the contracting officer is directed to issue a final decision from which further appeal may be taken.

The appeals are sustained.

Dated: 6 September 2002

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

ROLLIN A. VAN BROEKHOVEN
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 Nos. 51118 and 51384, Appeals of S.P.L. Spare Parts Logistics, Inc., rendered in conformance with the Board's Charter.

Dated:

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