

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Aerobotics, Corp. ) ASBCA No. 52134  
 )  
Under Purchase Order No. L-8528 )

APPEARANCE FOR THE APPELLANT: Mr. Gregory W. Walker  
President

APPEARANCE FOR THE GOVERNMENT: Kenneth H. Goetzke, Jr., Esq.  
Trial Attorney  
National Aeronautics and Space  
Administration  
Langley Research Center  
Hampton, VA

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

Appellant timely appealed the termination for default of its purchase order for the design, fabrication and operational demonstration of three unmanned air vehicles. Appellant seeks to convert the termination to one for the convenience of the Government, alleging that it substantially delivered its required performance. We deny the appeal.

FINDINGS OF FACT

1. On 24 September 1998 the Government forwarded National Aeronautics and Space Administration (NASA) Purchase Order L-8528 in the amount of \$24,995 to appellant for immediate acknowledgment of acceptance of the order. Appellant's president signed the acknowledgment; the date of the signature is not stated. The acknowledgment states in part:

By signing this acknowledgment, the Contractor agrees to adhere to the terms and conditions as specified, including delivery date, as indicated.

(R4, tab 8)

2. The purchase order called for the "[d]esign, fabrication, and operational demonstration of three (3) small unmanned air vehicle airframes for the [Aeroskate] PC-20A aircraft." The intent of the project was to acquire an unmanned minimal demonstration vehicle that would carry the weight of the electrical equipment for the

stability augmentation system necessary for the airplane to be flown by a non-expert pilot, *i.e.*, the average person, with minimal instructions (tr. 6, 8, 16, 58). The Aeroskate PC-20A (the PC-20A) has a 12-inch wing span and weighs under a pound, thus could be transported into the field for launching (tr. 80).

3. The PC-20A was developed by appellant and Prestec, Inc. (the company that was to become appellant's subcontractor under the purchase order) under an earlier Cooperative Research and Development Agreement with two Army Research Laboratory agencies located at NASA. The purchase order resulted from a proposal by appellant and Prestec, Inc to use the PC-20A for the further development of an unmanned airframe, and their assurances to the Government that the PC-20A and its engines would meet NASA's objectives for this program. The required demonstrations were to be given for other Government agencies in an effort to obtain funding to promote additional development of unmanned air vehicles, specifically the PC-20A, for use in surveillance. (Tr. 6-9, 35-36, 53, 56-57, 74-77, 86)

4. The Statement of Work lists six deliverables:

1. Three Aeroskate PC-20A airframes with engines, engine cut off [sic] system, fuel bladders, and parachute recovery system.
2. A one-man-operable collapsible launcher.
3. Two (2) of the Aeroskate airframes shall have the electronic packages integrated into them.
4. Flight demonstrations shall be conducted in calm and windy conditions. Sufficient aircraft stability shall be integrated into the flight controller such that a single non-pilot can operate the aircraft.
5. Flight demonstrations shall be video recorded from the on-board video where NASA video personnel are simultaneously taking video of the aircraft's flight from the ground.
6. All ground station support equipment shall be delivered to the Government.

(R4, tab 8)

5. The purchase order included FAR 52.212-4 CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (APR 1988), which provides at § (m) that the Government may

terminate the purchase order for cause should the contractor default or fail “to comply with any of the terms and conditions” (R4, tab 8).

6. The period of performance was 60 days, with a requested delivery date of 30 November 1998. The purchase order did not provide for partial or progress payments, or for Government furnished equipment. (R4, tab 8)

7. Prestec, Inc. as appellant’s subcontractor was to provide the launcher and three PC-20A each with parachute, engine with mount, and fuel bladder. Also Prestec, Inc. was to support appellant in its electronics or system integration and testing. (R4, tab 1 ¶ 6, ex. B at 2, ex. D; tr. 9, 29, 35-36) It became clear the PC-20A could not carry the weight of the requisite equipment, likely due to aerodynamic instability because the PC-20A could not fly at a sufficiently high speed (R4, tab 1 ex. D; tr. 26, 47, 50-51, 65, 84, 95-96).

8. The required demonstration was to be conducted in Puerto Rico using “the full system . . . with the stability augmentation system that would allow a non-expert pilot to fly [the system] with a minimal amount of training.” That demonstration was cancelled because of the unsuitability of the PC-20A. (Tr. 57-58)

9. Apparently because of the PC-20A’s unsuitability, appellant developed a new unmanned air vehicle airframe which had a 14-inch wing span (tr. 15, 47-48, 65-66, 80).

10. In the latter part of October 1998, the Army was planning “a very large robotics demonstration,” and wanted to include an unmanned air vehicle (R4, tab 1 ex. D; tr. 14, 32, 68). At the request of the Government, three of appellant’s employees, accompanied by the Government employee who was responsible for the technical aspects of the purchase order, traveled to Ft. Campbell, KY (tr. 14-15, 49, 67). During that demonstration at Ft. Campbell, appellant flew the newly-developed, non-PC-20A unmanned air vehicle. The Government’s technical representative stated that no demonstration objectives or specifications were met by the vehicle that was demonstrated at Ft. Campbell (tr. 76), and pointed out that the technology shown was “at least four decades or more older” (tr. 49). That witness described the activity at Ft. Campbell:

This was – although the aircraft may not be the typical balsa-wood [sic] hobby aircraft, this was basically a demonstration of hobby – flying of a small aircraft that you would see as a hobby activity.

(Tr. 67)

11. Specifics of the manner in which the items delivered or demonstrated at Ft. Campbell by appellant, did not meet the requirements, numbered as the statement of work in the purchase order, include: (items 1, 3) the unmanned air vehicle flown at Ft. Campbell

would not fly with the necessary weight for the electrical systems, thus there was no on-board stability system or any of the required electrical systems (tr. 50, 67, 78); (item 2) although appellant demonstrated a launcher, it was not “one-man-operable” (tr. 60-61); (item 4) the unmanned air vehicle required expert pilotage (tr. 67); and (item 5) while appellant demonstrated some video capability, it never demonstrated on-board ground video recording during any flight, nor was any ground video-recording done simultaneously (tr. 62-67).

12. Prior to the 30 November 1998 delivery date established in the purchase order, there was no demonstration of the functionality of any of the deliverable hardware (tr. 11-12, 18, 69, 76, 116-17). Although some flight demonstrations and other capabilities were shown at Ft. Campbell with the newly developed airframe (tr. 62), at no time did appellant deliver items which met all aspects of the objectives or the specifications of the purchase order (tr. 136). Appellant left some electrical items which were to be installed and demonstrated, in one of the NASA laboratories to which appellant had access (tr. 13, 18).

13. Appellant submitted an invoice in the amount of \$18,093 dated 10 November 1998 setting out charges of \$9,178 for equipment and material and \$8,915 for labor (R4, tab 1 at 2, tab 7). None of the amount was paid (R4, tab 1 at 2).

14. Although the Government representatives had the authority to grant an extension of time for performance of the purchase order, appellant did not request additional time for the delivery date of the purchase order (tr. 42-43, 84-85).

15. There is no evidence, or even an allegation, that appellant attempted to equip the PC-20A with electrical equipment of less weight which would perform to meet the specification requirements, nor is there any other proof that the specifications were impossible or commercially impracticable to meet.

16. After the Ft. Campbell trip, appellant’s owner sold most of the business assets to a former employee and moved to Alaska. There is no evidence of further effort by appellant under either ownership to complete work on the purchase order. (Tr. 97-100)

17. On 18 December 1998 the Government terminated the purchase order for default “as a result of [appellant’s] failure to deliver the required aerial vehicles in accordance with the Statement of Work by the delivery date” (R4, tab 4). Appellant’s timely appeal followed. The Government did not reprocur these items.

#### DECISION

Termination for default is a drastic sanction that should be imposed upon a contractor only for good cause in the presence of solid evidence. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987), quoting *J. D. Hedin Construction Company Inc. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The Government has the burden to prove the termination for default was justified. (*Id.*) If the default is proven, the burden shifts to the contractor to come forward with proof that its default was excused by circumstances beyond the control and without the fault or negligence of appellant or a subcontractor at any tier. *FDL Technologies, Inc.*, ASBCA No. 41515, 93-1 BCA ¶ 25,518 at 127,098.

Under the terms of the purchase order, appellant obligated itself to provide specific deliverables (findings 2, 4). Also under the purchase order's terms, the Government was entitled to terminate the contract if appellant failed to comply with any contract term (finding 5). Appellant failed to deliver most, if not all, of the items it agreed to provide under the purchase order (findings 7-12). Therefore, we conclude that the Government's decision to terminate appellant's purchase order was justified. The Government has carried its initial burden.

Appellant's primary asserted excuse to the default is that the designated unmanned air vehicle, *i.e.*, the PC-20A, would not support the weight of the required electrical equipment (likely due to insufficient speed), thus seemingly bringing into question whether the specifications were design or performance and if performance, whether the specifications were impossible or commercially impracticable to meet. Leaving aside the fact that the purchase order, and specifically use of the PC-20A to carry the necessary equipment, was the result of a proposal from appellant and Prestec, Inc., its subcontractor, the portions of the specifications concerned on this point are clearly performance specifications. The law regarding performance versus design specifications is settled. In *P.R. Burke Corp. v. United States*, 277 F.3d 1346 (Fed. Cir. 2002) the Court, quoting from *Blake Constr. Co. v. United States*, 987 F.2d 743, 745 (Fed. Cir. 1993), quoting from *J.L. Simmons Co. v. United States*, 188 Ct. Cl. 684, 689, 412 F.2d 1360 (1969), stated at 1357:

“Performance specifications 'set forth an objective or standard to be achieved, and the successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, *selecting the means and assuming a corresponding responsibility* for that selection.' . . . Design specifications, on the other hand, describe in precise detail the materials to be employed and *the manner in which the work is to be performed*. The contractor has no discretion to deviate from the specifications, but is 'required to follow them as a road map.'” [Emphasis in original]

In accordance with the proposal of appellant and its subcontractor, appellant was to equip the PC-20A with electrical systems that would operate certain tasks and deliver certain information. Since the specifications are performance, there is no Government liability, absent appellant's proving that the Government's performance standards against which appellant's design was measured, were impossible or commercially impracticable to meet. *Engineering Technology Consultants, S.A.*, ASBCA No. 43600, 92-3 BCA ¶ 25,133 at 125,298. Appellant has presented no evidence or even argued that it made any attempt to equip the PC-20A with electrical equipment of less weight which would still perform to meet the specifications, or in any other respect proven that the specifications were impossible or commercially impracticable to meet (finding 15).

Further, we note that it is undisputed that appellant abandoned work under the purchase order, entitling the Government to default the purchase order (findings 5, 16). A default termination can be upheld on any ground which existed at the time of the contracting officer's decision. *Kelso v. Kirk Brothers Mechanical Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994).

Accordingly, the termination for default is upheld and the appeal is denied.

Dated: 28 August 2002

(Signatures continued)

I concur

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JEAN SCHEPERS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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

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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. 52134, Appeal of Aerobotics, Corp., rendered in conformance with the Board's Charter.

Dated:

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