

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Friedman Enterprises, Inc.) ASBCA No. 54886
)
Under Contract No. SPO750-04-V-H858)

APPEARANCE FOR THE APPELLANT: Mr. Wayne Friedman
President

APPEARANCE FOR THE GOVERNMENT: Vasso K. Monta, Esq.
Agency Counsel
Defense Supply Center (DLA)
Columbus, OH

OPINION BY ADMINISTRATIVE JUDGE JAMES
UNDER RULES 11 AND 12.3

This appeal arises from the contracting officer's (CO) October 2004 final decision that denied appellant's request to reinstate the captioned purchase order. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 607. The appellant elected the Board's Rule 12.3 accelerated procedures. The parties elected to submit the appeal on the written record pursuant to Board Rule 11. The Board's 25 February 2005 Scheduling Order established a 30 March 2005 deadline for evidentiary submissions. The government submitted declarations after that date and appellant responded to them. As discussed in a 12 May 2005 telephone conference, the Board has excluded all evidence submitted after 30 March 2005 from the record.

SUMMARY FINDINGS OF FACT

1. On 26 February 2004 the Defense Supply Center Columbus (DSCC) solicited quotations to be submitted by 11 March 2004, for quantities of 120 to 720 units of steel sprockets, National Stock Number (NSN) 3020-00-252-5637, in accordance with five specified drawings whose revisions were dated "03/02/89", "02/28/89", "02/28/01", "11/16/65" and "04/13/67", with a "REQUIRED DELIVERY DATE" of 20 September 2004 (R4, tab 1).

2. Appellant's 10 March 2004 quote to DSCC offered to sell the steel sprockets in the quantities solicited at the uniform unit price of \$189.00, with "DELIVERY DAYS . . . 90." To DSCC's two questions – "USED, RECONDITIONED, REMANUFACTURED, or FORMER GOV'T SURPLUS?" and "DUTY FREE ENTRY

REQUESTED?” the quote answered “NO.” To DSCC’s statement, “BY QUOTING BID WITHOUT EXCEPTION YOU HAVE STATED THAT THE SUPPLIES TO BE DELIVERED UNDER THIS SOLICITATION CONFORM TO ALL SPECIFICATIONS/ STANDARDS/DRAWINGS,” the quote stated “BID WITHOUT EXCEPTION,” and to DSCC’s statement, “BUY AMERICAN ACT – BALANCE OF PAYMENTS PROGRAM” the quote replied “DOMESTIC END PRODUCTS.” The quote did not mention a need to import sprockets from a foreign country. (R4, tab 2 at 1-2)

3. DSCC’S 12 March 2004 abstract listed six quotes on the foregoing solicitation. Appellant’s quote was 50.5% lower than the next low quote. The abstract stated:

CAGE 3BQS1 [appellant] FAILED PACE PRICING –
OUTSIDE ACCEPTABLE RANGE COMPARED TO
HISTORY (ADJUSTED FOR TIME/QTY) PRICE
REASONABLENESS DETERMINATION REQUIRED.

(R4, tab 3 at 1)

4. The 15 March 2004 e-mail from DSCC’s Paula Webb asked appellant to confirm its price and delivery terms and that the items quoted were “new/unused/non-surplus parts and conform to all specifications in the solicitation” and to provide “an informal cost breakdown or a quote from the manufacturer/distributor” (R4, tab 4). (Ms. Webb was the CO who later signed the resulting purchase order (R4, tab 7).)

5. Appellant’s 16 March 2004 e-mail to CO Webb stated:

I cannot provide documentation from the manufacturer or
authorized . . . distributor.

I can certify that the parts are in new condition, in original
manufacturer packaging, and that the packaging label
contains the name of Gibraltar [sic] Sprocket Company.

Appellant confirmed its \$189.00 unit price and “delivery of from 60 to 90 days.” (R4, tab 4)

6. CO Webb’s 17 March 2004 e-mail to appellant requested a “copy of the packaging label for verification.” Appellant’s e-mail to CO Webb on the same date stated: “Attached is a copy of the packaging label for NSN 3020-00-252-5637.” The Rule 4 tab with the foregoing e-mails contains another page, stating:

NSN 3020-00-252-5637
MPN 11637173
SPROCKET, WHEEL
1 EACH A7 79
PC 7804-35 / A-2756
GIBRALTAR SPROCKET CO.
PORT HURON MI USA

(R4, tab 5 at 1, 3) Notwithstanding CO Webb's 11 August 2004 Memo for File that stated that such packaging label was not sent to her, though she had requested it (R4, tab 15), DSCC CO Martha Sass' 8 September 2004 letter to appellant stated: "[T]he buyer [CO Webb] asked you to send a packaging label for verification, which was done by your fax of March 17, 2004" (R4, tab 17 at 1). The Board finds that CO Webb received that packaging label on 17 March 2004 and that the meaning of the number "A7 79" on its fourth line was not explained by any pre-award evidence in the record.

7. CO Webb's 18 March 2004 Pricing Memorandum determined that appellant's quoted price was "fair and reasonable" because "Contractor states they have over 700 of these in stock. The low price is due to having residual stock on hand that was obtained years ago" (R4, tab 6)

8. On 20 March 2004 DSCC issued Purchase Order No. SPO750-04-V-H858 (the PO) on DD Form 1155, JUN 94, for 240 steel sprockets at a \$189.00 unit price, for a total price of \$45,360.00, for delivery "90 DAYS APO." DD Form 1155 Block 6 identified Michael Steurer as "Local Administrator" for DSCC. Inspection and acceptance were to be at appellant's address in San Leandro, CA. The PO cited appellant's "offer dated 2004 MAR 10" and stated: "DELIVER FOB: DESTINATION BY: 2004 JUN 18" (which was 90 days APO). Block 16 was not checked for appellant to accept the PO, and appellant did not sign and date the PO in the spaces provided for acceptance. (R4, tab 7)

9. On 2 June 2004 Nick Quattrociocche of the Defense Contract Management Command, San Francisco, assigned to administer the PO, advised DSCC's Melanie Goad that appellant had stated that "these items are coming from the Netherlands" which required import licensing and State Department processing (app. supp. R4, tab 8). The record contains no evidence that Melanie Goad was a CO or provided the foregoing information to any DSCC CO.

10. Appellant's 13 June 2004 e-mail to DSCC's Michael Steurer -- who later identified himself as a "CO" (R4, tab 13) -- advised that "delivery [of the steel sprockets] will not be completed until four to six weeks past the contractually required due date." Appellant offered a \$1,200 price reduction to change the inspection from origin to destination and to extend delivery of the first 20 units to 30 June and of the balance to

30 July 2004. (R4, tab 9) CO Steurer became aware after 13 June 2004 that those steel sprockets were “of the Netherlands source” (R4, tab 17 at 1).

11. Appellant did not tender the steel sprockets for DSCC’s inspection and acceptance by 18 June 2004 (R4, tab 14). After 18 June 2004 DSCC did not encourage appellant to perform the PO.

12. Appellant’s 27 July 2004 e-mail to CO Steurer stated that the “parts” would be at a “bonded warehouse” in Edison, NJ, on 2 August 2004, or, if DSCC waived source inspection, the items could be delivered to the government’s designated destination at New Cumberland, PA on 1 and 3 August 2004 (R4, tab 10).

13. Appellant’s 28 July 2004 facsimile letter to CO Steurer stated that the product was “other than from its own stock,” that “[p]rior to award I [Friedman] discussed the source (U.S. or Netherlands) and the condition of the parts with Paula [Webb]” and “[f]ollowing the award, I [Friedman] learned that to import the product required my company to register as an importer of U.S. Munitions Import List Articles and obtain a Permit for Importation of Firearms, Ammunition and Implements of War from the Department of the Treasury” and “the approval of the U.S. Department of State.” After delays to secure such permit, appellant was able to deliver the parts. The letter contained copies of the 15-17 March 2004 e-mails described in findings 4-6. (R4, tab 11)

14. CO Steurer’s 2 August 2004 e-mail to appellant stated:

I received the fax you sent dated July 28, 2004 regarding subject order [SPO750-04-V-H858]. I left you a voice mail indicating that the material offered is not acceptable. The date of manufacture can not be determined. The origin of material is not a domestic small business. The order will be cancelled based on the above factors.

Appellant’s 2 August 2004 e-mail to CO Steurer stated that the date and source of the material could be determined from the label sent on 28 July 2004. The CO’s later 2 August 2004 e-mail to appellant stated:

The material offered is 10 years older than the current drawing requirements.

The material is surplus and no technical evaluation was performed prior to award. The material has no commercial application, so any surplus must be government surplus. How did the material get overseas? Your offer does not

indicate material is government surplus from an overseas source. All a mute [sic] issue because the material does not meet current drawing requirements.

These factors justify cancellation.

(R4, tab 13)

15. On 4 August 2004 CO Steurer issued unilateral Modification No. P00001 to the PO, stating:

The above cited purchase order was an offer to purchase the supplies described therein provided that delivery was made by 06/18/2004. Since that date was not met, the Government's offer to purchase has lapsed. No deliveries will be accepted by the Government under this order for the following CLIN(s): CLIN 0001 NSN/Part Number 3020-00-252-5637 From Quantity 240 To Quantity 0.

(R4, tab 14)

16. On 2 and 6 August 2004 appellant for the first time asserted that on or about 13 June 2004 CO Steurer had agreed to change source inspection to an alternate address on the East Coast and to accept consideration for late delivery of the sprockets several weeks after 18 June 2004. Appellant disputed CO Steurer's 2 and 4 August 2004 statements, requested his supervisor to reinstate the PO and to permit delivery of the items to the destination at New Cumberland, PA, and concluded: "If you are unable or unwilling to reinstate the order, please provide me with instructions on how to file an appeal and or protest." (R4, tab 16) CO Steurer's supervisor by e-mail told appellant that she concurred with CO Steurer's actions (R4, tab 17).

17. On 4 October 2004 CO Sass issued to appellant a final decision denying its claim to reinstate the lapsed PO.¹ She stated that appellant "did not deliver conforming material by the required delivery date." (R4, tab 18) Appellant timely appealed to the ASBCA from that final decision by a notice of appeal postmarked 3 January 2005.

¹ The CO's final decision stated that appellant sought compensation of its expenses incurred in purchasing material under the PO, and cited letters to "Admiral Linda Bird and Mr. Steven Searcy." The appeal record contains no request by appellant for compensation of expenses to purchase material nor letters to Admiral Bird or Mr. Searcy.

DECISION

Appellant's 6 August 2004 e-mail statements to the CO's supervisor were a written request for adjustment of contract terms or other relief in which appellant disputed and sought to appeal CO Steurer's 2 and 4 August 2004 statements including Modification No. P00001 (finding 16). Thus, there was a claim under the CDA. *See* FAR 2.101; *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995).

A purchase order such as this PO is an offer by the government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the order, by furnishing the supplies or services ordered or by proceeding with the work to the point of substantial performance prior to the due date. *See* FAR 13.004(a), (b).

Appellant seeks the Board to order DSCC to "withdraw the cancellation" (app. br. at 8). Since DSCC did not cancel the PO as such, appellant in effect seeks the Board to reinstate the PO. The Board has no authority to do so. *See Alsace Industrial, Inc.*, ASBCA No. 51709, 99-1 BCA ¶ 30,227 at 149,542-43 n. (no authority in the nature of specific performance to order an agency to reinstate a lapsed, unilateral PO). The Board does, however, have jurisdiction to determine whether a unilateral PO ripened into an obligation binding on the offeror (DSCC), *i.e.*, whether appellant accepted the offer. *See ITT Defense Communications Division Space Group*, ASBCA No. 13420, 69-1 BCA ¶ 7458 at 34,953.

Appellant did not tender the steel sprockets by 18 June 2004, the original date set in the PO for inspection and acceptance by DSCC (findings 8, 11). Assuming, *arguendo*, that as appellant asserted on 2 and 6 August 2004, CO Steurer agreed with appellant's 13 June 2004 offer of a \$1200 price reduction to extend the PO delivery dates for the first 20 units to 30 June 2004 and the balance to 30 July 2004, appellant did not tender the first 20 sprockets by 30 June nor the balance by 30 July 2004, but instead notified CO Steurer that the items would be in Edison, NJ on 2 August 2004, or in New Cumberland, PA on 1 and 3 August 2004 if he waived source inspection (finding 12). Thus, appellant did not tender the supplies by the original or the allegedly extended delivery dates.

If complete performance in accordance with the terms and conditions of a PO is not tendered, the government's offer lapses by its own terms, rendering the PO incapable of being accepted by a contractor. *See Rex Systems, Inc.*, ASBCA No. 45301, 93-3 BCA ¶ 26,065 at 129,565. After 18 June 2004 DSCC did not encourage appellant to perform the PO (findings 11, 14-15). In such circumstances appellant bears the costs of non-performance. *See Alsace Industrial, Inc.*, ASBCA No. 51709, 99-1 BCA ¶ 30,227 at 149,542.

Appellant argues that Mr. Friedman told CO Webb before the PO was awarded that the sprockets he quoted were in The Netherlands and were manufactured in July 1979, and so DSCC waived its right to cancel the PO on the grounds of non-conformity of the sprockets (app. br. at 3-5). The record evidence does not substantiate those assertions (findings 4-7), and DSCC's Modification No. P00001 did not cancel the PO, but rather stated that the PO had "lapsed" due to non-delivery of the supplies (finding 15), so appellant's argument fails.

Moreover, one cannot determine whether appellant's sprockets conformed to the PO requirements, since they were not tendered for inspection. As distinguished from undocumented hearsay "that there were no changes to form, fit or function after 1979" (app. br. at 5), appellant presented no credible evidence to show how the sprockets, manufactured in July 1979, could have conformed to the specified drawing revisions dated 2 March 1989, 28 February 1989 and 28 February 2001 (finding 1). The CO's final decision was proper for this additional reason.

Appellant argues that its delay to tender the sprockets was excusable since the Treasury and State Departments delayed issuance of an import license (app. br. at 6-7). An excusable delay must be beyond the control and without the fault or negligence of the contractor. FAR 49.401(b). Appellant's delay to obtain an import license for the sprockets located in The Netherlands arose from its failure to ascertain the time it needed to import those sprockets before submitting its quote (finding 13), which did not state a need to import sprockets (finding 2). Thus, such delay was not excusable.

Accordingly, for the foregoing reasons, the appeal is denied.

Dated: 3 June 2005

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continue)

I concur

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. 54886, Appeal of Friedman Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals