

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
New Era Contract Sales, Inc.) ASBCA No. 56204
)
Under Contract No. SPM740-04-D-5G61)

APPEARANCE FOR THE APPELLANT: Mr. Larry Ramirez
President

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

OPINION BY ADMINISTRATIVE JUDGE DICKINSON
ON RESPONDENT’S MOTION FOR SUMMARY JUDGMENT

This appeal arises under Indefinite Delivery Purchase Order (IDPO) No. SPM740-04-D-5G61 for the supply of coupling tubes used on certain aircraft and helicopters. On 13 August 2007 the Defense Supply Center Columbus (“DSCC” or government) terminated the IDPO for default for the failure of New Era Contract Sales, Inc. (“New Era” or appellant) to deliver coupling tubes required by a 29 June 2006 delivery order. New Era appealed from the termination for default, alleging that its failure to deliver was excused because the new owner of its supplier refused to honor its quote. DSCC has moved for summary judgment on the basis that the undisputed reason for New Era’s failure to deliver is not excusable as a matter of law. New Era opposes the motion. The record for purposes of the motion consists of the pleadings and attachments thereto and the Rule 4 file as supplemented by DSCC on 3 March 2009.¹

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 29 March 2004 DSCC issued a solicitation for NSN 4730-00-0009-3386, described as “CRITICAL APPLICATION ITEM COUPLING, TUBE. STEEL MATERIAL, SWAGED, ½ IN. OD TUBE SIZE, USED ON F-16 AIRCRAFT AND MODEL H53 HELICOPTER.” The solicitation listed five sources for the part: Stanley

¹ New Era’s 27 September 2007 notice of appeal and the thirteen documents attached to it served as New Era’s complaint. New Era has filed two 3-page documents dated 8 February 2008 relating to the motion and the government’s answer. We refer to the one including a section labeled “ARGUMENT” as “app. opp’n.” We refer to the other one as “app. reply.”

Harrison Corporation (08199 P/N H10036-08); Deutsch Company Metal Components; McDonnell Douglas Corp; The Boeing Company; and Lockheed Martin Corporation. (R4, tab 3)

2. On 6 April 2004 New Era obtained a price and delivery quote from Stanley Harrison² for a unit price of \$14.55-each for quantities of 462-925 and \$13.17-each for quantities of 926-2774. The quoted lead time for delivery was 16 weeks. (Compl. ex. B)

3. On 10 July 2004 IDPO No. SPO740-04-D-5G61 was issued to New Era (R4, tab 1). The IDPO contained the following pertinent terms and conditions:

NOTICE: This is an offer for an Indefinite Delivery Purchase Order (IDPO) contract for a period of one year, with 1 one-year options, [sic] for the item of supply listed in the solicitation item description.^[3]

....

(b) The estimated annual demand quantity for the item of supply is 1868. This is an estimate only and is not purchased by this contract.

(c) This IDPO order contains the terms and conditions of the contract, [sic] It is an offer by the Government to order at least the minimum quantity of supplies (2020 EA) as stated in the first delivery order. The contractor shall furnish to the Government, when and if ordered, the supplies specified in Section B up to an aggregate dollar value of all orders, including the initial order equal to the simplified acquisition threshold of \$100,000 (FAR 52.216-22 Indefinite Quantity).

(d) Such orders may be issued from 10-JUL-04 to 06-JUL-06 (FAR 52.216-18 Ordering).

(e) There is no limit on the number of orders that may be issued during the contract period. The Contractor is obligated to honor individual orders for quantities covered by the incremental quantity ranges specified in Section B.... For

² While New Era's request for a quote was addressed to Stanley Harrison, the quote was faxed back to New Era from "Sierr[a]cin/Harrison" (compl. ex. B).

³ On 10 June 2005 the one-year option was exercised in Modification No. P00001 extending the IDPO period from 10 July 2005 to 11 July 2006 (R4, tab 14).

informational purposes only, and without any obligation, the Government anticipates 1 orders [sic] per year.

....

(h) The contractor's method of accepting the IDPO contract (for the first delivery order and all follow-on orders) is their performance of the first delivery order.

(i) If the contractor accepts the Government's IDPO offer by furnishing the supplies in the first delivery order, an IDPO contract is formed and the contractor agrees to honor additional orders at the price quoted for the quantity range that will cover the total quantity on the order (regardless of destination). Failure to make timely delivery on a follow-on order may therefore result in contractor liability to the Government under the terms of the Default Clause at FAR 52.249-8.

(R4, tab 1) (emphasis in original) The IDPO's firm fixed-price per item for both the base year and the option year was \$13.77⁴ (quantities of 462-925), \$13.60 (quantities of 926-2774), \$13.40 (quantities of 2775-4623) and \$13.35 (quantities of 4624-22192) (R4, tabs 1, 4). The IDPO did not contain an escalation clause providing for adjustment in the IDPO price for increases in the cost of performance due to an increase in the cost of material.

4. On 11 July 2004 Delivery Order No. 0001 was issued for a total quantity of 2020 coupling tubes to be delivered to four locations (R4, tab 5). New Era delivered 2020 coupling tubes in accordance with the terms of Delivery Order No. 0001 (R4, tab 6).

5. FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984), referenced in the IDPO, provided:

(a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to--

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

⁴ There is no explanation in the record for why the contract price for quantities of 462-925 is less than the cost quoted by Stanley Harrison (*see* SOF ¶ 2).

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

....

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

6. On 1 April 2006 DSCC issued a modification that changed the IDPO number from "SPO" to "SPM," due to the implementation of DSCC's Business Systems Modernization program. The modification made no substantive changes to the IDPO. (R4, tab 7)

7. On 29 June 2006 Delivery Order No. 0001⁵ was issued under the changed IDPO No. SPM740-04-D-5G61 for 741 parts to be delivered to two locations by 21 November 2006 (R4, tab 2).

8. New Era alleges that on 30 June 2006 it issued a purchase order for the required parts and was advised by Eaton Corporation, new owner of Stanley Harrison, that it would “not honor the two-year pricing from our original quote from Stanley Harrison. Further, they direct[ed] us to submit pricing requests to their distributor, Herber Aircraft Services” (compl. ¶ 11). New Era has not provided any documentation to support this allegation, however DSCC has not disputed the allegation and, for purposes of the motion, we accept it as true. New Era also alleges, and we accept for purposes of the motion, that “all other sources cited in the contract did not have stock and insisted that the product was produced on an as needed basis” (app. reply ¶ 3).

9. On 5 July 2006 New Era faxed to DSCC a request that DSCC “cancel the basic IDPO and call 0001[A] in its entirety with no liability to either party. The manufacturer has decided that they will no longer hold there [sic] IDPO pricing because of the increase in metals.” (Compl. ex. F) The government avers that this document is not in the contract file, but accepts “it as true” for purposes of the motion (gov’t mot. at 2). There is no indication in the record that DSCC ever responded to New Era’s request.

10. Eight months later, on 6 March 2007, DSCC advised New Era by e-mail that Delivery Order No. 0001A “was on the Jan 22, 2007 delinquent deliveries list. CDD was 11/21/2006. We have many backorders for this part.” DSCC requested a revised delivery date. New Era responded immediately by e-mail that “[b]ack on 07/05/2006, Diane sent a cancellation request to Gary Meyer/Cary Bryant for this delivery order and the basic contract. We are unable to accept the order because of the increase in the cost of metals used on these parts.” (Compl. ex. F1)

11. On 20 March 2007 New Era’s request for cancellation of the basic IDPO and Delivery Order No. 0001A was denied by the contracting officer in a letter and New Era was advised that continued failure to provide the parts could subject it to termination for default under FAR 52.249-8 (compl. ex. G).

12. On 22 March 2007 New Era received a quote from Herber Aircraft Service for the parts at a unit price of \$45.43 each and delivery of 27 weeks. New Era then passed the information on to DSCC with a request for an increase in the IDPO price and delivery time for Delivery Order No. 0001A . “The original supplier has been bought out and they are not honoring any contracts that were in place at the time of purchase...” (Compl.

⁵ “Although this was the second delivery order, it was identified as 0001 because of the systems change” (gov’t mot. ¶ 6). We will hereafter refer to this second delivery order as Delivery Order 0001A.

ex. H) New Era has offered the bare assertion that “[i]n researching other options, we found that one, the material was not available at a reasonable price and two, [] it could not be obtained in [sic] timely manner to insure contract delivery compliance” (app. opp’n at 1 (¶ 11), 2 (¶ 3)).

13. On 10 April 2007 the DSCC contracting officer offered to extend the 29 June 2006 delivery order to purchase 741 coupling tubes in exchange for consideration from New Era in the form of a \$510.18 reduction in price and a firm delivery date; the contracting officer also stated that failure to respond would result in a modification withdrawing the order because the government’s offer to purchase was not accepted in accordance with its terms (R4, tab 8 at 1). New Era declined DSCC’s proposal by fax on the same day by asking DSCC to “Please cancel order. We cannot supply parts” (R4, tab 8 at 2).

14. On 10 May 2007 DSCC denied New Era’s request for cancellation of the delivery order and advised that continued failure to deliver the parts could result in termination for default. The letter again requested a revised delivery date “[a]s this stock is still required” (R4, tab 9).

15. On 21 June 2007 the DSCC contracting officer advised New Era that termination for default under FAR 52.249-8 was being considered and gave New Era an opportunity to present in writing any facts bearing on the question of whether New Era’s failure to perform “arose out of cause [sic] beyond your control and without fault or negligence on your part” (R4, tab 10).

16. New Era responded to DSCC on 22 June 2007:

Per your request, we are submitting the following information and documentation to demonstrate that we were not negligent in our non-performance and that the circumstances which led to our non-performance were beyond our control.

On 03/30/2004, we received two year pricing from the cited source (Sierracin Harrison Corp) for P/N H10036-08.... We used that pricing to determine our price to you for the two year contract you wished to issue. At the time of delivery order 0001 (against contract SP0440-04-D-5G61) which was issued on 07/10/2004, we were able to get material from Sierracin Harrison Corp using their price quote.

The next delivery order (on contract SPM440-04-D-5G61) was placed on 06/29/2006. At the time of the order, we placed our order with Sierracin Harrison Corp but were told

that they had been purchased by another company during this time frame (they were purchased by Stanley Aviation, cage 08118 which was in turn bought by Eaton Aviation). We were told that we would need to purchase our parts through Eaton Aviation's distributor (Herber Aircraft) and that they would not honor the pricing given by Sierracin Harrison Corp. [The] current quote...from Herber Aircraft [is] at \$45.43 per unit. They have stated that the increase is due to the exorbitant rise in titanium costs as well as an internal evaluation done by Eaton which determined that Sierracin Harrison Corp had drastically under priced this part.

We notified DSCC on 07/05/2006 that we would be unable to perform on this contract so that you would have time to re-procure before the parts became back ordered.... Unfortunately, as a small business, I am not in a position to absorb a \$23904.66 loss. I cannot hold Sierracin Harrison Corp accountable as they no longer exist.

(R4, tab 11)

17. By letter dated 13 August 2007 and modification dated 10 October 2007 DSCC terminated the IDPO and second delivery order for default under FAR 52.249-8 for "failure to continue performance" (R4, tabs 12, 13).

18. On 5 October 2007 the Board docketed New Era's appeal from the termination for default.

DECISION

The government bears the burden of proving that its termination of the IDPO for default was a reasonable exercise of its discretion. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987); *Darwin Constr. Co. v. United States*, 811 F.2d 593, 596-97 (Fed. Cir. 1987); *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996). DSCC argues that there are no disputed material facts and it is entitled to judgment as a matter of law because New Era's refusal to perform unless it was granted a price increase was an anticipatory repudiation of the contract justifying the termination for default (gov't mot. at 3-4). New Era argues that its failure to supply the coupling tubes was excusable under FAR 52.249-8(d).

We evaluate the government's motion for summary judgment under the well-settled standard that summary judgment is properly granted only where the moving

party has met its burden of establishing the absence of any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-moving party must then set forth specific facts showing the existence of a genuine issue of material fact for trial; conclusory statements and bare assertions are insufficient. *Id.* at 1390-91; *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). All significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus, supra*, 812 F.2d at 1390.

Under the terms of the IDPO, once New Era performed under the first delivery order, it was obligated to perform each successive delivery order up to the “aggregate dollar value of all orders, including the initi[al] order equal to the simplified acquisition threshold of \$100,000” (SOF ¶ 3). New Era performed under the first delivery order of the IDPO (SOF ¶ 4), thereby creating a contract to honor subsequent delivery orders up to the \$100,000 maximum contract price. On 10 June 2005, DSCC exercised the option for an additional year of performance from 10 July 2005 through 11 July 2006 (SOF ¶ 3, n. 2). On 29 June 2006 DSCC initiated the second delivery order under the IDPO with a required delivery date of 21 November 2006 (SOF ¶ 8). New Era contacted its supplier and was informed that the price quoted by Stanley Harrison, the original supplier, would not be honored (SOF ¶ 9). New Era immediately requested DSCC cancel the IDPO and the second delivery order (SOF ¶ 10).

It is well-established that, under the terms of the firm fixed-price IDPO and in the absence of an escalation clause, New Era accepted the risk of increased prices. *Spindler Constr. Corp.*, ASBCA No. 55007, 06-2 BCA ¶ 33,376 at 165,462-63. New Era’s 5 July 2006 unequivocal refusal to perform under Delivery Order No. 0001A months before the 21 November 2006 delivery date was an anticipatory repudiation which would have justified its termination for default at that time. *United States v. DeKonty Corp.*, 922 F.2d 826, 828 (Fed. Cir. 1991); *C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et al.*, 04-1 BCA ¶ 32,568 at 161,140; *CCB Industries, Inc.*, ASBCA No. 48009, 96-2 BCA ¶ 28,414 at 141,902. However, the government still needed the parts and offered to purchase them for consideration in the form of a price reduction and a new firm delivery date (SOF ¶¶ 11, 14, 15). New Era continued to refuse to provide the parts and the 21 November 2006 delivery date in Delivery Order No. 0001A came and went. The government then terminated the IDPO and the delivery order for default (SOF ¶ 18). New Era’s failure to make timely delivery of the parts establishes a *prima facie* case of default. *General Injectables & Vaccines, Inc. v. Gates*, 519 F.3d 1360, 1363 (Fed. Cir. 2008).

The burden then shifts to New Era to demonstrate that its failure to deliver the parts was excusable. *Id.* New Era argues that its refusal to perform was excusable under

FAR 52.249-8(d) because the price increase at issue was due to no fault of its own or its supplier:

[O]ur request for cancellation was caused by the default of a subcontractor caused by new ownership's refusal to honor the subcontractor's original quote to us, prior to takeover and is not based on inflationary price increases. The refusal to honor the original quote is beyond the control of our firm and the manufacturer we intended to use. It is obviously not the fault or negligence of either.

(App. opp'n, ARGUMENT ¶ 3) While New Era argues now that inflationary price increases were not the cause of its supplier's refusal to honor its quoted prices, its own contemporaneous documentation shows otherwise (*see* SOF ¶¶ 10, 11, 17).

The use of the phrase "beyond its control and without its fault or negligence" as used in FAR 52.249-8(d), has been interpreted to mean that the party alleging the excuse must "prove that it took all reasonable action to perform the contract notwithstanding the occurrence of the excuse." *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 408 (Ct. Cl. 1978). The undisputed facts fail to raise a material issue of fact that either New Era or its chosen supplier or its successor were actually unable to provide the 741 coupling tubes ordered in the second delivery order. Rather the record shows that both New Era and its chosen supplier elected not to provide the parts at what they deemed to be a disadvantageous price (SOF ¶¶ 10, 17), thereby failing to honor the agreed contract terms of price and delivery. While both New Era and its supplier may elect to make such business decisions, those decisions are well within their control and carry with them consequences for New Era under the IDPO contract, in this case the specific consequences contained in the FAR 52.249-8(a)(1) default clause for failure to meet the contractual delivery date. Because New Era has failed to offer credible evidence of an actual inability to deliver coupling tubes by itself or its supplier, the question of whether the coupling tubes were available from other suppliers is immaterial to our decision.

CONCLUSION

As a matter of law, looking at the record in the light most favorable to New Era and drawing all inferences in its favor, we grant the government's motion for summary judgment and deny the appeal.

Dated: 23 April 2009

DIANA S. DICKINSON
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. 56204, Appeal of New Era Contract Sales, Inc., rendered in conformance with the Board's Charter.

Dated:

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