

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Commwise, Inc. Joseph Wetzel d/b/a Avetel) ASBCA No. 56580
)
Under Contract No. N00189-07-P-1582)

APPEARANCE FOR THE APPELLANT: Mr. William Wisely
Chairman

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Davis Young, Esq.
Assistant Counsel
Fleet Industrial Supply Center
Norfolk, VA

OPINION BY ADMINISTRATIVE JUDGE STEMLER
ON THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT
OR TO DISMISS FOR LACK OF JURISDICTION

This appeal arises from a contracting officer’s final decision rescinding an earlier decision terminating appellant’s contract for cause.¹ The earlier termination decision arose from a Request for Quotations (RFQ) and unilateral purchase order for copper cable. The government moves for summary judgment or, in the alternative, for dismissal for lack of jurisdiction arguing that the government never had a contract with appellant.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 13 August 2007, NAVFAC Mid-Atlantic sent a procurement request form to the Navy’s Fleet and Industrial Supply Center, Norfolk (FISC), for two items. Item 0001 was 3000 feet, in 2 rolls, of “Cable, 350MCM copper.” Item 0002 was 1 reel containing 250 feet of “Cable 2/0 copper for 15000 volt ... Cable shall be UNSHIELDED” (emphasis in original). FISC conducted the procurement on behalf of NAVFAC using the Simplified Acquisition Procedures contained in Part 13 of the Federal Acquisition Regulations (FAR). FISC created a pre-solicitation notice for

¹ A decision in this appeal was originally issued on 6 August 2009, dismissing the appeal for lack of jurisdiction. By Order dated 12 August 2009, the Board, *sua sponte*, vacated and recalled the decision.

publication in FedBizOpps². The pre-solicitation notice provided interested vendors with instructions on how to obtain a copy of prospective RFQs. The pre-solicitation notice listed the two types of desired cable. The first type of desired cable was mistakenly listed as “Cable, 250MCM copper,” instead of 350MCM copper cable. The second type of desired cable was listed correctly as “2/0 copper,” however, whether the cable was to be “shielded” or “unshielded” was not called out. Emanuel Clemons, Contract Specialist, and Maria Swift, Contracting Officer, were listed as the officials to contact regarding obtaining a copy of the prospective RFQ. (R4, tabs 6, 7)

2. Solicitation No. N00189-07-T-0511, dated 28 August 2007, was issued as a RFQ with the listing of the two types of desired cable. Item 0001 listed the correct specifications for two reels, 1500 feet each, of “Cable, 350MCM copper” and item 0002 was also listed correctly for 1 reel of 250 feet “cable, 2/0 copper ... unshielded.” (R4, tab 8)

3. On 6 September 2007, Commwise, Inc. (Commwise) submitted a quotation via e-mail (not on Standard Form 1449) in response to the RFQ. Appellant quoted on both items 0001 and 0002. The quote stated in pertinent part: “[t]he vendor has confirmed that they have read the entire solicitation and have provided the information that was requested.” However, the item 0001 description in the quote was: “[g]eneral cable, 250kcmil 15kv 133% unblend, cable to [sic] on 2 reels ...” The item 0002 quote was for “General Cable, 2/0 AWG 15kv 133 unblend cable” and did not specify whether it was “shielded” or “unshielded.” The quote added a shipping cost of \$900. (R4, tab 9)

4. In early September 2007, Mr. Clemons contacted Mr. Joseph Wetzel of Commwise to inquire as to the bid pricing submitted by Commwise and to confirm the amount. Mr. Clemons also requested that Commwise submit its quote on a Standard Form 1449. Mr. Wetzel confirmed the quoted pricing and also informed Mr. Clemons that Commwise’s e-mail address had changed. (R4, tab 3; answer ¶ 4)

5. On 11 September 2007, Commwise electronically signed and submitted its quote for item 0001 in the amount of \$21,360.00 (\$20,910.00 plus \$450.00 shipping) and item 0002 for \$1,592.50 (\$1,142.50 plus \$450.00 shipping), for a total of \$22,952.50. The quote was submitted using Standard Form 1449. The signed quotation contained the listing for item 0001 as “Cable 350MCM copper” and item 0002 as “cable, 2/0 copper ... unshielded.” (R4, tab 10)

6. On 15 September 2007, the government issued Unilateral Purchase Order No. N00189-07-P-1582 for both items 0001 and 0002 specifying “Cable 350MCM copper” for item 0001 in the amount of \$20,910.00, and “Cable 2/0 copper” for item 0002 in the

² FedBizOpps is the government’s “one stop virtual marketplace” where commercial vendors and government buyers are invited to post solicitation opportunities with the Federal Contracting Community. See <https://www.fbo.gov>.

amount of \$1,142.50 to appellant. Item 0003 was \$900 for shipping. The purchase order listed “Commwise, Inc. Joseph Wetzel d/b/a Avetel” as the offeror with a required delivery date of 2 October 2007. Commwise was not required to provide written notice of acceptance. The government sent the purchase order to Commwise’s outdated e-mail address. As a result, it was not received by Commwise. (R4, tabs 2, 3, 11)

7. More than a month after the purchase order’s delivery date, on 5 November 2007, NAVFAC contacted Commwise to inquire about delivery. Commwise advised NAVFAC that it had not received a copy of the purchase order. That same day, Commwise contacted FISC regarding the purchase order and FISC resent the purchase order the following day. (R4, tabs 3, 11)

8. On 15 November 2007, Commwise delivered two rolls of 250MCM copper cable to NAVFAC. The government rejected the cable as non-conforming to item 0001 and asked that Commwise take the cable back and furnish the 350MCM cable. Commwise contends that its supplier would not accept return of the cable as it had been cut to non-standard length. (R4, tab 3) On or about 16 November 2007, Commwise delivered 2/0 copper cable for item 0002. The government rejected the 2/0 cable because it was “shielded” instead of the required “unshielded” and therefore did not conform to the specifications. The government requested appellant to retrieve the nonconforming cable, but to date, appellant has not. (Stip. 2-4)³

9. On 15 November 2007, Commwise invoiced the government in the amount of \$22,952.50 for the tendered cable under both items 0001 and 0002 along with the shipping costs. The government, contending that the cable was nonconforming, has not paid the invoice. (Stip. 5; compl. at 7 (attached invoice)).

10. According to the record before us, Commwise has not delivered any other cable to the government (R4, tab 3; stip. 4).

11. Contracting Officer Maria Swift issued a final decision dated 10 April 2008, terminating the entire contract for \$22,052.50 for cause pursuant to FAR 52.212-4(m) CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (FEB 2007). Given that the contract amount was \$22,952.50, the contracting officer apparently deducted the \$900 shipping charge from the amount for the items in her final decision. The final decision specifies that the item 0001 cable had been rejected as nonconforming. It does not specify why item 0002 was rejected. (R4, tab 1) Commwise wrote to the government, by letter dated 12 June 2008, apparently in response to the government’s termination decision. Commwise stated it “submits this appeal on the following grounds” and contended that its mistake in tendering the 250MCM cable, instead of the 350MCM

³ At the Board’s request, the parties have made certain stipulations of fact. We have adopted several stipulations in part.

cable, stemmed chiefly from the government's error in the pre-solicitation notice. Commwise also maintained that the government should have alerted them to the change from 250MCM to 350MCM in the RFQ. In addition, Commwise asserted that the government should have noticed, because of the low price, that Commwise's bid was for the less costly 250MCM cable. In regard to the termination for cause, Commwise wrote:

On April 10, 2008 the Navy sent an official Termination for cause letter canceling the order. The letter simply states that the Navy ordered 350MCM cable and Commwise tendered 250MCM cable and requested we remove it from the Navy's facility.

(R4, tab 3)

12. By letter dated 1 July 2008, Commwise timely appealed the termination decision (R4, tab 4). The appeal was docketed as ASBCA No. 56450.

13. By final decision dated 17 July 2008, and in response to Commwise's request that she reconsider her decision, Contracting Officer Swift rescinded her 10 April 2008 final decision. Ms. Swift concluded that because there was no contract between the parties, it was improper for the government to have issued the original decision:

I have closely re-examined the procurement record in the contract file and reconsidered the decision to terminate contract N00189-07-P-1582 for cause. The purpose of this letter is to ... notify you that I have rescinded the termination for cause because I have determined that a contract was never established.

The decision concluded with appeal rights language. (R4, tab 5) Commwise timely appealed on 23 September 2008. The appeal was docketed as ASBCA No. 56580.

14. By motion dated 8 October 2008, the government moved to dismiss ASBCA No. 56450 as moot. With the concurrence of appellant, ASBCA No. 56450 was dismissed (unpublished) from the Board's docket on 12 November 2008. ASBCA No. 56580, appellant's appeal from the 17 July 2008 final decision, remained on the Board's docket and is the subject of the government's motion now before us.

15. The parties in their joint stipulation state in part:

Appellant's claim is a 12 June 2008 letter to the contracting officer requesting reconsideration of the contracting officer's 10 April 2008 Termination for Cause. The Navy considered

Appellant's 12 June 2008 letter to be a written demand submitted to the contracting officer seeking "other relief arising under or related to a contract" per 41 U.S.C. 605(a) and FAR 2.101. The contracting officer's final decision dated 17 July 2008 ... was the Navy's response to appellant's 12 June 2008 claim.

(Stip. 6)

DECISION

The government has moved the Board to grant summary judgment in its favor, or in the alternative, dismiss the appeal for lack of jurisdiction arguing that the Navy does not have a contract with Commwise. In the joint stipulation of fact, the government states that its 17 July 2008 final decision was in response to Commwise's 12 June 2008 claim, asking the government to reconsider its decision to terminate for cause. Upon reconsideration of its termination decision, the government concluded that the purchase order was a unilateral contract that lapsed when Commwise failed to accept the contract by delivering conforming goods, therefore, no contract was ever established.

Commwise counters that it failed to deliver the conforming goods, namely the 350MCM copper cable, because it was misled by the government. First, the pre-solicitation notice had the wrong description for item 0001 which the government never pointed out to Commwise. Second, the government should have known that Commwise's quote was for the less expensive 250MCM cable. No evidence is in the record to support this contention.

Summary judgment is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). There are no material facts in dispute. Appellant's 11 September 2007 quote contained the correct specifications (SOF ¶ 5). The government's unilateral purchase order (its offer) contained the correct specifications (SOF ¶ 6). Commwise was required to deliver items conforming to the specifications in its quote and the government's offer. Appellant delivered non-conforming items to the government. In circumstances such as present here, we have held that the government's purchase order is an offer to enter into a unilateral contract. Commwise's substantial performance in attempting to supply the items created an "option contract", and obliged the government to keep the offer open until the date specified for delivery, or in the absence of such a date, for a reasonable time. This offer could have been accepted by Commwise by delivery of conforming goods. When Commwise delivered non-conforming goods, the offer lapsed by its own terms and Commwise was responsible for the costs of non-performance. *See, Comptech Corp.*, ASBCA No. 55526, 08-2 BCA ¶ 33,982 at 168,082-84.

CONCLUSION

The government is entitled to summary judgment as a matter of law. The motion for summary judgment is granted. The appeal is denied.

Dated: 13 August 2009

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

I concur

I concur

ALEXANDER YOUNGER
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

OWEN C. WILSON
Administrative Judge
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. 56580, Appeal of Commwise, Inc. Joseph Wetzel d/b/a Avetel, rendered in conformance with the Board's Charter.

Dated:

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