

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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American AquaSource, Inc.) ASBCA No. 56677
)
Under Contract No. W91GDW-08-D-4010)

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Washington, DC

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT Tudo Pham, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON APPELLANT’S MOTION FOR SUMMARY JUDGMENT

This appeal arises from the termination of a commercial items contract for cause for failure to deliver. American AquaSource, Inc. (AAS) moves for summary judgment, alleging that the government waived the delivery date. Alternatively, AAS argues that, if the termination is construed to be “for a reason other than late delivery,” it was procedurally defective because the government failed to issue a cure notice as required by FAR 12.403-(c)(1). The government opposes the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 18 March 2008, the United States Army, acting by and through the Joint Contracting Command – Iraq/Afghanistan (government), issued a request for proposals (RFP) for an indefinite delivery/indefinite quantity commercial items contract to provide all supplies and personnel necessary to produce, bottle, palletize, and issue purified bottled water at Logistics Staging Area (LSA) Adder, Tallil, Iraq (R4, tab 4 at 1). Minimum inventories were to be in place by 1 August 2008 (R4, tab 4, ¶ 4.1). The RFP contemplated one 12-month base year and two 12-month option periods (R4, tab 1 at 14 of 37).

2. The Statement of Work (SOW) provided, in part, as follows:

11.2 The Government will provide land within a secure military base for the purpose of setting up and operating the required production facility and water storage yard....

11.3 Base support, as available, to include billeting/quarters, messing facilities, AAFES Post/Base Exchange, banking, check cashing, currency exchange, commissary, theater, laundry, gymnasium, Morale Welfare and Recreation facilities and activities commensurate with that afforded Government employees and military personnel. All contractor personnel are to be provided living space comparable to that provided to military and DoD civilians. In the short term, that may be a tent with cots and shower and toilet facilities. As base improvements continue, contractors will be moved along with the military personnel into living containers or hardstand buildings and assigned quarters based on grade.... No contractors in theater will be billeted off of a US secure facility.

(R4, tab 1, attach. J-1 at 9 of 16)

3. On 3 April 2008, AAS submitted its pricing and technical proposals (R4, tab 7). AAS offered to provide the water for \$2.97 per case (R4, tab 7, revised pricing proposal at 56 of 56). The technical proposal included the following relevant provisions:

6.1 Proposed Timeline

[Construction of the water bottling plant (site survey and site preparation) was scheduled to begin the week of 12 May 2008. The last construction activity (plumbing completion) was scheduled to be completed the week of 14 July 2008. The initial inventory of laydown goods from a 3rd party was also scheduled for the week of 14 July 2008].

14.0 Footprint (production & housing)

We are planning a 35,000 square foot facility.... We will arrange for a regional contractor to prep the ground and pour the concrete pad for the building according to conditions.

....

16.0 Contingency Plan

...In the first quarter of the contract, we are buying bottled water from a Centcom approved supplier in order to commission the plant in a timely fashion [and] meet the deadline for opening.

(R4, tab 7 at 9, 14, 15)

4. The government awarded Contract No. W91GDW-08-D-4010 to AAS on 18 May 2008 (R4, tab 1 at 1). The proposals became part of the contract at award (R4, tab 2 at 1).

5. FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (FEB 2007), was incorporated into the contract by reference. The clause provides, in part, as follows:

(m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(R4, tab 1 at 1, block 27)

6. Concurrent with award of the contract, the government issued Task Order (TO) No. 0001 for 1,040,000 cases of water. At \$2.97 per case, the total price of TO No. 0001 was \$3,088,800. The delivery date for minimum inventories remained 1 August 2008. (R4, tab 4, ¶ 4.1, tab 8)

7. In June 2008, a dispute arose over how much land the government was required to provide for the water bottling plant. The base had set aside 6 acres. However, AAS took the position that it was entitled to 11 acres. In AAS's view, the land issue had to be

resolved before it could “lock in anything to do with the plant construction or water lay down area—which includes purchasing the original water order...” (R4, tabs 11, 14, 15)

8. In July 2008, a dispute arose regarding the availability of on-base housing for AAS’s Iraqi construction workers. On 9 July 2008, AAS advised that it was ready to begin construction and requested the government to provide housing for 3 expatriates and approximately 35 Iraqi construction workers beginning 14 July 2008 (R4, tab 16). According to AAS, the government did not have any space available (R4, tab 17). Other information in the record indicates that the government advised AAS that the workers could be housed on “Contractor’s row” (R4, tab 18).

9. On 12 July 2008, AAS advised the contracting officer (CO) that work could not begin due to the lack of housing and requested him to issue a stop work order “absolving [us] of responsibility for any delay from the date of contract award until such time as we are given a Notice to Proceed...” (R4, tab 20).

10. On 14 July 2008, AAS demanded that the government pay \$3,088,800, the amount AAS would have received if it timely delivered the water. AAS explained that the payment was necessary in “order to maintain full readiness to proceed on this contract when the delay is lifted.” (R4, tab 21)

11. On 23 July 2008, the government directed AAS to show cause why the contract should not be terminated for cause for failure to deliver. The notice stated, in part, as follows:

As of 22 July 2008, you have failed to begin construction on the Bottle Water Plant.... The Government has no confidence that you will complete construction...on or before 1 August 2008.

...If your failure to perform arose from causes beyond your control and without fault or negligence on your part, you [may] present, in writing, any facts bearing on the question...within 5 days after receipt of this notice....

(R4, tab 25)

12. On 25 July 2008, AAS replied that it was unable to deliver the water because the government had failed to comply with the contract requirements to provide a suitable site for its bottling plant and housing for its Iraqi workers (R4, tab 26 at 3-5).

13. On 1 August 2008, the CO replied that, consistent with the size of the facility described in AAS’s proposal, the government would provide 6 acres of land. He also

stated that the government was only required to provide billeting and life support to AAS employees “as available.” The CO further stated that the government had done nothing to prevent AAS from performing the contract and that it had never ordered AAS to stop work. The CO offered AAS “an opportunity to remedy the current situation” on the following conditions:

- Submit a new proposed timeline[,] including a completion date for construction of a water purification facility....
- Vetted American employees with CAC cards will move onto COB Adder immediately and be given billeting....
- TCN [Third Country National] and LN [Local National] personnel will be located on land set aside on COB Adder’s Contractor Row area. [AAS] will be responsible for providing life support....
- Consent to a no-cost settlement for equitable adjustments [sic] requests and a signed release of claims letter provided by the Government.

The Government expects [AAS] to comply with the terms of the Contract and the provisions listed above. If these requirements are not met the Government will terminate for cause the Task Order and IDIQ per FAR 52.212-4(m). This letter is not providing [AAS] an excusable delay, suspension or extension of work, rather it is an opportunity for [AAS] to comply with the terms of the Contract.

(R4, tab 30, ¶ 4)

14. In its final response to the show cause notice dated 5 August 2008, AAS accepted the 6 acres of land offered by the government, but asserted that the land was not suitable. According to AAS, the government was contractually required to level the land and cover it with gravel to allow access and mobility. With respect to housing, AAS demanded, at a minimum, that the government expand contractor’s row to provide space to construct a camp for its Iraqi workers. (R4, tab 32)

15. On 18 August 2008, MAJ George F. Scheers, Jr., the CO at the time, replied that the government was not required to improve the land. He also stated that the government had not contemplated providing “life support” for AAS employees, but offered to furnish some living, shower, and toilet trailers if AAS would agree to the following clarification of paragraph 11.3 of the SOW:

11.3 Land to construct a [temporary] logistics support area. The plot of land will be approximately 3.98 acres and located adjacent to the existing “contractor row[.]” The government will [not] provide any improvements to the land...

The CO stated that the government “may be willing to excuse the delay in consideration for water delivered to LSA Adder at the current contract price from an approved CENTCOM source and the change to clarify life support in the SOW.” He indicated that the government was willing to negotiate. (R4, tab 33)

16. On 26 August 2008, AAS personnel conducted a survey of the land allocated for the water bottling plant (answer ¶ 41).

17. On 29 August 2008, Mr. Peter Vint, AAS’s contract administrator/general counsel, and MAJ Scheers exchanged the following e-mails:

[By Mr. Vint:]

The only other issues would be agreement on our proposal to move forward (we will supply that as soon as we have the estimates, most probably within one week), and supply of water in the interim before the plant is up and running.... As to interim supply of water, we would ask that you check to see whether the current water contract can be extended 2-3 months, which might be the easiest way to go. If it cannot, please let us know as soon as possible and we will find an alternate temporary water source.

[By MAJ Scheers:]

The government does not intend to modify the contract to grant you an extension without a release of claims so please include any detailed requests for adjustment in your proposal.

(R4, tab 43)

18. On 14 September 2008, AAS responded by offering to start work if the government agreed to pay AAS \$1,585,580 for all delays from 17 May through 17 September 2008 (R4, tab 34).

19. On 19 September 2008, the CO terminated the base contract and TO No. 0001 for cause for failure to deliver (R4, tab 35).

20. The government did not issue a cure notice prior to terminating the contract.

21. AAS timely appealed the CO's final decision to this Board on 12 December 2008, where it was docketed as ASBCA No. 56677.

22. AAS moved for summary judgment on 4 May 2010, alleging that there is no dispute as to the fact that the government entered into negotiations to extend the contract after the delivery date had passed. As a result, AAS urges us to find that the government waived the delivery date as a matter of law. The government denies that it waived the delivery date.

23. Neither side filed affidavits in connection with the motion.

DECISION

Summary judgment is appropriate when the moving party is entitled to judgment as a matter of law and no disputes over material facts remain. FED. R. CIV. P. 56(c); *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1371-72 (Fed. Cir. 2005). A material fact is one that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). All justifiable inferences must be drawn in favor of the nonmoving party. *Liberty Lobby*, 477 U.S. at 255.

AAS argues that the government waived the delivery because it entered into negotiations with AAS to extend the contract after the delivery date had passed. In order to prove waiver, the contractor must establish two elements:

The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are: (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent.

Empire Energy Management Systems, Inc. v. Roche, 362 F.3d 1343, 1354 (Fed. Cir. 2004) quoting *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969); see also *Range Technology Corp.*, ASBCA No. 51943 *et al.*, 06-2 BCA ¶ 33,371 at 165,435 (applying the elements set forth by *DeVito* to a commercial items contract).

It is undisputed that AAS failed to deliver by 1 August 2008, the specified delivery date, and that the government did not terminate the contract until 19 September

2008, 49 days later. What is a reasonable time for the government to terminate a contract after default depends upon the circumstances of each case. *DeVito*, 413 F.2d at 1154. The period for termination after default is greater where the contractor abandons performance or where its situation is such as to render performance impossible or unlikely, than where it continues performance in reliance on the lack of termination and proceeds to incur obligations in efforts to perform. Although the contract required AAS to deliver 1,040,000 cases of bottled water by 1 August 2008, there is no evidence that AAS placed any orders or attempted to place any orders for bottled water during this period. Under these circumstances, drawing all inferences in favor of the nonmovant, AAS has not established that the 49-day delay in terminating the contract was unreasonable. *E.g.*, *Progressive Tool Corp.*, ASBCA No. 42809, 94-1 BCA ¶ 26,413 at 131,392 (67 days not too long where contractor did not continue working after the delivery date).

AAS has also failed on motion for summary judgment to prove the second element of *DeVito*. In order to prove reliance, it is not enough for the contractor to show that it incurred costs. The costs must have been incurred in continued performance of the contract and with the government's knowledge and implied or express consent. As evidence of reliance, AAS points out that it surveyed the site on 26 August 2008. While this work was apparently performed with the knowledge and consent of the government, standing alone, it is not substantial enough to support a finding of waiver. AAS also alleges that its Iraqi construction contractor charged it a fee of \$5,000 per day from 15 July through 19 September 2008, or \$245,000 for the 49-days between 1 August and 19 September 2008. Assuming *arguendo*, that incurrence of a daily fee under these circumstances constitutes continued performance, the government did not encourage or induce AAS to incur these costs. In its 1 August 2008 letter, the government offered AAS the opportunity to continue performance on certain conditions, including consenting to a no-cost settlement for all equitable adjustments and executing a release of claim provided by the government. The letter concluded as follows:

The Government expects [AAS] to comply with the terms of the Contract and the provisions listed [herein]. If these requirements are not met the Government will terminate for cause the Task Order and IDIQ per FAR 52-212-4(m). This letter is not providing [AAS] an excusable delay, suspension or extension of work, rather it is an opportunity for [AAS] to comply with the terms of the Contract.

We have reviewed the cases cited by AAS and do not find that they dictate a different result.

AAS alternatively contends that, if the termination was based on a reason other than late delivery, it is procedurally defective because the government failed to issue a cure notice as required by FAR 12.403(c)(1). Since we find that the contract was terminated for failure to deliver, we need not address this argument.

Accordingly, AAS's motion for summary judgment is denied.

Dated: 22 September 2010

ELIZABETH A. TUNKS
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. 56677, Appeal of American AquaSource, Inc., rendered in conformance with the Board's Charter.

Dated:

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