

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
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TTF, L.L.C. ) ASBCA Nos. 58495, 58516  
 )  
Under Contract No. SPM4A7-09-M-2635 )

APPEARANCE FOR THE APPELLANT: Mr. David Storey  
President

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.  
DLA Chief Trial Attorney  
Edward R. Murray, Esq.  
Trial Attorney  
DLA Aviation  
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE HARTMAN

In these appeals, appellant, TTF, L.L.C. (TTF), contends that the Defense Logistics Agency (DLA) wrongfully terminated its “contract” for aircraft fuselage fairings and that it is entitled to price “adjustments” for government caused delays with respect to testing and approval of the first article. Pursuant to Rule 11, the parties have elected to submit the appeals on the record without a hearing. TTF submits its appeals for an expedited decision based upon the record pursuant to Rule 12.3.

FINDINGS OF FACT

On 20 October 2008, Defense Supply Center Richmond (DSCR), a field activity of DLA, issued Request for Quotations (RFQ) No. SPM4A7-09-Q-1105 for 37 aircraft fuselage fairings (R4, tab 4 at 1, 2, 10). The RFQ incorporated by reference Federal Acquisition Regulation (FAR) 52.219-3, NOTICE OF TOTAL HUBZONE SET-ASIDE (JAN 1999), which set aside or restricted the RFQ to small businesses located in a Historically Underutilized Business Zone (HUBZone) (R4, tab 4 at 2, 17), and required that “A HUBZone small business concern nonmanufacturer agrees to furnish in performing this contract only end items manufactured or produced by HUBZone small business manufacturer concerns.” FAR 52.219-3(e) (1999) (now (f)(1)).

The RFQ included both FAR clause 52.209-3, FIRST ARTICLE APPROVAL – CONTRACTOR TESTING (SEP 1989) and paragraph (a) of a DSCR standard clause 52.209-9G11, GOVERNMENT FIT VERIFICATION TEST (JAN 1996) (R4, tab 4 at 15, tab 40). The RFQ required first article testing be conducted upon one item in accordance with

referenced drawings and drawing notes, specifications, and specific requirements set forth, and that the results be provided in a report (R4, tab 4 at 3, 11). The RFQ expressly stated that the first article test (FAT) report shall be submitted to the Defense Supply Center Richmond, 8000 Jefferson Davis Highway, Richmond, Virginia, to the attention of DSCR-FADC/Post Awards (*id.* at 15). The RFQ also required one unit of the lot be submitted for government fit verification tests, which would consist of checking form, fit and function of the item on an aircraft at a government test site (*id.* at 3, 15). The RFQ stated that, at least 14 days before completion of the unit to be fit tested, the CO shall be notified in writing of the anticipated completion date so that the government may coordinate with its test facility for conduct of the fit tests (*id.* at 15). The RFQ also expressly stated:

GOVERNMENT FIT VERIFICATION TEST REQUIRED.

SHIP TO:

DoDAAC W33KD9  
Commander  
AMCOM Project OLR Bldg 874  
853 North [L]ighting Rd.  
MARK FOR: W33KD9  
ATTN: ANNIE WHEELER  
Hunter Army Airfield  
Savannah GA 31409

(*Id.* at 3-4)

In November 2008, TTF submitted to DLA a quote “WITHOUT EXCEPTION,” represented that it would be “MANUFACTURER” of the items, and identified itself as a “HUBZone Small Business” (R4, tabs 5, 6). TTF offered \$6,500 for the contractor FAT report, \$19,520 for the government fit test, and \$6,500 per unit for a production quantity of 37, and a period of delivery of 150 days for FAT report, 150 days (after approval of FAT report) for first article government fit testing, and 150 days (after fit test approval) for delivery of the production quantity (*id.*).

TTF’s quote was the only quote DLA received from a HUBZone business (R4, tabs 7, 39). DLA’s buyer, Jeffrey Vittone, subsequently negotiated with David Storey, President of TTF, regarding the prices offered, and TTF revised its offered prices to \$12,500 for the FAT report, \$1,500 for the government fit test, and \$2,024.22 per unit for the production quantity (R4, tab 39). As a result, DLA issued a unilateral Purchase Order (PO), No. SPM4A7-09-M-2635, to TTF on 8 December 2008 for a total price of \$88,896.14 (R4, tab 1). Block 16 of the PO indicated TTF was not required to sign to indicate acceptance and there was no signature on behalf of TTF in the signature block (*id.* at 1).

The delivery periods in the PO were the delivery periods quoted by TTF. The “FAT CONTRACTOR TEST REPORT” was “DUE 08 JUN 09 (180 DAYS FROM THIS AWARD),” the 150 days quoted by TTF plus 30 days set forth in the PO for DLA to deliver a copy of the necessary mylar drawings to TTF (R4, tab 1 at 2, 4). The First Article Approval – Contractor Testing clause in the PO granted the government 60 days to evaluate TTF’s first article test report, and to conditionally approve, approve, or disapprove (R4, tab 1 at 16). TTF then had 150 days to provide the first article to the government for the fit verification test (“GOVERNMENT FIT TEST DUE 150 DAYS FROM [FAT] APPROVAL”) (R4, tab 1 at 2). Finally, the PO provided the production quantity was due 150 days after government fit test approval (*id.*).

The PO contained both the First Article Approval – Contractor Testing clause with the ship to address of Defense Supply Center Richmond and paragraph (a) of DSCR’s Government Fit Verification Tests clause set forth in the RFQ (R4, tab 1 at 16). The PO incorporated by reference FAR 52.242-17, GOVERNMENT DELAY OF WORK (APR 1984); 52.246-2, INSPECTION OF SUPPLIES – FIXED-PRICE (AUG 1996); and 52.219-3, NOTICE OF TOTAL HUBZONE SET-ASIDE (JAN 1999) (R4, tab 1 at 16, 18). The PO expressly stated in the first line of text beneath the 42 form blocks that it was a “HUBZONE AWARD” (*id.* at 2).

Although the award was a HUBZone set-aside and TTF had represented itself as “manufacturer” of the item, on 22 December 2008, less than two weeks after issuance of the DSCR PO, TTF sent a purchase order to Eltee Tool & Die Co. (Eltee) in Endicott, New York, for manufacture of the first article and production quantity of fairings described in the DSCR PO (R4, tab 8). Eltee is not a HUBZone small business concern (*see* R4, tab 9).

Eltee manufactured one fuselage fairing for TTF. On 8 April 2009, Eltee sent TTF an invoice, certificate of conformance and packing list for a quantity of one “PN: 70215-02312-047, FAIRING FUSELAGE NSN 1560-01-134-7303” (R4, tabs 10-12).

On 22 April 2009, TTF did not send the first article test report prepared to DSCR in Richmond, Virginia, as specified in the RFQ and PO, but sent the test report prepared (and first article itself) to Hunter Army Airfield in Savannah, Georgia, the site stated in the RFQ and PO for performance of the government fit test (R4, tab 1 at 16, tab 4 at 15, tabs 13, 14). Because TTF sent the first article test report to an incorrect address, an Army installation, DSCR did not receive the report and begin an evaluation. In November and December of 2009, TTF notified Justin Thompson, its Administrative Contracting Officer (ACO) at the Defense Contract Management Agency (DCMA) in Houston, Texas, and Gloria Williams, its Contracting Officer (CO) at DSCR in Richmond, Virginia, respectively, that its contract was being delayed because it was waiting results of a first article evaluation. (R4, tabs 16-18) The email communications did not identify where TTF had sent the first article report (*id.*).

In March of 2010, a Contract Administrator at DSCR, Dorothy L. Jeter-Jones, sent TTF a notice stating the fairings were no longer needed and offering to pay TTF for its first article work if satisfactory and it agreed to an otherwise “no-cost” cancellation (R4, tab 19). TTF responded on 12 April 2010 that it wished to continue with production and was awaiting first article approval from the government (R4, tab 20).

In June and July 2010, TTF sent two letters to Ms. Jeter-Jones stating that it was awaiting first article approval and that the delivery date needed to be extended due to government-caused delay. Neither letter indicated the FAT report had been sent to Hunter Army Airfield in Georgia, rather than to DLA in Virginia. (R4, tab 35, ex. 14). On 8 July 2010, Ms. Jeter-Jones responded by email that she had forwarded TTF’s correspondence to the DLA Aviation First Article Monitor (R4, tab 35, ex. 15). Shortly thereafter, based on information supplied by Ms. Jeter-Jones, Robert A. (Al) Sandlin, a DLA First Article Monitor, located the FAT report at Hunter Army Airfield in Georgia and had it sent to DLA in Richmond (*see* R4, tabs 22, 23).

On 24 August 2010, Jacob D. Kegriss, the DSCR Product Specialist for the item, informed CO Williams that the FAT report had been reviewed and conditionally approved, pending the item passing fit verification (R4, tabs 23, 26). On the same date, CO Williams advised TTF of FAT approval pending fit verification test (R4, tab 26). The next day, CO Williams issued Modification No. P00001 to the PO “to revise delivery schedule” to provide for delivery of the production quantity on 25 January 2011 (R4, tab 2).

On 31 August 2010, CO Williams received notification of approval of first article fit verification testing (R4, tab 29). The following day, she notified TTF of the approval and instructed:

Your firm is authorized to proceed with the production items....

....

...The delivery schedule...remains in effect and DSCR is requiring performance in accordance with the delivery schedule. If you are unable to comply with the delivery schedule due to government delay in first article review and approval, you must contact the contract administrator within 10 days....

(R4, tab 30) Since the original PO required delivery of the production quantity within 150 days after fit test approval, the fairings were to be delivered on 29 January 2011 (*see* R4, tab 1 at 2).

TTF did not advise the contract administrator within 10 days of the CO’s September communication that it was unable to comply with the delivery schedule, but two weeks

before the January production delivery date sent DSCR a letter requesting a 120-day extension to the delivery schedule “due to vender delays” (R4, tab 31). The CO did not extend the delivery date by modification, but issued a show cause notice based on TTF’s failure to timely deliver the production quantity (R4, tab 33). TTF did not respond to the show cause notice, but shipped a quantity of 14 on or about 15 August 2011, which were invoiced for by TTF on 17 August, accepted on 18 August, and paid for on 24 August 2011 (R4, tabs 34, 42, 43).

As of 11 September 2012, TTF had not delivered the remaining quantity of 23 due under the PO, but filed a “Complaint” with the CO asserting that it was due \$66,326.65 for 335 days of delay based on the Eichleay method (R4, tab 35 at 3, 4). Upon receiving TTF’s claims, CO Williams realized TTF had not delivered the full quantity of 37 due under the terms of the PO and the PO thus had lapsed. She therefore issued Modification No. P00002 to the PO on 19 September 2012 cancelling the remaining quantity due under the purchase order (R4, tab 3).

On 13 November 2012, TTF submitted a claim to the CO asserting the remaining quantity on the PO was wrongfully cancelled, and the government should have re-established the delivery date of the PO rather than cancelling the remaining quantity or terminated the PO for “Convenience” and paid it \$46,557.06 (R4, tab 36 at 11-12).

In 2013, CO Susan Perkins issued a final decision denying TTF’s wrongful cancellation claim stating the remaining quantity was cancelled based on TTF’s failure to deliver in accordance with the terms of the order (R4, tab 38). CO Perkins also revoked acceptance of the 14 fairings received due to fraud, gross mistake amounting to fraud and/or latent defect pursuant to the Inspection of Supplies clause because the PO was a HUBZone set-aside and TTF had subcontracted all manufacturing to Eltee, a non-HUBZone business (*id.*). CO Perkins added:

We are exploring our options and the costs we incurred as a result of your misconduct and will likely issue an affirmative Government claim in the future based on your misleading actions. Although I understand that you are currently debarred from receiving Federal contracts for other misrepresentations, I still plan to refer your actions to our fraud and debarment counsel. I will also inform our small business office.

(*Id.* at 2)

TTF filed appeals with this Board regarding both its 11 September and 13 November 2012 claims submitted to the CO. They were docketed, respectively, as ASBCA Nos. 58495 and 58516.

## DECISION

In *Comptech Corp.*, ASBCA No. 55526, 08-2 BCA ¶ 33,982 at 168,082-83, we explained that a purchase order which has not been executed by the contractor and contains no other indication of acceptance by the contractor, such as the purchase order at issue in this appeal, comprises simply an offer to enter into a unilateral contract. The offer presented is to buy certain supplies on specified terms and conditions if the offer is accepted by the act of delivering those goods on or before the date that the offer specifies. If complete performance in accordance with the offer's terms is not tendered, the offer simply lapses by its own terms.

The irrevocability of an offer partially performed lapses if an offeree fails to tender complete performance by the offer's specified date because, after not delivering timely, the offeree can no longer perform in accordance with the offer's terms. *Comptech*, 08-2 BCA ¶ 33,982 at 168,083. When an offer lapses by its terms, the offeree (supplier) bears the costs of nonperformance. *Id.* at 168,082. Although an immediate right to withdraw or cancel an offer arises where an offeree fails to tender performance by the specified date, the offeror need not formally notify the offeree that the offer has lapsed or take any other specific action because the offeree, as a matter of law, lacks the ability to bind the offeror by subsequent acceptance. *Id.* at 168,083.

TTF requested in January 2011 that DSCR extend the delivery date set forth in the PO for the production quantity of fairings but DSCR did not do so, nor modify the PO in any other respect. TTF did not tender complete performance in accordance with the terms and conditions of the PO by the January 2011 delivery date and the PO therefore lapsed by its own terms, unless DSCR (through its actions) revived and extended the irrevocability of its PO for some period of time. *Comptech*, 08-2 BCA ¶ 33,982 at 168,083-84. TTF does not cite any evidence of an affirmative act upon the part of DSCR, such as conduct seeking or encouraging continued performance that would constitute an affirmative act, and we are aware of no such "affirmative" act. *See id.* at 168,084.

While TTF references its delivery to DSCR of 14 fairings in August 2011, DSCR's acceptance of those items has been revoked by the CO under FAR 52.246-2, INSPECTION OF SUPPLIES – FIXED-PRICE (AUG 1996) clause based upon fraud or gross mistake amounting to fraud. In obtaining the PO, TTF represented to DSCR that it, a HUBZone small business, was manufacturing the fairings under this HUBZone set-aside, when in actuality the manufacturing work was being performed by a non-HUBZone business pursuant to a TTF purchase order. TTF does not dispute here that the fairings for the PO were being manufactured by Eltee, not it. (*See Appellant's Response Br.* at 4, 16, 18) Compliance with HUBZone requirements was a condition of this HUBZone set-aside PO. TTF thus knowingly delivered fairings not in accordance with the terms and conditions of the PO. *See Dongbuk R&U Engineering Co.*, ASBCA No. 58300, LEXIS 73, \*22-30 (13 Aug.

2013). The delivery of fairings which do not comport with the HUBZone requirements cannot, as a matter of law, be viewed as a valid delivery. See *Louisiana Lamps and Shades*, ASBCA No. 45294, 95-1 BCA ¶ 27,577 at 137,435 (there can be no valid delivery when the supplies tendered fail to substantially comply); *Ralbo, Inc.*, ASBCA No. 43548, 93-2 BCA ¶ 25,624 at 127,534-35.

In summary, the fairings PO lapsed by its own terms. *Comptech*, 08-2 BCA ¶ 33,982 at 168,084-85. When the CO issued a modification to the PO decreasing its amount to zero and cancelling the fairings production line item, TTF did not possess any contract with DSCR and the CO's amendment of the fairings PO simply constituted an administrative recognition of the fact the PO had lapsed by its terms. *Id.* at 168,085. Because TTF did not timely deliver in accordance with the terms and conditions of the fairings PO, it has no "contract" with DSCR pursuant to which it can pursue a claim for delay damages associated with first article approval. *Id.*

### CONCLUSION

Both appeals are denied.

Dated: 3 September 2013

  
TERRENCE S. HARTMAN  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

  
DIANA S. DICKINSON  
Administrative Judge  
Acting 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 Nos. 58495, 58516, Appeals of TTF, L.L.C., rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals