

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Jayco International, LLC) ASBCA No. 58461
)
Under Contract No. N40442-11-P-8440)

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OPINION BY ADMINISTRATIVE JUDGE CLARKE

This appeal arises out of a contract for electric forklift batteries to be used on forklifts deployed on a Navy ship. The Navy refused to accept batteries delivered by Jayco contending they were nonconforming. Jayco International, LLC (Jayco) filed a certified claim for \$237,622.06 contending that the Navy improperly rejected the batteries. Jayco appealed the Navy’s denial of its claim. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. We deny the appeal.

FINDINGS OF FACT

1. On 27 April 2011, the Military Sealift Fleet Support Command (MSFSC) posted amended Solicitation No. N40442-11-T-7464 stating:

[MSFSC], Norfolk, VA intends to award a firm fixed price purchase order for USNS ALAN SHEPARD for the following Brand Name or Equal parts:

ITEM P/N
(OR EQUAL) DESCRIPTION QTY PRICE PER UNIT
EXTENDED PRICE
1 18-E80S-21 BATTERY FORKLIFT QTY: 10

2 18-E80S-27 BATTERY, GEL, MAINT FREE FOR 10K
FORKLIFT, QTY: 4 EA

(R4, tab 5 at 1-2, tab 6 at 4) The name of the manufacturer (brand) was not included in the solicitation, however, appellant agrees that the part numbers “correspond to batteries manufactured by EnerSys, Inc.” (R4, tab 8 at 2).

2. The solicitation incorporated by reference FAR 52.211-6, BRAND NAME OR EQUAL (AUG 1999), which provides in part:

(a) If an item in this solicitation is identified as “brand name or equal,” the purchase description reflects the characteristics and level of quality that will satisfy the Government’s needs. The salient physical, functional, or performance characteristics that “equal” products must meet are specified in the solicitation.

(b) To be considered for award, offers of “equal” products, including “equal” products of the brand name manufacturer, must —

(1) Meet the salient physical, functional, or performance characteristic specified in this solicitation....

....

(d) Unless the offeror clearly indicates in its offer that the product being offered is an “equal” product, the offeror shall provide the brand name product referenced in the solicitation.

(R4, tab 5 at 2)

3. Mr. Walko, president of Jayco, contacted EnerSys to ask for a quote and was told that several different batteries could be described by the part number in the solicitation and that more information would be needed. Mr. Walko informed the Navy that EnerSys needed more information describing the desired batteries. (Tr. 2/74-76)

4. On 12 May 2011, the solicitation was modified to list the following salient characteristics:

Batteries must fit in both Hyster E40XM and E60XM forklifts without modifications to either forklift.

Batteries must be VRLA (Valve Regulated Lead Acid) type (maintenance free).

Batteries must be “Shock Hardened”

Batteries must be UL rated as “EE”.

Classification Code:

20 -- Ship and marine equipment

(R4, tab 5 at 4)

5. On 25 May 2011, Jayco submitted its quote in response to the amended solicitation. The quote identified the products offered as ten “18-E80S-21EE SmartHog sealed tubular battery” at a unit price of \$14,714.57 for a total price of \$147,145.70 and four “18-E80S-27EE SmartHog sealed tubular battery” at a unit price of \$18,647.18 for a total price of \$74,588.72. (R4, tab 6 at 2)¹ The quote provided that both batteries complied with “SparkProof tray (EE),” “Shock Hardened,” and “VRLA.” The total price quoted was \$221,734.42. (*Id.*)

6. On 8 June 2011, MSFSC issued Purchase Order (PO) No. N40442-11-P-8440 (PO 8440) to Jayco for ten EnerSys forklift batteries Part No. 18-E80S-21 for a total price of \$147,145.70 and four batteries (gel) Part No. 18-E80S-72 for a total price of \$74,588.72 for a cumulative total price of \$221,734.42 (R4, tab 2 at 1, 4). The delivery date for the batteries was 25 July 2011 (*id.* at 5). The contract incorporated FAR 52.212-4, CONTRACT TERMS AND CONDITIONS -- COMMERCIAL ITEMS (JUN 2010) that provided in paragraph (i) that payment “shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract” (R4, tab 2 at 6). At the request of the Navy, Jayco’s president, Mr. Walko, signed the order on 9 June 2011 (R4, tabs 13, 14 at 2).

7. On 8 July 2011, Jayco issued PO No. J507-P8440 to EnerSys, Reading, Pennsylvania, for ten 18-E80S-21EE SmartHog batteries, 800 ampour, sparkproof tray (EE), Shock Hardened, VRLA, and four 18-E80S-27EE SmartHog batteries, 1040 ampour, sparkproof tray (EE), Shock Hardened, VRLA, for a total amount of \$211,720.00. The terms were, “\$100,000 Net 30, Balance At Time of Shipment” (supp. R4, tab 25 at 5), which means EnerSys only gave Jayco a \$100,000 line of credit and Mr. Walko had to pay the difference, \$111,720.00, before the order was shipped (tr. 2/14-16; supp. R4, tab 25 at 5). The battery descriptions were the same as EnerSys’s quote to Jayco (tr. 2/15-16). On or about 24 August 2011, EnerSys had manufactured ten 18-E80S-21EE and four 18-E80S-27EE SmartHog batteries in accordance with Jayco’s purchase order and they were ready to ship (gov’t br., joint stip. ¶ 7).

¹ The batteries are made by EnerSys.

8. On 6 October 2011, Mr. Walko emailed Mr. Shoemake, MSFSC, stating that the EnerSys batteries would ship as soon as he got a bank assignment in place with the government (R4, tab 12 at 6-7).

9. On 7 October 2011, Mr. Meyers, Bibby Financial Services (Bibby), emailed Mr. Shanks, MSFSC CO, a copy of an unsigned Instrument of Assignment (IOA) and Notice of Assignment (NOA) (tr. 2/133; R4, tab 24).

10. On 21 October 2011, CO Shanks emailed written comments on the previously submitted unsigned draft IOA and NOA to Mr. Walko and Mr. Meyers stating among other things, "The [IOA] must be executed in accordance with FAR 32.805(a)(1)" (gov't br., joint stip. ¶¶ 7-8).

11. Mr. Walko recalled that EnerSys had the batteries he ordered, but he was waiting for the Navy to approve the assignment of funds. According to Mr. Walko, in October or November 2011 CO Shanks asked him if the Navy could buy the batteries from EnerSys. Mr. Walko agreed and the batteries were sold to the Navy. (Tr. 2/96-99) Mr. Walko immediately sent a second purchase order to EnerSys and the batteries were manufactured but EnerSys sold the batteries to the Navy a second time (tr. 2/22-25), but without Jayco's permission (tr. 2/135, 144). At that time EnerSys would no longer do business with Jayco. The assignment with Bibby was for EnerSys batteries so Mr. Walko went to Mr. Gonzales, a private investor, for funding for equivalent batteries from another manufacturer. (Tr. 2/25; R4, tab 32)

12. Mr. Ricky Jennings is a CO with the Military Sealift Command (MSC) (tr. 1/20). He took over responsibility for PO 8440 in November 2011 (tr. 1/21).

13. An IOA was signed by Mr. Walko on 3 November 2011 and by Mr. Miller, Pulaski Bank, on 3 November 2011 and an NOA was signed by Ms. Lieson of Bibby, on 8 December 2011 and by the CO Jennings on 9 December 2011 (R4, tab 22; gov't br., joint stip. ¶ 10). The IOA assigned to Bibby all of Jayco's rights to receive all payments under PO 8440 (R4, tab 22 at 1). Mr. Jennings testified that he signed the NOA on 9 December 2011 acknowledging receipt on that date (tr. 1/23; R4, tab 22 at 3). He returned the NOA to Bibby on 29 December 2011 (tr. 1/23).

14. On 19 January 2012, Mr. Walko executed an Assignment of Contract agreement purporting to assign PO 8440 to James Gonzales and Kaye Davis, however, Mr. Walko testified that it wasn't really an assignment (tr. 2/21, 26; supp. R4, tab 33). On or about 20 January 2012, Jayco and Mr. Gonzales entered into a loan agreement in

the amount of \$139,800 (tr. 2/18-19; supp. R4, tab 32).² The agreement contained the sentence, “[t]he contract supplies are currently awaiting shipment from the manufacturer” (tr. 2/19; supp. R4, tab 32 at 1). Pursuant to the loan agreement and promissory note, Jayco received funds in the amount of \$139,800.00 for the purpose of partial advanced funding of the cost of goods on contract PO 8440 (gov’t br., joint stip. ¶ 19).

15. On 7 February 2012, Jayco issued a purchase order to Interstate PowerCare SoCal, Garden Grove, California, for ten Hawker 18-75IEL-21EE³ and four Hawker 18-75IEL-27EE batteries (supp. R4, tab 26). Mr. Walko testified that Hawker assured him that their batteries would meet all of the salient characteristics listed in the solicitation amendment (tr. 2/116).

16. On 9 February 2012, Mr. Walko emailed CO Jennings and informed him that the batteries would be shipped on 13 March 2012 (R4, tab 12 at 11). CO Jennings responded to Mr. Walko on the same day stating:

We have spoken with the battery manufacturer, EnerSys, about the availability/status of batteries. EnerSys says they have no batteries in stock and none in the pipeline. Are you sure you are providing the correct batteries?

(R4, tab 12 at 11) Mr. Walko replied, “Absolutely” (*id.*). CO Jennings testified that Mr. Walko did not tell him that he was delivering Hawker batteries instead of EnerSys batteries (tr. 1/32; R4, tab 12 at 11). He recalled asking Mr. Walko if he was providing EnerSys batteries and Mr. Walko responded “Absolutely” (tr. 1/33; R4, tab 12 at 11).

17. On 17 February 2012, CO Jennings emailed Mr. Walko asking him to confirm that he was supplying EnerSys batteries (R4, tab 12 at 16). Mr. Walko responded to CO Jennings by email on the same day stating that Jayco was providing batteries that were “OR EQUAL” to the part numbers in the contract and requested issuance of a contract modification to clarify the batteries they were now proposing along with new delivery dates (*id.* at 15). CO Jennings warned Mr. Walko that if he couldn’t provide the shipboard approved shock hardened EnerSys batteries he would terminate the contract (tr. 1/36). CO Jennings understood Mr. Walko’s 17 February 2012 email verified that he understood that the government wanted the EE rated, shock hardened, sparkproof tray, VRLA batteries (tr. 1/36-37).

² The document at Rule 4, tab 32, is not signed, but Mr. Walko testified that it was signed by both parties (tr. 2/20).

³ It is unclear why the order identifies the batteries as “IEL” since the name plate on the batteries delivered clearly identifies the batteries as “EL” (R4, tab 16 at 11).

18. CO Jennings responded to Mr. Walko on 22 February 2012 stating that Mr. Walko had not answered the question of if he was supplying EnerSys (R4, tab 12 at 14). CO Jennings went on to state that “[i]n order to ensure the batteries are acceptable” he would send an engineering representative to inspect the batteries at the vendor’s facility at no cost to Jayco. He asked for vendor contact information and said he would modify the contract to add the on-site inspection. (*Id.*) He stated, “The Government will not be obligated to pay for batteries that are shipped here and determined to be unacceptable upon inspection” (*id.*). He ended by stating, “You have been granted more than enough time to complete this requirement. My only other option is to terminate for cause.” (*Id.*) CO Jennings testified that he agreed to modify the contract but only to inspect the batteries at the contractor’s facility; he did not agree to change the contract to allow delivery of Hawker Envirolink batteries (tr. 1/39).

19. On 23 February 2012, Mr. Walko responded to CO Jennings:

Thought that I had answered your question. Yes, we are providing EnerSys manufactured batteries. They are manufactured at EnerSys/Hawker’s forklift battery plant in Tennessee [sic], Cage Code (3C3B9). Hawker is a division or subsidiary of EnerSys....

....

EnerSys and EnerSys/Hawker batteries are physically the same dimensions, same technology and they both use the same cells to make the batteries. Both are SHOCK HARDENED, SPARKPROOF TRAY, and VRLA and they both are made for the E40XM and E60XM....

Our batteries can be inspected at the plant’s Cage Code address (3C3B9) and they will be shipped, packaged to your specifications, with a Certificate of Conformance, direct from the plant to San Diego.

(R4, tab 12 at 13-14)

20. Mr. Hughes, Material Handling Equipment (MHE) Program Manager, went to the EnerSys plant in Richmond, Kentucky, on 7 March 2012. He was shown the manufacturing process. The plant manager said there was no order for shipboard batteries from Jayco. (Tr. 1/106-08)

21. On 7 March 2012, CO Jennings sent Mr. Walko an email stating do not ship the batteries until they have been inspected and that they must be EnerSys batteries “or equal” (R4, tab 24 at 7). CO Jennings testified that he was responding to Mr. Walko’s request for a contract modification (*see* finding 17) and told him he was only going to modify the inspection and acceptance location to allow inspection at the manufacturer’s facility instead of San Diego. He did not agree to modify the contract to accept Hawker batteries. (Tr. 1/43-44) CO Jennings testified that he “inadvertently”⁴ used the term “or equal” in the email (tr. 1/44). He did not issue a modification because Jayco had the batteries shipped. (Tr. 1/40-42, 45)

22. On 12 March 2012, Hawker Powersource, Inc., Ooltewah, Tennessee,⁵ shipped five Envirolink 018-075EL-21 batteries to the MCS BATS warehouse, San Diego, California on behalf of Jayco (R4, tab 15). This shipment arrived at MCS BATS, San Diego on 20 March 2012 (R4, tab 16 at 3). Inspection of the batteries confirmed that they were Hawker brand 18-75-EL-21EE⁶ (*id.* at 4). The batteries were not equal to the specified EnerSys batteries and were only “shell cases with gel cells inside” (tr. 1/45-46).

23. On 23 March 2012 Mr. Hughes and Mr. Monroe, a Navy engineer, went to the Hawker plant in Tennessee to conduct a visual inspection of the batteries Jayco had ordered. The batteries were not there since they had been shipped to San Diego (*see* finding 22). While at the Hawker plant Mr. Hughes was told that Hawker did not manufacture shipboard approved batteries and were of a lower amperage. (Tr. 1/109-13, 168, 175-77) They inspected batteries similar to those shipped to San Diego and saw that they were not shock hardened (tr. 1/197-98). Mr. Hughes documented this failed attempt to inspect batteries later in a 31 August 2012 memorandum (R4, tab 16 at 4-5).

24. On 26 March 2012, Mr. Walko emailed Mr. Jennings stating:

FYI: The inspection of the batteries did not take place on Friday.

....

The batteries were ready earlier in the week, but Hawker, contrary to my instructions, accidentally shipped out the

⁴ Mr. Jennings apparently described his use of “or equal” as a “poor choice of words” in his deposition (tr. 1/48).

⁵ Interstate PowerCare was identified as the billing address (R4, tab 15).

⁶ Mr. Hughes memorandum incorrectly states that in addition to the 18-75-EL-21EE batteries that 18-75-EL-27EE batteries were received. The shipping documents (R4, tab 15) and pictures of the batteries (R4, tab 16 at 11) prove that only the 21EE batteries were received.

batteries but were in the process of redirecting them back for inspection.

(R4, tab 12 at 20)

25. When the five batteries arrived at the MSC BATS warehouse in San Diego, Mr. Jim Thomas, MSC Director of Logistics, happened to be in San Diego; he visually inspected the batteries and took pictures to send to Mr. Hughes. The batteries did not have brackets or the heavy steel cover and were not shipboard approved batteries. (Tr. 1/115-16)

26. Between 5 April 2012 and 12 April 2012 there were a series of emails between Mr. Walko and CO Jennings relating to inspecting the batteries that were at the Navy Warehouse in San Diego (R4, tab 12 at 25-29). Mr. Walko disagreed with Mr. Hughes's comments that the batteries were not equal to the EnerSys batteries⁷ (R4, tab 12 at 26, 29).

27. CO Jennings decided to cancel the contract because Jayco did not deliver conforming batteries (tr. 1/45-46). On 11 April 2012, CO Jennings signed a letter cancelling PO No. N40442-11-P-8440 (R4, tab 7). CO Jennings cancelled PO 8440 because the batteries delivered to San Diego were not EnerSys batteries approved for shipboard use (tr. 1/76). He testified that he did not know "at any point in time" before the batteries were inspected that Jayco intended to provide Hawker batteries (tr. 1/64-65)⁸.

28. Mr. Hughes wrote a technical analysis memorandum, dated 31 August 2012, documenting his findings concerning the batteries delivered to the BATS warehouse in San Diego⁹ (tr. 1/117; R4, tab 16). The memorandum included pictures of the Hawker batteries at the San Diego warehouse (R4, tab 16 at 3, 4, 10, 11). He could see from the pictures that the Hawker batteries did not have the required cover hold downs and could not be used in a shipboard electric forklift (*id.* at 4). Mr. Monroe testified about pictures included in Mr. Hughes's 31 August 2012 memorandum. The batteries depicted on page 10 are the Hawker batteries delivered to the BATS warehouse in San Diego. By looking at the case, Mr. Monroe concluded that they were not shock hardened and approved for shipboard use. (Tr. 1/180; R4, tab 16 at 10) The picture on page 11 is of the name plate on the Hawker batteries that indicates the battery is a 750 amp-hour battery (tr. 1/180-81).

⁷ There is no evidence in the record establishing that Mr. Walko ever saw the Hawker batteries.

⁸ This testimony appears to conflict with Mr. Walko's 23 February 2012 email to CO Jennings referring to Hawker batteries (finding 19).

⁹ Mr. Hughes noted that he incorrectly indicated that the warehouse had received both 21EE and 27EE batteries when only five 21EE batteries had been received (tr. 1/117).

29. Messers. Hughes and Monroe testified persuasively using photographs of EnerSys batteries and Hawker batteries. It was their testimony that Hawker batteries were clearly not designed for shipboard use. (R4, tabs 16-18; tr. 1/152-59, 182-84, 2/169-70, 72-74)

30. On 23 August 2012, Jayco submitted a certified claim for the “total value of the Contract, plus the additional costs incurred by Jayco due to the [Agency’s] improper rejection of the batteries” in the amount of \$237,622.06 to CO Jennings (R4, tab 8). On 18 September 2012, CO Jennings denied the claim (R4, tab 1 at 1). On 14 December 2012, Jayco appealed the CO’s final decision to this Board (R4, tab 9). The appeal was docketed as ASBCA No. 58461 on 17 December 2012.

31. On 8 February 2013, Mr. Parker, EnerSys, sent a letter to Mr. Copetas of MSFSC including the statement:

I can state categorically that the Hawker Environlink batteries ordered by JAYCO through Interstate Batteries, although suitable for use in many commercial and shore-based applications, do not comply with any of the referenced Military Standards for Navy shipboard batteries with the exception of the UL EE requirement.

These Hawker batteries are not in H.I. Shock trays – there are no provisions on these trays for the battery to be bolted into the forklift frame. Nor is there any provision for the battery covers to be bolted closed. The tray cover lacks any reinforcement and is not lined suitably to hold the cells in place when the cover is closed. There is absolutely no EMI shielding present on the battery cables. The trays appear to have received a standard commercial paint so it is questionable they would meet the Salt Fog requirement.

From an electrical capacity point-of-view, the Hawker batteries are rated at 75 AH per positive plate. This means they cannot provide the required capacity. The EnerSys 18-E80S-21EE is rated at 800 AH compared to 750 AH for the Hawker 18-75-21 and the EnerSys 18-E80S-27EE is rated at 1040 AH compared to 975 AH for the Hawker 18-75-27.

(R4, tab 20 at 4)

32. Mr. Monroe testified about a 5 March 2013 letter to him from Mr. Colwell, Hawker Plant Manager, that reads as follows:

The Hawker (18-75IEL-21EE & 18-75IEL-27EE) batteries supplied to JAYCO are commercial off the shelf (COTS) batteries. They are UL EE rated, but have not been designed or tested HI Shock, EMI, or Salinity. The Hawker (18-75IEL-21EE & 18-75IEL-27EE) batteries are not shipboard use approved nor equivalent to the EnerSys (18-E80S-21EE & 18-E80S-27EE) batteries.

(Tr. 1/178; R4, tab 21) Mr. Monroe also testified that the Hawker batteries had a different plate design and lower amperage rating than the EnerSys batteries (tr. 1/179).

33. Jayco paid Interstate PowerCare a total of \$50,000.00 for the ten 18-75IEL-21 and four 18-75IEL-27 Hawker Envirolink batteries. The five Hawker Envirolink batteries delivered by Jayco to San Diego were not EnerSys SmartHog batteries. To date Jayco has never tendered for delivery EnerSys 18-E80S-21EE and 18-E80S-27EE SmartHog forklift batteries. (Gov't br., joint stip. ¶¶ 26-29)

EE vs EX Designation

34. Mr. Parker was government sales representative for EnerSys from 1984 to the summer of 2013 when he retired (tr. 2/148). Mr. Parker explained the meaning of the part number 18-E80S-21EE. The "18" is the number of cells and at 2 volts per cell it is a 36 volt battery (tr. 2/155). The "E" stands for EnerSys (tr. 2/156). The "80" is the amperage rating per positive plate. The "21" stands for the number of plates in each cell. This is an 800 amp battery. (*Id.*) He thinks the "S" stood for sealed back in the 1990's when they started building the batteries (tr. 2/157). The "EE" indicates a UL spark resistant rating. Mr. Parker testified if it had an "EX," "[t]hat would be an explosion resistant battery. You don't see many of those used anymore. They're mostly maybe in like mining applications [or] chemical factories, something like that." (*Id.*) The 18-E80S-27 is the same except that it has 27 plates (*id.*). Mr. Parker was shown PO 8440, page 4, and testified that the part numbers alone do not provide enough information for EnerSys to risk manufacturing – it does not tell them where it is to be used (tr. 2/159). The item numbers indicated that the batteries were to be used on the USNS Alan Shepard and that provided the information he needed to build the battery (*id.*). He was shown the amendment to the solicitation that added VRLA, Shock Hardened and EE¹⁰ rating and testified that additional information would tell them it was for shipboard use because there is no application in the commercial sector for that type of battery (tr. 2/161).

¹⁰ EE alone does not indicate shipboard use (tr. 2/170-71).

Mr. Monroe testified about a UL rated EE and EX battery trays (ptr. 2/6-8).¹¹ He testified that an EX rated tray is not shock hardened; “[t]here is no relation between UL and shock hardened” (ptr. 2/8).

35. Mr. Crowley is the National Sales Manager for Putnam Motor PowerSlide, a company that sells forklift batteries (tr. 1/201). He is familiar with EnerSys and Hawker batteries (tr. 1/202). He sells both EnerSys and Hawker batteries (tr. 1/203). He has been in the battery industry for 30 years (tr. 1/206). He testified that “shock hardened” means heat treated steel in the industry (tr. 1/207, 229). The Part Nos. 18-E80S-21EE and 27EE do not come with the bolts and tie downs. The EX rated “tray” has the marine grade plywood under the cover bolts that secure the cover to the tray. (Tr. 1/209-10, 224) The cells in the EnerSys and Hawker batteries are manufactured by EnerSys in Richmond, Kentucky, and are both flat plate cells. They are the same cells. (Tr. 1/211-13)

36. We find that the Hawker batteries were not equal to the EnerSys batteries and did not meet the specifications of the contract (*see* findings 29, 31, 32, 34-35).

DECISION

Contentions of the Parties

Jayco states, “What the Navy ordered from Jayco were Commercial Item batteries with the salient characteristics listed in ¶ II.4,^[12] above” (app. br. at 8). Jayco contends, “The tendered Hawker batteries met each of the salient characteristics identified in the Contract, as well as the salient characteristics identified in the Solicitation, as set forth in ¶ II.4” (app. br. at 6, ¶ 17; app. reply br. at 5). It then argues the Navy improperly terminated the contract because the Hawker batteries failed to meet Military Specifications (MIL-S-901, MIL-S-810, MIL-S-461) that were not identified in the contract (app. br. at 8; app. reply br. at 3). Next Jayco asserts that the Navy agreed to accept “or equal” batteries and the Hawker batteries were equal to the EnerSys batteries ordered by PO 8440.

The Navy contends that it accepted Jayco’s quote and thereby entered into a contract for ten 18-E80S-21EE and four 18-E80S-27EE EnerSys batteries meeting all the salient characteristics identified in the amended solicitation (gov’t br. at 15-17). According to the Navy it never modified the contract to allow Jayco to deliver “or equal” batteries and the Hawker batteries that Jayco delivered to San Diego were not the required EnerSys batteries (gov’t br. at 18, 23-24).

¹¹ The cite to “ptr.” refers to the portion of the hearing dealing with protected information that was transcribed separately.

¹² The batteries must fit in Hyster E40XM and E60XM forklifts, be VRLA type, be shock hardened, and UL rated as “EE” (app. br. ¶ 4).

Solicitation and Award

The original solicitation was defective in that as a brand name or equal solicitation it failed to list any salient characteristics or provide sufficient information to actually purchase the desired batteries (findings 1, 2). Mr. Walko discovered the ambiguity and did precisely what he was required to do – he inquired (finding 3). As a result of that inquiry, the Navy amended the solicitation adding salient characteristics (finding 4). Jayco submitted a quote that included EnerSys part numbers and all of the salient characteristics in the amended solicitation (finding 5).

We agree with the Navy that at award both parties understood what the requirement was (gov't br. at 15-16). It is clear that the Navy accepted Jayco's quote and that both parties understood that PO 8440 ordered ten 18-E80S-21EE and four 18-E80S-27EE EnerSys batteries that would fit in Hyster E40XM and E60XM forklifts, were VRLA maintenance free, shock hardened, and UL rated "EE" (finding 5). The solicitation as modified set forth the product numbers of EnerSys batteries and their salient characteristics, so that offerors could quote the brand name or an equal. Jayco quoted the brand name, EnerSys, and thus, pursuant to paragraph (d) of the Brand Name or Equal clause (finding 2), Jayco became obligated to provide the brand name product referenced in the solicitation.

After Jayco was unable to supply the agreed EnerSys batteries, the government indicated a willingness to consider Hawker batteries. We view that consideration of Hawker batteries to be an effort to mitigate damages and not an agreement to accept the unequal Hawker batteries in lieu of EnerSys batteries. As we find, even if Jayco had the right to substitute an "equal," its substitute was clearly not equal.

In light of this decision it is unnecessary to discuss the details of EE vs. EX designation.

Jayco's Financing

It is significant to us that EnerSys refused to give Jayco a line of credit for the entire amount of the order for batteries. EnerSys extended only \$100,000 credit towards the \$211,720.00 price and required Jayco to pay the remaining \$111,720.00 before EnerSys would ship the order (findings 7, 13). Obviously the Navy had nothing to do with this arrangement between Jayco and EnerSys. Pursuant to PO 8440, the Navy was not obligated to pay Jayco until the batteries were delivered and accepted (finding 6). Pursuant to the IOA, Bibby was entitled to receive payment from the Navy (finding 13), but that would not occur until after delivery and acceptance. That means Jayco had to arrange to receive money from Bibby, or somewhere else, to make the advance partial payment required by EnerSys before it would ship batteries ordered by Jayco. Jayco failed to document in the record any attempt it made to obtain the money for the advance payment. The only evidence in the record shedding any light on this aspect of the case is

Mr. Walko's testimony that he never paid EnerSys anything because "[t]hat was going to be done after the inspection." (Finding 13) Absent any evidence in the record to the contrary, we conclude that Jayco's failure to have the batteries sitting at EnerSys delivered to the Navy was due to its own inability to make the advance payment demanded by EnerSys.

Jayco complains that the Navy took too long to sign the NOA and as a result Jayco lost two lots of batteries that it could have delivered (finding 11). Although CO Shanks received unsigned copies of the IOA and NOA on 7 October 2011 (finding 10), there was nothing at that time for him to sign and no delay can be assigned to the Navy. The Navy did not receive signed copies of the IOA (to Bibby)¹³ and NOA until on or about 8 December 2011. CO Jennings signed the NOA one day later on 9 December 2011 (finding 13). There is no explanation in the record why CO Jennings took until 29 December 2011 to return the NOA to Bibby (*id.*). Even so, we do not consider the Navy to have unreasonably delayed signing and returning the NOA. However, the NOA had nothing to do with providing advance payment to Jayco to allow it to pay EnerSys the \$111,720 needed to ship the batteries (*id.*).

Mr. Walko testified that twice the Navy took batteries that he had ordered and were ready to ship. The first time CO Shanks asked if the Navy could buy the batteries Mr. Walko agreed; the second time the Navy did not inform him about the purchase. After the second time, EnerSys refused to do business with Jayco. (Finding 11) In any event, as we stated above, we attribute Jayco's inability to have the EnerSys batteries shipped to its failure to pay EnerSys the advance payment it demanded. Accordingly, we need not sort out Mr. Walko's contentions about the Navy purchasing its batteries.

Jayco Orders Hawker Batteries

After the second set of EnerSys batteries were sold to the Navy and EnerSys would no longer do business with Jayco, Mr. Walko went to Mr. Gonzales for financing (findings 11, 14). On 7 February 2012, Jayco ordered Hawker batteries (finding 15). Mr. Walko testified that Hawker assured him that its batteries met all the salient characteristics in the contract (*id.*). Mr. Walko's reliance on Hawker's representation was an unfortunate error on his part. The evidence supporting the conclusion that the Hawker batteries delivered to San Diego were not equal to the EnerSys batteries, particularly the pictures, is overwhelming (findings 28-29, 31-33).

¹³ There is no evidence in the record explaining why the NOA was to Bibby and not M&I Bank that had provided Jayco the \$1.5 million letter of credit (finding 7).

CONCLUSION

The Navy's PO 8440 ordered EnerSys batteries identified in the amended solicitation and Jayco's quote. PO 8440 was not modified to allow tender of "or equal" batteries. Jayco failed to tender the EnerSys batteries. The Navy properly rejected the Hawker batteries and properly denied Jayco's claim. The appeal is denied.

Dated: 21 May 2015



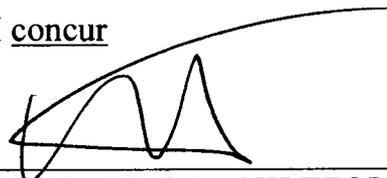
CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



RICHARD SHACKLEFORD
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. 58461, Appeal of Jayco International, LLC, rendered in conformance with the Board's Charter.

Dated:

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