

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Medi-Peth Medical Lab, Inc.) ASBCA No. 49844
)
Under Contract No. SPO200-95-C-5423)

APPEARANCE FOR THE APPELLANT: Mrs. Eileen Adams
Vice President

APPEARANCE FOR THE GOVERNMENT: Kathleen D. Hallam, Esq.
Chief Trial Attorney
Defense Personnel Support
Center (DLA)
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

This timely appeal is from a contracting officer's decision demanding reimbursement for all 504 specula which appellant delivered under its supply contract. The demand is based on the Warranty of Supplies clause and the undisputed fact that none of the specula delivered complied with all the salient characteristics of the commercial item description. Appellant contends that: (1) the items supplied were identical to the sample presented prior to award; and (2) appellant was unaware that the contract stated that the required samples were not bid samples and the successful bidder was to supply specula which complied with the contract specifications. Only entitlement is before us. We deny the appeal.

FINDINGS OF FACT

1. On 20 May 1994 the Defense Personnel Support Center (DLA) issued Solicitation No. SP0200-R-94-4157 (the solicitation) seeking offers for the delivery of 504 packages of "Speculum, Vaginal, Medium, Plastic, Disposal, 5 in blades with light guide: 25 per bag" (the speculum) (R4, tab 1 at 3). The national stock number for the speculum was NSN 6515-01-164-3073 (R4, tab 1 at 5), and the solicitation provided the speculum "shall be in accordance with commercial item description A-A-54567 dated 24 January 1992" and Defense Personnel Support Center (DPSC) Drawing 23496 (R4, tab 1 at 8, tab 2 at 1).

2. The salient characteristics of commercial item description (CID) A-A-54567 include: (1) open positions of approximately 7/8, 1-3/4, and 2-3/4 inches; (2) a design in accordance with DPSC Drawing No. 23496 except that a fourth open position was optional;

and (3) a handle designed to accept and retain a halogen light and provide an integral light path on the lower blade (R4, tab 2 at 1).

3. DPSC Drawing 23496 set forth a number of dimensions that were not included in the CID, one of which was a blade width of approximately 1 1/16 inch (R4, tab 3).

4. On 31 May 1994 appellant submitted its initial offer of \$86.00 per package, indicated that appellant proposed to supply speculum Model #58601 with Illuminator Cat. #78600 (R4, tab 1 at 7), and included a page of catalog literature relative to KleenSpec 586 series disposable speculum (R4, tab 1 at 2).

5. Since appellant had not provided the item in the past and DPSC had no experience with appellant, on 5 July 1994 the procurement contracting officer (PCO) requested that appellant provide a preaward sample for evaluation in accordance with DPSC Clause 52.209-9P08 PREAWARD SAMPLE(S) (JAN 1992) (R4, tab 4; tr. 15, 26) which is incorporated into the solicitation and states (R4, tab 1 at 67):

(a) The submission of samples of supplies proposed to be furnished by the successful offeror may be required prior to making any award under this solicitation.

....

(d) The samples referred to in the preceding paragraphs are not bid samples; rather, these samples are for the purpose of establishing the offeror's capability, if awarded a contract, to produce items conforming to the specifications. . . . Offerors are cautioned that upon receipt of any award hereunder, they are obliged to deliver supplies which comply with the specifications regardless of whether any sample submitted hereunder deviates in any way from the specification requirements.

6. In response to the PCO's request, on 8 July 1994 appellant provided a sample of a Welch Allyn product that consisted of a disposal speculum - part number 58601A with an illuminator - part number 78600 (R4, tab 4).

7. On 12 July 1994 the DPSC engineer who received the sample for evaluation, advised the PCO that the sample was not evaluated but rather deemed acceptable based on Welch Allyn's past performance, and that the bidder should be advised that total compliance with the specifications was required (ex. G-2; tr. 17, 20-21, 70-71). Appellant was not advised whether its pre-award sample was approved or disapproved (tr. 26).

8. Appellant was required to remove from its offer all reference to catalog numbers and product literature and to provide a statement of intent to comply with the specifications. On 22 August 1994, appellant complied with this requirement, although appellant had not read the specifications and was unaware of the requirements of the CID and drawings. (Tr. 21, 96-98; R4, tab 6) This record does not reflect a date when appellant did read the contract in its entirety.

9. Appellant was required to submit its catalog prices so that the Government could determine price reasonableness. On 7 November 1994 appellant provided a list of prices “for the items required on the above solicitation.” (Tr. 27-28; ex. G-4)

10. On 30 January 1995 appellant was awarded Contract Number SP0200-95-C-5423 in the amount of \$43,344 (the contract) which incorporated the terms and conditions of the solicitation (R4, tab 7), and thus included DPSC Form 4234 Master Solicitation (C&T and Medical) (Jan 1992) (R4, tab 1 at 43), and DPSC Clause 52.246-9P35 WARRANTY OF SUPPLIES (JAN 1992) (R4, tab 1 at 16), the latter of which states in part (ex. G-1 at 18):

52.246-9P35 WARRANTY OF SUPPLIES (JAN 1992)

....

(b) Contractor’s Obligations.

(1) Notwithstanding inspection and acceptance by the Government of supplies furnished under this contract, . . . the contractor warrants that for one year after receipt of supplies at destination:

(i) All supplies furnished under this contract will be free from defects in material or workmanship and will conform with all requirements of this contract; and

....

(c) Remedies Available to the Government.

(1) The contracting officer shall give written notice to the contractor of any breach of warranties in paragraph (b)(1) of this clause within 13 months from receipt of supplies at destination.

....

Within a reasonable time after the notice, the contracting officer may exercise one or more of the following options and also, following the exercise of any option, may unilaterally change it to one or more of the other options set forth below:

(i) Require an equitable adjustment in the contract price for any supplies or group of supplies;

....

(iv) Return any supplies or group of supplies under this clause to the contractor . . . for screening and correction or replacement;

....

(4) If the contractor fails to accept return of the nonconforming supplies, . . . the contracting officer may exercise one or more of the following remedies:

(i) Retain or have the contractor return the nonconforming supplies and require an equitable adjustment in the contract price.

(ii) Return or hold the nonconforming supplies for contractor's account, or require the return of the nonconforming supplies and then hold for contractor's account, whereupon the contractor shall repay the contract price therefor. In such event, the Government may reprocure similar supplies upon such terms and in such manner as the contracting officer may deem appropriate, and charge to the contractor the additional costs occasioned the Government thereby.

(iii) If the contractor fails to furnish timely disposition instructions, dispose of the nonconforming supplies for the contractor's account in a reasonable manner, the Government is entitled to reimbursement from the contractor or from the proceeds for the reasonable expenses of the care and disposition of the nonconforming supplies, as well as for any other costs incurred or to be incurred.

11. In March 1995 appellant delivered the shipment required under the contract and subsequently was paid the full contract price of \$43,344 (R4, tabs 8, 11, 16 ¶ 4, 18 ¶ 5; tr. 1/50).

12. Because there were questions about the items appellant supplied, on 26 June 1995 the contracting officer (CO) requested the local DPSC engineer to make a full evaluation of the specula, advised appellant the shipment was suspended, and requested appellant to verify the specula delivered (R4, tab 15; tr. 48-53).

13. The Welch Allyn specula appellant delivered under the contract deviated from the salient characteristics of the CID and drawing in that: (a) the open positions were 1 5/8, 1 7/8, and 2 1/4 inches; (b) the blade width was 1 3/8+ inches; and (c) the handle required an adapter before it would accept a halogen light (ex. G-7; tr. 75-77, 82-83, 100-08).

14. On 11 August 1995 the CO advised appellant that the specula delivered were nonconforming and invoked options one and four under the Warranty of Supplies clause, requiring an equitable adjustment with respect to the 101 packages already issued by the Government to its various installations and return of the remaining 403 packages (R4, tab 18; tr. 53-54).

15. After appellant's refusal to agree to an equitable adjustment or accept return of the supplies, on 21 February 1996 the CO issued a final decision demanding reimbursement of the full contract price of \$43,344 paid to appellant (R4, tab 20). Later the CO returned 384 packages to Welch Allyn, the manufacturer, for full refund of appellant's purchase price. Also for those packages already issued, the Government again reduced its claim by the amount of appellant's purchase price for the specula. As a result, the Government's total warranty action was reduced to \$14,358.96. (Tr. 64-65; ex. G-14).

DECISION

In *Aero Products Research, Inc.*, ASBCA No. 25956, 87-1 BCA ¶ 19,425 at 98,213 *aff'd on motion for reconsider.*, 87-3 BCA ¶ 20,061, this Board set out the elements the Government must prove to establish a claim under the Warranty of Supplies clause: (1) there were defects or nonconformities in the supplies furnished under the contract; (2) such defects or nonconformities were discovered and, *a fortiori*, occurred sometimes before "one year after receipt of supplies at destination"; (3) the contracting officer gave timely notice of breach of warranty to the contractor; (4) the quantity of supplies subject to the warranty action was proper; and (5) the amounts assessed were proper.

On this record, elements (1) through (4) are clearly proven (element (5) relates to quantum). Appellant argues that: (1) since it was not advised the sample it provided failed to satisfy contract specifications, it supplied the identical item in fulfilling the contract; and (2) it was unaware of the provisions of the contract clause Preaward Sample(s), which states (finding 5):

(d) The samples [submitted prior to receiving contract award] are not bid samples; rather, these samples are for the purpose of establishing the offeror's capability, if awarded a contract, to

produce items conforming to the specifications. . . . Offerors are cautioned that upon receipt of any award hereunder, they are obliged to deliver supplies which comply with the specifications regardless of whether any sample submitted hereunder deviates in any way from the specification requirements.

This argument does not excuse appellant's failure to comply with the contract. Additionally we note that after submission of the sample, appellant was required to remove from its offer all reference to catalog numbers and product literature, and to provide a statement of intent to comply with the specifications (finding 8). This requirement should have alerted appellant to investigate further if it intended to supply the same item as the sample.

Accordingly we deny the appeal as to entitlement and remand it to the parties for determination of quantum.

Dated: 14 February 2001

JEAN SCHEPERS
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 49844, Appeal of Medi-Peth Medical Lab, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals