

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Connectec, Inc.) ASBCA No. 51579
)
Under Contract No. SP0451-96-C-0554)

APPEARANCE FOR THE APPELLANT: James H. Bradshaw, Esq.
Tustin, CA

APPEARANCES FOR THE GOVERNMENT: Donald S. Tracy, Esq.
Chief Trial Attorney
Defense Supply Center (DLA)
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE PAUL

This is a timely appeal of a contracting officer's decision terminating appellant Connectec, Inc.'s (CI) supply contract for default. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601 *et seq.*, is applicable. The Board held a hearing in San Francisco, California; appellant's counsel opted not to attend the hearing. Both parties later filed post-hearing briefs.

FINDINGS OF FACT

1. The Defense Supply Center, Richmond (DSC) awarded Contract No. SP0451-96-C-0554 to CI on 19 April 1996. The contract was a firm, fixed-price instrument for the supply of 168 electrical switch cable assemblies. The face amount of the contract was \$57,624.00; it required that CI deliver the cables within 120 days after contractual award, or by 16 August 1996. The contract incorporated several clauses by reference including FAR 52.249-8 "DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984)" (R4, tab 1).

2. CI did not deliver the cables on or before the contractual delivery date. On 23 August 1996, CI forwarded a letter to the contracting officer in which it stated, in pertinent part:

Due to our vendor's delay in providing the tooling, Connectec hereby requests a 120 day extension in the delivery date of the subject contract. A sum of \$500.00 is offered as consideration for this extension.

Please issue a modification to reflect this change.

(R4, tab 14)

3. After negotiating a price reduction of \$900.00, the contracting officer issued Modification No. P00001 to the contract which extended the delivery date to 28 February 1997 (R4, tab 11).

4. On 14 February 1997, two weeks prior to the revised delivery date, CI forwarded a letter to the contracting officer in which it sought clarification of a contractual drawing (R4, tab 18). In a letter forwarded to DSC on 18 June 1997, CI repeated its request for clarification (R4, tab 21).

5. On 12 August 1997, DSC answered CI's technical questions in writing. The contracting officer also wrote, in pertinent part:

Request you provide this office with a list of all your questions/concerns regarding this contract by close of business August 18, 1997. After the date, we will not entertain anymore [sic] questions from your company as your lack of performance is resulting in back orders at the DSCR. It is also requested that you provide this office with your revised delivery date by August 22, 1997. No additional delays will be tolerated and Termination for Default procedures will be implemented if the delivery date is not met.

(R4, tab 22) CI responded to the contracting officer's requests in writing on 18 August 1997. It stated that it did "not have any more technical questions at this time." CI also sought a 180-day extension of the contractual delivery date (R4, tab 23).

6. DSC replied to CI's request in a letter of 21 August 1997. Ms. Lisa Bennett, a contract specialist, wrote, in part:

A formal modification will be issued extending the delivery date to 120 days after receipt of modification. This delivery extension allows for the same number of days cited in your original proposal upon which you received the contract.

Ms. Bennett also asserted: "Please inform this office whether or not you will be able to complete this contract within 120 days after receipt of modification" (R4, tab 24).

7. On 17 September 1997, the contracting officer unilaterally issued Modification No. P00002 to the contract which extended the delivery date by 120 days. The new, revised date was 30 January 1998. (R4, tab 12)

8. On 30 January 1998, CI informed DSC in writing that the “parts for this contract are ready for shipment.” But CI also asked DSC to make a determination regarding the placement of markings on the assemblies. (R4, tab 27) On 4 February 1998, the contracting officer responded as follows:

In reference to your fax dated January 30, 1998, you may place the marking as shown in option #1. Please provide your delivery date no later than February 11, 1998. If you are going to request a formal modification for the delivery extension, please state your offer of consideration.

(R4, tab 28) CI replied to the contracting officer’s request on 5 February 1998. It wrote, in part:

Please issue a delivery date Modification Providing Connectec 2 weeks from the date of the Mod. to arrange for Source Inspection. The sum of \$300.00 is offered for this Modification.

(R4, tab 29)

9. On 17 February 1998, the contracting officer forwarded the following response to CI:

This is in response to your letter of 5 February 1998 concerning Contract SP0451-96-C-0554.

You are delinquent in meeting the delivery schedule of your contract. Specifically, you failed to deliver a quantity of 168 each on or before 30 January 1998. In view of the foregoing, your contract could be terminated for default. However, since you have proposed to deliver the supplies under your contract by the date of 3 March 1998, I have decided to forbear exercising the Government’s right to terminate your contract for default until that date.

Your contract will be terminated for default if you fail to meet the revised delivery date of 3 March 1998. The DD250s for the quantity on this contract must be in the

possession of Lisa Bennett, DSCR-JBPC, by close of business 3 March 1998. Any assistance rendered to you on this contract and any acceptance by the Government of delinquent deliveries under the contract will be solely for the purpose of mitigating the Government's damages and is not to be construed by you as an intention on the part of the Government to condone your delinquency or as a waiver of any rights the Government may have under the contract.

(R4, tab 30)

10. On 2 March 1998, CI wrote to DSC as follows:

The parts for the subject contract were presented to QC for final inspection and it was determined that some length dimensions are not exactly in line with requirements.

As you know this contract had lots of technical insufficiencies in the drawings which took a long time for government to rectify them [sic] and these delays proved to be very costly for Connectec.

At this point we have come across this problem that [sic] our QC can not completely approve these parts.

All the parts manufactured up to this point are non-conforming that have to reworked or remade.

We need to send two units for your evaluation. Please fax us the name and address of the person to forward these units for evaluation. We need your assistance in guiding us to a solution which will not be a burden to either party at this point.

(R4, tab 31) There is no record evidence substantiating CI's allegations that the contractual drawings were insufficient.

11. CI did not deliver the assemblies by the mutually agreed, revised delivery date of 3 March 1998. The contracting officer terminated the contract for default on 10 March 1998. She wrote:

You are hereby notified that above contract is terminated for default effective immediately. Your right to proceed further with performance of this contract is terminated. This

termination is based on your failure to perform IAW the terms and conditions of the contract, specifically your failure to deliver the supplies IAW the established delivery schedule. The terminated supplies may be procured against your account and you will be held liable for excess cost. This notice constitutes a final decision of the contracting officer from which you have the right of appeal. Confirming modification to follow.

(R4, tab 32)

12. The contracting officer issued Modification No. P00003 on 10 March 1998 in which she formally terminated the contract for default (R4, tab 13). This appeal followed.

DECISION

A termination for default is a drastic sanction, and the Government is held strictly accountable for its enforcement of that contractual right. *J. D. Hedin Construction Co. Inc. v. United States*, 408 F.2d 424, 431, 187 Ct. Cl. 45, 57 (1969); *Precision Dynamics, Inc.*, ASBCA Nos. 41360, *et al.*, 97-1 BCA ¶ 28,722 at 143,376. In attempting to demonstrate that the Government has not met its burden in this regard, CI formulates two arguments. Firstly, it contends that the contracting officer acted unreasonably when, through the execution of Modification No. P00002, she unilaterally extended the delivery date by 120 days, rather than the 180 - day period which CI had requested (br. at 4). Appellant also contends that we should overturn the default termination because the contracting officer never issued a “show cause letter” (br. at 3-4).

CI’s first argument is without merit. The delivery date set forth in Modification No. P00002 is irrelevant to the default termination. DSC effectively waived this delivery date and subsequently, through mutual agreement, established a third, revised delivery date of 3 March 1998 (findings 8, 9). Moreover, even if the contracting officer had granted CI a 180 - day extension from the date of its letter of August 18, 1997, she would likely have established the new delivery date in February 1998 (finding 5). By establishing a new date of 3 March 1998, the contracting officer actually exceeded CI’s request. The issue is thus moot.*

Even if the delivery date set forth in Modification No. P00002 were somehow relevant to the default termination, the contracting officer acted reasonably in unilaterally extending the contract by 120 days. *ITT Corp. v. United States*, 509 F.2d 541, 547-48, 206

* We also note that the contract was subject to summary termination when CI delivered non-conforming supplies prior to 3 March 1998. *Louisiana Lamps and Shades*, ASBCA No. 45294, 95-1 BCA ¶ 27,577 at 137,435

Ct. Cl. 37, 49-50 (1975); *DeVito v. United States*, 413 F.2d 1147, 1154-55, 188 Ct. Cl. 979, 991-92 (1969). As she noted, the revised delivery date of 30 January 1998 “allows for the same number of days cited in your original proposal upon which you received the contract” (finding 6). Thus, in granting CI an additional 120 days, the contracting officer was, in effect, reestablishing the original, contractual performance period. Moreover, the record does not reveal that CI was experiencing any performance problems at the time when Modification No. P00002 was issued. In response to a query by DSC, CI stated that it did “not have any more technical questions at this time” (finding 5). Accordingly, DSC acted reasonably in this regard.

We also conclude that DSC did not invalidate the default termination by failing to issue a “show cause” letter. Issuance of such a letter was non-mandatory and was, thus, not required because CI failed to meet the revised delivery date. *Alberts Associates, Inc.*, ASBCA No. 45329, 95-1 BCA ¶ 27,480 at 136, 887.

CONCLUSION

The appeal is denied.

Dated: 30 September 2002

MICHAEL T. PAUL
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. 51579, Appeal of Connectec, Inc., rendered in conformance with the Board's Charter.

Dated:

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