

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
FitNet International Corp.) ASBCA No. 56605
)
Under Contract No. W911SF-08-P-0080)

APPEARANCE FOR THE APPELLANT: James S. DelSordo, Esq.
Argus Legal LLC
Manassas, VA

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT Megan E. Stephens, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT’S MOTION TO DISMISS

FitNet International Corp. (FitNet) appeals the termination for cause of the captioned supply contract (hereinafter “Contract 0080”). The government moves to dismiss on grounds of an untimely appeal. We find the appeal timely and deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 11 February 2008, the government issued a “Meet or Exceed” solicitation for the supply of 150 “heavy duty cabinets” (hereinafter “wall lockers”). The item description in the solicitation required, among other things, that the wall lockers be constructed of 12 gage steel with dimensions of 48 inches wide, 24 inches deep and 72 inches high. The solicitation did not specify by brand name the product of a specific manufacturer nor did it include the phrase “brand name or equal.” (R4, tab 26, attach. A) On 13 February 2008, FitNet responded to the solicitation with an offer of a wall locker constructed with no 12 gage steel and a maximum depth of only 22 inches. (R4, tab 26, ex. A at 1-2)

2. By email dated 15 February 2008, the contract specialist for the government sent FitNet a picture of the desired lockers and stated: “The wall lockers must match this exactly and must be 12 gage. Are you going to be able to supply me with this?” (R4, tab 26, ex. A at 11) By email dated 16 February 2008, FitNet responded to the inquiry in

relevant part as follows:

Please be aware that we are offering an “equal,” which meets the salient characteristics of the specifications requested. On a “brand name or equal” solicitation, the FAR allows for non exact matches. The depth of these lockers are but a fraction smaller than the specs (by two inches)...

(*Id.*)

3. On 21 February 2008, the contracting officer (CO) awarded Contract 0080 to FitNet. Although the award block (Block 29) of the contract document (SF 1449) stated that FitNet’s offer was accepted, the contract schedule did not describe the wall locker offered by FitNet, but repeated the description of the wall locker in the 11 February 2008 solicitation. (R4, tab 1 at 1, 3)

4. Contract 0080 required delivery of 150 wall lockers by 22 March 2008 at a unit price of \$675.82 and a total contract price of \$101,373.00. The contract included, among other clauses, the FAR 52.212-4 CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (FEB 2007) clause. Paragraph (d) of that clause incorporated by reference the FAR 52.233-1 Disputes clause. Paragraph (m) allowed the government to terminate the contract for cause “in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions.” (R4, tab 1 at 1-4)

5. On or about 2 May 2008, FitNet tendered delivery of 150 wall lockers to the government under Contract 0080. The government rejected the delivery on the alleged grounds that the tendered lockers (i) were two inches shallower and two inches taller than the specified dimensions in the contract, (ii) had defective welding and (iii) were not constructed of 12 gage steel. (R4, tabs 9, 23)

6. On 6 May 2008, the contracting officer issued a cure notice requiring FitNet to deliver specification compliant lockers within 28 days “or the Government may terminate for cause” (R4, tab 11). On 12 May 2008, FitNet proposed to provide an additional seven lockers to make up for the lost storage space due to the smaller than specified depth (R4, tab 20). This proposed cure was not acceptable to the government since the specified storage space was needed in each individual locker (R4, tab 23).

7. On 27 May 2008, FitNet submitted a certified claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605. The claim alleged, among other things, that “the end user is now unfairly preventing the delivery [of the lockers]” and that the 6 May 2008 cure notice was issued “under what now appears to be ‘questionable pretenses’” (R4, tab 26 at 4-5). The claim demanded, among other things, reformation of Contract 0080 to “correct obvious mistakes by the Contracting Office,” payment of the

contract price upon redelivery of the tendered lockers, payment for an alleged locker “upgrade,” and payment of various other costs allegedly incurred as a result of the rejection of the tendered lockers. (R4, tab 26 at 1, 3, 5-6)

8. On 24 June 2008, the contracting officer terminated Contract 0080 for cause pursuant to paragraph (m) of the Contract Terms and Conditions-Commercial Items clause. A detailed Determination and Findings document was prepared by the contracting officer to support the termination decision. (R4, tab 31) FitNet received the termination notice and notice of its appeal rights on 25 June 2008 by FAX and on 28 June 2008 by mail (R4, tab 32; gov’t reply br., ex. I).

9. On 25 July 2008, the contracting officer sent a letter to FitNet, without a subject or reference line, but otherwise stating in relevant part:

In accordance to FAR 52.233-1, you are notified that a Contracting Officer’s Final Decision will be issued on 31 July 2008. The Government is conducting a comprehensive review of the issues and will address them in this decision.

(R4, tab 34)

10. On 31 July 2008, the contracting officer issued a final decision denying entirely FitNet’s contract reformation and payment claim on the merits (R4, tab 34 at 5-10). This decision of the claim included an extensive response on the merits to the allegation that the government was unfairly preventing delivery of the tendered lockers (*id.* at 5-6). The decision also responded to the allegation that the cure notice was issued “under ‘questionable pretenses’” with the following statement:

The Contracting Officer stands by his decision to seek a cure of the nonconformities in the product FitNet sought to deliver.... and, following the tender by FitNet of an unacceptable cure, his decision to terminate the Purchase Order for cause.

(*Id.* at 10)

11. On 30 October 2008, FitNet delivered by hand to the Board an appeal of the contracting officer’s 31 July 2008 decision “concerning the Government’s improper termination for cause of the above referenced purchase order and denial of FitNet’s claim for its costs to perform the purchase order in the amount of \$179,373.”

DECISION

The government moves to dismiss the appeal as to the termination for cause on the ground that FitNet failed to appeal the 24 June 2008 termination decision within 90 days of receipt as required by the CDA, 41 U.S.C. § 606. The 30 October 2008 appeal letter was delivered by hand to the Board on that date (SOF ¶ 11). This was 124 days after FitNet had received the termination decision by mail (SOF ¶ 8). Timely filing of an appeal is a jurisdictional requirement that we cannot waive. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982). Appellant opposes the motion on the basis that the contracting officer's 31 July 2008 decision reconsidered his 24 June 2008 decision.

The government does not contest the timeliness of the appeal as to the 31 July 2008 decision on FitNet's contract reformation and payment claim. Among the issues in that claim were the alleged improper rejection of the tendered wall lockers and the alleged improper issuance of the cure notice (SOF ¶ 7). Notwithstanding his declaration to the contrary (app. motion, attach. A), the contracting officer's decision on the merits of the claim, rather than summarily denying it on the basis of his prior termination decision, was in effect a reconsideration of the termination whether he consciously intended that effect or not. *See William Howard Wilson d/b/a Wilson Maintenance*, ASBCA No. 47831, 97-1 BCA ¶ 28911 at 144,128 ("By undertaking to review the merits of Mr. Wilson's allegations anew rather than summarily denying the claim based on the earlier decision, the contracting officer effectively elected to reconsider that decision.")

The issue to be resolved with respect to the finality of the 24 June 2008 termination decision is whether FitNet has presented evidence showing that it reasonably or objectively could have concluded that the contracting officer's 31 July 2008 claim decision included a reconsideration of the 24 June 2008 termination decision. *See Sach Sinha and Associates, Inc.*, ASBCA No. 46916, 95-1 BCA ¶ 27,499 at 137,042. We find that it has. FitNet has shown that it could reasonably or objectively conclude from the contracting officer's 25 July 2008 letter stating that the government was conducting a comprehensive review of the issues (SOF ¶ 9), and from the responses in the 31 July 2008 decision to the termination issues in the claim (SOF ¶ 10), that the termination had been reconsidered in that decision, and that it had 90 days from receipt of the 31 July 2008 decision to appeal to this Board.

The motion to dismiss is denied.

Dated: 23 July 2009

MONROE E. FREEMAN, JR.
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. 56605, Appeal of FitNet International Corp., rendered in conformance with the Board's Charter.

Dated:

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