

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
FastLinks, Inc.) ASBCA No. 57170
)
Under Contract No. W911RX-10-P-0017)

APPEARANCE FOR THE APPELLANT: Mr. Olamide Bello
President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Tudo Pham, JA
Scott N. Flesch, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PAUL

This is a timely appeal of a contracting officer's (CO) decision terminating appellant FastLinks, Inc.'s (FastLinks) contract for default. The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 is applicable; and appellant has elected to proceed under Board Rule 12.3. A hearing was held in Kansas City, Missouri. We deny the appeal.

FINDINGS OF FACT

1. FastLinks was awarded fixed-price Contract No. W911RX-10-P-0017 with an effective date of 15 December 2009 to deliver and to install an amplified antenna system at the Irwin Army Community Hospital in Fort Riley, Kansas. The total contract amount, as awarded, was \$31,700.31. The delivery date specified in the contract was 15 January 2010. The purpose of the antenna system was to facilitate the use of hand held radios in the hospital, particularly in the basement. The contract contained, *inter alia*, a clause entitled "Termination for cause" which provided:

The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by

law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(R4, tab 2 at 1, 6, 13, 17; tr. 1/18)

2. As of 12 January 2010, FastLinks had neither delivered nor installed the antenna system. On that date, Mr. Olamide Bello, FastLinks' president, forwarded the following e-mail to the Army's CO, MAJ Blakeman:

We had few of the order on back order [sic]. We have reschedule [sic] the installation to the 23rd. Please confirm this will be a good time for you. The orders should be in on the 18th which give us few days to bench test the equipments.

On 13 January 2010, the CO responded as follows:

The customer needs the antenna installed by the time allowed in the contract. The 23rd would put you in breach of contract as the window for your performance ends on 15 Jan. I recommend contacting some of your competitors to get the parts you need so you can meet the suspense.

If that doesn't work, the Government can modify the contract to reflect the new delivery/installation date, however, you would have to provide the Government with some form of consideration (compensation) for allowing us to modify the contract to meet your needs. I cannot tell what form or amount of consideration to offer, but typically contractors offer a price reduction, expedited delivery, or warranty/extended warranty etc. If you are unable to offer something in exchange the Government will terminate the contract and leave you with a poor performance rating which will affect your ability to compete for future Government contracts.

Please respond at your soonest with your course of action and/or proposed consideration.

(R4, tab 6 at 1)

3. FastLinks did not perform by the contractual completion date of 15 January 2010. In order "to protect FastLinks from further default," the CO issued bilateral

Modification No. P00001 to the contract with an effective date of 1 February 2010. The purpose of the modification was to stop work on the project until a determination could be made “whether to resume work or terminate [the] contract.” (R4, tab 22)

4. Negotiations ensued between the parties; and, as consideration for a time extension, FastLinks obtained extended warranties from its vendor for the various parts to be installed on the project (R4, tabs 26, 27; tr. 1/27-28). Accordingly, the parties entered into contractual Modification No. P00002 with an effective date of 10 February 2010 which allowed FastLinks to resume work and extended the contractual completion date to 19 February 2010 (R4, tab 30).

5. As of the revised completion date, FastLinks had not installed the antenna system. On 1 March 2010, Steven L. Butler, the CO, forwarded a “CURE NOTICE” to appellant. He wrote, in pertinent part:

You are notified that the Government considers your failure to install the amplifier and antennae at Irwin Army Community Hospital in accordance with the requirements of the contract, to be a condition that is endangering the performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice, the Government may terminate this contract for default under the terms and conditions of the Default Clause of this contract.

Mr. Butler also stated:

If your contract is terminated for cause, you will be liable for re-procurement and administrative costs and your contract performance information will be posted to the Past Performance Information Retrieval System (PPIRS).

(R4, tab 32)

6. FastLinks did not comply with the cure notice; and, on 17 March 2010, the CO terminated the contract for default. Mr. Butler wrote, in part:

This is notification that the Government is terminating the subject contract for default under the terms and conditions IAW FAR Clause 52.212-4 (m) Termination for cause.

This termination is effective immediately upon receipt of this notification. You are directed to stop all work hereunder and shall immediately cause any and all of your suppliers and

subcontractors to cease work. We are terminating your right to perform under the subject contract for the following reasons:

1. Fastlinks was scheduled to make complete installation of the antenna January 15, 2010. A delay was encountered and addressed in a group meeting on January 21, 2010, which ensued a stop work order so that Fastlinks could re-program/re-design the plan to provide the antenna and other parts and install the antenna.
2. A resume work was issued and signed by Olamide Bello on February 10, 2010 after Fastlinks provided information and assurance that they could install the antenna by February 19, 2010.
3. On February 19, 2010 you indicated via email and phone that you would not be able to finish the installation.
4. A cure notice has been given to Fastlinks with a 10 day response on March 1, 2010. A 16 page document was provided to the Contracting Office from Fastlinks, which only showed manufacturer delay of parts for the requested installation.
5. A phone call was received on March 09, 2010 indicating that Fastlinks was ready to start work on installing antenna and a tentative final install date of March 17, 2010 was discussed. Fastlinks was provided a list of staff at the hospital to make coordination with to access the areas of installation. Hospital staff spoke to Fastlinks several times to coordinate access to work areas in the hospital.
6. On March 16, 2010, an email was received from the staff of the hospital detailing the poor performance of Fastlinks; which was not in accordance with the infection control checklist provided to Fastlinks.

This is the final decision of the Contracting Officer.

(R4, tab 44)

7. On 30 March 2010, FastLinks filed a notice of appeal (R4, tab 55). The Board's Recorder docketed the appeal as ASBCA No. 57170.

8. The CO moved expeditiously to reprocur the antenna system; and, on 28 July 2010, it entered into Contract No. W911RX-10-P-0111 with KA-COMM, Inc. of Manhattan, Kansas. The parts list was virtually identical to that contained in FastLinks' contract. (R4, tab 2; ex. G-53; tr. 1/209) The price of \$31,710.16, which was only \$9.85 higher than the total award amount of FastLinks' contract was also virtually identical to FastLinks' price (R4 tab 2; ex. G-53). KA-COMM installed the system as awarded in only five days, and it functioned properly (tr. 1/209, 212-13).

DECISION

The original delivery date for FastLinks' contract was 15 January 2010 (finding 1). It did not perform the installation by this date (finding 3). The revised completion date was 19 February 2010 (finding 4). It did not install the antenna system by that date (finding 5). On 1 March 2010 the CO forwarded a cure notice to FastLinks (finding 5). It did not comply with the cure notice; and, on 17 March 2010, the CO terminated the contract for default (finding 6). It is, thus, undisputed that FastLinks did not perform its contractual obligations.

Nevertheless, in its brief, FastLinks attempts to excuse its non-performance by arguing that the specified amplifier "does not match the operating frequencies of the antennas" and was, therefore, defective (app. br. at 2). Unfortunately for FastLinks, the follow on contractor, KA-COMM, installed the same antenna, and it worked properly (finding 8). Hence, we must reject Fastlink's contention that the contract's parts list was defective.

FastLinks also belatedly argues that it could not complete the contract because the Army withheld contractually required technical information from it (app. br. at 2-4). However, CO Butler testified credibly, that the documents referred to by FastLinks were not part of any contractual requirement and that it could have installed the antenna system without them (tr. 1/275, 277).

We have carefully examined FastLinks' other contentions and reject them as unsupported by the evidentiary record. In formulating its contentions, FastLinks pointedly ignores the fact that the follow-on contractor, KA-COMM, performed the contractually required installation in only five days without any apparent problems.

CONCLUSION

The appeal is denied.

Dated: 25 May 2011

Michael T. Paul

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

Eunice W. Thomas

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. 57170, Appeal of FastLinks, Inc., rendered in conformance with the Board's Charter.

Dated:

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