

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Platinum Logistic Services Company ) ASBCA No. 57965  
 )  
Under Contract No. W5KA4N-11-P-0390 )

APPEARANCE FOR THE APPELLANT: Mr. Nisar Ahmad  
President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
MAJ Samuel E. Gregory, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAUL  
PURSUANT TO BOARD RULE 11

This is a timely appeal of a contracting officer's (CO) decision terminating appellant Platinum Logistic Services Company's (PLSC) contract to supply material handling equipment (MHE) to Shindand Air Base, Afghanistan, for default. On 17 September 2012, the Board issued a scheduling order in which it, *inter alia*, ordered the parties to file opening briefs on 11 January 2013. Respondent complied with our order and forwarded a copy of its brief to appellant. However, appellant has declined to file a brief. The Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109, is applicable. Only issues of entitlement are before us for decision. We deny the appeal.

FINDINGS OF FACT

1. On 12 September 2011, the Regional Contracting Center, Herat (respondent) which was located at Camp Stone, Afghanistan, issued Solicitation No. W5KA4N-11-T-0084. Respondent sought to lease various pieces of MHE (R4, tab 43) in order to complete several roadwork projects at Shindand Air Base, Afghanistan, prior to the rainy season in 2012. (R4, tab 17 at 2-3)

2. Among the clauses incorporated by full text in the solicitation was Federal Acquisition Regulation (FAR) 52.212-2, EVALUATION-COMMERCIAL ITEMS (JAN 1999), which provided:

(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming

to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors shall be used to evaluate offers:

Offerors must provide pictures of the actual proposed equipment. Offerors who do not provide pictures will not be considered for award.

Quotations will be evaluated using only price as an evaluation factor. Award will be made to the responsible offeror at the lowest price.

(b) Options. The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

(c) A written notice of award or acceptance of an offer, mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

(R4, tab 43 at 33 of 77)

3. On 12 September 2011, respondent forwarded the solicitation as a request for quote, via email, "for MHE Lease without operator at Shindand AB, Afghanistan." The email also stated that offers were due by "22 Sep 11 at 2:00 P.M. Herat Local Time; however early submission of quotes is highly encouraged." The email also provided: "Evaluating factors are found in Clause 52.212-2 EVALUATION-COMMERCIAL ITEMS (page 33). Contractor who do [sic] not provide pictures of proposed equipment will not be considered for award." (R4, tab 3 at 4)

4. PLSC's president, Mr. Nisar Ahmad, responded to the solicitation with an email dated 19 September 2011. He stated:

The purpose of this email is to inform you that most of the machinery asked for in the solicitation W5KA4N-11-T-0084 are new model years and they can not be found in Afghanistan. [H]owever we have lower model years available which their specifications (Horse Power, operating weight, etc.) are a little different than what is in solicitation. Can we quote for what we have available? If not, how long do we have to supply the equipments as per the solicitation?

Also the amendment 0001 you sent has changed only the grader's model # from 14M to 14G or equal. But the specifications provided for 14G are wrong. Also the 14G can not be found in the market and has to be imported. Can we provide 12G instead?

ITEM 0007) Is there any way I can provide a CAT 769D Rock Dump for this item instead of CAT 730? The CAT 769D is a stronger machine and the only weak point about it, is that it is a 1996 model. The machine is kept in a very good condition and is fully mission capable.

ITEM 0008) Can we provide wheel excavator instead of tracked excavator? (Again the specs. provided for Item 0008 are for a CAT 336D model which is a 2011 model and can not be found in Afghanistan)

ITEM 0009) Can I provide a CAT 422E for this item? (CAT 422E Specs: 75-90 HP, 1.5 CY3 Bucket, 2454 KG Lifting cap.)

ITEM 0013) Can I provide a CAT CB434D model 2003 for this Item? (CAT CB434D Specs: 84 HP, 7380 KG Operating Weight)

ITEM 0014) Can I provide a CAT PF300B model 2004 for this Item? (CAT PF300B Specs: 99 HP, 46200 Lbs Operating Weight)

Once again the reason I am asking to provide the above machinery instead of what is asked for in solicitation is, because the equipment in solicitation are not available in

[A]fghanistan markets. And I am offering you what I have for an express delivery.

Please answer the above questions so I can send you my best quote.

Looking forward to serve you better.

(R4, tab 3 at 2-3)

5. On 22 September 2011, PLSC forwarded its offer to the CO. The offer contained detailed descriptions of the various pieces of MHE which appellant could provide, the number of days after contract execution when the equipment would be delivered, and unit prices. As required by the solicitation, PLSC also provided unit prices for the pieces of MHE. In addition, appellant also included in its offer photographs of samples of the proposed equipment. The "Schedule Plan," contained at the beginning of the offer, stated that the "transportation will take maximum 30 days." (R4, tab 1)

6. PLSC was awarded Contract No. W5KA4N-11-P-0390 on 28 September 2011 for a total fixed-price contract amount of 49,122,500 Afghani (AFN). The contract encompassed the lease of 29 pieces of MHE, including dump trunks, blade graders, bulldozers, and bucket loaders, for a six-month performance period beginning on 30 September 2011. Included in the contract were options for two additional six-month periods. (R4, tab 4 at 1, 3-27, 29-32)

7. The contract contained the following pertinent FAR clauses: 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010); 52.217-8, OPTION TO EXTEND SERVICES (NOV 1999); and 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000) (R4, tab 4 at 32, 39). It also contained these relevant clauses:

**C<sup>3</sup> CLAUSE 952.245-0001 GENERAL CONDITIONS FOR LEASED EQUIPMENT (AUG 2011)**

(a) All equipment furnished under this contract shall be in good working order. The Government reserves the right to reject equipment that is not in safe and operable condition. The Government may allow the Contractor to correct deficiencies within 24 hours. No payment for travel to an incident or point of inspection, or return to the point of hire, will be made for equipment that does not pass inspection. No payment will be made for time that the equipment was not available for use.

(b) All operating supplies, except those listed below, shall be furnished by the  Government  Contractor.

Operating supplies include fuel, oil, filters, lube/oil changes. Even though this clause specifies that all operating supplies are to be furnished by the contractor, the Government may, at its option, elect to furnish such supplies when necessary to keep the equipment operating. The cost of such supplies will be determined by the Government and deducted from payments to the contractor.

Exceptions:

None

(c) All repairs to equipment necessary to maintain operability shall be made and paid for by the contractor. The Government may, at its option, elect to make such repairs when necessary to keep the equipment operating. The cost of such repairs will be determined by the Government and deducted from payment to the contractor. If equipment cannot be repaired and operable within 2 calendar days, the contractor shall remove and replace the equipment at no additional expense to the Government. The pro-rated cost associated with the number of days the equipment was unavailable shall not be invoiced and will not be payable by the Government.

(d) For payment purposes, the time for hire shall start at the time the equipment is provided at the delivery location specified in the Statement of Work and end when the equipment is available for pick up at the specified return location. The Government shall provide 2 calendar days advance notice of requested contractor pick up.

C<sup>3</sup> CLAUSE 952.245-0003 GOVERNMENT LIABILITY FOR LEASED EQUIPMENT (WITHOUT OPERATOR) (AUG 2011)

For equipment furnished by the contractor under this contract, without operator, the Government will assume liability for any loss, damage or destruction of such equipment, except that no reimbursement will be made for loss, damage or destruction due to (1) ordinary wear and

tear, (2) mechanical failure, or (3) the fault or negligence of the contractor or the contractor's agents or employees.

**C<sup>3</sup> CLAUSE 952.245-0004 CONTRACTOR'S  
RESPONSIBILITY FOR PROPERTY AND PERSONAL  
DAMAGES (AUG 2011)**

Except as provided in C-JTSCC clauses 952.245-0002 and 952.245-0003, the contractor will be responsible for all damages to property and to persons, including third parties that occur as a result of contractor or contractor's agents or employee fault or negligence. The term "third parties" is construed to include employees of the Government.

(R4, tab 4 at 61-62)

8. On 29 September 2011, appellant forward an email to 1LT Daniel Hamilton, the Air Force's facilities engineer, in which it inquired whether it could make an initial delivery of a rock-dump and two front-end loaders. It included photographs of the items which it proposed to deliver. 1LT Hamilton responded, in part, as follows:

The "rock-dump" pictured is not a rock dump, it is a dump truck. Please do NOT send this, as we will not accept it. Please send the ROCK DUMP in you[r] proposal or equivalent.

Also, do NOT send the two small Front-End Loaders as they do not meet the contract specifications.

On the same day, appellant replied in these terms:

Ok, I won't send the MAN Rock Dump I had them available in stock, I have to get the other Rock Dump from outside the country with the remaining equipment that I don't have available I [sic] going to do everything I can to deliver everything ASAP this contract is my priority. I won't send the loaders either although I was going to send the Loaders for temporary use only till I get the bigger ones.

(R4, tab 24 at 32-33)

9. As of 1 October 2011, PLSC had not delivered any items of MHE. On that date, appellant asked if it should send a shipment. 1LT Hamilton replied “[y]es, [s]end equipment within contract specs ASAP.” (R4, tab 24 at 31) On 2 October 2011, PLSC emailed, in part: “Due to security reason I just sent you only one D7 bulldozer, and about the forklift and the one skid skidder I will call/Email you later on today to coordinate the delivery for tomorrow.” Respondent stated: “Please send a picture of Skid Steer loader to confirm it meets the contract requirements.” *Id.* at 29. Accordingly, PLSC forwarded a photograph of the skid skidder. On 3 October 2011, 1LT Hamilton forwarded the following email to appellant:

Sir,

These skid steers do not meet the contract specifications.

The contract calls for:

Bobcat w/forklift attachments

FFP

Skid Steer w/forklift attach 4,360Lb lifting cap, 74HP,  
7,700lb operating weight.

New Holland L180 or Bobcat S630 or equal (2 Each)

Please send skid steers in accordance to contract specifications.

Furthermore, I am rejecting the “D7 Dozer” you sent to us. This Dozer is not a D7---it is a D6 size dozer that was changed and painted to look like a D7. It is unacceptable. Also, the D6 has several mechanical problems.

Additionally, the employees you sent to deliver the dozer yesterday were not cooperative with our security and one did not have a legitimate tazkera.

PLSC is not off to a good start with this contract. Please deliver MHE in accordance to the contract and in good working order and we can overcome this poor start.

(*Id.* at 28)

10. On the same date, PLSC responded as follows:

Gentlemen,

About the skid steer I did a mistake, it is not for permanent use it is for temporary use until the actual one arrives with the attachment, I already sent an email to Mr. Hernandez couple days ago regarding the skid steer.

Mr. Hamilton please let me know if you want to use the skid steer temporary [sic].

About the D7 dozer, it is D7 and I have the documents reflecting that it is a D7 dozer, and if you look at the pictures, that is the one I proposed, and if the D7 dozer has mechanical problems let me know what kind of problems it has and I will send you my mechanics to fix it. And sorry about the behavior of the delivery guy yesterday, promise that will not happen in the future and he will not be my delivery guy again. The next delivery guy will have proper documents to enter Shindand AB. And Platinum Logistic Service Company is all about customer satisfaction. I always make sure to send you the MHE's which I proposed in my proposal.

Mr. Hamilton please let me know if you have a copy of my proposal, if not I will send you a copy of it so we are tracking the same equipments.

(R4, tab 24 at 27)

11. Respondent replied: "The dozer is NOT a D7. The CAT factory tag on the dozer even states it is a D6R" (R4, tab 24 at 26-27).

12. On 8 October, PLSC transmitted this email.

I have been trying to call your cell phone since morning, but I could not find a chance to reach you. Sir, I got part of the equipments ready to deliver. Those are Four (4) dump trucks, One (1) Forklift and One (1) Backhoe. These equipments are ready to be schedule [sic] for tomorrow delivery. But due to security issues, I have to provide these in the bellow [sic] listed phases:

Two (2) Dump trucks - Tomorrow - Sunday (09-Oct-11.)  
Two (2) Dump trucks - Monday (10-Oct-11.) One (1)  
Forklift, One (1) Backhoe – Tuesday (11-Oct-11.)

Please let me know by an hour, so I can schedule a delivery  
for tomorrow. Thank you very much!

(R4, tab 24 at 25)

13. 1LT Hamilton replied: “Please proceed with delivery tomorrow.” Also on 8 October 2011, appellant stated: “Tomorrow @ 12:00 PM you will receive two Dump trucks. Be at the gate to receive it [sic] from my drivers. Thank you.” On 9 October 2011, respondent stated:

We will meet your drivers at the gate. Please be sure the trucks and equipment meet the required specifications, Please find the attached SOW.

All equipment and trucks will be inspected and checked for meeting the SOW requirements before accepting.

(R4, tab 24 at 24-25)

14. Also on 9 October 2011, 1LT Hamilton forwarded this email to appellant:

As I have stated before: the Entry Control Point to Shindand is only open from 0800-1100 and from 1200-1645.

If your drivers show up between 1000 and 1100, they will have to wait until after 1200 to gain access to the base due to the ECP being shut down.

I understand that your drivers are out there now with the MHE, but we are unable to bring them on base, regardless of who you call.

Also, what is your fix action for the FAKE D7 Dozer you delivered? As stated before, that Dozer you delivered is D6—painted to say D7. The factory plate states it is a D6 and has a D6 size blade on it. This is fraudulent and is not accepted. Please advise ASAP on proper delivery of a D7 Dozer.

(R4, tab 24 at 23)

15. After inspecting the items of MHE which PLSC had delivered, respondent transmitted the following email:

Sir,

The decaled "D7R" CAT dozer is actually a D6R, even the CAT factory steel identification plate states it is a D6R. Upon arriving, the delivery driver had a hard time to get the dozer to move off the truck. He had to work for a while to even get the dozer tracks to operate. Once he had the dozer off the truck, we drove it back to our area. However, on the way back the tracks suddenly stopped and wouldn't move. We tried to get it to move for a while and then suddenly it started moving again. The operator noted that the blade control did not function properly and seems to be operating backwards. All the warning lights on the dash are flashing. The engine seems to be overheating as you can hear it boiling. No teeth on the ripper. (The contract was for a D7, D5, but not a D6).

Today, two dump trucks arrived for inspection:

1: (Yellow in color). 579,417 km on speedometer. Air was heard leaking while inspecting truck. The alternator main wire had been broken and was just twisted together and probably will not work or even stay twisted together. There are serious oil leaks. Two of the front leaf spring clamps are broken and just hanging there. Thick wire tied around the leaf spring and sway bar, not sure if leaf spring is holding sway bar in place or vise [sic] versa. The batteries are just sitting there and bouncing around, not secured. The muffler hanger bracket is broken and just hanging by the muffler. The overall condition of the truck is very poor. This truck is tired and Not in condition to haul the loads we are expecting to be hauling. This truck should not be accepted.

2: (Orange cab/gray bed in color). 379,688 Km on speedometer. The truck has five really bad tires. There was garbage piled in the bed. The bed sides and tailgate all open, however there are serious gaps on all three sides. It will leak badly all over the road while hauling soil materials. There is a hole in the front of the dump body where soil will spill on top of the engine and transmission. The dump body will not even go up, even with both drivers and the mechanic trying to get it to go up, (they finally all gave up on it). The main wire from the alternator to the batteries was completely broken off and the batteries are not being charged. On this truck only, [i]f all the needed repairs mentioned (and no others arise) are repaired, I will re-inspect the truck for approval.

(R4, tab 24 at 22-23)

16. On 25 October 2011, Modification No. P00001 was executed. It modified several of the contract line item numbers, reduced the required items of MHE to 27, and decreased the contract's fixed-price for the base period to \$964,185.95 (R4, tab 6).

17. On 28 October 2011, 1LT Hamilton listed in writing the "associated problems" with various items of MHE which PLSC had delivered during that month, including equipment not previously discussed. He wrote:

**1992 Dump Truck** (3235 Yellow/aluminum color bed) 390,457Km on speedometer. Exhaust system very bad, exhaust is coming directly into the cab. Muffler is very loud and leaking badly. Tailgate has large gap and leaks out soil. The lug nuts are loose, can be turned by hand. The leaf spring brackets are broken. Alternator wires broken/cut and the battery are not getting charged. Wipers suddenly stop working at random. The tailgate opens when the truck is shut off. Driver side taillights are not working. The air brakes are leaking and it drains air supply quickly. The tailgate does not close. Loose mirror on passenger side. Overall, it is in rough condition at best.

**5K All Terrain forklift** (Yellow) Unknow[n] Hrs on meter. Brakes are very bad, grind loudly and even vibrate through the forklift. Parking brake does not work. Door latch broken off and missing. Missing the lift charts for properly and safely lifting objects.

2. The following equipment was rejected immediately.

**Backhoe:** This was the same backhoe that Platinum had sent a picture of and we had rejected it. They stated they were not actually sending that particular machine, but they did. The specifications call for an enclosed cab with A/C. The picture was of an open cab, no A/C. What they did was to fill the gaps on the sun shade rollover structure with Plexiglas and silicone to try to make it into an enclosed cab. They did this with NO windows or A/C. Also, the seat was broken and does not slide forward or backward to adjust for using the backhoe. When swung around to operate the backhoe, you can't get your legs around the back because of the broken seat. When raised, the hand throttle doesn't stay when it moves, it returns to idle. The backhoe is a sideswing style, but it doesn't move side to side. It seems stuck in the position it is in, making it useless. The machine stalled while trying to swing out the dipper stick. Upon trying to start it, it was discovered that the wiring was messed with and a pushbutton switch had been rigged to start the machine instead of the key switch. However, when it was attempted to be started, the battery was dead and it also ran out of diesel fuel. This machine clearly is in rough condition at best. It was not able to inspect any further due to it being broken down.

(R4, tab 7)

18. On 2 November 2011, TSgt Jose A. Hernandez, the CO, forwarded a cure notice to appellant. He wrote:

1. You are notified that the Government considers your failure to comply with the statement of work in accordance to the terms and conditions of the Purchase Order a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice the Government may

terminate for Cause under the terms and conditions of the 52.212-4 Contract Terms and [C]onditions—Commercial Items clause of this contract[.]

2. Description of problems: You were awarded contract W5KA4N-11-P-0390 on 28 Sep 11 for several pieces of Heavy Equipment in accordance with the statement of work, so far all the equipment that you have delivered is non operational and in need of extensive repair. The attached MFR from the Contracting Officer Representative (COR) details the discrepancies.
3. Please acknowledge receipt of this letter in writing and respond within 10 days with an acceptable plan to replace existing equipment with the required equipment in operable condition and a plan to prevent future occurrences.
4. Questions concerning the above may be addressed to the undersigned via phone at 318-822-6508 or via email [jose.a.hernandez1@afghan.swa.army.mil](mailto:jose.a.hernandez1@afghan.swa.army.mil)[.]

(R4, tab 8)<sup>1</sup>

19. On 14 November 2011, PLSC responded to the cure notice in writing. It conceded that “some of the MHE I provided are not IAW the SOW.” But it also contended that “[a]ll MHE delivered were operational.” Appellant blamed respondent’s “operators” for misusing the equipment and offered to provide its own drivers if respondent would offer them operators’ licenses. (R4, tab 9) In addition, PLSC transmitted a revised delivery schedule which stated that it would be as long as 45 to 60 days before certain items of MHE could be delivered (R4, tab 10).

20. On 22 November, the replacement CO, MSgt Chad D. Miller, forwarded the following email to appellant:

In regards to your response to the cure notice. We have decided to allow this contract to continue based on how your company stated they will correct these issues.

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<sup>1</sup> The “MFR,” memorandum for record, referred to by TSgt Hernandez is the document partially set forth in finding 17.

With that being said, below are some items I need to address:

1. You provided a schedule with delivery of all required equipment. If these vehicles are not delivered as stated in your Delivery Schedule, I will be forced to terminate this contract.

a. I need your company to send myself an email everyday with the status of delivery for each vehicle listed. For example; Item 0007 Dump Truck is supposed to be delivered within 1 day. Item 0007 Dump Truck needs to be delivered no later than 25 November 2011 (your response to this email by 24 November).

b. This is very important: I need your company to send myself an email every day, with the latest status, until all vehicles are delivered.

2. The Government will not provide an operator's license at the time your company delivers the equipment. Nowhere in the contract does it state the Government will provide such and the contract will not be adjusted to state so. If you refuse to deliver the vehicles based on this, you will be in default of the contract and I will continue the termination process. One thing you should understand; if the Government damages any equipment of yours, you have the right to file a claim. We are just as responsible for taking care of your equipment, as you are responsible with providing us operational equipment according to the contract. When I say damage, I am not referring to normal wear and tear. Damage would be similar to a broken window.

3. For delivery: Once the Government accepts the vehicle, we are stating you have met the terms and conditions of the contract for that particular piece of equipment. This does not mean a defective piece of equipment won't get through our inspections. If we find a piece of equipment that is not operational after we accept it, it could still be unacceptable. In this case, the Government will establishing [sic] proof that we did not cause the problem. But, I will make sure our Government inspectors are doing a complete inspection before accepting any piece of equipment. Be sure to arrive with equipment that is fully operational. If a piece of

equipment is delivered and not fully operational, I will view that as a No Delivery.

4. Operators will not be provided by your company in regards to this contract.

If you have any issues with the above or the way forward, please advise and I will be in contact with your company to continue the termination process. Once again, I want to re-emphasize; your company needs to send myself an email every day with the latest status, until all required vehicles are delivered. I need a response to this email no later than 24 November 2011.

After I receive your response and you agree, I expect the vehicles with a 1 day delivery to be delivered No Later than 25 November 2011. And then all other vehicles delivered accordingly after that. Please let me know if you have any questions.

(R4, tab 11 at 1-2)

21. The parties then arranged for two items of MHE, a dump truck and a water truck, to be delivered to the appropriate gate at Shindand Air Base at 0830 hrs on 24 November 2011. However, the vehicles were not timely delivered and, in fact, did not arrive at the gate, according to 1LT Hamilton, until closing time when "it was too late to get them in." On 25 November 2011, PLSC accused 1LT Hamilton of "lying" about the attempted delivery. (R4, tab 13 at 1, tab 14 at 3, 4, 8) PLSC ultimately did attempt to deliver the two items of MHE on 25 November 2011, but respondent refused to accept them. In 1LT Hamilton's words, the "'water truck' was basically a water tank on a flatbed truck and the dump truck had numerous things wrong with it" (R4, tab 14 at 1, 3).

22. On 2 December 2011, PLSC delivered four items of MHE: a rubber tire roller, a grader, and the same water truck and dump truck that had previously been rejected. As 1LT Hamilton stated:

We rejected all pieces of MHE again.

- Dump truck (green): Still had multiple serious problems along with several minor ones. The air brakes still leaked and

exhaust leaked into the cab. Due to the air leaking, the dump truck has a tough time raising even empty.

- Rubber tire roller: Same one as before. Very old and does not meet our needs.

- Water truck: Same as before. This is a fuel tank mounted to a flat bed truck. A release system is rigged in the back to empty water by turning a valve. Not a water truck.

- Grader: Grader has not moved since initial delivery, it is still broke down in the clean soak yard.

(R4, tab 15 at 1)

23. Respondent conducted a detailed inspection of the grader. It concluded:

I did an inspection on the grader and it was rejected. Once the engine started, there were 2 hydraulic cylinders leaking badly leaving a puddle on the ground; the control/steering rack was broken and doesn't stay up, instead the steering wheel along with the control rack falls onto your legs; battery boxes unsecured and the covers falling off; the center swing gauge for the moldboard is off center; 3 tires with problems; 2 lights not working; horn not working; bad hydraulic hose; leaking antifreeze; shifter sticking/hard to move...we stopped at this point as they said would take it back...I believe they were a bit embarrassed at this point...[.]

(R4, tab 15 at 1)

24. On 3 December 2011, the CO forwarded the following memorandum to PLSC:

1. This letter has been issued to address areas of concern in reference to the aforementioned contract that was awarded to your company (Platinum Logistics Services Company).

2. Contract W5KA4N-11-P-0390 was awarded to Platinum Logistics on 28 September 2011. The contracting office has been informed that you are not performing your duties in accordance with the terms and conditions of the contract. Specifically, you are failing to deliver acceptable equipment

as stated in the contract. The overall equipment provided for this contract has been poor and requires your immediate attention to correct all the following deficiencies:

- a. GREEN DUMP TRUCK - would hardly raise dump bed when empty, air brakes leaked and exhaust leaked into the cab.
- b. WATER TRUCK - water had to be turned on & off manually in the back of the truck where the water sprays. Individual turning this on/off is directly in the path of the water. The contractor/customer came to an agreement that if ktr modifies truck w/internal water valve & fix fuel gage, customer would accept similar.
- c. RUBBER TIRE ROLLER - seat was located in rear and driver can't see where they are driving.
- d. GRADER - wouldn't start, once grader was running it shut itself off. Equipment rolled off the back of the truck & the hydraulics weren't working. Two hydraulic cylinders leaking badly leaving a puddle on the ground. The control/steering rack was broken and doesn't stay up; the steering wheel along with the control rack falls onto your legs; battery boxes unsecured and the covers falling off; the center swing gauge for the moldboard is off center. Equipment leaking antifreeze.
- e. FORKLIFT- equipment will not start and the brakes are failing. Contractor notified 18 November; mechanic was due on site to fix by 28 November; mechanic has not shown up.

3. These business practices are unacceptable. Your failure to perform in accordance with the terms and conditions of the contract is unacceptable and a direct violation of the terms and conditions of the contract.

4. You are hereby notified that the Government considers your current situation and the contractual issues stated above, as a failure to comply with the terms and conditions of the contract. Unless you are able to provide the Government adequate assurance of future performance, the Government

may terminate this contract, or any part hereof, for cause in accordance with FAR Clause 52.212-4(m).

5. You have 7 days from the date of this letter of concern (3 Dec 2011 to 10 Dec 2011) to remedy this failure and deliver acceptable equipment or the Government may terminate this contract, for cause. Please sign and return a copy of this letter to the undersigned. If you have any questions please contact me via e-mail at [chad.d.miller1@afghan.swa.army.mil](mailto:chad.d.miller1@afghan.swa.army.mil).

(R4, tab 16)

25. On 4 December 2011, appellant responded to the CO's letter as follows:

I read your letter of concern I don't think that the customer will accept any MHE from us no matter what changes we bring in the MHE. The customer doesn't agree what the contract itself after I met with him on delivery time, they want different MHE than what is in the contract and I am sure you guys already know it so let's come to agreement to get over with this instead of wasting our times. Now I have spent over a million dollars to buy MHE for you I have provided you the invoices from UAE, before buying any of these Equipment I sent Specs and Picture to the KO and then I bought them to make sure that it is what you need, these MHE is [sic] not usable in Afghanistan so I can'[t] sell them or lease them to anyone else so now that you don't want them I would respectfully ask the Government of USA to pay for my losses this is too much money that I can not afford and my company will face bankrup[t]cy.

I know I can't do anything if you don't pay me but I am sure that USG is not here to harm a local small business like me. Especially for something that is not my fault at all I am bringing you what I sold you and I am not trying to do anything wrong.

(R4, tab 18 at 4-5)

26. The CO replied to PLSC's email on 5 December 2011. He stated:

You delivered a grader that didn't start. Once it did start, the grader would turn itself off. This is only one incident, your supervisor on site is aware of what the equipment was rejected for. Don't tell me you are not somewhat at fault here. Capt Franklin was there for delivery and confirmed what the customer was stating. Capt Franklin was a middle party from the Contracting Office and had a[n] unbiased opinion.

You can't tell me a grader that doesn't start is something we should accept? The contract was modified to reflect your proposal. Your proposal was not for equipment that will not run.

I expect you to deliver the following equipment no later than 10 Dec 2011:

1. Dump Truck
2. Rubber Tire Roller
3. Water Tank
4. Grader
5. D7 Dozer

If you are refusing to deliver the equipment as stated in the contract, I will go directly into the termination process. Please let me know what your plans are.

(R4, tab 18 at 3)

27. On 6 December 2011, appellant responded to the CO's email. It asserted, in part:

I will deliver the equipment you have listed below on 10 Dec 11 but before that I would like get my answers from you regarding the issue mentioned above and a Confirmation from your customer stating that he agrees with the Contract MOD.

I have told you before and I would like to repeat that your customer doesn't want any of the Equipment on the contract please talk to your customer and tell him I am delivering what is in my contract. Otherwise no matter what I deliver they

will not accept. The problem is not my equipment the problem is the expectation of your customer from his original requirement. Your customer told us from the first day that he doesn't accept the contract MOD but contracting office told us to deliver what's on the contract.

Mr. Miller I am sure you know it very well where the problem comes from so please find a solution, the problem will not get solved when I deliver anything it is more [a] contractual issue between you and your customer not me. But I am still ready to deliver the MHE and I have bought them all and I have provided you the invoices as a prove.

(R4, tab 18 at 3)

28. On 8 December 2011, the CO replied to PLSC's email. He stated, in part:

I do know where the problem is coming from and you need [sic] take responsibility for this equipment and start delivering equipment that is operational. When you deliver equipment in accordance with the contract that is not operational, it will be rejected. When you deliver equipment in accordance with the contract that is operational, it will be accepted. Capt Franklin is on site to verify deliveries and he has confirmed this equipment is non operational. He is a neutral party and looks out for the well being of the Government as well as the KTR's. When he relays back to me that your equipment is non operational, I view that as though you are not performing in accordance with the contract.

We want this contract to be a success, but we will not accept equipment that is non operational. Please confirm you will deliver operational equipment on 11 Dec? Also, I need a time you plan to deliver this equipment? If you have any questions let me know.

(R4, tab 18 at 1-5)

29. On 11 December 2011, PLSC made what would be its last attempted delivery of MHE to Shindand Air Base. The delivery consisted of a front end loader and a steel wheel roller. The latter piece of equipment was not accepted for the following reasons:

- loose battery (minor)
- leaking hydraulic hose (1) (minor)
- broken fuel cap (minor)
- front roller NOT vibrating/compacting (functional issue-major)

The loader was accepted; however, the following deficiencies were noted:

- shoddy electrical work (minor)
- loose batteries (2) (minor)
- fuses missing (5) (minor-lights, horn, etc)
- 1 lug missing on front, left tire (minor)
- slow transmission into other gears (minor)
- key has cable secured to machine (minor)

(R4, tab 21 at 2-3) Ultimately, the loader was operable for only two days (R4, tab 23).

30. On 11 December 2011, PLSC forwarded two invoices to the CO for payment. The CO, in turn, transmitted the invoices to 1LT Hamilton for analysis. On 12 December 2011, 1LT Hamilton responded to the CO in these terms:

These invoices are very incorrect and unacceptable. Nothing has worked yet.

The "D6R" dozer; as I have stated many times it has not worked since arrival. It was never accepted. There are numerous problems with it that the contractor has been informed about and has not repaired. The fact that he would even try and invoice for this piece of equipment show [sic] to me the contractor has no intention improving on this contract. He knows this piece is broke and has not fixed it.

The 20T Dump Truck. These have never worked for more than an HOUR. The contractor has been repeatedly informed about repairs and does not make them.

JCB: Forklift; the brakes have not worked on this since delivered, it was never accepted. The contractor has stated several times even in response to the cure notice that he would repair and he hasn't.

I cannot agree to these invoices. It would be waste to pay the contractor for a service they did not provide.

Way Forward: My opinion is still to terminate the contract. After 3 months, delivering one piece of working equipment does not show they are capable of this contract. I still want to terminate for default.

The CO replied that he would “start the termination for default paperwork.” (R4, tab 22 at 1-2)<sup>2</sup>

31. On 31 December 2011, the CO sent the following “show cause” notice to PLSC:

1. Since you have failed to perform Contract W5KA4N-11-P-0390 within the time required by its terms, the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to MSgt Chad Miller, Contracting Officer, Herat RCC at [chad.d.miller1@afghan.swa.army.mil](mailto:chad.d.miller1@afghan.swa.army.mil) within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default.

2. Contract W5KA4N-11-P-0390 was awarded to Platinum Logistics on 28 September 2011. The contracting office has been informed that you are not performing your duties in accordance with the terms and conditions of the contract. Specifically, you are failing to deliver acceptable equipment as stated in the contract.

3. Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or

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<sup>2</sup> The “one piece of working equipment” to which 1LT Hamilton referred was the front end loader which ceased to function after only two days of operation (finding 29).

services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

4. Request you acknowledge receipt of this Show Cause Notice by signing this letter and returning a copy to myself at chad.d.miller1@afghan.swa.army.mil.

(R4, tab 25)

32. In a discursive response which eventually became the complaint in this proceeding, PLSC essentially blamed its purported failure to perform on the perceived inability of various governmental officials to communicate with one another regarding their expectations for the contract. Other than offering to provide PLSC's own operators for the equipment, appellant did not state any intent to attempt any further performance of the contract. In closing, it sought payment in full for its invoices. (R4, tab 26)

33. On 21 January 2012, the CO promulgated the following memorandum for record:

1. Contract was awarded 28 September 2011 for MHE equipment at Shindand AB, with a delivery date of 30 Sep 2011 to 29 Mar 2012. Two option periods included, each one for 6 months. One modification issued 23 Oct.; this modification was issued to "change the equipment description to reflect the contractor's quote". Prior to award, the COR was provided a copy of each KTR's equipment proposal. Platinum Logistic Services Company was the CORs #1 choice, since they were the lowest technically acceptable proposal; they received the award. Modification one also removed CLIN 0010, two pieces of equipment.

2. On 28 October 2011 the Contracting Office received a memo from the COR indicating the KTR was not delivering operational equipment. The equipment that had been delivered up to this point was either rejected or was accepted and shortly thereafter began to malfunction. The KTR was required to provide a mechanic to fix the equipment; but they either didn't provide one or provided an individual that was not a mechanic and couldn't fix the equipment. See attached MHE Memo for comments from COR.

3. On 2 November 2011 a Cure Notice was sent to the KTR. The KTR responded on 14 November 2011. See attached Response Letter. On 21 November the KTR provided a new delivery schedule. It was agreed upon by the Contracting Office and the COR to allow this KTR to continue according to their delivery schedule. On 22 November I took over KO actions for this contract. On 22 November the KTR was informed they would be given another chance to perform based on their delivery schedule. Their first delivery was scheduled for 24 November. The COR was at the gate and no KTR or equipment. KTR said they were at the gate waiting for the COR. Apparently on 25 November both parties were able to locate each other, but both parties disagreed with what the other was saying again. The KTR showed up with a dump truck and water truck. COR stated both pieces of equipment were rejected. The KTR stated they were rejected for minor issues. Both parties stated the other was lying. With all the back and forth, the Contracting Office decided to send Capt Franklin to Shindand to witness the delivery of this equipment. On 29 November, the KTR tried to deliver a grader and rubber tire roller along with the same water truck and dump truck as before. The COR stated the grader and roller were not operational and the same problems with the dump truck and water truck as before. I informed the KTR not to deliver any equipment until Capt Franklin arrives and can witness the actual delivery. The intent was to get a neutral party involved from the Contracting Office that could verify the condition of the equipment the KTR was providing.

4. Capt Franklin arrived and delivery was scheduled for 2 Dec. KTR delivered and all equipment was rejected. Capt Franklin concurred with the COR about rejecting the equipment. On 3 Dec, a letter of concern was sent to the KTR giving them 7 days to correct the equipment deficiencies and try to deliver again. KTR responded to the letter of concern and didn't believe the COR would accept anything they deliver. We informed the KTR to try another delivery before Capt Franklin leaves Shindand. Delivery was scheduled for 11 Dec. The KTR delivered a front end loader and a steel wheel roller. The front end loader was accepted

and the steel wheel roller was rejected due to the vibratory function not working.

KTR was informed if this function was working they would accept it. They did not try to deliver the steel wheel roller again.

5. After this last attempt to deliver, the Contracting Office received word from the COR stating they don't believe this KTR can provide the equipment and would like to continue with the termination procedures.

6. Termination for cause was sent to policy & legal for review. Policy/Legal recommended we issue a show cause and allow the KTR ten days to show cause. Show cause created and sent to policy/legal for review. After corrections from the comments, the show cause was issued 31 Dec 2011. KTR signed and returned the show cause on 9 Jan 2012. We received their response to the show cause on 10 Jan 2012. See attached "MHE cause response" from the KTR. After reviewing the show cause, we believe the KTR cannot provide the equipment as stated in the contract. The KTR stated his equipment was not accepted because the COR didn't agree with the modification. This was not the case; Capt Franklin (Contracting Officer) was on site during delivery and confirmed the equipment delivered was not operational and should not be accepted. The KTR also stated "the contracting officer (Mr. Hernandez) confirmed the MHE was acceptable for the COR/contract." TSgt Hernandez modified the contract to match the KTR's original proposal; TSgt Hernandez did not agree to the KTR providing equipment that was not operational. The KTR also stated, "Our REP heard it from the COR and his inspection team that they did not know anything about the MOD and they were surprised when we presented the MOD to them after they rejected so many of our deliveries already." After hearing this from the KTR we discussed this issue with the COR. The COR indicated they were not happy with the change to the equipment in the mod, but they informed us that even with the equipment change the equipment was still not acceptable because it was not operational. After discussing with the COR, we informed them if the equipment is operational they need to accept it. We decided to send Capt Franklin to

Shindand to witness the delivery. With Capt Franklin on site and witnessing the delivery; the equipment was rejected. The equipment was rejected due to inoperability and was confirmed by Capt Franklin. See attached KO memo.

7. Contracting Officers basis to terminate for cause: 1) The Government still has a need for this requirement and the KTR is not performing. 2) This termination would be in the best interest of the Government.

8. The point of contact for this memorandum is the undersigned at DSN 822-6382 or by email at [chad.d.miller1@afghan.swa.army.mil](mailto:chad.d.miller1@afghan.swa.army.mil).

(R4, tab 27)

34. On 21 January 2012 the CO executed Modification No. P00002 which terminated the contract for cause (R4, tab 28). This appeal followed.

#### DECISION

It is axiomatic that a default termination is a drastic sanction which should be imposed or sustained only for good grounds and solid evidence. *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). In addition, it is well settled that the government bears the burden of proof as to whether a termination for default was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). If the government establishes a *prima facie* case in this regard, then the burden of production, or going forward, shifts to the contractor. *Id.*

Here, the government has met its initial burden. Through a host of CLINs, the contract required that PLSC furnish items of MHE which met detailed specifications (findings 5-6). In addition, the contract provided: "All equipment furnished under this contract shall be in good working order. The Government reserves the right to reject equipment that is not in safe and operable condition." (Finding 7) Over a period of several months, appellant failed to meet these requirements. It delivered—or attempted to deliver—items of MHE which did not conform to contract requirements and which, with one temporary exception, were inoperable (findings 8-17, 21-29). Based upon these repeated instances of noncompliance, respondent would have been justified in terminating the contract for default in its early stages. *See, e.g., FitNet International Corp.*, ASBCA Nos. 56604, 56605, 11-1 BCA ¶ 34,697 at 170,878-79. However, even after issuing a cure notice, the CO demonstrated restraint and gave PLSC another opportunity to comply with the contract (findings 18-20). But the CO's efforts were unavailing, and he

ultimately had to terminate for default (findings 30-34). Even at this late date in the life of the contract, appellant gave no assurances that it would deliver conforming and operable items of MHE in the future. It simply blamed government personnel for its own failings (finding 32). On the basis of these facts, the Board upholds the termination for default.

CONCLUSION

This appeal is denied.<sup>3</sup>

Dated: 15 August 2013



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

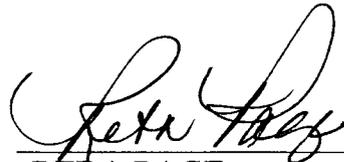
I concur

I concur



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



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REBA PAGE  
Administrative Judge  
Acting 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. 57965, Appeal of Platinum Logistic Services Company, rendered in conformance with the Board's Charter.

Dated:

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

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<sup>3</sup> Based upon our disposition of this appeal on the merits, the Board denies respondent's motion to dismiss for failure to prosecute, filed on 25 June 2013, as moot.