

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Dace Enterprises, LLC) ASBCA No. 57984
)
Under Contract No. W91RUS-11-P-0094)

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Washington, DC

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Army Chief Trial Attorney
CPT Anthony F. Schiavetti, JA
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Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE GRANT

Appellant Dace Enterprises, LLC (Dace) appeals from the government's termination for cause of its commercial items contract to provide support for specified Oracle and Sun server hardware systems, operating system software, and integrated software. The government asserts Dace was never authorized to provide the required support, did not provide the required support, and failed to cure the situation when requested, and thus the termination for cause was proper. Dace argues that its nonperformance was excusable because of contract errors or omissions constituting government breach, and because the government abused its discretion in terminating. For the reasons stated below, we deny the appeal.

FINDINGS OF FACT

Solicitation and Contract

1. On 25 August 2011, the Army Contracting Command--Aberdeen Proving Ground, Ft. Huachuca, Arizona, issued Solicitation No. W91RUS-11-T-5144, a Request for Quotations (RFQ) to procure systems support for 151 Oracle and Sun server hardware systems, operating system software, and integrated software, such as firmware. The RFQ identified "Oracle Premier Support for Systems" as the brand name support for the requirement, but allowed "or equal" quotes. (R4, tab 1 at 1-10, 15-16, tab 3 at 2) Actual service would be provided by Oracle, but authorized Oracle resellers could offer to provide that support through Oracle (tr. 1/55-56, 60, 111, 195, 204, 208). Each of the 151

servers had identifying features listed (called "salient characteristics" in the RFQ): serial number, part number, brief description, unit of issue, and quantity (R4, tabs 1, 3).

2. Three contract line item numbers (CLINs) were identified in the solicitation for the 151 servers, with sub-line items under each. Each CLIN listed delivery as "FOB: Destination" with a delivery "SHIP TO" address of "2133 CUSHING ST., FORT HUACHUCA/AZ/85613" (R4, tab 1 at 12). The actual equipment was located in a variety of different countries and continents, and it was not possible to ascertain this from the solicitation alone based on the equipment information provided (tr. 1/168-69, 194).

3. The solicitation explicitly instructed vendors to "include any and all re-instatement fees if applicable" in their quotes (R4, tab 1 at 9). Reinstatement fees are fees established by the equipment/service provider (in this case, Oracle) to reinstate support that has lapsed, and to cover back support retroactive to the date of the lapse (tr. 1/62). Coverage had lapsed for these servers and the contracting officer (CO) expected that reinstatement fees would apply, but because such fees are sometimes waived by the equipment/service provider, reinstatement fees were not included as a separate contract line item (tr. 1/199-200).

4. Dace submitted a quote in response to the RFQ on 23 September 2011, specifying the brand name "Oracle Premier Support for Systems" and not an alternate or "equal" product (R4, tab 4 at 1, 10; tr. 1/201, 2/55, 62-63). Before submitting its quote, Dace had contacted Tech Data Corporation (Tech Data) with the intent to buy the services from Tech Data and resell them to the government. However, Tech Data informed Dace that they were not authorized to provide Oracle hardware, services, or support. Dace submitted its offer based on information obtained from the Oracle website store. Dace did not call or email a contact person at Oracle to receive a custom quote for the work solicited by the government. (Tr. 2/48-52; R4, tab 38)

5. A total of three quotes were received, including Dace's which was the lowest (tr. 1/200-01). Based on Dace's quote, the government awarded firm fixed-price Purchase Order No. W91RUS-11-P-0094 to Dace on 28 September 2011 for \$145,000 (R4, tab 5). The Purchase Order required Dace to deliver brand name Oracle Premier Support for Systems (R4, tab 5 at 4-5). The delivery date for all three CLINs was 28 September 2011, with a contract period of performance of 28 September 2011 to 27 September 2012 (R4, tab 5 at 4-5). Dace accepted this Purchase Order on 29 September 2011, thereby forming the contract at issue here (R4, tab 39).

6. On 30 September 2011, Dace invoiced the government for the contract price of \$145,000, which the government paid on 28 October 2011 (R4, tab 63).

7. The contract incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010). The clause, among other things, set forth the government's right to terminate the contract for cause under specified circumstances:

(m) *Termination for cause.* 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.

(R4, tab 5 at 6)

8. FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010) also specified that the contractor is relieved of liability for default for excusable delays.

(f) *Excusable delays.* The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers.

(R4, tab 5 at 6)

Oracle Support, Programs, and Policies

9. Oracle Premier Support for Systems, required by the contract, is a brand name, comprehensive support solution for server systems, and includes coverage for system hardware, operating system software, and integrated software. It consists primarily of services support, but also includes replacement hardware items. Features include 24/7 support from Oracle systems experts, two-hour on-site hardware service (within a defined coverage area), updates to integrated software and operating system software, and personalized support tools via Oracle's website. (Tr. 1/55-58, 109; R4, tabs 60, 62 at 6-7)

10. Oracle itself always provides the parts and services required for Oracle Premier Support for Systems, with most of the services being delivered remotely via telephone or through Oracle's website. Oracle does authorize a limited number of its third-party partners to resell Oracle Premier Support for Systems, but Oracle still provides the required parts and services. Oracle prices the support provided to its third-party resellers

as a percentage of the price of the equipment, so the price does not depend on or relate to the location of the equipment. (Tr. 1/55-58, 60-61, 158-59, 204; R4, tabs 10, 60)

11. A purchaser can buy Oracle Premier Support for Systems at the time the hardware is first acquired (renewing the support when it comes due), or acquire the support after a lapse of support coverage. If support coverage has lapsed, Oracle policy calls for payment of a reinstatement fee or penalty to reinstate the support, and payment of back support retroactive to the date of the lapse. If the lapse exceeds 90 days, Oracle may also charge a recertification fee, which entails an on-site assessment. (Tr. 1/61-63, 84-88; R4, tab 62 at 114-15, 128-29, 160-61) Oracle may waive either the reinstatement fee or the recertification fee or both (tr. 1/86, 108-09).

12. Oracle has a separate program called the "Oracle PartnerNetwork" (OPN). Program members get access to information about Oracle products and services that Oracle publishes through its OPN website, are allowed limited use of Oracle's designated OPN program member logos and branding, and receive other benefits. All third-party partners of Oracle are required to apply for and be approved for membership in Oracle's OPN program. However, membership alone does not entitle members to distribute Oracle products. (Tr. 1/18-19, 22, 25; R4, tab 61)

13. Actual distribution of Oracle products and services by an OPN program member requires a further agreement, such as a Full Use Distribution Agreement (FUDA). For distribution to public sector entities, including the U.S. government, an addendum to the FUDA is also required – the "Public Sector Addendum." (Tr. 1/22, 25-30) Even with a FUDA and Public Sector Addendum, an OPN program member is still only authorized to resell certain Oracle products and only the first year of technical support. The FUDA and Public Sector Addendums do not authorize resale of support renewals beyond the first year of support on new products. That is limited to a few existing Oracle partners, and is not typically available to new OPN program members. (Tr. 1/30-33; R4, tab 10)

Dace's Efforts to Secure Oracle Support

14. Before submitting its offer, Dace contacted Oracle to join Oracle's PartnerNetwork (app. supp. R4, tab 9 at 79). Immediately after receiving the contract award, Dace emailed Oracle via a central partner ordering email address to buy Oracle Premier Support for Systems to resell to the government (tr. 1/66-67, 2/16-18, 56-58; R4, tab 40). Dace's inquiry was initially fielded by Oracle personnel in India, who indicated that the request would have to be processed through the proper Oracle channels (tr. 1/67; R4, tab 41). On 3 October 2011, Dace repeated its request, via the same email address (R4, tab 42).

15. Ultimately, Dace's inquiry got into the right channels, and Oracle personnel told Dace on 20 October 2011 that Dace was not an authorized partner and thus could not

be given a quote by Oracle to resell Oracle Premier Support for Systems (tr. 2/58-59; R4, tab 47). Dace followed up the same day, asking for help in getting its "partner contact status updated," and was again told the same thing by Oracle: that Dace was not an OPN program member, was not authorized to quote renewals for Oracle support and was not authorized to resell Oracle Premier Support for Systems (tr. 1/70-72; R4, tab 48).

16. The next day, 21 October 2011, Dace applied to join the OPN program (R4, tabs 50, 65). On 16 November 2011, Oracle approved the application, with a one-year membership at a cost of \$2,000 (R4, tabs 52, 53). Oracle never approved Dace for a FUDA, a Public Sector Addendum, or for resale of support renewals (tr. 1/37, 40-42, 2/61-62; app. supp. R4, tab 65).

17. Dace continued to try to buy Oracle Premier Support for Systems to resell to the government. Mr. Dace contacted Ms. Brandon Williams of Oracle in late November 2011 (tr. 1/137); she reviewed his request, discussed the matter with him, and ultimately told Mr. Dace on 13 December 2011 that Oracle could not proceed as requested because Dace was not an authorized renewal partner (R4, tab 57). At Dace's request, the matter was referred to Ms. Williams' director, who advised Dace the same thing on 20 December 2011 (R4, tab 59).

Cure Notice and Termination

18. Based on the wording of the contract, Dace believed that all the equipment was located at Ft. Huachuca (R4, tab 9; tr. 2/29-30). On 31 October 2011, Dace discovered otherwise after receiving a service call for batteries to be delivered to Ft. Belvoir, Virginia (app. supp. R4, tab 29; tr. 2/26, 29-30). Dace advised the CO on 21 November 2011 that a request had come for service at Ft. Belvoir which was "not listed in the contract as a place of performance" (R4, tab 7). The next day, Dace received a full list from the government identifying all the worldwide server locations, including Ft. Huachuca for 44 specified servers (app. supp. R4, tab 43; tr. 2/27-28).

19. In November, after being informed by other government personnel that Dace was not providing the required support, Mr. Marty Peterson of the requiring activity contacted Oracle to discuss the issue. Oracle explained that Dace was not an authorized reseller of Oracle support, and the equipment specified in the contract was not covered by any Oracle support. (App. supp. R4, tab 41; tr. 1/164-67) Mr. Peterson relayed this information to the CO on 21 November 2011 (app. supp. R4, tab 41). She immediately contacted Dace, who assured her that Dace was "actively engaged in support of this contract" (R4, tab 7; tr. 1/204-06).

20. On 23 and on 29 November 2011, counsel for Oracle sent a letter to the CO formally stating that Dace was not authorized by Oracle to resell Oracle support services

to anyone, and the equipment covered by the government's contract was not covered by a support contract with Oracle (R4, tabs 10, 11; app. supp. R4, tab 50).

21. After receiving Oracle's second letter, on 29 November 2011 the CO again asked Dace to confirm that Dace was providing Oracle Premier Support for Systems (R4, tab 16). Dace responded that same day, noting that it was "just learning that these assets...are located worldwide," not just at Ft. Huachuca. Dace reported that "understanding the logistics of these assets, Dace Enterprises has submitted to Oracle these serial numbers...for renewal." Dace "confirm[ed] that Dace Enterprises is providing Premier Support for Systems (as branded equal)." This was the first time Dace mentioned providing an "equal" product rather than brand name support. (R4, tab 17 at 1-2, 5; tr. 2/62-63)

22. The CO issued a cure notice to Dace on 1 December 2011, stating that "the Government considers your failure to provide the Oracle Premier Support for Systems...a condition that is endangering the performance of the contract" (R4, tabs 17, 18; tr. 1/211-12). Addressing Dace's recent statement that it was providing a product "as branded equal," the CO noted that Dace's quote had not identified an "equal" product, and that evaluation was done and award made on the basis of the Oracle brand name product. The cure notice concluded by notifying Dace of the government's right to terminate for cause unless the problem was cured within 10 days. (R4, tab 18)

23. Dace responded on 5 December 2011, saying it had "requested again to place these serial numbers with Oracle" to provide the brand name support (R4, tab 19). At this point, the CO issued a stop work order on 6 December 2011 (R4, tabs 20, 21, 23).

24. On 9 December 2011, Dace advised the CO that Dace's government contract had been "place[d]" with Oracle for Oracle Premier Support for Systems and all the contract equipment was "covered." Dace also stated that it had asked Ms. Williams of Oracle to contact the CO "with confirmation as to renewal status." (R4, tab 25) Ms. Williams did contact the CO that same day, but did not confirm Dace's assertions. Rather, she explained to the CO that the equipment listed in the government's contract was not at that time covered by Oracle for Oracle Premier Support for Systems (tr. 1/128, 147, 213-15; R4, tab 26).

25. The CO immediately notified Dace that Oracle had reported that support had not been renewed, and that she did not consider the problem cured (R4, tab 26; tr. 1/215). After further exchange of emails, on 13 December 2011 Dace informed the CO that it had contacted Oracle and was told by Oracle that Dace was *not* an authorized partner for hardware renewals (app. supp. R4, tab 62 at 260; R4, tab 29).

26. The next day, 14 December 2011, the CO terminated the contract for cause "for failure to deliver the services called out in the contract by the established delivery

date of 28 September 2011” (R4, tab 32). In making her decision, the CO considered the lack of any information provided her as to any performance issues for 60 days into the contract, and Dace’s repeated representations, before and after the cure notice, that Oracle support had been renewed when it had not. Ultimately, she concluded that Oracle authorization would not be forthcoming, hence her decision to terminate. (Tr. 1/218-19) This termination was formally captured by Modification No. P00002 effective the same day (R4, tab 30).

27. On 7 February 2012, Dace filed a notice of appeal with this Board from the CO’s final decision terminating the contract for cause.¹

DECISION

It is well established that termination for default (or for cause in this case) is a drastic sanction which should be imposed only for good grounds and on solid evidence. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). The government bears the initial burden to prove that a termination for cause of a commercial items contract is justified under the standard set forth in FAR clause 52.212-4(m). *Genome-Communications*, ASBCA Nos. 57267, 57285, 11-1 BCA ¶ 34,699 at 170,889. Once the government meets this burden, the burden then shifts to the contractor to establish that its nonperformance was excusable, or was caused by the government’s material breach, or that the CO’s termination decision was arbitrary, capricious, or an abuse of discretion. *D.A. Services, Inc.*, ASBCA No. 52755 *et al.*, 05-1 BCA ¶ 32,820 at 162,403.

The contract called for Dace to deliver one year of brand name Oracle Premier Support for Systems for specified systems and software, beginning on 28 September 2011 (findings 4, 5). However, Dace was never authorized by Oracle to resell Oracle Premier Support for Systems to the government (findings 15, 16, 17, 19, 20) and without such authorization, Dace could not perform the contract. When the government discovered the problem, the CO issued a cure notice to Dace. Ultimately the problem remained; by Dace’s own admission, Oracle had not authorized Dace to provide the required support (finding 25). The CO thus reasonably concluded that Dace was in default and would not be able to perform, and reasonably terminated the contract for cause.

Dace has argued that its nonperformance was excusable under Clause 52.212-4(f) due to “acts of the government,” specifically the government’s statement in the contract that the place of delivery was Ft. Huachuca, AZ when the servers were located worldwide, and the government’s failure to specifically state that the Oracle Premier Support for

¹ The CO had also issued a demand for re-payment on 28 December 2011 which has not been paid and is not before the Board at this point.

Systems coverage had lapsed. Dace argues that this failure to disclose “superior knowledge” constituted a material contract breach, excusing any subsequent Dace default. Further, Dace also argues that the government breached its implied warranty of specifications by not accurately and clearly addressing these two points. Lastly, Dace argues that the government abused its discretion in terminating the contract for default because the government did not consider how its own actions (not stating location or lapsed coverage) contributed to the default. (App. br. at 15-18, 20-22)

Under Clause 52.212-4(f), to be excused from default the contractor must show that its nonperformance was caused by an occurrence beyond the reasonable control of the contractor and without its fault or negligence (finding 8). Thus we examine Dace’s arguments to see if Dace’s nonperformance was excused under this standard. Fundamentally, as explained below, the cause of nonperformance was the fact that Dace was not authorized to provide Oracle Premier Support for Systems. Even if all the servers were at Ft. Huachuca, with no lapse of coverage (what Dace argues it expected), Dace could not have performed the contract.

With regard to server location, the contract did not state that servers were located worldwide, it identified the “FOB: Destination” point for all three CLINs as Ft. Huachuca, and one could not tell from reading the equipment list where the equipment actually was (finding 2). Despite this, however, the facts do not justify relief for Dace under either a superior knowledge or an implied warranty of specification theory. Under both theories, Dace is alleging a breach of contract and is required to prove “the fundamental facts of liability, causation and resultant injury.” *Kimmins Contracting Corp.*, ASBCA Nos. 42762, 42948, 94-3 BCA ¶ 26,990 at 134,421 (superior knowledge); *Alliance General Contractors, LLC*, ASBCA No. 54979, 09-1 BCA ¶ 34,030 at 168,327 (defective specifications). As explained below, a causation problem is present here for both theories, defeating relief for Dace.

With regard to the government’s greater knowledge about server location, this is irrelevant for at least some of the contract: 44 servers were in fact located at Ft. Huachuca (finding 18) and even for those Dace could not perform its contract because it was not authorized to provide Oracle support. As to the other servers, without Oracle authorization, it does not matter where they are located or what related performance issues might arise related to those locations – Oracle support cannot be provided.² As to Dace’s argument that the government breached its implied warranty of specifications (with location being considered part of the specifications), before Dace can obtain relief it has to show that it “substantially complied with the specifications and that the results were unsatisfactory.” *American Renovation and Construction Co.*, ASBCA No. 53723, 10-2

² Moreover, even for an authorized contractor, the importance of location is attenuated because the contractor does not provide the actual parts and services support, Oracle does (findings 1, 9, 10).

BCA ¶ 34,487 at 170,078. Even if the specifications are viewed as being for Oracle brand name support for servers *at Ft. Huachuca*, Dace did not “substantially comply” with the specifications (indeed, Dace did not comply at all) and thus this argument fails.³ In sum, even if all servers were located at Ft. Huachuca as Dace expected, Dace was not authorized by Oracle to provide the required support and could not have performed. Dace’s lack of authority to provide Oracle support *anywhere* was the root of the problem, not the government’s failure to specify server location.

With regard to Dace’s argument that the government failed to specify that support coverage had lapsed, the facts here also do not justify relief for Dace under either a superior knowledge or an implied warranty of specifications theory. The fixed-price contract required offerors to include reinstatement fees “if applicable” (findings 3, 5) which indicates that coverage might have lapsed, and, depending on the length of the lapse, could trigger recertification fees as well. The contract thus placed on Dace the responsibility to explore this pricing risk before crafting its fixed-price offer, regardless of whether there was a separate CLIN for this contingency or not. The government cannot be said to have withheld superior knowledge when the solicitation informed offerors of this possibility, nor is there an implied warranty that coverage had not lapsed when the solicitation identified the issue for further offeror inquiry. And in any case, even if there had been no lapse of coverage at all (or even if the solicitation had said more clearly that there was), Dace was not authorized by Oracle to provide the required support. There were no “acts of the government” as to lapsed coverage excusing default or constituting material breach.

Finally, there is no basis here to conclude that the government abused its discretion in terminating for cause. Certainly the government’s right to terminate is discretionary, and must not be arbitrary, capricious or an abuse of discretion. *Darwin Constr. Co. v. United States*, 811 F.2d 593, 597-98 (Fed. Cir. 1987). Further, the CO apparently did not consider the location issue or lapsed coverage as part of her termination decision (*see* finding 26). However, the record also does not show that these matters were an issue at the time of the CO’s termination decision. As to location, responding to an inquiry by the CO, Dace replied that it now understood “the logistics of these assets” and had submitted the equipment serial numbers to Oracle for renewal (finding 21). With regard to lapsed support coverage, the solicitation specifically advised offerors to include reinstatement fees if applicable, placing that risk on the contractor (finding 3). The focus leading up to the termination was on whether Dace was authorized, or could become authorized, to provide support at all, not where the support was to be provided or whether the support was for lapsed coverage equipment (finding 26). For these reasons, it was not an abuse of discretion for the CO to terminate without specifically addressing these two points.

³ A corollary causation issue also surfaces because Dace offered Oracle brand name support having reason to know that Oracle’s authorization would be required yet without adequately exploring the matter first (finding 4).

We have considered Dace's other arguments, but they do not alter the conclusion reached here.⁴

CONCLUSION

For the reasons stated above, the appeal is denied.

Dated: 1 November 2013



ELIZABETH M. GRANT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



ELIZABETH A. TUNKS
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

⁴ Additionally, we do not address the government's affirmative defense of fraud, despite appellant's request, since the government has opted not to pursue that defense (app. br. at 22 n.2; gov't reply br. at 9). We also do not address theories of relief raised in Dace's complaint that were not argued in its post-trial brief. *Tri-State Consultants, Inc.*, ASBCA No. 55251, 08-1 BCA ¶ 33,800 at 167,332.

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. 57984, Appeal of Dace Enterprises, LLC, rendered in conformance with the Board's Charter.

Dated:

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