

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Earthstar Construction and Logistics Company) ASBCA No. 58086
)
Under Contract No. W5K9FH-12-P-0110)

APPEARANCE FOR THE APPELLANT: Mr. Omer “Shokran” Amanzada
President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Anthony V. Lenze, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS

Earthstar Construction and Logistics Company (ESCC) appeals the termination for cause of a contract to supply refrigerated connexes.

FINDINGS OF FACT

1. The Army Regional Contracting Center (RCC) Camp Leatherneck, Afghanistan (government), issued Request for Quotations (RFQ) No. W5K9FH-12-T-0082 for seven “Refrigerated Connex[es]” on 24 January 2012 (R4, tab 2 at 3 of 25). A connex or reefer is a large shipping container used to refrigerate or store food and other perishables (tr. 1/13).

2. The RFQ incorporated FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (JUN 2010) by reference. The clause provides, in part, as follows:

(a) *Inspection/Acceptance.* The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect...any supplies...that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies...at no increase in contract price.... The Government must exercise its postacceptance rights (1) within a reasonable time after the defect was discovered...; and (2) before any substantial change occurs in the condition of the item....

....

(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....

....

(m) *Termination for cause.* The Government may terminate this contract...for cause in the event of any default by the Contractor.... 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.... 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 4 of 25)

3. The government issued Amendment No. 0001 to the RFQ on 25 January 2012, changing the product description from “Refrigerated Connex” to “Refrigerated Connex (NEW).” The narrative accompanying the amendment stated that offers must be for “brand new items” and that offers “for used items will be considered non-responsive.” In addition, the contracting officer (CO), MAJ Bruce A. Skrabanek, emailed offerors that quotations had to be for “NEW items ONLY” and that the government would “NOT ACCEPT” offers for used items. (R4, tab 3)

4. On 26 January 2012, Mr. Omer “Shokran” Amanzada, ESCC’s president, submitted a price proposal in the amount of \$300,080 (supp. R4, tab 14 at 3; tr. 2/26).

5. On 26 January 2012, the CO requested Mr. Amanzada to return a signed copy of Amendment No. 0001 and to verify that he was “quoting ‘NEW’ con[n]exes and NOT used con[n]ex[e]s.” He also requested a specification sheet. (Supp. R4, tab 14 at 4)

6. Mr. Amanzada returned a signed copy of the amendment on 26 January 2012. The CO thereafter sent another email requesting Mr. Amanzada to verify that he was providing “a new con[n]ex, NOT used” and to submit a specification sheet (supp. R4, tab 14 at 3). Mr. Amanzada indicated that he would send a specification sheet and pictures of the units to “indicate the NEW MODEL of products” (supp. R4, tab 14 at 2-3).

7. On or about 27 January 2012, Mr. Amanzada emailed pictures of the reefers to the CO. The pictures are not in the record. The CO told Mr. Amanzada that “the pictures look good” and that he was looking forward to seeing the reefers delivered. (Tr. 1/16-17)

8. Mr. Amanzada alleges that the CO also asked him to provide the serial numbers of the reefers (tr. 1/44-45). According to Mr. Amanzada, he told the CO that it was “a very long” and “a very critical way” to Camp Leatherneck, so if he did not accept the serial numbers to “please turn around right now because we didn’t get too much expenses this way.” Mr. Amanzada testified that the CO “accepted” the serial numbers. (Tr. 1/86)

9. On 30 January 2012, Mr. Amanzada submitted a revised price proposal in the amount of \$264,999. The proposal stated, in part, that “[w]e have carefully reviewed and analyzed the information provided and fully understood the requirements declared in related Request for Quotation (RFQ) & attached additional information.” (R4, tab 4 at 3) The proposal included the technical specifications for a ThinLINE Carrier connex dated March 2009 (R4, tab 4 at 8).

10. At the hearing, Mr. Amanzada testified that he was unaware that the RFQ required new reefers:

[The CO] did not mention it was just new-- new items. New items that it's not used in Afghanistan. Because in Afghanistan, it's not the same conditions like Germany, like Dubai or like U.S.A.

In Afghanistan, that was the first time that Afghan peoples understand what is reefers.... Because the Afghan people [have had] three decades of war there.

(Tr. 2/28)

11. Mr. Amanzada also testified that the CO’s interpreter, Mr. Mohammed Malik, asked him to provide “some discount on reefers because we don’t have budget” and “we want to award [the contract] to your company.” According to Mr. Amanzada, ESCC gave Mr. Malik \$50,000. (Tr. 2/26) Mr. Malik did not testify.

12. The government awarded the contract to ESCC on 31 January 2012 (R4, tab 1 at 1). The delivery date was 28 February 2012 (R4, tab 1 at 4 of 28). The contract did not include a requirement for a generator (tr. 2/31).

13. ESCC purchased “7 Reefers without...Generator and Escorting” from Taka Poo Trading, Ltd. in Kabul, Afghanistan, for \$189,000 on 9 February 2012. The cash

invoice issued in connection with the transaction required ESCC to pay “%50...at the mobilization and %50...when the delivery note is signed.” (App. supp. R4, tab 2; tr. 1/78, 1/84, 2/29-30)

14. Abulwalid Transit and Farwerding Co. (ATC), ESCC’s trucking company, delivered the first shipment of reefers on 21 February 2012. Mr. Patrick Jimenez, the contracting officer’s representative (COR), met the trucks at the gate, signed the delivery notes, and escorted them onto the base. He testified that his job was to “receive the items, inspect the items and report to Contracting” (tr. 1/67). The delivery notes or waybills were issued by ATC and were in English and Arabic. They were not U.S. Government forms. The delivery notes requested that the signed forms be returned to ATC. (App. supp. R4, tabs 5-8)

15. Mr. Jimenez met the trucks at the gate and signed the delivery notes or waybills so they could get on the base:

A ...[A]s the trucks came through the gate, I had to sign a waybill. Without...signing the documents, the [guards] would not let them on the site. But, the documents I signed was just proof that the subcontractor had delivered the...items that were listed on the waybill.

....

Q Can you describe [this document]?

A [T]his is basically a waybill that states what contractor’s delivering it, where did they pick up the load from, what load they’re carrying, the check number, the driver’s name, where they’re delivering the ticket, where they’re delivering the items, the con[n]exes’ serial numbers....

Q Is that your signature in the bottom right corner?

A Yes, sir.

Q And tell us again. Why did you sign?

A [T]o get them on the camp, I had to sign and escort [the] truck[s] one by one through the gate.

Q Do these documents convey acceptance?

A No, sir, it clearly states...on the document that goods received on such and such a date. There's...nothing in here that states that the items were inspected and accepted.... [T]his piece of paper is normal practice for when subcontractors deliver items. It's just proof that they delivered the items so that they get paid by the contractor that...got them to do the job for them.

(Tr. 1/71-72)

16. Mr. Jimenez did not inspect for serial numbers:

A...I inspect for the condition of the equipment. How the contract was written. The contract was written for new reefers. It was bid for new reefers and I expected to get new reefers.

If new reefers are not delivered, then I...will deny the...load. I'm not going to waste the government's money when we're asking for new equipment and pay for used equipment.

(Tr. 1/88)

17. After inspecting the reefers, Mr. Jimenez concluded that they were used:

A ...[T]here's numerous bolts and rivets missing out of the reefers. The reefers were not sealed. In order to store food, they have to be in a sealed environment.

There was multiple dents, scrapes and abrasions in the con[n]exes. There was wiring that was showing where the wiring harness had been either pinched or cut and there was wires showing where there shouldn't be.

Overall, they were just in bad condition....

(Tr. 1/69; R4, tab 6 at 1-21)

18. The CO was present for the inspection and testified that the reefers "were definitely not new" (tr. 1/26).

19. On 22 February 2012, the CO issued a “Notice of Rejection” to ESCC stating “that ALL items delivered to Camp Leatherneck on 21 February 2012 are rejected for non-conformance to the terms of the contract.” He directed ESCC to deliver new reefers by 15 March 2012 and warned that failure to deliver by that date might be considered a default under FAR 52.212-4(m). (R4, tab 5 at 1, 3)

20. On 22 February 2012, Mr. Amanzada apologized to the CO “for deliver[ing] poor refrigerated Connexes to Leatherneck.” He also returned a signed copy of the rejection notice. (R4, tab 5 at 1-2)

21. After the first shipment was rejected, Mr. Amanzada allegedly told the CO that new reefers were not available in Afghanistan and that only “newly imported” reefers from Germany and Dubai were available. He also told the CO that “in case of any problem if our reefers has we are ready to stock some of our money with your RCC and we can fix it at any time that you want if its out of order. [The CO] did not accepted it....” (App. supp. R4, tab 1)

22. On 10 March 2012, ESCC delivered a single reefer (R4, tab 7 at 2; app. supp. R4, tab 1). Mr. Charles Rodgers, who replaced Mr. Jimenez as COR, inspected the reefer while it was still on the truck and concluded that it was used. He took photographs of the reefer which are in the record. (R4, tab 8) Mr. Rodgers concluded that the exterior of the reefer had been repainted and that the inside was rusty (tr. 2/12, 21). The reefer also had dents (tr. 2/21-22). Mr. Rodgers sent the truck back without signing a delivery note (R4, tab 7 at 3).

23. On 13 March 2012, the CO issued a notice of rejection for the single reefer delivered on 10 March 2012. The notice stated that if ESCC failed to deliver new reefers by 15 March 2012, the government would consider terminating the contract for cause. (R4, tab 9)

24. ESCC failed to deliver new reefers on 15 March 2012 and the government terminated the contract for cause on 17 March 2012 (R4, tab 11). On 18 March 2012, ESCC notified the CO that it wished to appeal the termination (R4, tab 12).

25. Mr. Amanzada asserts that the government should not have terminated the contract because its reefers were used, stating that “[i]f our reefers does not meet the requirements, so you should keep some amount of our money. In case of any problems, you call us. We should immediately—someone would come and repair [it].” (Tr. 1/54)

26. At the hearing, the CO credibly testified that the contract did not require ESCC to provide a generator and that lack of a generator “was not considered in anyway [sic] with regard to termination of the contract” (tr. 1/23).

27. Following the termination, the CO testified that the government reprocured new connexes without any issue (tr. 1/43).

28. ESCC appealed the termination to this Board on 19 April 2012. We docketed the appeal as ASBCA No. 58086 on the same date.

DECISION

Default termination is a drastic sanction that should be imposed “only for good grounds and on solid evidence.” *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The government bears the burden of proof that a default termination is justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). Once the government establishes default on the part of the contractor, the burden of proof shifts to the contractor to prove that the default was excusable. *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996); *Double B Enterprises, Inc.*, ASBCA Nos. 52010, 52192, 01-1 BCA ¶ 31,396 at 155,110. The principles that apply under the FAR clauses that govern terminations for default apply with equal force to terminations for cause under a commercial items contract. *General Injectables & Vaccines, Inc.*, ASBCA No. 54930, 06-2 BCA ¶ 33,401 at 165,593, *aff'd*, 519 F.3d 1360, (Fed. Cir. 2006), *reh'g denied*, 527 F.3d 1375 (Fed. Cir. 2008).

The government contends that it properly terminated the contract for cause because the reefers tendered by ESCC were used and not new. ESCC does not seriously contend that its reefers were new. Based on the eyewitness testimony of Mr. Jimenez, MAJ Skrabanek, Mr. Rodgers, the photographs taken by Mr. Jimenez and Mr. Rodgers, and Mr. Amanzada’s apology of 22 February 2012, we are convinced that the reefers were used. (Findings 17-20, 22-23) Consequently, the government has established that ESCC was in default of its contract. The burden of proof now shifts to ESCC to prove that the default was excusable.

A contractor’s default may be excused if it is caused by an occurrence that is beyond its reasonable control and without its fault or negligence. ESCC presents the following excuses for its default: (1) Mr. Jimenez accepted the reefers by signing the delivery notes; (2) the CO accepted the reefers by telling Mr. Amanzada that his photographs looked “good”; (3) the CO “accepted” the reefers by accepting their serial numbers; (4) the CO did not tell Mr. Amanzada that only new reefers would be accepted; (5) new reefers were not available in Afghanistan; (6) Mr. Malik, the CO’s interpreter, solicited and received a \$50,000 bribe to ensure that ESCC was awarded the contract; (7) the contract was terminated because ESCC did not deliver a generator; (8) ESCC suffered a significant loss on the contract and the U.S. Government should compensate it for at least a portion of its losses. (App. supp. R4, tab 1; R4, tab 13 at 3; ESCC email to government dated 27 July 2013)

Mr. Jimenez did not accept the first shipment of reefers by signing the delivery notes. The delivery notes were issued by ATC, ESCC's trucking company, and were returned to ATC after they were signed. (Finding 14) They were printed in English and Arabic and were not U.S. Government forms (*id.*). Mr. Jimenez testified that the truckers used the signed delivery notes as proof of delivery so they would get paid by their contractor (finding 15). Even if Mr. Jimenez accepted the reefers, FAR 52.212-4(a) of the contract gave the government the right to reject nonconforming items within a reasonable period of time. The government rejected the first shipment of reefers on 22 February 2012, the day after it was delivered, and it rejected the second shipment on 13 March 2012, three days after ESCC attempted delivery. (Findings 19, 23)

Mr. Amanzada's second and third arguments, that the CO accepted the reefers by telling him that the photographs looked "good" and emailing him the serial numbers of the reefers are without merit. FAR 52.212-4(m) of the contract gave the government the right to inspect supplies tendered for acceptance. This means that the government had the right to physically inspect the reefers to ensure that they met the requirements of the contract before accepting them. ESCC may not unilaterally divest the government of this right by substituting photographs and serial numbers for an actual inspection.

With respect to ESCC's fourth argument, the contract, as amended, clearly and unambiguously required ESCC to deliver new reefers. Based on Amendment No. 0001, Mr. Amanzada's acknowledgement of the amendment, and the numerous emails from MAJ Skrabanek to Mr. Amanzada stating that used reefers were not acceptable, Mr. Amanzada knew or should have known that the contract required new reefers. (Findings 3, 5-6) As president of ESCC, Mr. Amanzada was responsible for reading and understanding the contract prior to bidding. If he did not understand what was required, he should have asked for clarification and his failure to do so does not excuse ESCC's failure to perform. It is well established that the government is entitled to strict compliance with the requirements of its contracts and a contractor may not substitute its judgment in complying with contract requirements. *Free & Ben, Inc.*, ASBCA No. 56129, 11-1 BCA ¶ 34,719 at 170,957; *American Turbo Systems, Inc.*, ASBCA No. 55906, 09-2 BCA ¶ 34,262 at 169,289. Thus, ESCC was not free to substitute used reefers for new reefers.

ESCC next argues that new reefers were not available in Afghanistan (finding 21). ESCC has failed to prove this assertion. MAJ Skrabanek was able to reprocur new reefers without any issue (finding 27).

Mr. Amanzada next argues that Mr. Malik, MAJ Skrabanek's interpreter, solicited and accepted a bribe of \$50,000 to make sure that the contract was awarded to ESCC. Appellant has not demonstrated how this allegation, if in fact true, is material to the appeal before us.

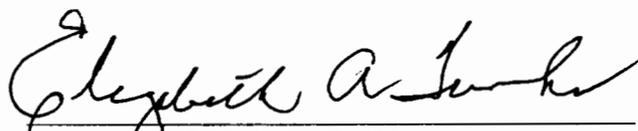
Mr. Amanzada's seventh argument, that the government improperly terminated the contract because ESCC did not deliver a generator. The contract did not require ESCC to deliver a generator and MAJ Skrabanek credibly testified that the termination was not based on failure to deliver a generator (finding 26).

ESCC lastly argues that it suffered a significant loss on the contract and that the U.S. Government should compensate it for at least a portion of its losses. We have concluded that the government properly terminated the contract for cause because ESCC delivered used reefers instead of new reefers as required by the contract. Under FAR 52.212-4(m) of the contract, the government is not liable to ESCC for any amount for supplies not accepted. Thus, ESCC is not entitled to any compensation for its losses on the contract.

CONCLUSION

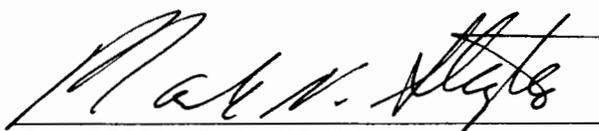
Although we sympathize with ESCC's financial situation, the requirement that the reefers be new is clear and ESCC was in default. Accordingly, ESCC's appeal is denied.

Dated: 13 November 2013



ELIZABETH A. TUNKS
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



JOHN J. THRASHER
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. 58086, Appeal of Earthstar Construction and Logistics Company, rendered in conformance with the Board's Charter.

Dated:

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