

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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 AXXON International, LLC) ASBCA Nos. 61224, 61268, 61625
)
 Under Contract No. W912DW-16-P-0136)

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OPINION BY ADMINISTRATIVE JUDGE OSTERHOUT
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

The dispute at issue concerns Contract No. W912DW-16-P-0136 (the contract) between the Army Corps of Engineers (the government or Corps) and AXXON International, LLC (appellant or AXXON). The contract required delivery of an oil filtration trailer. The government terminated the contract for cause and alleged the termination was justified because AXXON did not deliver by the due date set forth in the contract, January 31, 2017. The government requested the Board find the termination for cause justified. In its response, AXXON opposed the motion because it alleged that the delivery date was uncertain or, in the alternative, waived. In its reply, the government argued that AXXON did not dispute any material facts. Further, the government stipulated as a matter of fact that the parties agreed to a revised delivery date of March 15, 2017.¹ We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On August 30, 2016, the government issued Solicitation No. W912DW-16-Q-0069 (the solicitation). The solicitation contained eight contract line item numbers (CLINs).

¹ Both parties spent much time briefing the procurement of the oil filtration trailer and the purpose of the advance payment. Based upon this decision, these arguments are not ripe for decision at this time and they are not addressed here.

CLIN 001 required an oil filtration trailer. CLIN 002 provided for the shipping of the container. The rest of the CLINs were options for additional items on the oil filtration trailer. (R4, tab 4 at 83-88)

2. The solicitation required delivery on January 31, 2017 (R4, tab 4 at 95).

3. On September 19, 2016, AXXON submitted a proposal. AXXON proposed: \$350,800.00 for CLIN 0001; \$12,000.00 for CLIN 0002; \$5,000.00 for CLIN 0003; \$9,200.00 for CLIN 0004; \$800.00 for CLIN 0005; \$78,000.00 for CLIN 0006; \$94,000.00 for CLIN 0007; and a notation that CLIN 0008 was already included in CLIN 0001. (R4, tab 10 at 165-68) This totaled \$549,800.00.

4. On September 30, 2016, the government issued a contract to AXXON, providing funding information for all eight CLINs, in the total award amount of \$549,800.00 (R4, tab 11 at 180, block 26). However, the CLIN amounts did not reflect AXXON's proposal nor did they add up to the total award amount of \$549,800.00. Instead, adding the CLIN prices together in the contract resulted in a higher number, specifically \$595,490.00. Specifically, the contract included: \$465,400.00 for CLIN 0001; CLIN 0002 was not listed in the list of amounts; \$9,850.00 for CLIN 0003; \$25,400.00 for CLIN 0004; \$5,950.00 for CLIN 0005; \$26,250.00 for CLIN 0006; \$55,900.00 for CLIN 0007; and \$6,740.00 for CLIN 0008. (R4, tab 11 at 182-85) The government referred to the contract as "the Government's Offer" in its brief (*see gov't mot. at 10 ¶ 22*).

5. A delivery date was not included in the contract (R4, tab 11).

6. The contract did not incorporate the proposal or offer. The contracting officer (CO) required AXXON to sign and return the contract. (R4, tab 11 at 180 blocks 28-29)

7. The contract incorporated by reference Federal Acquisition Regulation (FAR) 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (MAY 2015) (R4, tab 11 at 193). Paragraph (m) of the clause pertains to termination for cause. It states:

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 written request, with adequate assurances of future performance. . . . If it is determined that the Government improperly terminated this contract

for default, such termination shall be deemed a termination for convenience.

FAR 52.212-4(m).

8. Although a delivery date was not listed in the contract, the parties agreed upon a January 31, 2017 delivery date. On October 13, 2016, AXXON sent the CO an email stating, “[i]n reviewing the delivery lead time on the original solicitation, January 31st, 2017 was the desired delivery date listed. Since most of the system is being prepared in Houston, Texas, after reviewing our scenario – we can now meet that date.” (R4, tab 21 at 276)

9. After several rounds of correspondence between the parties discussing various issues with the original government offer or unsigned contract, on October 17, 2016, the parties both signed Modification No. P00001. This modification added CLIN 0002, funded at \$30,000.00, and increased the total amount to \$579,800.00. (R4, tab 25 at 295-96)

10. Modification No. P00001 also stated that it changed the delivery date for CLIN 0002 from July 31, 2016 (which occurred before the contract was signed on September 30, 2016, and was not in the original contract), to January 31, 2017. No other delivery dates were discussed. (R4, tab 25 at 297)

11. On January 18, 2017, AXXON informed the CO via email, “[w]e now forecast a delivery to the Chief Joseph Dam in Bridgeport, Washington, about mid-March. . . .” The email included a request for a partial payment of 25% of the contract value, subject to FAR 52.232-14. (R4, tab 32 at 313) The email included an invoice attachment that asked simply for 25% of the total contract value, or \$144,950.00 (R4, tab 32 at 315).

12. During January and February 2017, in response to the government asking for more detailed invoices, AXXON provided the same invoice several times with a list that included 10% work done for CLIN 0001 and 100% work done for CLINS 0003 through 0008. This totaled \$176,630.00. The invoice included a delivery date of “3/15/17” in the delivery date box. (R4, tab 37 at 339, tab 43 at 377)

13. The government stated in its motion for summary judgment that AXXON submitted an invoice on February 13, 2017, requesting partial payment and that, “[t]he invoice indicates a delivery date of ‘3/15/17’” and also contained warranties and representations stating that the accelerated progress payment was to be used for sub-contractor payment (gov’t mot. at 21 ¶ 55). Appellant accepted this fact without comment or clarification (app. statement of genuine issues of disputed material facts at 20-21 ¶ 55).

14. On February 13, 2017, the CO signed the bottom of the February 13, 2017 invoice, requesting, “[p]lease pay in accordance with FAR 52.232.40” (R4, tab 64 at 523).

15. The government did not modify the contract to extend the delivery date to March 15, 2017, or any other date. Instead, the government left the delivery date open even though the CO processed an advance payment *after* January 31, 2017, had passed. The first time the government acknowledged that March 15, 2017, was an agreed upon delivery date was in its reply brief, filed on November 2, 2018, when responding to appellant’s waiver argument. The government stated, “[t]he Government now stipulates as a matter of fact, that the Appellant requested, and the Government agreed, as a matter of forbearance, to a revised delivery date of March 15, 2017 when the Government approved the Appellant’s invoice for an accelerated payment.” (Gov’t reply at 5)

16. On February 14, 2017, the government paid \$186,200.00 to AXXON as an accelerated payment (R4, tab 106 at 830).

17. On March 8, 2017, AXXON notified the government via email that the oil filtration trailer would be delivered on April 17, 2017, and operational by April 20, 2017 (R4, tab 226 at 1687).

18. On April 5, 2017, the CO issued what the government refers to as a show cause notice to AXXON to demonstrate why AXXON’s contract should not be terminated but did not state that it was a show cause notice. The notice stated that AXXON sent the government an earlier email on March 22, 2017, which the government considered a “request to extend the performance period of the contract to 15 JUN 2017.” The notice further stated that the delivery date of January 31, 2017, was already two months late. The notice requested both technical assurances and financial documentation concerning the subcontractor because a partial payment had been paid. The government concluded by stating, “[w]ithout further evidence from AXXON, USACE will not consider modifying the contract to extend the performance period. AXXON’s failure to perform under the terms of the contract may result in termination procedures in accordance with FAR 52.212-4 for this order.” (R4, tab 69 at 541)

19. While the show cause notice was not labeled as such, both parties interpreted the communication as a show cause notice. On April 7, 2017, AXXON acknowledged receipt and stated it would respond the next week (R4, tab 70 at 543). On April 13, 2017, AXXON requested an extension from April 14, 2017, to 11 am on April 18, 2017, which the government approved (R4, tab 71 at 544).

20. On April 18, 2017, AXXON responded to the show cause notice via email. In its response, AXXON informed the government that it had difficulties with its subcontractor and that even though AXXON had already paid the subcontractor, it would not be requesting additional relief or contract modification, except to extend the delivery date to July 28, 2017. AXXON detailed that Globecore was the defaulting subcontractor and Regenesys was the new subcontractor involved in its contract. AXXON included attachments to the email concerning communications with both subcontractors. (R4, tab 74 at 551)

21. On April 19, 2017, AXXON provided another email to the CO, updating the percentage complete for various work performed on the contract. The email also included, via attachments, a list of American components and a list of foreign components. (R4, tab 75 at 572)

22. On April 24, 2017, AXXON informed the government that it was aware “that financial penalties are sometimes enacted by the government for very late performance.” AXXON proposed adding a three-year extended warranty instead of financial penalties because of the cost overruns it was already experiencing from the change in subcontractor. (R4, tab 78 at 578)

23. On May 4, 2017, AXXON sent the CO an email requesting technical clarifications (R4, tab 89 at 616).

24. On May 9, 2017, the CO sent an email to AXXON labeled “W912DW-16-P-0136 Termination Letter – Oil Filtration System.” On May 10, 2017, AXXON responded that it received the letter. (R4, tab 90 at 618)

25. The May 9, 2017, termination letter stated that delivery was required by January 31, 2017 but no delivery had yet been made. The CO stated that on January 18, 2017, AXXON forecasted a delay until mid-March and requested an interim payment for the subcontractor. The CO stated, “[a] payment was authorized and made in the amount of \$186,200.00 for the purpose of paying the subcontractor, Globecore to ensure timely delivery of the finished product.” The CO stated that AXXON sent another email on March 22, 2017, in which AXXON stated that instead of being operational on April 20, 2017, AXXON anticipated the end of June for delivery. Then in an April 18 email, AXXON requested the date be moved to July 28, 2017. The CO concluded, “[w]hen awarded, AXXON agreed to deliver the trailer within 4 months, but it has now been 7 months without delivery, and still AXXON request[s] the time to deliver be more than twice the original award at 10 months.” The letter included the standard appeal rights. (R4, tab 2 at 56-58)

26. On June 2, 2017, the government issued Modification No. P00002 to the contract, terminating the contract for cause (R4, tab 92).

27. On June 16, 2017, AXXON appealed the termination. The appeal was docketed as ASBCA No. 61224. On August 24, 2017, ASBCA No. 61268 was docketed. On August 29, 2017, it was consolidated with ASBCA No. 61224. On May 14, 2018, ASBCA No. 61625 (\$393,600.00 AXXON claim for remainder of contract balance) was docketed and consolidated with the other two appeals.

DECISION

The government filed a motion for summary judgment requesting that the Board find its termination for cause justified. Appellant responded that a delivery date was not established or, in the alternative, the government waived the delivery date. The government replied that AXXON did not dispute any issues of material fact and, even if waiver occurred, termination for cause was still justified because delivery never occurred. We deny the motion.

Standard for Summary Judgment

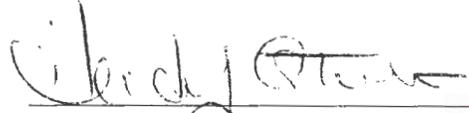
“Summary judgment should be granted if it has been shown that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Quality Trust, Inc.*, ASBCA No. 59983, 16-1 BCA ¶ 36,368, at 177,276 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). For a non-moving party to defeat summary judgment, it “must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)).

Here, the contracted delivery date was January 31, 2017 (SOF ¶ 10). However, the government paid AXXON an “advance payment” in February 2017, without having received the items and without modifying the contract to include a new delivery date (SOF ¶¶ 14-16). “The record presently before us is not so complete that we can find, without further development of the record,” that a new delivery date was established or what that delivery date should have been. *SIA Construction, Inc.*, ASBCA No. 57683, 14-1 BCA ¶ 35,762 at 174,987. Thus, a genuine issue of material fact exists concerning the new delivery date of the oil filtration trailer and the government is not entitled to judgment as a matter of law.

CONCLUSION

The government's motion is denied.

Dated: December 20, 2019



HEIDI L. OSTERHOUT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 61224, 61268, 61625 Appeals of AXXON International, LLC, rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals