

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -)
)
Iqrar Ahmed and Partner Contracting) ASBCA Nos. 62494, 62495
Company)
)
Under Contract No. FA4911-20-P-M011)

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OPINION BY ADMINISTRATIVE JUDGE MCILMAIL

In ASBCA No. 62494, appellant challenges the government’s termination of its contract for shower and latrine blocks for default. In ASBCA No. 62495, appellant challenges the contracting officer’s denial of its claim for an extension of time.

FINDINGS OF FACT

On November 7, 2019, the parties contracted for appellant to deliver 25 shower blocks and 25 latrine blocks (the parties call these shower and latrine blocks “trailers” (gov’t br. at 1; app. br. at 1)) to Prince Sultan Air Base in Saudi Arabia for \$3,656,250 (R4, tab 1 at 1, 3-4). The contract incorporates Federal Acquisition Regulation (FAR) 52.202-1, Definitions (*id.* at 5). The contract also incorporates FAR 52.212-4, Contract Terms and Conditions--Commercial Items (*id.*), which provides, at paragraph (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. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the

Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

At paragraph (s), FAR 52.212-4 provides:

Order of precedence. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (1) the schedule of supplies/services; (2) The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations paragraphs of this clause; (3) the clause at 52.212-5; (4) addenda to this solicitation or contract, including any license agreements for computer software; (5) solicitation provisions if this is a solicitation; (6) other paragraphs of this clause; (7) the Standard Form 1449; (8) other documents, exhibits, and attachments; and (9) the specification.

The contract's schedule provides for delivery of the shower and latrine blocks to the air base "60 Days After Receipt Of Award" (*id.* at 4). The contract's statement of work (which is Attachment 1 to the contract (R4, tab 1 at 16)), at ¶ 1, Scope of Works, provides:

- 1.1. The Shower and Toilet container will be built according to Sitemaster-**25 Seaway Series Specifications** based from government provided sample details. Contractor detailed shop drawings will be provided before award.
- 1.2. All building fixtures will be as per attached specification only. No other specifications will be taken into consideration.
- 1.3. Building size of refurbished shipping container = 8ft. x 20ft. (2.4m x 6m)
- 1.4. Crane, rigger and all accessories for unloading the building at site to be provided **by Contractor**.
- 1.5. Fall Restraint System for short duration roof or modular building roof seam connections to be provided by contractor.

(R4, tab 1 at 16) (emphasis in original) Paragraph 2 of the statement of work, Completion Time, provides:

2.1. The buildings will be delivered and set in 60 working days from receipt of a firm purchase order, full payment and approved shop drawings, subject to contractor workload at the time of order.

2.3. Upon pick-up of the buildings, a PCN (Project Completion Notice) will be issued by contractor as part of quality management procedures and must be signed and accepted by client.*

(*Id.* ¶ 2)

Sixty calendar days after November 7, 2019, ended on January 6, 2020; sixty working days (consisting, in Saudi Arabia, of Sundays through Thursdays) after November 7, 2019, ended on January 30, 2020 (app. br., Ahmed decl. ¶ 6). Appellant did not deliver the 25 shower blocks and 25 latrine blocks by January 6, 2020. Indeed, by January 6, 2020, appellant had delivered, at most, only two shower blocks and two latrine blocks, which the government says were not compliant with the contract and appellant says had “minor installation issues that could easily have been remedied” (gov’t br. at 28; app. br. at 6 ¶ 34, 8 ¶¶ 17, 44). On January 7, 2020, the contracting officer issued a “Show Cause Notice” that states:

Since you have failed to cure the conditions endangering performance under Contract No FA4911-20-P-M011 as described to you on 3, 4, and 5 January 2020, 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 [the contracting officer], within 10 days after receipt of this notice.

(R4, tab 10 at 1 (alteration added)) On that same day, the contracting officer directed appellant to stop work (app. br., ex. 1 at 4 ¶ 25). On February 1, 2020, the contracting officer issued a modification terminating the contract for cause (R4, tab 16). On February 5, 2020, the contracting officer issued a final decision that ostensibly terminates

* We omit from our recitation of ¶ 2 what is apparently a stray “2.2” (*see* R4, tab 1 at 16).

the contract for cause, and references as an attachment the February 1, 2020 modification that terminated the contract for cause (R4, tab 17 at 3-4).

DECISION

In ASBCA No. 62494, “[t]he government bears the burden of proof on the issue of the correctness of its actions in terminating a contractor for cause.” *Avant Assessment, LLC*, ASBCA No. 58867, 15-1 BCA ¶ 36,067 at 176,127. The government’s justification for the termination for cause is that appellant did not deliver the required number of contract-compliant trailers by January 6, 2020 (gov’t br. at 20, 28; gov’t reply at 12). The contract provides for delivery “60 Days After Receipt Of Award.” (R4 tab 1, at 4) Sixty calendar days after receipt of award ended on January 6, 2020, and appellant had not delivered the required number of units by that date. However, as appellant points out (app. br. at 2-3), the contract incorporates FAR 52.202-1, which provides:

When a solicitation provision or contract clause uses a word or term that is defined in the Federal Acquisition Regulation (FAR), the word or term has the same meaning as the definition in FAR 2.101 in effect at the time the solicitation was issued

FAR 2.101 defines “day” as “unless otherwise specified, a calendar day.” The statement of work so “otherwise specifies” (emphasis added):

The buildings will be delivered and set in *60 working days* from receipt of a firm purchase order, full payment and approved shop drawings, subject to contractor workload at the time of order.

(R4, tab 1 at 16)

Regardless of what the phrase “from receipt of a firm purchase order, full payment and approved shop drawings, subject to contractor workload at the time of order” means, and regardless what that phrase implies for the administration of the contract, ¶ 2.1 specifies “60 *working days*” as the time available to the contractor for delivery, and 60 working days from November 7, 2019, ended on January 30, 2020. January 30, 2020, then, is the contract’s earliest possible completion date under any of the scenarios set forth in either the schedule or ¶ 2.1. Consequently, that appellant did not deliver the required number of contract-compliant trailers by January 6, 2020, was not cause for terminating the contract. Therefore, the government improperly terminated the contract for default, and that termination is deemed a termination for convenience.

The government says that (1) we should resort to the contract's order of preference clause to resolve what it says is an inconsistency between the schedule and ¶ 2.1 of the statement of work; (2) the phrase "60 working days" can't be plucked out of ¶ 2.1 to trigger the "otherwise specified" language in FAR 2.101: and (3) ¶ 2.1 must be read out of the contract (*see* gov't br. at 22-23; gov't reply at 6-7). Indeed, whereas the schedule starts the clock running "After Receipt Of Award," ¶ 2.1 starts the clock running "from receipt of a firm purchase order, full payment and approved shop drawings, subject to contractor workload at the time of order." (R4, tab 1 at 16) However, we are not putting ¶ 2.1 ahead of the schedule; after all, no one is saying that the delivery and performance deadline date was "60 working days from receipt of a firm purchase order, full payment and approved shop drawings, subject to contractor workload at the time of order," and it is not as if the schedule says "60 Calendar Days After Receipt Of Award." Finally, we are not plucking "working days" out of ¶ 2.1, we are interpreting the term "days" as it appears in the schedule in light of the term "working days" found in ¶ 2.1. That is why we recite ¶¶ 1 and 2.3 of the statement of work above, to point out that ¶ 2.1 is not an errant insertion into a contract to which it bears no relation. The "buildings" referenced in ¶ 2.1 are the same buildings referenced in ¶¶ 1 and 2.3; that is, those buildings are the same trailers that the government says were not delivered in the 60 days that the schedule allows.

Consequently, we see no inconsistency that needs resolution for us to decide this dispute. This dispute concerns whether the term "days" within the meaning of the parties' \$3.6 million contract means "calendar days" or "working days," and the only contract language that directly and expressly addresses that question is found in ¶ 2.1, and that says "working days." That is a "specification otherwise" that sets aside the default meaning "calendar day" found in FAR 2.101. In short, the term "working days" in ¶ 2.1 tells us what the parties meant by the term "days" as it appears in the schedule.

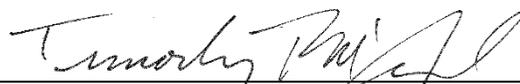
We also decline the government's apparent invitation to throw the "working days" baby out with the ¶ 2.1 bathwater and read ¶ 2.1 of the statement of work out of the contract, because "[a]n interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous." *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). Here, the government's interpretation would unnecessarily render the "working days" contract language useless, inexplicable, void, and superfluous. Nor do we need to resort to extrinsic evidence (as the government urges (gov't br. at 23-24)), because we do not find the contract language at issue ambiguous. *See All Star/SAB Pac., J.V.*, ASBCA No. 50856, 99-1 BCA ¶ 30,214 at 149,479. ASBCA No. 62494 is sustained, and the termination of the contract for cause is deemed a termination for convenience.

In ASBCA No. 69495, appellant challenges the contracting officer's effective denial of its request for an extension of time. Given that ASBCA No. 62494 is sustained, ASBCA No. 62495 is denied as moot.

CONCLUSION

ASBCA No. 62494 is sustained, and the termination of the contract is deemed a termination for convenience. ASBCA No. 62495 is denied as moot.

Dated: August 24, 2021



TIMOTHY P. MCILMAIL
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. 62494, 62495, Appeals of Iqrar Ahmed and Partner Contracting Company, rendered in conformance with the Board's Charter.

Dated: August 25, 2021



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