

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of - )  
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ATECH Inc. ) ASBCA No. 62764  
 )  
Under Contract No. FA4861-19-P-A225 )

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL

Appellant, ATECH, Inc. (ATECH), challenges the termination for convenience of a commercial items contract for the provision of spare parts for an aircraft arresting system and seeks an unpaid amount of \$85,907.50. The parties have submitted this appeal on the record pursuant to Board Rule 11. The Board sustains the money claim but rejects the challenge to the termination for convenience.

FINDINGS OF FACT

1. This procurement began on September 20, 2019, when the Air Force 99th Contracting Squadron published a notice of intent to issue a sole source contract to ESCO Zodiac Aerospace (ESCO) to purchase BAK-14 barrier parts and clutch assemblies for use by the Power Pro maintenance shop at Nellis Air Force Base (R4, tabs 1-2). The sole source notice was based on the Air Force's belief that only ESCO could provide parts "at the level of quality required because the supplies . . . are unique or highly specialized" (R4, tab 1). But the notice allowed other suppliers to submit a capability statement by September 24, 2019 (*id.*).

2. The BAK-14 is support equipment for the BAK-12, which is the standard Air Force aircraft arresting system for decelerating landing aircraft. According to a Federal Aviation Administration draft advisory circular published in 2019:

The BAK-14 hook cable support system . . . is a bidirectional hook cable (pendant) support system used in conjunction with the BAK-12, or a comparable arresting system, to engage and safely stop a hook-equipped aircraft. It provides the means to support the pendant at least 2 inches above the runway surface while giving air traffic control (ATC) the means to lower the pendant below the surface of the runway to prevent damage to low-undercarriage aircraft, the pendant, and the pavement below the pendant during tramplng.

*Aircraft Arresting Systems on Civil Airports*,  
[https://www.faa.gov/documentLibrary/media/Advisory\\_Circular/draft-150-5220-9B.pdf](https://www.faa.gov/documentLibrary/media/Advisory_Circular/draft-150-5220-9B.pdf) at A-2.\*

3. The sole source notice listed 18 discrete parts that the Air Force expected ESCO to furnish (R4, tab 2 at 3, 5).

4. After the Air Force granted an extension, ATECH submitted a proposal on September 26, 2019 (R4, tab 4; app. supp. R4, tab A-2). The proposal contained a list of the 18 parts that ATECH proposed to furnish (R4, tab 4 at 2).

5. The proposal contained various representations by ATECH, including that “ATECHs main supply and support is for US MIL standard aircraft arresting systems such as fixed BAK-12, mobile BAK-12 (MAAS), [and] BAK-14” (R4, tab 4 at 14). It listed numerous examples of entire BAK-12 systems or parts related to the BAK-12 that ATECH had provided to the United States and other countries (*id.* at 16-20). The proposal included a conditional first article test approval by the Air Force of the clutch assembly (*id.* at 12) and included sketches of the parts it proposed to furnish (*id.* at 4-11).

6. The Air Force has not identified any statements in the ATECH proposal that were false or misleading.

7. On the same day that ATECH submitted its proposal, the contract administrator, 2d Lieutenant (Lt) Jonathan Schnicker, requested a technical evaluation. The request passed through several hands until late that day, Staff Sergeant (SSgt) Aaryn Meeds, Power Production Craftsman, examined the proposal and wrote “Looks

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\* This is the same definition that the FAA used in a 2006 version of this document.  
*See Aircraft Arresting Systems on Civil Airports*,  
[https://www.faa.gov/documentLibrary/media/Advisory\\_Circular/150\\_5220\\_9a.pdf](https://www.faa.gov/documentLibrary/media/Advisory_Circular/150_5220_9a.pdf) at 8.

like it should work.” On the following day, Technical Sergeant (TSgt) Meed’s e-mail was forwarded to 2d Lt Schnicker by TSgt Sasha Korjenic, who stated that they had received “the green light from the Power Pro Shop!” (App. supp. R4, tab A-5 at 1-3) TSgt Korjenic completed a technical acceptability worksheet indicating that ATECH’s product was acceptable (app. supp. R4, tab A-6).

8. On September 30, 2019, the contracting officer (CO), Françoise Douala, issued a determination and finding that ATECH’s price of \$85,907.50 was fair and reasonable because, among other things, it was 28.6% lower than ESCO’s price (app. supp. R4, tab A-7).

9. CO Douala awarded the above-captioned contract on that same date. Other than by attaching ATECH’s offer, the contract does not contain detailed specifications. The contract contained Federal Acquisition Regulation (FAR) 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (OCT 2018). (R4, tab 5 at 4, 14, 24)

10. While the record does not identify a specific date, sometime in early 2020 the Air Force’s “end users went to a conference and met the head of the aircraft arresting systems office from” the Air Force Life Cycle Management Center, who purportedly stated that ATECH was not authorized to provide the contracted items (app. supp. R4, tab A-11 at 1; *see also* tab A-9).

11. On January 22, 2020, CO SSgt Lorali Herrell e-mailed ATECH requesting an “overall status” for the contract. ATECH wrote back later that day, stating that the order was 85% complete and that it was “on schedule for our February 28th delivery date.” CO Herrell responded later that day by advising ATECH that the “Government may be anticipating a change in requirement so for the time being, please hold off on sending anything out to the customer.” (App. supp. R4, tab A-8 at 1-2)

12. CO Herrell did not direct ATECH to stop work. While the exact sequence of events is unclear, the Air Force decided at approximately the same time that it no longer wanted to buy the parts from ATECH and began trying to find a way to terminate the contract. On February 4, 2020, SSgt Meeds, who had provided the technical approval, wrote to Gerard Wasserbauer, the Aircraft Arresting Systems (AAS) Program Manager and Engineer, stating that despite repeated attempts he (SSgt Meeds) had “been unable to receive a memorandum or documentation stating that ATECH is an unauthorized supplier of BAK-14M parts for the Air Force” (app. supp. R4, tab A-9 at 3). He stated that he needed this to “provide our contracting office to use as legal justification to cancel our current contract” (*id.*).

13. Mr. Wasserbauer wrote back later that day stating “[a]s flight safety critical equipment, we can only procure aircraft arresting system components from qualified

sources . . . . We have confirmed with AFLCMC/Robins that ATECH is not qualified to provide these parts. Any contract to ATECH to provide these BAK-14M components needs to be terminated.” (*Id.* at 2)

14. The CO subsequently received a memorandum dated February 19, 2020, from Douglas E. Gilliam, USAF Logistics Manager, Base & Aircraft Arresting Systems, in which he explained that an aircraft arresting system is used to capture tail hooks of aircraft experiencing an emergency or an aborted takeoff where the pilot cannot stop the aircraft on the runway. He stated that ATECH was not a qualified source for BAK-14 parts and provided a list of parts by National Stock Numbers (NSNs) that ATECH was authorized to provide. He also provided instructions to the contracting office as to how it should route its parts requests so that they would be purchased from qualified sources. (App. supp. R4, tab A-10)

15. FAR 2.101 defines a qualification requirement as “a Government requirement for testing or other quality assurance demonstration that must be completed before award of a contract.” The parties agree that such qualification requirements are governed by FAR Subpart 9.2. They also agree that this contract did not contain a qualification requirement (app. br. at 2; gov’t br. at 7-8).

16. The Air Force did not provide ATECH an opportunity to respond to the concerns raised by Messrs. Wasserbauer and Gilliam, and there is no evidence that ATECH was aware of them. On February 27, 2020, ATECH advised CO Herrell that “all items . . . are ready for shipment” and asked her how it should proceed (app. supp. R4, tab A-8 at 1).

17. On the following day, February 28, 2020, CO Herrell terminated the contract for convenience. By way of explanation, she stated “[i]t has been brought to 99 CONS’ attention by AFLCMC/WNZ that the NSN items required under this contract are not items that ATECH is currently qualified to provide.” (R4, tab 6)

18. With respect to NSNs, CO Herrell’s statement was at least somewhat misleading because the contract did not identify any NSNs (*see* R4, tab 5).

19. With respect to payment, in the termination letter the CO correctly quoted the commercial items clause, which provides that if the government terminates for its convenience, “the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination” (R4, tab 6 (quoting tab 5 at 15)).

20. After ATECH informed the CO that it had completed 100% of the work and wished to be paid the full contract price, the CO switched gears. In a March 2, 2020, e-mail, she demanded that ATECH “demonstrate to the satisfaction of the

Government the actual costs incurred using ATECH's standard record keeping system." CO Herrell again referenced her belief that the contract specified NSN items and now added a requirement that ATECH produce "documentation of certification for all required items" (R4, tab 7 at 1). If ATECH could not produce these certifications, she threatened to reduce the contract price by 50% (*id.*).

21. On March 9, 2020, ATECH's attorney informed the CO that ATECH contested the termination for convenience, contending that the FAR Subpart 9.2 Qualification Requirements did not apply to this contract because, among other things, there is no qualified parts list for BAK-14 parts (R4, tab 8).

22. CO Herrell did not provide a substantive response. After nearly three months had passed, ATECH's attorney inquired about the status. In an e-mailed reply on June 2, 2020, she again quoted at length the language in the commercial items clause that provides for the contractor to be paid based on the percentage of work completed. But, without explanation, in the very next paragraph she again demanded ATECH provide proof of costs incurred. She again demanded proof that ATECH was authorized to provide the items at issue but did not respond to ATECH's contentions with respect to FAR Subpart 9.2, nor did she explain what authorization requirement she had referred to. (R4, tab 10 at 1)

23. On June 10, 2020, ATECH, through counsel, informed CO Herrell that it believed it was at an impasse and asked her to issue a final decision. ATECH again asked her to address its contention that there was no FAR Subpart 9.2 qualification requirement. (R4, tab 12 at 1)

24. On July 1, 2020, ATECH submitted a settlement proposal claim, in which it sought payment of the full \$85,907.50, based on its completion of 100% of the work on all 18 parts to be provided to the Air Force. ATECH pleaded with the Air Force to simply allow it to deliver the products to demonstrate that they met the Air Force requirements. In return for doing so, it offered to reduce the contract price by \$17,000. (R4, tab 15 at 1-2)

25. The Air Force never allowed ATECH to deliver the parts and, as a result, the Air Force has never inspected them.

26. CO Herrell began working on a final decision. On July 21, 2020, she reached out to 2d Lt Schnicker, the contracting administrator at the time of award. She advised him of the status of the procurement and stated that the solicitation folder was "messy." He informed her that "when doing the purchase I don't remember anyone ever saying there was a required source. Plus they technically approved it."

CO Herrell responded, in part, by stating “I agree with you, the end users approved it and I think it’s a classic situation of people signing off on technical evaluations and not realizing the consequences of doing so.” (App. supp. R4, tab A-11 at 2)

27. Despite several extensions, CO Herrell never issued a final decision. After a change in personnel, a new CO, Mr. Cha-On Gordon, issued a final decision on November 12, 2020. CO Gordon denied ATECH’s request that the termination for convenience be reversed and found no entitlement for any costs contained in its termination settlement claim because “ATECH has not adequately supported its termination costs.” (R4, tab 25 at 2) While the letter was largely conclusory, he repeated the assertion that ATECH was not a qualified source of BAK-14 parts, without responding to ATECH’s observation that the contract contained no such requirement (*id.* at 1).

28. In response to CO Gordon’s statement that it had not adequately supported its termination costs, ATECH submitted a request for reconsideration on November 18, 2020, that included a declaration from its president, Philip Ahagen. With respect to the 18 components of the final product, Mr. Ahagen testified that he had “personally examined each of the eighteen items and affirm that they were completely manufactured before February 19, 2020.” He attached photographs of each of the items as they existed when ATECH received notification of the termination. (R4, tab 27 at 7, 26-43)

29. In a one-sentence e-mail on December 3, 2020, CO Gordon denied the reconsideration request (R4, tab 28).

30. On December 19, 2020, ATECH filed a timely appeal. In its complaint, ATECH alleges that “[b]ecause the Air Force has abused its discretion in terminating the contract for convenience, the Air Force has breached the contract entitling ATECH to \$85,907.50.” (Compl. ¶ 19)

31. ATECH submitted an affidavit from Mr. Ahagen dated November 29, 2021, along with its opening brief. The Air Force has not submitted any declarations or deposition testimony.

## DECISION

### *A. Termination for Convenience*

A contractor faces a steep burden in overturning a termination for convenience. The Court of Appeals for the Federal Circuit has stated: “We do not scrutinize *de novo* whether termination was the best course. In the absence of bad faith or clear abuse of discretion, the contracting officer’s election to terminate for the

government's convenience is conclusive." *T & M Distribs., Inc. v. United States*, 185 F.3d 1279, 1283 (Fed. Cir. 1999).

The Federal Circuit's nonprecedential decision in *Oregon Woods, Inc. v. Salazar*, 355 F. App'x 403 (Fed. Cir. 2009) has facts comparable to this appeal and is persuasive. The contract in that appeal involved a project to replace a boardwalk in a wildlife refuge. After award, a government engineer e-mailed the CO to express his view that the plans and specifications were inadequate, and that no qualified engineer had reviewed them. After receiving a second e-mail from another engineer echoing these sentiments, the CO terminated the contract for convenience. *Id.* at 404.

While there was some evidence that an engineer had, in fact, reviewed the solicitation, the Federal Circuit upheld the Civilian Board of Contract Appeals' grant of summary judgment. Because the CO had received opinions from two engineers expressing their concerns that the specifications were inadequate, the Court concluded that the CO "was well within his discretion" to rely on those recommendations and terminate the contract. *Oregon Woods*, 355 F. App'x at 405.

At its core, this appeal is the same. The CO received advice from two officials with expertise in aircraft arresting systems who objected to the purchase of BAK-14 parts that had not been subjected to a preapproval process (findings 13-14). Because these parts are used in a system that stops aircraft in emergency situations, the Board holds that it was reasonable to require a higher level of scrutiny than a process that resulted in a same-day e-mail of "Looks like it should work" (finding 7).

The parties have briefed the Board on the particulars of FAR Subpart 9.2 Qualification Requirements and Department of Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 209.2, Qualification Requirements/DFARS 209.270, Aviation and Ship Critical Safety Items. But the Board does not need to determine which of these regulations should have been followed in conducting this procurement for us to conclude that the CO acted in a rational manner when she accepted the advice of the subject matter experts.

To be sure, there is a disconnect between the statements by Air Force officials concerning qualification requirements, certification of parts, and NSNs, and what the contract actually says (findings 9, 13-14, 17, 20, 22, 27). But ultimately these statements demonstrate that the Air Force made a mistake by issuing a contract that failed to protect its own interests.

The Board concludes that Air Force officials acted in good faith with respect to the decision to terminate the contract. They simply wanted to ensure that the Air Force was buying parts that had been vetted and would ensure the safety of landing aircraft. It is entirely possible that ATECH's BAK-14 parts would have been

safe, but we conclude that the CO was well within her discretion to err on the side of safety by accepting the recommendation of the subject matter experts and terminating the contract for convenience. *Oregon Woods*, 355 F. App'x at 404-05. However, our conclusion regarding this issue does not negate the operation of the relevant contract clause regarding entitlement.

*B. Payment*

Less understandable is the Air Force's refusal to pay ATECH anything. The commercial items clause provides:

(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 or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies . . .

..

FAR 52.212-4(a). This clause gives the government a variety of remedies if the contractor delivers items that do not conform to the contract, including a reduction in price. But the government cannot avail itself of these remedies if it does not let the contractor deliver the goods and thus never ascertains that they are defective (finding 25). The Air Force has no basis for demanding a reduction in price based on the delivery of nonconforming goods.

FAR 52.212-4 also provides:

(l) *Termination for the Government's convenience*. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination . . .

..



FAR 52.212-4(l) (emphasis added). Based on the plain language of the clause, if ATECH performed 100% of the work, it was entitled to 100% of the contract price.

The Board holds that ATECH has proven by preponderant evidence that it completed 100% of the contract work. The evidence that supports this includes the November 2020 Ahagen declaration with the accompanying photographs of the completed parts, and ATECH's history of providing parts related to the BAK-12 to the U.S. and other governments (findings 5, 28). The Board also concludes that ATECH's statements on January 22, 2020, that it had completed 85% of the work, and its statement on February 27, 2020, that it had completed all the work, both made before it was aware that there was a dispute, also support its position (findings 11, 16). In a typical appeal, the burden of proof would shift to the government to produce evidence demonstrating that ATECH did not complete 100% of the contract work, but because the Air Force never examined the parts (finding 25), it cannot do so.

The absence of factual support for its case leads the government to make a variety of arguments that are based on pure conjecture or innuendo and are not well received by the Board. Thus, the government attempts to counter ATECH's photographs of the completed items by contending that it has "no way of knowing that appellant's photographs were actual photographs of the work it allegedly produced" (gov't br. at 35). Actually, there was a way – to inspect the actual goods, which ATECH has repeatedly invited the government to do.

The government also tells us that "there are inconsistencies in the record that call into question whether the goods appellant produced comply with the terms of the contract" (gov't br. at 35). But having made this provocative statement, the government does not identify an actual contract term that ATECH violated and merely refers us to every single document it submitted in support of its Rule 11 brief, without directing us to any particular page.

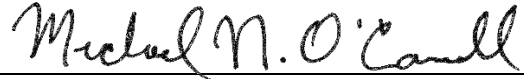
Finally, the Air Force recycles some arguments that it had raised earlier in this appeal and which Mr. Ahagen seemingly rebutted in his affidavit submitted with ATECH's opening brief. For example, the Air Force speculates that maybe ATECH did not really complete the work on this contract by February 28, 2020. It cites an invoice from a supplier obtained through discovery that is dated March 9, 2020 (gov't br. at 35; *see* R4, tab G-23). But Mr. Ahagen testified in his affidavit that ATECH did not use those items for this contract (Ahagen aff. at 3). The Air Force has nothing to contradict this testimony and simply ignores it in its brief. The Board accepts Mr. Ahagen's uncontroverted explanation.

ATECH is entitled to payment of the full \$85,907.50

CONCLUSION

The appeal is sustained in the amount of \$85,907.50. Interest pursuant to 41 U.S.C § 7109 is to run from July 1, 2020 until date of payment.

Dated: October 13, 2022



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MICHAEL N. O'CONNELL  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



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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 No. 62764, Appeal of ATECH Inc., rendered in conformance with the Board's Charter.

Dated: October 14, 2022



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