ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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Aviation Technology, Inc.	)	ASBCA No. 48063
	)	
Under Contract No. DAAH01-93-D-0028	)	

APPEARANCE FOR THE APPELLANT: Mr. Curtis Lloyd
President

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Michael D. Isacco, Jr., JA
MAJ Ralph Tremaglio, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE STEMPLER

This is a timely appeal from a contracting officer's decision terminating for default the two delivery orders issued under the captioned contract. Both parties have elected to waive a hearing and proceed on the record pursuant to Rule 11. The Contract Disputes Act is applicable.

FINDINGS OF FACT

1. On 31 August 1993, Aviation Technology, Inc. (ATI) and the U.S. Army Missile Command entered into Contract No. DAAH01-93-D-0028. The firm fixed-price five year indefinite quantity delivery order contract was for hydraulic pressure standards. The contract called for ATI to submit to the Government for approval, a Contractor Validation Plan (CVP) within 60 days after award of the contract (30 October 1993). One first article unit was required to be delivered within 60 days after approval of the CVP. The contract contained the FAR 52.233-1 DISPUTES (DEC 1991), and FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clauses. The contract also contained the FAR 52.209-4 FIRST ARTICLE APPROVAL—GOVERNMENT TESTING (APR 1984) clause, which provided in part:

> (d) If the Contractor fails to deliver any first article on time, or the Contracting Officer disapproves any first article, the Contractor shall be deemed to have failed to make delivery within the meaning of the Default clause of this contract.[1]

(R4, tab 1)

2. The Statement of Work (SOW) (as amended) for the contract stated:

> 1.1 This specification covers a Hydraulic Pressure Standard (HPS). The device will be used as a calibration standard from 0 to 10,000 pounds per square inch. It will interface with the Hand Test Unit Pump Assembly, NSN: 4320-00-105-0243, as the hydraulic pressure source. It will use one or more pressure transducers and a microprocessor controller to convert pressure into a temperature compensated digital reading in the selected units.
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> . . . .
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> 3.2.1 **General.** The HPS shall consist of suitable transducers and electronics (solid state) to process and display pressure from 0 to 10,000 psig. Units displayed will be psig or KPA. One or more transducers may be used. The hydraulic pressure standard is dual scale but simultaneous display of the scales is not required.
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> . . . .
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> 3.2.20 **Controls.** The HPS shall be controllable from the front panel. The minimum controls required permit selection of High or Low accuracy, units of pressure, a reference pressure capability, input source, and system reset. Controls selection shall be through a common keypad interface or a selection switch. The selection shall be clearly indicated by a panel light or on the display unit for the duration of the selection.
>
> . . . .
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> 3.2.22 **Pressure Units.** The pressure shall be measured using a transducer and displayed in psi or KPA units using gage pressure as a reference. The units will be clearly shown on the display unit.
>
> . . . .

3.2.23 **Reference Pressure Capability.** The HPS shall incorporate the capability to display absolute pressure when a constant, representing the local barometric pressure, is entered into the system. The system shall permit barometric pressure to be entered using any of the standard english [sic] or metric designations such as: Millimeter of Mercury (mm HG), Inches of Mercury (in Hg), Inches of Water (in H_2O), feet of water (ft H_2O), psi, or kilogram per square centimeter (kg/cm^2). The reference pressure input capability will be through a keypad or thumb-screw interface in any of the above selected units then internally translated to psi or KPA as required by the pressure units selection. It is acceptable to provide an absolute unit with a "tare" switch, which would allow the unit to be used in a gage mode.

. . . .

4.2.1 **Contractor Demonstration tests.** . . .

. . . .

d. After successful completion of the above tests, step 4.2.1.a shall be repeated and test data recorded to demonstrate the capability of the unit to successfully withstand exposure to the maximum environmental requirements and maintain nominal ambient environment performance characteristics. These tests shall be performed in the presence of the Government Inspection Authority. Upon successful completion of the contractor demonstration test, the unit shall be submitted to the procuring activity for Government first article testing. The contractor shall furnish all test results and data recorded during the contractor demonstration tests (See 4.2.1) concurrent with first article submittal.

(R4, tabs 2, 3)

3. Also on 31 August, the Government issued Delivery Order No. 0001 (DO 1). The order was for one first article and 50 production units. The unit price was $12,952 for the first article and $8,635 for the production units. (R4, tab 5) On 17 September 1993, the Government issued DO 2 for 60 production units (R4, tab 7).

4. On 21 October 1993, the Government issued bilateral Modification No. 0001 changing the due date for submittal of the CVP from 60 days after award to 90 days after award (29 November 1993) (R4, tab 4).

5. On 30 November 1993, ATI submitted its CVP (R4, tab 13).

6. After several rejections and resubmittals, the CVP was approved on 14 February 1994 (R4, tabs 15, 16, 18, 20). The first article was now due on 15 April 1994.

7. On 13 or 14 April 1994, Anthony (Tony) Verderame, ATI's vice-president of engineering, and Ben Guyse, the Government's contract specialist (without warrant) for the contract had a telephone conversation. Appellant informed the Government that its outside software developer had suffered a mental breakdown and was hospitalized. Appellant stated that it would take over the software development and requested a five to six week extension in the first article delivery schedule. (R4, tab 21, SR4, tabs 30, 69 at 5-6, tab 71at 15, 36)

8. On 28 April 1994, a number of Government representatives visited ATI and observed the first article. They were not satisfied with its progress. Appellant represented that it could deliver the first article by 16 May 1994. (R4, tabs 22, 24)

9. On 3 May 1994, the contracting officer sent ATI a show cause notice for failure to timely deliver the first article on 15 April 1994. Appellant was directed to provide information as to whether the cause of the default was beyond its control and without its fault or negligence. The notice stated:

> Any assistance given to you in this contract or any acceptance by the government of delinquent goods or services will be solely for the purpose of the mitigating [sic] damages, and it is not the intention of the government to condone any delinquency or to waive any rights the government has under the contract.

(R4, tab 23)

10. On 10 May 1994, at 5:18 p.m., ATI faxed Mr. Guyse and informed him that environmental testing for the first article would begin on 11 May at ATI and continue to May 16, whereupon the testing would continue at ATI's testing subcontractor for 4 more days, and requested that it be advised of what arrangements the Government had made to witness the tests in accordance with 4.2.1 of the SOW[2] (R4, tab 25; SR4, tab 71 at 47-48). On 10 May, Mr. Guyse telephoned Tony Verderame and informed him that the Government would not be witnessing the tests and to proceed with them (R4, tab 25; SR4

tab 69 at 9-10). Appellant denies it received this telephone call (SR4, tab 73 at 70-71). We find that the telephone call did occur.

11. On 12 May 1994, ATI responded to the show cause notice. According to ATI, the delinquency was caused by the software subcontractor's medical problems and ATI requested an extension in the first article delivery period to 31 May (R4, tab 26).

12. On 18 May 1994, Mr. Guyse and Tony Verderame had a telephone conversation in which Mr. Guyse informed Mr. Verderame that the Government would extend the delivery date to 31 May for $500 in consideration. Appellant was informed that if this date was not met, the contract would be terminated for default (SR4, tab 22). In the conversation, Mr. Verderame did not agree to the 31 May date and he told Mr. Guyse that ATI's window with its testing lab had been missed when ATI canceled the scheduled tests, and that the tests needed to be rescheduled (SR4, tab 26). John Verderame testified that the lead time to reschedule the lab testing was four to five weeks (SR4, tab 73 at 68-69).

13. On 20 May 1994, the Government issued proposed bilateral Modification No. 0102 to DO 1. The modification extended the first article delivery date to 31 May for $500 in consideration. (SR4, tab 16) ATI did not sign this modification on the advice of counsel (SR4, tab 69 at 12, tab 71 at 74-75, tab 73 at 7, 54).

14. On 24 May 1994, Tony Verderame called Mr. Guyse and informed him that there was a conflict in the SOW that ATI discovered the evening of 20 May.[3] ATI discovered this "conflict" while validating the manual (SR4, tab 71 at 31). It was ATI's position that the requirements of ¶ 3.2.23 of the SOW could not be met without adding a third display to the unit and that ¶ 3.2.1 required only two displays. ATI was willing to provide the third display without cost to the Government but requested a delivery extension to 7 July 1994. ATI requested that the Government issue a change order or a stop work order by 25 May. (R4, tab 29; SR4, tab 72 at 50) As of the last week of May, ATI stopped work on the contract on the advice of counsel pending the Government's decision on a delivery date (SR4, tab 73 at 62-63).

15. On 10 June 1994, ATI's counsel wrote the contracting officer requesting a decision on the question by 14 June (R4, tab 31).

16. On 14 June 1994, the contracting officer faxed a letter to ATI. The contracting officer stated that the SOW was not ambiguous or conflicting and that no third display was needed. (R4, tab 32)

17. On 16 June 1994, ATI and Government personnel participated in a conference call to discuss the matter. The Government's position was that the contract did not require a third display although one was permissible and even desirable. All that was

needed was an indicator that would allow the operator to know whether the unit was in the absolute or gage mode of operation. Any type of indicator would be satisfactory. Tony Verderame stated in his deposition testimony that such an indicator was required by the SOW (SR4, tab 71, p. 17-18). The ATI unit as it then existed did not have any type of indicator to tell the operator what mode of operation the unit was in (SR4, tab 73, p. 56-57). ATI responded that now that it knew that the indicator did not need to be an "alpha" display (*i.e.*, that the LED display of the units would spell out what mode of operation the unit was in) the unit could be shipped immediately.[4] (R4, tab 35; SR4, tab 12)

18. On 16 June 1994, ATI's counsel wrote the contracting officer and stated that the Government had failed to inform ATI that the Government would not be witnessing the environmental tests and that caused ATI to cancel the tests and miss its delivery date. Counsel stated that ATI would have made timely delivery by 31 May absent this problem. (R4, tab 36)

19. On 23 June 1994, the contracting officer issued ATI another show cause notice for failing to deliver the first article on 31 May. ATI responded on 29 June. (R4, tabs 38, 41)

20. On 27 July 1994, the contracting officer terminated the contract (including both delivery orders) for default for failure to deliver the first article (R4, tab 45).

21. On 24 October 1994, ATI filed a timely appeal.

CONTENTIONS OF THE PARTIES

It is appellant's initial position that the Government waived the 15 April 1994 delivery date for the first article and that no bilateral or unilateral date was reestablished. If a unilateral date was established as 31 May 1994, it is appellant's position that the date was not reasonable, and if reasonable, this 31 May date was waived by subsequent Government conduct. Further, appellant contends that even if a reasonable unilateral date was established and it is held to not have been waived, its failure to deliver was excused by the Government's breaches of the contract in failing to witness the environmental tests, and in failing to cooperate by not responding promptly to requests for information.

The Government's position is that the contract was terminated for failure to meet the 31 May 1994, not the 15 April 1994 date and therefore the waiver issue raised by appellant is irrelevant. The Government contends that the 31 May date was established bilaterally through the conduct of the parties and if not bilaterally, the Government unilaterally established 31 May as a delivery date by making it clear to appellant that the Government considered that date to be valid. It is the Government's position that the 31 May date was reasonable and that appellant has no excuse for its failure to deliver.

The Government sees its proposed nonattendance at the environmental tests as immaterial, denies that the SOW was defective, and alleges that if it was defective, the defect was patent.

DECISION

We start with the well known principle that a default termination is a drastic sanction and that the Government is held to strict accountability in using this sanction and bears the burden of proving the propriety of its actions. *Lanzen Fabricating, Inc*., ASBCA No. 40328, 93-3 BCA ¶ 26,079 at 129,608.

The contract gives the Government the right to terminate for default if the contractor, without legal excuse, fails to deliver the first article by the date required by the contract. (*See* finding 1) In our view, the central question in this appeal is what, if any date, is required by the contract for delivery of the first article.

Appellant's argument that the 15 April 1994 delivery date was waived by the Government is mooted by the facts and the Government's position in this litigation. The Government terminated for failure to meet a 31 May 1994 date (*see* findings 19, 20) and does not now argue that the 15 April date was valid (Gov't br. at 22). Since it is both parties' position that the 15 April date was not operative, it was incumbent on the Government to establish that a new delivery date was established. *International T. & T. Corp., ITT D.C.D. v. United States*, 509 F.2d 541 (Ct. Cl. 1975); *Lumen, Inc.*, ASBCA No. 6431, 61-2 BCA ¶ 3210.

The Government contends that the 31 May date was established bilaterally. This bilateral agreement could not be express obviously, since appellant refused to sign the Government's proposed modification. (*See* finding 13) The Government contends that the bilateral agreement to 31 May as the new first article delivery date can be gleaned from ATI's conduct. We discern no conduct of ATI's between 12 May and 31 May 1994 that can serve as a basis for our holding that it agreed to 31 May 1994 as the first article delivery date. ATI did not agree in the 18 May telephone conversation (finding 12), refused to sign the proposed modification (finding 13), and on 24 May told the Government that it needed until 7 July 1994 to deliver the first article (finding 14).[5]

The Government next contends that it unilaterally set the delivery date as 31 May. This argument is not convincing. The Government attempted to set the date bilaterally by issuing a bilateral modification. After ATI refused to sign the modification, the Government never issued a unilateral modification. It is clear that ATI was not working towards this date for on the very day the Government issued the proposed modification, ATI discovered what it alleged to be a defective SOW and determined that an extension to 7 July 1994 was necessary. (*See* findings 13, 14) Without a binding delivery date, ATI could not be defaulted for failing to meet the schedule. *Lanzen, supra*, at 129,609.

In view of our holding that there was no enforceable first article delivery schedule in place at the time the Government terminated the contract for default, we need not address the remaining issues raised by the parties.

CONCLUSION

The appeal is sustained. The termination for default is converted to a termination for the convenience of the Government.

Dated: 8 August 2000

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

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

NOTES

[1] Paragraph (a) of this clause requires the first article unit to be delivered within 150 days of the date of the contract (28 January 1994). The parties ignored this provision in the administration of the contract and in this litigation and used the first article date tied to the approval of the CVP as set forth above.

[2] John Verderame, ATI's Chairman of the Board of Directors, testified that it was unfair of ATI to give the Government such short notice. It was not necessary for the Government to be present for the tests to be performed since its role was observation only (SR4, tab 73 at 70-71).

[3] It appears that from this notice forward and during this litigation both ATI and the Government did not fully understand ATI's problem or were unable to clearly articulate it. We have attempted to distill the many confusing descriptions of the matter from the record and offer this as our best attempt to state the problem: When being used to calibrate testing equipment, the unit could be operated in the "absolute" or "gage" modes, the difference being an offset is entered when operating in one of the modes. The reading from the unit is expressed as PSIA if in the absolute mode and PSIG if in the gauge mode. ATI felt that a third display was needed to physically show the reading was an absolute reading. The Government did not require a third display that could say "PSIA" but merely required that an indicator be on the unit to allow the operator to recognize that the unit was operating in the absolute mode. This indicator could take any form, including a simple light.

[4] ATI did not feel that a simple indicator would provide the Government with a quality unit since while it may comply with the SOW, an indicator could be independent of the mode of operation and operator mistakes could easily be made (SR4, tab 73 at 61-62, 64-65).

[5] The Government cites John Verderame's deposition testimony that "[w]e had an oral understanding that that [31 May] was the deadline (SR4, tab 73 at 54)" (Gov't reply br. at 7) as support for this contention. This testimony is cited out of context. A review of Mr. Verderame's entire testimony shows that ATI had an understanding that the Government was unwilling to extend the first article delivery to any date beyond 31 May 1994. Mr. Verderame's statement was merely a confirmation that ATI understood the Government's position at the time.

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. 48063, Appeal of Aviation Technology, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals