ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Laumann Manufacturing Corporation	)	ASBCA No. 51249
	)	
Under Contract No. SPO750-97-C-2207	)	

APPEARANCE FOR THE APPELLANT: Mr. Thomas Laumann
President

APPEARANCE FOR THE GOVERNMENT: Carol N. Matheke, Esq.
Trial Attorney
Defense Supply Center,
Columbus (DLA)

OPINION BY ADMINISTRATIVE JUDGE YOUNGER

Appellant challenges the default termination of its supply contract for failure to meet the delivery schedule, contending primarily that the parties established a longer schedule during the pre-award survey. Respondent chiefly argues that it permissibly reduced the delivery schedule because it waived first article requirements at the time of award. Both parties have elected to submit the appeal under our Rule 11. We deny the appeal.

FINDINGS OF FACT

1. By date of 1 October 1996, respondent issued Solicitation No. SPO750-96-R-2455 for transmission shift control assemblies to be used on Humvee trucks. CLINs 0001 through 0004 called for 1,366 units. CLIN 9907 called for a first article test but also stated that no award would be made for this CLIN "[i]n the event the first article test and approval requirements are waived." (R4, tab 1 at 1, 7-10 of 36)

2. Section B of the solicitation contained various standard clauses, including: FAR 52.209-3 FIRST ARTICLE APPROVAL - CONTRACTOR TESTING ALTERNATE I (SEP 1989); FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984); and DCSC 52.209-9C07, ADDITIONAL REQUIREMENTS - FIRST ARTICLE APPROVAL - CONTRACTOR TESTING (FEB 1995) (R4, tab 1 at 17, 18, 23 of 36). The latter clause provided, in paragraph (h) that "[w]hen First Article Approval is waived, the delivery time will be reduced by 120 calendar days . . . , unless offeror specifies a different treatment reduction period below: Number of Days Reduction" (*id*. at 18 of 36). We find that appellant did not specify a different reduction period.

3. Section B of the solicitation contained DCSC 52.212-9C18, REQUIRED DELIVERY WITH DELIVERY EVALUATION FACTOR (DEC 1995), in which "220" was inserted for the

number of days within which the 1,366 units in CLINs 0001-0004 were to be delivered after the date of the contract (R4, tab 1 at 12 of 36).

4. Contract award was preceded by a preaward survey on 27 and 28 February 1997. On the standard form (SF) 1404, Preaward Survey of Prospective Contractor - Technical, the industrial specialist stated that "a first article is not a requirement of this instant solicitation" and that the quantity called for by CLINs 0001-0004 "shall be delivered 220 days after date of contract (ADAC)." (Ex. A-2 at 4) Substantially the same information was repeated in the "DATA" section of the SF 1403, Preaward Survey of Prospective Contractor - (General) (*id*. at 1-2). On the SF 1405, Preaward Survey of Prospective Contractor - Production, the industrial specialist noted that appellant's planned production schedule called for shipment 140 days after date of contract, and stated that appellant "has successfully manufactured and delivered the identical item, as required in this instant solicitation . . . on schedule" (*id*. at 6-7).

5. By date of 17 April 1997, respondent awarded appellant Contract No. SPO750-97-C-2207, accepting appellant's offer on the solicitation. The contract did not contain first article test and approval requirements but did contain, in section F, clause F22, REQUIRED DELIVERY WITH DELIVERY EVALUATION FACTOR, in which "100" was inserted for the number of days within which all CLINs were to be delivered after award. (R4, tab 1 at 1, 14 of 15)

6. By letter to respondent dated 14 May 1997, appellant stated that it had received the contract in the mail on 13 May 1997 with an FOB destination delivery date of 26 July 1997 for all CLINs. Appellant requested a no cost extension to 31 December 1997. (R4, tab 2) By letter to appellant dated 4 June 1997, the contracting officer stated that "[t]he effective date of the order should have read 'May 17, 1997', not 'April 17, 1997.' This date is corrected by Modification P00001," an advance copy of which was enclosed. The contracting officer rejected appellant's proposed extension to 31 December 1997, stating that "Modification P00001 has been issued to revise the delivery schedule to read September 12, 1997 which is 100 days from the date of the modification." (*Id*., tab 3 at 1)

7. Unilateral Modification No. P00001 dated 4 June 1997 provided that "[t]he AWARD DATE on this order is changed to 97 MAY 17 . . . in lieu of 97 APR 17" and changed the delivery date for CLINs 0001-0004 from 26 July 1997 to 12 September 1997 (*id*., tab 4).

8. By letter to respondent dated 11 July 1997, appellant asserted that one contract drawing called out hardware depicted on certain ordnance drawings, which appellant requested (*id*., tab 6). After internal consultation, the contracting officer advised appellant by letter dated 6 August 1997 that "[t]he numbers you suspect to be ordnance drawings are page numbers from the General Motors Engineering Standards Book, not drawing numbers" (*id*., tab 9; *see also* tab 11). We find no evidence of impact on the work as a result of the time taken to respond to appellant's request.

9. In a telephone conversation with the contracting officer on 12 August 1997, appellant's contract administrator stated, according to a contemporaneous memorandum, that

appellant was "unable to complete this contract within the specified time and asked if I would give him a delivery extension if he agreed to consideration" (*id*., tab 10). When she declined an extension, appellant's contract administrator stated that, absent an extension, appellant would not meet the delivery schedule and was "not willing to invest any more time or money on production" (*id*., tab 10 at 1-2). By cure notice dated the next day, the contracting officer characterized appellant's "notification of intent to stop work [as] a condition that is endangering performance" (*id*., tab 12). In response, appellant requested an extension to 31 December 1997, offered $3,000 consideration, and denied that it had stopped work (*id*., tab 13 at 1).

10. We find that appellant failed to deliver any units by the 12 September 1997 delivery date established in unilateral Modification No. P00001.

11. By memorandum dated 18 September 1997, the contracting officer concluded that termination for default was warranted because: (a) the contract was delinquent, with no shipments having been made; (b) based upon prior experience with appellant, an extended delivery date would probably not be met; and (c) numerous backorders made reprocurement necessary (*id*., tab 13 at 2). In an uncontroverted affidavit in this appeal, the contracting officer states that, in making the termination decision, she "considered all of the factors in FAR 49.402-3(f)." (Affidavit of Shirley Spratt, ¶ 7)

12. By unilateral Modification No. P00002 effective 22 September 1997, the contracting officer terminated the contract for default (R4, tab 15).

DECISION

Respondent contends that it has met its burden of proof regarding the default termination principally because the delivery schedule was properly reduced to 100 days following waiver of the first article requirements and appellant thereafter failed to meet the schedule. Respondent also agues that there was no excusable delay and that the pre-award survey conferred no rights upon appellant. (Respondent's brief at 9-17)

Appellant principally contends that "the delivery schedule in the contract was not the same schedule that the parties had agreed to and relied upon during the Preaward Survey." (Appellant's brief at 4) In particular, appellant urges that, at the preaward survey, respondent represented both that the first article requirements had been waived and that the delivery schedule was 220 days ADO. (*Id*.) Appellant asserts that it "believed that the schedule set during the Preaward Schedule was the final and agreed upon schedule," and that the contracting officer wrongly insisted upon a 100 day schedule. (*Id*. at 5-6) Appellant also maintains that it was excusably delayed "approximately two weeks" by the lack of a timely response to its 11 July 1997 request for technical information and challenges the procedural sufficiency of the default, arguing that the contracting officer performed "no analysis or review" pursuant to FAR 49.402-3(f). (*Id*. at 6)

We have examined the record, mindful that a default termination is "'a drastic sanction . . . which should be imposed (or sustained) only for good grounds and on solid evidence.'" *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) quoting *J.D. Hedin Construction Co., Inc. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). Initially, respondent bears "the burden of proof with respect to the issue of whether termination for default was justified." *Id*. If respondent carries its burden, then the burden "shifts to appellant to come forward with proof that its default was excused by circumstances beyond the control and without the fault or negligence of appellant . . . . " *FDL Technologies, Inc.*, ASBCA No. 41515, 93-1 BCA ¶ 25,518 at 127,098.

In this case, respondent carried its initial burden. As we have found, appellant failed to deliver any units by the 12 September 1997 date established in Modification No. P00001 (finding 10). *See, e.g., Churchill Chemical Corp. v. United States*, 602 F.2d 358, 362 (Ct. Cl. 1979) (recognizing that "where a contractor fails to comply with contract delivery schedules the contract may be terminated, pursuant to the default clause").

We cannot conclude, however, that appellant has carried its burden. As indicated, appellant's primary position is that it was not in default at the time of termination because the parties established either a 220 or 140 day schedule at the pre-award survey. This position, which misconceives the nature and significance of such surveys, is at odds with a line of decisions in which we have held that "the pre-award survey is made for the benefit of the Government and for its guidance in making the award." *Trand Plastics Co.*, ASBCA No. 3708, 57-1 BCA ¶ 1186 at 3300. Hence, "even if [such surveys] are inadequately performed they do not confer rights upon contractors." *Venice Maid Co., Inc.*, ASBCA Nos. 20546, 20792, 76-2 BCA ¶ 12,045 at 57,810; *see also, Tri-States Service Co.*, ASBCA No. 31139, 90-3 BCA ¶ 23,059 at 115,773 (recognizing that pre-award surveys "are for the benefit of the Government and not for the benefit of the contractor"); *Netz Glove & Mitten Co.*, ASBCA No. 23275, 82-1 BCA ¶ 15,664 at 77,472 (same). "The reason for this rule is that the Government is not obliged, by contract or otherwise, to conduct an investigation into a prospective contractor's capability to perform a contract." *Wright Industries, Inc.*, ASBCA No. 18282, 78-2 BCA ¶ 13,396 at 65,491; *see also*, FAR 9.106-1(a) (recognizing that a pre-award survey is normally required only where information "is not sufficient to make a determination regarding responsibility").

Appellant's position is also at odds with the contract documents, which authoritatively established a 100 day delivery schedule. The solicitation advised bidders that "first article test and approval requirements [could be] waived" (finding 1), an action that "was within the discretion of Government officials." *T.M. Industries*, ASBCA No. 21025, 77-1 BCA ¶ 12,400 at 60,061, *aff'd on reconsid.*, 77-1 BCA ¶ 12, 545. The standard First Article Approval clause (*see* finding 2) provided that respondent "may waive the requirement for first article approval test," and the Additional Requirements - First Article Approval clause provided that if there were a waiver, "the delivery time will be reduced by 120 calendar days" because appellant did not specify a different period (*id*.). The contract as awarded reflected

that waiver, reducing the original 220 day schedule by 120 days to 100 days in clause F22 (finding 5).

We must also reject appellant's unsubstantiated excusable delay contention, which rests upon the timeliness of the response to the request for technical information (*see* finding 8). We have not been pointed to a contractual time limit governing response time. Nonetheless, the request appears to have been based upon a misconception, and there is no evidence that the response time impacted the performance schedule (*id*.). *See, e.g*., *Law v. United States*, 195 Ct. Cl. 370, 385 (1971) quoting *Jefferson Construction Co. v. United States*, 368 F.2d 247, 256 (Ct. Cl. 1966) (holding that "[i]t is [appellant's] burden to show 'where the work was delayed because of lack of [submittal] approval'").

While we thus reject appellant's positions regarding the length of the delivery schedule and excusable delay, we also cannot accept appellant's argument that the default is procedurally deficient for failure to consider the FAR 49.402-3(f) factors. As we have found, the record contains an uncontroverted affidavit from the contracting officer that she did consider those factors (finding 11). In any event, in *DCX, Inc. v. Perry*, 79 F.3d 132, 135 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 992 (1996), our court of appeals held that the FAR 49.402-3(f) factors "are not prerequisites to a valid termination." *See also Nisei Construction Co., Inc.*, ASBCA Nos. 51464 *et al*., 99-2 BCA ¶ 30,448 at 150,444-45.

CONCLUSION

The appeal is denied.

Dated: 11 July 2001

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
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. 51249, Appeal of Laumann Manufacturing Corporation, rendered in conformance with the Board's Charter.

Dated:

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