ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Production Service & Technology, Inc.	)	ASBCA No. 53353
	)	
Under Contract No. N00189-00-P-2111	)	

APPEARANCE FOR THE APPELLANT: Mr. Gregory A. Grose
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Benjamin M. Plotkin, Esq.
Davis Young, Esq.
Trial Attorneys
Fleet and Industrial Supply Center
Norfolk, VA

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

This appeal involves the termination for cause of a contract to fabricate split bow sheave weldments for the cable ship, USNS Zeus. At issue is the Government's motion for summary judgment on grounds of anticipatory repudiation, which has been opposed by appellant. We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

On 29 September 2000, the Navy awarded firm, fixed-price commercial item purchase order Contract No. N00189-00-P-2111 for "Split Bow Sheave Weldments for USNS Zeus" to appellant Production Service & Technology, Inc. The contract amount was $408,734.00 and the required delivery date was 15 November 2000. (R4, tab 10)

Of relevance is the following contract clause, found in FAR 52.212-4 CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 1999):

> (d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613) [CDA]. Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The

> Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.
>
> . . . .
>
> (f) Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence . . . . The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.
>
> . . . .
>
> (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.

(R4, tab 5)

Paragraph 3.1.2 of the specifications provided that the 3.5 inch thick steel required for the sheave plate base shown on drawing 595-7372927 be ASTM A588 Grade A (R4, tab 5 at 4). Prior to submitting its proposal, appellant contacted eight steel suppliers and obtained a number of quotations for the A588 Grade A steel. One of the potential suppliers, Oliver Steel Plate Co. (Oliver), confirmed that it had the steel in stock at the time of appellant's pre-award inquiry, but appellant did not make any arrangement with Oliver to hold the steel for it pending contract award. (R4, tab 42; app. opp. to Gov't mot., ¶ 12)

After contract award, appellant learned that only half of the required amount of A588 Grade A steel remained available from Oliver (R4, tab 42; app. opp. to Gov't mot., ¶ 13). By a telephone message on 2 October 2000, a telephone conversation on 3 October 2000 and a letter dated 6 October 2000, appellant informed the Government that the steel was "not readily available in the size required to make the sheave barrel plate" and asked whether it could substitute a "3 inch plate and reduce the machining tolerance to end up with the same finished diameter as specified on the drawing" (R4, tabs 11, 32).

Both appellant and the Government consulted the designer of the split bow sheave weldment about the possibility of using 3 inch steel plate. The designer was willing to consider appellant's request if he was provided "with the required weldment tolerance." (Daniels aff. ¶¶ 6-8) According to appellant, the issue became moot when it learned that the A588 Grade A steel was not available in either the 3 or 3.5 inch thickness (app. opp. to Gov't mot., ¶ 15). Thus, in a 16 October 2000 telephone call, appellant inquired about substituting ASTM A572 Grade 50 steel. This time, the designer advised appellant that the "proposed change in material was acceptable" and that he would recommend approval of the change when appellant submitted the request to the Government. (Daniels aff. ¶ 9; R4, tab 15)

Paragraph 3.1.5 of the specifications required that the sheave "[f]lange bearings and thrust bearings as shown on drawing 595-7372925 . . . be manufactured by Seal-Pro Technology Group, Inc. (Seal-Pro) or equal" and provided the part numbers, description and quantities for each (R4, tab 10). The Seal-Pro bearings were selected by the designer in June 2000 (Daniels aff. ¶ 4). According to a Government letter dated 3 June 2002 contained in the appeal correspondence file, the draft drawings and specifications were "shopped" around to potential vendors "for the purpose of validating the documentation and determining if a number of the vendors would bid on the job." One of these potential vendors, Craft Machine Works, Inc. (Craft), obtained a quote in the amount of $108,286.00 for the bearings from Seal-Pro on 24 June 2000. The quote contained the following note: "DELIVERY: SHIP 10-12 WEEKS AFTER CUSTOMER DWG APPROVAL." (Attach. to app. rebuttal to Gov't resp. to app. mot. to compel)

The designer received a copy of the quote from Seal-Pro on 30 June 2000 (Daniels aff. ¶ 4). The Government's 3 June 2002 letter acknowledges that the quote was used to develop the Government's estimate for the contract, which includes $108,286.00 for "Purchase Flanged Bearings & Shaft Sleeves" (R4, tab 1 at 7 of 18). As to the delivery time, the designer's affidavit states only: "At no time did I discuss with Seal-Pro's [sic] their proposed delivery time with the government" (Daniels aff. ¶ 4). The Government's 3 June 2002 letter denies generally that Government personnel had any knowledge of estimated delivery time.

On 18 September 2000, appellant received a quote from Seal-Pro for the specified parts which advised that delivery was estimated to be 10 weeks after drawing approval (app.

resp. to Gov't interrog. 4, tab 3). After contract award, appellant discussed various options for delivery of the parts with Seal-Pro, but it does not appear that any of the options discussed would have made it possible for appellant to meet its contractual 15 November 2000 delivery date (R4, tabs 16-18, 20-22, 42).

On 18 October 2000, appellant advised the contract specialist that the bearings would not be delivered until "after mid-December." Thereafter, a number of telephone conversations ensued between the contract specialist and others, including appellant, and the Government's end-user and counsel to discuss the problems and possible solutions, including extending the completion date. One of these conversations took place at 4:00 p.m. on 18 October 2000, during which the contract specialist advised appellant to "start minimizing his costs – ASAP" (R4, tab 16). Appellant asserts that, following this direction, it "stopped all production efforts" (compl. ¶ 7).

At 4:31 p.m. that same day, appellant sent by fax to the contract specialist a letter which summarized the two issues affecting the contractual delivery date. As to the bearings, appellant advised that it had placed an order with Seal-Pro based upon a "negotiated 7-8 week delivery which equates to mid-December." As to the steel, appellant advised that (1) there was no ASTM A588 Grade A steel and would not be any for two to three months and (2) it had checked availability of the ASTM A572 Grade 50 steel, and there were some delivery problems, but that it did not yet have all the relevant information. The 18 October 2000 letter went on to request possible progress or partial payment from the Government because of the payment terms required by Seal-Pro and because steel was expensive. (R4, tab 18)

In a letter sent to Seal-Pro by fax at 5:24 p.m., appellant advised Seal-Pro that it had just spoken to the contracting officer, thought it prudent "to minimize our exposure," and asked Seal-Pro to put its order on hold for 24 hours until it could "sort . . . out" the delivery problem (R4, tab 17). Another letter to Seal-Pro the following morning (a copy of which was sent to the contract specialist) requests that Seal-Pro "act reasonably and have some flexibility" (R4, tab 20).

Further conversations between the contract specialist and appellant, during which the possibility of a new contractual delivery date was discussed, continued through 24 October 2000, when the contract specialist advised appellant that the end-user would not agree to a late delivery and that the Government was considering either a no-cost cancellation of the contract or a termination for default (R4, tabs 19, 23, 25). By letter dated 25 October 2000, appellant was formally notified that the Government intended to proceed with a no-cost cancellation (R4, tab 26).

On 29 October 2000, the Government forwarded to appellant a proposed modification for a no-cost cancellation of the contract. Thereafter, there were a number of telephonic and written communications between the Government and appellant, the gist of

which was that appellant wanted to recover its alleged costs under a termination for convenience (R4, tabs 27-30, 35, 36).

On 9 November 2000, the contracting officer unilaterally issued Modification No. P00001 terminating the purchase order contract for cause pursuant to FAR 52.212-4(m). The modification stated that the cancellation was due to appellant's "anticipated inability to make delivery on the specified date of 15 November 2000, as indicated by written and verbal communication from [appellant] on 18 October 2000." The modification advised appellant that it had the right to appeal the decision under the Disputes clause, FAR 52.233-1, but did not advise appellant of its appeal rights as required by FAR 33.211. (R4, tabs 40, 41)

By a letter dated 18 December 2000, appellant requested a contracting officer's final decision. It urged her to convert the termination for cause into a termination for convenience and requested $122,860.00 in costs it alleged it had incurred prior to the termination for cause. The letter included a CDA certification. (R4, tab 42) In a final decision dated 14 February 2001, the contracting officer declined to convert the termination and denied appellant's monetary claim in its entirety (R4, tab 46). This timely appeal followed.

DISCUSSION

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co*., ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding the Government's motion for summary judgment, we are not to resolve factual disputes; rather, we are to ascertain whether material facts are in dispute. *See, e.g., General Dynamics Corp*., ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851; *ITT Federal Services Corp*., ASBCA No. 46146, 97-1 BCA ¶ 28,655, *aff'd*, 132 F.3d 1448 (Fed. Cir. 1997). The Government has the burden of proving that its termination of the contract for cause was proper. *Lisbon Contractors, Inc. v. United States,* 828 F.2d 759, 765 (Fed. Cir. 1987).

The contract provides that the Government "may terminate this contract . . . for cause in the event of any default by the Contractor . . . ." (FAR 52.212-4(m)). The Government contends that the termination was justified because appellant repudiated the contract, an act of default. It acknowledges that, in order to establish an anticipatory repudiation, it must show that appellant "communicated an intent not to perform in a positive, definite, unconditional and unequivocal manner, either by (1) a definite and unequivocal statement by the contractor that it refused to perform or (2) actions which constitute actual abandonment

of performance." *Jones Oil Co*., ASBCA Nos. 42651 *et al*., 98-1 BCA ¶ 29,691 at 147,150. *See also Danzig v. AEC Corp*., 224 F.3d 1333, 1337-38 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 995 (2001) (anticipatory repudiation includes cases in which reasonable grounds support the obligee's belief that the obligor will breach the contract and, upon request, the obligor fails to give adequate assurance of due performance). It asserts that appellant's 18 October 2000 letter satisfies the repudiation test because the letter advised the Government that appellant did not have the required materials to perform the contract in accordance with the specifications and meet the 15 November 2000 delivery date. (Gov't br. at 4,7)

Appellant's first argument in opposition to the Government's motion is that the designer knew that A588 Grade A steel was not available and that Seal-Pro required 10 to 12 weeks for delivery of the bearings and, therefore, that the Government should have known the contractual delivery date would be impossible to meet and any default was excusable. The contention is based in part upon a telephone conversation which appellant has summarized in its opposition to the Government's motion. Because there is no supporting affidavit or other record evidence of this telephone conversation, the summary is not sufficient to show an evidentiary conflict. *E.g., Ver-Val Enterprises, Inc.*, 01-2 BCA ¶ 31,518 at 155,597.

Nevertheless, we are persuaded that the record evidence establishing that the designer received and used the 24 June 2000 Pro-Seal quote to Craft is sufficient to raise a genuine issue of fact regarding the Government's knowledge of the delivery time. The designer's affidavit does not address whether he discussed the delivery time with Government personnel and the Government offers only general and hearsay denials of any such knowledge. *Cf. Franklin E. Penny Co. v. United States*, 524 F.2d 668 (Ct. Cl. 1975) (where Government issues drawings with list of Government-approved sources of supply, it warrants their ability, but not their willingness, to do the work).

Appellant further asserts that it did not repudiate the contract, but rather that, following the contracting agency's direction to minimize its costs, it stopped all work as directed and then requested a meeting to resolve the material delivery issues associated with the project (app. br. at 6). We are also persuaded that there are also genuine issues of material fact as to whether appellant repudiated the contract. The 18 October 2000 letter upon which the Government relies merely addressed the difficulties appellant was having obtaining timely delivery of the bearings and steel. The letter does not contain a "definite and unequivocal statement" by appellant that it is refusing to perform the contract. Moreover, it contains a request for a progress or partial payment. The inference we draw from the letter, therefore, is that appellant still intended to perform the contract.

Nor does the record evidence otherwise reflect "a positive, definite, unconditional and unequivocal" intent by appellant not to perform its obligations. Indeed, we infer just the opposite from appellant's 18 and 19 October 2000 letters to Seal-Pro inasmuch as they

indicate a desire on appellant's part to sort out the delivery problems and to continue working with Seal-Pro. The same is true of the various telephone conversations with the contract specialist which establish that appellant was exploring the possibility of extending the contractual delivery date.

And, while appellant did stop production work on 18 October 2000, it asserts that it did so at the Government's direction to minimize its costs and exposure. Whether appellant's actions constitute actual abandonment or were reasonable under the circumstances cannot be resolved on the record now before us.

DECISION

The Government's motion for summary judgment is denied.

Dated: 27 September 2002

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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 certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53353, Appeal of Production Service & Technology, Inc., rendered in conformance with the Board's Charter.

Dated:

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