

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Sigma Tech Enterprises, Inc.) ASBCA No. 52774
)
Under Contract No. SP0451-00-W-8000)

APPEARANCE FOR THE APPELLANT: Garreth E. Shaw, Esq.
Garreth E. Shaw, P.C.
San Antonio, TX

APPEARANCE FOR THE GOVERNMENT: Donald S. Tracy, Esq.
Trial Attorney
Defense Supply Center Richmond (DLA)

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

This timely appeal is from a contracting officer's decision to default terminate appellant's purchase order to supply power strips. We deny the appeal.

FINDINGS OF FACT

1. On 3 September 1999 the Defense Supply Center Richmond (DSCR or government) issued Request for Quotations (RFQ) SPO451-99-Q-PF15 for the supply of 1170 items described as:

POWER STRIP, ELECTRICAL
WOODHEAD DANIEL CO [sic]
CAGE 79409
P/N 31593B123
ERICSON MANUFACTURING CO.
CAGE 82832
P/N 7000-50-2

(R4, tab 2)

2. The RFQ incorporated the following solicitation provision by reference: FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (APR 1998) which states in part:

(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 . . . that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies . . . at no increase in contract price. . . .

. . . .

(c) *Changes*. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) *Disputes*. This contract is subject to the Contract Disputes Act of 1978, as amended 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 of 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.

. . . .

(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 assurance 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. . . .

(R4, tab 2) FAR 52.233-1, DISPUTES (DEC 1998) states in part:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

3. Further the RFQ included Clause L54, 52.217-9002, CONDITIONS FOR EVALUATION AND ACCEPTANCE OF OFFERS FOR PART NUMBERED ITEMS DLAD (NOV 1998), which states in part:

(a) The product described by the manufacturer's name and part number or by the manufacturer's name and part number as modified by additional requirements referred to in the procurement identification description (PID) of this solicitation is that product which the Government has determined to be acceptable. All offerors must indicate below whether they are offering the exact product or alternate product and must furnish the data required for whichever is applicable. Exact product means the identical product described by the manufacturer's name and part number cited in the PID, modified (if necessary) to conform to any additional requirements set forth in the PID, and manufactured by or under the direction of the manufacturer cited in the PID. Any product not meeting these criterion is considered an alternate product even though it may be manufactured in accordance with the drawings and/or specifications of the manufacturer cited in the PID. In either case, any product offered must be either identical to or physically, mechanically, electrically and functionally interchangeable with the product cited in the PID including additional requirements referred to in the PID, if any.

....

(b) EXACT PRODUCT. If the exact product is offered, any offeror other than the manufacturer cited in the PID must furnish, when requested by the Contracting Officer, evidence that the product being offered is that product described by the manufacturer's name and part number specified in the PID. Such evidence may be an invoice or other correspondence from the manufacturer cited in the PID or other evidence sufficient to establish the identity of the product and its manufacturing source. In addition, if the product is manufactured for the manufacturer cited in the PID, evidence of approval and acceptance by the manufacturer cited in the PID must also be furnished.

The RFQ included the following boxes under the citation to this clause:

(a) Exact Product Applicable to _____

CLIN(s)

[] Alternate Product Applicable to
CLIN(s)_____

(d) CLIN NR.(S)_____

HAVE BEEN PREVIOUSLY FURNISHED OR EVALUATED
AND APPROVED UNDER CONTRACT/SOLICITATION
NR. _____

(R4, tab 2 at 9)

4. Appellant had not read the above clause prior to submitting its quotation (tr. 86), and did not advise the government that it did not have, and was unable to find on the internet, a copy of this clause (tr. 134).

5. The RFQ stated: “Upon request, the Contracting Officer will make [the incorporated clause’s] full text available. Also, the full text of a clause may be accessed electronically at these addresses: [four web sites follow]” (R4, tab 2 at 8).

6. In response to the RFQ, appellant submitted a quotation under line item 0001 to supply 1170 electrical power strips at \$74.94 each for a total of \$87,679.80. Under Place of Manufacture appellant stated: “Ericson Manufacturing Co.” and under Place of Inspection (Packaging): “Final assembly, packaging, packing & marking by Sigma Tech Enterprises, Inc.,” followed by appellant’s address. (R4, tab 4 at 1)

7. In several places, appellant made representations by placing a check mark or an X in an appropriate box. In clause L54, 52.217-9002, CONDITIONS FOR EVALUATION AND ACCEPTANCE OF OFFERS FOR PART NUMBERED ITEMS DLAD (NOV 1998) appellant represented, by placing a check mark in the appropriate box under (a), that its quotation was based on supplying the “Exact product” for the line item 0001. Under (d), appellant represented that line item 0001 had been previously furnished or evaluated and approved under contracts SP0451-98-M-MA88 and – MA89. (R4, tab 4 at 9)

8. In checking “Exact product,” appellant intended to state that it was supplying the exact product that appellant supplied under two previous contracts with the government (tr. 128).

9. On 28 September 1999 appellant submitted a quotation for the option quantity of 1170 at the same \$74.94 price with a sixty-day delivery (R4, tab 4a).

10. On 21 October 1999 the contracting officer (CO) sent appellant Purchase Order No. SP0451-00-W-8000 (R4, tab 10). The CO's cover letter stated:

Attached is copy of subject purchase order for the power strip, solicitation SP0451-99-Q-PF15, which is a bilateral agreement. Request you sign in block 16 and return front page to this office as soon as possible. When the order is processed and fully executed, a complete copy will be returned to you for your records.

Please let me know if you have any questions.

11. On 22 October 1999 appellant signed the purchase order in block 16 and returned it by facsimile to DSCR. Block 16 of the purchase order states:

Reference your written quote of 99 Sep 28, and furnish the following on terms specified herein.

ACCEPTANCE: THE CONTRACTOR HEREBY ACCEPTS THE OFFER REPRESENTED BY THE NUMBERED PURCHASE ORDER AS IT MAY PREVIOUSLY HAVE BEEN OR IS NOW MODIFIED, SUBJECT TO ALL OF THE TERMS AND CONDITIONS SET FORTH, AND AGREES TO PERFORM THE SAME.

(R4, tab 1 at 1)

12. The purchase order, a six-page document, set out the ordered electrical power strips by manufacturer's part number and required delivery by 21 December 1999, FOB Defense Distribution Depot San Joaquin, CA (R4, tab 1 at 4).

13. On 7 October 1999 the DCMC representative who visited appellant had noted that appellant was having some difficulty delivering on other orders in a timely manner. However, the recommendation was: "No reason not to award this contract to SIGMA TECH." (R4, tab 9)

14. On 4 November 1999 appellant wrote the government:

In order to proceed with the contract we need the contracting officer's signature in block 24. . . .

The color of the power strip cord . . . will be black color instead of yellow. The same product supplied in our earlier two

contract[s] . . . had yellow color power cord. . . . There are no changes in the specifications or size of the product. . . .

(R4, tab 11)

15. On 5 November 1999 the government faxed the executed “Order for Supplies and Services” (R4, tab 12).

16. On 12 November 1999 the CO faxed appellant, referenced appellant’s 4 November 1999 letter, and stated: “Please submit the technical, illustrated description of the item that you offered for the subject award. Your offer needs to undergo evaluation as an alternate offer.” (R4, tab 13)

17. On 15 November 1999 Larry B. Smith, Chief, Section JBTB, Product Center 2, sent the CO his recommendation which stated in part:

The contractor is not one of the cited manufacturers. The contractor has offered to supply the power strips with the exception that each power cord will be black in lieu of yellow, (color), external jacket. The contractor quoted with the intent to furnish an item he would fabricate from components he would acquire. The requirements of this NSN currently cite two manufacturer’s part numbers.

The contractor’s request is not acceptable. The Government does not have in its possession sufficient, accurate or legible data to purchase this part from other than current sources. Recommend this contract be cancelled.

(R4, tab 14)

18. On 23 November 1999 appellant submitted the technical, illustrated description of each component of the item offered under the contract (R4, tab 15).

19. On 3 December 1999 the CO faxed appellant that its 23 November 1999 letter and the accompanying data are under review as an alternate offer, and appellant would be notified of the results when the review was returned (R4, tab 16).

20. On 22 December 1999 the CO faxed appellant and stated in part:

The material offered by your company is not the part numbered material cited in the item description. Your company quoted with the intent to furnish material that was fabricated from

components bought from one of the contractors listed in the item description. Your request is unacceptable. Both of the sources listed in the item description have their material tested and rated by Underwriters Laboratories. From the material that was provided for evaluation, quality aspects that would identify Sigma Tech as a source capable of meeting the minimum requirements of the Government for NSN 6150-01-442-8586 were not addressed. Further data does not cite Sigma Tech as a manufacturer of this material.

A no cost cancellation is requested for SPO4100W800 in total. If a no cost cancellation is not possible, please provide the total amount of costs incurred by your firm as a result of your beginning performance under the order and a cost breakdown of the total amount.

(R4, tab 17)

21. On 27 December 1999 appellant responded to the CO's 22 December 1999 letter setting out the manufacturer, description and properties, and testing and quality control of the components which appellant was using in assembling the power strips. Further appellant asserted it was supplying the exact item required by the contract and stated:

Same product was supplied in the past to your agency under contract numbers SP0451-98-M-MA88 and SP045-98-M-MA89.

Please show us what requirement of NSN 6150-01-442-8586 is not addressed. Most of the contract quantity is ready for shipment.

We have completed similar assembly where a three wire power cord is attached to an existing device on contract# TC-GS-07F-90690 with General Services Administration in the past and, also have a current contract# TC-GS-07F-J0030 with GSA.
[emphasis in original]

(R4, tab 18)

22. On 10 January 2000 appellant provided the government with a cost breakdown of the total costs incurred since beginning performance of the contract. The total

cancellation cost was \$87,429.80 (essentially the full contract price) plus storage of \$600 per month, beginning 21 January 2000 until delivery (R4, tab 19).

23. On 11 January 2000 the review and evaluation of appellant's 27 December 1999 letter was sent to the CO. That report rejected the power strips appellant described. (R4, tab 20)

24. On 12 January 2000 the CO faxed appellant, referenced appellant's 27 December 1999 letter, and stated that only the specified Daniel Woodhead and Ericson Manufacturing Co. cages were acceptable and requested "costs to cancel be submitted" (R4, tab 21).

25. In response to the government's inquiry, on 13 January 2000 Ericson wrote that the order history of parts relating to, but not constituting the Ericson catalog number 7000-50-2, reflected that in two of appellant's orders in 1998 and 1999, Ericson had supplied only components and not the final assembled product (R4, tabs 20, 22).

26. On 29 February 2000 the CO wrote appellant, stating the government would not accept any material other than the material described in the Item Description of Purchase Order No. SP0451-00-W-8000, and offered appellant "a reasonable extension to the delivery schedule" to deliver Ericson Manufacturing Co. P/N 7000-50-2. Appellant was requested to notify the government within ten days of its decision. Appellant was advised it could request relief under FAR 14.407-4, MISTAKES AFTER AWARD which permits correction by modification, rescission or reformation. (R4, tab 23)

27. On 9 March 2000 appellant wrote the CO, objected to the CO's 29 February 2000 letter and stated in part:

We inadvertently might have marked [that appellant would supply Exact product].

....

Receiving the signed bilateral contract agreement on 11/5/99 in response to our letter dated 11/4/99 was a clear signal for us to go ahead and proceed with the contract . . . We duly proceeded with the contract and assembled the 1170 each Electrical Power Strips. We never received any stop work order or do not proceed instructions at any time while the contract was proceeding at its normal speed to meet the delivery date of 12/21/99.

(R4, tab 24 at 1-2)

28. Effective 19 April 2000 the CO terminated the Purchase Order No. SP0451-00-W-8000 for default (R4, tab 8). This timely appeal followed.

DECISION

Termination for default is a drastic sanction that should be imposed upon the contractor only for good cause in the presence of solid evidence. *J.D. Hedin Construction Co., Inc. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The Government has the burden of proving that its default termination was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987).

Appellant states that it inadvertently marked that it was supplying the “Exact product” set out in the RFQ and the purchase order (finding 27). Appellant further asserts that its statements “Ericson Manufacturing Co.” under Place of Manufacture, and “Final assembly, packaging, packing & marking by Sigma Tech Enterprises, Inc.” followed by appellant’s address, under Place of Inspection (Packaging) were sufficient to put the government on notice that appellant was not supplying either of the two items set out in the RFQ and purchase order. Rather appellant was purchasing and assembling the components.

We cannot agree that appellant’s notations on the RFQ were sufficient to put the government on notice that appellant’s designation of exact product was in error. The contract provided: “Changes in the terms and conditions of this contract may be made only by written agreement of the parties” (finding 2).

When the government learned through appellant’s 4 November 1999 letter of appellant’s plan to manufacture the power strips, the government offered in its 12 November 1999 fax to consider an alternate (finding 16). Once the government determined not to accept the alternate for the power strips designated, on 22 December 1999 it offered appellant a no cost cancellation, or alternatively, an opportunity to submit its costs incurred to date (finding 20). On 10 January 2000 appellant submitted essentially the full contract price as cancellation costs (finding 22), subsequently stating that absent a stop work order it duly proceeded with the contract (finding 27).

Appellant is in error. On 12 November 1999, appellant was on notice to halt production until further instructions, and no stop work order was necessary to convey this fact to appellant. *See Master Research & Manufacturing, Inc.*, ASBCA No. 46341, 94-2 BCA ¶ 26,747 at 133,071 (In an appeal involving a unilateral purchase order which set out a specific item, the government correctly refused an item other than that designated, which the contractor had begun manufacturing, and the contractor was obligated to cease work even though there was no stop work order.)

After review, the government rejected the power strips which appellant planned to submit, and offered appellant a reasonable extension to the delivery schedule in which to supply the power strips set out in the RFQ and Purchase Order (finding 26). Appellant was obligated by its contract to “comply with any decision of the Contracting Officer” (finding 2).

Appellant points to a number of instances in the sequence of events when, appellant asserts, the government agreed to appellant’s deviations from the contract provisions. The contract set out the procedure for proposing an alternate product and its approval. Appellant never requested that procedure, and the government was not obligated to accept an alternate absent the designated evaluation.

Appellant failed, after the government’s request, to provide adequate assurances of future performance, as appellant was required to do by the contract (finding 2). The government was entitled to default terminate the contract.

Accordingly, the appeal is denied.

Dated: 11 December 2003

JEAN SCHEPERS
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting 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. 52774, Appeal of Sigma Tech Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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