

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Kamp Systems Inc.) ASBCA No. 54192
)
Under Contract No. SP0470-02-D-0256)

APPEARANCE FOR THE APPELLANT: Ms. Patricia A. Coleman
President

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

OPINION BY ADMINISTRATIVE JUDGE MOED
PURSUANT TO RULE 12.3

This is an appeal from the default termination of a supply-type contract for failure to timely deliver a first article. Appellant Kamp Systems Inc. (KSI) has elected the Accelerated Procedure under Rule 12.3. The parties have agreed to decision of the appeal on a documentary record, without a hearing, pursuant to Rule 11. KSI did not submit a brief as provided in the Board's order relating to that process. In the absence thereof, we have resorted to the documents of record and the pleadings for KSI's positions on the issues in the appeal.

FINDINGS OF FACT

1. On 25 May 2001, the Defense Supply Center Richmond (DSCR) issued a solicitation seeking offers for award of one or more contracts, on a fixed-price, indefinite quantities basis, for supply of floor panels for C-5 aircraft (R4, tab 46). The contract contained the FAR 52.216-22 INDEFINITE QUANTITY (OCT 1995) clause. The minimum quantities required to be purchased by the government are listed in the schedule under the heading "Guaranteed Minimum Quantity" (R4, tab 1 (hereinafter "contract")).

2. The solicitation asked offerors to propose first article and production unit prices for estimated quantities of different types of panels. The panels were listed by contract line items (CLINs) 0001 through 0068, and arranged into Groups 1 through 22. Each CLIN was identified by a part number (P/N) and a National Stock Number (NSN) (of which only the final four digits are set forth herein). (R4, tab 46)

3. The solicitation informed prospective offerors that the government intended to award primary and secondary contracts. In part, the solicitation and resulting contract state that:

First article testing requirements and guaranteed minimum quantities apply to both the primary and secondary contractors for each group. However, the primary awardee may be responsible for subsequent delivery orders (production quantities above and beyond the guaranteed minimum quantities) whereas the secondary awardee would receive subsequent delivery orders only in the event that the primary awardee cannot meet the Government's demands.

(Contract at 2)

4. On 17 January 2002, the present contract was awarded to KSI as secondary contractor for Groups 8 and 16. The contract was initially for the period 18 January 2002 - 17 January 2005 with an option in the government to extend the term for an additional year (contract at 2). The contract provided for purchases during the initial term as follows:

<u>Group</u>	<u>CLIN</u>	<u>NSN</u>	<u>Guaranteed Minimum Quantity</u>	<u>Delivery Date</u>
8	9906AA (first article)	5824	1	90 days after receipt of order
	0034	5824	3	90 days after first article approval
	0035	5825	3	90 days after first article approval
	0036	5438	3	90 days after first article approval
	0037	1451	3	90 days after first article approval
16	9906AB (first article)	6887	1	120 days after receipt of order
	0059	6887	3	90 days after first article approval

(Contract at 3A)

5. On 19 February 2002, the contracting officer issued Delivery Order (D/O) No. 001Z under the contract for delivery of floor panels as follows:

<u>Group</u>	<u>Contract CLIN</u>	<u>D/O CLIN</u>	<u>NSN</u>	<u>Quantity</u>	<u>Delivery Date</u>
8	9906AA (first article)	9906AA	5824	1	24 June 2002
	0034	0004	5824	3	20 January 2003
	0035	0005	5825	3	20 January 2003
	0036	0003	5438	3	20 January 2003
	0037	0002	1451	3	20 January 2003
16	9906AB (first article)	9906AB	6887	1	24 July 2002
	0059	0001	6887	3	19 February 2003

(R4, tab 3 at 3)

6. Initially, DSCR furnished mylars to KSI for production of Group 8 panels (R4, tabs 2, 57). The record does not describe or define “mylar.” The term, however, has been defined in a prior decision of our Board as “tracings or reproducible drawings [in the form of] transparencies with a photographic coating.” *Elcon Associates, Inc.*, ASBCA No. 44189, 95-2 BCA ¶ 27,859 at 138,913.

7. After receiving the mylars for the Group 8 panels, KSI requested that mylars for P/N 4F21013, which was the Group 16 panel (NSN 6887), also be furnished (R4, tab 2). On 14 February 2002, after receipt of the mylars furnished in response to that request, KSI informed DSCR that the same were inadequate in that they did not “provide critical information needed to locate and shape intricate panel features” (R4, tab 59). In an E-mail message, dated 24 April 2002, KSI stated that the needed mylars should contain “locational information for any and all features that are required” (R4, tab 7). KSI suggested that the mylars numbered 4F21013, sheets 1 and 2 would contain the required information (R4, tab 59).

8. As of 2 April 2002, KSI had not received a response to the foregoing requests. By letter of that date, KSI reiterated the request, stating also that “[t]he absence of the mylars for [P/N] 4F21013 is affecting our delivery schedule” (R4, tab 6). In the E-mail message dated 24 April 2002 (R4, tab 7), KSI mentioned another technical data problem, namely, that “the contract calls for a 4F21013-239A configuration” whereas “our drawings . . . cover only -239B and -239C parts.” (R4, tab 7) In the solicitation (and in KSI’s price offer), 4F21013-239A is shown as the part number for panel NSN 6887 under CLIN 059 (contract at 16).

9. As of 10 June 2002, mylars 4F21013, sheets 1 and 2, sought by KSI (finding 7) had not yet been furnished by DSCR. In a written status inquiry made on that date, KSI told

DSCR that it had “hop[ed that] the mylar issue would have been resolved before now so that it would be possible to run both first article panels concurrently.” KSI stated that its offered prices were based on concurrent processing of the first articles. (R4, tab 12)

10. On or about 24 July 2002, KSI was notified that DSCR was having the technical data package for the contract “re-validated” and that “once the [DSCR] technician approves the package and agrees that it is complete, [DSCR] will mail out the missing mylar sheets to [KSI].” DSCR hoped that “this will be completed within the next 2-3 weeks.” (R4, tab 16) On 17 September 2002, DSCR sent KSI mylars 4F21002, sheets 1 and 2 for use on NSN 6887 (R4, tab 68). KSI responded on 18 September 2002 that these mylars had been furnished previously and did not contain the information needed to manufacture NSN 6887 (P/N 4F21013) (R4, tab 17).

11. On 19 September 2002, DSCR advised KSI that mylars 4F21013, sheets 1 and 2 were not available (R4, tab 17). This is contradicted by an internal DSCR E-mail message, dated 24 September 2002 (R4, tab 72) stating that those mylars were “called out on the DSCR Form 924 [not elsewhere described] and need to be sent out . . . to [KSI] as soon as possible” (R4, tab 72). The record does not indicate whether this was done.

12. On 26 September 2002, DSCR took a different course. In an E-mail to KSI of that date, DSCR transmitted advice from one of its technical specialists that the information sought by KSI from mylars 4F21013, sheets 1 and 2 could be obtained from *Drawing No. 4F21013, sheets 1 and 2* (R4, tab 19). This contradicted KSI’s position, stated in a communication to DSCR, dated 20 September 2002, that these mylars were needed because they contained details as to certain notches on the panels which were not adequately depicted in the drawings (R4, tab 70). There is nothing further on this matter in the record. However, unilateral Modification No. 001Z02 to D/O No. 001Z, dated 4 October 2002 (R4, tab 23), contains the statement, not disputed by KSI, that “[t]he contractor has received all the required drawings, mylars, and technical data necessary to manufacture these parts.”

13. On or about 2 October 2002, KSI requested the extension of the delivery dates of the first articles. KSI proposed that the delivery date for CLIN 9906AA, which was the first scheduled delivery of the first articles, be extended by 120 days from 2 October 2002 (31 January 2003) and extended for 150 days from that date (1 March 2003) in the case of CLIN 9906AB (R4, tab 21). On 4 October 2002, the contracting officer issued unilateral Modification No. 001Z02 (R4, tab 23) to D/O No. 001Z extending the delivery dates of all of the ordered supplies. The delivery date of CLIN 9906AA was extended from 24 June 2002 to 30 December 2002. The delivery date for CLIN 9906AB was extended from 24 July 2002 to 29 January 2003.

14. Sometime prior to 7 November 2002, DSCR became concerned that KSI would not deliver the first article under CLIN 9906AA on or before the extended date of 30 December 2002 (finding 13). That concern was based on information from the

administrative contracting officer, Defense Contract Management Area, Santa Ana, CA, that no later than 15 November 2002, KSI would be evicted from the building in Chino, CA, which housed its manufacturing facility. The County of San Bernardino, California was the landlord of that building. (R4, tab 29)

15. By letter of 7 November 2002, the contracting officer notified KSI that the government “was aware” that KSI would not meet that delivery date. Characterizing said failure of timely delivery as a condition endangering the performance of the contract, the contracting officer directed KSI, on pain of default termination, to cure that condition within 10 days and take action to ensure delivery within the time specified in the contract. (R4, tab 26) The contract contained the FAR 52.209-4 FIRST ARTICLE APPROVAL-GOVERNMENT TESTING (SEP 1989) ALTERNATE I (JAN 1997) and FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) clauses.

16. KSI responded by letter of 11 November 2002 stating that it intended to meet the 30 December 2002 delivery date for the first article for NSN 5824 (CLIN 9906AA) (R4, tab 28). KSI, however, did not deliver that supply by 30 December 2002 (R4, tab 31).

17. On 31 December 2002, asserting a failure to make progress on this contract, the contracting officer sent KSI a show cause notice, substantially in the form set forth in FAR 49.607(b) (R4, tab 32). In its letter of 9 January 2003 responding to the notice, KSI stated that information that it was “facing eviction from our facility” was “without merit.” The issue had been “resolved and [KSI] was endeavoring to meet” the delivery date of 30 December 2002 for CLIN 9906AA (finding 13).

18. KSI asserted, however, that the delays associated with obtaining correct mylars from DSCR (findings 6-12) and resolving other data issues had made it necessary to secure new vendors for critical materials, thereby delaying performance of the contract. On that basis, KSI asked for a new delivery schedule calling for delivery of the first articles under CLIN 9906AA and CLIN 9906AB on or before 5 February 2003 and 5 March 2003, respectively.

19. On 22 January 2003, the parties entered into bilateral Modification No. 001Z03 to D/O No. 001Z (R4, tab 35) extending each of the delivery dates set forth in unilateral Modification No. 001Z02. The delivery dates of CLINs 9906AA and 9906AB were extended to 5 February 2003 and 5 March 2003, respectively, as requested by KSI. The modification also contained the following statement:

It is very important that the new delivery dates in this modification are met. If the contractor fails to meet the first delivery date of February 5, 2003, the Government will terminate this contract for default.

20. Subsequently, in a letter dated 6 February 2003, which confirmed previous oral advice, KSI notified DSCR that it had been “forced” by its landlord to move out of the building housing its manufacturing facility (finding 14). KSI had secured new premises elsewhere and had begun moving its facility to that location. KSI said that it needed time to set up its operations in the new premises and asked DSCR for “consideration . . . when these circumstances not under our control have caused us not to be able to meet the contract delivery schedule” (R4, tab 37).

21. KSI did not deliver the first article under CLIN 9906AA on 5 February 2003 as provided in bilateral Modification No. 001Z03 to D/O No. 001Z (finding 19; R4, tab 36). By written notice dated 25 March 2003 (R4, tab 41) the contracting officer terminated the contract and D/O No. 001Z for default for “failure to deliver the supplies [in accordance with] the established delivery schedule.” That notice was incorporated into unilateral Modification No. 001Z04 issuing the default termination in the form of a written contracting officer’s decision pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended (R4, tab 44).

22. Prior to the termination of the contract, the contracting officer issued a memorandum, dated 19 March 2003 which set forth the chronology of events leading to that action. The memorandum also contains findings as to the factors required to be considered, pursuant to FAR 49.203(f), in determining whether the contract should be terminated for default. Among the matters to be considered, under FAR 49.203(f)(3), was “[t]he urgency of the need for the supplies or services.” The contracting officer found that quantities were on hand, with no pending back orders, for all of the NSNs ordered in D/O No. 001Z with additional quantities due in from other sources. He stated that “[a]ll five NSN’s are well and will not be re-procured.” The memorandum concluded that the contract and D/O No. 001Z should be terminated for default. (R4, tab 40)

23. In a letter to the contracting officer, dated 28 March 2003 (R4, tab 43) KSI asserted that the failure of delivery was due to excusable causes of delay. On that ground, KSI asked that the default termination be set aside. Various alleged excusable causes were set forth. It was alleged, first, that production had been delayed by “continued confusion” created by the government concerning the mylars, including the repeated transmittal of incorrect mylars.

24. This was followed by a second category consisting of allegations as to events extrinsic to the contract which were said to have contributed to the failure to make the first delivery on time. The record is not sufficient for finding any of these allegations to be fact. Such findings, however, are not necessary in view of the basis on which we decide this appeal. The first of these events was the alleged delay by the government in settling claims and making payments under two other contracts awarded by the Department of the Air Force which allegedly prompted the County of San Bernardino to evict KSI from its production premises.

25. The second cited event was the change in delivery destination (from Travis Air Force Base, CA to Lackland Air Force Base, TX) for a large piece of ground support equipment being produced under another Department of the Air Force contract. That change is alleged to have “engaged [KSI’s] management, engineering and production personnel” during December 2002 and January 2003 while KSI was attempting to meet the delivery schedule under this contract.

26. The third alleged extrinsic cause of delay was the higher priority accorded by KSI to the fulfillment of two Department of the Air Force contracts said to have carried DX ratings. Orders rated as DX would take precedence over unrated orders such as those issued under this contract (contract at 1) (FAR 12.303(a)). The complaint in this appeal states that KSI worked on the DX-rated orders during the period December 2002 - February 2003 (compl. at 16).

27. The contracting officer responded that KSI’s letter of 28 March 2003 “presents no compelling reasons” for reversal of the decision terminating the contract for default (R4, tab 42). Following that response, KSI timely submitted the present appeal from that decision.

DECISION

This contract and D/O No. 001Z were terminated for default because of KSI’s failure to deliver the first article under CLIN 9906AA on or before 5 February 2003, as provided in D/O No. 001Z, as modified (finding 19). Under ¶ (d) of the FIRST ARTICLE APPROVAL-GOVERNMENT TESTING (SEP 1989) ALTERNATE I (JAN 1997) clause of the contract, the failure to deliver a first article on time was deemed to be a failure to “make delivery within the meaning of the Default clause” of the contract.

The government had the burden of proof as to the propriety of the default termination. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). The fact that KSI failed to deliver a CLIN 9906AA on time would satisfy that burden unless KSI came forward with evidence showing that the failure of timely delivery arose from cause(s) beyond the control and without the fault or negligence of KSI or a subcontractor at any tier. *FDL Technologies, Inc.*, ASBCA No. 41515, 93-1 BCA ¶ 25,518 at 127,098.

KSI alleges that the failure to timely deliver CLIN 9906AA was caused by various acts or omissions of the government which are said to have delayed the performance of this contract. The first of these was the failure of the government to timely furnish the mylars needed for production of panels under D/O No. 00Z1 (findings 6-12). The other alleged causes of performance delay cited by KSI are actions taken by the government under other contracts with KSI (findings 24-26). It is not necessary to determine the merits of these

allegations because even if well-founded, they cannot serve to extend the existing delivery dates of supplies under D/O No. 00Z1. All of the alleged causes of delay existed prior to 22 January 2003, the date of agreement on Modification No. 00Z103 establishing the existing delivery schedule (finding 19). For that reason, none of them can serve to excuse the failure to deliver CLIN 9906AA on time. The agreement on the schedule in Modification No. 00Z103 “eliminate[d] from consideration the causes of delay occurring prior to such agreement [citations omitted].” *RFI Shield-Rooms*, ASBCA Nos. 17374, 17991, 77-2 BCA ¶ 12,714 at 61,731. In agreeing to the new delivery schedule in Modification No. 00Z103, KSI surrendered its right to “argue the excusability of then existing causes of delay . . . as a defense to a later default.” *Do-Well Machine Shop, Inc.*, ASBCA Nos. 34565, 40895, 99-1 BCA ¶ 30,320 at 149,946, *aff’d on reconsid.*, 99-2 BCA ¶ 30,548.

In the complaint, KSI argues that the contract should not have been terminated for default because KSI was a secondary contractor for Groups 8 and 16 panels (finding 4) and the government had not shown that the primary contractors for these groups were “not able to perform” (compl. at 18). The argument is untenable because the distinction, in the contract, between primary and secondary contractors related only to placement of orders in excess of specified minimum quantities in both types of contracts (finding 3).

That provision does not diminish, or have any bearing on, a contractor’s obligation to timely deliver actually ordered supplies. Availability of those supplies from other sources was a factor considered, pursuant to FAR 49.402-3, in deciding that the contract should be terminated for default. That factor did not militate against default termination inasmuch as there was no need or intention to reprocur the undelivered supplies from other sources (finding 22).

CONCLUSION

For the reasons set forth above, the termination of D/O No. 001Z and this contract for default were proper. The appeal, accordingly, is denied in all respects.

Dated: 21 October 2003

PENIEL MOED
Administrative Judge
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. 54192, Appeal of Kamp Systems Inc., rendered in conformance with the Board's Charter.

Dated:

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