ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Zulco International, Inc.	)	ASBCA No. 55441
	)	
Under Contract No. SPO100-05-D-4046	)	

APPEARANCE FOR THE APPELLANT: Mr. Mohammad Ishaq
President

APPEARANCES FOR THE GOVERNMENT: Kathleen D. Hallam, Esq.
Chief Trial Attorney
Michael L. McGlinchey, Esq.
Trial Attorney
Defense Supply Center (DLA)
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
PURSUANT TO BOARD RULE 11

At issue in this appeal is the government's termination for default of a contract to supply swords and scabbards to the United States Marine Corps. The parties elected to proceed with a submission on the record under Board Rule 11. Briefs were submitted by both parties. We deny the appeal.

FINDINGS OF FACT

On 2 August 2004, the Defense Supply Center Philadelphia (DSCP) of the Defense Logistics Agency (DLA) issued Solicitation No. SPO100-04-R-0149 for a minimum of 1,200 and a maximum of 2,950 swords and scabbards in various sizes under an Indefinite Delivery/Indefinite Quantity contract. Sealed offers were due by 8 September 2004 (R4, tab 1 at 1, 2). The solicitation provided in Block 10:

> In compliance with the above, the undersigned agrees, if this offer is accepted within 120 calendar days . . . from the date of receipt of offers specified above, to furnish any or all items upon which prices are offered at the price set opposite each item, delivered at the designated point(s), within the time specified in the schedule.

(R4, tab 1 at 1)

The swords and scabbards were to be manufactured in accordance with MIL-S-19206E and Drawing P-230 REV A, subject to changes that were identified in the solicitation (R4, tab 1 at 5, 12). The solicitation further provided that two first article samples were due within 90 days after award, that they would be represented by contract line item number (CLIN) 9906, that inspection would take place at the "contractor's plant" also referred to as "at source," and that acceptance of delivery would be at destination (DSCP) (*id*. at 2, 17). The standard FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE (APR 1984), clause was incorporated and provided for termination in whole or in part for failure to deliver within the time specified or any extension (*id*. at 29).

Appellant Zulco International, Inc. submitted its unit price offer of $59.99 on 3 September 2004 (R4, tab 1 at 1, 2). The offer was not accepted within 120 days and appellant extended its offered price to 14 January 2005 at DSCP's request (*id.* at 58).

On 18 January 2005, DSCP awarded appellant Contract No. SPO100-05-D-4046 (R4, tab 5). At the same time, DSCP issued Delivery Order No. 0001 (DO No. 0001) for the minimum quantity, 1,200 sword and scabbard sets in four different sizes, at a total price of $71,988. DO No. 0001 again required appellant to deliver two first article samples within 90 days after contract award. Thus, the first articles were due 18 April 2005, with inspection to take place at the contractor's plant and acceptance at the DSCP New Cumberland, PA delivery destination. (R4, tab 6)

In February 2005, the contract administrator discovered that the basic contract was missing several clauses (app. br., e-mail attachs.). On 18 May 2005, the contracting officer issued Modification No. P00001 correcting the omissions. Of relevance here, the modification incorporated the standard FAR 52.209-4, FIRST ARTICLE APPROVAL – GOVERNMENT TESTING (SEP 1989) clause which provides that a contractor is "deemed to have failed to make delivery within the meaning of the Default Clause" for failure to deliver any first article on time or if the contracting officer disapproves any first article. (R4, tab 7 at 1, 2 of 3)

Appellant submitted samples in either March 2005, pursuant to a request made by the DLA buyer before award, or as a first article on 11 April 2005 (R4, tab 15; app. br. at 2). The record does not reflect where or to whom the samples were submitted. Several government e-mails indicate that the government was having difficulty arranging for inspection of appellant's first article samples at its manufacturing facility in Pakistan during the late March and early April 2005 time period (app. br., attachs.).

An e-mail dated 13 April 2005 from appellant's marketing manager indicates that appellant may have attempted to reach an individual identified as the DLA buyer on

several occasions, but there is no evidence establishing why it had been trying to do so or the subject matter it wanted to discuss. An undated document that appears to reflect internal government communications indicates the government did not expect appellant to meet the 18 April 2005 delivery date. (App. br., attachs.)

An undated two-page letter in the record signed by the contracting officer refers to the samples submitted as first article samples and states they were examined, but not where, for visual and dimensional requirements and "were found not found acceptable [sic]." The letter is followed by an undated memo marked "Page 3" at the top that appears to be an internal government communication. The letter and memo are assembled together behind a blank sheet of paper that is date-stamped 20 April 2005. (R4, tab 10)

On 20 June 2005, the contracting officer issued unilateral Modification No. 00011A to DO No. 0001 "to change the inspection point of the first article (CLIN 9906) FROM: Origin To: Destination." No other changes to the delivery order were made by the modification. (App. br., attach.)

On 1 August 2005, appellant submitted additional samples (R4, tab 15 at 2). A two-page letter that is hand-dated 10 August 2005 and again signed by the contracting officer states that these first article samples were examined for visual and dimensional requirements and "were not found acceptable." Apart from the elimination of the extra word "found" and the addition of a hand-written notation in the margin that appears to be a measurement change, this letter is identical to the contracting officer's undated two-page letter that is assembled behind the blank sheet of paper date-stamped 20 April 2005. (R4, tab 11)

By a letter dated 24 August 2005 to the contracting officer, appellant recounted an earlier telephone conversation with her in which it had explained that, despite its efforts, the samples it had twice provided did not meet the specification, and that its manufacturing unit had invested time and money on the samples. The letter concluded that appellant was "honestly very sorry" it could not fulfill the requirements and requested the contract be cancelled. (R4, tab 12)

The contracting officer responded on 29 August 2005 with a letter advising appellant that since it had failed the second submittal of the first article, the government was considering terminating the contract for default for failure to deliver. The contracting officer invited appellant to provide any facts bearing on its delinquency, in particular relating to whether failure to perform was the result of causes beyond its control and without any negligence on its part. (R4, tab 13)

Appellant did so on 6 September 2005. It pointed out that it had been providing medical supplies to DSCP without difficulty for years. It explained that it had supplied its "1st first article sample" well in advance of the contract requirement and had time to submit the second, but was delayed by confusion about where the samples would be inspected. It then described new equipment costs, the expense of hiring new employees after the departure of existing technical personnel, the purchase of materials and a multitude of international communications, all of which it alleged it had incurred "to get the results." It acknowledged that the samples did not pass inspection. (R4, tab 14)

On 21 September 2005, the contracting officer prepared a "MEMO FOR RECORD" setting forth the reasons she had decided to terminate the contract for default. She found that appellant had failed first article testing on two occasions and had requested cancellation of the contract. She determined it had not performed in accordance with the specification and had repudiated the contract. She concluded that appellant would not fulfill the requirement, that its failure did not arise out of causes beyond its control or without its fault or negligence and that there was no excusable cause for the failure to meet the contractual obligations. (R4, tab 15)

The contracting officer issued Modification No. P00003 terminating the contract for default on 6 March 2006 (R4, tab 17). On that same day, she also issued Modification No. 0001/02 to DO No. 0001 which included the same "NOTICE OF TERMINATION" included in Modification No. P00003 to the contract (R4, tab 18).

There is no evidence that appellant submitted any additional first article samples or ever delivered any of the swords and scabbards.

A timely appeal was filed with the Board on 4 May 2006 and docketed as ASBCA No. 55441. The Notice of Appeal states that appellant unsuccessfully tried to contact the DLA buyer after award because it had received incomplete specifications and drawings and needed more information. The parties elected to proceed under Board Rule 11 and have submitted this appeal on the record.

DISCUSSION

The government has the burden of proving that the termination for default was justified. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). Under the First Article Approval-Government Testing clause of the contract, FAR 52.209-4(d), appellant is deemed to have failed to make delivery within the meaning of the Default clause, FAR 52.249-8, if its first article samples are disapproved by the contracting officer. That is what occurred in this case. The government has satisfied its burden by showing that appellant did not pass the first article tests. S*ee SAI Industries Corp*., ASBCA No. 49161, 98-1 BCA ¶ 29,723 at 147,376.

Appellant must now show that its nonperformance was excusable in order to have the default overturned. *See DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 992 (1996); *Precision Standard, Inc.*, ASBCA Nos. 41375, 44357, 96-2 BCA ¶ 28,461 at 142,154.

Appellant makes two arguments. The first is that there was no contract because appellant's offer expired on 14 January 2005, before the government's award on 18 January 2005. The government acknowledges the late award, but asserts that appellant never attempted to disavow the contract and has waived its right to refuse to perform and ratified the contract.

A contractor may extend its offer or waive the expiration of the acceptance period if he accepts the award of a contract on the basis of its bid. *See Military Industrial Supply Co.*, ASBCA No. 43872, 94-3 BCA ¶ 27,238 at 135,793. There is no evidence in this record of any attempts by appellant to disavow the contract. On the contrary, we are satisfied that the evidence establishes that appellant waived the expiration of its offer. Appellant alleges that it attempted to contact the DLA buyer to discuss the fact that its offer had expired, but the only document upon which it relies is an e-mail dated 13 April 2005 that does not reflect the subject matter appellant wanted to discuss. Moreover, this present allegation seemingly contradicts statements in the Notice of Appeal to the effect that appellant was trying to contact the buyer because it had incomplete specifications and drawings. In any event, the e-mail is dated after the first submission of samples, which the government rejected. Appellant continued to work on the contract and submitted additional samples on 1 August 2005. Indeed, as reflected in its letters dated 24 August 2005 and 6 September 2005, appellant expended time and resources in attempting to comply with the specifications and submitting these samples.

Appellant also contends that it could not begin to manufacture the first article samples because the inspection was to be performed during production and that the government's delay in changing the location of inspection until 20 June 2005 somehow resulted in its failure to pass first article inspections. There are a number of difficulties with this argument.

First, there is absolutely no record evidence supporting the contention that first article inspection was to take place during production. Thus, the delay in deciding where the first article samples were to be inspected could not have had any impact upon production of first articles that conformed to the specifications. Next, the first article samples were submitted before the 18 April 2005 deadline. Appellant's present contention that these were not "official" first article samples, but rather samples of a similar sword, differs from statements made in its 24 August and 6 September 2005 letters. In any event, irrespective of whether appellant initially may have submitted

existing swords as its first article samples, the contracting officer allowed appellant to submit additional samples as its first article on 1 August 2005. These samples did not pass first article testing despite the time and resources appellant alleges it expended in trying to meet the specification requirements.

Based upon the foregoing, we conclude that appellant has not demonstrated that its failure to make delivery should be excused.

CONCLUSION

The appeal is denied.

Dated: 9 October 2007

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

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. 55441, Appeal of Zulco International, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals