ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Syracuse International Technologies	)	ASBCA No. 55607
	)	
Under Contract No. SPO920-03-V-8554	)	

APPEARANCE FOR THE APPELLANT: Sam Z. Gdanski, Esq.
Gdanski & Gdanski, L.L.P.
Suffern, NY

APPEARANCE FOR THE GOVERNMENT: Vasso K. Monta, Esq.
Associate Counsel
Defense Supply Center,
Columbus (DLA)
Columbus, OH

OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON THE GOVERNMENT'S MOTION TO DISMISS, AND IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

The government has filed the subject motion, contending that the complaint fails to state a claim upon which relief may be granted, and alternatively that there are no material facts at issue and the government is entitled to judgment as a matter of law. Appellant opposes the motion. For reasons stated, we grant the government's motion for summary judgment and deny the appeal.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. By solicitation issued on 23 June 2003, the Defense Logistics Agency, Defense Supply Center, Columbus (government) sought to procure four electronic control panels (R4, tab 1). Upon receipt of a price quote from S.I.T. Corporation, d/b/a Syracuse International Technologies (S.I.T. or appellant), the government issued to appellant Purchase Order No. SP0920-03-V-8554 (PO), dated 12 July 2003. Per Block 10 of the PO, delivery was required "135 days ADO", *i.e*, 135 days after date of order. We find that the delivery date was 24 November 2003. Appellant did not sign this PO, nor was it required to sign the PO. (R4, tab 3)

2. It is undisputed and we find that appellant did not deliver the control panels by 24 November 2003. For purposes of this motion, we accept appellant's contention that the parts were over 80% complete as of this date (app. oppos., ¶ 7).

3. By facsimile letter (fax) to appellant dated 24 February 2004, the contracting officer (CO) advised that the government's offer lapsed on 24 November 2003 due to

appellant's failure to make delivery on the required delivery date. The CO allowed 48 hours for S.I.T. to provide evidence that the items had been shipped prior to the date of the fax, 24 February 2004. (R4, tab 4) The record does not show any communications between the parties between the date the PO lapsed, 24 November 2003 and the date of the subject fax.

4. Appellant did not provide evidence to the CO to show that the items were shipped prior to 24 February 2004, and we find that they were not shipped prior to this date.

5. By fax to the government dated 24 February 2004, S.I.T. advised, *inter alia*, that the items were 99% complete, the order was delinquent due to manufacturer-caused delays, and the "order is scheduled to ship the week of 3/8/2004 or sooner." S.I.T. requested that the government "advise your acceptance." (R4, tab 5) The record does not show any such acceptance by the government. Notwithstanding, appellant shipped the items, and they were received by the government on or about 16 March 2004 (R4, tab 7)[1].

6. On 3 March 2004, by modification P00001, the CO cancelled the items under the PO, indicating that the "[c]ontractor did not meet required delivery date [of] 11/24/03" and the "[m]aterial is no longer needed" (R4, tab 6).

7. Notwithstanding the subject cancellation, appellant sought payment for the items it delivered (R4, tab 10). By fax to appellant dated 2 April 2004, the CO referenced the government's fax letter dated 24 February 2004, which he deemed a "withdrawal letter", and also referenced the government's unilateral PO modification, dated 3 March 2004, cancelling the PO. The CO stated that the delivered items would be returned to S.I.T. (R4, tab 8) The items were eventually returned.

8. By letter dated 29 April 2004, which appellant reissued on 4 June 2004, appellant protested the cancellation of the order. S.I.T. contended, *inter alia*, that when the government issued its notice of cancellation, the control panels were 99% complete and the government was unreasonable in cancelling the PO. (R4, tab 11) By response dated 17 June 2004, the CO stated that the decision to cancel the PO was firm (R4, tab 12).

9. By letter to the government dated 2 August 2006, appellant's counsel enclosed a claim letter from S.I.T. in the amount of $57,520, the purchase price of the PO, and which requested a CO decision on the claim (R4, tab 14). The CO issued a decision

[1] The actual receipt date is shown as "31/6/04." However in the context of the date of the relevant conversation and from the entirety of the record, we believe that this is a typographical error, and the date should correctly read: "3/16/04."

dated 18 September 2006, denying the claim in its entirety (R4, tab 15). This appeal followed.

CONTENTIONS OF THE PARTIES

The government has moved the Board to dismiss the appeal for failure to state a claim upon which relief may be granted[2], or in the alternative, for summary judgment. In support of its motion for summary judgment, the government contends that the PO was a unilateral contract and the undisputed facts show that the PO lapsed by its own terms when delivery was not made by the required delivery date. As such, appellant was not entitled to any payment under the PO, and the government is entitled to summary judgment as a matter of law.

Appellant contends that the government waived, or was estopped from relying upon the 24 November 2003 delivery date of the PO by its failure to advise appellant of the lapse of the PO for 90 days, upon which passage of time appellant relied to continue work. According to appellant, the government knew or should have known that work was continuing because among other things, appellant had a regular course of dealing with the government to supply items both before and after PO delivery dates. Appellant also contends that the government revived the PO by the fax dated 24 February 2004, by which time the contractor had achieved 99% completion in assembling the control panels and had substantially performed, and thus the government could only terminate the PO in accordance with FAR termination provisions. Appellant also contends that the government cancelled the PO for a suspect motivation, *i.e.*, not because of the lapse of the PO but because the government no longer needed the items.

DISCUSSION

It is well settled that 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. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In order to counter a motion for summary judgment, the

[2] By letter to the Board dated 18 December 2006, copy to the government, appellant requested that its complaint consist of its request for equitable adjustment (which later became its claim) and its notice of appeal. This request was effectively granted in the Board's letter dated 21 December 2006, which stated that appellant's complaint had been received and filed. While inartfully phrased, appellant's complaint generally asserts a claim upon which relief could be granted, *i.e.*, the revival of a lapsed PO, if appellant could establish a set of facts in support of its claim. However for reasons stated herein, appellant has failed to provide any evidence of such facts, and the government is entitled to judgment as a matter of law.

nonmovant must show some evidence of disputed material facts. Mere arguments, assertions or speculation of counsel or reliance upon the pleadings is insufficient to defeat a motion for summary judgment. *T & M Distributors, Inc. v. United States*, 185 F.3d 1279 (Fed. Cir. 1999); *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624 (Fed. Cir. 1984).

We believe there are no material disputed facts on this record. For reasons stated below, we conclude that the government is entitled to judgment as a matter of law.

Upon issuance, the subject PO was an offer by the government to acquire the four control panels from appellant, subject to the terms and conditions of the PO. The PO was not signed by appellant, nor did appellant otherwise accept the PO in writing. Accordingly, at the time of issuance, the PO was a mere offer and was freely revocable by the government. However, one may accept a PO other than in writing, *i.e.*, by proceeding with the work to the point of substantial performance. This occurred here. At that point, there came into existence a unilateral contract or purchase order. See FAR 13.004. Under a unilateral contract or purchase order, the government was duty bound to honor the contract until the date scheduled for delivery under the PO, that is, by 24 November 2003. *Rex Systems, Inc.*, ASBCA No. 45301, 93-3 BCA ¶ 26,065 at 129,565.

Appellant failed to deliver the items by 24 November 2003. When appellant failed to deliver the items by the delivery date, the government's obligations to appellant under the PO ended. The government's obligations lapsed by its own terms. *See Rex Systems, Inc., supra.*

Appellant argues that the government "waited" 90-days to advise appellant of this lapse, that this notification delay was unreasonable and was tantamount to a waiver of the delivery date. We do not agree. It is well settled that once a PO lapses, the government is under no contractual duty to provide appellant with notice of the lapse. As we stated in *Klass Engineering, Inc.*, ASBCA No. 22052, 78-2 BCA ¶ 13,463 at 65,792, *reconsidering*, 78-2 BCA ¶ 13,236:

> When the date specified for performance of an offer to enter into a unilateral contract arrives, and complete performance in accordance with the terms of that offer has not been tendered, the offer lapses and terminates by virtue of the conditions stated in the offer. [citation omitted] Once such offer has thus terminated, the offeree cannot cause a contract to be created by subsequent acceptance. . . . The foregoing rules apply without regard to whether revocation of the offer may be precluded by the offeree's part performance thereof, so as to bind the offeror by unilateral contract. . . . *Therefore once the offer has lapsed the offeror-promisor may formally notify the offeree--promisee of the cancellation or*

> *revocation of the offer. . . but is under no duty to do so. The offeror need take no action whatsoever once the offer has lapsed*, and the offeree is without power to bind the offeror by a subsequent acceptance, which, in the context of an offer for a unilateral contract, can be accomplished only by a tender of the full consideration previously requested. [Emphasis added]

Moreover, appellant fails to adduce any evidence to show that the government encouraged appellant's continued performance after lapse of the PO or at any time during the purported 90 days of "delay". If appellant chose to continue performance during this period, it did so at its own risk.

Buffalo Forge Company, ASBCA No. 22887, 78-2 BCA ¶ 13,491, cited by appellant is distinguishable. In *Buffalo Forge* we held that it was error for the government to reject a contractor's tender of items beyond the delivery date because there was evidence that the parties had a course of dealing that purchase orders beyond the delivery date were routinely treated as viable, that late performance would continue, that a contractor's reasonable new delivery date would be accepted and deliveries made in conformance therewith would be accepted. Appellant fails to offer evidence of any such course of dealing here.

Appellant contends that the CO's fax dated 24 February 2004 served to revive the lapsed PO. Assuming, *arguendo* that this was true, we fail to see how this helps appellant. The CO's fax, reasonably construed, indicates that the government would accept delivery if appellant could show that the items had been shipped prior to 24 February 2004. It is undisputed that appellant was unable to show shipment prior to this date. Hence, appellant failed to comply with the PO, as purportedly revived.

Appellant also alleges that the contract was not cancelled because of appellant's failure to deliver, but because the government no longer needed the parts. We find this argument to be irrelevant as the PO lapsed by its own terms for appellant's failure to timely tender the items in question.

In its opposition papers, appellant offers us numerous legal theories, such as waiver, forbearance, estoppel, constructive termination and the like in support of its position. We have considered them all, but are not persuaded that any of them -- singly or in combination -- can defeat the government's motion on this record. For the most part, appellant relies on cases involving bilateral contracts, and ignores the case law involving unilateral contracts and purchase orders that are relevant here.

DECISION

For reasons stated, we conclude that the government is entitled to judgment as a matter of law. The government's motion for summary judgement is granted. The appeal is denied.

Dated: 30 November 2007

JACK DELMAN
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. 55607, Appeal of Syracuse International Technologies, rendered in conformance with the Board's Charter.

Dated:

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