ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Comptech Corporation	)	ASBCA No. 55526
	)	
Under Purchase Orders SP0750-04-M-6948	)	
SP0750-05-M-6085	)	

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

OPINION BY ADMINISTRATIVE JUDGE HARTMAN ON
RESPONDENT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

This appeal involves two "purchase orders" for gears. The appellant seeks to recover costs "in accordance with termination for convenience laws and regulations." The government has moved to dismiss appellant's appeal or, in the alternative, for grant of summary judgment in its favor, contending that it does not have a contract with appellant because appellant did not tender timely the gears solicited and it was under no obligation to grant appellant a waiver of the tolerance requirement it specified for the gears.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On 27 September 2004, the Defense Supply Center, Columbus (DSCC) issued Purchase Order (PO) No. SP0750-04-M-6948 (6948) in the amount of $9,666.00 for 14 vehicular arm steering gears (Gears) to appellant, Comptech Corporation (Comptech), a division of Maven Engineering Corporation, a small woman-owned business, located in Rockville, MD. The PO stated delivery of the Gears was to occur in "210 DAYS" or by 25 April 2005. The PO did not require Comptech to execute it and Comptech did not do so. (Compl. ¶¶ 1, 2, 4, answer ¶¶ 2, 4; R4, tab 3)

Approximately one month later, on 28 October 2004, DSCC issued a second PO, No. SP0750-05-M-6085 (6085), in the amount of $9,424.00 for 16 additional Gears to

Comptech. PO No. 6085 stated Gear delivery was to occur in "210 DAYS" or by 26 May 2005. PO No. 6085 also did not require Comptech to execute the PO and Comptech did not do so. (Compl. and answer ¶ 4; R4, tab 6)

Both POs included by reference DSCC clause 52.246-9C01, INSPECTION AT ORIGIN (JUN 2001), stating inspection for compliance with contract requirements will be performed at origin (R4, tab 3 at 7-8, tab 6 at 7-8). They also included DSCC clause 52.211-9C41, DELIVERY INSTRUCTIONS FOR NEW CUMBERLAND (OCT 2000), stating delivery should be made to New Cumberland, PA (R4, tab 3 at 7, tab 6 at 7).

During April of 2005, Comptech requested a 60-day extension of the delivery date on PO No. 6948 in exchange for a reduction in amount of $250. DSCC thereafter issued amendments to both of the POs extending the delivery dates by 60 days and reducing their amounts by $250. Comptech was not required to execute the modifications and did not do so. (R4, tabs 8 through 11; app. opp'n at 10; compl. and answer ¶ 4)

Comptech did not deliver any Gears to DSCC by the extended delivery dates, *i.e.*, 24 June 2005 and 25 July 2005. During Comptech's in-house review of the Gears, it discovered that certain bore holes (Bores) were out of tolerance because the honing subcontractor had accidentally "bellmouthed" a portion of the Bores, resulting in the Bores being oversized. Because Comptech believed the "out of tolerance" dimension could not be corrected, it submitted to DSCC on 18 July 2005 a request that it be granted a waiver on both PO No. 6085 and 6948. Eight days later, DSCC's Quality Assurance Engineer stated:

> This waiver requests that the contractor be allowed to provide twenty-nine [sic] nonconforming Steering Gear Arm Assemblies.... The nonconformance includes one dimension (diameter) for two through holes which do not meet drawing requirements.... I concur with the Senior QARs comments...that this is a major waiver because of the apparent criticality of this dimension.... Approval of this waiver may have a significant effect on the usability, reliability, maintainability and/or safety of the end item…. Final approval/disapproval of this waiver should only be made by the procuring office since the system design criteria for the end item is not known in sufficient detail at this level.

On 15 August 2005, a DSCC contract administrator sent Comptech an e-mail stating that "[s]tatus is being requested" on PO No. 6948, which was to have been delivered about two weeks earlier, and "[p]lease provide this information as soon as possible, so that our records can be updated." Comptech advised DSCC by e-mail the same day that it was awaiting word on its waiver request and, "[i]f the waiver is granted, [it] can ship within

4 weeks" since "the phosphate finsih [sic] [coating] takes 2-3 weeks." (Compl. ¶¶ 10, 11, answer ¶ 11; R4, tabs 12, 13; app. opp'n at 6-7).

On 6 October 2005, DSCC's Product Assurance Specialist recommended denial of Comptech's waiver request. The next day, by letter dated 7 October 2005, DSCC's contract specialist advised Comptech as follows:

> [Y]ou asked for a modification to the contract to accept waiver on a dimension that was out of tolerance.
>
> It has been determined that your request is not acceptable. Per our technical department, this is a critical wear component, and dimensions should be in accordance with the contract.
>
> ...[R]equest you provide an updated delivery schedule by October 21, 2005. Failure to do so may result in the issuance of a modification withdrawing the [PO] because the Government's offer to purchase was not accepted in accordance with its terms.

Comptech requested by e-mail dated 26 October that it be allowed "until 10/31/05 to advise whether [it] will be able to correct or if contract will have to be canceled." The contract administrator for DSCC responded by e-mail the same day that Comptech could advise "no later than the 31st" per its request. (R4, tabs 14, 15, 16; app. opp'n at 10; compl. and answer ¶ 11)

Comptech did not submit an updated delivery schedule by 31 October. Rather, on 28 October, it advised DSCC by e-mail that it would be resubmitting its waiver request. Comptech explained it was revising its deviation request for parts that meet the blueprint tolerance over 90% or more of their length to request a "Use As-Is" disposition since it believes the portion of Bore that is oversize will not affect fit or function and for other parts not meeting that tolerance to request DSCC approval to rework the parts with (a) electroless nickel deposit or hard chrome plating to build up the Bore and hone to size or (b) "press fit Sleeve/Bush the oversize holes and Hone to size." It stated that it would like "The next higher assembly drawing" and name of "someone in technical that our Engineer can speak with." (R4, tab 17 at 2 of 4; app. opp'n at 11; compl. ¶ 12, answer ¶¶ 11, 12)

Approximately one month later, the DSCC contract administrator advised Comptech by e-mail on 1 December 2005 that: (1) the next higher level drawing requested was not available; (2) providing parts to DSCC that are out of tolerance is unacceptable; (3) its "request for rework is not acceptable;" and (4) both of the Gear POs

will be cancelled. Comptech responded by e-mail the same day that it did not want the POs cancelled. The contract administrator replied in an e-mail dated 13 December 2005 that DSCC expects "to receive material in accordance with the contract" and both POs will be cancelled. One week later, a DSCC contracting officer (CO) issued amendments to the POs decreasing their amounts to "zero" and cancelling "at no cost" the contract line item numbers for 14 and 16 Gears. (R4, tabs 18 through 21; app. opp'n at 11; compl. and answer ¶¶ 13, 15, 16, 17)

On 22 December 2005, Comptech notified DSCC's contract administrator that "[w]e are not accepting the cancellation of the...2 orders" and "request a meeting...with you, your engineer, and [Comptech's] engineer" (R4, tab 22; compl. and answer ¶ 17). By letter dated 1 March 2006, a DSCC CO advised Comptech as follows:

> A purchase order is merely an offer on the part of the Government to purchase supplies provided performance is in accordance with the terms and conditions of the purchase order. When the date specified for performance of an offer to enter into a unilateral purchase order arrives, and complete performance in accordance with the terms of that offer to *include technical requirements* has not been tendered, the offer lapses and terminates by virtue of the conditions stated in the offer.
>
> Although the Government is not required to review nor accept nonconforming parts, the items you wished to submit for these two orders were reviewed numerous times and found to be unacceptable. Therefore, these orders will remain canceled. No further action will be taken on this issue. [Emphasis in original]

(R4, tab 23; compl. and answer ¶ 19)

On 13 March 2006, Comptech wrote DSCC again requesting that it be granted a meeting (R4, tab 24 at 7; compl. ¶ 19; answer ¶ 19). About two weeks later, Comptech sent DSCC by telecopier a letter stating that each Gear "contract clearly allows for acceptable repairs" and "[c]ancellation of these contracts...constitutes an economic waste" (R4, tab 24 at 2). In early April of 2006, DSCC's CO contacted Comptech by telephone to request it furnish her "the contract reference that allows repair" and Comptech responded to her request by letter dated 26 April 2006 (R4, tab 24 at 1, tab 26 at 2; compl. and answer ¶ 20).

In a letter dated 4 May 2006, which the CO stated was a final decision appealable to this Board, the CO advised Comptech:

> The Government is under no obligation to accept nonconforming parts. The Government has reviewed your requests previously and advised you on two separate occasions that your proposals are not acceptable. That position is still valid. Both orders remain canceled and will not be reinstated.

(R4, tab 27; compl. and answer ¶ 21) Comptech timely appealed the CO's final decision to this Board.

Contemporaneously with the filing of its answer, DSCC filed a motion to dismiss the appeal for failure to state a claim upon which relief may be granted or, in the alternative, for summary judgment (gov't mot.). Comptech filed an opposition to DSCC's motion (app. opp'n) with an affidavit attached from its president stating, among other things, that: "In 2004, Comptech purchased the Laumann Corporation" (Laumann); "I am involved daily in reviewing bids to be submitted and as part of this process I review Laumann's past contract files;" "Laumann has had prior contacts [sic] with the DSCC and DLA Agencies with similar requirements as are at issue" here; and, "[i]n the past, when Laumann requested deviations/waiver for strict compliance or when it submitted a non-conforming product, it was always given the waiver or was provided with an opportunity to meet with agency technical representatives to discuss the impact of the waiver or deviation." DSCC thereafter filed a reply to the opposition to its motion (gov't reply).

DECISION

In its three-count complaint, Comptech contends: DSCC cancelled the POs improperly; the cancellations should be converted into terminations for convenience of the government; and it should be paid costs and damages in accordance with "applicable termination for convenience laws and regulations." Comptech asserts in count I that the CO abused her discretion in refusing "to consider the next higher drawing, which would have established that the Gear holes, although out of tolerance, would not have affected the Gear's performance" (compl. ¶¶ 24 through 27). It asserts in count II that the CO also abused her discretion by not considering the factors set forth in FAR 49.402-3 "before deciding to terminate a contract for default" (compl. ¶¶ 28 through 33). In count III, it asserts that DSCC's refusal to grant it a waiver "constituted a constructive change to the POs." According to Comptech, there was an "established course of dealing" developed over 31 years with "Laumann Corporation," a company purchased by Comptech in 2004, that when Laumann submitted a "nonconforming product" to DSCC or another Defense Logistics Agency (DLA) component, Laumann would apply for and receive a "waiver," which did not happen here. (Compl. ¶¶ 7, 9, 34 through 41)

DSCC moves to dismiss the appeal for failure to state a claim on which relief can be granted or, in the alternative, for summary judgment. DSCC contends it does not have a contract with Comptech and that Comptech has not presented facts demonstrating it is entitled to the relief it seeks. DSCC asserts that: (1) the Gear POs lapsed by their terms because Comptech did not deliver timely the Gears; (2) DSCC had the right, as a matter of law, to insist on strict compliance with Gear specifications; and (3) Comptech had no "course of dealing" with DSCC entitling it to grant of a specification waiver.

DSCC's motion relies on the Rule 4 file in this appeal (*e.g.*, gov't mot. at 1, 3). Comptech also relies on the Rule 4 file in its opposition and upon an affidavit appended to its opposition (*e.g.*, app. opp'n at 3-4, 7-8). Because the parties have presented matters outside of the pleadings, which are not being excluded in our consideration of the motion, we treat DSCC's motion as one for summary judgment. *E.g., Precision Standard, Inc.*, ASBCA No. 54207, 03-2 BCA ¶ 32,265 at 159,600; *see* FED. R. CIV. P. 12(b).

The standards set forth in FED. R. CIV. P. 56 guide our resolution of a summary judgment motion. *J.W. Creech, Inc.*, ASBCA Nos. 45317, 45454, 94-1 BCA ¶ 26,459 at 131,661; *Allied Repair Service, Inc.*, ASBCA No. 26619, 82-1 BCA ¶ 15,785 at 78,162-63. We will grant such a motion only where the pleadings, depositions, interrogatory answers, and admissions on file, together with any affidavits or other evidence, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The party seeking summary judgment has the burden of demonstrating both elements and the nonmovant is entitled to have all inferences drawn in its favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

As discussed above, the two POs here were not signed by any representative of Comptech and contain no other indication of acceptance by Comptech. Accordingly, the POs were not accompanied by promissory acceptance and, as a matter of law, comprise simply an "offer" by DSCC to enter into a unilateral contract. *Superior Engineering & Electronics Co.*, ASBCA No. 39022, 90-1 BCA ¶ 22,529 at 113,070; *Sunshine Cordage Corp.*, ASBCA No. 38904, 90-1 BCA ¶ 22,382 at 112,471, *aff'd on recon*. 90-1 BCA ¶ 22,572; *Klass Engineering, Inc.*, ASBCA No. 22052, 78-2 BCA ¶ 13,236 at 64,716 (*Klass I*), *aff'd on recon.*, 78-2 BCA ¶ 13,463 (*Klass II*); Federal Acquisition Regulation (FAR) 13.004(a), (b).

The "offer" presented by the POs is to buy certain supplies on specified terms and conditions if the offer is accepted by the act of delivering those goods on or before the date that the offer specifies. *Sunshine Cordage, supra*, 90-1 BCA ¶ 22,382 at 112,471; *Amplitronics, Inc.*, ASBCA No. 33732, 87-2 BCA ¶ 19,906 at 100,703; *Ordnance Parts & Engineering Co.*, ASBCA No. 31166, 86-1 BCA ¶ 18,545 at 93,154; FAR 13.004(a). If complete performance in accordance with the offer's terms and conditions is not tendered, the "offer" lapses by its own terms. *E.g.*, *Master Research & Manufacturing,*

Inc., ASBCA No. 46341, 94-2 BCA ¶ 26,747 at 133,071; *Ordnance Parts & Engineering Co.*, ASBCA No. 37985, 89-2 BCA ¶ 21,805 at 109,704; *Amplitronics, supra*, 87-2 BCA ¶ 19,906 at 100,704. When an offer lapses by its own terms, the offeree (supplier) bears the costs of nonperformance. *Alsace Industrial, Inc.*, ASBCA No. 51709, 99-1 BCA ¶ 30,227 at 149,542, *recon. denied*, 1999 ASBCA LEXIS 47; *Western Mfg. Co.*, ASBCA No. 25089, 81-1 BCA ¶ 15,024 at 74,346.

Ordinarily, an offer is revocable prior to acceptance, and its revocation precludes the acceptance of that offer. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 35, 36(1)(c), 42 cmt. a (1981); JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 2.18 (rev. ed. 2007); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 43 (2001); FAR 13.004(c). Because the law deems it unjust, however, to allow revocation of an offer where an offer can only be accepted by performance and the offeree has begun performing, a subsidiary promise — that the offeror will not revoke its offer if part performance is given — is implied as included in the offer and an offeree's rendering of partial performance is deemed to create an "option contract." RESTATEMENT (SECOND) OF CONTRACTS §§ 45(1), 87(2); MURRAY ON CONTRACTS § 43(D); PERILLO, CORBIN ON CONTRACTS § 2.29; *see* FAR 13.004(b). When the offeree undertakes a substantial part of the performance requested, its actions form an "option contract" binding the offeror to keep its "offer" open until the time stated in the offer or, if no time is stated, for a reasonable time. *Amplitronics, supra*, 87-2 BCA ¶ 19,906 at 100,704; *Klass I, supra*, 78-2 BCA ¶ 13,236 at 64,717; *P.E.C. Corp*., ASBCA No. 13709, 69-1 BCA ¶ 7559 at 34,996; *ITT Defense Communications Division Defense-Space Group*, ASBCA No. 13420, 69-1 BCA ¶ 7548 at 34,953; RESTATEMENT (SECOND) OF CONTRACTS § 45(1); *see* FAR 13.004(b), (c).

The principal legal consequence of an "option contract" is that it limits an offeror's power to revoke its offer. RESTATEMENT (SECOND) OF CONTRACTS § 25; *see* FAR 13.004(b), (c), 13.302-4. Under an option contract, the offeree is not bound to complete its performance. RESTATEMENT (SECOND) OF CONTRACTS §§ 37 cmt. a, 45 cmt. e. The offeror alone is bound, but its duty of performance is "conditional" on the offeree's "acceptance," *i.e*, completion or tender of the invited performance in accordance with the terms of the offer. *Id*. §§ 37 cmt. b, 45(2), 224, 225; *see* FAR 13.004 (when supplier accepts offer, contract established). The major element differentiating an option contract from all other contracts is that the optionee (option holder) has both the legal power to accept a second contract for the contemplated exchange and the legal privilege of not exercising that power. The optionor (option giver), on the other hand, has liability to become bound to execute the exchange and also a disability to avoid it. ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 11.1 (rev. ed. 2007).

In sum, an option contract or "binding option is a standing offer as well as a contract." It involves both a binding promise to keep an offer open, which is a contract (usually unilateral in character), and making of an offer of some exchange, *i.e*., giving of

an "option," which creates a "power of acceptance" in the holder of the option, just as in the case of a revocable offer. PERILLO, HOLMES, CORBIN ON CONTRACTS §§ 2.23, 11.8; *accord* MURRAY ON CONTRACTS § 43 n.338. The offeree's "acceptance" exercising the option is an event qualifying the offeror's duty under the contract, *i.e.*, a condition. RESTATEMENT (SECOND) OF CONTRACTS §§ 37 cmt. b, 224 cmt. c; HOLMES, CORBIN ON CONTRACTS § 11.1 n.14. "Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused." RESTATEMENT (SECOND) OF CONTRACTS § 225(1). Accordingly, an optionor's "binding" promise (to not revoke its offer) is a contract, but not yet a contract of "purchase and sale." There is no completed contract for "purchase and sale" until the occurrence of the condition, *i.e.*, the optionee accepts the option/offer. *Id*.; PERILLO, CORBIN ON CONTRACTS §§ 2.23, 11.8 n.3.

Historically, courts have disagreed on whether action by the offeree that was not part of the performance requested by the offeror, *e.g.*, expense incurred in preparation to render the requested performance or in investigating whether it was desirable to accept the offer, were sufficient to create an "option contract." *E.g.*, PERILLO, CORBIN ON CONTRACTS § 2.31. Today, however, courts generally hold that an option contract will arise where an offeree takes "substantial and definite action" in reliance on the offer, if that action is reasonable and such as the offeror had reason to foresee. *Id*.

Drawing all reasonable inferences in favor of Comptech as the nonmovant, Comptech's initiation of performance here was "substantial" enough under the standard of FAR 13.004(b) to create "option contracts," binding DSCC to keep both offers open until the dates set forth in those offers. Comptech's actions, however, did not convert the POs into binding contracts for the "sale and purchase" of Gears. DSCC's liability under its offers continued "conditional" upon full consideration being furnished to it. To create a binding "purchase" contract, an offeree's actions of acceptance cannot deviate from the terms of the "offer." *East West Research, Inc.*, ASBCA No. 42667, 91-3 BCA ¶ 24,281 at 121,372; *Amplitronics*, *supra*, 87-2 BCA ¶ 19,906 at 100,705; *MPT Enterprises*, ASBCA Nos. 25339, 25834, 84-1 BCA ¶ 17,169 at 85,528. As explained in *Klass I*, *supra*, 78-2 BCA ¶ 13,236 at 64,717, "[u]nder [the] classical rules of contract formation, acceptance . . . takes place when the offeree tenders the *requested performance*" (emphasis added).

Comptech requested that DSCC extend the date set forth in one of the offers and DSCC exercised its discretion to do so, extending by unilateral amendment the dates set forth in both offers by 60 days. It is not disputed that Comptech failed to deliver (or at a minimum make available for inspection) the Gears called for in each DSCC offer by the extended dates set forth (*i.e.*, 24 June and 25 July 2005).

An offeree's absence of performance or defective performance operates as non-occurrence of the "condition." RESTATEMENT (SECOND) OF CONTRACTS §§ 37 cmt.

b, 224 cmt. c; HOLMES, CORBIN ON CONTRACTS § 11.1 n.14. When the parties have made an event a "condition" of their agreement, there is no mitigating standard of materiality or substantiality which is applicable to non-occurrence of that event. RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. d. Accordingly, the events qualifying DSCC's duties under the option contracts here did not occur and no duty arose on the part of DSCC to perform.

The "irrevocability" of an offer partially performed lapses when an offeree fails to tender complete performance by the offer's specified date because, after not delivering timely, the offeree can no longer perform in accordance with the offer's terms. *Rex Systems, Inc.*, ASBCA No. 45301, 93-3 BCA ¶ 26,065 at 129,565; *Klass II, supra*, 78-2 BCA ¶ 13,463 at 65,792; *P.E.C. Corp.*, *supra*, 69-1 BCA ¶ 7559 at 34,997; *accord Syracuse Int'l Technologies*, ASBCA No. 55607, 08-1 BCA ¶ 33,742 at 167,042. While an immediate right to withdraw or cancel an offer arises when an offeree fails to tender complete performance by the specified date, the offeror need not formally notify the offeree that the offer has lapsed or take any other specific action because the offeree, as a matter of law, lacks the ability to bind the offeror by subsequent acceptance. *L&D Industries, Inc.*, ASBCA No. 38239, 91-2 BCA ¶ 23,718 at 118,719; *Amplitronics, supra*, 87-2 BCA ¶ 19,906 at 100,704. Thus, by their own terms, the offers here lapsed, unless DSCC (through its actions) revived and extended the "irrevocability" of the POs for some period of time. *Sunshine Cordage, supra*, 90-1 BCA ¶ 22,382 at 112,471; *Klass I, supra*, 78-2 BCA ¶ 13,236 at 64,718.

Comptech asserts in its opposition that "DSCC encouraged [it] to continue to perform long after the...completion dates, thereby waiving delivery in accordance with those dates and reviving the" POs. It cites three actions in support of this assertion: (a) DSCC's 15 August 2005 e-mail inquiry to it about the "status" of PO Gears to have been supplied on 25 July 2005; (b) its response of the same date that it was awaiting grant of a waiver request and it could deliver Gears four weeks after grant of the requested waiver; and (c) DSCC's 7 October 2005 letter denying its waiver request, requesting it "provide an updated delivery schedule by October 21, 2005" (subsequently amended to 31 October at Comptech's request), and warning that "[f]ailure to do so may result in...issuance of a modification withdrawing the [PO] because the Government's offer to purchase was not accepted in accordance with its terms." (App. opp'n at 10-11)

Revival of a lapsed offer requires an affirmative act on the part of the government. Such an act generally is words or conduct seeking or encouraging continued performance. *Davies Precision Machining, Inc. v. United States*, 35 Fed. Cl. 651, 660 (1996); *L&D Industries, supra*, 91-2 BCA ¶ 23,718 at 118,718 (offer was revived by inspection and rejection of supplies furnished four months after delivery date and request supplier take corrective action on future shipments of remaining items); *Amplitronics, supra*, 87-2 BCA ¶ 19,906 at 100,704-05 (repeated requests for revised delivery schedule, telephone communications with supplier for 18 months after delivery date, agency visits

to supplier's plant, continued supplier performance, and authorization by CO for issuance of modification with new delivery date manifested government intent to keep offer alive until formally extended); *Buffalo Forge Co.*, ASBCA No. 22887, 78-2 BCA ¶ 13,491 at 66,037 (as a general rule, lapsed offer is not "revived without further positive action by the [CO]"); *Klass I, supra,* 78-2 BCA ¶ 13,236 at 64,718 (suggestion of corrective measures and encouragement of continued performance extends life of PO).

We do not deem a simple e-mail inquiry to Comptech by a DSCC contract administrator located in Ohio regarding the "status" of supplies that were to have been tendered about two weeks earlier in Maryland for inspection and then delivered to New Cumberland, PA, "so that DSCC records can be updated" to comprise an affirmative act seeking or encouraging continued performance. *E.g., Michigan Hardware Co.*, ASBCA No. 24419, 80-2 BCA ¶ 14,670 (an inquiry three weeks after delivery date concerning whether alternate bearings still available not deemed sufficient to extend offer).

The contract administrator's 7 October 2005 letter to Comptech denying the waiver request, requesting "an updated delivery schedule" by 21 October 2005, and warning that a modification may be issued withdrawing the POs if the updated delivery schedule is not submitted because neither PO had been "accepted in accordance with its terms," and subsequent extension of the submission date for an updated delivery schedule to 31 October 2005 pursuant to Comptech's request, at best, constituted a revival of the POs only until 31 October 2005. In the absence of acceptance of the POs, DSCC was free to modify the offers' terms after the offers lapsed. *Amplitronics, supra,* 87-2 BCA ¶ 19,906 at 100,705. The contract administrator's 7 October letter here clearly set forth an additional requirement – the submission of a revised delivery schedule by a specified date that she could review and, if acceptable, issue another modification to the POs setting forth a new delivery date. *See id*. The administrator's 7 October letter expressly stated failure to submit such a schedule by the specified date may result in "issuance of a modification withdrawing" the POs. In requesting a 10-day extension of the submission date for a revised delivery schedule, Comptech recognized the 7 October letter set forth an "additional" requirement for the POs. As found above, it asked that it be allowed extra days "to advise whether [it] will be able to correct [the out of tolerance Gears] or if contract will have to be canceled." Any revived offers thus included or incorporated the 7 October 2005 letter requirement that Comptech submit a revised delivery schedule by a specified date or the POs may be withdrawn. *Id.; accord L&D Industries, supra,* 91-2 BCA ¶ 23,718 at 118,719 (CO letter finalized time offer would remain open).

It is undisputed that Comptech did not submit a revised delivery schedule to DSCC on or before 31 October 2005. Any revived offers accordingly lapsed by their own terms. *See Amplitronics, supra,* 87-2 BCA ¶ 19,906 at 100,705. DSCC was under no obligation to notify Comptech of the lapse. *E.g., L&D Industries, supra,* 91-2 BCA ¶ 23,718 at 118,719. About one month later, however, DSCC informed Comptech it was withdrawing the POs, as warned. Thus, in December 2005 when the CO issued

modifications to the POs decreasing their amounts to "zero" and "cancelling" the contract line items, Comptech did not possess any "contracts" with DSCC, and the CO's amendment of the POs constituted simply an administrative recognition of the fact the POs had lapsed by their terms.

While Comptech contends in count II of its complaint that DSCC's CO abused her discretion in not considering factors set forth in FAR 49.402-3 for consideration "before deciding to terminate a contract for default," there simply was no contract between it and DSCC in December of 2005 which could have been terminated, either for default or for convenience of the government. Accordingly, count II of Comptech's complaint fails to present a claim upon which relief can be granted. *E.g., East West Research, supra*, 91-3 BCA ¶ 24,281 at 121,372 (where no contract came into being because supplier produced items not complying with specifications, withdraw of offer cannot act as a termination or breach); *L&D Industries, supra*, 91-2 BCA ¶ 23,718 at 118,719 (CO authorized to terminate a PO for failure to make delivery of goods specified).

Further, while Comptech contends in count I of its complaint that it was an abuse of discretion for the CO to refuse "to consider the next higher drawing, which would have established that the Gear holes, although out of tolerance, would not have affected the Gear's performance," DSCC was not obligated to consider Comptech's request for waiver or "counteroffer" to supply Gears which differed from those specified. *E.g., Sunshine Cordage, supra*, 90-1 BCA ¶ 22,382 at 112,471. As DSCC asserts in its motion, it is well established that the government has the right to insist on "strict compliance" with its specifications. *Cascade Pacific International v. United States*, 773 F.2d 287, 291 (Fed. Cir. 1985); *Granite Construction Co. v. United States*, 962 F.2d 998, 1006-07 (Fed. Cir. 1992); *cert. denied*, 506 U.S. 1048 (1993). Thus, count I of the complaint also fails to present a claim on which relief can be granted.

Finally, in count III, Comptech asserts that DSCC's refusal to grant it a waiver "constituted a constructive change to the POs" because there was an "established course of dealing" developed over 31 years with "Laumann Corporation" that when Laumann submitted a "nonconforming product" to DSCC or another DLA component, Laumann would apply for and receive a "waiver." In support of this contention, Comptech cites an affidavit from its president stating that "Laumann has had prior contacts [sic] with the DSCC and DLA Agencies with similar requirements as are at issue" and was "always given the waiver" requested "when it submitted a non-conforming product." While the affidavit references "similar requirements," it does not identify any specific contracts or parts for which Laumann was previously granted a waiver. DSCC contends: "waivers/deviations from specification requirements are granted on a case by case basis...after technical evaluation;" "[i]t is absurd to even suggest that the Government would have granted carte blanche approval to each and every request for waiver/deviation that one contractor has made irrespective of the item involved or the extent of the

non-conformity;" and there simply "can be no course of dealing" based upon the facts alleged (gov't reply at 1-2).

The sufficiency of Comptech's cause of action in count III depends upon two essential elements: the existence of (1) enforceable contractual rights and (2) a course of dealing that extinguished an otherwise explicit contract requirement on which Comptech justifiably relied. *E.g., Penn Screw & Machine Works, Inc.*, ASBCA No. 32382, 89-3 BCA ¶ 22,205 at 111,692. Normally, the enforceable rights conferred upon an offeree under a unilateral PO are limited to the power to make that offer irrevocable by initiating performance. *Id.* Other rights generally do not inure to an offeree until an offeree tenders the requested consideration or the offeror prematurely revokes the offer or otherwise wrongfully prevents performance. *Id.* As discussed above, Comptech has not shown the existence of any enforceable contract rights here. It did not tender the Gears or a revised delivery schedule by the dates set forth in the offers at issue. Thus there simply was no "contract" between Comptech and DSCC for the supply of Gears that could be "constructively changed" by a decision to not grant a tolerance waiver.

Moreover, Comptech has not shown a course of dealing on which it justifiably relied that nullified the POs' Gear tolerance requirement. While a prior course of dealing between contractual parties can extinguish an otherwise explicit contractual requirement, *e.g., L. W. Foster Sportswear Co. v. United States*, 405 F.2d 1285 (Ct. Cl. 1969), to nullify an unambiguous specification requirement based upon conduct, one must show: actual knowledge by both parties of consistent conduct by one party in its contract dealings with the other over an extended period of time regarding a particular contract provision upon which the other is reasonably entitled to rely. *E.g., Davis Group, Inc.*, ASBCA No. 48431, 95-2 BCA ¶ 27,702 at 138,092; *Wagner Awning & Manufacturing Co.*, ASBCA No. 19986, 77-2 BCA ¶ 12,720 at 61,828. The affidavit of Comptech's president does not establish consistent conduct by DSCC regarding "the Gear tolerance provision" in prior contract dealings with Comptech during any prior period of time. Rather, the affidavit simply asserts a course of conduct by DSCC (granting of a waiver for non-conforming items furnished) in contract dealings with Laumann Corporation regarding "similar requirements." However, even assuming Comptech's assertion to be true, grant of waivers for "similar requirements" in the past to Laumann does not entitle Comptech to rely upon a belief that DSCC will grant it a waiver of the different tolerance requirement for Gears here. *Davis Group, supra*, 95-2 BCA ¶ 27,702 at 138,092; *Joseph T. Yamin*, ASBCA No. 35373, 90-2 BCA ¶ 22,657 at 113,837; *Wagner Awning & Manufacturing, supra*, 77-2 BCA ¶ 12,720 at 61,828; *see also Carb Manufacturing Co.*, ASBCA No. 5249, 65-2 BCA ¶ 5189 at 24,411 (no contractor acquires a vested right to indulgences received on earlier contracts). It simply is not reasonable to assume that, because DSCC has granted a waiver of certain specifications in the past, it will later waive a "different" specification. *See, e.g., Doyle Shirt Manufacturing Corp. v. United States*, 462 F.2d 1150, 1154 (Ct. Cl. 1972) (consistent practice of granting specification waiver required).

Comptech may not rest upon vague, unsupported allegations to oppose DSCC's motion. "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine issue for trial." *Penn Screw, supra*, 89-3 BCA ¶ 22,205 at 111,694. Based on our examination of the evidence presented and cited in response to DSCC's motion, and drawing all reasonable inferences in favor of Comptech, the nonmovant, we conclude that Comptech has failed to show that a reasonable fact finder could decide the course of conduct issue in its favor. *See, e.g., Anderson v. Liberty Lobby, Inc*., 477 U.S. at 248-50; *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories*, 984 F.2d 1182, 1185 (Fed. Cir. 1993).

In its opposition to DSCC's motion, Comptech asserts there are six questions of material fact that preclude grant of summary judgment to DSCC: (1) whether Comptech substantially completed the Gears; (2) whether the "slightly larger portion of the bore holes" would have negatively affected performance of the Gears; (3) whether DSCC could adequately evaluate the Gears produced and the effect of the "slightly larger portion of the bore hole" without consideration of the next higher drawings; (4) whether DSCC complied with contractual obligations to inspect the Gears; (5) whether Comptech had knowledge of Laumann's prior waivers/deviations; and (6) whether DSCC established new delivery due dates "after it repeatedly extended the original dates" (app. opp'n at 15). A fact is "material" if it may affect the outcome, *i.e*., the finding of that fact is relevant and necessary to the proceeding. A genuine dispute exists with respect to that fact if sufficient evidence is presented that a reasonable fact finder could decide the issue in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248-50; *Opryland USA, Inc. v. Great American Music Show, Inc*., 970 F.2d 847, 849-50 (Fed. Cir. 1992). None of the first five facts set forth by Comptech is relevant to DSSC's motion or need be determined for us to resolve that motion. With respect to the sixth fact set forth by Comptech, there simply is no genuine dispute. DSCC does not contend a new delivery date was established for the Gears and Comptech has neither contended nor cited any evidence that a new delivery date was established for the Gears. As the nonmoving party, Comptech must present sufficient evidence to demonstrate a specific conflict. *Opryland USA*, 970 F.2d at 850; *Lemelson v. TRW, Inc.*, 760 F.2d 1254, 1261 (Fed. Cir. 1985). Accordingly, Comptech has failed to show there is any genuinely disputed question of material fact that would preclude grant of summary judgment here.

CONCLUSION

DSCC's motion for summary judgment is granted and the appeal is denied.

Dated: 1 October 2008

TERRENCE S. HARTMAN

Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
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. 55526, Appeal of Comptech Corporation, rendered in conformance with the Board's Charter.

Dated:

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