ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
American Turbo Systems, Inc.	)	ASBCA No. 55906
	)	
Under Contract No. F09603-02-D-0121	)	

APPEARANCE FOR THE APPELLANT: Mr. John Gouveia
President

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
Maj Kathleen J. O'Rourke, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN

American Turbo Systems, Inc. (ATS or appellant) seeks to reverse the termination for default of the subject contract and a related delivery order for failure to deliver a conforming first article by the delivery date as extended by the government. A hearing was held and post-hearing briefs were filed. We have jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601-613.

FINDINGS OF FACT

1. Solicitation No. F09603-02-R-70366 was issued by the Department of Air Force (government) and called for the delivery of first articles and production units of a Roof-Mounted Air Conditioning Module (RACM) in response to delivery orders (R4, tab 1 at 3). According to ¶ 6.1 of the Purchase Description (PD), "The RACM is intended for retrofit installation in kit form, on an A/M32A-60A [Dash 60] ground power unit. Its purpose is to provide cooling or heating for personnel, cargo, and electronic compartments in aircraft during ground servicing and checkout by connection to the aircraft airborne duct system" (R4, tab 2 at 10).

2. During the relevant time period, the government used two large pieces of equipment to provide conditioned air to test aircraft avionics and other controls as part of basic aerospace ground support -- a Dash 60 gas turbine generator and an air conditioner unit known as the "C-10." Each piece of equipment was the size of a small Volkswagon. The proposed RACM, a much smaller unit, was to provide the same conditioned air as the C-10 but was to be mounted on the Dash 60 generator, and as such, would improve mobility and reduce deployment cost (tr. 1/13-15). The government planned to use the RACM program for approximately 15-20 years as a bridge program until development of

an integrated Combined Generator Air Conditioner (CGAC) that would eventually replace the Dash 60 (tr. 1/19).

3. ATS submitted a proposal on the solicitation. Appellant's proposal committed to meeting the PD and the specifications (R4, tab 30 at 5). Para. 3.11 of the PD provided that "[t]he weight of the complete RACM shall not exceed 350 pounds" (R4, tab 2). Appellant's proposal stated that "the ATS/RACM weight is within the requirements of the purchase description at approximately 250 Lbs" (R4, tab 30, Section 3 at 28).

4. ATS was awarded the contract on 28 February 2003. The contract was for one year, with option to extend performance on an annual basis for up to three years. Insofar as pertinent, the contract included the following clauses: FAR 52.209-3, FIRST ARTICLE APPROVAL – CONTRACTOR TESTING (SEP 1989) ("First Article" clause); FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000); FAR 52.232-16, PROGRESS PAYMENTS (FEB 2002); FAR 52.233-1 DISPUTES (JUL 2002); FAR 52.233-3, PROTEST AFTER AWARD (AUG 1996); FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984); FAR 52.245.4, GOVERNMENT-FURNISHED PROPERTY (SHORT FORM) (APR 1984); AFMCFARS 5352.245-9001 GOVERNMENT-FURNISHED PROPERTY/CONTRACTOR REQUISITIONING (AFMC) (JUL 1997). (R4, tab 1 at 29-38) In accordance with the government furnished property clauses, the government provided a Dash 60 generator to appellant to assist in the performance of the contract (*id*., at 38).

5. After contract award, a protest was filed and the government issued a stop work order (SWO) in accordance with the PROTEST AFTER AWARD clause (R4, tab 3). After the protest was resolved, the SWO was lifted and Delivery Order No. F09603-02-D-0121-0001 (DO No. 0001) was issued on 12 December 2003. DO No. 0001 required delivery of three first article units on or before 30 June 2004, a first article test plan, first article test report and related manuals, reports and instructional package (R4, tab 4).

6. Upon the government's issuance of DO No. 0001, another protest was filed and a second SWO was issued. After resolution of the second protest, the SWO was lifted on 27 February 2004 and appellant was authorized to begin performance on the first articles. (R4, tab 7)

7. Pursuant to Modification No. P00002 on 27 February 2004, the contracting officer (PCO) exercised the first option year of the contract, extending the contract through 27 February 2005 (R4, tab 6). Delivery Order No. F09603-02-D-0121-0002 (DO No. 0002) for production units was issued on 25 May 2004. DO No. 0002 stated "NOTE: NO COSTS ARE AUTHORIZED TO BE INCURRED BEFORE F/A APPROVAL." (R4, tab 8)

8. On 4 June 2004, the government extended performance under DO No. 0001 to 30 September 2004 (R4, tab 11). At appellant's request, the government granted appellant several additional time extensions to deliver the first article units. Performance was extended to 30 April 2005 (R4, tab 15); to 31 July 2005 (R4, tab 16); to 31 January 2006 (R4, tab 17); and finally to 31 July 2006 (R4, tab 22). Pursuant to Modification No. P00006, the government also exercised the second option year under the basic contract, to 26 February 2006 (R4, tab 14).

9. Appellant manufactured the first article unit and subjected it to testing in the spring of 2005. Appellant's progress report to the government dated 14 June 2005 stated as follows:

> This testing has identified that the RACM cannot meet all of the performance requirements of the Purchase Description. American Turbo Systems has identified actions necessary to make the RACM compliant with the Purchase Description, and will provide an action plan to recover.

(R4, tab 62 at 4)

10. As a result of these performance failures, appellant redesigned the first article unit, which resulted in increased, unanticipated costs. One element of this redesign was a redesign of the primary heat exchanger. A consequence of this redesign was a significant increase in the weight of the first article unit. (S*ee* finding 13, *infra*).

11. Appellant recommenced testing of the unit, as redesigned, in early 2006. By email to the government on 16 February 2006, appellant advised that the performance of the government-furnished Dash 60 generator had deteriorated to such an extent that it precluded continued first article testing (R4, tab 96). A contract Modification, No. P00008, was issued by the government in March 2006 to provide appellant with a replacement Dash 60 generator to be used through 31 May 2006 (R4, tab 19). The generator set was delivered to appellant on or about 29 April 2006 (R4, tab 113). The loan period was extended by Modification No. P00009 until on or about 15 July 2006 (R4, tab 21).

12. Appellant did not adduce any evidence showing that the deteriorated condition of the government furnished Dash 60 generator, or any delay in providing its replacement impacted the weight of appellant's redesigned first article unit, or caused any of the other failures under the PD as stated below. We find that the government furnished Dash 60 generator did not cause any of these failures.

13. By email dated 10 July 2006, appellant advised the government, in pertinent part, as follows:

During development and construction of the RACM first articles last year, our engineering had projected by analysis a weight of 300 lbs... After the performance failure, we started a program to upgrade the RACMs performance that included an increase of physical size of the primary heat exchanger and cooling fans plenums. This resulted in larger overall packaging of the unit. Engineering projected that the changes would affect the weight, but believed we would be within the 350 lb limit. *Weight concerns were not in the forefront of our actions during our concentrated effort to build a RACM that would meet or exceed performance expectations.* We entered into first article testing and have had success throughout the testing.

In June, during preparation for vibration testing, sample 2 was weighed to enable programming of vibration inputs. *We were astounded to learn the unit weighed 476 lbs.*

....

[W]e have reviewed the unit to determine where weight could be removed and know that some of the hand construction techniques required to remanufacture the original first articles of a year ago into the unit of today contributed to some weight increases that production units would not see...*All in all, we believe the production unit would be lighter, but it would not return the unit to the 350 lb limit.*

.....

At this juncture, we would like your thoughts regarding the over weight condition. *We recognize that the 350 lb weight limit exists in the Purchase Description, and we did not pay enough attention to this detail as we should have.* However, the ATS RACM provides exceptional performance and has been proven through the environmental requirements of the Purchase Description. Unless there is some underlying issue with the weight we are unaware of, we would suggest that Robins engineering determine if a waiver would be considered.

(R4, tab 141) (Emphasis added)

14. Appellant was of the view, based upon a technical analysis, that the additional weight would not materially affect safety, nor the ability of persons to manually lift the unit to the latching assembly at the top of the Dash 60. By email to the government dated 28 July 2006, appellant indicated that its planned production unit would weigh 10 to 15 pounds less than the first article, but it reaffirmed that appellant's design would not meet the 350 pound limit in the PD (R4, tab 154).

15. The delivery date under DO No. 0001 was 31 July 2006. ATS did not represent that it could rework the first article to meet the PD weight limit by 31 July 2006, nor did it request a time extension to do so. Appellant's first article test report was provided to the government in a number of installments, the last of which was on 25 July 2006 (R4, tab 153).

16. By email to appellant dated 8 August 2006, the PCO transmitted a proposed bilateral contract modification for a no-cost termination for convenience of DO No. 0002 for the production units, stating that the government "no longer requires/need [sic] the acquisition" (R4, tab 155). It appears that appellant declined to sign the proposed modification, and the government issued it unilaterally on 10 August 2006 (R4, tab 24).

17. By memorandum to appellant dated 5 September 2006, the PCO disapproved appellant's first article test report and the first article. The PCO found a number of failures to meet PD requirements. First, the PCO found that appellant's first article units failed to meet the not to exceed weight limit of 350 pounds. The PCO acknowledged appellant's structural analysis on safety issues but was not persuaded, stating as follows:

> The structural analysis indicated a 15% buckling safety factor for the 478 pound loading of the A/M32-60 enclosure. An additional analysis was requested by the Government regarding the degradation to the stability of the A/M32-60; this analysis confirmed a reduction of stability due to increased height for the center of gravity. Neither analysis considered weight or placement of the bleed air hose and the air conditioning ducts on top of the A/M32-60, as required by the Purchase Description. The bleed air hose, air conditioning ducts, and necessary rack required to house these components will further reduce the buckling safety factor and decrease stability.

(R4, tab 161 at 1) The PCO also stated that "ATS's rationale for Government acceptance of increased unit weight requires the Government to assume an unacceptable risk for structural failure of the A/M32-60 enclosure as well as system destabilization during towing" (*id*. at 2).

18. The PCO's notice of disapproval also noted the following additional failures of the first article under the PD: No acceptable design element for a storage rack for the bleed air hose and air conditioning ducts, ¶ 3.8.2; failure to meet noise level limit, ¶ 3.9; popped rivets during vibration test; failure to record half-flow performance in accordance with a government approved test procedure (*id*. at 1-3).

19. Under (d) of the First Article clause (finding 4), if the CO disapproves the first article, "the contractor shall be deemed to have failed to make delivery within the meaning of the Default clause of this contract." The government gave appellant 10 days to present any legally-supportable excuses for its failure to deliver in accordance with contract requirements.

20. Along with the disapproval notice, the PCO issued a show cause notice to appellant dated 5 September 2006, indicating that a termination for default was being considered, and seeking appellant's position on whether appellant's failure to perform arose out of causes beyond its control and without its fault or negligence. Appellant was given 10 days to respond. (R4, tab 162)

21. The government granted appellant a time extension to reply to the above notices. On 26 September 2006, appellant responded. In summary, appellant contended that the deterioration of the government-furnished Dash 60 generator and the government's delay in replacing it caused scheduling and testing delays; that the government failed to make contractually-required progress payments; that the protests delayed performance and caused its engineering team to leave appellant's employment; and that appellant was not given an opportunity to cure any defects in the first articles. (R4, tab 167)

22. Appellant's response failed to satisfactorily explain how any of the above government actions or inactions caused appellant to design a first article unit that weighed 476 pounds, or 126 pounds heavier than the PD limit. Appellant had conceded earlier that this PD failure could not be cured or corrected during production (findings 13, 14). Appellant's response reiterated that there was no safety issue with the greater weight (R4, tab 167).

23. The PCO replied to appellant by memorandum dated 22 December 2006. The PCO stated that "the cause of an unsuccessful First Article Test Report is not because of alleged Government delays or failure to provide progress payments but due to ATS' failure to produce the Roof Mounted Air Conditioner Module (RACM) according to required specifications." Insofar as the weight violation was concerned, the PCO addressed ATS' safety analysis as follows:

> The ATS dynamic analysis arrived July 12,2006 [sic], and indicated a 5% increase in tipping force occurred at the turning speed requirement of eight miles per hour as defined by AS8090, which is still less than the total force necessary to cause a roll-over. The engineer found the ATS structural and dynamic analysis had not considered the additional weight of the RACM mounting frame, or the four air conditioning ducts and duct rack located on top of the RACM enclosure, as defined by the PD. The added weight decreases the structural safety factor while increasing the tipping force. Based on a resulting safety factor approaching 1.00 and considering the age and reported condition of existing A/M32-60 carts, the risk of buckling at worse case conditions was judged not acceptable.

(R4, tab 170). The PCO also stated that appellant failed to satisfactorily address the other PD failures stated in the government's first article disapproval notice. The PCO concluded that the government would proceed to terminate for default the contract and DO No. 0001 (*id*.).

24. The PCO reviewed the relevant FAR provisions related to termination and concluded that default termination was appropriate (tr. 1/165-70). The PCO prepared a file for the review of the Termination Contracting Officer (TCO), attaching a memorandum recommending termination for default. The TCO performed his own review of the relevant documents, and obtained technical input from Mr. Moyses, the government's mechanical engineer assigned to the project (tr. 1/223). The TCO believed that of all the asserted PD failures, appellant's failure to meet the weight limit was the strongest basis to support default (tr. 1/225-26). He had no reservations about proceeding with a default termination (tr. 1/232-33).

25. By memorandum dated 21 February 2007, the TCO issued a CO's decision, terminating for default the subject contract and DO No. 0001 pursuant to the Default clause in the contract. The TCO determined that appellant failed to comply with the requirements of the contract within the time specified, and such failure was not shown to be beyond its control, fault or negligence. (R4, tab 171) This appeal followed.

DECISION

With respect to the issues in this appeal, we recently stated the governing law in *Zulco International, Inc.*, ASBCA No. 55441, 07-2 BCA ¶ 33,701 at 166,847, *aff'd on recon*., 08-1 BCA ¶ 33,799:

> 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. *See 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.

In the instant appeal the government has shown that appellant's first article failed to comply with the weight limit set forth in the PD, as well as several other PD requirements. Appellant's first article unit weighed 476 pounds, which exceeded the maximum permissible weight of 350 pounds by 36%, and which exceeded its first article proposal weight of 250 pounds by over 90%.

Appellant contends that its unit passed the most stringent of the performance tests of the PD, and the PCO should not have disapproved the first article. While it is well settled that the government may not disapprove a first article for defects that are "readily and easily correctable in the course of production," *Penjaska Tool Company*, ASBCA No. 31836, 89-2 BCA ¶ 21,700 at 109,100, appellant has not shown that the PD violations identified by the government fall into this category. Indeed, the record shows that appellant's overweight first article could not be corrected in production, and appellant conceded as much (findings 13, 14).

Alternatively, appellant argues that the government was required to negotiate a waiver of the weight limitation in the PD. We do not agree. It is well settled that the government has the right to insist on strict compliance with the specifications, and it was under no contractual or legal obligation to waive the weight limitation in the PD. *See Comptech Corp.*, ASBCA No. 55526, 08-2 BCA ¶ 33,982 at 168,085. Appellant did not show that it was impossible to meet the 350 pound weight limit, or that such a limitation was beyond the state of the art. *See Reflectone, Inc.*, ASBCA No. 42363, 98-2 BCA ¶ 29,869 at 147,829-30 (and cases cited). Appellant expressed confidence in its proposal

that this PD requirement would be met, and proposed a unit weight of 250 pounds (finding 3).

The government was of the view that the increased weight of the RACM presented a risk of instability that it was unwilling to accept. Appellant believed that this risk was relatively small. However, the record does not show that the government's concerns were without basis, and it is not within our province to second-guess the government's assessment of the risk attributable to this failure.

Appellant also contends that the PD was impermissibly vague with respect to a number of the enumerated first article failures, *i.e*. the storage rack, noise level and low flow mode. We are not persuaded. Appellant's proposal committed to meeting all the PD requirements, and no requests for clarification were made in these areas prior to award. In any event, the weight limit of 350 pounds was unquestionably clear. Appellant has not shown that any specification deficiencies, delays in providing GFP, delays in making progress payments or any other government action or inaction caused appellant to design a first article that weighted 476 pounds in violation of the PD.

Appellant contends that the default termination was improperly motivated by the government's desire to move towards a new diesel-based technology, and hence the government had no interest in the success of the RACM program. The weight of the evidence does not support this contention. Rather, the weight of the evidence shows that the RACM program was to be used by the government as a bridge between changing technologies; that the RACM concept was viewed with favor by the government and was expected to increase mobility and reduce deployment cost; and that with respect to this particular contract, the government provided appellant with numerous time extensions to deliver the first article units. The government's termination for convenience of DO No. 0002 for the production units was issued only after appellant had advised the government in July 2006 that its first article units had failed to meet the weight limits of the PD and the matter was not correctable. There is no persuasive evidence that the government would have terminated the production units if appellant's first article had conformed to the PD and the specifications.

CONCLUSION

We have duly considered all of appellant's contentions. Appellant has not shown that its failure to deliver a conforming first article was excusable under the contract and the law. We uphold the termination for default of the contract and DO No. 0001.

The appeal is denied.

Dated: 24 September 2009

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. 55906, Appeal of American Turbo Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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