

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
FitNet International Corp. ) ASBCA Nos. 56604, 56605  
Under Contract No. W911SF-08-P-0080 )

APPEARANCE FOR THE APPELLANT: James S. DelSordo, Esq.  
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Manassas, VA

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
LTC Dana J. Chase, JA  
MAJ Christine C. Fontenelle, JA  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

In ASBCA No. 56604, FitNet International Corp. (FitNet) appeals the denial of its claim for reformation of the captioned purchase order (hereinafter "Purchase Order 0080") plus money damages for government breach of the order as reformed. In ASBCA No. 56605, FitNet appeals the government's termination for cause of the order. We find that the government's award notice for Purchase Order 0080 accepted FitNet's "Seller's Bid Specification." However, we also find that FitNet tendered a product for delivery that did not comply with that specification. Accordingly, we deny both appeals.

FINDINGS OF FACT

1. On 12 February 2008, the government solicited bids for supply of 150 wall lockers that "Meet or Exceed" the following specification:

LI 001, HEAVY DUTY CABINETS, 12 GA Steel,  
48"W x 24" D x 72" H, gray in color. No legs. 2 doors on  
each unit, padlock style lock, padlock not included. Two  
shelves in each unit bottom shelf 24" off bottom. One hook  
in middle of cabinet. Sides and front ventilated, solid back  
and bottom. Shipping included in price., 150, EA;

(R4, tab 35 at 1-2)

2. The solicitation was issued on the FedBid electronic bidding system (*id.* at 2). The FedBid instructions to bidders on this solicitation included the following:

**Meet or Exceed:** The Buyer is allowing Sellers to submit bids that either meet or exceed the requested specification. Sellers MUST enter exactly what they are bidding (including make, model, and description) into the blank description field in order for the bid to be considered.

(R4, tab 37 at 2)

3. On 13 February 2008, FitNet submitted a bid in response to this solicitation. FitNet's bid was in the total amount of \$101,373 for 150 lockers meeting the following specification:

Seller Bid Specification: Offering the U.S. made Hallowell HESL 4822 all welded turn handle equipment heavy duty storage locker/cabinets meeting/exceeding the salient characteristics called for on the solicitation

(*Id.*)

4. The HESL 4822 locker was manufactured by the Hallowell Division of List Industries, Inc. (hereinafter "List"). On 13 February 2008, FitNet submitted the List description of the HESL 4822 locker to the contract specialist administering the solicitation for the government. The List description stated that the HESL 4822 locker was "[u]nibody all-welded...construction" and, with the exception of the door handle and cam, constructed of steels thinner than 12 gage.<sup>1</sup> The List description also indicated that the standard size locker available closest to the size specified in the government solicitation was 48"W x 22"D x 72"H. (R4, tab 26 at 10-11)

5. On 15 February 2008, the contract specialist sent a picture of the desired lockers to FitNet and stated: "The wall lockers must match this exactly and must be 12 gauge. Are you going to be able to supply me with this?" (R4, tab 26 at 20) By e-mail dated 16 February 2008, FitNet responded:

Please be aware that we are offering an 'equal' which meets the salient characteristics of the specifications requested. On a 'brand-name or equal' solicitation, the FAR allows for non exact matches. The depth of these lockers are but a fraction

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<sup>1</sup> Gage is a measure of steel thickness, the higher the gage, the thinner the steel (tr. 1/ 37, 170)

smaller than the specs (by two inches) and the lockers come with a small integrated base so their bottom wont [sic] rest directly on the floor. These differences have nothing to do with the functionality of these lockers and therefore are a non-issue.

(*Id.*)

6. By e-mail dated 19 February 2008, FitNet made the following further response to the contract specialist's inquiry:

We have confirmed with List Industries, the manufacturer, that the lockers in your pictures are comparable to the custom dura-tuff extra heavy duty storage locker which had been offered in our quote. The lockers offered are a custom product manufactured with '*prime grade sheet steel*' and not with the standard steel measured by 'gauge.' In short, the prime grade sheet steel product molds to create a higher tinsel [strength] cabinet, which is heavier and more durable than the lockers on the pictures.

These custom lockers, in summary, would match the products on the picture. We trust this information answers your question.

(*Id.*)

7. On 20 February 2008, the contract specialist again asked FitNet: "will the lockers look like the ones in the picture – I don't want them heavier or thicker – just the 12 gauge" (R4, tab 26 at 19). On the same day FitNet replied:

Yes, the lockers will look like the lockers on your pictures. The prime grade sheet steel used for these custom lockers wont [sic] be heavier, but stronger than the steel used on the lockers on your pictures. We've attached pictures so you can verify their similarity. We've also attached a color chart showing 3 separate shades of 'grey' (711, 706 and 725) available. Color metal plates will be forwarded to confirm the choice. By the way, these custom lockers come with a lifetime warranty. Trust these answers will satisfy your concerns.

(*Id.*)

8. On 22 February 2008, the contracting officer issued Purchase Order 0080 to FitNet, effective 21 February 2008. Block 29 of the purchase order stated in relevant part: "YOUR OFFER ON SOLICITATION (BLOCK 5)...IS ACCEPTED AS TO ITEMS: SEE SCHEDULE." The Purchase Order Schedule contained a single line item as follows:

| ITEM NO | SUPPLIES/SERVICES   | QUANTITY | UNIT | UNIT PRICE | AMOUNT       |
|---------|---|----------|------|------------|--------------|
| 0001    | HEAVY DUTY CABINETS<br>FFP<br>W804F208031001 HEAVY DUTY CABINETS, 12 GA STEEL<br>48"W X 24" D X 72" H, GREY, W/LOCKING MECHANISM Per<br>Bid and information given on FedBid solicitation<br>W804F23BN08007. No legs. Two doors on each unit,<br>two shelves in each unit, bottom shelf 24" off of bottom. Hook<br>in middle back of cabinet. Sides and front ventilated per<br>pictures supplied to vendor. Solid back and bottom. color:<br>gray— more specific coloring to be given to requestor to make<br>more definitive decision. Padlock style lock, padlock not<br>included. All items ship at the same time. Shipping is include<br>in price to 31905. | 150      | Each | \$675.82   | \$101,373.00 |

(R4, tab 1 at 1, 3)

9. Purchase Order 0080 required delivery of the ordered lockers on 22 March 2008. The purchase order also included, among other provisions, the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (FEB 2007) clause. (*Id.* at 3, 4) Paragraph (d) of this clause incorporated by reference the FAR 52.233-1, DISPUTES clause. Paragraph (m) stated in its entirety:

Termination for cause. The Government may terminate this contract, or any part thereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount of supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for

default, such termination shall be deemed a termination for convenience.

10. On 11 March 2008, FitNet obtained a quote from List for 150 HESL 4822 lockers. On 20 March 2008, two days before delivery to the government was due, FitNet ordered the lockers from List. (R4, tab 41 at 1) FitNet's president contends that the government contract specialist "did not give us the go-ahead to proceed for at least two weeks after the contract had been received," and that she "held up the contract, after it had been issued, until the second week of March at the end user's request." (R4, tab 7 at 1, tab 8 at 3)

11. Purchase Order 0080 contained no provision requiring a notice to proceed from the government before the contractor could begin work (R4, tab 1). The contract specialist had no authority to delay work on the purchase order and she denied at hearing that she issued any stop work order after Purchase Order 0080 was issued (tr. 1/121). We find the alleged government delay of the start of work unproven.

12. FitNet's president alleges that in a telephone conference on 25 March 2008 with the contract specialist and the List sales representative, he offered to deliver and the government agreed to accept an "upgraded" HESL 4822 locker (R4, tab 7 at 1-2; tr. 1/80-81). The contract specialist, however, had no authority to modify the purchase order specification and denied at hearing any agreement on her part to approve an "upgrade" (tr. 1/123). The contracting officer issued no modifications to Purchase Order 0080 changing the specifications (tr. 1/169). We find the alleged government approval of a specification "upgrade" unproven.

13. On or about 2 May 2008, FitNet tendered to the government the lockers it had procured from List. The using activity inspected the lockers and found, among other things, that they were (i) spot-welded, not all-welded construction as represented in the List description and (ii) 74 5/8 inches high, not 72 inches which was the standard height in the List description that matched the height specified in the solicitation. (R4, tab 9 at 2, 5, 6; tr. 1/149-52)

14. The importance of the specified height of 72 inches in the solicitation was explained by the NCO in charge of procuring the lockers for the using activity as follows:

Q. ...as a practical matter, does it make any difference whether it's too high or too low?

A. The reason that we were trying to get those wall lockers requested without the legs, and to a certain height is, our locker room, it's got a low ceiling and in order for us to put our LCS and our C-bag, which is our cold weather bag, for

deployments, we'd lock those on the top of these wall lockers, and there was just enough head space for us to get those bags in there.

(Tr. 1/152)

15. By letter dated 6 May 2008, the contracting officer notified FitNet that the tendered lockers failed to meet the purchase order specifications as to height and depth “adversely affecting storage capacity,” and the steel gage used in construction. The letter gave FitNet 28 days to cure these deficiencies. (R4, tab 11 at 1)

16. By e-mail dated 12 May 2008, FitNet proposed to cure the depth deficiency by providing seven additional lockers to make up for the reduced volume of the 150 wall lockers tendered (R4, tab 20 at 1-2). On 20 May 2008, the using activity rejected the proposed cure on the following grounds:

Given that each locker was intended to provide adequate storage space for each individual Soldier, the provision of 7 additional lockers to “make up” the cumulative volume lost (spread over 150 lockers) is no cure of the deficiency in storage space for each Soldier. Moreover, the cure does not address the material and welding deficiencies.

(R4, tab 23)

17. By e-mail dated 22 May 2008, FitNet submitted an uncertified “claim” to the contracting officer in an unstated amount for alleged government wrong-doings in connection with the solicitation, award and administration of Purchase Order 0080 (R4, tab 24). By e-mails dated 27 May 2008 and 11 June 2008, FitNet submitted an amended certified claim to the contracting officer for (i) reformation of Purchase Order 0080 to specify the “Seller Bid Specification” for the Hallowell HESL 4822 lockers; (ii) immediate payment of the \$101,373 purchase order upon redelivery of the lockers; (iii) additional costs of \$22,500 for upgrade of lockers, \$700 per month for temporary storage, \$3,255 to redirect trucks to Jacksonville, \$1,500 for unloading trucks, and \$1,500 for reloading trucks; and (iv) legal and miscellaneous fees in connection with the claim (R4, tab 26 at 1, 3, 5-6, tab 27).

18. On 24 June 2008, the contracting officer terminated Purchase Order 0080 for cause. The specific grounds cited for the termination were (i) failure to deliver within the required time; (ii) failure to provide 12 gage steel construction and the required dimensions; and (iii) failure to cure these deficiencies within 28 days after receipt of the cure notice. (R4, tab 32 at 2-3) By final decision letter dated 31 July 2008, the

contracting officer denied FitNet's 27 May 2008 claim entirely and reaffirmed the 24 June 2008 termination for cause (R4, tab 34 at 5-11). These appeals followed.

### DECISION

The government solicitation for the lockers specified, among other things, the dimensions of the lockers (48"W X 24"D X 72"H) and construction using 12 gage steel. The solicitation, however, permitted sellers to offer a product meeting or exceeding the "requested specification" if they entered "exactly what they are bidding" on the electronic bid form. FitNet entered its "Seller Bid Specification" on the electronic bid form. FitNet's Seller Bid Specification offered the "Hallowell HESL 4822 all welded...heavy duty storage locker/cabinets meeting/exceeding the salient characteristics called for on the solicitation." (Findings 1-3) In support of its bid, FitNet provided to the government before award the manufacturer's description of the HESL 4822 lockers. The manufacturer's description stated that the lockers were all welded construction and showed that its standard locker dimensions would meet the height and width requested by the government, but were two inches short of the depth. The manufacturer's description also showed that, with the exception of the door handle and cam, the steels used in construction were thinner than the 12-gage steel required by the requested specification. (Finding 4)

Notwithstanding these differences from the government specification, the contracting officer awarded Purchase Order 0080 to FitNet stating in the notice of award that "YOUR OFFER...IS ACCEPTED AS TO ITEMS: SEE SCHEDULE." The only item in the Schedule was the locker described in the requested specification. (Finding 8) In determining whether to contract with appellant, it was the contracting officer's duty to determine whether the item being offered by appellant, if represented accurately, met or exceeded the solicitation specification. Since the solicitation expressly allowed "meet or exceed" offers, we conclude that the contracting officer's acceptance of FitNet's meet or exceed offer was an acceptance of the offered product as meeting or exceeding the requested specification.

The lockers tendered to the government by FitNet on 2 May 2008, however, were not the lockers described in the Seller Bid Specification or in the manufacturer's description. The tendered lockers were spot welded, not all-welded construction, and they were 74 5/8 inches high and not 72 inches high. The tendered delivery on 2 May 2008 was also 41 days late. (Findings 9, 13) There is no credible evidence that the government caused the delay or that there was any other excusable cause for the delay. The late tender of non-conforming goods was a breach of contract by FitNet entitling the government to terminate the contract for cause (finding 9). Even if the specified 22 March 2008 delivery date were deemed to have been waived, FitNet's subsequent tender of non-conforming supplies entitled the government to summarily terminate the

contract for cause. *Louisiana Lamps and Shades*, ASBCA No. 45294, 95-1 BCA ¶ 27,577 at 137,435.

Since the contract formed by the government's acceptance of FitNet's offer was a contract for the lockers offered in the Seller Bid Specification, the claim in ASBCA No. 56604 for reformation of the contract terms to that same effect is moot. However, since that contract was breached by FitNet's failure to deliver the specified items within the specified time, and not by any actions of the government, the claim for damages in ASBCA No. 56604 and the claim for relief from the termination in ASBCA No. 56605 are both without merit.

The appeals are denied.

Dated: 22 February 2011

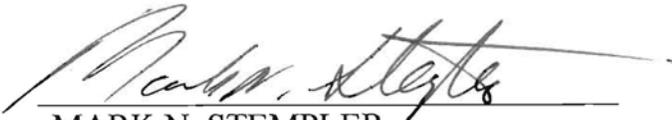


MONROE E. FREEMAN, JR.

Administrative Judge  
Armed Services Board  
of Contract Appeals

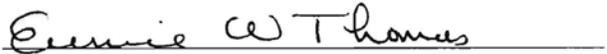
I concur

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 Nos. 56604, 56605, Appeals of FitNet International Corp., rendered in conformance with the Board's Charter.

Dated:

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