ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
New Era Contract Sales, Inc.	)	ASBCA Nos. 56661, 56662, 56663
	)	
Under Contract No. SPM750-06-D-7461	)	

APPEARANCE FOR THE APPELLANT: Mr. Larry D. Ramirez
President

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
DLA Chief Trial Attorney
Vasso K. Monta, Esq.
Senior Counsel
DLA Land and Maritime
Columbus, OH

OPINION BY ADMINISTRATIVE JUDGE DICKINSON
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

These appeals arise from three delivery orders issued under indefinite quantity Basic Contract No. SPM750-06-D-7461 for the supply of fuel pumps. On 18 September 2008 the Defense Supply Center Columbus ("DSCC" or government) terminated the three delivery orders at issue for default for the failure of New Era Contract Sales, Inc. ("New Era" or appellant) to deliver the parts ordered. New Era appealed from the terminations for default, alleging that its failure to deliver was excused because its subcontractor refused to honor its previously quoted prices. DSCC has moved for summary judgment on the basis that the undisputed reason for New Era's failure to deliver is not excusable as a matter of law. New Era opposes the motion. The record for purposes of the motion consists of the pleadings with attachments, the Rule 4 file and the parties' motion filings with attachments.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 21 July 2006 DSCC issued indefinite quantity Basic Contract No. SPO750-06-D-7461[1] to New Era for a variety of items identified by National Stock Numbers (NSN) and manufacturer CAGE codes and part numbers. The firm fixed-price contract provided that the government would order supplies under the contract by issuing

[1] The contract advised that, due to the implementation of DSCC's Business Systems Modernization program, the contract number would later be referred to with the prefix of "SPM" rather than "SPO" (R4, tab 1 at 2).

delivery orders. The contract did not include an economic price adjustment provision. The contract period was for one year ending on 20 July 2007. (R4, tab 1) Modification No. P00001, dated 11 July 2007, extended the contract period an additional year ending on 20 July 2008 and also increased contract prices (56661, 56663, R4, tab 2)[2]. One of the items identified in the contract was NSN 2910-01-384-5937, a fuel pump manufactured by Isuzu Motors (R4, tab 1 at 4).

2. On 30 November 2007 DSCC issued Delivery Order (DO) 0037 requiring New Era to deliver 5-each NSN 2910-01-384-5937 fuel pumps by 14 February 2008 (56662, R4, tab 1).

3. On 8 December 2007 DSCC issued DO 0039 requiring New Era to deliver 12-each NSN 2910-01-384-5937 fuel pumps by 10 March 2008 (56661, R4, tab 1). On 15 February 2008 the delivery date was changed to 13 June 2008 (56661, R4, tab 3).

4. Also on 8 December 2007 DSCC issued DO 0041 requiring New Era to deliver 57-each NSN 2910-01-384-5937 fuel pumps by 11 April 2008 (56663, R4, tab 1).

5. On 6 March 2008 New Era requested cancellation of all three delivery orders at issue and also requested that NSN 2910-01-384-5937 be removed from the basic contract, stating:

> Attached you will find a letter from the approved manufacturer stating that they have changed their discount structure and [New Era is] no longer included as a vendor who receives the discount. I cannot complete these delivery orders or any more issued against this delivery order. I apologize for the inconvenience. There was absolutely no way to foresee this one!

(56661, 56662, 56663, R4, tab 4) The referenced letter from Isuzu Motors America, Inc., dated 4 March 2008, stated:

> Per your request, this will confirm that Isuzu recently clarified for its distributors that its "contract order" program only applies to purchases for resale to OEM customers, and not to other customers (including, but not limited to government customers). We understand that as a result, you will be unable to continue performance on government contract SPM750-06-D-7461, but we've determined that this

[2] The Rule 4 file contains the contract at tab 1 followed by dividers for each appeal with documents tabbed from 1 through 9 behind each divider.

> is a necessary policy clarification to ensure fairness among all customers within our supply chain.

(Id.) It is undisputed that, as a result of Isuzu's change in its discount structure, New Era's subcontractor (the Isuzu distributor from whom New Era was buying the Isuzu parts) would not honor the prices it had previously quoted to New Era (compl. at 2; answer at 3).

6. On 18 July 2008 DSCC issued a Show Cause notice to New Era with respect to the three DOs (56661, 56662, 56663, R4, tab 5). On 29 July 2008 New Era responded to the Show Cause notice by stating that the manufacturer had changed its discount structure and that, as a result, its subcontractor would not honor the prices that had been quoted to New Era during the bidding process. It was New Era's position that "[t]his was absolutely beyond our control and certainly without fault or negligence on our part or that of our subcontractor." (56661, 56662, 56663, R4, tab 6)

7. On or about 22 August 2008 DSCC issued contracting officer final decisions terminating the three DOs at issue for default (56661, 56662, 56663, R4, tab 7), citing FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984), which provided:

> (a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to--
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> ....
>
> (c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

> (d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

Termination modifications to the contract were executed 18 September 2008 (56661, 56662, 56663, R4, tab 8).

8. By letters dated 25 November 2008, New Era timely appealed the terminations for default of the three DOs. The appeals were docketed as ASBCA Nos. 56661 (DO 0039), 56662 (DO 0037) and 56663 (DO 0041).

DECISION

The government bears the burden of proving that its termination of the DOs for default was a reasonable exercise of its discretion. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987); *Darwin Constr. Co. v. United States*, 811 F.2d 593, 596-97 (Fed. Cir. 1987); *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir. 1996). DSCC argues that there are no disputed material facts and it is entitled to judgment as a matter of law because New Era's refusal to perform was a failure to timely deliver under the three DOs which justified termination for default. New Era argues that its failure to supply the Isuzu Motors fuel pumps was excusable under FAR 52.249-8(d).

We evaluate the government's motion for summary judgment under the well-settled standard that summary judgment is properly granted only where the moving party has met its burden of establishing the absence of any genuine issue of material fact 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 which may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-moving party must then set forth specific facts showing the existence of a genuine issue of material fact for trial; conclusory statements and bare assertions are insufficient. *Mingus Constructors, Inc.*, 812 F.2d at 1390-91; *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). All significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus*, 812 F.2d at 1390.

Apparently in the course of obtaining parts under DO 0037 for delivery by 14 February 2008 (SOF ¶ 2), New Era was advised by its subcontractor that the price

originally quoted by it to supply the fuel pumps to New Era would not be honored. The increase in the cost to New Era to obtain the fuel pumps was confirmed by the manufacturer, Isuzu Motors, on 4 March 2008. New Era immediately requested DSCC cancel all three DOs for the part and requested the part be removed from the basic contract. (SOF ¶ 5) The record contains no response by DSCC to New Era's request.

In July 2008 the government issued a show cause notice as to all three DOs after the delivery dates had passed without performance by New Era and termination for default was complete by 18 September 2008 (SOF ¶¶ 6, 7). New Era's failure to make timely delivery of the parts as required by DOs 0037, 0039 and 0041 establishes a *prima facie* case for default termination. *General Injectables & Vaccines, Inc. v. Gates*, 519 F.3d 1360, 1363, *reh'g. denied and opinion supplemented*, 527 F.3d 1375 (Fed. Cir. 2008).

The burden then shifts to New Era to demonstrate that its failure to deliver the parts was excusable. *Id.* New Era argues that its refusal to perform was excusable under FAR 52.249-8(d) because the price increase at issue was due to no fault or negligence of its own or its subcontractor (SOF ¶¶ 5, 6). The use of the phrases "beyond the control and without the fault or negligence of the Contractor" in FAR 52.249-8(c) and "beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either" in FAR 52.249-8(d), has been interpreted to mean that the party alleging the excuse must "prove that it took all reasonable action to perform the contract notwithstanding the occurrence of the excuse." *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 408 (Ct. Cl. 1978) (where the court interpreted almost identical language contained in a Department of Agriculture contract). More recently the Court of Appeals for the Federal Circuit articulated the "normal rule" that "the contractor alone is responsible for the deficiencies of its suppliers and its subcontractors absent a showing of impossibility." *General Injectables & Vaccines, Inc. v. Gates*, 527 F.3d at 1378. The undisputed facts fail to raise a material issue of fact that either New Era or its subcontractor was actually unable to provide the Isuzu Motors fuel pumps ordered in the three DOs. Rather the undisputed record shows that New Era refused to deliver the fuel pumps at the contracted price solely because its cost of obtaining the parts had increased (SOF ¶¶ 5, 6), thereby failing to honor the agreed contract terms of price and delivery. New Era advances the argument that, while it understands the "inevitability of price increases" and the risks inherent in such occurrences and, while it has performed under a "long list of contracts...with no profit or *acceptable* losses" (emphasis in original), it should be entitled to relief in this instance in the form of no-cost cancellation of the three DOs because it determined the increased cost of delivering the Isuzu Motors fuel pumps to be unacceptable (app. reply at 4).

It is well-established that under a firm fixed-price contract the contractor accepts the risk of increased costs as well as the possible benefit of decreased costs associated with the items to be delivered under the contract. FAR 16.202-1; *ITT Federal Services*

Corp. v. Widnall, 132 F.3d 1448, 1451 (Fed. Cir. 1997). Further, under firm fixed-price contracts the government does not bear either the risk of increased costs or the benefit of decreased costs unless it specifically agrees to do so by including an economic price adjustment clause in the contract. FAR 16.203-1. There was no such clause in either the basic contract or the three DOs at issue here.

CONCLUSION

As a matter of law, looking at the record in the light most favorable to New Era and drawing all inferences in its favor, we grant the government's motion for summary judgment and deny the appeals.

Dated: 4 April 2011

Diana S. Dickinson

DIANA S. DICKINSON
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

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. 56661, 56662, 56663, Appeals of New Era Contract Sales, Inc., rendered in conformance with the Board's Charter.

Dated:

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