ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Delta Industries, Inc.	)	ASBCA No. 57356
	)	
Under Contract No. SPM7L0-10-M-3108	)	

APPEARANCE FOR THE APPELLANT: Mr. George Price
Secretary/Treasurer

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

OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND
APPELLANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Delta Industries, Inc. (Delta) appealed under the Contract Disputes Act (CDA), 41 U.S.C §§ 7101-7109, from the contracting officer's (CO's) denial of its $10,020 claim for contract termination costs. The government moved for summary judgment on the ground that appellant tendered delivery under a unilateral purchase order (PO) after the delivery date had passed and the PO lapsed. Appellant opposed and cross-moved for summary judgment in the amount of $5,000, the price of the required supplies, upon the ground that it made delivery to a common carrier on the date that the government notified it that the PO was cancelled. For the reasons set forth below, we grant the government's motion and deny appellant's cross-motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

The following facts are undisputed.

On 5 February 2010, in response to Delta's 4 February 2010 quotation, the Defense Logistics Agency's branch then known as the Defense Supply Center Columbus (DSCC) issued PO No. SPM7L0-10-M-3108 to Delta, located in Idaho Falls, Idaho, and identified as a small business. The PO stated that it was an "offer." The box on the PO requiring the supplier's signature to indicate acceptance of the PO was not checked and Delta was not required to sign the PO. CO Michelle Vandermolen signed it on behalf of the government. (R4, tab 1 at 1 of 5; gov't reply, ex. 4) The PO called for 100 units of "ARMOR PLATE,"

National Stock Number 2540-01-552-1719, a "CRITICAL APPLICATION ITEM," at $50 per unit, for a total price of $5,000, in accordance with Drawing No. 6W728 6432686, "BASIC DOCUMENT," Amendment No. 2 dated 26 January 2005 (hereafter "the drawing") (R4, tab 1 at 2 of 5). The PO required delivery FOB destination, New Cumberland, Pennsylvania, by 113 days after the date of the order, *i.e.*, by 29 May 2010, which Delta points out was a Saturday, followed by Sunday and the Memorial Day holiday on Monday 31 May 2010 (*id.* at 1, 3 of 5). The record does not indicate whether delivery could be made to New Cumberland on a Saturday. The PO incorporated by reference FAR 52.213-1, FAST PAYMENT PROCEDURE (MAY 2006) (*id.* at 4), which provides in paragraph (a) that "[t]he Government will pay invoices based on the Contractor's delivery to a...common carrier...."

The drawing depicts "ARMOR, NODLR HOLE COVER" and, at Note No. 2, calls for material to be ".125" HHS" (R4, tab 7 at 37).[1] On 1 March 2010, 24 days after PO award, Delta inquired of Sharon Scott about ".125" HHS," stating "[w]e have no idea" what material this is and seeking clarification (R4, tab 5 at 9, 10). The government identifies Ms. Scott as a contractor employee working for the agency (mot. at 3, ¶ 7 and n.3). DSCC's mechanical engineer Eric Wilde informed Ms. Scott on 17 March 2010, 16 days after Delta's inquiry, that "HHS" meant "High Hard Steel" (R4, tab 5 at 1, 2). She informed Delta that day that "HHS" meant "High Hardness Steel" (*id.* at 1). On 25 March 2010, nine days later, Delta informed Ms. Scott that its new Quality Assurance Representative (QAR) sought more clarification and it asked for a specification for the High Hardness Steel (hereafter "HHS"). On 29 March 2010 Mr. Wilde responded to Ms. Scott that Delta "should be using MIL-DTL-46100 (ARMOR PLATE, STEEL, WROUGHT, HIGH-HARDNESS)," and Ms. Scott so informed Delta that day. (*Id.* at 1)

On 28 and 29 April 2010, DSCC's contract administrator, Linda Crew, noting the PO due date of 29 May 2010, stated that the items were urgently required and sought Delta's acceleration or partial shipment at no additional cost to the government. Delta responded to her on 29 April that it could not expedite without government consideration and that the contract was on track to meet the due date. (R4, tab 6)

However, on 19 May 2010, Delta informed Ms. Crew that its suppliers could not locate the material and it asked for a list of suppliers (R4, tab 7 at 1, 38). Ms. Crew forwarded the inquiry that day to Quality Assurance Specialist Alana Huron, who forwarded it to engineer Wilde on 20 May 2010, stating:

> - I was unable to locate HHS on the mil std.

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[1] The Board has numbered consecutively the pages of Rule 4 tabs 5, 7, 9 and 11 and of appellant's exhibits to its notice of appeal.

> - The left corner of the dwg states proprietary dwg, though it is extremely unclear. The item is currently AMSC of 2G...Should this be a full and open item? The TIR list BAE as the 3/2, they are the only source. We only procured this 3 times and only 1 has been delivered. That contract was iaw with the drawing. It was changed from a 4H to 2G back in 06/2008
>
> - Please assist me in determining the true AMSC code and finding a source or who I should contact for locating the source for the contractor.

(R4, tab 7 at 2).

In response to a government interrogatory concerning the basis for its claim, Delta stated:

> 3-29, [the government's] engineer issued a directive for Armor plate, Steel, Wrought, High hardness, but without contract authority per FAR 43.102(a)1-3...No contract modification was issued by the [government], however, the HHS callout was changed to 46100 Armor plate within the [government's] Quality System taken from that engineering directive, on or about 3-29 [citing Ms. Huron's above inquiry to engineer Wilde]. Unaware of the [government's] internal contract change and without proper contract modification to change HHS to Armor plate at the contract level - and with two [government] directives in hand affirming for HHS - the contract administrator cleared the patent material error concern (FAR 246-7003) and released the contract to production using the confirmed material, HHS.

(Mot., ex. 1 at 6)

On 20 May 2010, Delta ordered two sheets of armor plate material from a Chicago supplier at a total price of $659.24, for delivery by 1 June 2010. Delta claims to have begun production by 1 June. (Mot., ex. 2 at 4-5; notice of appeal (NOA), attachs. at 1 (timeline, 6/1/10))

By e-mail of 7 June 2010, Ms. Crew informed Delta that the PO's due date had passed. She also stated:

> In addition to [Delta] not having familiarity with the material and being unable to locate suppliers, our engineers have since deemed the specifications for this award insufficient for procurement. Consequently, we have determined it is in the best interest of the Government to withdraw the award.

(R4, tab 9 at 1) The record does not elaborate upon the government's engineers' conclusions. The e-mail and record reflect that Ms. Crew attached unilateral PO Modification No. 1, signed on 7 June 2010 by CO Jacquelyn Maurer, effective that day. The modification stated:

> The [PO] was an offer to purchase the supplies described therein provided that delivery was made by 05/29/2010. Since that date was not met, the Government's offer to purchase has lapsed. No deliveries will be accepted by the Government under this order....

(R4, tab 2 at 1) The modification reduced the item quantity ordered and the PO amount to zero (*id.* at 2). Delta replied on 7 June that it had found a supplier, bought the proper material, and had manufactured and already shipped the items (R4, tab 9 at 1).

The items were delivered to United Parcel Service (UPS) on 7 June 2010, which shipped them to Salt Lake City, Utah, that day, with a scheduled delivery date of 14 June 2010 at the PO's New Cumberland, Pennsylvania, delivery destination. Delta averred in its complaint that it placed HHS items into shipment status on 7 June 2010 after learning of the withdrawal of the PO for non-delivery. Delta's Certificate of Conformance by its QAR certified that the supplies had been sent by UPS on 7 June 2010, were of the quality specified, and conformed to contract requirements. The steel shipped was grade 4130AQ. The government states that it is unknown whether that material conformed to the HHS specification but it is conceding that it did for purposes of its motion. (R4, tab 10; mot. at 5 n.4, mot., ex. 2 at 3-4; compl. at 2, ¶ 4)

Delta has not contended or offered evidence that, prior to its 7 June 2010 shipment, it sought any extension of the PO's delivery date or alleged to the CO that the government had changed the PO's material specification or that there were safety issues.

On 8 June 2010 Ms. Crew sought Delta's proof of delivery at destination. Delta responded that day that the items' arrival date in Pennsylvania was to be 14 June 2010. Ms. Crew replied that the PO had been withdrawn, the government did not intend to accept the material, and Delta should attempt to recall the shipment. (R4, tab 9 at 10-11)

On 8-14 June 2010 Delta sought assistance, not specified in the record, from Joe Crawford of the Defense Contract Management Agency, whom Delta described as its

"ACO." He sought documents from Delta but the record does not include evidence of any further response by him. (NOA, attachs. at 1 (timeline, 6/8/10) and at 37-38)

A 28 June 2010 memorandum from "Engineering" to "Contracts," author unnamed, which the parties have identified as a Delta document, concluded that, if DSCC required anything other than .125 HHS there would have to be a contract modification (mot., ex. 2 at 9; NOA, attachs. at 40).

Also on 28 June 2010, Delta filed a claim with CO Maurer for $25,000 in alleged damages due to contract cancellation (NOA, attachs. at 39). On 29 July 2010 Delta alleged that the improper cancellation created a termination for convenience and it reduced its claimed amount to $10,020, said to include the "[c]ontract amount" of $5,000; $2,500 for "[s]torage awaiting delivery;" $500 for "re-shipping, (assuming items to be [re-]shipped);" and $1,020 for administrative/purchasing expense to respond to errors, for a total of $9,020 (R4, tab 3). The $1,000 difference is not explained.

On 2-3 August 2010, the government contended that there was no termination but rather a withdrawal of the PO. Delta alleged that it had been directed in March 2010 to change material, resulting in a contract change for which it was entitled to a time extension for government-caused delay and a price adjustment, in addition to termination for convenience costs. (R4, tab 11 at 1-3; NOA, attachs. at 43, 45-47)

By final decision of 23 August 2010, CO Maurer denied Delta's claim on the basis that a unilateral PO, not a contract, was involved; when Delta failed to deliver by the specified delivery date, the order lapsed of its own accord; and the government had no obligation to pay for the material or for any termination costs. She stated that the government did not cause any delays or change the order; it merely attempted to answer Delta's questions posed well after award; and Delta had the obligation to ensure that it understood item requirements before it submitted its quotation. (R4, tab 4)

The government concedes for purposes of its motion that material manufactured to the MIL-A-46100 standard would constitute a change in the PO's material specification because it has specific hardness and testing requirements (mot. at 3, ¶ 5).

Delta acknowledged in response to a government request for admission that "There is no indication in the Delta work file that the material noted as MIL-DTL-46100 (ARMOR PLATE, STEEL, WROUGHT, HIGH-HARDNESS) was ever used in production" (mot., ex. 1 at 4, ex. 3 at 6).

DISCUSSION

The government contends that it is entitled to summary judgment because its unilateral PO was an offer that lapsed of its own accord after appellant failed to deliver

the items ordered by the due date. The government alleges that it did not delay appellant, which did not act promptly to perform the PO, and appellant is not entitled to an extension of the due date based upon a change to the material specifications because, as appellant has acknowledged, no authorized government official ever modified the PO and appellant did not perform to any changed standard.

Appellant opposes the government's motion and cross-moves for summary judgment in the amount of $5,000, the PO's price, on the basis that it delivered the required goods to a common carrier on the date that the government notified it that the PO was cancelled. It now contends that the dispute does not concern an alleged contract change, which it describes as a secondary matter, but rather the government's refusal to pay for items delivered. It alleges that the PO became a binding contract because substantial performance had occurred and that the government did not comply with Federal Acquisition Regulation (FAR) 13.302-4(2) (which we infer in context to mean FAR 13.302(b)(2)), FAR 49.101(c) or FAR 49.102. Appellant further contends that it produced, packaged and shipped the items before the government cancelled the PO (despite its complaint allegation that it placed them into shipment status after learning of the PO's withdrawal); title passed to the government upon appellant's delivery of the items to a common carrier for shipment; and appellant invoiced for the items after the government had received them. Appellant asserts that it was thus entitled to payment under FAR 52.213-1's fast pay procedures upon delivery to the common carrier. It also alleges, among other things, that the government solicited the items despite having internal records from past buys showing that the specifications were defective, with safety implications. It describes this, too, as a secondary matter.

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). In deciding a summary judgment motion, we do not resolve factual disputes but ascertain whether there is a genuine issue of material fact. A material fact is one that might affect the outcome of the case. There is a genuine issue of material fact if the evidence is such that a reasonable fact finder could find in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Even though both parties have moved for summary judgment, summary judgment in favor of either party is not proper if there are disputed material facts. We are to evaluate each party's motion on its own merits, drawing all reasonable inferences against the party whose motion is under consideration. However, the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are insufficient. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

The PO stated that it was an "offer." It was the government's offer to buy materials from appellant supplier, the offeree, upon specified terms and conditions. FAR 13.004(a). At any time before acceptance occurs, by written notice to the supplier,

the government may withdraw, amend, or cancel its offer. FAR 13.004(c). As here, when the offeree does not accept a PO by signing it, and was not required to do so, it accepts the offer by delivering the materials in accordance with the specified terms and conditions, or by proceeding with the work to the point of substantial performance (*id.*). In the latter case, a unilateral option contract is created, obligating the government to keep its unilateral PO offer open until the delivery date. However, if the supplier does not tender complete performance in accordance with the offer's terms and conditions by the due date, the offer lapses by its own terms and the supplier bears the costs of nonperformance. *Comptech Corp.*, ASBCA No. 55526, 08-2 BCA ¶ 33,982 at 168,082-83 (collecting authorities); *Syracuse Int'l Technologies*, ASBCA No. 55607, 08-1 BCA ¶ 33,742 at 167,043; *Rex Systems, Inc.*, ASBCA No. 45301, 93-3 BCA ¶ 26,065 at 129,565; FAR 13.004(b). *See also Vantage Associates, Inc.*, ASBCA No. 55647, 09-1 BCA ¶ 34,041, *aff'd,* 342 Fed. Appx. 619 (Fed. Cir. 2009) (government no longer bound to keep PO open when supplier asserts it cannot meet due date; court notes PO would lapse by its own terms when due date not met). Once its offer has lapsed, the offeror need take no action to cancel the offer, and the offeree supplier cannot thereafter bind the offeror by subsequently tendering full performance. Any continuation of performance is at its own risk. *Syracuse Int'l*, 08-1 BCA ¶ 33,742 at 167,043; *Klass Engineering, Inc.*, ASBCA No. 22052, 78-2 BCA ¶ 13,463 at 65,792.

FAR 13.302-4(b)(2), cited by appellant, refers to a CO's cancellation of a unilateral PO; the CO's notice to the "contractor" that the PO has been cancelled; and the CO's request for the contractor's written acceptance of cancellation. If the contractor does not accept the cancellation or claims costs as the result of beginning performance under the PO, the CO is to process the action as a termination. Given this context and the settled law reported above, FAR 13.302-4(b)(2) is properly read to apply to cancellations prior to the end of the performance period. When a PO lapses because the contractor does not deliver by the due date, as here, FAR 13.302-4's cancellation provisions do not apply. *Kaeper Machine, Inc. v. United States*, 74 Fed. Cl. 1, 7 (2006). FAR 49.101(c) refers to the government's refraining from terminations for convenience when the undelivered balance of a contract is less than $5,000 and does not apply. FAR 49.102 refers to terminations for convenience or default and is also inapplicable. FAR 52.213-1's fast pay procedures are irrelevant because appellant did not deliver items to a common carrier by the PO's due date and the PO lapsed.

Appellant alleges government delay but the record rather shows that appellant did not act expeditiously to ensure the PO's performance by the due date. Despite submitting a quotation to supply the material, appellant apparently was unfamiliar with it. However, it was not until 1 March 2010, 24 days after PO award on 5 February 2010, that appellant notified Ms. Scott that it had no idea what the material was. It took the government 16 days to respond, but on 29 April 2010, 31 days after Ms. Scott's 29 March 2010 response to appellant's second inquiry concerning the material specification, appellant informed the government that it was on track to meet the due date. It was not until

20 days thereafter, on 19 May 2010, that appellant notified the government that it was having trouble finding suppliers. Regardless, it placed its order for material the next day, calling for delivery by 1 June 2010, which was three days after the PO's 29 May 2010 due date. Even if we were to accept, without deciding, appellant's implication that the holiday weekend was pertinent to its ability to deliver by the PO's due date, it claims only that it had begun production by 1 June. Delivery to New Cumberland, Pennsylvania, the designated delivery destination, was not expected until 14 June 2010.

Based upon Ms. Crew's 7 June 2010 e-mail to appellant that the government's engineers deemed the specifications insufficient, and drawing reasonable inferences in appellant's favor, we assume without deciding that there were problems with the PO's material specifications and with government engineer Wilde's interpretation of them. This is also suggested by appellant's 28 June 2010 engineering report, although it was dated 30 days after the PO's due date. However, appellant never asked for an extension of the PO's delivery due date at the time. Moreover, as appellant acknowledged in its interrogatory responses, the PO was not modified by an authorized government official to impose a MIL-DTL-46100 or other requirement and appellant undertook production using the PO's stated HHS standard. It claims to have delivered compliant materials and, for purposes of its motion, the government accepts that it did. Under these circumstances appellant has not raised a triable issue as to delay because of a defective specification.

There are no genuine issues of material fact. Appellant did not meet the PO's due date; the PO lapsed; and appellant is not entitled to payment. The government is entitled to summary judgment in its favor as a matter of law.

DECISION

We grant the government's motion for summary judgment, deny appellant's cross-motion for summary judgment, and deny appellant's appeal.

Dated: 23 February 2012

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 57356, Appeal of Delta Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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