

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
DODS, Inc.) ASBCA No. 57816
)
Under Contract No. SPM4A7-11-M-E280)

APPEARANCE FOR THE APPELLANT: Mr. David Storey
President

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
DLA Chief Trial Attorney
Edward R. Murray, Esq.
Trial Attorney
DLA Aviation
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE CLARKE
PURSUANT TO RULE 12.3

DODS, Inc. (DODS) appeals the “termination” of a unilateral purchase order contending that the government delayed its performance causing it to fail to deliver in accordance with the order. The government contends that when DODS failed to deliver on time the unilateral purchase order lapsed. We have jurisdiction pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. DODS elected to have this appeal decided on the record pursuant to Rules 11 and 12.3.¹ We deny the appeal.

FINDINGS OF FACT

1. On 27 October 2010, Defense Logistics Agency Aviation (DLA) issued request for quotations No. SPM4A7-11-Q-1233 (R4, tab 7). The solicitation was for three aircraft fairings (R4, tab 7 at 4, 13, 15).

2. On 3 November 2010 DODS submitted its bid “without exception” in the amount of \$38,730.00 promising to deliver three aircraft fairings within 180 days in accordance with all specifications, standards and drawings cited in the solicitation (R4, tab 8).

¹ Both parties incorrectly refer to Rule 12.2 in their briefs. On 19 December 2011 DODS, Inc. elected to proceed under Rule 12.3.

3. On 9 December 2010 Purchase Order No. SPM4A7-11-M-E280 (PO E280) was issued to DODS for the three aircraft fairings (R4, tab 1). PO E280 was signed by the government's contracting officer but did not require a signature from and was not signed by DODS (*id.*). Delivery was required by 7 June 2011 (*id.* at 1, 13, 14).

4. The record includes a document referred to by the government as a "Contract Report" provided by DODS that records the direct hours worked on PO E280 (R4, tab 25). The Contract Report indicates that the first day worked on PO E280 was 17 February 2011, some 70 days after award, when Ms. LeBlanc worked 3.75 hours on the bill of materials (*id.* at 2). Prior to 7 June 2011, the Contract Report documents that Ms. LeBlanc was the only person working on PO E280 (R4, tab 25). She worked a total of 17 days (76.25 hours) between 17 February 2011 and 7 April 2011 mainly on drawings/prints, "autocad," and the bill of materials (*id.*).²

5. On 7 April 2011 Mr. Webber conducted a post-award conference with Mr. Storey and Ms. Janneke Beniest at DODS (R4, tab 9). Mr. Webber documented the meeting on a DD Form 1484 Post-Award Conference Record (*id.*). Mr. Webber made the following entries:

Contractor states Fiberglass, Aluminum, and Hardware will be purchased. Contractor states he is preparing RFQs (Request for Quotes)....

....

The FDD (Final Delivery Date) for this contract is June 7, 2011. Contractor states he can meet the delivery date. Note: as of the date of the conference, contractor states he was preparing RFQs. However, without knowing how long it will take for his vendors to manufacture or produce the material necessary for him to enter production, the contractor's delivery statement is somewhat ambitious and could prove to be unrealistic. There was no production or production employees in his facility as of the date of the conference.

(R4, tab 9 at 1-2) Mr. Webber also noted that DODS' heat treatment equipment must be "validated and certified" and adhesive must be tested before production could commence (*id.* at 4). Mr. Storey stated he needed clarification concerning a "hidden line" on a drawing and Mr. Webber told him to contact the "ESA" at the buying command (*id.*).

² The Contract Report also records five days (18.75 hours) of work in July 2011 and one day (4 hours) in December 2011 (R4, tab 25 at 3).

6. As part of the Rule 4 the government included its interrogatories and DODS' responses. Interrogatory 4 read:

All documents evidencing, describing, or related to any costs, expenses, or obligations you incurred during Contract performance, including but not limited to invoices, purchase orders, quotations, receipts, cancelled checks, payroll information, salaries and benefits information, travel expenses, and all indirect costs such as overhead and general and administrative costs.

(R4, tab 26 at 2) DODS' response to interrogatory 4 was "See Tab 4, none" (*id.* at 3).

7. On 19 April 2011 DODS sent a request to Ms. Gloria Williams, Contracting Officer (CO), listing eight drawings, two of which it did not have and six that had the wrong date (R4, tab 28). However, the government included evidence in the record that DODS downloaded the drawings it alleged it did not have on 9 December 2010 (R4, tab 17 at 2, 4, 7). The government also presented evidence that DODS had the correct versions of all but one of the documents listed as to which there was a minor discrepancy (R4, tabs 29-33). DODS did not rebut the government's evidence. We find that the issues with drawings listed in DODS' 19 April 2011 request did not delay its performance.

8. On 7 June 2011 Ms. LeBlanc emailed³ CO Williams a letter⁴ dated 6 June 2011 stating that "the engineering department has been working on the contract and has come across discrepancies in dates on a contract document provided to DODS INC." (R4, tab 11). The letter listed seven drawings and the "discrepancies"⁵ (*id.*).

9. DODS did not deliver the aircraft fairings on 7 June 2011 as required by PO E280. On 10 June 2011 the government issued Modification No. P00001 cancelling PO E280:

The above cited purchase order was an offer to purchase the supplies described therein provided that delivery was made

³ The email referenced PO E280 but has a date of 7 June 2006. It appears Ms. LeBlanc's email is set for 5 years prior to the actual date.

⁴ This letter was one of 17 virtually identical letters sent to CO Williams between 6 and 8 June 2011 claiming data discrepancies (R4, tab 12).

⁵ In its brief the government presents evidence that the discrepancies either did not exist or were insignificant (gov't br. ¶¶ 19-22). Because of the legal position we take in this decision we need not analyze the government's proof.

by 06/07/11. 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 for [the 3 aircraft fairings].

(R4, tab 2)

10. On 9 August 2011 DODS submitted a claim to the CO requesting that PO E280 be terminated for convenience (R4, tab 15). CO Janice Hicks denied DODS' claim on 13 October 2011 (R4, tab 16). DODS appealed the denial of its claim on 21 October 2011 and the appeal was docketed as ASBCA No. 57816 on 24 October 2011.

DECISION

We have jurisdiction to determine if a unilateral purchase order "ripened" into a binding contract as a result of DODS' actions. *Friedman Enterprises, Inc.*, ASBCA No. 54886, 05-2 BCA ¶ 32,991 at 163,520 (The Board has jurisdiction to determine whether a unilateral purchase order "ripened into an obligation binding" on the government.).

DODS contends that it was entitled to excusable delays caused by the government's alleged defective drawings among other things and requests a termination for convenience. The government contends that the unilateral purchase order lapsed when DODS failed to deliver on time. DODS' position assumes the existence of an option contract. For the reasons stated below, we conclude that DODS' meager performance was insufficient to create an option contract and its associated irrevocable offer.

PO E280 was a unilateral purchase order (finding 3). A unilateral purchase order is an offer to create an option contract. *Comptech Corp.*, ASBCA No. 55526, 08-2 BCA ¶ 33,982 at 168,082 (Purchase orders are not accompanied by a promissory acceptance and comprise simply an offer to enter into a unilateral contract.). Purchase orders have three distinct phases – (1) the offer, (2) the option contract, and (3) the completed purchase and sale contract. In the offer phase there is no contract and the government is free to revoke the offer at any time before an option contract arises. *Comptech*, 08-2 BCA ¶ 33,982 at 168,082 ("Ordinarily, an offer is revocable prior to acceptance, and its revocation precludes the acceptance of that offer."). If the contractor engages in "substantial performance" in attempting to supply the item an option contract is created wherein the offer becomes irrevocable. *Commwise, Inc. Joseph Wetzel d/b/a Avetel*, ASBCA No. 56580, 09-2 BCA ¶ 34,240 at 169,230 ("Commwise's substantial performance in attempting to supply the items created an 'option contract', and obliged the government to keep the offer open until the date specified for delivery, or in the absence of such a date, for a reasonable time."); *Comptech*, 08-2 BCA ¶ 33,982 at

168,083 (“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.”). If the contractor successfully performs the contract by delivering conforming services or supplies on time a “completed purchase and sale contract” comes into existence. *Comptech*, 08-2 BCA ¶ 33,982 at 168,083 (An optionor’s binding promise not to 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 acceptance of the offer by performance.). If the contractor fails to successfully perform, the option contract and purchase order lapse without the need for any action on the part of the government. *Id.* at 168,083-84.

The “substantial performance” standard is embodied in FAR 13.004(b):

(b) When appropriate, the contracting officer may ask the supplier to indicate acceptance of an order by notification to the Government, preferably in writing, as defined at 2.101. In other circumstances, the supplier may indicate acceptance by furnishing the supplies or services ordered or by proceeding with the work to the point where substantial performance has occurred.

The Board recognizes the “substantial performance” standard. *Comptech*, 08-2 BCA ¶ 33,982 at 168,083 (“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.”).

DODS’ performance cannot be characterized as “substantial” or even serious for that matter. DODS did nothing for the first 70 days after the date of PO E280 (finding 4). The only performance under the contract was by Ms. LeBlanc who worked a total of 76.25 hours during 17 days between 17 February 2011 and 7 April 2011 primarily with drawings (finding 4). On 7 April 2011, 117 days from the date of PO E280, there was no production at DODS’ facility (finding 5). There is no evidence in the record that DODS ordered material needed for production (findings 5, 6). The alleged drawing discrepancies did not delay it (finding 7). Since there was no “substantial performance,” no option contract was formed. The government had the right to revoke the offer at any time. The revocable offer then lapsed when the delivery date arrived without delivery of the three aircraft fairings.

DODS’ request that the Board convert the “termination” to a termination for convenience depends upon the existence of an option contract. Premature cancellation of a purchase order when an option contract is in effect is considered to be a termination for convenience. *Michigan Hardware Co.*, ASBCA No. 24419, 80-2 BCA ¶ 14,670 at 72,349 (termination of a purchase order when 85 percent of performance completed was

a termination for convenience); *Klass Engineering, Inc.*, ASBCA No. 22052, 78-2 BCA ¶ 13,236 at 64,719, *recon. denied*, 78-2 BCA ¶ 13,463 (Because a purchase order was withdrawn at the time appellant had an enforceable unilateral contract the Board held that the contract was terminated for convenience.). Since we have held that no option contract came into existence, DODS has no basis for a termination for convenience.

CONCLUSION

For the reasons stated above DODS' appeal is denied.

Dated: 18 June 2012



CRAIG S. CLARKE
Administrative Judge
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. 57816, Appeal of DODS, Inc., rendered in conformance with the Board's Charter.

Dated:

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