

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
DODS, Inc.) ASBCA No. 57817
Under Contract No. SPM4A7-11-M-K222)

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 6 January 2011, Defense Logistics Agency Aviation (DLA) issued request for quotations No. SPM4A7-11-Q-3650 (R4, tab 7). The solicitation was for one aircraft stiffener to be delivered within “180 days ARO”² (*id.* at 1, 3, 11). The solicitation, CLIN 9906, also required a first article (FA) sample within 90 days (*id.* at 13). The solicitation identified 67 drawings and specifications which were required to manufacture the item (R4, tab 7 at 5-11).

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.

² The definition of “ARO” is not in the record, however, PO K222 identifies the first article delivery date as “90 days ARO JUNE 5, 2011” from which we infer that “ARO” means “After Receipt of Order” or words to that effect.

2. On 12 January 2011 DODS submitted a quote in response to the solicitation (R4, tab 8). DODS bid "WITHOUT EXCEPTION" one first article sample within 90 days and one production unit within 180 days (*id.* at 1).

3. On 4 March 2011 Purchase Order No. SPM4A7-11-M-K222 (PO K222) was issued to DODS for the aircraft stiffener (R4, tab 1). PO K222 was signed by the government's contracting officer but did not require a signature and was not signed by DODS (*id.* at 1). The first article was to be delivered "90 days ARO JUNE 5, 2011" (*id.* at 2).

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 K222 (R4, tab 23). The Contract Report indicates that the first day worked on PO K222 was 12 May 2011, some 69 days from the date of award, when Ms. LeBlanc spent four hours printing and organizing specifications and documents (*id.*). Prior to the 5 June 2011 FA due date the Contract Report indicates that Ms. LeBlanc, the only person working on PO K222, worked six days and a total of 17.25 hours between 12 May 2011 and 20 May 2011 (*id.*).

5. On 13 May 2011 Mr. Webber, government quality assurance representative, 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 entry:

According to the contract, the First Article is to be delivered on June 5, 2011. As of the date of this conference, the contract was not in production. The contractor did not anticipate release of RFQs (Request for Quotes) to his vendors until May 16th (at the earliest). It is highly unlikely that the contractor will meet the First Article delivery date as stipulated in the contract. Contractor states he has requested an extension.

(R4, tab 9 at 2). The post-award conference record does not indicate that DODS had any questions or concerns about the technical data. Under "SPECIFICATION INTERPRETATION," the record states "Contractor states he is familiar with, and understands the applicable specifications involved with this procurement" (*id.* 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 relating 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 24 at 2) DODS' response to interrogatory 4 was "See Tab 4, none" (*id.* at 3).

7. On 17 May 2011 Ms. Beniast, DODS, sent a "Delay Notice" to Ms. Williams, contracting officer, requesting an extension on PO K222 (R4, tab 10). The Delay Notice read in pertinent part:

Regarding Contract SPM4A7-11-M-K222, this contract has a First Article and participation from DCMA is 100%. Engineering is complete. The Post Award was performed on May 13, 2011. Request extension per the contract requirements, 120 [sic] from the date of the Post Award. New Delivery of First Article: September 13, 2011.

(R4, tab 10 at 2)

8. CO Williams denied DODS' request for a delay in PO K222's first article the next day (R4, tab 11). She stated, "[p]er DCMA, as of May 13, 2011, you had not begun any production work on the contract and had not even issued RFQ's to suppliers. It is clear that the post-award conference did not delay your work on this contract. The original dates will stand." (*Id.*)

9. DODS failed to deliver the first article on 5 June 2011 as required by PO K222.

10. On 7 June 2011³, two days after the FA delivery date, Ms. LeBlanc emailed CO Williams a 6 June 2011⁴ letter including a list of twelve drawings that DODS asserted had "discrepancies in dates" (R4, tab 12 at 2). However, the government included evidence in the record relating to each of the listed drawings illustrating that DODS had the correct versions of the drawings. The contract listed all of the drawings required for production of the aircraft stiffener (R4, tab 1 at 5-11). The government then compared the drawings listed in DODS' 7 June 2011 letter with the contract and found that DODS had the correct versions of the drawings (R4, tabs 12, 25-28). DODS did not

³ This email refers to PO K222 but is dated 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 13).

rebut the government's evidence. We find that issues with the drawings listed in DODS' 7 June 2011 letter did not delay its performance.

11. On 10 June 2011 the government issued Modification No. P00001 cancelling PO K222:

The above cited purchase order was an offer to purchase the supplies described therein provided that first article delivery was made by 06/05/2011. 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 aircraft stiffener].

(R4, tab 2)

12. On 9 August 2011 DODS submitted a claim to the CO requesting that PO K222 be terminated for convenience (R4, tab 16). CO Janice Hicks denied DODS' claim on 13 October 2011 (R4, tab 17). DODS appealed the denial of its claim on 21 October 2011 and the appeal was docketed as ASBCA No. 57817 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 K222 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 obligated 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).

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 service 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 69 days after the date of PO K222 (finding 4). The only performance under the contract was by Ms. LeBlanc who worked a total of 17.25 hours during 6 days between 12 May 2011 and 20 May 2011 primarily with drawings (finding 4). On 13 May 2011, 70 days from the date of PO K222, 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 10). Since there was no “substantial performance,” no option contract was formed. The government had the right to revoke the offer at any

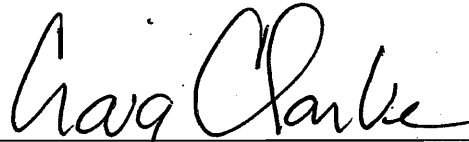
time. The revocable offer then lapsed when the delivery date arrived without delivery of the first article.

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 complete 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. 57817, Appeal of DODS, Inc., rendered in conformance with the Board's Charter.

Dated:

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