

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Paranetics Technology, Inc.) ASBCA No. 55329
)
Under Contract No. DAAH01-02-D-0013)

APPEARANCE FOR THE APPELLANT: Mr. Joseph R. Little
President

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq
Acting Chief Trial Attorney
CPT John J. Pritchard, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS

This is an appeal from a contracting officer’s decision denying a claim for \$104,983 in unabsorbed overhead. Only entitlement is before us.

FINDINGS OF FACT

1. On 13 June 2001, the Army Aviation and Missile Command (AMCOM) issued solicitation No. DAAH01-R-0135 for a firm fixed price requirements type contract for parachute assemblies for the MQM-107 aerial target drone. The solicitation contemplated a base year with a single first article and four option years. The solicitation was set aside for small businesses. AMCOM and its customer, the Air Force, had a critical need for the assemblies. (R4, tabs 5, 19, 34, 36)

2. Drawing No. 13366255, the top assembly drawing, included the following note:

1. INTERPRET DRAWING IN ACCORDANCE WITH
DOD-STD-100.

(R4, tab 67 at 1)

3. Drawing No. 13366263 (labeled a specification control drawing) depicted the double D-ring, which connected the parachute canopy to the drogue chute (R4, tab 67 at 15; tr. 2/38-39). The lower left-hand corner of the drawing contained a block entitled “SUGGESTED SOURCES OF SUPPLY,” listing U.S. Forgecraft Corporation (Forgecraft) as a potential source of supply. Note 1 on the drawing stated as follows:

IDENTIFICATION OF THE “SUGGESTED SOURCES OF SUPPLY” HEREON IS NOT TO BE CONSTRUED AS A GUARANTEE OF PRESENT OR CONTINUED AVAILABILITY AS A SOURCE OF SUPPLY FOR THE ITEM.

(R4, tab 67 at 15)

4. Paragraph 201.4.2 of DOD-STD-100C, entitled “Specification control drawing,” provided, in part, as follows:

A specification control drawing depicts an existing commercial item or vendor-developed item . . . available on an unrestricted basis . . . (footnotes omitted). The drawing, under the heading “SUGGESTED SOURCE(S) OF SUPPLY” shall list the name . . . and item identification number of two or more known sources unless . . . there is only one source. [T]he notation “SPECIFICATION CONTROL DRAWING” shall appear above the title block. .

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Note 1: The suggested sources listed on a specification control drawing are not intended to represent the only source for the item.

(Ex. G-2)

5. Paragraph 201.4.3, entitled “Source control drawing,” provided, in part, as follows:

A source control drawing depicts an existing commercial or vendor item which exclusively provides the . . . characteristics required . . . (footnotes omitted). Quality conformance inspection and approval procedure shall be stated on the drawing or in a document referenced on the drawing. The drawing shall include the following:

“ONLY THE ITEM DESCRIBED ON THIS DRAWING WHEN PROCURED FROM THE VENDOR(S) LISTED HEREON IS APPROVED. . . .

The drawing shall include under the heading “APPROVED SOURCES OF SUPPLY,” the name and . . . and item identification number of each item that has been tested and approved for use. . . . In addition “SOURCE CONTROL DRAWING” shall be shown adjacent to the title block. . . .

(Ex. G-2)

6. The DoD standard further required that both specification control drawings and source control drawings contain a disclaimer which states as follows:

IDENTIFICATION OF THE “SUGGESTED SOURCE(S) OF SUPPLY” HEREON IS NOT TO BE CONSTRUED AS A GUARANTEE OF PRESENT OR CONTINUED AVAILABILITY AS A SOURCE OF SUPPLY FOR THE ITEM. . . .

(Ex. G-2)

7. We find that drawing No. 13366263 was a specification control drawing.

8. On 15 February 2002, AMCOM awarded Contract No. DAAH01-02-D-0013 to appellant, Paranetics Technology, Inc. AMCOM simultaneously issued delivery order (DO) 0001 for the first article and a production quantity of 88 assemblies. The delivery date for the first article was 20 April 2002 and the delivery date for the production quantity was 30 September 2002. (R4, tab 2)

9. On 28 February 2002, the contracting officer received an agency-level protest from a disappointed bidder (R4, tab 4). The contracting officer issued a stop work order on 28 February 2002 (R4, tabs 6, 7). FAR 52.233-3 PROTEST AFTER AWARD (AUG 1996), provides, in part, as follows:

(a) Upon receipt of a . . . protest . . . the Contracting Officer may . . . direct the Contractor to stop . . . work. . . .

(b) . . . The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, . . . if

(1) The stop-work order results in an increase in the time required for, or in the Contractor’s cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts its right to an adjustment within 30 days after the end of the period of work stoppage. . . .

10. The contracting officer rescinded the stop work order 39 days later on 8 April 2002 (R4, tab 16).

11. Mr. Joseph R. Little, appellant's president, testified that he discussed filing a claim for the delay caused by the protest with the contracting office (tr. 2/7). He did not identify the government representative to whom he spoke or the date on which the alleged conversation took place. Neither the written record nor the testimony of AMCOM's witnesses corroborated Mr. Little's contention. He admitted at the hearing that he did not file a written claim within 30 days. (Tr. 2/7) We find that appellant did not comply with the 30-day requirement of FAR 52.233-3.

12. As a result of the protest, AMCOM extended the delivery date for the first article until 14 June 2002 and the delivery date for the production quantity until 25 November 2002 (30 items), 25 December 2002 (28 items), and 25 January 2003 (30 items) (R4, tab 2).

13. On or about 8 April 2002, Mr. Little learned that Forgecraft, the suggested source for the double D-rings, had declared bankruptcy (tr. 2/27). He contacted Bourdon Forge Company, Inc. (Bourdon), a company with which he had done business in the past to see if it could supply the rings. He did not place an order at that time due to the expense of retooling. (Tr. 2/27-29)

14. On 4 September 2002, AMCOM's Redstone Arsenal notified appellant that the first article had been approved and that it could proceed with the production quantity (R4, tab 22).

15. In the belief that "the government was in the risk position . . . because . . . [the double-D ring] was a sole source" item, Mr. Little made minimal efforts to locate another source and did not notify AMCOM that Forgecraft was in bankruptcy until approximately 29 October 2002 (R4, tab 71; tr. 2/13-14). At that time, he advised that Bourdon expected to acquire the dies from Forgecraft and might be able to deliver the rings in 14 to 16 weeks. (R4, tab 71; tr. 2/13-14)

16. DO 0002 was issued on 12 November 2002 for a quantity of 71 assemblies, with 30 assemblies each to be delivered on 25 May and 25 June respectively, and 11 assemblies to be delivered on 25 July 2003 (R4, tab 26).

17. During a pre-installation inspection on 27 November 2002, Redstone Arsenal found that one of the reference lines was not routed correctly. Since the defect might

cause the lines to tangle, it rejected the first article despite its earlier acceptance (R4, tab 28).

18. Appellant started production on or about 10 December 2002 (R4, tab 29).

19. Appellant notified AMCOM on 16 December 2002 that Bourdon had not yet acquired the die for the double D-ring and asked if there was an alternative source for the part or whether rings from old assemblies could be reused (R4, tab 30).

20. On 5 March 2003, appellant advised AMCOM that it had purchased 68 double D-rings made by Forgecraft from a distributor. The rings were in the distributor's inventory when Forgecraft declared bankruptcy. (R4, tab 35; tr. 2/33)

21. AMCOM looked for an alternate source through 17 July 2003 when it learned that Bourdon might be able to supply the rings (R4, tabs 32, 33, 34, 35, 45).

22. On 7 April 2003, AMCOM issued DO 0003 for 33 assemblies with a delivery date of 6 December 2003 (R4, tab 37).

23. On 22 May 2003, appellant advised that it would not be able to make a shipment that month due to the lack of double D-rings. Appellant also advised that it considered the lack of double D-rings to be a government caused delay. (R4, tab 39)

24. On 17 July 2003, Bourdon provided a quotation to appellant for 323 double D-rings with delivery in 16 to 18 weeks (R4, tab 43).

25. On 8 August 2003, appellant advised that it had received a quotation from Bourdon and requested AMCOM to issue a contract modification for the increased cost of the rings (R4, tab 46). On 28 August 2003, appellant again requested a modification for the price increase (R4, tab 49).

26. On 9 October 2003, by bilateral modifications, the delivery dates for DO 0002 (71 items) were extended until 30 April 2004 (35 items) and 30 May 2004 (36 items) and DO 0003 (33 assemblies) until 30 June 2004, and increased the price by \$59.32 per unit. The modifications stated that "[t]his delay in delivery is due to the government's suggested source identified on the drawing (for the double D-ring's) having gone out of business." (R4, tabs 54, 55; tr. 2/62)

27. On 30 July 2004, appellant submitted a certified claim for unabsorbed overhead to the contracting officer in the amount of \$104,983 (R4, tabs 57, 63). The contracting officer denied the claim on 1 November 2005 (R4, tab 64).

28. Appellant appealed the denial to this Board on 26 January 2006 and we docketed the appeal as ASBCA No. 55329.

29. On 1 February 2007, the Defense Contract Audit Agency (DCAA) issued an audit report on the price adjustment claim. DCAA found that appellant had been awarded seven government contracts between 15 February 2002 and 30 June 2004 (the actual dates of performance). The contracts totaled approximately \$3,000,000. DCAA concluded that “Paranetics was able to take on other work to make up for any lost revenue due to the alleged delay or disruption” of the subject contract during the delay period. (Supp. R4, tab 86) At the hearing, Mr. Little confirmed that Paranetics had some of its highest years of revenue ever during the alleged delay period (tr. 2/31).

DECISION

Appellant argues that it is entitled to \$104,983 in unabsorbed overhead pursuant to the *Eichleay* formula because the suggested source on a specification control drawing went out of business after contract award, resulting in a protracted search for an alternate source. According to appellant, DO 0001 was delayed by 430 days (25 January 2003 through 30 March 2004); DO 0002 was delayed by 310 days (25 July 2003 through 30 May 2004); and DO 0003 was delayed by 207 days (6 December 2003 until 30 June 2004). In addition, appellant asserts that a stop work order relating to a bid protest delayed the work by an additional 39 days (28 February through 8 April 2002). (R4, tab 57)

To recover *Eichleay* damages, a contractor must meet the following prerequisites:

First there must have been a government-caused delay of uncertain duration. *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1056 (Fed. Cir. 1993). The contractor must also show that the delay extended the original time for performance or that, even though the contract was finished within the required time period, the contractor incurred additional costs because he had planned to finish earlier. *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1370 (Fed. Cir. 2003). Finally, the contractor must have been on standby and unable to take on other work during the delay period. *Interstate Gen.*, 12 F.3d at 1056-57.

Nicon, Inc. v. United States, 331 F.3d 878, 883 (Fed. Cir. 2003), citing *Eichleay Corp.*, ASBCA 5183, 60-2 BCA ¶ 2688 at 13,568; *Capital Electric Co. v. United States*, 729 F.2d 743, 747 (Fed. Cir. 1984). Appellant has failed to prove that it is entitled to unabsorbed overhead.

In connection with the 39-day stop work order issued for the bid protest, appellant failed to timely request an adjustment. FAR 52.233-3 PROTEST AFTER AWARD (AUG 1996) requires the contractor to assert a claim for an adjustment “within 30 days after the end of the period of work stoppage.” Appellant did not comply with this requirement. Thus, its claim for unabsorbed overhead relating to the stop work order is untimely.

As to the remaining alleged delays, appellant argues that the double D-rings were a sole source item. In appellant’s view, this renders the government responsible for the delays resulting from Forgecraft’s bankruptcy and the search for a new source. Appellant is incorrect.

The double D-ring was not a sole source item. If drawing No. 13366263 was a sole source drawing, it would have been identified as a source control drawing instead of a specification control drawing. It would have included a note stating that “[o]nly the item described on this drawing when the vendor(s) listed hereon is approved” and set forth quality conformance inspection and approval procedures. Specification control drawing No. 13366263 did not include any of this information. Moreover, the drawing expressly disclaimed responsibility for the “present or continued availability” of the item from the suggested source. Although appellant alleges that the drawing was defective because it did not list two sources as required by paragraph 201.4.2 of DOD-STD-100C, the paragraph provides an exception when “there is only one source.” The evidence is that Bourdon was not a possible source for the double D-rings until long after contract award.

The appeal is denied.

Dated: 12 October 2007

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

ALEXANDER YOUNGER
Administrative Judge
Acting 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. 55329, Appeal of Paranetics Technology, Inc., rendered in conformance with the Board's Charter.

Dated:

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