

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Yonir Technologies Inc.) ASBCA No. 56736
)
Under Contract No. SPM7A5-08-M-1189)

APPEARANCE FOR THE APPELLANT: Mr. David Felder
President

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
DLA Chief Trial Attorney
Vasso K. Monta, Esq.
Trial Attorney
Defense Supply Center
Columbus, OH

OPINION BY ADMINISTRATIVE JUDGE TING

Defense Supply Center Columbus (DSCC or the government) awarded a contract to Yonir Technologies Inc. (appellant or Yonir) to supply 12 Magnetron units for use in F-4 aircraft. The contract was terminated for default when appellant's First Article Test (FAT) samples failed inspection and when it refused to accept a no-cost cancellation of the contract. While acknowledging that FAT by the government was a contract requirement, appellant nevertheless argues that the government accepted its offer to provide Magnetron units only in a "serviceable condition." Appellant argues that the termination was improper and the government breached the contract.

Yonir elected to proceed on the written record without a hearing under Board Rule 11. At the Board's request, both parties have provided additional information supplementing the record.¹

FINDINGS OF FACT

1. In December 2007, DSCC Aviation Supply Chain Detachment issued an RFQ to procure 12 Magnetron Frequency Control units, NSN: 1430-00-051-7548, 610R874 REV D DD (Magnetron units). The items specified were Northrop Grumman Systems configurations P/N 610R874G01 and P/N 616R319G01. The RFQ specified that "GOVERNMENT FIRST ARTICLES TEST APPLIES." Item 9906 of the RFQ referred

¹ Yonir's submission is dated 15 March 2010 and DSCC's submission is dated 18 March 2010.

to FAR 52.209-4 for information concerning the FAT requirement. (R4, tab 1 at 2, 4) The Magnetron units are used on F-4 aircraft (supp. R4, tab G-3, ¶ 2).

2. David Felder (Felder) is president of Yonir. On 29 January 2008, he sent Sara B. Finney (Finney) of DSCC an e-mail concerning the RFQ (R4, tab 3). Felder advised Finney that “We have 12 units in stock.... These units are not in NS [New Surplus] condition.” The e-mail also said that “[y]ou should note that the units cannot be overhauled. They are closed and they can be either good or bad.” The e-mail went on to say “If you wish us to quote for our units in Serviceable condition we will gladly do that. I just do not want to waste your time and ours.” (R4, tab 3) In reply on the same day, Finney’s e-mail said “I am going to look into this a little further, and will get back with you” (*id.*).

3. Felder’s 7 February 2008 e-mail to Finney asked “Do you have any news on what you wish to do?” (R4, tab 3). Finney’s reply e-mail the same day said “Yes, please provide a quote on the 12 each that you have available to include the FAT. According to the product specialist, and in accordance with the RFQ, FAT will be required.” (*Id.*)

4. Felder forwarded his quote by way of an e-mail attachment on 8 February 2008. The quote was in response to SPM7A5-08-Q-0198. It was for 12 magnetron units, NSN: 1430-00-051-7548 at \$6,750 each for a total amount of \$81,000. Condition of the units offered was stated as “SV.”² The quote stated:

We are offering units in serviceable condition. All units will be sent for testing at Radio Research Instrument Co., Cage 57174. The test will be performed in accordance with all relevant technical orders. A test report will be issued to every unit.

Please note that a unit that fail testing will not be repaired as there is no repair manual for the part. Consequently some variations in the final delivered quantity is possible. We will ship 15 units for testing.

We find what Felder meant by providing Magnetron units in “serviceable condition” was that they were not new and unused and could not be repaired, but Yonir would send the

² According to Yonir, SVC is an “industry abbreviation for Serviceable” (app. opening br. at 6). In supplementing the record, both parties provided the Board with various non-contractual definitions of the term serviceable (app. submission of 15 March 2010 and DSCC submission of 18 March 2010). In entering into Contract 1189, the record does not show there was agreement that the Magnetron units Yonir was to provide would be “serviceable” only.

units for testing by an independent laboratory to “all relevant technical orders.” The RFQ did not require new nor unused units. Neither did the RFQ require testing by an independent laboratory and testing to any relevant Technical Order (TO) standard.

5. Finney’s 11 February 2008 e-mail sent at 4:15 p.m. acknowledged receipt of the quote. Notwithstanding Felder’s reference to testing by Radio-Research Instrument Co., Inc. (Radio-Research), she reminded Felder that under the solicitation, “the requirement is for Government FAT to be done at Hill AFB.”³ Her e-mail also asked whether the quoted unit price included the cost of FAT, and whether FAT cost could be shown as a separate line item. (R4, tab 3)

6. In his e-mail to Finney sent on 11 February 2008 at 4:59 p.m., Felder asked:

Can you clarify what FAT is? We plan to send the units to Radio Research so we are certain that the units which we supply are in SVC condition. Please kindly clarify exactly what you wish to do as our price to you includes the certification by Radio Research.

(App. br., appx. A)

7. Finney’s 11 February 2008 e-mail sent at 5:07 p.m. to Felder forwarded an attachment—the RFQ—and advised that the FAT requirements are cited in Clauses I09A05 and Clause I09D06. The e-mail went on to say “Basically, 3 units would be sent to Hill AFB for testing within 30 days of receipt of order. The Government would have 120 days to test and notify you of the results.” (R4, tab 3 at 11)

8. Finney’s 13 February 2008 e-mail at 1:04 p.m. to Donna Andren (Andren) of Yonir stated that “I am still in need of a response to the below regarding FAT” (R4, tab 3). We find Finney wanted to confirm if FAT at Hill AFB would be acceptable to Yonir. Andren’s 13 February 2008 e-mail response at 4:42 p.m. to Finney said “I spoke to David, and we agree to the ‘FAT’ clause” (*id.*).

9. Finney spoke to Andren on 14 February 2008. During that conversation, Finney was told: “No charge for FAT,” and “Unit price @ \$6750 for 12 as quoted.” (R4, tab 3 at 11) Finney’s 14 February 2008 e-mail at 11 a.m. to Andren proposed “\$5470 each for the quantity of 12 each for your consideration” and said “Please review and advise by 2/18/08 if this is acceptable.” The e-mail also sought clarification of Yonir’s delivery time inasmuch as FAT testing “will take up to 150 days.” (R4, tab 3) In reply, Andren

³ Hill AFB, Utah, is the Engineering Support Activity (ESA) for the Magnetron units procured in this case. It determines the technical requirements for this item and evaluates first article submissions (supp. R4, tab G-3, ¶ 3).

wrote that Yonir “will supply the remainder units within 30 days of first article completion of testing.” Andren also proposed splitting the parties’ price difference in half at \$6,110 per unit. (*Id.*).

10. In an e-mail sent to Felder on 19 February 2008 at 10:01 a.m., Finney stated “I will need you to complete clause I11C01, Government Surplus Material, in the attached RFQ, and submit it to me before the order can be issued for this requirement” (app. rebuttal evidence, ex. 9).

11. On 21 February 2008, Yonir faxed to Finney the representations required under Clause I11C01, 52.211-9000, GOVERNMENT SURPLUS MATERIAL (APR 2002) DLAD. Under this clause, the offeror was required to make certain representations with respect to the surplus material offered. The RFQ Yonir completed included its representation that the material it offered was not new, was not unused, and was not of such age or so deteriorated as to impair its usefulness or safety. (R4, tab 3 at 7-10)

12. Thereafter, DSCC issued Contract 1189, Order For Supplies Or Services, for 12 Magnetron units for \$73,320 or \$6,110 each. Yonir accepted the contract on 27 February 2008. Finney signed the contract as CO for DSCC. (R4, tab 1; supp. R4, tab G-1) There is no evidence that the parties incorporated appellant’s 8 February 2008 quote as a part of the contract.⁴

13. In his e-mail sent on 27 February 2008 at 2:39 p.m. to Finney, Felder acknowledged receipt of Contract 1189. He apologized for not being totally familiar with all procedures and asked two questions: (1) what did the reference to 610R874 REV D DD mean, and (2) whether the reference to inspection and acceptance at origin refer to the FAT. Finney’s response at 3:45 p.m. stated that the reference to 610R875 REV D DD would not “effect [sic] this order.” Her e-mail went on to say “The delivery schedule is for the FAT units to be delivered to Hill AFB within 30 days after the date of the order” (app. rebuttal evidence, ex. 10).

14. Contract 1189, as awarded, described the item procured as “CONTROL, MAGNETRON FREQUENCY” 610R874 REV D DD, NORTHROP GRUMMAN SYSTEMS P/N 610R874G01 or P/N 616R319G01. Section B of the contract provides that “GOVERNMENT FIRST ARTICLE TEST APPLIES.” Item 9906 of the contract refers to “FAR 52.209-4 for information concerning the FAT requirement.” (Supp. R4, tab G-1) The text of the contract did not mention terms like “serviceable condition,” “New Surplus,” or testing by an independent laboratory to any TO standard.

⁴ We note appellant’s 8 February 2008 quote contains a different unit price from the unit price the parties finally agreed upon.

15. The contract as awarded included Clause I49A15, FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) and Clause I49A01, FAR 52.249-1, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SHORT FORM) (APR 1984) (supp. R4 at 11). It also included Clause I09A05, FAR 52.209-4, FIRST ARTICLE APPROVAL – GOVERNMENT TESTING (SEP 1989). This clause provides, in part:

(d) If the Contractor fails to deliver any first article on time, or the Contracting Officer disapproves any first article, the Contractor shall be deemed to have failed to make delivery within the meaning of the Default clause of this contract.

In addition, the contract included Clause I09D06, 52.209-9C11, ADDITIONAL REQUIREMENTS – FIRST ARTICLE APPROVAL – GOVERNMENT TESTING (SEP 2005), DSCC, which required at subparagraph 4 that prior to shipment of the first article, the contractor must present the samples to the DCMA QAR for inspection for compliance with specification requirements. (Supp. R4, tab G-1 at 11)

16. Contract 1189 included as well Clause D46D03, 52.246-9C41, PACKING AND MARKING REQUIREMENTS (FEB 2004), DSCC, which provides, in part:

Packing and marking requirements for items being procured shall be accomplished as stated herein (See Section B). The items identified in Section B shall be Preserved, Packaged, Packed and Marked in accordance with MIL-STD-2073-ID and Marked in accordance with MIL-STD-129P.

(R4, tab 1 at 7)

17. Contract 1189 included, at Section D, Clause A42D01, 52.242-9C05, NOTIFICATION OF REJECTION OF UNILATERAL AWARD (OCT 2002), DSCC. This clause provides, in part:

NOTE: Not applicable to Bilateral Purchase orders.

The Government's offer to purchase, as evidenced by this order, is made on the basis of your quotation.

(Supp. R4, tab G-1 at 6)

18. The record shows that on 4 March 2008, Radio-Research tested the three Magnetron FAT samples furnished by Yonir. The Test Data Sheets show that it found the units in “good” condition mechanically. Electrically, Radio-Research conducted functional tests in accordance with TO 12P2-2APQ120-2-3-5 and noted no anomalies. (App. rebuttal evidence, exs. 15A, 15B, 15C)

19. When Hill AFB examined the FAT samples Yonir sent, it found the samples missing the contractually specified MIL-STD-129 marking and labeling requirements⁵, the DD250 or WAWF [Wide Area WorkFlow⁶] Receiving Report documentation⁷, the government QAR report, and the source documentation.⁸ Additionally, Hill AFB found that “[t]he connecting terminals have pieces of wire and clumps of solder on them,” and the samples “would require reworking before use.” Also, one of the three items was missing “the 23 Plate and required hardware,”⁹ and one of the items had its terminals marked in black instead of white as required by the contract drawing. Because the FAT samples failed visual inspections, Hill AFB did not proceed with functional testing. According to Hill AFB’s memorandum of 26 August 2008, the discrepancies contained one or more critical areas which would prevent “use” of the item. (R4, tab 5)

20. By letter dated 2 September 2008, contracting officer Kelly Penwell (CO

⁵ The requirements are set out in Section B and Clause D46D03, 52.246-9C41 PACKAGE AND MARKING REQUIREMENTS (FEB 2004) DSCC of Contract 1189 (supp. R4, tab G-1 at 4, 7).

⁶ See DFAR 252.246-7000, MATERIAL INSPECTION AND RECEIVING REPORT (MAR 2003).

⁷ See Clause E46B01 252.246-7000 MATERIAL INSPECTION AND RECEIVING REPORT (JAN 2008); DFARS 252.246-7000, MATERIAL INSPECTION AND RECEIVING REPORT (JUN 2004) DSCC (supp. R4, tab G-1 at 8).

⁸ When asked by Felder what he needed to do with the FAT samples under Contract 1189, the DCMA New York Quality Assurance Specialist (QAS) “skimmed through the contract” and “informed Mr. Felder that he could just ship the sample to Hill AFB” (supp. R4, tab G-4, ¶¶ 4-7). The QAS acknowledged that he missed Clause I09D06 which required QAR inspection prior to FAT sample shipment. Even though the QAS might have misled Felder, he was nevertheless on notice because the QAR inspection requirement appeared in full text as paragraph 4 of Clause I09D06 on page 9 of Contract 1189. (Supp. R4, tab G-1 at 9)

⁹ The 23 Plate on drawing 616R319 is an aluminum plate. Drawing 616R319 shows 2 each -24 (Machine Screw MS24693-C25). Drawing 411R890 shows 2 each (Nut Plates 1JA448810), and 4 each (Rivets MS20426AD3-4). These items are the missing hardware. The original discrepancy list was in error in referencing drawing Note 7; the requirement is actually drawing Note 6. (Gov’t ltr. of 18 March 2010, attach. 4).

Penwell) notified Yonir that its samples had failed the FAT. The letter said that the government wanted to obtain items “that were manufactured by an approved source and are usable.” (R4, tab 6)

21. Felder’s 2 September 2008 e-mail to CO Penwell stated that the FAT samples shipped to Hill AFB were tested in accordance with “the requirements of TO 12P2-2APQ120-2-3-5” and there was nothing in the Hill AFB FAT report “to indicate that the First Article Units were tested as per the applicable Technical Order.” Yonir protested CO Penwell’s findings and asked that no action be taken until its protest was “fully investigated.” (R4, tab 7)

22. In her e-mail reply sent on 2 September 2008, CO Penwell forwarded the second page of the FAT Report from Hill AFB which “must have not been attached to the fax sent this morning.” The e-mail went on to say that since Yonir failed to pass the FAT, the government was considering terminating the contract for default. Yonir was given the opportunity to present any facts which would excuse its failure to perform within 10 days after receipt of the e-mail. Felder’s 2 September 2008 e-mail reply maintained that it “made abundantly clear that we offered Control, Magnetron units that were taken out of APQ-120 units that we planned to send for testing at an independent lab and provide to the Government in SVC condition.” The e-mail stated that its e-mail exchanges with Finney left no room for doubt as to “what we offered and what the Government expected to receive.” (R4, tab 8)

23. Felder’s 3 September 2008 e-mail to CO Penwell proposed that the government (1) return the FAT units to Yonir “for the purpose of re-shipping them back to Hill AFB in a manner defined by you, and agreed to by DCMA,” (2) clarify to Hill AFB that “the...parts were ordered and should be in SVC condition and not New Surplus,” and (3) clarify in advance that the items “should be checked for functionality as indicated in the relevant APQ-120 Technical Order so as to verify that they are indeed Serviceable.” (R4, tab 8) On 2 October 2008, CO Penwell responded as follows:

It has been determined that the parts you provided cannot be accepted, and you will not be authorized to submit another First Article Test. In lieu of a termination for default, you will be given the opportunity to accept a no cost cancellation. The parts you sent for First Article Testing can be returned at your expense. Request that you respond with your

concurrence to a no cost cancellation and return of your parts within 3 business days.

(R4, tab 9)

24. Felder's 3 October 2008 e-mail to CO Penwell said "We disagree with your conclusion and do not accept your recommended solution." He maintained that "the delivered parts fully conform to those offered to the Government as the basis of our contract." (R4, tab 10)

25. On 6 October 2008, CO Penwell e-mailed Felder and explained:

The Government awarded the subject contract to you with the understanding that the parts could pass a First Article Test. Upon viewing the items, the Engineering Support Activity at Hill AFB stated that the submitted items were in very poor condition. Regardless of the testing, they were also received without any documentation, certs, or DD250, and were incorrectly marked, which led to a delay with Hill AFB identifying the items....

Yonir was told that the government had the right to terminate the contract for default for failure to provide a conforming FAT. Since such termination would have a negative impact on appellant's future business, CO Penwell said the government would be flexible and offer a no cost cancellation to resolve the dispute. (R4, tab 10)

26. Felder's 7 October 2008 e-mail reiterated the presentation it made to Finney in the quote submitted on 8 February 2008:

We are offering units in Serviceable condition. All units will be sent for testing at Radio Research Instrument Co. CAGE 57174. The test will be performed in accordance with all relevant technical orders. A test report will be issued for every unit.

With respect to CO Penwell's offer for a no cost cancellation, Felder said "We wish to present our case in full before the appropriate authority." (R4, tab 11)

27. CO Penwell's 8 October 2008 e-mail advised Felder that if Yonir would not accept a no-cost cancellation, she would have no alternative but to terminate Contract 1189 for default. Felder was advised that "[t]he termination for default will contain appeal rights, and you can appeal to the ASBCA or the court." He was also told to

contact an Alternative Dispute Resolution (ADR) specialist “[i]f you wish to pursue Alternative Resolution.” (R4, tab 13)

28. In a decision issued on 6 November 2008, CO Penwell terminated Contract 1189 for default. The decision said that “[y]our firm has failed to pass the First Article Test and refused to accept a no-cost cancellation that was offered by the Government.” (R4, tab 14) On 10 November 2008, the CO issued Modification No. P00001 confirming the 6 November 2008 termination (R4, tab 15). Appellant appealed by notice dated 4 February 2009. The Board docketed the appeal on 5 February 2009. By letter dated 16 April 2009, Yonir elected to proceed on the record without a hearing pursuant to Board Rule 11.

DECISION

The question before us centers on whether DSCC agreed to purchase the Magnetron units in what appellant referred to as in “serviceable condition.” What constitutes “serviceable condition” is not stated or defined in the RFQ. As far as we can determine, what appellant meant by Magnetrons in a “serviceable condition” was that they were not new or unused, “can be either good or bad,” and could not be overhauled, but could meet the standard of a TO if tested by an independent laboratory. (Findings 2, 4, 5)

As a threshold condition for contract formation, there must be an objective manifestation of voluntary, mutual assent. RESTATEMENT (SECOND) OF CONTRACTS (Restatement) § 18 (1981) To satisfy its burden to prove such a mutuality of intent appellant must show, by objective evidence, the existence of an offer and a reciprocal acceptance. *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003); *see also* Restatement § 22(1) (“The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties”).

The detailed e-mail negotiation history between Finney and Felder leading to award of the contract does not support appellant’s contention that DSCC agreed to accept Magnetron units in “serviceable condition” as defined in appellant’s quotation. In response to DSCC’s RFQ, Felder advised Finney by e-mail on 29 January 2008 that he had 12 Magnetron units in stock, but the units were not in “NS” or New Surplus condition and “cannot be overhauled.” Felder said “If you wish us to quote...our units in Serviceable condition we will gladly do that.” (Finding 2) Although Finney asked for a quote in her 7 February 2008 e-mail, there is no evidence that she agreed that “serviceable” units, as defined by Felder, would be acceptable. Finney did make clear, however, that “in accordance with the RFQ, FAT will be required.” (Finding 3)

Appellant submitted its quote on 8 February 2008. The quote said “We are offering units in serviceable condition.” As reflected in its quote, what appellant meant by “serviceable” units would be those that would pass an independent laboratory–Radio-Research–testing in accordance with “all relevant technical orders.” (Finding 4) Notwithstanding appellant’s reference to testing by an outside laboratory which the RFQ did not require, Finney’s 11 February 2008 e-mail to Felder reiterated that “the requirement is for Government FAT to be done at Hill AFB.” On the basis of the record before us, we cannot conclude that DSCC manifested acceptance of Yonir’s offer to provide “serviceable” Magnetron units if they would pass testing by an independent laboratory to TO 12P2-2APQ120-2-3-5. To the contrary, during negotiations, DSCC repeatedly went back to the RFQ requirements for FAT to be done by the government at Hill AFB.

On the other hand, there is no dispute that appellant understood FAT was a contract requirement. When it sought clarification on 11 February 2008, Finney referred appellant to the First Article clauses (Clause I09A05 and Clause I09D06). She also told appellant that “3 units would be sent to Hill AFB for testing within 30 days of receipt of order.” (Finding 7) Finally, when Finney e-mailed on 13 February 2008 to confirm if the FAT requirement would be acceptable to Yonir, she was told by Yonir’s Andren “I spoke to David [Felder], and we agree to the ‘FAT’ clause” (finding 8). We conclude that DSCC awarded Contract 1189 upon appellant’s acceptance of the FAT requirement.

Invoking Clause A42D01 which states “The Government’s offer to purchase, as evidenced by this order, is made on the basis of your quotation,” appellant argues that Contract 1189 “expressly incorporates the negotiation and Appellant’s offered terms” into the contract (app. opening br. at 5). As we have found, there simply is no evidence that the government, through Finney, agreed to accept the Magnetron units if they passed a TO test performed by an independent laboratory. The TO appellant relied upon is not found in the contract. Nor was the word “serviceable” found in the contract. As for incorporating appellant’s quote as a part of Contract 1189, Clause A42D01 provided that it was “Not applicable to Bilateral Purchase orders.” (Finding 17) Contract 1189 was a bilateral purchase order signed by both Yonir and the CO (finding 12).

When Hill AFB examined the FAT samples, it found the samples missing the contractually required MIL-STD-129 marking, the DD250 or WAWF Receiving Report documentation, the government QAR report, and the source documentation. Additionally, Hill AFB found that “[t]he connecting terminals have pieces of wire and clumps of solder on them,” and the samples “would require reworking before use.” Also, one of the three units was missing the “23 Plate and required hardware,” and one of the units had its terminals marked in black instead of white as required by the contract drawing. According to Hill AFB’s memorandum of 26 August 2008, the discrepancies contained one or more critical areas which would prevent use of the unit. (Finding 19)

Appellant has not challenged these findings but argues that “[t]hese observations are not relevant to whether parts must meet a Serviceable standard” (app. opening br. at 10). As we concluded earlier, DSCC never accepted Yonir’s offer to provide “serviceable” Magnetron units that were tested by an independent laboratory to the standard of a TO. To the contrary, appellant accepted the contract on the condition that its FAT samples must pass FAT at Hill AFB. Yonir’s first articles failed that test.

Under Contract 1189’s First Article clause, if the CO disapproves any first article, the contractor shall be deemed to have failed to make delivery within the meaning of the Default clause of the contract. FAR 52.209-4(d); *FXC Corporation*, ASBCA No. 33904, 91-2 BCA ¶ 23,928 at 119,872 (holding termination for default proper when contractor failed to satisfy contract’s first article requirements and failed to prove its FAT failures were minor).

CONCLUSION

Because the government never accepted appellant’s offer to provide Magnetron units in “serviceable condition” and because the contract the parties executed required the Magnetron units to pass FAT, we hold that DSCC properly terminated appellant’s contract for default when its samples failed the contractually-prescribed FAT.

Accordingly, this appeal is denied.

Dated: 7 April 2010

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 56736, Appeal of Yonir Technologies Inc., rendered in conformance with the Board's Charter.

Dated:

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