

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
Voices R Us, Inc.) ASBCA Nos. 51565, 52307
Under Contract No. N00600-95-C-0666)

APPEARANCE FOR THE APPELLANT: Mr. Hari P. Kunamneni
President

APPEARANCES FOR THE GOVERNMENT: Jerome C. Brennan, Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Voices R Us, Inc. (VRU) appeals a unilateral determination that it owes the Government \$1,334 for the convenience termination of the above-captioned contract. We sustain the appeals and find that the Government owes VRU \$12,716.30 for the termination.

FINDINGS OF FACT

1. Contract No. N00600-95-C-0666 was awarded to VRU on 17 January 1995 to replace a computer system for a test stand at the Naval Aviation Depot (NADEP), Jacksonville, Florida. The contract at award required commercially-available hardware and operating system software, development of applications software, system integration, acceptance testing, documentation, a software support station and data. (R4, tab A) The negotiated contract price at award was \$74,000. The contract incorporated by reference the FAR 52.233-1 DISPUTES (DEC 1991) clause and the FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (APR 1984) clause. (R4, tab A at I-4, 5)
2. After award, VRU procured the hardware and operating software, and developed the applications software at its office in Cupertino, California. The contract gave the Government the discretion to require the MIL-STD-1521 audit and review procedures for the applications software development (R4, tab A at C-14, ¶¶ 4.2.3, 4.2.3.1). The

Government elected not to require those procedures. The NADEP engineer testified that the applications software development was “primarily a translation effort . . . taking an existing test program . . . and basically rewriting it exactly the way it was.” There was “no creativity involved in it at all, or design.” (Tr. 249-50) He further testified that “I couldn’t do any design reviews out there in California, because you had to be on the test stand for me to evaluate your software” (tr. 329).

3. On or about 31 August 1995, VRU delivered the hardware and software material to the Government, and its (at the time) technical business manager, Mr. Kunamneni, arrived at the test stand site to integrate the system and perform acceptance testing. Mr. Kunamneni worked on the system integration from 31 August through 30 November 1995, and again from 10 January until 3 April 1996. (R4, tab T at 9, 10) On 3 April 1996, Mr. Kunamneni left the test stand site (R4, tab 10 at 10). Later that month, VRU submitted an invoice for partial payment for the system integration work although no part of that work had been successfully demonstrated to, or accepted by, the Government. The Government engineer testified: “We tried to do demonstrations on three occasions, I believe, in the six-month period ending in April ’96, and in each one of them they were a technical failure. And we had to abandon it.” (Tr. 259-60)

4. The Government refused to pay VRU’s invoice and VRU refused to return to the site. *See Voices R Us*, ASBCA Nos. 51026, 51070, 98-1 BCA ¶ 29,660 at 146,957. On 15 April 1997, the Government terminated the contract for convenience (R4 tab C). On 16 April 1998, VRU submitted its termination settlement proposal with a demand for a decision within 60 days (R4, tab T). *See Voices R Us, Inc.*, ASBCA No. 51565, 99-1 BCA ¶ 30,213 at 149,478. On 18 April 1998, VRU certified the settlement proposal as a claim to the termination contracting officer (TCO) (R4, tab U).

5. On 27 April 1998, the TCO issued a unilateral “no cost” settlement determination on the ground that the proposal was untimely (R4, tab W). VRU appealed that determination. We sustained the appeal as to timeliness in *Voices R Us, Inc.*, ASBCA No. 51565, 99-1 BCA ¶ 30,213. Following that decision, the Defense Contract Audit Agency (DCAA) audited VRU’s proposal, and the parties attempted to negotiate a settlement.

6. VRU’s settlement proposal was submitted on the “inventory basis,” without objection by the TCO. The proposed costs were the costs allegedly incurred for the terminated work-in-process under contract line item (CLIN) 0001AB (software development, system integration, acceptance testing and documentation) and CLIN 0002 (software support station). No costs were proposed for CLIN 0003 (test and demonstration report). (R4 tab T at 1) The work and material under the other CLINs in the contract, 0001AA (hardware and software material), 0004 (airfare reimbursement) and 0005 (settlement of extra work claims), had been accepted and paid for by the Government before the termination (app. 2d supp. R4, tab A-29; R4, tab B at 12-15; R4, tabs LL, MM).

7. During the settlement negotiations, VRU asserted that it was entitled to an equitable adjustment of the CLIN 0001AB price, but refused to state the basis for an adjustment other than the fact that its costs of performing the work exceeded the CLIN price (R4, tabs SS, HH; app. 4th supp. R4, tab 3-31). In its post-hearing brief, VRU states that it is entitled to an adjustment of the CLIN 0001AB price in the amount of \$40,710 because the Government failed to provide “feedback” on in-process inspection of VRU’s software development work (app. main br. at 3-4; app. reply br. at 2-6). No claim for failure to provide “feedback” was submitted at any time by VRU to a contracting officer in writing, for a sum certain, and with sufficient detail to apprise the contracting officer of the basic facts of the claim.

8. On 27 July 1999, the TCO issued a unilateral settlement determination, on the total cost basis, which held that VRU owed the Government \$1,334 (R4, tab JJ). VRU’s appeal of that determination is ASBCA No. 52307. Our findings relevant to the amount of the termination settlement under FAR Part 49 are set forth below.

9. Material: VRU incurred \$10,493 for purchase of the hardware and software material (app. 3rd supp. R4, tab 38 at 8). The Government accepted and paid the agreed price (\$13,000) for that material under CLIN 0001AA (app. 2nd supp. R4, tab A-29). VRU initially claimed that it also incurred \$1,944.20 for material for CLIN 0002 (the software support station) (R4, tab T at 10). The DCAA auditor questioned that cost, and it is not claimed in VRU’s post-hearing briefs (R4, tab II at 5; app. main br. at 9; app. reply br. at 10).

10. Direct labor hours - Total Contract: VRU claimed that it incurred a total of 1,797.25 direct labor hours on the contract. The claimed hours consist of (i) 1,281.5 hours for CLIN 0001AB; (ii) 379.75 hours for the extra work compensated under CLIN 0005 (Modification P00006) and in a Judgment Fund settlement; and (iii) 136 hours for “[M]aking Mr. Kunamneni available between May 20 -June 28 [1996]” (R4, tab T at 9-10; tr. 88-89). The audit report questioned the 136 hours (R4, tab II at 7-8). We agree that those hours are unsupported. VRU provided some advice during the period in question. But there is no credible evidence that providing that advice required the claimed hours, or that the Government directed VRU to have Mr. Kunamneni standing by full-time during this period. (App. 3rd supp. R4, tabs 14-17) The proven direct labor hours incurred in performing the contract up to the termination are 1,661.25.

11. Direct labor hours - CLIN 0001AB: The 1,281.5 hours claimed for CLIN 0001AB consist of (i) 455 hours incurred at VRU’s home office in Cupertino, California, before 31 August 1995; and (ii) 826.5 hours incurred after 31 August 1995 at the test stand site (R4, tab T at 7-10). All of the hours incurred at the test stand site were incurred as claimed for the system integration task under CLIN 0001AB. However, not all of the 455 hours incurred at the home office were incurred for CLIN 0001AB work. Some part of those hours were incurred for procuring the hardware and software material under CLIN

0001AA (app. 3rd supp. R4, tab 38 at 9-16). On the basis of the contemporaneous correspondence, we find that no less than 228 hours of the claimed 455 hours were incurred for software development work under CLIN 0001AB (app. 1st supp. R4, tabs 22, 24; app. 2nd supp. R4, tab A-11; app. 4th supp. R4, tabs 3-2, 3-5). The proven total hours incurred for CLIN 0001AB work at the home office and at the test stand site up to the time of termination are 1,054.5 (826.5 + 228).

12. Direct labor cost: VRU initially proposed an hourly labor rate of \$55 for 1995 hours and \$83 for 1996 hours (R4, tab T at 9, 10). All of the direct labor for the contract was performed by Mr. Kunamneni. An internal VRU memorandum dated 24 February 1998 shows that his hourly salary rate during the period the work was performed (January 1995 to April 1996) was \$29 per hour for “straight time” and \$43.50 per hour for overtime (R4, tab PP at 2, 4). The straight time/overtime hours for the proven CLIN 0001AB work were respectively 1,023.75 and 30.75. The straight time/overtime hours for the entire contract were respectively 1,580 and 81.25. (R4, tab T at 7-10; app. 1st supp. R4, tabs 26, 27, 31-33; app. main br. at 8) Applying the proven rates to the proven hours, the total incurred direct labor costs up to the time of termination were \$31,026.38 for CLIN 0001AB and \$49,354.38 for the entire contract.

13. Overhead: VRU’s termination proposal included overhead, G&A and profit in the hourly rates proposed for direct labor hours (R4, tab T at 4, 9-10). The auditor found no support for any indirect costs (R4, tab II at 8). In its posthearing brief, VRU claims as “overhead” the FICA, Medicare and California state unemployment insurance taxes on Mr. Kunamneni’s compensation. We take judicial notice of the FICA (6.2) and Medicare (1.45) percentages, and the evidence shows a California unemployment insurance tax of 3.4 percent (ex. A-1 at 35). On this evidence, the proven overhead rate is 11.05 percent of direct labor cost, and the proven overhead cost is \$3,428.14 for CLIN 0001AB, and \$5,453.66 for the entire contract.

14. Consultant Fee: VRU claims a \$750 consultant fee for a “contact person” for “clarification’s [sic], request for changes to computer system and concerns regarding computer system performance” on the NADEP contract. These services were rendered between 20 May and 10 September 1996 concerning unresolved technical issues affecting the systems integration work. (R4, tab T at 10; app. 1st supp. R4, tab 35 at 2, tab 36; tr. 50-56; app. 3rd supp. R4, tabs 15, 16, 18, 20; app. 4th supp. R4, tab 3-21). The auditor questioned the claimed cost on the ground that VRU did not provide sufficient information to establish allowability under the criteria set forth in FAR 31.205-33 (R4, tab II at 9). Based on the testimony of VRU’s technical business manager as to the consultant’s role and services provided, and the documentary evidence of the consultant’s services, we find the fee to be reasonable, allowable under the cited FAR provision, and allocable to the CLIN 0001AB work.

15. Per diem: VRU initially proposed \$12,690 for Mr. Kunamneni’s lodging, rental car, meals and incidental (M&I) expenses (hereinafter per diem expenses) at the test stand site (R4, tab T at 9-10). The auditor found supporting data for only \$6,773 of the claimed expenses (R4, tab II at 11). Evidence at hearing showed total per diem expenses of \$11,966 (lodging: \$4,108; rental car: \$2,548; M&I: \$5,310) for 177 days (app. 3rd supp. R4, tabs 36.1, 37, 39.1, 40). VRU concedes and the Government does not contest that 46 days of the 177 days were attributable to the extra work compensated under CLIN 0005 (Modification P00006) and the Judgment Fund settlement (app. main br. at 8; R4, tab II at 10-11; Gov’ t reply br. at 6). VRU’s proven total incurred per diem expense for work performed under CLIN 0001AB was \$8,856 ($\$11,966/177 \times 131$).

16. Airline Ticket: VRU claims \$394 for “airline tickets” (R4, tab T at 10). The auditor appears to have confused this cost with the cost for Mr. Kunamneni’s second trip to Jacksonville (\$450) which was reimbursed by the Government under CLIN 0004 in Modification No. P00004 to the contract (R4, tab II at 9-10). The evidence at hearing established that the claimed tickets were purchased on 11 August 1995 (app. 1st supp. R4, tab 37). We find that the claimed cost was incurred for Mr. Kunamneni’s first trip to Jacksonville and is properly allocable to CLIN 0001AB. The total air travel cost incurred for the contract was \$844 ($\$394 + \450).

17. G&A: The auditor found that VRU could neither describe nor support the G&A-type expense supposedly included in its hourly rates, nor could it describe or support the allocation base (R4, tab II at 8). At hearing, VRU offered in evidence a number of checks written in 1995 and 1996 for G&A type expenses (ex. A-1). In its post hearing brief, VRU determines a monthly average G&A expense from these checks and then divides that amount by 171 hours to claim a G&A expense of \$3.28 allocable to each direct labor hour claimed (app. main br. at 5, 7). VRU does not explain the rationale for the 171 hour allocation base. VRU had other work in the same accounting periods as the NADEP work (app. 3rd supp. R4, tab 19). The G&A expense properly allocable to the NADEP contract is not proven.

18. Total Costs Incurred: The evidence does not show what costs, if any, were incurred for CLINs 0002 and 0003. The proven total costs incurred in performance of CLIN 0001AB and in performance of the entire contract were:

	<u>CLIN 0001AB</u>	<u>Contract</u>
a. Material (Finding 9)	--	\$10,493.00
b. Direct labor (Finding 12)	\$31,026.38	49,354.38
c. Overhead (Finding 13)	3,428.14	5,453.66
d. Consultant (Finding 14)	750.00	750.00
e. Per Diem (Finding 15)	8,856.00	11,966.00
f. Airfare (Finding 16)	394.00	844.00
g. Property return (Finding 22)	116.39	116.39

g. G&A (Finding 17)	--	--
h. Total	\$44,570.91	\$78,977.43

19. Estimate to Complete - Direct Labor Hours: At the time of termination, VRU had completed 25 percent of the CLIN 0001AB system integration work, and had expended 826.5 direct labor hours on that work (app. 3rd supp. R4, tab 21; Finding 11). In addition, the acceptance testing and documentation tasks under CLIN 0001AB and CLIN 0003, and the software support station under CLIN 0002 remained to be provided. VRU's final cost proposal for award of the contract included 80 and 160 direct labor hours respectively for acceptance testing and documentation, and material cost only for the software support station (app. 1st supp. R4, tab 11). On this evidence, we find that 2,719.5 direct labor hours $((826.5 \times 3) + 80 + 160)$ of Mr. Kunamneni's time (or that of a similarly qualified person) would be required to complete the contract.

20. Estimate to Complete - Cost: At the time of termination, Mr. Kunamneni's hourly salary rate at VRU had risen to \$91.30 (app. 4th supp. R4, tab 3-15 at 21). If the contract had not been terminated, the 2,719.5 direct labor hours required to complete the work at that rate plus 11.05 percent overhead would have cost VRU no less than \$275,726.43. Of the 2,719.5 additional hours required to complete the contract, all but the 160 documentation hours would have to be performed at the test stand site. This would involve an additional 448 days at the site $((2,719.5 - 160)/40 \times 7)$, at an additional per diem cost of not less than \$30,284.80 $(\$11,966/177 \times 448)$. See Finding 15. VRU also would have incurred \$5,350 in material costs to complete the software support station (CLIN 0002) (app. 1st supp. R4, tab 11 at 2). On these findings, the total estimated cost of completion is not less than \$311,361.23,

21. Loss Adjustment: With a proven total contract incurred cost of performance of \$78,977.43 (Finding 18), and an estimated cost to complete of not less than \$311,361.23 (Finding 20), the estimated total cost at completion is not less than \$390,338.66. The total contract price as modified through Modification No. P00007 was \$92,717 (R4, tab II at 12). For purposes of determining if VRU would have made a profit or incurred a loss if the contract had been completed, we add to the contract price the \$14,204 paid by the Government from the Judgment Fund to settle three of VRU's extra work claims under the contract (R4, tab II at 15). With that adjustment to the contract price, VRU would have incurred a loss of not less than \$283,417.66 if the contract had been completed, the loss adjustment for the termination settlement is 27.39 percent, and the allowed cost after application of the loss adjustment is \$12,207.97 $(\$44,570.91 \times .2739)$. See FAR 49.203(b)(3).

22. Settlement Expenses: VRU's termination settlement proposal claimed \$602.40 for six labor hours by Mr. Kunamneni preparing the proposal, one labor hour for locating and mailing Government property and \$15 for "posting." (R4, tab T at 5; R4, tab Z at 1). The auditor questioned all labor cost for lack of support for the claimed

hourly rate (\$100.40). The proposal was prepared and the Government property mailed in 1998. The evidence does not indicate Mr. Kunamneni’s salary rate for 1998 (as distinct from VRU’s hourly charge to its customers). However, applying his 1997 hourly salary rate of \$91.30 with 11.05 percent overhead, we find the proven settlement expense to be \$608.33. *See* Findings 13 and 20. The cost of returning the Government property (\$116.39) is not a settlement expense but a performance expense and has been included as such in Finding 18.

23. Disposal and Other Credits: VRU credited the Government with \$100 for “[D]isposal of Labwindows” (R4, tab T at 5). The auditor and TCO accepted that credit and took additional credits for the \$45,921 in payments made to VRU under CLIN 0001AA (\$13,000), CLIN 0004 (\$450), CLIN 0005 (\$18,267), and from the Judgment Fund in settlement of three extra work claims (\$14,204) (R4, tab II at 14-15; R4, tab JJ at 3, 13). The additional credits taken by the auditor and TCO are inapplicable to VRU’s inventory basis termination settlement proposal. That proposal is for costs incurred on the terminated CLIN 0001AB (and CLINs 0002 and 0003) and does not include any costs incurred for the CLINs for which payment was made, or for the extra work compensated in the Judgment Fund settlement. *See* Findings 9-18.

DECISION

Since the negotiated total contract price at award was less than \$100,000, the FAR 52.249-1 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (SHORT FORM) (APR 1984) clause was required by regulation. *See* FAR 49.502(a)(1). Accordingly, the termination settlement is governed by the “short form” clause and the FAR Part 49 regulations incorporated by reference therein. *See G.L. Christian and Associates v. United States*, 312 F.2d 418, 425-27, *reh’g denied*, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963). Pursuant to those regulations, the unilateral termination settlement due VRU is as follows:

- (i) Allowed cost after loss adjustment
(Finding 21).....\$ 12,207.97
- (ii) Settlement expenses (Finding 22)..... ..\$ 608.33
- (iii) Disposal credit (Finding 23)..... (\$ 100.00)
- (iv) Net settlement (Items (i)+(ii)+(iii))..\$ 12,716.30

The foregoing determination is made on the “inventory basis.” That is the basis on which VRU submitted its termination settlement proposal, without objection by the TCO. *See* Finding 6. The inventory basis is by regulation the “preferred” basis for termination settlement proposals. Under the inventory basis the contractor proposes only costs allocable to the terminated portion of the contract. *See* FAR 49.206-2(a). In VRU’s case the terminated portion of the contract was CLINs 0001AB, 0002 and 0003. The TCO improperly used the “total cost basis” for his determination that VRU owed the

Government \$1,334. *See* Finding 8. The total cost basis for termination settlement is to be used only when use of the inventory basis is not practical or will unduly delay settlement. FAR 49.206-2(b). Neither condition was present here. Moreover, use of the total cost basis by the TCO had the effect of depriving VRU of the profit it had earned on the work and material accepted and paid for by the Government under CLINs 0001AA, 0004 and 0005.

In its post-hearing briefs, VRU seeks to avoid, or at least diminish, the loss adjustment by arguing entitlement to a \$40,710 price adjustment for the Government's failure to provide "feedback" during the software development process. No such claim, however, was submitted to any contracting officer in writing, for a sum certain and with sufficient detail to apprise the contracting officer of the basic facts on which the claim was premised. *See* Finding 7. Therefore, we have no jurisdiction over the claim and give it no further consideration here. *See Skip Kirchorfer, Inc.*, ASBCA Nos. 40515 *et al.*, 93-3 BCA ¶ 25,899 at 128,837. VRU also argues that the loss adjustment should be computed solely on the basis of the costs incurred, estimated cost to complete and prices for the terminated CLINs. FAR 49.203(a), however, requires that the loss adjustment percentage be the "ratio of (i) the *total contract price* to (ii) the *total cost incurred* before termination plus the estimated cost to complete *the entire contract*" (emphasis added). *See Boeing Defense & Space Group*, ASBCA No. 50048, 98-2 BCA ¶ 29,779 at 147,560-62.

The FAR Part 49 regulations required the submission of VRU's initial termination settlement proposal for purposes of negotiating a termination settlement agreement. FAR 49.103, 49.104, 49.105, 49.107, 49.109. Notwithstanding its submission by VRU as a certified claim (*see* Finding 4), the proposal did not become a claim until there was an impasse in negotiation. *See James M. Ellett Construction Co., Inc. v. United States*, 93 F.3d 1537, 1543-44 (Fed. Cir. 1996). An impasse in negotiation did not occur until the TCO's 27 April 1998 unilateral "no cost" determination. *See* Finding 5.

The appeals are sustained in the amount of \$12,716.30 with interest pursuant to 41 U.S.C. § 611 from 27 April 1998.

Dated: 6 March 2001

MONROE E. FREEMAN, JR.
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 Nos. 51565, 52307, Appeals of Voices R Us, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals