

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Hermes Consolidated, Inc. d/b/a)
Wyoming Refining Co.) ASBCA Nos. 52308, 52309
)
Under Contract Nos. SPO600-96-D-0504)
SPO600-97-D-0510)

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OPINION BY ADMINISTRATIVE JUDGE JAMES ON
CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The contractor submitted convenience termination and breach of contract claims under two indefinite delivery, indefinite quantity (IDIQ) fuel contracts. The contracting officer (CO) allowed \$300,800 for such claims. The contractor appealed the disallowance of additional compensation under both contracts. ASBCA No. 52308 pertains to Contract No. SPO600-96-D-0504. ASBCA No. 52309 pertains to Contract No. SPO600-97-D-0510.

The consolidated complaint in the two appeals alleged four counts: Count I - unrecovered termination costs under both contracts for respondent's failure to order the guaranteed minimum quantities of JP-8 fuel under clause I86.12, DELIVERY-ORDER LIMITATIONS-SCOPE OF CONTRACT (BULK) (DFSC JUL 1994); Count II - breach damages under both contracts attributable to inclusion of an improper clause I1.03-2(1) TERMINATION FOR THE GOVERNMENT'S CONVENIENCE in the contracts; Count III - breach damages under both contracts for negligent Government estimates of the quantities to be ordered; and Count IV - damages under both contracts for breach of implied-in-fact contracts contemplating recovery of the contractor's costs incurred in the 1990's to modify its facilities to refine JP-8 jet fuel, when respondent failed to purchase the minimum quantities of JP-8 fuel.

Respondent moves for partial summary judgment with respect to the measure of recovery under Count I and for judgment on Counts II, III and IV. Appellant opposes, cross-

moves for partial summary judgment on Counts I and II, and contends that genuine issues of material fact foreclose summary judgment on Counts III and IV. Appellant has filed two affidavits by its former president, Dennis J. McCormick, both dated 24 November 2001, one in support of its opposition to the motion and one in support of the cross-motions (opposition and supporting affids., respectively). Respondent has not filed any affidavits.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 18 September 1996 the Defense Fuel Supply Center (DFSC), later renamed the Defense Energy Support Center (DESC), awarded IDIQ-type Contract No. SPO600-96-D-0504 (contract 504) to Hermes Consolidated, Inc. d/b/a Wyoming Refining Co. (WRC) to supply Ellsworth AFB, South Dakota (Ellsworth) an estimated quantity of 27,126,000 gallons of JP-8 jet fuel as ordered by DFSC during the period 1 October 1996 through 30 September 1997 (52308, R4, tabs 1, 7).

2. On 4 September 1997 DFSC awarded IDIQ-type Contract No. SPO600-97-D-0510 (contract 510) to WRC to supply Ellsworth an estimated quantity of 25,200,000 gallons of JP-8 fuel as ordered by DFSC during the period 1 October 1997 through 30 September 1998 (52309, R4, tab 1).

3. Contracts 504 and 510 contained the FAR 52.216-22 INDEFINITE QUANTITY (APR 1984) clause which provided in pertinent part:

(b) . . . The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the schedule as the “maximum.” The Government shall order at least the quantity of supplies or services designated in the Schedule as the “minimum.”

(52308, R4, tab 1 at A-99; 52309, R4, tab 1 at A-66)

4. Contracts 504 and 510 contained Clause I86.12, DELIVERY-ORDER LIMITATIONS - SCOPE OF CONTRACT (BULK) (DFSC JUL 1994), which provided in pertinent part:

(a) The Government agrees to purchase, during the period of this contract and in accordance with the terms of this contract, at least a quantity (or quantities) of product that, under the contract terms, will be not less than 75 percent of the total original estimated contract volume.

(52308, R4, tab 1 at A-100, per amend. 0001 at 2 of 6; 52309, R4, tab 1 at A-66)

5. Contracts 504 and 510 contained Clause F1.08, DELIVERY AND CONTRACT PERIODS (DOMESTIC BULK) (DFSC APR 1986), which provided in part: “Insofar as practicable, the Government will attempt to lift [receive deliveries] in approximately equal monthly quantities.” Clause F1.08 did not require, but did permit, WRC to accumulate or to make deliveries at a monthly rate of more than 8.33%, or at a daily rate exceeding 1/365, of the contract quantity. (52308, R4, tab 1 at A-70; 52309, R4, tab 1 at A-42)

6. WRC asserts that Clause F1.08 “meant that WRC had to stand ready to deliver 2,260,500 gallons of JP-8 per month” under contract 504 and 2,100,000 gallons per month under contract 510 (app. mot. in 52308 at 6, in 52309 at 5). WRC states: “For contracts 0504 and 0510 WRC was obligated to have inventory available for deliveries from WRC’s storage terminal to [Ellsworth]” (supporting affid. at ¶ 18). In contract 504, Schedule Note 3 required WRC to have a minimum of 15,000 and a maximum of 22,000 barrels of JP-8 fuel “available for individual deliveries/deliveries per day” (52308, R4, tab 7 at 2). In contract 510, Schedule Note 5 required WRC to have a minimum of 15,000 and a maximum of 22,000 barrels of JP-8 fuel “available for individual deliveries” (52309, R4, tab 8 at 2).

7. Contract 504 contained clause I1.03-2 (FAR 52.212-4) CONTRACT TERMS AND CONDITIONS - COMMERCIAL ITEMS (DOMESTIC BULK) (OCT 1995). In contract 510 clause I1.03-2 was designated CONTRACT TERMS AND CONDITIONS - COMMERCIAL ITEMS (BULK) (DFSC JUL 1996). In both contracts, ¶ (l) of that clause, TERMINATION FOR THE GOVERNMENT’S CONVENIENCE, provided in pertinent part:

The Government reserves the right to terminate this contract, or any part thereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder Subject to the terms and conditions of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard [sic] record keeping system, have resulted from the termination.

(52308 R4, tab 1 at 4; 52309, R4, tab 1 at 3)

8. Clause B14.04, ESTIMATED SUPPLIES TO BE FURNISHED (DOMESTIC BULK) (DFSC JUN 1992) in contract 504 provided in pertinent part:

(b) The maximum and minimum quantities are defined in the DELIVERY-ORDER LIMITATIONS - SCOPE OF CONTRACT clause.

(c) The refined product to be furnished hereunder, f.o.b. point . . . and estimated quantity are as follows:

...	JP8	...	
<u>ITEM</u>	<u>EST. QTY/GALS</u>	<u>...</u>	<u>BASE UNIT PRICE</u>
			(02 APR 96)
0101	27,126,000	...	0.761671 . . .
FOB origin delivery at the refinery [of WRC] . . . Newcastle, WY			

(52308, R4, tab 7 at 2) In contract 510, Clause B14.04, ¶ (c), the estimated quantity for JP-8 fuel was 25,200,000 gallons at a \$0.765338 base unit price (52309, R4, tab 8 at 2).

9. On 11 August 1997 DFSC's Janet Crump initiated a Purchase Request (PR) to the CO requesting "a Termination for the Convenience of the Government in the amount of 3,750,000 USG" of JP-8 fuel on contract 504. On 10 September 1997 DFSC proposed to WRC a no-cost modification of contract 504 to reduce the quantity of line item 0101 by 3,750,000 gallons, citing "reduced requirements at Ellsworth AFB" (52308, R4, tab 9).

10. WRC's 12 September 1997 letter to DFSC stated that WRC would not agree to such no-cost modification, and DFSC had not lifted the minimum of 75% of the "total original estimated contract volume" of contract 504 (52308, R4, tab 10; SOF ¶ 4).

11. On 22 September 1997 DFSC issued unilateral Modification No. P00001 to contract 504, which stated:

1. Pursuant to Clause I1.03-2, CONTRACT TERMS AND CONDITIONS - COMMERCIAL ITEMS DOMESTIC BULK)(OCT 1995)(I) TERMINATION FOR THE GOVERNMENT'S CONVENIENCE, the contract is modified as follows:

a. Clause B14.04, ESTIMATED SUPPLIEST [sic] TO BE FURNISHED, line item 0101 is reduced by 3,750,000 USG from 27,126,000 to 23,376,000 USG.

b. The total estimated contract value is decreased by \$2,856,266.25 from \$20,661,087.55 to \$17,804,821.30.

2. All other terms and conditions remain unchanged.

Modification No. P00001 was issued 27 days after the final delivery order under contract 504, No. 4011 dated 26 August 1997, was issued, but 8 days before the ordering period ended on 30 September 1997. (52308, R4, tab 7; AR4 3d, tab 3)

12. The Government ordered 16,824,476 gallons, and WRC delivered 16,843,123 gallons, of JP-8 under contract 504 (AR4 3d, tabs 1, 3). This was 3,501,377 gallons fewer than the original minimum purchase obligation of 20,344,500 gallons (75% of 27,126,000).

13. On 17 February 1998 WRC submitted a certified claim to the CO with three “counts”: (a) Under the convenience termination clause, WRC (1) claimed \$2,666,704 due to DFSC’s failure to order the minimum quantity specified in the contract; (2) calculated \$2,666,704 by multiplying the \$.761671 base unit price times a 3,501,123 (sic)^{*} gallon shortfall; and (3) asserted that JP-8 jet fuel is not a “commercial item” subject to the I1.03-2(l) commercial items termination clause. (b) As an alleged breach of an implied-in-fact contract, WRC claimed \$2,387,000 as damages, based on costs incurred in connection with its capital improvements program, unrecovered due to respondent’s failure to order the contract’s minimum purchase obligation. (c) To formalize an informal commitment under P.L. 85-804, WRC claimed \$2,387,000, alleging that its 1992-95 \$9.5 million capital investments facilitated the national defense by providing increased capacity to produce JP-8 in an isolated location for a single base. (52308, R4, tab 12)

14. On 13 March 1998 DESC’s Ms. Crump initiated a PR to the CO requesting a “Termination[] for the Convenience of the Government” of 6,400,000 USG” of JP-8 fuel on contract 510. On 17 March 1998 DESC proposed to WRC a no-cost modification of contract 510 to reduce the quantity of line item 0101 by 6,400,000 gallons, citing “reduced requirements at Ellsworth AFB” (52309, R4, tab 10).

15. WRC’s 19 March 1998 letter to DESC stated that WRC would not agree to such no-cost modification, and DFSC had lifted only 20.9% of the minimum of 75% (18,900,000 gallons) of the “total original estimated contract volume” (52309, R4, tab 11).

16. On 23 March 1998, six months before contract 510’s ordering period ended, DESC issued Modification No. P00001 to contract 0510, which provided:

1. Reference Clause B14.04, Estimated Supplies To Be Furnished. Contract Line Item 0101 is reduced by 6,400,000 gallons from 25,200,000 gallons to 18,800,000 gallons.

2. The total estimated contract value is decreased by \$4,898,163.20 from \$19,286,517.60 to \$14,388,354.40[.]

....

* WRC’s cross-motion for summary judgment cited a 3,501,377 gallon shortfall (20,344,500 - 16,843,123) (app. mot., ¶ 23).

Except as provided herein, all terms and conditions of [contract 510], as heretofore changed, remains [sic] unchanged and in full force and effect.

(52309, R4, tab 8) DESC issued seven delivery orders for a total of 8,115,000 gallons of JP-8 under contract 510 after the date of Modification No. P00001 (AR4 3d, tab 4).

17. The Government ordered 14,615,000 gallons, and WRC delivered 14,604,377 gallons of JP-8 under contract 510 (AR4 3d, tabs 2, 4). This was 4,295,623 gallons fewer than the original minimum purchase obligation of 18,900,000 gallons (75% of 25,200,000).

18. On 23 November 1998 WRC submitted a certified claim to the CO under contract 510, alleging the same three counts as its contract 504 claim, and that DESC's quantity estimate was negligent. WRC calculated \$3,287,603 for the first count by applying the base unit price of \$0.765338 per gallon to the 4,295,623 gallon shortfall, and \$2,355,000 for the other counts. (52309, R4, tab 12)

19. The CO's 24 May 1999 final decisions allowed WRC to recover \$127,840 under contract 504 and \$172,960 under contract 510 (52308, 52309, R4, tabs 13). These timely appeals followed. DESC has refused to pay WRC the \$300,800 allowed in the final decisions (AR4, tabs 8-12).

20. Mr. McCormick, WRC's former president, states that in meetings, briefings, updates and correspondence with WRC, "warranted DESC officials" elicited WRC's commitment to make capital investments in plant and equipment to increase its annual JP-8 production from about 12 to 37 million gallons, and agreed to purchase sufficient quantities of JP-8 to allow WRC to recover such capital costs (opposition affid., ¶¶ 25, 26). The affidavit exhibits and supplementary Rule 4 documents cited in support of Mr. McCormick's foregoing statement discuss Government meetings, correspondence and conversations with petrochemical producers, including WRC, about concerns in changing from JP-4 to JP-8 fuel and awareness that the producers would have to make some capital improvements to their plants and facilities. Such documents, however, contain no specific agreement with WRC by a warranted DFSC or DESC contracting officer to purchase any minimum amount of JP-8 fuel so as to enable WRC to recover its capital investment for JP-4 to JP-8 fuel conversion (opposition affid., ¶ 38).

Parties' Positions

As to Count I, respondent argues that it properly terminated the contracts for convenience and WRC's recovery is limited by the contracts' termination for convenience provision to the price for fuel delivered plus "reasonable charges." WRC argues that the

Government breached the contracts by failing to purchase the specified minimum quantities, and so it is entitled to recover the contract price for the fuel shortfalls, because the convenience termination provision was “subject to the terms and conditions of this contract,” including the minimum quantity provision in Clause I86.12, Modification No. P00001 to each contract did not alter respondent’s duty to order the prescribed minimum quantities, and Modification No. P00001 to contract 504 was an invalid retroactive termination, citing *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988); *PHP Healthcare Corp.*, ASBCA No. 39207, 91-1 BCA ¶ 23,647.

Count II asserted that contracts 504 and 510 included the commercial items convenience termination clause, but JP-8 fuel is not a commercial item. WRC now concedes that the Commercial Items termination for convenience clause was properly part of the contracts, withdrawing that contention (app. opposition at 5, n.1).

Respondent argues that Counts III and IV are legally insufficient. According to WRC, Counts III and IV raise disputed material facts, pointing to various paragraphs of the McCormick affidavit. WRC argues that Count III is supported by a new theory of withheld “superior knowledge” of DESC’s faulty estimate for contract 504, and Count IV is supported by *Ortiz Enterprises, Inc.*, ASBCA No. 52049, 01-1 BCA ¶ 31,155. WRC’s complaint and motions for summary judgment no longer seek extraordinary contractual relief under P.L. 85-804, the last “count” in its February and November 1998 claims (SOF ¶¶ 13, 18), tacitly abandoning that ground.

DECISION

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. When the parties cross-move for summary judgment, as in this case, the tribunal must evaluate each motion on its merits. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

I.

A contractor is entitled to recover the contract price for unordered supplies or services required by the minimum purchase obligation of an IDIQ contract only if the contractor “was required to and did maintain the capability of providing the minimum services set in the contract.” *See Maxima*, 847 F.2d at 1554, cited in *Delta Const. International, Inc.*, ASBCA No. 52162, 01-1 BCA ¶ 31,195 at 154,028, *recon. granted*, 01-1 BCA ¶ 31,242, *appealed*, Fed. Cir. No. 01-1253 (15 March 2001).

WRC argues that Modification No. P00001 reduced the estimated quantity of JP-8 set forth in Clause B14.04, ¶ (c), by 3,750,000 gallons for contract 504 and by 6,400,000 gallons for contract 510, but did not alter Clause B14.04, ¶ (b), which referred to

definitions of minimum quantities, or Clause I86.12, which prescribed “75 percent of the total original estimated contract volume” as the minimum purchase obligation (SOF ¶¶ 4, 8, 11, 16). WRC concludes that Modification No. P00001 did not reduce respondent’s minimum quantity purchase obligations under contracts 504 and 510.

The contractor raised this same argument in *Montana Refining Co.*, ASBCA No. 44250, 94-2 BCA ¶ 26,656 (*Montana I*). DFSC terminated 2,100,000 gallons from the 16,525,000 gallon “estimated quantity,” but did not modify the “65% of the total original estimated contract volume” provision in the Minimum Quantity clause. Janet Crump, who monitored DFSC’s fuel consumption, declared that she had “requested that the [CO] terminate 2,100,000 gallons. This amount represented the anticipated difference between actual lifts and the minimum quantity.” 94-2 BCA at 132,611. We held: “It is clear from the undisputed facts that [the CO] intended to terminate 2,100,000 gallons of the 10,741,250 gallon minimum quantity and that appellant so understood.” 94-2 BCA at 132,613. Here, WRC likewise understood that the CO intended to terminate portions of the minimum quantities under contracts 504 and 510, for which reason WRC refused to consent to the no-cost modifications (SOF ¶¶ 9-10, 14-15).

Again, in *Montana Refining Co.*, ASBCA No. 50515, 00-1 BCA ¶ 30,694 (*Montana II*), the Government partially terminated the “estimated quantity” two-thirds of the way through the contract without express mention of the “total original estimated contract volume.” Without reliance upon any explanatory affidavit, as in *Montana I*, the Board in *Montana II* held that “Montana was only obligated to remain ready to perform the contract with an *unaltered minimum quantity* for two-thirds of the performance period” (emphasis added), 00-1 BCA at 151,629.

Accordingly, we reject WRC’s argument that the partial terminations of contracts 504 and 510 did not alter their respective minimum quantities. As those partial terminations were understood contemporaneously, DFSC terminated 3,750,000 gallons from the 20,344,500 gallon minimum quantity under contract 504, leaving 16,594,500 gallons; DFSC ordered 16,824,476 gallons (SOF ¶ 12). DESC terminated 6,400,000 gallons from the 18,900,000 gallon minimum quantity under contract 510, leaving 12,500,000 gallons; DESC ordered 14,615,000 gallons (SOF ¶ 17). We hold that the Government satisfied its minimum purchase obligations under both contracts 504 and 510.

WRC argues further that DFSC’s 22 September 1997 partial termination in contract 504, eight days before the ordering period expired on 30 September 1997 (SOF ¶ 11), was “retroactive.” This argument fails, because in *Montana II*, 00-1 BCA at 151,628, we held that expiration of the basic performance period is the demarcation line for retroactive terminations, citing *PHP Healthcare Corp.*, ASBCA No. 39207, 91-1 BCA ¶ 23,647 at 118,451. DESC’s 23 March 1998 partial termination in contract 510 was six months before the ordering period ended (SOF ¶ 16). Therefore, there was no retroactive termination in either contract 504 or contract 510.

Moreover, WRC cannot recover a “proportionate” payment for the minimum quantities specified in these contracts corresponding to the portion of the contract ordering term that elapsed before the partial termination was issued, because contracts 504 and 510 do not so state or provide. *See Montana II*, 00-1 BCA at 151,629 (“The question is whether Montana should be paid for two-thirds of the minimum quantity. The contract does not so state and we are not willing to extend *Maxima* without contract language requiring payment for proportionate readiness to perform”).

In ¶¶ 73-81 of its complaint under Count I, and in its cross-motion for summary judgment (app. mot. at 16-18), WRC asserts that the phrase “subject to the terms and conditions of this contract” in the Termination for the Government’s Convenience clause in its contract (SOF ¶ 7), is the legal equivalent of the phrase “unless otherwise stated” in *Montana I*. In *Montana I*, the non-standard termination clause stated that “[t]he Government shall not be liable for unordered quantities, unless otherwise stated in this contract” (94-2 BCA at 132,611). We held that the Government was liable for the damages the contractor could prove it had suffered as a result of DFSC’s failure to purchase the quantity specified in the Minimum Quantity clause. We do not agree that “subject to the terms and conditions of this contract” in contracts 504 and 510 is the equivalent of “unless otherwise stated” in *Montana I*. The “subject to” phrase in contracts 504 and 510 is included in the FAR 52.212-4 clause, and this record contains no evidence that DFSC intended to deviate from the FAR provisions with respect to terminated quantities. Moreover, the “subject to” phrase in contracts 504 and 510 modifies WRC’s right to payment for work performed; it does not modify the Government’s liability for unordered quantities, as in the *Montana I* clause.

It follows that WRC is limited to the price for fuel delivered plus “reasonable charges” under Clause I1.03-2, ¶ (1) convenience termination provision, as respondent argues.

We grant partial summary judgment to the Government on Count I.

II.

Appellant’s brief in opposition to the Government’s motion conceded that the FAR 52.212-4 TERMINATION FOR THE GOVERNMENT’S CONVENIENCE clause was properly in contracts 504 and 510 (app. opposition at 5, n.1). Therefore, we grant summary judgment to respondent with respect to Count II.

III.

The Federal Circuit’s decision in *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001), disposes of Count III. Faced with arguments similar to those WRC

advances, the court held that the Government satisfies its legal obligation under an IDIQ contract once it purchases the minimum quantity prescribed in the contract, and the contractor cannot expect that the Government will purchase more than such minimum quantity regardless of the accuracy of its estimates. We perceive no disputed material facts with respect to Count III, and grant summary judgment to respondent thereon.

IV.

Since DFSC/DESC purchased the minimum quantities of JP-8 under contracts 504 and 510, the major premise of WRC's Count IV is absent. Therefore, we grant summary judgment to respondent on Count IV.

CONCLUSION

Appellant's motions are denied. Respondent's motions are granted. The appeals will proceed on the issue of appellant's recovery under the termination for convenience clauses.

Dated: 15 February 2002

DAVID W. JAMES, 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. 52308, 52309, Appeals of Hermes Consolidated, Inc. d/b/a Wyoming Refining Co., rendered in conformance with the Board's Charter.

Dated:

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