

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Individual Development Associates, Inc.) ASBCA No. 55174
)
Under Contract No. M00264-00-C-0004)

APPEARANCE FOR THE APPELLANT: Ms. Susan E. Hughes
President

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
Chief Trial Attorney
Douglas R. Jacobson, Esq.
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Ft. Snelling, MN

DECISION BY ADMINISTRATIVE JUDGE FREEMAN

This appeal is a continuation of a dispute that began in October 2000 when the government terminated for convenience CLIN 0001 of the captioned contract. We previously have issued three decisions on this dispute, including a decision on reconsideration. See *Individual Development Associates, Inc.*, ASBCA No. 53910, 04-2 BCA ¶ 32,740, *aff'd on recon.*, 05-2 BCA ¶ 32,985; and *Individual Development Associates, Inc.*, ASBCA Nos. 55174, 55188, 06-2 BCA ¶ 33,349. Familiarity with these decisions is presumed. The present decision determines the net amount of the termination settlement. After hearing on the merits and briefing by the parties we conclude that the net amount of the termination settlement is a credit of \$18,065.39 due the government.

FINDINGS OF FACT

1. On 17 July 2000, Individual Development Associates, Inc. (IDA) was awarded the captioned contract (hereinafter Contract 0004) for instructional services at the Marine Corps University (MCU), Quantico, Virginia. The total contract price at award for five, firm fixed price, base term contract line item numbers (CLINs) was \$194,216.92. (R4-53910, tab 3 at 1, 6-7)

2. The contract incorporated by reference IDA's Technical and Price Proposals and also included, among other provisions, the FAR 52.212-4, CONTRACT TERMS AND

CONDITIONS – COMMERCIAL ITEMS (MAY 1999) clause. That clause stated in relevant part:

(d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. . . .

. . . .

(l) Termination for the Government’s convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms 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 record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor’s records. The Contractor shall not be paid for any work performed or costs incurred, which reasonably could have been avoided.

(R4-53910, tab 3 at 2, 46, 48 of 62)

3. CLIN 0001 of Contract 0004 required IDA to teach, tutor, test and counsel American English for the period 17 July 2000 through 31 May 2001 for 200 resident students at the Amphibious Warfare School (AWS) of the MCU. The firm fixed price of CLIN 0001 was \$80,625.68. (R4-53910, tab 3 at 6 of 62) IDA’s Technical Proposal at Section 2.22 stated that 326 man-hours of classroom instruction would be provided under CLIN 0001 (R4-53910, tab 3, Technical Proposal at 53).

4. The contract requirements at Section A-4a2 for all instructional CLINs included, among other items, the following: “(3) Review and critique of all student

papers by qualified instructors, and (4) One-on-one counseling for each student with their instructor at least three times during each course” In the AWS school for which the American English instruction was to be provided by IDA under CLIN 0001, the students were required to write eight papers over the 10 month course from August to May. (R4-52910, tab 3 at 29-30 of 62)

5. On 16 October 2000, the procuring contracting officer (PCO) notified IDA that CLIN 0001 was terminated in its entirety for the convenience of the government (R4-53910, tab 13). At the time of termination, the AWS course was only 2½ months into its 10 month duration, and only 13 of the 326 man-hours of instruction in IDA’s Technical Proposal for that course had been performed (R4-53910, tab 25 at 1). There is no evidence that, at the time of termination, IDA had reviewed and critiqued all eight of the student papers required over the duration of the AWS course, or that IDA had provided the required three one-on-one counseling sessions to each of the 200 AWS students.

6. On 8 November 2001, IDA submitted a total cost basis termination settlement proposal for a net payment to IDA of \$199,714 (R4-53910, tab 19 at 12, 15).¹ This proposal did not conform to the contract termination for convenience clause which required a settlement based on “a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination” (*see* finding 2).

7. On 8 May 2002, IDA submitted its total cost termination settlement proposal as a certified claim under the Contract Disputes Act of 1978 for breach of contract damages and equitable adjustment under the contract Changes clause (R4, tab 40).

8. On 15 August 2002, the termination contracting officer (TCO) issued a final decision on IDA’s total cost settlement proposal/claim. He denied the claim and unilaterally determined the termination settlement and net payment amounts as follows:

(i) Books and Materials for CLIN 0001	
[35% x \$80,625.68]	\$28,218.99
(ii) Instruction for CLIN 0001	
[3.99% x (\$80,625.68 – \$28,218.99)]	\$ 2,091.03
(iii) Settlement Expenses	\$ 6,265.70
(iv) Total Settlement Amount	\$36,575.72
(v) Previous Payments for CLIN 0001	\$48,375.41

¹ The text of the proposal states that the net payment requested is \$198,843. The SF 1436 computation of the proposal, however, shows a net payment requested of \$199,714 representing the difference between the net proposed settlement of \$346,730 and payments to date on all CLINs of \$147,016. (R4-53910, tab 19 at 12, 15)

(vi) Net Payment (Refund) Due (\$11,799.69)

(R4-53910, tab 58 at 1, 3) The final decision demanded payment from IDA of the amount of \$11,799.69.

9. The 35 percent contract value of CLIN 0001 allocated to books and materials in the TCO's determination was based on the 35 percent value assigned in IDA's Price Proposal to Payment #1, 15 August for "[d]elivery of textbooks and preliminary instructional materials" (R4-53910, tab 58 at 4, tab 3, Price Proposal at 29).

10. To determine the percentage of completion of the CLIN 0001 instructional work, the TCO divided the 13 hours actually performed on that work up to the termination by the 326 total hours for that work in IDA's Technical Proposal. To determine the contract value of the completed work, the TCO applied the percentage of completion (3.99) to the CLIN 0001 price, \$80,625.68, less the contract value of the books and instructional materials, \$28,218.99, in IDA's Price Proposal. (R4-53910, tab 3, Technical Proposal at 53, Price Proposal at 29, tab 25 at 1, tab 58 at 3-4)

11. The TCO's determination of the settlement expenses, \$6,265.70, was approximately 19 percent of the "adjusted" claimed settlement expenses.² The allowed percentage was the ratio of the "contract funding remaining on this CLIN," \$32,250.27, to the total settlement amount claimed, \$346,730, less the claimed settlement expenses, \$31,169, less the payments to date on all CLINs, \$147,016.³ The TCO's rationale for allowing only 19 percent of the settlement expenses was that "[a]ll of the costs incurred clearly are not necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract, under the commercial termination clause," and that "the one requirement of the termination clause, an estimate of the percentage of physical completion has never been provided" (R4-53910, tab 58 at 6). We find on *de novo* review that none of the claimed settlement expenses were incurred for a percentage-of-completion settlement proposal that was required by the contract termination clause. They were incurred for a total cost settlement proposal and could have been avoided by IDA if it had complied with the contract.

12. The amount of payments received by IDA for the CLIN 0001 work (\$48,375.41) is not disputed (R4-53910, tab 19 at 18, tab 58 at 3).

² The claimed settlement expenses on the SF 1436 were \$31,169 (R4-53910, tab 19 at 15). The TCO adjusted this amount to \$32,745.53 (R4-53910, tab 58 at 4).

³ \$168,545.

13. The TCO's final decision of 15 August 2002 was appealed and docketed as ASBCA No. 53910. In our decision of 9 September 2004, we held that the convenience termination of CLIN 0001 was proper and "remanded [the dispute] to the contracting officer for determination of quantum where [IDA] may submit a termination proposal in accordance with this opinion and the language of the commercial termination clause contained in the contract." *Individual Development Associates, Inc.*, ASBCA No. 53910, 04-2 BCA ¶ 32,740 at 161,925, *aff'd on recon.*, 05-2 BCA ¶ 32,985.

14. On 16 June 2005, IDA submitted a revised settlement proposal purportedly in accordance with the Board's decision of 9 September 2004 (supp. R4-55174, tab 1). The revised settlement proposal as amended on 3 August 2005, however, was not based on an estimated percentage of completion of the CLIN 0001 work, but instead consisted of a re-pricing of all five, firm fixed price, base term CLINs at IDA's purported "regular prices" for a revised total contract price of \$1,004,645.26.⁴ After deducting all government payments for those CLINs (\$170,821.56), IDA proposed a "Total Price Owed" of \$833,823.70. The discrepancy between the total government payments stated in the SF 1436 for the 8 November 2001 total cost settlement proposal and the total government payments stated in the 3 August 2005 amended revised settlement proposal is not explained. (Supp. R4-55174, tab 5 at 1, 3-10)

15. IDA's amended revised settlement proposal also included as "Charges Resulting from the Termination that Could not Be Avoided" (i) a total of \$258,742.29 for termination consultant, telephone and delivery service, termination consultant/accountant, accounting, and attorney services, and (ii) \$560,893.80 for "Lack of Prices Not Realized." With these charges added to the "Total Price Owed," the total amount of the amended revised settlement proposal was \$1,651,131.40. (Supp. R4-55174, tab 5 at 11)

16. By final decision dated 6 September 2005, the TCO denied entirely IDA's amended revised settlement proposal and reaffirmed his prior decision of 15 August 2002 finding a refund due the government of \$11,799.69 (supp. R4-55174, tab 6). This decision was timely appealed and docketed as ASBCA No. 55174.

17. In our decision of 19 July 2006, we granted the government's motion for summary judgment denying the claim items for re-pricing the CLINs and for "Lack of Prices Not Realized." We denied the motion as to the settlement expense items for

⁴ The "re-pricing" of the CLINs in the 3 August 2005 amended revised settlement proposal was not based on additional costs allegedly incurred in performing the non-terminated CLINs. Therefore, we do not reach the question reserved in the *footnote to our 9 September 2004 decision. See *Individual Development Associates, supra*, 04-2 BCA at 161,925.

termination consultant, telephone and delivery service, termination consultant/accountant, accounting, and attorney on the ground that the reasonableness of the claimed expenses and amounts incurred presented a genuine issue of material fact. We denied on the same ground the government's motion for summary judgment on the contracting officer's unilateral determination of the settlement amount and the refund due the government. We dismissed as duplicative the related ASBCA No. 55188. *Individual Development Associates, Inc.*, ASBCA Nos. 55174, 55188, 06-2 BCA ¶ 33,349 at 165,370.

18. Board order dated 18 January 2007 set 21 May 2007 for “[h]earing on both entitlement and quantum limited to the issues remaining for decision under the Board’s 19 July 2006 decision on the government’s Motion for Summary Judgment”⁵ Board order dated 3 April 2007 further defined the issues for the hearing as “the percentage of completion of the CLIN 0001 work at the time that CLIN was terminated, and any reasonable charges incurred as a result of that termination.” (Bd. corr. file)

19. Our 3 April 2007 order also sustained a government objection to, and denied IDA’s motion to admit, evidence relating to IDA’s argument that its bid of the base term CLINs as an “inseparable whole” negated the government’s right to terminate a portion of those CLINs. The order stated that the “inseparable whole” argument was rejected in our decision of 9 September 2004, *Individual Development Associates, supra*, 04-2 BCA at 161,924-25, and would not be reconsidered here. (Bd. corr. file)

20. At hearing on 21 May 2007, IDA represented by its President offered no evidence on the percentage of completion of CLIN 0001 at the time of termination. IDA’s President stated both in argument and testimony that: “We have never filed a claim based on percentage of completion because the termination was illegal, so the termination clause does not apply” (tr. 1/30, 103). The TCO testified at hearing and affirmed the basis for his determination of the percentage of completion of CLIN 0001 in his final decision of 15 August 2002 (tr. 1/133-35, 152, 159-60).

21. IDA presented no evidence at hearing supporting its claimed settlement expenses. To the contrary, IDA’s President stated that: “We are withdrawing all of the expenses that are associated with the termination,” and that: “We are withdrawing all claims for reasonable charges that resulted from the termination” (tr. 1/27, 29). This withdrawal was confirmed in IDA’s post hearing brief which stated: “To summarize,

⁵ At hearing, no entitlement issues within our jurisdiction were raised that had not been previously decided.

then, IDA has withdrawn all claims for the termination consultant, telephone and delivery service, termination consultant/accountant, accounting, and attorney” (app. br. at 26).

DECISION

IDA’s argument for sustaining the appeal is stated in the introduction to its post-hearing brief as follows:

IDA respectfully suggests that the only issue currently before the ASBCA is entitlement, specifically the government’s right to terminate a complete and an accepted commercial item and to offer IDA a percentage of completion of said item. All monetary claims “relating to a contract,” the only other area over which the ASBCA has jurisdiction, have been denied or withdrawn. IDA has not submitted a claim based on a percentage of completion. To so state would be a factual misrepresentation. The ASBCA has already denied the contracting officer’s claim based on a percentage of completion.

IDA vigorously challenges the propriety of the partial termination for convenience. The termination clause states the following: “The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience.” Accordingly, the ASBCA is correct in stating “that the government had the contractual right to partially terminate the contract for convenience” (ASBCA No. 53910). However, the government did not terminate part of the contract. Rather, as the evidence clearly shows, the contracting officer partially terminated CLIN 0001, the smallest commercial unit, after it was complete and accepted, thus effecting an illegal termination in violation of federal procurement law and unilaterally changing IDA’s offer.

Further IDA contends that the government has offered no proof that it had the contractual right to terminate a complete and an accepted commercial item. Rather it has merely asserted that it has this right. Indeed the government has offered no explanation of what work it was terminating since the enrollment in IDA’s copyrighted courses, which the contract clearly states the government was purchasing, was

complete and accepted at the time of the termination. Most egregiously, the government claims the right to use the termination clause to reform the contract; to unilaterally change IDA's offer; and to bifurcate IDA's commercial terms.

Last, IDA draws the ASBCA's attention to the government's perverse attempt to determine a percentage of completion of a complete and an accepted commercial item. This effort is analogous to a consumer trying to determine a percentage of completion of a loaf of bread or a book. . . .

(App. br. at 1-2)

It is apparent from the foregoing that IDA has staked everything in this appeal on the proposition that CLIN 0001 was a complete and accepted item at the time it was terminated. This proposition is patently false. IDA's Technical Proposal was incorporated by reference in the contract the parties entered into on 17 July 2000. That proposal stated that 326 man-hours of classroom instruction would be provided for the AWS course under CLIN 0001 (finding 3). It is not disputed that at the time CLIN 0001 was terminated only 13 man-hours of classroom instruction had been provided and there is no evidence that the requirements for review and critique of student papers, or one-on-one counseling of students had been completed (finding 5).

IDA is also incorrect where it states that "[t]he ASBCA has already denied the contracting officer's claim based on a percentage of completion." Our decision of 19 July 2006 denied the government's motion for summary judgment on the contracting officer's decision on the ground that there were genuine issues of material fact to be resolved in a full evidentiary hearing. That hearing was held on 21 May 2007. IDA had the opportunity there to offer evidence on the percentage of completion at termination and the reasonable costs incurred as a result of the termination in opposition to the contracting officer's determinations on those issues. IDA not only declined to do so, it stated that it had never submitted a claim based on percentage of completion and withdrew its entire previously submitted claim for costs incurred as a result of the termination (findings 20, 21). These actions were reaffirmed in its post-hearing brief, quoted above.

The TCO at hearing reaffirmed the basis for his determination of the percentage of completion of the CLIN 0001 work based on IDA's own allocation of the contract value of the books and instructional materials, IDA's own proposal of the instructional man-hours required for CLIN 0001, and the only evidence of the hours actually performed up to the time of termination (findings 5, 8-10, 20). In the absence of any credible contrary

evidence, we find the contracting officer's determination of the percentage of completion was correct.

We do not agree, however, with the government's adoption in its post-hearing brief of the TCO's 15 August 2002 determination of \$6,265.70 as the settlement expenses or reasonable charges resulting from the termination (gov't br. at 27-28). While the evidence in the record is sufficient for our finding the percentage of completion, there is no evidence of any settlement expenses or other reasonable charges incurred by IDA resulting from the termination. The settlement expenses in IDA's 8 November 2001 and 3 August 2005 proposals were incurred respectively for a total cost settlement proposal and a price revision settlement proposal, and not for a percentage-of-completion settlement proposal that was required by the contract termination clause (findings 6, 11, 14, 15).

The appeal is denied. The termination settlement amount under the convenience termination clause of the contract for the termination of CLIN 0001 is \$30,310.02. Since \$48,375.41 was paid to IDA under the contract for its partial performance of CLIN 0001 before the termination, there is a net credit (refund) due the government of \$18,065.39.

Dated: 20 December 2007

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 No. 55174, Appeal of Individual Development Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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