

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Genome-Communications) ASBCA Nos. 57267, 57285
)
Under Contract No. NNX09-TT43P)

APPEARANCES FOR THE APPELLANT: Mr. Eugene Koprowski
President
Ms. Nancy Bruening
Managing Director

APPEARANCES FOR THE GOVERNMENT: Vincent A. Salgado, Esq.
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Stennis Space Center, MS

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
UNDER RULE 11

In these two appeals, appellant Genome-Communications (Genome) seeks to recover the cost to provide instructional training materials for a seminar, and challenges the termination of its contract for cause. In ASBCA No. 57267, Genome contends that it tendered the training materials and has not been paid by the government. In ASBCA No. 57285, Genome urges that the termination for cause was unjustified. In both appeals, the government insists that Genome failed to deliver the training materials contracted for in accordance with the delivery schedule, as extended, failed to comply with a cure notice, and is neither entitled to payment nor to setting aside the termination for cause. Both parties have submitted the appeals on the record pursuant to our Rule 11. We sustain both appeals.

STATEMENT OF FACTS

A. The Contract

The National Aeronautics and Space Administration Shared Services Center (NASA or government) issued combined Synopsis/Solicitation No. 332984 dated 17 July 2009 for a contract which required offerors to conduct a two-day, instructor-led Certified Authorization Professional (CAP) review seminar, and CAP exam. The stated objective of the training was “to prepare students for the CAP Exam.” The statement of work referred to the Federal Information Security Management Act, 44 U.S.C. § 3541 *et seq.* (FISMA), a

statute which in general is intended to ensure the security of government information systems. *See* 44 U.S.C. § 3541. Quoted in its entirety, the statement of work required:

Delivery of a course that presents an overview of FISMA compliance requirements and discusses what documentation is needed, and what types of information to include in that documentation. Additionally, the delivery should include steps on how to perform security testing and evaluation (test for security vulnerabilities giving students a general idea on how to actively exploit and identify security vulnerabilities). Lastly, students will be given an opportunity to receive associated CAP certification.

(R4, tab 1 at R-7, tab 2 at R-10-11) The contractor was to provide all training materials. Both the course and the testing were to be held at the Goddard Space Flight Center (Goddard) between 31 August and 1 September 2009 (R4, tab 2 at R-11).

In response to the solicitation, Genome submitted a proposal dated 23 July 2009 (R4, tab 3 at R-15).

Effective 11 August 2009, NASA awarded a firm-fixed-price contract to Genome in the amount of \$18,000. The contract required Genome to provide training materials, consisting of 25 CAP Review Guides and CAP Practice Examinations, and to conduct a CAP review seminar at Goddard, and administer the CAP examination leading to CAP certification for each student at a later date. The delivery date for the training materials was 31 August 2009, and the two-day seminar was scheduled to begin on the same date. (R4, tab 6 at R-32-33) By date of 27 August 2009, the parties modified the contract to extend the dates, requiring that the seminar be conducted on 10-11 September 2009, with the CAP review guides and practice examinations to be delivered on 10 September 2009 (R4, tab 7 at R-39-40).

The contract, which was subject to the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.*, contained various standard clauses, including FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAR 2009), 48 C.F.R. § 52.212-4 (2009) (R4, tab 6 at R-34).

B. Performance

By date of 1 September 2009, Genome sent its “first batch” of PowerPoint slides to NASA via e-mail, setting forth its proposed course presentation (R4, tab 8 at R-46, tabs 9A-9G).

These slides comprise over 350 pages in printed form (R4, tabs 9A-9G). They are divided into seven categories, as follows: (a) Legal Regulations, Compliance and Investigations; (b) Telecommunications and Network Security; (c) Malicious Code; (d) Business Continuity and Disaster Recovery Planning; (e) Access Controls; (f) Operations; and (g) Cryptography (*id.*). Upon review of the slides in this initial submission, we find that: (a) they contain an abundance of generalized information regarding legal concepts, the internet and its processes, and emergency disaster planning; (b) some of the information contained in the slides appears relevant, and some appears irrelevant, to the broad descriptions in the statement of work; and (c) they do not include the CAP Review Guides and CAP Practice Examinations.

A senior training coordinator at Goddard responded to Genome’s submission on 3 September 2009 with the following e-mail:

At this time the PowerPoint presentation does not meet the requirements as documented in the Statement of Work. The requested seminar and subsequent examination is for the Certification & Accreditation Professional [sic] (CAP). What you provided at this time is geared more toward the Certified Information Systems Security Professional (CISSP) review seminar. Yes, both are certifications managed by ISC(2) [the International Information Systems Security Consortium, a not-for-profit organization providing vendor-neutral information on security education and certification], however, there is more specific focus on documenting your security posture in the CAP.

Additionally, we need to verify that the plan is, in fact, to provide each attendee with an official ISC(2) examination voucher for the CAP, as per the [Statement of Work], and on the final purchase order.... [P]lease let me know when we can expect the updated PowerPoint presentation.

(R4, tab 10 at R-416) In a further e-mail exchange on the same day, the senior training coordinator assured Genome that “we want the course delivered but, [with]...more specific content” (*id.* at R-415).

Genome replied in an e-mail, also on 3 September 2009, and stated:

We seek an immediate resolution to the question posed by this e-mail...from the senior training coordinator, as this issue raised will cause a delay in the performance of the contract terms, per the modification, i.e. training seminar next week at Goddard.

How do the PowerPoint slides specifically not represent the CAP Review content when they specifically follow the subject matter areas we outlined in our proposal to NASA and the [statement of work]?

E-mail from senior training coordinator is vague and does not provide specifics for action by us as the contractor, thus, we cannot comply with it at this time.

Genome requested a contracting officer's decision on the question. (R4, tab 11 at R-423) (Boldface in original)

In an internal e-mail dated 3 September 2009, the senior training coordinator advised NASA staff that she had contacted Genome "to see about getting a revised PowerPoint presentation," and that Genome was "working with [a procurement official] to see if they can provide other content then [sic] what they initially sent us" (R4, tab 19 at R-479).

Genome sent an invoice to NASA by e-mail on 3 September 2009 for the full contract price of \$18,000 (R4, tab 47). The invoice was later returned without action by letter on 19 January 2010 with a statement that the "[s]ervices required under the Purchase Order have not been performed" (R4, tab 48).

On 4 September 2009, Genome supplied a draft agenda and a second set of slides for the scheduled training (R4, tab 12 at R-426). The draft agenda was divided into two days, and the subjects to be covered on each day set forth. During the first day, Genome contemplated covering an overview of the CAP exam, regulatory and compliance issues, FISMA, business continuity and disaster recovery planning, telecommunications and network security, and a CAP practice examination. During the second day, Genome contemplated covering operations security, cryptography, access controls, malicious code, test taking issues, and a second CAP practice examination. (R4, tab 12 at R-426) Genome's second set of slides addressed: (a) the broad outlines of FISMA; (b) FISMA's compliance process for information systems; (c) material regarding FISMA's documenting system; (d) performing risk assessments for information systems; (e) certification of information systems; and (f) accreditation of information systems (*id.* at R-429-44). From the second set of slides themselves, we find that, at a minimum, they address the following

areas called for in the statement of work: FISMA compliance, the statute's documentation requirements, risk assessments and certification. We further find that they address accreditation of a system.

By letter dated 9 September 2009, the contracting officer notified Genome that: (a) the CAP Review Seminar and Exam Training scheduled for 10-11 September 2009 had been cancelled; and (b) Goddard was still reviewing the presentation materials and would contact Genome when the review was completed. The contracting officer also invited Genome to begin "the negotiation of a modification...to reflect reasonable and allowable cancellation charges" relating to the 10-11 September 2009 session. (R4, tab 18 at R-476) The contracting officer notified Genome on 18 September 2009 that a manager at Goddard, would be contacting Genome "regarding changes to your presentation materials along with a couple of questions about the testing/exam process" (R4, tab 21 at R-486).

In response to questions from Genome regarding the status of NASA's review of the submitted materials and possible new dates for the seminar, the chief of the relevant procurement operations branch advised Genome by e-mail on 15 September 2009 that "[y]our NASA [point of contact] is the Contracting Officer, Ms. Kim Johnson," who "will be negotiating a settlement with you for the cancellation of the previously scheduled session." He also advised Genome that Goddard's "review of the presentation materials is still ongoing and may take some time given [the] end of fiscal year activities. Once the review is completed, Ms. Johnson will contact you." (R4, tab 20 at R-482-83)

On 22 September 2009, one Mike Marshall, a senior training coordinator at Goddard, sent Genome by e-mail a lengthy comparison between the CAP Review Seminar it wanted and the draft schedule and slides that Genome had submitted. Mr. Marshall stated that "we want the course to cover the five domains of the CAP," as follows:

- Understanding the Purpose of Certification
- Initiation of the System Authorization Process
- Certification Phase
- Accreditation Phase
- Continuous Monitoring Phase

(R4, tab 23 at R-495) We find that the second set of slides that Genome tendered by e-mail dated 4 September 2009 in some manner addressed at least two of these domains, certification and accreditation.

Mr. Marshall further explained that a treatise entitled *Building and Implementing Security Certification and Accreditation Program: OFFICIAL (ISC)2 Guide to the CAPcmCBK*, by Patrick D. Howard, was "closest to the content we're seeking" for the CAP Review Seminar. Mr. Marshall also referenced a second treatise, *FISMA Certification & Accreditation Handbook*, by L. Taylor, with eleven chapters specifically

noted, as a further example of the type of content that NASA wanted. He observed that Genome's proposed presentation, as set forth in Genome's 4 September 2009 e-mail, "doesn't seem to focus on the CAP content" and "is more geared to a CISSP review course, which our audience here has already taken earlier this year." (R4, tab 23 at R-495-96) In a further e-mail to Genome on the same day, Mr. Marshall stated that:

[I]t did seem like a large portion of the course focused on CISSP topics and not C&A, which more of a process oriented certification. It's the focus of the content – even those sections that you believe might be in line with the CAP certification – that is more of a concern here, and many of the other topics are well out of range for a CAP course.

(R4, tab 25 at R-504) In yet another e-mail to Genome on the same date, Mr. Marshall stated that the topics that he had referenced from the two treatises in his earlier e-mail were "a guide to the sort of topics that should have been included in the course – a CAP course" (R4, tab 26 at R-508). The record contains no evidence regarding Mr. Marshall's authority, if any, to interpret contract requirements or to negotiate changes and we find that he did not compare Genome's submission to the statement of work.

In defense of its course materials, Genome stated in a 22 September 2009 e-mail to Mr. Marshall that:

We do cover FISMA in our first draft. We consider access controls to be part of "coordinating security for interconnected systems." We consider enterprise certification to be the same as "legal regulations and compliance." We consider operation security as the same as "security procedures" and "remediation planning" to be the same as business continuity and disaster recovery. So, this is a simple rewrite. We have four other books that we are using as well and some videos.

One of our sources was The CISSP and CAP prep Guide by Krutz and Vines (Wiley).

(R4, tab 26 at R-509)

Mr. Marshall and Genome scheduled a conference call for 23 September 2009 so that the parties could discuss the training materials and Mr. Marshall's comments (R4, tab 27 at R-513). Shortly after the conference call began, Genome hung up, accusing Mr. Marshall of attempting to renegotiate the contract (R4, tab 28 at R-518). In an e-mail to NASA counsel of the same date, Genome requested that he "assign a contracting officer

to talk about this as people in the training office are not following their agreements” (R4, tab 29 at R-520).

By letter dated 26 March 2010, the contracting officer furnished a cure notice to Genome in the form of a filing with the Board in response to an order to the contracting officer to issue a decision. While acknowledging “the procedural imperfections presented in this matter,” he asserted that “Genome’s refusal to act in good faith regarding the preparation of training materials and discussion of testing methodology and procedures [were] conditions endangering performance.” He stated that NASA did not intend to reschedule the CAP course until Genome submitted materials that satisfied specified criteria, including meeting “a quality commensurate with other commercial organizations providing similar training.” The contracting officer further asserted that he would terminate the purchase order for cause if the conditions were not cured within 15 days of receipt. He also stated that he would pay Genome the full contract price “upon satisfactory performance of all training and testing required...in the purchase order and combined synopsis/solicitation and [upon] receipt of a proper invoice.” (R4, tab 36 at R-545-46)

Genome responded to the cure notice by memorandum dated 8 April 2010. Genome asserted that the cure notice was “deficient per federal contracting law,” alleged that NASA had exhibited behavior “which is not in...accord with the good faith requirements of the statute regarding Notices to Cure,” and expressed its willingness to accept a \$15,000 fee for work performed. (R4, tab 38 at R-553-54)

By decision dated 9 July 2010, the contracting officer terminated the contract for cause effective immediately, for “failure to remedy the conditions endangering performance as delineated” in the cure notice (R4, tab 44 at R-579).

Subsequent to the termination, the contracting officer sent an e-mail dated 1 November 2010 to an individual inquiring on behalf of Dun and Bradstreet, stating that the termination for cause was before the Board and that “NASA is under no obligation to make payments under this contract and will not do so unless order[ed] by an ASBCA judge” (Notice of Filing of Supplemental Exhibit/Filing of Supplemental Exhibit Into Evidence (app. supp. filing) at 9).

C. Claims and Appeals

Genome filed multiple appeals regarding contract performance. By date of 8 September 2009, Genome appealed to the Civilian Board of Contract Appeals from the contracting officer’s failure to render a decision as requested in Genome’s 3 September 2009 e-mail. This appeal was later dismissed for lack of jurisdiction. *Genome-Communications v. NASA*, CBCA No. 1719, 09-2 BCA ¶ 34,270. Genome also filed two other appeals with this Board, ASBCA Nos. 56934 and 56945, which were consolidated. Both were dismissed as premature by order dated 20 October 2009 (R4, tab 34 at R-538). Thereafter, in response

to a 12 February 2010 request from Genome for an order directing the contracting officer to issue a decision, we ordered the contracting officer to issue a decision no later than 19 March 2010, or to indicate why a decision need not be issued (R4, tab 35 at R-541). Instead of responding to this order with a decision, the contracting officer issued his 26 March 2010 cure notice.

Genome filed a claim with the contracting officer by date of 22 April 2010 in the amount of \$15,000 for “professional services performed in support of this contract” during August and September 2009 (R4, tab 40 at R-563). The contracting officer thereafter denied Genome’s claim by decision dated 14 June 2010, and Genome then filed a timely notice of appeal, together with a complaint for \$15,000 for services performed “during August and September 2009.” We docketed that appeal as ASBCA No. 57267. Thereafter, following the contracting officer’s termination of its contract for cause, Genome filed a notice of appeal and complaint challenging the termination, which we docketed as ASBCA No. 57285.

DECISION

A. Contentions of the Parties

In these two consolidated appeals, Genome seeks breach of contract recovery and relief from the termination for cause. ASBCA No. 57267 is the breach of contract appeal, and Genome’s position is that it is owed payment for the writing, editing and research services it performed to produce training materials and to prepare for the CAP Review Seminar and Examination. ASBCA No. 57285 is the appeal challenging the termination for cause, and Genome’s position is that NASA’s termination was unjustified. In both appeals, NASA asserts the contrary of Genome’s positions.

B. ASBCA No. 57285

We address the termination for cause in ASBCA No. 57285 first because it is potentially dispositive of both appeals. The substantive and procedural principles are set forth in the Contract Terms and Conditions—Commercial Items clause and given effect in the case law. Paragraph (m) of the clause, *Termination for cause*, provides that, if NASA properly terminated the contract for cause, then NASA “shall not be liable to [Genome] for any amount for supplies or services not accepted.” It is undisputed that NASA did not accept the course materials that Genome prepared in August 2009, and tendered on 1 September 2009, stating that “the PowerPoint presentation does not meet the requirements as documented in the Statement of Work.” It is also undisputed that NASA did not accept any work that Genome performed in response to NASA’s 3 September 2009 e-mail. Given the provisions of paragraph (m), as well as the absence of evidence of acceptance, if the termination for cause at issue in ASBCA No. 57285 is sustained, it will be dispositive of both appeals.

Paragraph (m) also conferred upon NASA the right to terminate for cause in the event of “any default” by Genome, or upon Genome’s failure “to comply with any contract terms and conditions,” or upon Genome’s failure “to provide [NASA]...with adequate assurances of future performance.” We have held that the “principles that apply under the FAR clauses that govern termination for default apply with equal force under [this] termination for cause provision.” *General Injectables & Vaccines, Inc.*, ASBCA No. 54930, 06-2 BCA ¶ 33,401 at 165,593, *aff’d*, 519 F.3d 1360, *supplemented*, 527 F.3d 1375 (Fed. Cir. 2008). Hence, a termination for cause is also “a drastic sanction...which should be imposed (or sustained) only for good grounds and on solid evidence.” *J.D. Hedin Constr. Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). In the first instance, NASA “bears the burden to prove that its termination for cause of [Genome’s] commercial items contract was justified” under the standards laid out in paragraph (m). *ZIOS Corp.*, ASBCA No. 56626, 10-1 BCA ¶ 34,344 at 169,619. If NASA satisfies its burden, then Genome has the burden of proving that its nonperformance was excusable. *E.g., DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir.), *cert. denied*, 519 U.S. 992 (1996). Paragraph (f) of the clause, *Excusable delays*, postulates that such delays must be “beyond the reasonable control of [Genome] and without its fault or negligence,” and provides examples.

Considering the evidence in the record before us, we conclude that NASA has failed to meet its burden of proving that the termination for cause at issue in ASBCA No. 57285 was justified. Under paragraph (m) of the clause, an unjustified termination for cause “shall be deemed a termination for convenience.” We accordingly sustain the appeal in ASBCA No. 57285 and deem the termination as one for the convenience of the government, for the reasons set forth below.

At the outset, we reject Genome’s chief attack on the termination, which is bad faith. Genome argues that NASA “never intended to honor its contract.” (Appellant’s Opening Brief at 2) In support of its argument, Genome focuses upon two matters of record. The first is the contracting officer’s 1 November 2010 e-mail stating that NASA was “under no obligation to make payments under this contract and will not do so unless order[ed] by an ASBCA judge.” The second is the timing of the termination itself, which Genome insists was retaliatory. (Appellant’s Brief (app. br.) at 2) The contracting officer issued his termination decision by date of 9 July 2010, which was shortly after Genome moved for summary judgment in ASBCA No. 57267. *See Genome-Communications*, ASBCA No. 57267, 10-2 BCA ¶ 34,589.

These two circumstances fail to establish a bad faith termination. It is familiar that “clear and convincing proof [is] necessary to overcome the presumption that the [contracting officer] acted properly and in good faith.” *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1243 (Fed. Cir. 2002); *Charitable Bingo Associates, Inc., d/b/a Mr. Bingo, Inc.*, ASBCA Nos. 53249, 53470, 05-1 BCA ¶ 32,863 at 162,847, *aff’d on recon.*, 05-2 BCA ¶ 33,088. There is no evidence – even to meet a preponderance standard

– to support Genome’s bad faith allegations. With respect to the contracting officer’s 1 November 2010 e-mail, it may reasonably be regarded – and we so regard it – as an appropriate response to an inquiry, given that the matter was then in litigation. With respect to the allegation of a retaliatory termination, it is simply speculative, insufficient to overcome the presumption. *See Defense Systems Co.*, ASBCA No. 50918, 00-2 BCA ¶ 30,991 at 153,005 (holding allegation of retaliatory cure notice, unsupported by evidence, insufficient to establish bad faith).

While we thus reject Genome’s bad faith allegations, we separately conclude that NASA has failed to meet its “burden to prove that its termination for cause...was justified.” *ZIOS Corp.*, 10-1 BCA ¶ 34,344 at 169,619. Paragraph (a) of the clause, *Inspection/Acceptance*, obliged Genome to “tender for acceptance those items that conform[ed] to the requirements of this contract.” In deciding Genome’s motion for summary judgment in ASBCA No. 57267, we held that there were triable issues regarding both whether Genome’s initial submission, and its subsequent submission, met contract requirements. *Genome-Communications*, 10-2 BCA ¶ 34,589 at 170,504.

Thereafter, the parties elected Rule 11 disposition of both appeals. Our Rule 11 provides that such an election “does not relieve [a party] from the necessity of proving the facts supporting [its] allegations.” *See, e.g., AeroParts*, ASBCA No. 37822, 90-1 BCA ¶ 22,510 at 112,984 (finding insufficient evidence of excusable delay and recognizing that Rule 11 does not relieve a party of its burden of proof). To meet their respective burdens of proof, the Rule affords parties the latitude to introduce “[a]ffidavits, depositions, admissions, answers to interrogatories, and stipulations” to support their allegations. Nonetheless, NASA, as the party with the burden of upholding the termination, has forsworn introducing affidavits or other materials and has relied exclusively upon the Rule 4 file and attorney argument. As a result, we now have before us the same record in support of NASA’s case in both appeals that we had in deciding the summary judgment motion in ASBCA No. 57267, where we necessarily resolved all doubt over factual issues in favor of NASA, as the nonmoving party. *Genome-Communications*, 10-2 BCA at 170,504.

Unaided by affidavits or other explanatory evidence from NASA, we are left chiefly with the parties’ dueling contemporaneous assessments of Genome’s submissions. Those assessments give us little insight into how, if at all, the materials fell short of the statement of work. Thus, with respect to Genome’s first set of slides, the Rule 4 file contains the slides themselves, and the senior training coordinator’s conclusory assertion that the set “does not meet the requirements as documented in the Statement of Work.” We have only been able to find from our own review that some slides appear relevant to the statement of work and some appear irrelevant. The evidence regarding the first set is in equipoise, as a result of which NASA’s case regarding it fails. *E.g., Hom-Russ, Inc.*, ASBCA No. 46142, 94-2 BCA ¶ 26,635 at 132,477 (denying liquidated damages in Rule 11 appeal where evidence was in equipoise regarding contractor’s responsibility for late completion).

The more significant part of the record relates to the second set of slides that Genome submitted on 4 September 2009. From our review of these slides, we have found that, at a minimum, they touched upon several areas called for in the statement of work: FISMA compliance, the statutory documentation requirements, risk assessments and certification. Nonetheless, NASA stresses Mr. Marshall's 22 September 2009 e-mail. NASA tells us that he provided a "detailed...comparison between the CAP Review Seminar required by the Contract, the draft schedule and slides that [Genome] had submitted, and the required corrections to conform to the [statement of work]" (Respondent's Memorandum In Support of the Contracting Officer's Denial of Appellant's Claim for Sum Certain and Termination for Cause (gov't br.) at 5).

We reject NASA's contention for two principal reasons. First, as we have found, Mr. Marshall's authority, if any, to interpret contract requirements or to order changes is not evident from the record. Second, Mr. Marshall did not purport to compare the second set of slides to the statement of work. Rather, Mr. Marshall measured the slides against a subjective yardstick of "what we want the course to cover." The two treatises that Mr. Marshall cited are nowhere mentioned in the statement of work. In any event, as we have also found, at least two of "the five domains of the CAP" to which Mr. Marshall alluded – certification and accreditation – were covered by Genome's second set of slides.

NASA also argues that termination was justified for failure to comply with the cure notice, which is said to have "explain[ed] the requirements with which [Genome] had thus far failed to comply" (gov't br. at 6). We conclude that noncompliance with the cure notice was excusable, NASA having imposed requirements that exceeded the statement of work, including a new requirement that materials be of "a quality commensurate with other commercial organizations providing similar training."

C. ASBCA No. 57267

Genome has alleged a breach of contract in ASBCA No. 57267, and has sought varying amounts. In its 22 April 2010 claim, which led to this appeal, Genome sought \$15,000 for services performed in August and September 2009. In its brief, however, Genome now seeks the full contract price of \$18,000 (app. br. at 1).

Having concluded in ASBCA No. 57285 that NASA's termination for cause was unjustified and is hence deemed a termination for convenience under paragraph (m) of the clause, we do not look to a breach of contract measure of damages to determine Genome's recovery. Instead, we look to paragraph (l) of the clause, *Termination for the Government's convenience*. Under paragraph (l), in the event of a termination for convenience, 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 slender record that we have in ASBCA No. 57267 does not permit determination of the amount called for by paragraph (l). We have not committed to decide quantum on the parties' Rule 11 submissions. Given these considerations, we remand the appeal to the parties for negotiation of quantum, consistent with the formula specified in paragraph (l) of the clause.

CONCLUSION

ASBCA No. 57285 is sustained. ASBCA No. 57267 is sustained and remanded to the parties for the negotiation of quantum.

Dated: 25 February 2011



ALEXANDER YOUNGER
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. 57267, 57285, Appeals of Genome-Communications, rendered in conformance with the Board's Charter.

Dated:

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