

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Xerox Corporation ) ASBCA No. 58478  
 )  
Under Contract No. GS-25F-0062L )  
Delivery Order No. W9133L-07-F-0003 )

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CPT Ahsan M. Nasar, JA  
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OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the National Guard Bureau (NGB) contracting officer's (CO's) 4 October 2012 decision denying Xerox Corporation's (Xerox's) certified, undated, \$461,757.07 termination ceiling charge (TCC) claim under Delivery Order No. W9133L-07-F-0003 (DO 3) issued under the captioned General Services Administration (GSA), Federal Supply Schedule Contract No. GS-25F-0062L (the FSS contract), which decision Xerox appealed to this Board.

On 25 January 2013 respondent moved to dismiss the appeal for lack of jurisdiction on the ground that Xerox's claim requires interpretation of an FSS contract clause; it should have been directed to the GSA CO; and the ASBCA does not have jurisdiction of this appeal. Xerox's 27 February 2013 response argued that this appeal presents no dispute about the FSS terms, only the DO 3 terms. Upon the Board's request for the FSS contract and DO 3, on 15 May 2013 the parties submitted the FSS contract cover page with two modifications, and DO 3 with 16 modifications. None of those documents had a TCC clause. On 28 May and 10 July 2013 the Board requested the parties to submit a complete copy of the FSS contract, which was done on 26 July 2013. On 30 July 2013 the parties identified FSS Modification No. PO-0103, which incorporated "Solicitation Number 3FNJ-C1-01-0001-B, Refresh 14" into the FSS contract (ex. G-26). That solicitation specified Special Item Number (SIN) 51-58b, including paragraph 13, "EARLY TERMINATION CHARGES" (ex. G-27 at 29), which resembles the TCC clause set forth in respondent's motion to dismiss (gov't mot. at 2, ¶ 7).

Respondent's 31 July 2013 letter to the Board states: "The government hereby withdraws its motion to dismiss the subject appeal." Xerox's 6 August 2013 letter states that it has no objection to withdrawal of the government's motion. A non-frivolous question concerning our jurisdiction having been brought to our attention, we proceed *sua sponte* to examine it.

### STATEMENT OF FACTS (SOF)

#### A. The FSS Contract

1. Based on Solicitation No. FCGE-C1-00-0001-B, FSS and Xerox entered into the FSS contract effective 1 October 2001 for, *inter alia*, Federal Supply Class 36 (FSC 36), SIN 51-58 Lease to Ownership Plan, SIN 51-58a Operating Lease, and SIN 51-505, Document Production Services. The FSS stated:

#### **3. Discount(s)/Pricing:....**

##### **SIN 51-58 Lease to Ownership Plan (LTOP):**

....

**Early Termination Fee** – The fee will be calculated by using the formula prescribed under Xerox' letter dated September 13, 2001.<sup>[1]</sup> [SIN 51 58a contained the identical Early Termination Fee provision.]

....

##### **SIN 51-505 Document Production Services:**

....

Plan A –

Early Termination Fee – The Leasing Termination terms and conditions under the Refresher #2 Solicitation will apply for Xerox owned equipment.

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<sup>1</sup> Such letter is not in the appeal record.

#### **14. Refresher #2:**

The Leasing Terms and Conditions under SINs 51-58 and 51-58a are incorporated under the Refresher #2 Solicitation FCGE-C1-00-0001-B. Xerox acknowledges and accepts the terms and conditions prescribed under Solicitation Number “FCGE-C1-00-0001-B Refresher #2”.

(Ex. G-25 at 1, 3, 5, 6, 9; compl., ex. I at 2, 91).

2. FSS contract Modification No. PO-0103 (Mod. 103), signed on 24 September 2007 by the GSA CO and effective 1 February 2008, included “Solicitation No. 3FNJ-C1-01-0001-B, Refresh 14” (ex. G-26). Refresh #14 specified, *inter alia*, FSC 36 SINs 51 58 “Lease-to-Ownership Plan for Copiers,” 51 58a “Operating Lease Plan for Copiers,” 51 58b “Operating Lease Plan – (All Other Products under FSC 36)...with the exception of copiers,” and 51 505 “Document Production Services” (ex. G-27 at 25-26, 51, 192).

3. SIN 51 58b’s provisions, paragraph 2(3)(vii), stated: “The Termination Ceiling Charges, as applicable. (See Section 13, Early Termination Charges)” (ex. G-27 at 26). Section 13 provided:

#### **13. EARLY TERMINATION CHARGES**

Equipment leased under this agreement may be terminated at any time during a Government fiscal year by the Ordering Agency’s Contracting Office responsible for the delivery order in accordance with FAR 52.212-4, paragraph (l) *Termination for the Government’s Convenience*.

The Termination Ceiling Charge is a limit on the amount that a contractor may claim from the Ordering Agency on the termination for convenience of a lease or failure to renew a lease prior to the end of the lease term for reasons other than those set forth in section 14, Termination for Non-Appropriation. Termination ceiling charges will apply for each year of the lease term (See FAR 17.1). The Ordering Agency and contractor shall establish a Termination Ceiling amount. The Contracting Officer shall insert the Termination Ceiling Charge for amount of the first year in the order and modify it for successive years upon availability of funds.

No claim will be accepted for future costs: supplies, maintenance, usage charges or interest expense beyond the date of cancellation. In accordance with the bona fide needs rule, all termination charges must reasonably represent the value the Ordering Agency received for the work performed at cancellation based upon the shorter lease term. No termination cost will be associated with the expiration of the lease term.

....

**Formula 2: For Operating leases SIN 51 58a and 51 58b**

Termination Fee=  $PV(i, n, -PMT)$

“PV”= Present Value

“i” = Interest rate per month, equal to the interest rate applicable to the calculation of the payment on the delivery order

“n” = Number of months remaining from termination date to the end of the lease term

“PMT” = Current monthly payment amount of the original payments through end of the lease

(Ex. G-27 at 29)

**B. The Agency Delivery Order**

4. On 1 October 2006 the Army NGB CO signed and issued DO 3 to Xerox under the FSS contract for SIN 51-505, “Xerox Management Services; service agreement #2511807.”<sup>2</sup> DO 3 provided for a base year of 1 October 2006 through 30 September 2007 and three annual options, ending 30 September 2010. (Ex. G-7 at 1-8) DO 3 identified 102 Xerox equipments at NGB offices in Arlington Virginia, the Pentagon, and Fort Belvoir, Virginia (ex. G-7 at 16-20).

5. DO 3 included, *inter alia*, the Federal Acquisition Regulation (FAR) 52.217-8, OPTION TO EXTEND SERVICES (NOV 1999); 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR. 2000); and 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (SEP 2005) clauses. The FAR 52.212-4 clause provided, *inter alia*:

(l) *Termination for the Government's Convenience.*  
The Government reserves the right to terminate this contract,

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<sup>2</sup> Service agreement No. 2511807, is not in the appeal record.

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 paid for any work performed or costs incurred which reasonably could have been avoided.

DO 3 did not incorporate or establish any TCC amount as provided for in the "Early Termination Charges" clause (SOF ¶ 3). (Ex. G-7 at 8-10, 15)

6. DO 3 Modification No. P00003 (Mod. P00003), dated 29 September 2007, exercised option year 1 for the period 1 October 2007 through 30 September 2008. Mod. P00003 added contract line item number (CLIN) 1003 which specified "GS-25F-0062L SIN # 51-505 12 months of Xerox Management Services; service agreement #2511807.... Vendor agrees we are in 12 months of a 36 month agreement. There will be 24 months remaining on this agreement, to be exercised as options to the government." (Ex. G-10 at 1-2)

7. CO Karen A. Smith signed bilateral DO 3 Modification No. P00005 (Mod. P00005) on 28 January 2008, effective 20 December 2007 (ex. G-12 at 1), and sent it to Xerox on 29 January 2008 for signature (ex. G-5 at 1 of 5). Addendum I to Mod. P00005 described CLIN 1005 as: "12 [sic] months of a 60 month Xerox Document Management Services Agreement (12/01/07 through 09/30/08).... Contract Number 2511807" with a stated "QTY" of "10 Months" at \$38,954 per month "for Xerox copiers" (ex. G-12 at 2, 3 of 5). Xerox's James McWilliams signed Mod. P00005 on 25 January 2009. Xerox's version of Mod. P00005 contains the added statement, "49 Termination Ceiling Charge schedule(s) are attached" (ex. G-3 at 2). No such schedules were attached.

8. DO 3 Modification No. P00007, effective 16 October 2008, exercised "Option Period 2," 1 October 2008 to 30 September 2009. The CLIN 2001 description stated: "12 months of 60-month Xerox Document Management Services Agreement (10/1/08 to 09/30/09)" with CLIN 2002 for "Black & White Copiers." (Ex. G-14 at 1, 4 of 7)

9. Bilateral DO 3 Modification No. P00009, effective 10 July 2009, added CLIN 2004 for three copiers for July-September 2009, with a "Note: The government is not obligated to a 60 month IAW the GSA schedule lease terms.... Should the Government

terminate prior to lease expiration, price is subject to GSA's terms and conditions of the Termination Ceiling Charge (TCC) schedule. See TCC attached." No TCC was attached. (Ex. G-16 at 1, 3 of 11)

10. Bilateral DO 3 Modification No. P00011, effective 1 October 2009, exercised "Option Year 3," 1 October 2009 to 30 September 2010 for CLINs 3001-3004 (ex. G-18).

11. Bilateral DO 3 Modification No. P00013, effective 1 October 2010, citing FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT, extended performance from 1 October 2010 to 31 March 2011 (ex. G-20 at 1, 4 of 7).

12. Bilateral DO 3 Modification No. P00016, signed 4 April 2011 by Xerox, 6 April 2011 by the CO and effective 1 April 2011, citing FAR 52.217-8, OPTION TO EXTEND SERVICES, extended DO performance from 1 April to 31 July 2011 (ex. G-23).

13. Neither DO 3 nor any of its modifications established a TCC amount or mentioned SINs 51 58, 51 58a or 51 58b (exs. G-7 to G-23).

#### C. Xerox's Claim

14. Army CO Nicole N. Clark's 10 June 2011 letter to Xerox stated that DO 3, "which provides copiers and maintenance services," would expire on 31 July 2011 and NGB had "decided not to renew the current building lease; therefore, all [Xerox] equipment and personnel are required to be removed NLT August 01, 2011" (compl., ex. D).

15. Xerox submitted a certified claim for \$461,757.07 in "Termination Ceiling Charges" to CO Clark alleging that Xerox's "managed services contract under contract number 2511807 does not expire until 11-30-2012." Attached to the claim was "EXHIBIT A" which listed 55 items of Xerox equipment by serial numbers, each with SINs 51 58 and 51 58a TCC charges (but no SIN 51 58b TCC charges). (Ex. G-2 at 1, 5-6, 8, 9-64)

16. CO Clark's 4 October 2012 final decision denied Xerox's claim in its entirety. She stated that the claim included a "document...purporting to be Modification P00005" whose page 2 stated:

#### **SUMMARY OF CHANGES...**

*"49 Termination Ceiling Charge schedule(s) are attached".  
See attached Supplemental Pricing Addendum-Form 52086  
See attached Statement of Work Addendum Form 52520....*

The CO found that the quoted text “was never made a part of the delivery order.” She stated: “There is no language in either the delivery order [DO 3] or the GSA schedule [FSS contract] that made the Government liable for any termination ceiling charges” and that DO 3 never established a termination ceiling amount. (Ex. G-1 at 2-6)

17. FAR Subpart 8.4, FEDERAL SUPPLY SCHEDULES, applicable in October 2006, when DO 3 was executed, prescribed in pertinent part:

**8.406-6 Disputes.**

(a) Disputes pertaining to the performance of orders under a schedule contract. (1) Under the Disputes clause of the schedule contract, the ordering activity contracting officer may—

(i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or

(ii) Refer the dispute to the schedule contracting officer.

(2) The ordering activity contracting officer shall notify the schedule contracting officer promptly of any final decision.

(b) Disputes pertaining to the terms and conditions of schedule contracts. The ordering activity contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.

(c) Appeals. Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims.

## DECISION

Notwithstanding the withdrawal of respondent's motion and though neither party now contends that our Contract Disputes Act jurisdiction is lacking, a tribunal has the obligation to satisfy itself that there is jurisdiction to adjudicate the merits of an appeal. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

*Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367 (Fed. Cir. 2013) interpreted FAR 8.406-6 regarding the respective authorities of GSA schedule COs and ordering agency COs to decide disputes under agency orders issued under an FSS contract, and hence the proper board of contract appeals to decide such disputes on appeal. In *Sharp*, the Army issued a delivery order to Sharp to lease copier equipment in accordance with Sharp's GSA schedule contract. The order provided for a base year and three option years. The Army exercised the first two option years. The Army "partially" exercised option year three for six months and the parties extended the lease for three more months. Sharp filed a claim with the ordering CO alleging that the Army's failure to fully exercise option year three was a "premature cancellation" entitling Sharp to fees under the termination provisions of its schedule contract, and appealed to this Board on the basis of a deemed denial. We dismissed the appeal for lack of jurisdiction on the ground that FAR 8.406-6 did not permit an agency CO to decide disputes pertaining to the terms and conditions of schedule contracts. The Federal Circuit affirmed our decision holding that:

FAR 8.406-6 does not authorize an ordering CO to decide a dispute requiring interpretation of schedule contract provisions, in whole or in part, regardless of whether the parties frame the dispute as pertaining to performance. However, the ordering CO is certainly authorized to construe the language of the order (or its modifications)...as long as the dispute does not involve interpretation of the schedule contract. We also see no reason why an ordering CO resolving a dispute cannot apply the relevant provisions of the schedule contract, as long as their meaning is undisputed.... The dispute only need go to the GSA CO if it requires interpretation of the schedule contract's terms and provisions.  
[Footnotes omitted]

707 F.3d at 1374. Pursuant to *Sharp*, we must determine whether this appeal requires interpretation of a disputed schedule contract provision, in whole or in part.

In its 31 July 2013 letter withdrawing its motion to dismiss, respondent explained its rationale: FSS contract Mod. 103, effective 1 February 2008, included "Termination Ceiling Charges" for SIN 51 58b Operating Lease Plan (All Other Products under FSC 36). Mod. 103 postdated DO 3 for SIN 51 505, issued 1 October 2006, and respondent's

version of DO 3 Mod. P00005, effective 20 December 2007. Therefore, the TCC provision was not incorporated in DO 3 at those times. Respondent adds that if Xerox's version of Mod. P00005 is authentic (*see* SOF ¶ 7), then the Board must interpret the FSS contract, which would remove the appeal from the Board's jurisdiction.

Appellant's 6 August 2013 response to the government's 31 July 2013 letter asserts:

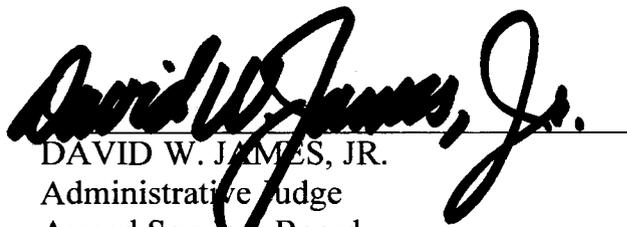
Modification 103 to Xerox's GSA Schedule Contract likely became effective on 24 September 2007, the date signed by the GSA Contracting Officer, not 1 February 2008 as the Government suggests.... Xerox believes that further review will reveal that the "effective date" identified in ...Modification 103 is in error as it is inconsistent with the purpose of the document and the standard practice of GSA when processing renewal modifications.

The parties' foregoing statements show that a tribunal will have to review, and hence interpret, the FSS contract to resolve the disputed issues of the intended date of FSS contract Mod. 103. Our SOF discloses additional FSS contract issues involving the actual presence of the FSS contract's fee clause, its effective date, and actual terms that require interpretation. We conclude that the tribunal authorized by FAR 8.406-6 to interpret such FSS contract terms and resolve those issues is not the ASBCA.

Therefore, we hold that FAR 8.406-6(b) required the ordering CO to refer this dispute to the GSA schedule CO, and the ASBCA lacks jurisdiction of the appeal. *See Sharp Electronics*, 707 F.3d at 1374; *Impact Associates, Inc.*, ASBCA No. 57617, 13 BCA ¶ 35,289 at 173,249 (dispute regarding both an FSS clause and an agency DO clause required a GSA CO's final decision and appeal to the Civilian Board of Contract Appeals).

Accordingly, we dismiss the appeal for lack of jurisdiction.

Dated: 13 September 2013

  
DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur



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

I concur



JOHN J. THRASHER  
Administrative Judge  
Acting 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. 58478, Appeal of Xerox Corporation, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals