

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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ESCgov, Inc. ) ASBCA No. 58852  
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Under Contract No. HC1028-12-C-0047 )

APPEARANCES FOR THE APPELLANT:

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Washington, DC

APPEARANCES FOR THE GOVERNMENT:

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER  
ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This appeal relates to the termination for convenience of a contract to procure software and related support services. The contractor, ESCgov, Inc. (ESC), a systems integrator, challenges the termination. The present motion for partial summary judgment relates to two counts of ESC's complaint, in which ESC seeks to recover software procurement costs and intellectual property costs, respectively. We deny the motion regarding both counts.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

*A. 2012 Contract*

1. Effective 24 July 2012, the Defense Information Systems Agency (DISA or government) awarded Contract No. HC1028-12-C-0047 (the 2012 contract) to ESC, a systems integrator, to provide a solution to specified software needs. The 2012 contract required that the contractor's solution include a product of BMC Software, Inc. (BMC). The product was BMC BladeLogic software and licenses. The 2012 contract also required ESC to furnish the technical services necessary to install, configure, implement, administer and sustain the solution on government-furnished

computing resources. (R4, tab 4 at 3) The 2012 contract was a follow-up contract to one awarded in 2008 (the 2008 contract) (R4, tab 4 at 45; *see* statements 11-13).

2. The 2012 contract contained various standard clauses, including both FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (JUN 2010) and FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (MAY 2004) (R4, tab 4 at 60).

3. By date of 29 August 2012, the government terminated the 2012 contract for convenience at no cost to either party, effective immediately (R4, tabs 9(a), (b)).

4. By date of 2 January 2013, ESC submitted a termination settlement proposal under FAR Part 49 seeking payment of \$3,384,500.76 under the 2012 contract (R4, tab 17).

5. After the parties failed to reach agreement on the settlement proposal, ESC submitted a certified claim under the 2012 contract by date of 12 June 2013, seeking payment of \$3,384,500.76 (R4, tab 20).

6. ESC has opposed the government’s motion for partial summary judgment with the Declaration of Keith Zagurski, its executive vice president and chief financial officer. In his declaration, Mr. Zagurski addressed the BMC BladeLogic software licenses that ESC had purchased at the time of the 2008 contract. He stated that “[t]he licenses purchased by ESCgov [from BMC] were perpetual, which meant that they did not have a defined term of use. The licenses also were limited to use in support of DISA, and could not be used for other customers.” (App. opp’n, ex. 1, Declaration of Keith Zagurski (Zagurski decl.) ¶ 8) Mr. Zagurski further stated that:

ESCGov purchased the Bladelogic software licenses based upon its understanding that DISA’s needs for the access and security configuration control solution requested would continue beyond the initial [2008] contract. Because the licenses were perpetual and not limited in term, ESCgov would be able to use the licenses on future DISA contracts.

(Zagurski decl. ¶ 9) Mr. Zagurski also stated that:

Although licenses with defined terms commonly are less expensive than perpetual licenses, ESCgov paid more for perpetual licenses than it likely would have for licenses with a defined term, because ESCgov planned to utilize the

licenses beyond the initial contract to provide access and security configuration control support to DISA.

(Zagurski decl. ¶ 10)

7. In his declaration, Mr. Zagurski also addressed ESC's intellectual property claim for the costs of the component templates and sensors and the extended object files. He stated:

Because the Bladelogic software itself did not provide the level of functionality to meet the 2008 Contract's requirements for access and security configuration control, ESCgov had to develop intellectual property to facilitate the provision of services under the 2008 Contract. ESCgov personnel developed component templates, sensors and extended object files in order to address security needs of DISA and to perform the 2008 Contract's requirements. ESCgov used this ESCgov-developed intellectual property to provide compliance and remediation support as required by the 2008 Contract.... [T]here was no requirement in the 2008 Contract directing ESCgov to create software to perform the access and security configuration control services. ESCgov developed the component templates, sensors and extended object files to ensure that it could meet the service requirements of the contract.

(Zagurski decl. ¶ 14)

8. Mr. Zagurski also stated that ESC "had to install the Bladelogic software along with the component templates, sensors and extended object files on DISA servers in order to provide the access and security configuration control services required by the 2008 Contract" (Zagurski decl. ¶ 15) (*see* statement 11). He further declared that "DISA did not pay ESCgov for this [intellectual property] development effort as part of the 2008 Contract" (Zagurski decl. ¶ 18).

9. Mr. Zagurski attested that ESC "recorded efforts associated with the intellectual property development to a cost objective established for the 2008 Contract" (Zagurski decl. ¶ 18). He added that "[a]lthough [ESC] recognized a ratio of costs to sales during 2008 in order to satisfy accounting requirements, ESCgov did not amortize the purchase price of the [BladeLogic] software licenses over the life of the 2008 Contract" and that "DISA did not pay ESCgov under the 2008 Contract for the BMC Bladelogic software licenses" (Zagurski decl. ¶¶ 21, 22).

10. Mr. Zagurski also stated that, after termination of the 2012 contract, ESC “requested that DISA deinstall and return the intellectual property comprised of component templates, sensors and object files that ESCgov had developed under the 2008 Contract,” but that DISA had not done so (Zagurski decl. ¶ 29).

#### B. 2008 Contract

11. On or about 21 April 2008, DISA awarded ESC Contract No. HC1028-08-F-2212 to provide “Access and Security Config[uration] Control” software utility services (the 2008 contract) (R4, tab 1 at 2).

12. The stated objective of the 2008 contract was “for the vendor to provide a complete solution for granular-level access control of [operating systems]” by providing “the solution software and/or devices and technical services” necessary (R4, tab 1 at 31). The 2008 contract did not require ESC to deliver any software licenses or to develop any software for DISA (Zagurski decl. ¶ 12). The contract did not require use of specific software, but instead permitted contractors to propose a solution (gov’t mot. ¶ 1).

13. It is undisputed that, at the time of the 2008 contract, ESC purchased 20,000 BladeLogic software licenses (Respondent’s Statement of Undisputed Material Facts and Memorandum of Law in Support of its Motion for Partial Summary Judgment (gov’t br.) ¶ 4; Appellant’s Opposition to Respondent’s Motion for Partial Summary Judgment (app. opp’n) ¶ 4)). DISA used “approximately 6,000 servers after 18 months” of contract performance (Zagurski decl. ¶ 13).

### DECISION

DISA seeks summary judgment regarding counts I and III of the complaint. In count I, ESC alleges that it “is entitled to payment of \$1,031,430.50, which represents the cost to procure the BMC BladeLogic software licenses that is allocable to the Contract” (compl. ¶ 52). In count III, ESC alleges that it “is entitled to payment of \$2,127,924 for [the government’s] continued retention and use of the ESCgov-developed intellectual property,” consisting of “(1) component templates; and (2) sensors and extended object files” (compl. ¶¶ 64, 69).

The nub of DISA’s argument regarding its entitlement to summary judgment on count I is that ESC incurred the cost of the BMC BladeLogic software licenses in connection with the 2008 contract and the cost is not a permissible pre-contract cost under FAR 31.205-32 (gov’t br. at 12-13). DISA insists that the cost of the licenses could not have been incurred in 2008 pursuant to negotiation and in anticipation of the 2012 contract, which had no delivery schedule in 2008. Secondly, DISA contends

that ESC's position does not comport with its own accounting practices. According to DISA, although ESC asserts that it purchased the BMC BladeLogic software licenses for the present contract, it allocated the entire amount of the license costs to the cost pool for the 2008 contract. (Gov't br. at 13-14)

ESC counters DISA's arguments regarding count I by contending, first, that, while DISA "seeks to establish the parameters of costs allowable...by exclusively applying the fixed-price convenience termination requirements in FAR Part 49....consideration also must be given" to FAR 52.212-4, due to the commercial nature of the present contract (app. opp'n at 18). ESC stresses that "the Board must analyze ESCgov's claims for the Bladelogic software licenses and ESCgov-developed intellectual property pursuant to the requirements of [both] FAR § 52.212-4(l) and FAR Part 49" (*id.* at 21).

The standards for summary judgment are familiar. The movant must show both that there are no genuine issues of material fact, and that it is entitled to judgment as a matter of law. *E.g.*, *Proveris Scientific Corp. v. Innovasystems, Inc.*, 739 F.3d 1367, 1371 (Fed. Cir. 2014); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In deciding a motion for summary judgment, "[o]ur task is not to resolve factual disputes, but to ascertain whether material disputes of fact – triable issues – are present." *Conner Bros. Construction Co.*, ASBCA No. 54109, 04-2 BCA ¶ 32,784 at 162,143, *aff'd*, *Conner Bros. Construction Co. v. Geren*, 550 F.3d 1368 (Fed. Cir. 2008) (quoting *John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969). We draw justifiable factual inferences in favor of the party opposing the motion, which in this case is ESC. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

Mindful of these principles, we deny DISA's motion for three principal reasons.

*First*, with respect to Count I, the record reveals disputed material facts regarding whether ESC incurred the cost of the BladeLogic software licenses solely in connection with the 2008 contract. While DISA asserts that "it is clear that the [BladeLogic software] licenses could not have been purchased [in 2008] 'pursuant to negotiation...and in anticipation of award' of the 2012 contract" (gov't br. at 13), ESC has proffered evidence to the contrary, chiefly in Mr. Zagurski's declaration. Thus, Mr. Zagurski states that "ESCgov purchased the Bladelogic software licenses based upon its understanding that DISA's needs for the access and security configuration control solution requested would continue beyond the initial [2008] contract" (statement 6). He adds that ESC paid a premium price for perpetual licenses "because ESCgov planned to utilize the licenses beyond the initial contract to provide access and security configuration control support to DISA [on a future contract or contracts]" (*id.*). While DISA derides Mr. Zagurski's declaration as a "self-serving, post-hoc" document which "conflicts with ESCgov's prior admissions and testimony"

(Respondent's Reply in Support of its Motion for Partial Summary Judgment (gov't reply br.) at 2), we cannot conduct a "trial by affidavit" on this summary judgment motion. *Grimberg*, 99-2 BCA ¶ 30,572 at 150,970. The same is true regarding DISA's argument that ESC allocated the entire amount of the license costs to the cost pool for the 2008 contract (gov't br. at 13-14). While DISA asserts that ESC's accounting practices refute its contention that the license costs were allocated to the 2012 contract, Mr. Zagurski states under oath that ESC "did not amortize the purchase price of the software licenses over the life of the 2008 Contract" (statement 9).

*Second*, with respect to Count III, we cannot credit DISA's primary argument that recovery of the costs for the intellectual property would contravene FAR 31.205-32. DISA tells us that the templates, sensors, and files were created and delivered during performance of the 2008 contract. Hence, DISA contends, the costs do not satisfy the requirements specified for precontract costs in FAR 31.205-32. (App. opp'n at 15-16) As noted, however, the 2012 contract contained FAR 52.212-4(1), the convenience termination clause for commercial items contracts (statement 2). Under that clause, "a commercial items contractor need not comply with regulatory cost principles," such as FAR 31.205-32. *SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832 at 175,224.

There are also factual issues regarding Count III that preclude summary judgment. Among them are DISA's contention that the restrictive markings that ESC claims to have placed on the intellectual property used in the 2008 contract "do not notify [DISA] that [ESC] intended to limit [DISA's] rights in the files" (gov't br. at 18). Issues of material fact also surround DISA's argument that "the evidence establishes that the Intellectual Property files were not developed [by ESC] exclusively at private expense, as [ESC] claims" (gov't br. at 19). The record contains contrary assertions under oath in Mr. Zagurski's declaration that "DISA did not pay ESC gov for this [intellectual property] development effort as part of the 2008 Contract" (statement 8).

*Third*, DISA has not persuaded us that it is entitled to judgment "as a matter of law." *Mingus*, 812 F.2d at 1390; FED. R. CIV. P. 56(a). We recognize that contract interpretation is generally a question of law that may be resolved by summary judgment. *E.g.*, *Osborne Construction Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083 at 168,514. In this case, however, the 2012 contract incorporated by reference both the commercial items convenience termination clause in FAR 52.212-4(1) and the fixed-price convenience termination clause in FAR 52.249-2 (statement 2). In their papers, the parties present sharply divergent positions regarding what law governs ESC's claim. While DISA insists that the claim should be measured solely against the fixed-price termination requirements of FAR Part 49 (gov't br. at 11-12), ESC contends that "consideration also must be given to the language [of the clause] at FAR § 52.212-4 regarding terminations for convenience" (app. opp'n at 18). "This clause

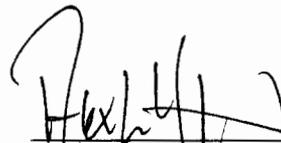
sets up a different method for determining fair compensation for the contractor in the event of a termination for convenience of a commercial items contract than the methods set forth in termination for convenience clauses prescribed in FAR Part 49.” *Dellew Corp.*, ASBCA No. 58538, slip op. at 12 (1 May 2015).

Given the uncertainty in the record regarding whether the parties intended to be guided by the fixed-price or a commercial items termination for convenience clause in the 2012 contract, summary judgment is unwarranted. We have elsewhere denied summary judgment when the parties contest the meaning of material contract terms, recognizing that “material disputes of fact...may arise concerning the meaning intended by the parties.” *Aegis Defence Services Ltd.*, ASBCA No. 59082, 15-1 BCA ¶ 35,811 at 175,138. Stated otherwise, “[w]hen the meaning of a contract and the parties’ intentions are both relevant and in dispute, there are mixed questions of fact and law that pose triable issues precluding summary judgment.” *Ashbritt, Inc.*, ASBCA Nos. 56145, 56250, 09-2 BCA ¶ 34,300 at 169,434.

### CONCLUSION

The government’s motion for partial summary judgment is denied.

Dated: 16 June 2015



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ALEXANDER YOUNGER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

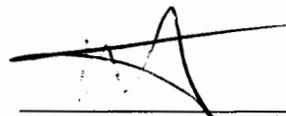
I concur



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

I concur



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RICHARD SHACKLEFORD  
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. 58852, Appeal of ESCgov, Inc., rendered in conformance with the Board's Charter.

Dated:

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