ARMED SERVICES BOARD OF CONTRACT APPEALS

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

APPEARANCES FOR THE APPELLANT: Francis E. Purcell, Jr., Esq.
Thomas O. Mason, Esq.
Cooley LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: William E. Brazis, Jr., Esq.
DISA General Counsel
JoAnn W. Melesky, Esq.
Laura J. Barke, Esq.
Trial Attorneys
Defense Information Systems Agency
Scott Air Force Base, IL

OPINION BY ADMINISTRATIVE JUDGE STEMPLER

Appellant appeals from the deemed denial of its contract termination for convenience claim. The appeal is governed by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. The Board conducted a three-day hearing. Both entitlement and quantum are before us for decision. We deny the appeal in part and sustain it in part.

FINDINGS OF FACT

The Predecessor Contract (2008 contract)

1. On 21 April 2008, the Defense Information Systems Agency (DISA or government), Defense Information Technology Contracting Organization, awarded a delivery order, No. HC1028-08-F-2212 (2008 contract), under a General Services Administration schedule contract to appellant, ESCgov, Inc. (ESCgov) (R4, tab 1B at 1). The 2008 contract was for a base period of one year, commencing 1 August 2008, and included two one-year option periods (*id.* at 23).

2. Modification No. P00005 of the 2008 contract modified the start date of the base period to 1 February 2009 (R4, tab 1B, Modification No. P00005 at 1). The government ultimately exercised all option periods, and further extended the period of

performance by another 6 months until 31 July 2012 (R4, tab 1B, Modification Nos. P00011, P00013, P00016).

3. The 2008 contract incorporated a Statement of Objectives (SOO), dated 27 June 2007, which described the agency's Access and Security Configuration Control (ASCC) program's need for an integrated and automated software-oriented solution:

> The purpose of this Statement of Objectives (SOO) is to obtain a dynamically scalable, cost effective, and integrated capability to achieve granular-level access control to operating systems (OS) and positive control of systems security configurations infrastructure through a government-controlled, "Vendor provided Service" for specified operating environments (OE) located in DISA owned and managed facilities and/or remotely located, DISA-managed systems.... The solution should utilize an on-demand service approach that will readily adjust to changes in access control and security configuration requirements (increases / decreases and changes in security policy) and is priced on a utility ("as used") basis.

(R4, tab 1B at 29) The agency aimed to "harden" the security of its operating environments through "the systematic checking or scanning of the operating system, to ensure that there are configurations put in place to prevent...hacking" (tr. 3/125-26).

4. The SOO contemplated a service providing automated configuration and security management which included, among other things, the capability to scan and report that configurations across DISA servers, operating systems, and databases meet information assurance compliance. The software would be installed and maintained on DISA-managed servers. (R4, tab 1B at 30-31, 33-34) In order for a system to be deemed information assurance compliant, it must meet the requirements of the DISA Security Technical Implementation Guides (STIGs) and Information Assurance Vulnerability Alerts (IAVAs). The STIG is a set of rules or set of configurations of servers released by the DISA Field Security Office (FSO) on a quarterly basis (tr. 3/126-27, 129). It is "a security configuration control setting" (tr. 3/156). The FSO also releases IAVAs on a daily or weekly basis which consists of alerts of immediate threats or vulnerabilities to a system that need to be addressed and remedied. The IAVA has since been converted to the Information Assurance Vulnerability Management (IAVM) and the terms IAVA and IAVM are used interchangeably. (Tr. 3/130)

5. The 2008 contract included a contract line item number (CLIN) at a firm-fixed-price (FFP) for the software utility service on a monthly basis. Payment depended on the number of DISA servers covered during a month (tr. 1/75). For example, Modification No. P00007, effective 31 August 2009, increased the number of DISA servers covered under the utility service CLIN to 7,500 (R4, tab 1B, Modification No. P00007 at 1). The contract also included a separate CLIN for technical support and consulting/implementation services that was designated as FFP but not separately priced (R4, tab 1B at 8, 15, 21; tr. 2/269).

6. On 6 August 2008, ESCgov executed a purchase order with BMC Software, Inc. (BMC), owner of the proprietary commercial software "BladeLogic[1]," to procure 20,000 perpetual software licenses for $2,424,736 and maintenance support (ex. G-3). The perpetual licenses were restricted to ESCgov's software utility service in support of DISA (*id.*; tr. 1/72). By purchasing 20,000 licenses of the software, ESCgov had the capability to apply the software to up to 20,000 servers at any point in time (tr. 1/68-69). In explaining the rationale for obtaining the more expensive perpetual licenses and more licenses than were required to support the 2008 contract, ESCgov's CFO and Executive Vice President, Mr. Keith R. Zagurski, testified that ESCgov made a business decision to purchase enough capacity to anticipate long-term support and future contracts with DISA (tr. 1/136-37, 252-53). ESCgov did not reach a level that required the use of 20,000 licenses during performance of the 2008 contract (tr. 1/136).

7. The BladeLogic software utilized internal compliance component templates. These component templates consisted of "a set of scripts that goes out and looks at the configuration settings denoted by the [FSO]'s STIG." (Tr. 3/136) The templates would be used to check configuration settings and make changes as appropriate (tr. 3/156). During performance, the parties realized that the "out of the box" baseline templates included with the commercial software could not fully meet the requirements of the DISA STIG (tr. 2/162, 164, 3/138-40). ESCgov estimated that the software would cover approximately 15-20% of the requirements (tr. 2/164). Additionally, there were other problems related to software implementation on DISA servers that impacted performance (tr. 3/140-41).

8. The BladeLogic software was flexible to create and modify templates to handle daily security changes (tr. 3/137-38). Through Modification Nos. P00008 and P00009 of the 2008 contract, effective 9 September and 17 November 2009, respectively, DISA modified the SOO and added additional funding for engineering services under the technical support CLIN. The modified SOO included tasks involving coding and scripting development to update component templates for

[1] ESCgov initially partnered with BladeLogic, Inc. to develop the proposal for the utility service utilizing the BladeLogic software (app. PFF ¶ 14). The BladeLogic software was later acquired by BMC (app. PFF ¶ 20 n.1; tr. 1/67).

testing, migration, implementation, and compliance monitoring of operating environments. (R4, tab 1B, Modification Nos. P00008, P00009; tr. 3/150-51)

9. ESCgov continued developing coding and scripts to supplement the BladeLogic software's baseline component templates to meet security checking and compliance requirements (tr. 2/112-13, 163, 183). This development included the creation of content including component templates and associated sensors and extended object files (tr. 2/172). According to ESCgov, component templates "have the ability to check the components to verify the existence of an object and...[s]ensors and extended object files are scripts and/or commands that are used by the component templates to help extract more information from the target systems" (R4, tab 11 at 1). The sensors contained scripts that executed the commands for checking configurations, and the extended object files executed the sensors that were modified (tr. 2/173). According to Mr. Philip S. Orda, DISA's IT specialist, ESCgov was tasked with maintaining the BladeLogic software and the compliance content including updating and modifying code on a daily basis to meet STIG requirements (tr. 3/158-59). ESCgov developed, updated, and modified component templates, sensors, and extended object files to meet DISA compliance requirements during the duration of the contract.

The Follow-On Contract (2012 Contract)

10. On 22 February 2012, DISA issued a solicitation seeking to award a contract "to obtain software as a service (SaaS) from a single, integrated, and contractor-provided software service solution, priced on a utility ("as used") basis, using BMC Bladelogic software" (R4, tab 2 at 13 of 108). DISA solicited proposals from contractors that were authorized resellers of the BladeLogic product (*id.* at 3 of 108). The contractor would be required to provide BMC BladeLogic software and licensing, and perform technical services necessary to maintain and sustain the ASCC BladeLogic Enterprise solution (*id.* at 13 of 108). The solicitation required offerors to propose a "fully loaded" unit price that included software licensing and technical support for the monthly utility service (*id.* at 13, 20 of 108). The period of performance was a base period of one year and included two one-year option periods (*id.* at 27 of 108).

11. The solicitation included a Performance Work Statement (entitled "Commercial Off-The-Shelf") (PWS), dated 13 February 2012, that described a variety of tasks to be performed including the creation of component templates to comply with the security directives released by the DISA FSO (R4, tab 2 at 11, 24-25 of 108). The solicitation also included Addendum 1 entitled "SOFTWARE SERVICES LICENSING REQUIREMENTS" which provided that DISA did not own the software provided by the contractor as a service, and "payment is based upon

monthly usage of the product per unit and technical services provided" (*id.* at 35-36 of 108). With regard to data rights, the solicitation provided in pertinent part:

> b. Rights in Data and Non-Disclosure Agreement. The Government shall have unlimited rights in all data first produced by the contractor and delivered hereunder (or first produced by the contractor under prior related Government contracts or subcontracts and modified hereunder) including technical data and computer software. Accordingly, the Contractor shall not incorporate "limited rights data" or "restricted computer software" as defined in FAR 52.227-14 in any deliverable without express written consent of the Contracting Officer. Contractor shall not incorporate "markings" what so ever [sic] on the data.

(*Id.* at 33 of 108)

12. Of relevance to this dispute, the solicitation (entitled "SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS") included FAR clauses 52.212-4 (including paragraph l, Termination for the Government's convenience), CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (JUN 2010); 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (MAY 2004); and 52.233-3, PROTEST AFTER AWARD (AUG 1996) (R4, tab 2 at 1, 65 of 108). Although the solicitation included some clauses not applicable to the acquisition of commercial items, the contract would be awarded in accordance with commercial items procedures (*id.* at 101-05 of 108). The contracting officer (CO) testified that she did not recall including FAR 52.249-2 in the contract and that no questions were submitted by offerors respecting that clause (tr. 3/17-19). The CO speculated that when the contract was drafted she "missed" the fact that two termination for convenience clauses were included (tr. 3/59).

13. In its technical proposal, with respect to data rights, ESCgov stated the following in pertinent part:

> ESCgov understands that the Government will have unlimited rights in all data first produced by ESCgov and delivered hereunder (or first produced by ESCgov under prior related Government contracts or subcontracts and modified hereunder) including technical data and computer software. Accordingly, ESCgov will not incorporate "limited rights data" or "restricted computer software" as defined in FAR 52.227-14 in any deliverable without express written consent of the Contracting Officer.

> ESCgov will not incorporate "markings" what so ever [sic] on the data.

(R4, tab 3 at 39 of 49)

14. On 24 July 2012, DISA awarded the captioned contract, No. HC1028-12-C-0047 (2012 contract) to ESCgov (R4, tab 4 at 1). The contract provided for a base year in the amount of $2,276,906 (consisting of $2,171,250 for twelve months of "Software as a Service"; $30,656 for training modules; and $75,000 for travel) (*id.* at 1-6). The contract period of performance began on 1 August 2012 (*id.* at 24, 53).

15. Paragraph (l) of the commercial items clause, FAR 52.212-4, provides that:

> *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.

16. Paragraph (g) of FAR clause 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (MAY 2004) provides that:

> If the Contractor and the Contracting Officer fail to agree on the whole amount to be paid because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed on under paragraph (f) of this clause:

(1) The contract price for completed supplies or services accepted by the Government (or sold or acquired under subparagraph (b)(9) of this clause) not previously paid for, adjusted for any saving of freight and other charges.

(2) The total of—

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs attributable to supplies or services paid or to be paid under subparagraph (g)(1) of this clause;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(2)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(2)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (g)(2)(iii) and shall reduce the settlement to reflect the indicated rate of loss.

(3) The reasonable costs of settlement of the work terminated, including—

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

17. On 1 August 2012, a protest was filed with the U.S. Government Accountability Office (GAO) alleging that ESCgov was improperly awarded the 2012 contract because it was not an authorized reseller of the BladeLogic software at the time of contract award (R4, tab 5).

18. On 10 August 2012, CO Carrie M. Ross (CO Ross), who awarded the 2012 contract, issued a stop work order to ESCgov pursuant to FAR clause 52.233-3, PROTEST AFTER AWARD (AUG 1996), as a result of the protest (R4, tab 6).

19. In a 16 August 2012 filing, DISA informed GAO that it intended to take corrective action by terminating the 2012 contract for convenience and awarding a contract to the protestor, determining that ESCgov was not an authorized reseller of BMC products. The agency requested dismissal of the bid protest. (R4, tab 8)

20. On 17 August 2012, GAO dismissed the bid protest (R4, tab 8B).

21. On 29 August 2012, CO Ross terminated the 2012 contract for convenience (R4, tab 9A). In a document entitled "Notice of Termination to Prime Contractors (FAR 49.601-2)," the government stated in pertinent part:

> (a) *Effective date of Termination.* ESCgov, Inc., is notified as of 29 August 2012 that Contract No. HC1028-12-C-0047 (referred to *as* "the contract") is terminated completely for the Government's convenience under paragraph (l), Termination for the Ordering Activity's Convenience of FAR clause 52.212-4, Contract Terms and Conditions – Commercial Items (JUN 2010). The termination is effective immediately upon receipt of this notice.

(R4, tab 9B at 3) CO Ross also sent a draft modification that proposed a termination of the contract at no cost to either party (R4, tab 9C). ESCgov acknowledged receipt of the termination notice but communicated that it would not agree to the proposed modification (*id.* at 1).

Post-Termination

22. In a letter dated 13 September 2012 to CO Ross, ESCgov requested "the return of ESCgov-developed intellectual property installed on DISA servers." ESCgov claimed that it developed the intellectual property at its own expense and alleged that DISA continued to use this intellectual property after termination of the 2012 contract. ESCgov also communicated that it would submit a termination settlement proposal pursuant to Part 49 for incurred costs resulting from the termination. (R4, tab 10)

23. In a letter dated 24 September 2012 to CO Ross, ESCgov again demanded the return of its intellectual property developed in support of the 2008 and 2012 contracts, which included the component templates, sensors, and extended object files that it referred to as its software. ESCgov asserted that the government did not have ownership rights or license rights over its developed intellectual property. (R4, tab 11)

24. In a letter dated 2 November 2012, CO Ross notified ESCgov that the government had removed and uninstalled all BladeLogic software and associated known component templates, sensors and extended object files that were a part of ESCgov's software solution used in performing both contracts (R4, tab 13).

25. In a letter dated 9 November 2012, ESCgov requested, among other things, an audit of DISA's current BladeLogic software to confirm that its intellectual property was removed from DISA's servers (R4, tab 14). CO Ross denied the request, in a letter dated 19 December 2012, and stated that ESCgov had failed to provide the government with a listing of its intellectual property in prior requests. Additionally, CO Ross requested ESCgov to submit its final termination settlement proposal in accordance with FAR Part 12. (R4, tab 15)

26. In a letter dated 2 January 2013, ESCgov submitted a listing of the component templates, sensors, and extended object files that it deemed as its intellectual property and requested return of these items (R4, tab 16). The list was created with input from ESCgov's engineering personnel, Mr. Anthony J. Fasano and Mr. Frank Brand, who primarily developed the items (tr. 1/166). Mr. Orda testified that, to his knowledge, the government and its current contractor, continued to use and operate the compliance templates developed by ESCgov subsequent to the termination (tr. 3/181, 218).

27. On 2 January 2013, ESCgov submitted its termination settlement proposal to the government, seeking recovery of its incurred costs pursuant to FAR Part 49 in the amount of $3,384,500.76 as a result of the termination. First, it asserted it was entitled to $1,031,430.50 for the BladeLogic software licenses purchased in 2008, an amount it calculated "based upon the position that the remaining 50% of the software license costs would have been allocated to and recovered under [the 2008 contract]," 50% of the license costs represented the present value of the licenses "that would have been used to support the [2012 contract]," and the licenses could not be used to support a customer other than DISA. (R4, tab 17) ESCgov further asserts that the licenses are perpetual and remain valid (app. br. at 19, 25). Second, ESCgov asserted that it was entitled to $180,937.50 that represented one month of utility services provided under the terminated 2012 contract. Third, ESCgov asserted that it was entitled to costs related to its development of component templates, sensors, and extended object files installed on DISA servers that it deemed as its intellectual property used to perform the contracts. It sought $2,127,924 which represented an

average of two methodologies used by its expert, Mr. Graham D. Rogers to assign a value of the intellectual property – a cost approach based on labor and other expenses incurred to develop the intellectual property and a royalty-based approach based on ESCgov's entitlement to royalties for licensing to DISA and its BladeLogic contractors for continued use of its intellectual property. Fourth, ESCgov asserted that it was entitled to termination settlement expenses for a sum total of $44,208.76 ($20,868.40 for severance of a terminated employee; $1,689 for its employees' preparation of the settlement proposal; $6,000 for consulting fees; and $15,651.36 for legal fees). (R4, tab 17)

28. In a letter dated 22 April 2013, CO Ross, after evaluating the settlement proposal pursuant to paragraph (l) of the commercial items clause, determined that the sought costs were unallowable except for the monthly utility cost of $180,937.50 (R4, tab 18). The CO stated that the contract had been awarded as a commercial items contract and further expressly recognized that FAR 12.403 allowed the use of FAR Part 49 as guidance where it did not conflict with FAR 52.212-4(1). We find that the parties were at an impasse as of this date.

29. On 12 June 2013, ESCgov converted its termination settlement proposal into a certified claim under the CDA for $3,384,500.76 and requested a contracting officer's final decision. Profit was expressly not claimed. (R4, tab 20)

30. CO Ross did not issue a final decision upon the claim (tr. 3/48). In a notice of appeal dated 29 August 2013, ESCgov appealed to the Board from the contracting officer's failure to issue a final decision (R4, tab 25).

31. On 9 December 2014, the Defense Contract Audit Agency (DCAA) issued a memorandum to DISA legal counsel in response to a request for litigation assistance to evaluate ESCgov's termination claim (ex. G-27). With respect to software licensing costs, the memorandum stated that the accounting records and invoices reflected costs incurred and paid under the 2008 contract, and therefore, the claimed costs resulting from the termination of the 2012 contract were not supported, citing FAR 12.403(d)(ii) (*id.* at 3).

32. Both ESCgov's President, Mr. Guy Speers, and Executive Vice-President Mr. Zagurski testified that half of the acquisition costs of the BladeLogic licenses were allocated between the two contracts (tr. 1/94, 169-70). However, Mr. Zagurski confirmed that ESCgov's accounting records showed no allocation to the 2012 contract (tr. 1/258-59).

33. Mr. Zagurski testified that the entire cost for the purchased BladeLogic licenses were pooled into an inventory assets account in 2008 (tr. 1/198-99, 243). The purpose of the inventory assets account was "to collect the costs to match costs with

revenue as our service was delivered" (tr. 1/237). ESCgov then allocated the costs of the licenses to a cost objective for the 2008 contract in accordance with generally accepted accounting principles but did not amortize these costs over the entire duration of the contract (tr. 1/199-200, 238). In explaining why BladeLogic license costs were not allocated to the 2012 contract, Mr. Zagurski stated that:

> By the time this contract was awarded, those costs had already been absorbed under another cost objective. To do that would be incorrect. We cannot continue to allocate costs once they've been fully absorbed.
>
> As I said, we could make an accounting adjustment to reverse all those charges, half of the license value and the maintenance, and then put that back into inventory asset. And then it sounds like, if it's in inventory asset, DISA would be more than happy to pay ESCgov for that amount of the licenses.

(Tr. 1/240-41)

34. Mr. Darrell J. Oyer served as ESCgov's expert for financial accounting (tr. 2/226). He was hired to review the DCAA's 9 December 2014 memorandum (tr. 2/235). He provided his expert report, dated 26 January 2015, in which he stated, with regard to DCAA's observations related to licensing costs, that "[f]inancial accounting would not allow deferral of these costs to any subsequent jobs and thus this accounting is not unexpected" and that the FAR for contract purposes is "concerned about costs being allocated to the benefiting job regardless of the year involved" (ex. A-136 at 1-2). To prepare his report, Mr. Oyer did not review ESCgov's accounting records and relied on the DCAA memorandum, his meeting with Mr. Zagurski, and portions of the FAR (tr. 2/234-35, 239-40; ex. A-136 at 5, Enclosure B). Mr. Oyer testified that the scope of his report does not contain opinions or analysis on the percentage of the license costs that should be allocated to either of the contracts (tr. 2/239).

35. Mr. Rogers was hired by ESCgov to serve as an expert in the valuation of its claimed intellectual property assets (tr. 1/262). Mr. Rogers is not a certified public accountant (tr. 2/15). In his 30 January 2015 expert report, he stated that the methodologies used to value the intellectual property were based on assumptions that ESCgov owns the rights to the claimed intellectual property (ex. A-131 at 16).

36. Mr. Rogers testified that he did not review ESCgov's accounting and payroll records or audit the information that was provided to him (tr. 2/24-25, 28-29, 32). He was retained by ESCgov to review its termination settlement proposal, and

issued an opinion letter, dated 14 December 2014, which later became the basis for ESCgov's demand for compensation in its proposal and subsequent claim related to intellectual property (tr. 2/18; ex. G-17). He stated that his 14 December letter did not list or clearly identify the intellectual property at issue in this appeal (tr. 2/49).

37. In his report, Mr. Rogers stated that the trending historical reproduction cost approach methodology used involves "the restatement of historical costs in current dollars in order to provide an indication of the total amount that would need to be invested today in order to reproduce the property" (ex. A-131 at 8 of 48). The report further stated that "actual expenditures by the company on the subject property" was required (*id.* at 9 of 48). However, at the hearing, he testified that a conservative estimate to determine the value was used instead because ESCgov was not:

> [A]ble to provide me the information as far as when the hours were incurred. So since I wasn't able to determine when the hours were incurred, I made the assumption that they were all incurred at the same time, which means that there's no future value, and therefore if there's no future value, it's another level of conservatism in this calculation.

(Tr. 2/94-95)

38. ESCgov's engineers, Mr. Fasano and Mr. Brand, primarily developed the intellectual property at issue (tr. 2/137-38). Mr. Fasano is a senior systems architect for ESCgov (tr. 2/159). Mr. Brand did not testify at the hearing. With regard to copyright marking, Mr. Fasano testified that each code that he created was marked with his name, the company name, and sometimes the date (tr. 2/213). Mr. Fasano initially testified that he attached copyright markings (tr. 2/184), but later on cross-examination suggested that Mr. Brand applied the proper copyright markings to his understanding (tr. 2/217). In a response to the government's second interrogatories, ESCgov stated, in part, that it "avers that the intellectual property has not been copyrighted and that ESCgov is in the process of obtaining a copyright" to a question on whether the claimed intellectual property were protected by copyright (ex. G-24 at 5-6, ¶ 6). Mr. Orda testified that ESCgov did not provide notification to the government that the templates or associated files were copyrighted or restricted for use (tr. 3/165, 167). Mr. Rogers testified that, to his knowledge, ESCgov did not have a patent or copyright for the intellectual property claimed (tr. 2/59-60). Weighing the competing evidence, we find that ESCgov has not adequately established that it's claimed intellectual property or software was marked with copyright notifications or other restrictions prior to the termination of the 2012 contract.[2]

---

[2] After the hearing, the government moved to strike the testimony of Mr. Fasano regarding the copyright markings on the content delivered to DISA. In its

39. The record includes copies of invoices in the sum total of $16,641.67 that contain an itemized list of legal fees incurred from September 2012 to January 2013 for legal services rendered in preparation of the termination settlement proposal (R4, tab 19).

40. As a result of the termination of the 2012 contract, ESCgov terminated the employment of the contract's program manager. The record includes a copy of the separation agreement, effective on 12 October 2012, between ESCgov and its terminated employee (ex. A-124). ESCgov agreed to pay a severance amount of $20,868.40 equating to seven weeks of compensation (*id.* at 450[3]; tr. 1/90).

41. The record also includes a copy of an undated document entitled "ENTERPRISE SOLUTIONS CORPORATION EMPLOYEE HANDBOOK" (ex. A-122). With regard to severance pay, paragraph 19.6 provided that "ESCgov in some instances pays severance to terminated employees who leave the organization" (*id.* at 66).

42. With respect to ESCgov's claim for $1,689 in connection with termination settlement proposal preparation costs incurred by its employees, Mr. Zagurski testified that "this is a very, very conservative estimate" consisting of two hours each of three people for a total of six hours at a commercial rate of $281.50 per hour (tr. 1/175). ESCgov does not cite any document in the record that supports its calculation of this amount.

43. The record includes a copy of an invoice, dated 31 December 2012, from Mr. Rogers submitted to ESCgov's counsel for services performed during December 2012 in the sum total of $7,972.50 (ex. G-18). We find that these services were rendered in connection with Mr. Rogers' 14 December 2012 letter (finding 36).

DECISION

Before the Board, now relying upon FAR 52.212-4(l), "Termination for the Government's convenience," and what it says is the "commercial nature" of the contract and the BladeLogic software, ESCgov seeks $3,384,500.76, consisting of (1) $1,031,430.50 for BladeLogic software licenses that ESCgov says it purchased in 2008; (2) $180,937.50 for one month of contract performance; (3) $2,127,924 for the government's alleged "retention and continued use of...ESCgov-developed software"; (4) $20,868.40 in severance paid to a program manager that ESCgov terminated

---

response to motion, appellant requested admission of exhibits that support Mr. Fasano's testimony. We denied the government's motion and appellant's request (*see* Bd. order dtd. 25 August 2015).

[3] Citations are to the consecutively-numbered pages unless noted otherwise.

subsequent to the termination of the contract; (5) $1,689.00 in employee costs to prepare the termination settlement proposal; and (6) $15,651.36 in legal fees and $6,000.00 in consulting costs to prepare the termination settlement proposal (app. br. at 1-2, 25-28, 35-37; app. reply br. at 9). FAR 52.212-4(l) provides, in pertinent part:

> 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.

The government asserts that ESCgov is entitled to no more than $58,366.94, including because, it now says, FAR 52.249-2, not FAR 52.212-4(l) governs (*see* gov't br. at 4, 84). FAR 52.249-2 provides, at paragraph (g):

> If the Contractor and the Contracting Officer fail to agree on the whole amount to be paid because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed on under paragraph (f) of this clause:
>
> (1) The contract price for completed supplies or services accepted by the Government (or sold or acquired under subparagraph (b)(9) of this clause) not previously paid for, adjusted for any saving of freight and other charges.
>
> (2) The total of—
>
> (i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs attributable to supplies or services paid or to be paid under subparagraph (g)(1) of this clause;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(2)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(2)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (g)(2)(iii) and shall reduce the settlement to reflect the indicated rate of loss.

(3) The reasonable costs of settlement of the work terminated, including—

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

In this appeal it is obvious the FAR 52.212-4(l) (the commercial items clause) and FAR 52.249-2 (the Part 49 clause) (findings 15, 16) are in conflict and cannot be harmonized. Because we cannot harmonize them, we must determine which clause to apply. *Cf. General Engineering & Machine Works v. O'Keefe*, 991 F.2d 775 (Fed. Cir. 1993) (two payment clauses not in conflict and no determination was necessary). The FAR itself permits the standard clause's principles to be used in conjunction with the commercial items clause, but only where the two clauses do not conflict.[4]

General. The clause at 52.212-4 permits the Government to terminate a contract for commercial items

[4] We note that the FAR does not permit use of provisions of the commercial items clause in contract's containing only the standard termination clause.

> either for the convenience of the Government or for cause. However, the paragraphs in 52.212-4 entitled "Termination for the Government's Convenience" and "Termination for Cause" contain concepts which differ from those contained in the termination clauses prescribed in Part 49. Consequently, the requirements of Part 49 do not apply when terminating contracts for commercial items and contracting officers shall follow the procedures in this section. Contracting officers may continue to use Part 49 as guidance to the extent that Part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4.

FAR 12.403. While the goal of each clause is fair compensation for the contractor upon the termination of the contract for the government's convenience, (*SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832) the commercial items clause's recovery is price based, while the standard clause's recovery is cost based. They also differ respecting the right to a government audit, the use of a contractor's standard record keeping system, compliance with the Cost Accounting Standards, and compliance with contract cost principles.

In this instance we are faced with a situation where there is no evidence in the record that the parties even realized that there were two termination for convenience clauses in the contract until after the contract was terminated. The contract itself was awarded as a commercial items contract using FAR Part 12 procedures (finding 12). Moreover, it was terminated pursuant to the commercial items clause (finding 21). It is clear that the commercial items clause was the proper clause for inclusion in the contract (*see* FAR 12.301(b)(3)) and the only evidence we have as to how the standard clause came to be included in the contract is that it was inadvertent (finding 12). We have no evidence of any reliance prior to termination of the contract on the standard clause's presence.

This is not the first appeal before us in which a contract included two different convenience termination clauses; in *American Packers, Inc.*, ASBCA No. 14275, 71-1 BCA ¶ 8846 at 41,129, with no evidence as to the parties' intent, we applied the clause preferred by the contractor on equitable grounds of fairness. More recently we encountered two different convenience termination clauses, FAR 52.212-4 and 52.249-1 in *Deas Construction, Inc.*, ASBCA No. 60633, 17-1 BCA ¶ 36,596. There the parties agreed on the proper operative clause and we used the commercial items clause stating: "Because this is a commercial services contract, we agree that FAR 52.212-4(l) is the applicable clause." *Id.* at 178,274 n.4. In general, pursuant to *SWR*, the overall purpose of a termination for convenience settlement is to fairly compensate the contractor and to make the contractor whole for the costs incurred in

connection with the terminated work; a contractor should not suffer as a result of a termination for convenience. We conclude that ESCgov's termination recovery should be determined using the commercial items clause (FAR 52.212-4(l)). Accordingly, we proceed to analyze ESCgov's termination recovery under FAR 52.212-4(l), using FAR Part 49 principles as guidance as permitted by FAR 12.403.

1. BladeLogic software licenses

ESCgov requests $1,031,430.50, a portion of the cost of its purchase in 2008 of "perpetual" BladeLogic software licenses (finding 27) because, it says, it purchased the licenses "specifically for [the government]," and, therefore, "cannot use the licenses in support of another entity, despite the fact that the licenses remain valid" (app. br. at 19-20, 24-25). ESCgov says that it "is precluded from using those licenses for another customer," and that, therefore, the termination "effectively render[ed] those licenses useless," entitling it to recover at least part of the licenses' purchase price (*id.* at 19).[5] However, fair compensation does not include the cost of purchasing those licenses. Because, according to ESCgov, those licenses are perpetual and valid, there is no need to make ESCgov "whole" for the costs incurred in connection with those licenses.

To begin with, ESCgov's position relies upon the assertion that the termination rendered the licenses useless because they are government contract-specific; however, the "uselessness" component of that assertion rings hollow. Because, as ESCgov admits, the licenses are perpetual and remain valid, there appears no reason why they could not be used to perform future contracts like the one terminated. Indeed, according to ESCgov, it purchased the licenses for use on a 2008 contract and "subsequent [such] contracts," well before it was awarded the 2012 contract at issue here (finding 6); it does not contend that there is no prospect of any such contracts being awarded to anyone in the future. In that sense, ESCgov is in the same position as when it purchased the licenses: it possesses licenses that it purchased including for use on future potential government contracts. There is no serious contention that the termination of the contract changed that scenario. For these reasons, ESCgov fails to demonstrate that fairness requires that it be reimbursed now for any of the cost of purchasing the BladeLogic licenses. Moreover, ESCgov's system of records shows no such allocation between the two contracts but rather a full allocation to the 2008 contract (findings 31-34).

---

[5] The amount that ESCgov claims for software licenses in this appeal is roughly half of what it says it paid for 20,000 licenses purchased upon having been awarded, in 2008, a predecessor contract to the contract at issue in this appeal (finding 6). That ESCgov may have purchased the licenses at issue in this appeal after the award of an earlier contract not at issue in this appeal does not change our analysis.

2. *Contract performance*

Compensation under the commercial items clause for a convenience termination may include payment of a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination. *See TriRAD Technologies, Inc.*, ASBCA No. 58855, 15-1 BCA ¶ 35,898 at 175,496-98 (applying FAR 52.212-4(l)). ESCgov seeks $180,937.50 for the one-month period that ended on 29 August 2012, the date that the government issued the termination notice (R4, tab 27; app. br. at 25-28). The government contends that ESCgov is entitled to only $58,366.94, for the period 1 August 2012 (the beginning of the base period) through 10 August 2012, when the government issued the stop work order (gov't br. at 110). ESCgov replies that it began performance on 24 July 2012, before the base period began, and that the contract required payment on a monthly basis, entitling it to a month of contract payment (app. reply br. at 22-23).

We agree with the government's rationale, but not its calculation. ESCgov performed 10 base-period contract days before being ordered to stop work. That is 10/365, or approximately 2.74 percent, of the 12-month base period. Although the government does not show its work, we infer that it bases its calculation upon the $2,171,250 contract price for the "software as a service" alone (*see* gov't br. at 110); however, we find that the more fair approach is to start with the full contract price. Using that approach, 2.74 percent of the $2,276,906 contract price (finding 14) is $62,387.22, the amount to which ESCgov is entitled for contract performance.

3. *ESCgov-developed software*

ESCgov seeks $2,260,875 (findings 27, 35-38) for what it says is software that it developed and deployed on government computer servers to "provid[e] additional functionality to the BladeLogic software to meet the contract requirements," saying further that subsequent to the termination of the contract, the government refused ESCgov's request to return the ESCgov-developed software, and continues to use it (findings 22-26).

Fair compensation for a convenience termination includes payment of a percentage of the costs related to partially completed work reflecting the percentage of the work performed prior to the notice of termination. *See TriRAD Technologies*, 15-1 BCA ¶ 35,898 at 175,498 (applying FAR 52.212-4(l)). However, ESCgov's request for $2,260,875 is, essentially, a request for what it says is the market value of its software, not a request for costs. Fair compensation for a convenience contract termination does not include the fair market value of an item (here, software) developed and deployed to perform the contract. Although ESCgov appears to request, in the alternative, $555,610.63 "in costs for the effort expended by its employees to develop the software" (app. reply br. at 34-35, 42), ESCgov also

explains that it developed that software to perform the 2008 contract; stating that "[b]ecause the Blade[L]ogic software lacked the full level of functionality to meet the 2008 Contract's requirements, ESCgov developed software to ensure compliance with the contract's requirements" (app. br. at 30). Because ESCgov effectively admits that the software was developed to perform a contract other than the one at issue here, we find that any cost incurred to develop that software is not compensable as a cost related to the terminated work of the contract at issue in this appeal. For these reasons, ESCgov does not demonstrate entitlement to recovery of either the value of the software, or the cost of its development.

4. Severance pay

Fair compensation for a convenience termination includes payment, as a settlement charge, of an employee severance payment resulting from the termination where the contractor had a legal obligation to pay the severance payment. *See TriRAD Technologies*, 15-1 BCA ¶ 35,898 at 175,499 (applying FAR 52.212-4(l)). Here, ESCgov seeks $20,868.40 in what it says was a severance payment to a program manager whose employment it terminated as a result of the termination of the contract (findings 40-41). However, ESCgov does not claim that it was obligated to make that payment; it says that "ESCgov's established practice was to pay terminated employees a severance payment as part of their termination," and that its "employee handbook permitted severance payments" (app. br. at 35). Fair compensation for a convenience termination does not include a voluntary severance payment to a terminated employee. Consequently, ESCgov does not demonstrate entitlement to recovery of its severance payment to a program manager because it was a cost that was incurred that reasonably could have been avoided.

5. Employee and consultant termination settlement proposal preparation costs

ESCgov seeks $1,689 in what it says are "employee costs to prepare the termination settlement proposal" (finding 42). The government objects that this amount was calculated with a "fully burdened rate" of $281.50 per hour that includes unallowable profit (gov't br. at 153). ESCgov replies by pointing to testimony that the rate it used "is a reasonable reflection of the costs ESCgov incurred for its employees' time," which it estimates consists of two hours each of three people, totaling six hours (app. reply br. at 45). However, a contractor may not rely upon testimony alone to support its claim to charges resulting from a commercial items convenience termination; it must, at least, point to contemporaneous documentation supporting the claimed charge. *See SWR*, 15-1 BCA ¶ 35,832 at 175,230-31 (applying FAR 52.212-4(l)). Because it does not point to any such documentation, ESCgov does not demonstrate entitlement to the employee costs that it claims it incurred preparing the termination settlement proposal.

6. Legal and consulting termination settlement proposal preparation costs

ESCgov seeks $15,651.36 in legal costs and $6,000.00 in consulting costs, both of which it says it incurred in "preparation of the termination settlement proposal" (finding 27; app. br. at 37-38). The government objects that those costs are not recoverable because, it says, the settlement claim was not submitted in good faith, and (quoting *Dairy Sales Corp. v. United States*, 593 F.2d 1002, 1006 (Ct. Cl. 1979) (citing *Topeka Janitor Service*, ASBCA No. 9989, 65-2 BCA ¶ 4911)), "no claim may be made," in a termination for convenience case, "for fees incurred in the preparation of claims which are not compensable" (gov't br. at 153-54). In the alternative, the government provides an itemized breakdown of the claimed legal fees, contending that ESCgov is entitled to no more than $5,489.00, all in legal costs (*id.* at 154-58). ESCgov replies by insisting that its fees are recoverable, including fees that the government points out are for "unsegregated time" (that is, time spent at least in part in pursuit of compensation for ESCgov-developed software), but provides no line-by-line response to the government's itemization (app. reply br. 45-47).

Implicit in the allowability of a contractor's costs in connection with the submittal of a termination for convenience settlement proposal is that the proposal is submitted in good faith; costs connected with a proposal not submitted in good faith are not allowable. *Anlagen-und Sanierungstechnik GmbH*, ASBCA No. 37878, 91-3 BCA ¶ 24,128 at 120,754. The government asserts that the settlement proposal was not submitted in good faith because, it says "ESCgov knew that the BladeLogic licenses were a cost of the 2008 Contract, not the 2012 Contract" at issue here, and that "ESCgov submitted a claim in the amount of $2,127,924 for the 'value' of compliance content that it knew was produced through performance of the 2008 Contract and that ESCgov had previously agreed to sell [to a third party] for only $85,000" (gov't br. at 154). The government cites no record evidence to support its "no good faith" position (*id.*). We will not scour the record for such evidence, and, therefore, without deciding whether ESCgov submitted the proposal in good faith, we hold that the government has failed to demonstrate that ESCgov did not submit the termination settlement proposal in good faith. *Cf. Creative Times Dayschool, Inc.*, ASBCA Nos. 59507, 59779, 16-1 BCA ¶ 36,535 at 177,981 (appellant that failed to cite record evidence in support of claim issue failed to demonstrate entitlement to compensation on that issue).

However, we are persuaded, following *Dairy Sales*, that ESCgov's claim for legal and consulting costs is unreasonably high. First, the parties agree that the consulting fees were for a valuation of the ESCgov-developed software (app. reply br. at 46; *see* gov't br. at 153), which alleged value we have found is noncompensable; consequently, those consulting fees are also noncompensable.

Second, with respect to the claimed legal fees, the government offers a detailed itemization of the attorney billing records in evidence in support of its position that ESCgov should recover no more than $5,489 in legal fees because, the government says, the remainder was spent in whole or unsegregated part in support of claims for noncompensable issues (as opposed to potentially compensable issues), mostly the claim for the value of the ESCgov-developed software (gov't br. at 154-58). Again, we have found that the value of the ESCgov-developed software is noncompensable; therefore, fees spent in pursuit of that value are noncompensable. ESCgov makes a mostly conclusory effort to contest the government's itemization of the claimed legal fees, providing no line-by-line challenge to that itemization, and no alternative quantification (app. reply br. at 45-47). Having reviewed the parties' positions (including the government's itemization and ESCgov's response) and the attorney billing records, and comparing ESCgov's more than $3 million claim to the $62,387.22 that we find is compensable, *cf. Dairy Sales*, 593 F.2d at 1006-07, we accept the government's position and find that $5,489 is reasonable compensation for legal fees incurred in the preparation of the settlement proposal.

Affirmative Defenses

Neither of the government's affirmative defenses changes our analysis. The first, that ESCgov's requests for the cost of purchasing the licenses and the value of the software it developed be reduced due to a lack of mitigation (gov't br. at 158), need not be considered because we do not award any compensation for those issues. The second, that ESCgov's damages should be reduced for failure to comply with the CDA in submitting "baseless" elements for recovery in its termination claim. The government requests that we reduce (in an unspecified amount) appellant's recovery, citing as support the anti-fraud underpinnings of the Contract Disputes Act's certification requirement ("41 U.S.C. § 605(c)(1))" [sic] 41 U.S.C. § 7103(b)(1)). This request is merely a thinly disguised attempt to have the Board access fraud penalties. It does not require citation that the Board does not possess such jurisdiction, even if the CO had issued a contracting officer's decision asserting such a claim. (Gov't br. at 160-64)

Summary

We award the following, plus interest:

Contract performance:	$62,387.22
Settlement proposal preparation legal costs:	$5,489.00
Total	$67,876.22

CONCLUSION

We have considered the parties' other arguments and are not persuaded thereby. The appeal is sustained in part, and ESCgov is awarded $67,876.22, plus interest upon that amount pursuant to the CDA, 41 U.S.C. § 7109, from 12 June 2013, the date that the CO received ESCgov's claim, until the date of payment.

Dated: 8 May 2017

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

I concur

RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur in result

TIMOTHY P. McILMAIL
Administrative Judge
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:

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