ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
MicroTechnologies, LLC	)	ASBCA No. 62394
	)	
Under Contract No. W52P1J-16-D-0029	)	

APPEARANCE FOR THE APPELLANT: Barbara Behn Ayala, Esq.
Counsel

APPEARANCES FOR THE GOVERNMENT: Michael P. Goodman, Esq.
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OPINION BY ADMINISTRATIVE JUDGE STINSON

Appellant MicroTechnologies, LLC (MicroTech), appeals a contracting officer's denial of its September 11, 2019, claim, in the amount of $46,743.19 (R4, tabs 1-2). Appellant elected to proceed under the Board's Small Claims (Expedited) procedures, Board Rule 12.2, and the parties agreed to submit this appeal for a decision on the record without a hearing pursuant to Board Rule 11. The Contract Disputes Act, 41 U.S.C. § 7106(b)(4)-(5), as implemented by Board Rule 12.2, provides that this decision shall have no precedential value, and, in the absence of fraud, shall be final and conclusive and may not be appealed or set aside. For the reasons stated below, MicroTech's appeal is denied.

FINDINGS OF FACT

1. On February 22, 2016, the Army Contracting Command, Rock Island, Illinois, awarded MicroTech Contract No. W52P1J-16-D-0029 (the Contract), 1 of 17 multiple award, Indefinite Delivery Indefinite Quantity contracts for Information Technology Enterprise Solutions - 3 Hardware (ITES-3H) (R4, tab 3 at 000010). The government accepted and incorporated appellant's offer dated December 14, 2015, submitted in response to Request for Proposal No. W52P1J-11-R-0171, "to the extent it does not conflict with this RFP, SOW, terms and conditions" (*id.*). The Contract provided that an ordering guide for customers placing orders against the contract would be published to the Army Computer Hardware, Enterprise Software and Solutions (CHESS) IT e-Mart website (*id.*).

2. The Contract incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 2015) (R4, tab 3 at 000047). Subparagraph (u) of that clause states:

> Unauthorized Obligations. (1) Except as stated in paragraph (u)(2) of this clause, when any supply or service acquired under this contract is subject to any End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement, that includes any clause requiring the Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:
>
> (i) Any such clause is unenforceable against the Government.
>
> (ii) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the EULA, TOS, or similar legal instrument or agreement. If the EULA, TOS, or similar legal instrument or agreement is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government or any Government authorized end user to such clause.
>
> (iii) Any such clause is deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement.
>
> (2) Paragraph (u)(1) of this clause does not apply to indemnification by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

48 C.F.R. § 52.212-4(u).

3. On June 29, 2017, MicroTech entered into a Master Purchase Agreement (MPA) with De Lage Landen Financial Services, Inc. (DLL), for the financing of loans by DLL for appellant to purchase equipment it leased to the government. DLL agreed to pay appellant the purchase price for leased equipment in return for title to the equipment and an assignment of appellant's lease payments received from the government on equipment orders. (App. supp. R4, tab 5 at 00012-14) In the event of a termination for convenience or non-renewal of a government contract that is the subject of the MPA,

appellant was required cooperate with DLL in preparing a claim to be submitted to the government in MicroTech's name for any unpaid lease payments, and seek appeal of any unfavorable final decision (app. supp. R4, tab 5 at 00016-18). Pursuant to Section 4.01 of the MPA, DLL assumed "all risks related to nonpayment of the Lease due to termination of the Prime Contract by User due to Non-renewal, Non-appropriation or Termination for Convenience" (app. supp. R4, tab 5 at 00017).

4. On March 8, 2018, the government issued a CHESS IT e-mart Request For Quote, Reference Number 232755, seeking to lease multi-functional devices/network printers, as well as annual maintenance and repair services (R4, tab 8).

5. On March 16, 2018, MicroTech submitted a quote in response to the government's request, identified as Proposal No. 0315ACEPortland. MicroTech's proposal included six supplemental terms and conditions. (R4, tab 8 at 000106, tab 9 at 000107, 000110)

6. Supplemental Term and Condition No. 1 stated the "Government agrees not to replace the Product with functionally similar Product or to revert to the use of any other Product to perform the functions performed by the Product for a period of one (1) year after any termination for convenience or non-renewal" (R4, tab 9 at 000110).

7. Supplemental Term and Condition No. 5 stated:

> Within fourteen (14) days after the date of expiration, nonrenewal or termination of the contract, the Government shall, at contractors expense, have the Products packed for shipment in accordance with manufacturer's specifications and return the Products to specified location in the continental United States, in the same condition as when delivered, ordinary wear and tear accepted, and certify in writing that all software has been deleted from all devices and is no longer in use by Government. Any expense necessary to return the Products to good and working order shall be at Government's expense.

(R4, tab 9 at 000110)

8. Supplemental Term and Condition No. 6 stated:

> Termination for Convenience – Contracts entered into hereunder may not be terminated except by the ordering office's contracting officer exercising the provisions of and providing notice in accordance with FAR 52.212.4, Contract

> Terms and Conditions-Commercial Item, paragraph (l) Termination for the Convenience of the Government. In the event of a Termination for Convenience, or a [sic] an event of non-renewal by the Government, the Government will promptly pay Contractor, or its assignee, the Termination Charges.

(R4, tab 9 at 000110)

9. On May 1, 2018, the United States Army Corps of Engineers (USACE), Portland District, solicited from MicroTech a firm fixed price Order No. W9127N18F0084 (the Order) under the Contract for "Printers/Copiers/Scanners Maintenance." The Order specified that the "Contractor maintains ownership of equipment; installs equipment; performs preventative and corrective maintenance; and provides standard printer consumbables [sic] (except paper)." (R4, tab 10 at 000164, 000167, 000206)

10. The Order solicited a base lease term of 5 months from, May 1, 2018, to September 30, 2018, with four 12-month options and one 7-month option, for a total of 60 months. MicroTech accepted USACE's offer on June 18, 2018. (R4, tab 10 at 164, 166) Bilateral Modification No. P00001, signed by the government on June 18, 2018, changed the base lease term to begin July 1, 2018, and run through September 30, 2018 (R4, tab 11 at 000219-20).

11. MicroTech executed a Bill of Sale dated August 14, 2018, selling to DLL its right, title, and interest in eight Ricoh printers that were the subject of the Order for a purchase price of $52,956.32 (app. supp. R4, tab 6).

12. On August 27, 2018, the government acknowledged receipt of the Federal Notice of Assignment and the Instrument of Assignment, indicating that monies due pursuant to the Order were assigned by MicroTech to DLL (R4, tab 20 at 000285).

13. On August 30, 2018, the government issued unilateral Modification No. P00002 incorporating into the Order the Federal Notice of Assignment. The Modification also stated, "Proposal number 0315ACEPortland, including all sections, is hereby incorporated into this Delivery Order by reference as if fully set forth herein." (R4, tab 12 at 000228)

14. On September 27, 2018, the government issued unilateral Modification No. P00003, exercising the first option, from October 1, 2018, through June 30, 2019, for a period of nine months (R4, tab 13). Bilateral Modification No. P00004, signed by the government on October 25, 2018, changed the base lease term to begin July 13, 2018, to match the acceptance date of the leased equipment (R4, tab 14).

15. By email dated March 20, 2019, the contracting officer notified MicroTech that USACE, Portland District, was in the process of transitioning all of its printer requirements, including those fulfilled under the Order, to the Defense Logistics Agency (DLA). Mr. Hayes stated that the "Portland District as a whole, along with other project offices, are in the works of transferring to a DLA enterprise solution for printers." (R4, tab 17)

16. On May 17, 2019, the government signed unilateral Modification No. P00005, with an effective date of July 1, 2019, exercising a three-month period of performance, from July 1, 2019, through September 30, 2019. The modification was issued under the authority of FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000), which was incorporated in the Order in full text. (R4, tab 10 at 000171, tab 15)

17. On July 23, 2019, the contracting officer notified MicroTech via email that the government would not exercise its option under the Order for the period that was to begin October 1, 2019 (R4, tab 18).

18. On or about August 2, 2019, the contracting officer confirmed with appellant during a telephone conference that the government planned to substitute the printers leased from MicroTech with functionally similar equipment (compl. ¶ 12; answer ¶ 12).

19. During the 15-month period of performance, the government made total payments of $23,928.00 (R4, tab 16).

20. On September 11, 2019, MicroTech submitted to the contracting officer via email its claim in the amount of $46,743.19 (R4, tab 1).

21. On November 25, 2019, the contracting officer issued a final decision denying MicroTech's claim (R4, tab 2). The contracting officer stated, in part:

> MicroTech's quotation was not incorporated into the order. Because task order no. W9127N18F0084 was solicited as an RFQ, MicroTech's quotation did not constitute a proposal that the Government accepted. Rather, the order itself constituted the Government's offer, which MicroTech accepted, per FAR 13.004. The order neither attached MicroTech's quotation nor used express and clear language

> incorporating MicroTech's quotation by reference, and therefore did not incorporate the quotation.

(R4, tab 2 at 000004) Appellant filed a timely notice of appeal, which was docketed as ASBCA No. 62394.

DECISION

The issue in this appeal is the effect, if any, of incorporating by reference into the Order, through unilateral modification, additional terms authored by the contractor, which taken together appear to create a right of MicroTech (or DLL as its assignee) to receive undefined "termination charges" in the event the government invokes its contractual right not to exercise an option for leased equipment and then within one year thereafter replaces the previously leased equipment with functionally similar equipment.

Appellant argues that the government materially breached Supplemental Term and Condition No. 1, which appellant refers to as the "Non Substitution Clause," and allegedly prohibits the government for one year "from replacing the leased equipment with functionally similar equipment" (app. br. at 1). According to appellant, the government's alleged breach "resulted in the inability of Appellant (and its financing source) to recover the purchase price paid by Appellant (and financed by its financing source) for the leased equipment through the 60-montlhly [sic] lease payments provided for in the Delivery Order" (app. br. at 2).

Appellant correctly notes that its Proposal No. 0315ACEPortland was incorporated into the Order pursuant to Modification No. P00002 (app. br. at 8, 12; finding 13). This is important because appellant's proposal was not part of the original agreement between the parties. *See Ricoh USA, Inc.*, ASBCA No. 59408, 17-1 BCA ¶ 36,584 at 178,198 (contract that resulted from the government's request for a quote included contractor's pricing schedule, but not its technical proposal). As stated in FAR 13.004(a):

> A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. Therefore, issuance by the Government of an order in response to a supplier's quotation does not establish a contract. The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.[1]

[1] Consistent with FAR 13.004(a), the final decision recognized that the Order did not incorporate appellant's proposal, stating "[b]ecause task order

Appellant argues that "[t]he Contracting Officer was clearly authorized to bind the government to both the Non-Substitution and the Termination Charge Clauses that are included in Appellant's quote and were incorporated into the DO" (app. br. at 13). As support, appellant cites FAR 52.212-4, specifically, subparagraph (g)(1), which states, "[t]he Contracting Officer is the only person authorized to direct changes in any of the requirements under this contract" (app. br. at 13-14 (citing Appellant's Proposed Findings of Facts ¶ 22)).[2]

Notwithstanding FAR 52.212-4(g)(1), as cited by appellant, the supplemental terms and conditions contained in appellant's proposal, and relied upon by appellant here, are not binding upon the government. The contracting officer had no authority to modify the Order in favor of MicroTech to include the supplemental terms and conditions, without there being consideration to the Government. As noted in *Craft Machine Works, Inc.*, ASBCA No. 47457, 98-1 BCA ¶ 29,467, "[i]t is well settled that a contracting officer does not have the authority to agree 'to increase the remuneration to be paid a contractor without any increase whatever in the contractor's obligations to the Government.'" 98-1 BCA ¶ 29,467 at 146,264 (citing *Joseph J. Jaeger, Jr.*, ASBCA No. 11413, 66-2 BCA ¶ 5757 at 26,822). It does not matter that the contract terms exceeding the contracting officer's authority were embodied in a written modification. *Wheeler Bros., Inc.*, ASBCA No. 16112 *et al.*, 73-1 BCA ¶ 9916 ("Such lack of authority cannot be overcome by the issuance of a contractual document which has the effect of increasing the amount to be paid to the contractor without any increase in the latter's

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no. W9127N18F0084 was solicited as an RFQ, MicroTech's quotation did not constitute a proposal that the Government accepted. Rather, the order itself constituted the Government's offer, which MicroTech accepted, per FAR 13.004. The order neither attached MicroTech's quotation nor used express and clear language incorporating MicroTech's quotation by reference, and therefore did not incorporate the quotation." (Finding 21) The final decision, however, failed to discuss or recognize the import of Modification No. P00002.

[2] Appellant's Proposed Findings of Facts ¶ 22 cites as support a version of FAR 52.212, which was included in the Contract "as an addendum to 52.212-4" and contains a section (g) entitled "Contract Authority" (app. br. at 8; R4, tab 3 at 000034-35). We note that, pursuant to FAR 12.302, TAILORING OF PROVISIONS AND CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS, the Contract also included a separate, tailored version, of FAR 52.212-4, "to reflect special contract terms and conditions that are unique for this contract" (R4, tab 3 at 000059). The Contract also incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 2015) (finding 2). Both the tailored version of FAR 52.212-4 and the May 2015 version include a section (g) entitled "Invoice" (R4, tab 3 at 000060). 48 C.F.R. § 52.212-4 (MAY 2015).

obligations to the Government, and such document will not be binding upon the Government.").

Appellant acknowledges that FAR 52.217-9 grants the government discretion to exercise options. Appellant argues, however, that this discretion "is constrained by the Non-Substitution clause" which "acts as a binding constraint on the Government in the event of a non-renewal and prohibits the Government from replacing the leased equipment with functionally similar equipment during the one-year period following any termination for convenience or non-renewal of the lease." (App. br. at 14-15)[3]

In essence, appellant's claim, based upon the application of Supplemental Term and Condition Nos. 1 and 6, renders void the government's right not to exercise its lease options, because the relief demanded by MicroTech seeks payment of monies appellant would have received pursuant to the Order, had the government exercised all options specified in the Order. Under appellant's theory, the government would be liable for full payment of the unexercised option years, even though appellant would not be required to provide the equipment or services specified in the Order.

The supplemental terms and conditions, as applied by appellant, would diminish the government's bargained-for right not to exercise its option to extend the lease. *Gov't Sys. Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988) (discussing the government's bargained-for right not to exercise a delivery order option). Indeed, at the time it accepted the Order, MicroTech "assumed any financial risks resulting from its financial planning based on the assumption that it would be awarded all option periods under the contract." *Phoenix Data Sols. LLC Aetna Gov't Health Plans*, ASBCA No. 60207, 18-1 BCA ¶ 37,164 at 180,923 (quoting *Vehicle Maint. Servs. v. GSA*, GSBCA No. 11663, 94-2 BCA ¶ 26,893 at 133,880). Inclusion of the supplemental terms and conditions into the Order, in essence, improperly transferred to the government the financial risk assumed by the contractor at the time it accepted the Order.

The government argues that application of the supplemental terms and conditions proffered by appellant together violated the Anti-Deficiency Act, 31 U.S.C. § 1341, and

[3] MicroTech claims entitlement to full payment of what it terms the "60 month lease" (app. br. at 1-2, 5-6, 10-11, 21-23, 26-27). Indeed, appellant alleges that the contracting officer "acknowledged that all of the equipment specified in the DO had been installed and accepted by the Government and that the lease commencement date for the 60-month lease plan shall be July 13, 2018" (app. br. at 6). In actuality, the contracting officer stated "[t]his is to acknowledge that the Equipment and Software referenced above has been installed and accepted and that the lease commencement date shall be 13 July 2018" (app. supp. R4, tab 2). The Order here included a base year, plus options, which totaled 60 months. The Order was not a 60-month lease. (Findings 10, 14).

FAR 52.212-4(u).[4] According to the government, the supplemental terms and conditions are unenforceable as they create an indeterminate liability requiring "the Government indemnify DLL, MicroTech's assignee, for losses resulting from the Government's decision not to exercise its option under the Order" (gov't br. at 7). The government likewise argues that the supplemental terms and conditions are unenforceable because they impose a penalty on the Government, also in violation of the Anti-Deficiency Act (gov't br. at 10-13).

In support of its argument, the government cites a decision of the Comptroller General, *Burroughs Corp.*, B-186313, 76-2 CPD ¶ 472 (Comp. Gen. Dec. 9, 1976), *modified in part, aff'd in part*, *Honeywell Info. Sys.*, B-186313, 77-1 CPD ¶ 256 (Comp. Gen. April 13, 1977), discussing a requirement that the government pay "separate charges" if it returned equipment to the contractor or terminated its use prior to the intended 60-month use of the system procured (gov't br. at 8-10). The Comptroller General held that the provision violated the Anti-Deficiency Act because payment would "subject the Government to an indeterminate liability." 76-2 CPD ¶ 472.

The government likewise cites *Fed. Data Corp.*, B-190659, 78-2 CPD ¶ 380 (Comp. Gen. Oct. 23, 1978), in which the Comptroller General held that "[t]he real effect of the 'separate charges' provision in the SEC contract was" to force "the contracting agency to purchase its requirements from the contractor for successive fiscal years or to pay damages for its failure to do so" (gov't br. at 10 (quoting *Fed. Data Corp*.)). The Comptroller General expressly rejected the argument that the government had ratified the "separate charges" provision, holding the government had no authority to contract for a provision in violation of funding statutes. *Id.*

We find the Comptroller General decisions, although not binding precedent, to be persuasive, and the supplemental terms and conditions appellant seeks to invoke here similar to the "separate charge" provisions, thereby imposing upon the government a penalty for not exercising the remaining option periods. See *JJA Consultants v. Dep't of the Treasury*, CBCA No. 432, 07-2 BCA ¶ 33,632 at 166,577 (issue is whether "charge represents the reasonable value of the work performed, or whether the charge amounts to a penalty for the agency's failure to continue to use the contractor's services.").

Appellant attempts to distinguish the Comptroller General decisions, stating that "[t]he Non-Substitution Clause at issue here contains no separate charge at all" (app. reply br. at 7), and that "[i]n contrast to the penalties addressed in the cases relied upon by the Government, it is undisputed that the 'Termination Charges' sought by MicroTech pursuant to the Termination Charge Clause in the Delivery Order refers to the termination

[4] Appellant's reply brief discusses FAR 52.212-4(l), but does not discuss the import of FAR 52.212-4(u) in the context of the Anti-Deficiency Act (app. reply br. at 3-4, 9-12).

charges provided for in FAR Clause 52.212-4(1) which include 'reasonable charges' that have resulted from the non-renewal" (app. reply br. at 9-10).[5]

Appellant's argument that it is "undisputed" the term "termination charges" equates to "reasonable charges" set forth in FAR 52.212-4(l) is misplaced. What is undisputed is that appellant's proposal contained no definition of "termination charges." Appellant offers only conjecture to link the two terms. It is appellant, not the government, that bears responsibility for failing to define the term in its proposal. *See, e.g*., *Selby Constr. Co.*, ASBCA No. 25533, 81-2 BCA ¶ 15,446 ("[u]nder the familiar *contra proferentem* rule the drafter of the contract must therefore suffer the consequences of its ambiguous terms.").

Even assuming that "termination charges" equates to "reasonable charges," appellant still would not be entitled to recover the damages it seeks. As noted by the government, "lost revenues and anticipatory profits are not among the 'reasonable charges' that are compensable pursuant to a termination for convenience" in a commercial items contract (gov't br. at 14-15 (citing *Nexagen Networks, Inc.*, ASBCA No. 60641, 19-1 BCA ¶ 37,258 at 181,328-29 (anticipated but unearned profits not compensable), and *Robertson & Penn, Inc*., *d/b/a Cusseta Laundry, Inc*., ASBCA No. 55625, 08-2 BCA ¶ 33,951 at 167,983 (lost revenue not compensable))).

Appellant claims that it "is not seeking lost revenues or anticipatory profits" and that the "reasonable charges" sought by MicroTech "represent the unavoidable and unrecovered costs incurred by MicroTech to purchase the Ricoh printers required by the Delivery Order for delivery to and acceptance by the Government" (app. reply br. at 11). Those remaining payments, however, were not incurred because of any non-renewal, or as stated in FAR 52.212-4(l), have not "resulted from the termination."

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[5] Appellant attempts to escape the import of the Anti-Deficiency Act, arguing that "as with breach of contract damages, the Permanent Indefinite Judgment Fund, 41 U.S.C. § 7108(a) and (b); 31 U.S.C. § 1304(a)(3)(C), is available to pay any final judgment of this Board awarding Appellant termination charges within the meaning of FAR Clause 52.212-4(1)" (app. reply br. at 10). Appellant's argument misses the mark. Congress established the judgment fund to provide a way in which to reimburse lawful judgments. *S. Carolina Public Serv. Auth.*, ASBCA No. 53701, 04-2 BCA ¶ 32,651 at 161,605 ("[t]o the extent that the government is liable for CDA claims, the judgment fund is generally available"). Here, the alleged contractual obligation arose from an agreement that violated the Anti-Deficiency Act. The judgment fund does not provide an independent statutory basis upon which to make lawful an unlawful contract provision. Indeed, 41 U.S.C. § 7108(c) requires that judgment fund payments be reimbursed "by the agency whose appropriations were used for the contract out of available amounts or by obtaining additional appropriations for purposes of reimbursement."

Of course, regardless of whether "termination charges" equates to "reasonable charges," or whether appellant's damages meet the requirements of FAR 52.212-4(l), it is of no consequence here because Supplemental Term and Condition No. 6, which contains the term "termination charges," is not properly part of the agreement between the parties, and appellant is not entitled to seek damages for the government's alleged "non-renewal" of the lease. Moreover, the Order here was not terminated for the convenience of the government, which is the type of termination to which FAR 52.212-4(l) applies.

Appellant also argues that "[e]very court and board that has addressed non-substitution provisions similar to the one at issue in this case has held that the Government's renewal option and its right to non-renew a lease contract can be legally restricted by contractual covenant from the Government that it will not replace the leased equipment with functionally similar equipment during the specified period of non-substitution" (app. br. at 15 (citing *Gov't Sys. Advisors*, 847 F.2d at 811; *Gov't Sys. Advisors, Inc. v. United States*, 21 Cl. Ct. 400 (1990), *vacated on reh'g*, 25 Cl. Ct. 554 (1990); *Mun. Leasing Corp. v. United States*, 1 Cl Ct. 771 (1983), and 7 Cl. Ct. 43 (1984) (cross-motions on summary judgment))).

A common thread running through the cases cited by appellant are that they involved lease to ownership contracts, whereby, at the end of the lease term, the government took ownership of the leased property. For example, in *Municipal Leasing*, the United States Claims Court noted that "[b]y paying the prorated monthly rates over the life of the contract . . . the Air Force would gain the ownership of the equipment." 1 Cl. Ct. at 772. Likewise, in *Government Systems Advisors*, the Claims Court noted that the delivery orders "were conditional sales contracts" whereby the government would "take title to the word processors after completion of a condition precedent, *i.e.*, a series of specified monthly payments, or buy-out." 21 Cl. Ct. at 408.

Appellant also cites a General Services Board of Contract Appeals decision, *Planning Research Corp. v. Dept. of Commerce*, GSBCA Nos. 11286-COM, 11576-COM, 96-1 BCA ¶ 27,954, in which the GSBCA noted that a lease to ownership provision may contain "'restrictions on the circumstances under which that party may decline to exercise its option to renew'" (app. br. at 18-19) (quoting *Planning Research Corp*., 96-1 BCA ¶ 27,954 at 139,636). However, the GSBCA held that the contract at issue there contained no such restrictions. *Id*. at 139,637. The Order at issue here was not a lease to ownership. Indeed, the Order specified that the "Contractor maintains ownership of equipment" (finding 9). The Claims Court and GSBCA decisions are neither controlling, nor binding upon us. The Federal Circuit decision cited by appellant, *Government Systems Advisors*, which is binding precedent upon this Board, is not controlling as it simply distinguished the Claims Court's decision in *Municipal Leasing*, noting that the delivery order under review by the court of appeals contained no restrictions like those at issue in the Claims Court decision. 847 F.2d at 813. Indeed, as

noted above, the Federal Circuit's decision recognized that the government (as the USACE here), had a bargained-for right not to exercise any delivery order options. *Id.* This bargained-for right not to exercise options is important in the context of this appeal, and it is that right which is impacted by the manner in which MicroTech seeks to invoke Supplemental Term and Condition Nos. 1 and 6.

Because the supplemental terms and conditions are not binding upon the parties, appellant's argument that its claim meets the elements of a breach of contract claim likewise is rejected. Appellant is not entitled to termination for convenience-type damages for "non-renewal." We have considered MicroTech's remaining arguments and find them unpersuasive.

CONCLUSION

For the reasons stated above, the appeal is denied.

Dated: June 9, 2020

DAVID B. STINSON
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. 62394, Appeal of MicroTechnologies, LLC, rendered in conformance with the Board's Charter.

Dated: June 9, 2020

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals