ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Empresa de Viacao Terceirense	)	ASBCA No. 49827
	)	
Under Contract No. F61040-94-C-0003	)	

APPEARANCE FOR THE APPELLANT: Sam Zalman Gdanski, Esq.
Suffern, NY

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE MOED ON THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This appeal relates to the compensation payable to appellant (EVT) as the result of the termination of the contract for the convenience of the Government. The Government now seeks partial summary judgment that such compensation is limited to any amounts due under the contract for services rendered before the effective date of termination, as provided in the "TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (SERVICES) (SHORT FORM) (APR 1984)" clause, FAR 52. 249-4 (hereinafter referred to as the "Short Form clause"). The alternative provision provided in the regulations is "TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (APR 1984)," FAR 52.249-2 (hereinafter referred to as the "Long Form clause").

FINDINGS OF FACT FOR THE PURPOSES OF THE MOTION

1. This appeal relates to a fixed-price contract to furnish home-to-work bus transportation for Portuguese nationals employed by the United States Government in U.S. Forces Azores operational areas on the island of Terceira, Azores, Portugal. The present contract, which was awarded on 1 October 1993, required EVT to furnish 4,780,858.33 kilometers of such services at a unit price stated in Portuguese Escudos (hereinafter indicated with a suffix "$00"). For the base year 1 October 1993 - 30 September 1994, the unit price was 30$00 per kilometer for a total of 143,425,750$00, equal to approximately $900,000 (U.S.) at the time of award. The contract granted the Government options to extend the duration of the contract, at increased unit prices, for four additional twelve month periods ending on 30 September 1998. On 10 July 1995,

as provided in the contract, the contracting officer gave EVT written notice of intent to exercise its option to extend the term of the contract through 30 September 1996. The option was exercised on 25 August 1995, subject to the availability of funds. Notice that the requisite funds had been provided was given to EVT on 10 October 1995.

2. By letter dated 30 November 1995 (R4, tab 4), the contracting officer notified EVT that the contract would be terminated for convenience, effective 1 January 1996, pursuant to the Short Form clause. However, neither that clause nor any other clause providing for either default or convenience termination had been included in the contract.

3. EVT had furnished these services, under successive contracts, continuously since 1958. At the request of the Board, the parties searched their records to ascertain the extent to which convenience termination clauses had been included in the contracts preceding the present one. Copies of only the most recent contracts could be located, with the following results:

Contract Number	Performance Period	Convenience Termination Clause
F61040-83-C0007	10/1/83-9/30/84	Short Form clause shown but deleted
F61040-84-C0009	10/1/84-9/30/85	Short Form clause included
F61040-86-R0032 (solicitation)	10/1/86-9/30/87	Short Form clause included
F61040-87-C0017	10/1/87-9/30/88	Short Form clause included
F61040-89-C0001	10/1/88-9/30/93	Long Form clause included

4. Subsequent to the termination, the contracting officer sought EVT's agreement to add the Short Form clause to the contract through bilateral modification. EVT would not agree to that modification, contending that inclusion of a termination clause was contrary to understandings between the parties preceding award of the contract. In a written declaration, dated 21 December 1999, submitted in opposition to the motion, Dr. Carlos Raulino, EVT's Chief Executive Officer stated that during negotiation of the contract, the Government had asked EVT to provide "new equipment for their [bus] routes" under the forthcoming contract. EVT's response was that inasmuch as "substantial costs would be incurred" for the new equipment, EVT would insist that the contract not be subject to termination during its entire term, including all option periods. Dr. Raulino stated that the Government's representatives had assured him that "unless the Base closed, the full term of the contract would be completed."

5. The position that the contract was not terminable was stated by Dr. Raulino at a meeting with the contracting officer on 5 December 1995, after issuance of the termination notice. A memorandum for record prepared by the Government's contract administrator, who was present at that meeting, states that the contracting officer

responded by denying that she had promised not to terminate the contract and that "the Government never guaranteed a five year contract," since it was possible only to "exercise one option year at a time" (R4, tab 7). In response to EVT's refusal to accept the Short Form clause, she told Dr. Raulino that under the "Christian doctrine," *i.e.*, the decision in *G.L. Christian v. United States*, 312 F.2d 418 (Ct. Cl. 1963), *cert. den'd*, 375 U.S. 954 (1963), this was a mandatory clause and, as such, was part of the contract even though omitted from the written text thereof. (R4, tab 8)

6. The Short Form clause is as follows:

> The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Government shall be liable only for payment under the payments provisions of this contract for services rendered before the effective date of termination.

7. FAR 49.502(c) states that the Short Form clause is to be inserted in:

> solicitations and contracts for services, regardless of value, when a fixed-price contract is contemplated and the Contracting Officer determines that because of the kind of services required, the successful offeror will not incur substantial charges in preparation for and in carrying out the contract and would, if terminated for the convenience of the Government, limit termination settlement charges to services rendered before the date of termination.

8. There is no evidence that the contracting officer made the foregoing determination as to this contract. It is undisputed that EVT had continuously performed these services since 1958 under successive contracts with the Government. It is also undisputed that at the time of contract award and at all times thereafter, EVT operated all public mass transportation on the island of Terceira pursuant to an exclusive franchise from the Azores Regional Government. There is no evidence, however, concerning the extent to which resources designated by EVT for use under this contract would have been needed for these other operations, as of the time of award, or were actually so used after the termination of the contract.

9. The Governments of the United States and Portugal have entered into an "Agreement on Cooperation and Defense - Technical Agreement" relating to the use of facilities in the Azores (R4, tab 27). Article VIII of the Agreement provides that the procurement by the United States of goods and services from Portuguese sources will be "in accordance with [the] laws and regulations" of the United States.

10. On 29 January 1996, pursuant to the contracting officer's request, EVT submitted a proposal for settlement of the termination (R4, tabs 5, 17). The proposal sought payment for various costs claimed to have resulted from the termination including depreciation and spare parts for seven buses claimed to have been acquired for this contract, apparently in order to fulfill the Government's request for new equipment for the contract. (Finding 4; Raulino deposition, 65, 66, 68-81, 98). The proposal also included an amount for the cost of canceling insurance coverage for the vehicles under the contract. The insurance had been purchased for the period 1 October 1995 - 30 September 1996. Following termination of the contract, EVT canceled that coverage, effective 31 December 1995. In a discovery deposition, Dr. Raulino testified that under Portuguese practice, no refund is due for the unused remaining period of a canceled annual vehicle insurance policy. In the proposal, EVT sought payment of the entire annual premium less the amount of an *ex gratia* partial refund made by the insurer. (Raulino deposition, 102, 109). The proposal does not include amounts due under the payments provisions of the contract for services rendered before the effective date of termination.

11. EVT also requested payment of administrative costs of its overall operations which it claims would have been recovered from payments for performance of the work that was terminated (Raulino deposition, 119, 120). The proposal also sought reimbursement of costs of severance pay and other labor charges for workers employed under the contract plus an amount for profit (R4, tabs 17, 20).

12. The parties were unable to agree on a settlement of termination costs. On 21 March 1996, EVT certified its proposal as a claim pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. On 10 April 1996, the contracting officer issued a written decision pursuant to the CDA (R4, tab 25) allowing the claim to the extent of 2,609,401$00. That amount consisted of costs of severance pay and cancellation of insurance and administrative costs. The claims for costs of depreciation and spare parts were denied, principally for the reason that the buses and parts could be used at no loss to EVT in its other operations. (R4, tab 25) EVT took a timely appeal from the contracting officer's decision which was docketed as ASBCA No. 49827.

DECISION

The Government has moved for partial summary judgment deeming the Short Form clause to be part of this contract as a matter of law. Summary judgment is properly granted only where the moving party has established that there is no genuine issue of material fact and that it is entitled to judgment as matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) The inclusion in the contract of a convenience termination clause was required by FAR 49.502(b). By reason of such requirement, a Termination for Convenience clause is "deemed to be part of a contract whether or not it [was] actually incorporated in full text or by reference in the contract document." *Voices R Us*, ASBCA Nos. 51026, 51070, 98-1 BCA ¶ 29,660 at 146,958, *aff'd on reconsid*, 98-2 BCA ¶ 29, 992

EVT contends, however, that a FAR convenience termination clause had been excluded from the contract as the result of representations by Government representatives during contract negotiations that, absent base closure, the contract would be continued for the initial year and four option years. The Government responds that no such representation was made. That dispute, however, does not constitute a material issue of fact on this motion. Any agreement to allow the Government to terminate the contract for convenience only in the event of a base closure would amount to a modification of the standard FAR convenience termination clauses. As there is no provision in FAR authorizing the contracting officer to enter into that modification, it would constitute a deviation under FAR 1.401(c), requiring prior authorization by the agency head or his designee. FAR 1.403 There is no evidence, nor is it contended, that such authorization was obtained. Therefore, the modification would have been beyond the contracting officer's authority and, invalid. *Yosemite Peak & Curry Co. v. United States*, 582 F.2d 552 (Ct. Cl. 1978); *Charles Beseler Co.*, ASBCA No. 22669, 78-2 BCA ¶ 13,483

EVT asserts also that the rule deeming a standard convenience termination clause to be a part of the contract is "inapplicable in the context of a foreign country" (app. resp. at 3). As applied to the present contract, that contention is plainly incorrect. The Government-to-Government agreement relating to the use of facilities in the Azores (R4, tab 27) provides, in Article VIII, that the procurement by the United States of goods and services from Portuguese sources will be "in accordance with [the] laws and regulations" of the United States Government (finding 9).

On this motion, the Government contends that the Short Form clause was the proper convenience termination clause for this contract and should be deemed to have been included in the contract pursuant to the rule of *G.L. Christian v. United States*, *supra*. Inasmuch as compensation under that clause is limited to payment for services rendered prior to termination, the practical effect of accepting that position is to preclude any recovery of the costs claimed by EVT. The Government's position, however, is

incorrect. The Short Form clause was authorized to be used only if the contracting officer made the determination set forth in FAR 49.502(c) (finding 7), which involved the exercise of discretion. We have authority to review the reasonableness of that exercise where the clause has been included in a contract. *Guard-All of America*, ASBCA No. 22167, 80-2 BCA ¶ 14,462 at 71,300. Here the clause is missing from the contract and we are asked by the Government to correct that omission by making the clause applicable as a matter of law. We do not have authority to take that action inasmuch it would require us to make the initial judgment as to the propriety of using the clause in the contract which is a function assigned by the regulation to the contracting officer. That is consistent with our holding in *Muncie Gear Works, Inc.*, ASBCA No. 16153, 72-1 BCA ¶ 9,429 at 43,794 that "[t]he *Christian* case does not require the incorporation of a clause whose applicability is based on the exercise of judgment or discretion."

With the omission of the Short Form clause from the contract and the ineligibility of that clause for inclusion in the contract by operation of law, the clause which must be deemed to have been included in the contract, under *Christian, supra*, is the Long Form clause prescribed for use in fixed-price contracts over $100,000 generally. FAR 49.502(b)(1)(i) On that basis, the Government's motion for partial summary judgment deeming the Short Form clause to be part of the contract is denied.

Dated: 23 February 2000

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

RONALD JAY LIPMAN
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49827, Appeal of Empresa de Viacao Terceirense , rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals