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 Alexander W. Purdue, USAF
Chief Trial Attorney
LT COL Daniel F. Doogan, USAF
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OPINION BY ADMINISTRATIVE JUDGE MOED
ON THE GOVERNMENT'S SECOND MOTION FOR
PARTIAL SUMMARY JUDGMENT

This is an appeal from the partial denial of appellant's (EVT) convenience termination claim. Among the items in that claim is severance pay, totaling 37,228,747.50 Portuguese Escudos, which is said to have been disbursed to Portuguese nationals, employed by EVT, who were laid-off as a result of the termination (R4, tabs 17, 20).

In the present motion, the Government seeks partial summary judgment that: (a) the extent of reimbursement of the costs of such severance pay as part of the convenience termination settlement is governed by U.S. laws and regulations; and (b) the FAR 52.237-8 SEVERANCE PAYMENTS TO FOREIGN NATIONALS EMPLOYED UNDER A SERVICE CONTRACT PERFORMED OUTSIDE THE UNITED STATES (MAR 1989) clause, which is not set forth in the contract, is a mandatory clause which must be deemed part of the contract by operation of law pursuant to the *Christian* doctrine. *G.L. Christian v. United States*, 312 F.2d 418, *reh'g den'd*, 320 F.2d 345 (Ct. Cl. 1963), *cert. den'd*, 375 U.S. 954 (1963).

Clause 14 in Section H of the contract provides that EVT "shall comply with all of the applicable labor laws of Portugal." EVT contends that the effect of this clause is to incorporate the law of Portugal relevant to severance pay into the contract. This is correct to the extent that the clause obligates EVT to comply with the law of Portugal in determining and disbursing severance pay to workers leaving its employ. We agree with the Government's position however, that according to its plain meaning, the clause does not purport to require the application of Portuguese law for determining how much of the

severance pay costs are allowable and reimbursable as part of the convenience termination settlement.

EVT contends, alternatively, that the contract does not contain a choice-of-law clause and that as a consequence, the contract is governed by the law of Portugal pursuant to the general rule that "absent a contract provision to the contrary, a contract entered into and performed in a foreign country is governed by the laws of that country." *Christopher D. Constantinidis Construction Co., S.A.*, ASBCA Nos. 34393, 34394, 90-1 BCA ¶ 22,267 at 111,863.

EVT made essentially the same contention in opposing the Government's first motion for partial summary judgment. That motion arose out of the omission of a termination for convenience clause from the text of the contract. The Government sought judgment that the FAR 52.249-4 TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT (SERVICES) (SHORT FORM) (APR 1984) clause was part of the contract by operation of law pursuant to the *Christian* doctrine. EVT contended that it was not proper to issue such a ruling inasmuch as that doctrine was "inapplicable in the context of a foreign country." In a decision dated 23 February 2000, we rejected that contention, holding that a convenience termination clause was part of the contract by operation of law and that the particular clause so incorporated was the FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (APR 1984) clause. *Empresa de Viacao Terceirense*, ASBCA No. 49827, 00-1 BCA ¶ 30,796.

The basis for that holding was the agreement between the Governments of the United States of America and Portugal relating to the operation of facilities by the United States on Portuguese territory, including the Azores, which contained a provision that the United States would procure goods and services from Portuguese sources "in accordance with [United States] laws and regulations." (R4, tab 27A) Inasmuch as EVT did not ask for reconsideration of the decision, that holding became the law of the case. *Space Age Engineering, Inc.*, ASBCA Nos. 25761 *et al.*, 83-2 BCA ¶ 16,815. On that basis, we hold that reimbursement of severance pay costs as part of the settlement of the convenience termination of this contract is governed by U.S. federal public contract law and partial summary judgment is granted to that effect.

The Government's nomination of the FAR 52.237-8 SEVERANCE PAYMENTS TO FOREIGN NATIONALS EMPLOYED UNDER A SERVICE CONTRACT PERFORMED OUTSIDE THE UNITED STATES (MAR 1989) clause for incorporation into the contract is erroneous. Effective 19 February 1993, pursuant to Federal Acquisition Circular (FAC) 90-16, dated 21 December 1992, published at 57 Fed. Reg. 60,583 (1992), the nominated clause (as revised in January, 1991) was removed "from the . . . FAR in anticipation of promulgation of the restrictions in the [Department of Defense] supplement, the DFARS [Defense Federal Acquisition Regulation Supplement]."

The clause authorized for use as of the date of award of this contract (1 October 1993) was the DFARS 252.237-7020 RESTRICTION ON SEVERANCE PAYMENTS TO FOREIGN NATIONALS (APR 1993) clause. That clause, promulgated in Defense Acquisition Circular [DAC] 91-5, dated 13 May 1993, with an effective date of 30 April 1993, 58 Fed. Reg. 28,458, 28,475 (1993), was as follows:

> (a) The Defense Federal Acquisition Regulation Supplement (DFARS) at 231.205-6(g)(2)(i) limits the cost allowability of severance payments to foreign nationals employed under a service contract performed outside the United States unless the head of the agency grants a waiver pursuant to DFARS 237.171-1.
>
> (b) In making the determination concerning the granting of a waiver, the head of the agency will consider whether -
>
> (1) The application of the severance pay limitations to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for members of the armed forces stationed or deployed outside the United States;
>
> (2) The Contractor has taken (or has established plans to take) appropriate actions within its control to minimize the amount and number of incidents of the payment of severance pay by to employees under the contract who are foreign nationals; and
>
> (3) The payment of severance pay is necessary in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services under the contract or is necessary to comply with a collective bargaining agreement.

Pursuant to DFARS 237.171-1 and -2 (1993), DFARS § 252.237-7020 RESTRICTION ON SEVERANCE PAYMENTS TO FOREIGN NATIONALS (APR 1993) was required to be inserted in solicitations and contracts which were to be "performed in whole or in part outside the United States" and "[p]rovide significant support services for members of the armed forces stationed or deployed outside the United States." While the

first criterion was satisfied in that the contract was for bus transportation services on the island of Terceira, Azores, Portugal, *Empresa de Viacao Terceirense*, *supra*, at 152,047, no facts have been furnished concerning the other criterion. On this record, the clause was not mandatory for inclusion in the contract and, therefore, not eligible for incorporation therein by operation of law pursuant to *Christian*, *supra*. *General Engineering & Machine Works v. O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993). That aspect of the motion for partial summary judgment is, accordingly, denied.

The outcome of the severance pay claim, however, does not depend on the inclusion of that clause in the contract. The clause refers to the cost principle at DFARS 231.205-6(g)(2)(i), 48 C.F.R. ch. 2 (1993) which is as follows:

> Notwithstanding the reference to geographical area in FAR 31.205-6(b)(1), under 10 U.S.C. 2324(e)(1)(M)[1], the costs of severance payments to foreign nationals employed under a service contract or subcontract performed outside the United States are unallowable to the extent that such payments exceed amounts typically paid to employees providing similar services in the same industry in the United States . . . 10 U.S.C. 2324(e)(3)[2] permits the head of the agency to waive these cost allowability limitations under certain circumstances (see 237.171 and the clause at 252.237-7020). [Footnotes 1, 2 inserted]

The above cost principle, if applicable[3], would form part of this contract pursuant to two other clauses. The first of these is the FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (APR 1984) clause, which states, in ¶ (h), that:

> The cost principles and procedures of Part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

The second relevant clause is the DFARS 252.231-7000 SUPPLEMENTAL COST PRINCIPLES (DEC 1991) clause, incorporated into the contract by Clause 1 of § H, which provides that:

> When the allowability of costs under this contract is determined in accordance with part 31 of the Federal Acquisition Regulation (FAR), allowability shall also be

determined in accordance with part 231 of the Defense FAR Supplement, in effect on the date of this contract.

In any event, we have yet to determine that EVT incurred any severance pay costs which would be otherwise allowable under FAR and DFARS. Unless and until that determination is made, we cannot, and do not, address the actual applicability, to this claim, of the restriction on allowability of severance payments to foreign nationals. We note, also, that there is no evidence in the present record that a waiver of the restriction was granted, or considered, by the cognizant agency head.[4]

CONCLUSION

The motion is granted in part, as set forth above, and otherwise denied.

Dated: 25 September 2000

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

1 10 U.S.C. § 2324(e)(1)(M) was originally enacted on 29 September 1988 as § 322(a) of the National Defense Authorization Act Fiscal Year 1989, Pub. L. No.

100-456, 102 Stat. 1918, 1952 (1988). As of 1 October 1993, the date of award of this contract, § 2324(e)(1)(M) (1993) read as follows:

> (e) Specific costs not allowable.- (1) The following costs are not allowable under a covered contract:
>
> . . . .
>
> (M) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined under regulations prescribed by the Secretary of Defense.

[2] 10 U.S.C.§ 2324(e)(3)(A) (1993) was enacted on 23 October 1992 as § 1352 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2559 (1992) It authorized an agency head to waive the applicability of 10 U.S.C. § 2324(e)(1)(M) (1993) to a covered contract, pursuant to regulations prescribed by the Secretary of Defense, if it were determined that:

> (i) the application of such provisions to the contract would adversely affect the continuation of a program, project, or activity that provides significant support services for members of the armed forces stationed or deployed outside the United States;
>
> (ii) the contractor has taken (or has established plans to take) appropriate actions within the contractor's control to minimize the amount and number of incidents of the payment of severance pay by the contractor to employees under the contract who are foreign nationals; and
>
> (iii) the payment of severance pay is necessary in order to comply with a law that is generally applicable to a significant number of businesses in the country in which the foreign national receiving the payment performed services

under the contract or is necessary to comply with a collective bargaining agreement.

[3] Both the restriction (10 U.S.C. § 2324(e)(1)(M)) and the provision for waiver of thereof (10 U.S.C. § 2324(e)(3)(A)) relate to "covered contract[s]." As defined in 10 U.S.C. § 2324(m) (1993), that term "means a contract for an amount more than $100,000 entered into by the Department of Defense *other than a fixed-price contract without cost incentives.*" (Emphasis inserted) That definition would appear to exclude the present firm, fixed-price contract. The cost principle might, nonetheless, be applicable here on the theory that the contract was effectively converted to a cost-reimbursement type when terminated for the convenience of the Government. *Worsham Construction Co., Inc*., ASBCA No. 25907, 85-2 BCA ¶ 18,016 at 90,369. The parties have not addressed this matter.

[4] See Footnote 2.

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