ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Konitz Contracting, Inc.	)	ASBCA No. 52299
	)	
Under Contract No. F48608-96-D0007	)	

APPEARANCE FOR THE APPELLANT: Shane Colton, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Robert P. Balcerek, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal arises from the contracting officer's (CO) denial of the contractor's December 1998 claim alleging that respondent extended the captioned contract for contour restoration and fence repairs at Warren Air Force Base beyond the two-year maximum term provided in its FAR 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989) clause, thereby obligating the contractor to keep its equipment, manpower and resources for the 1998 construction season available until respondent awarded another contract for such work.

In May 2001, respondent moved for summary judgment, arguing that (1) the Board granted respondent partial summary judgment on the contractor's claim under this same contract for the difference between the price of work respondent had ordered and the purported "minimum" amount for an indefinite quantity type contract, holding:

> Contract 7 is not enforceable as either a requirements contract or as an indefinite quantity contract. As such, appellant is entitled to payment only for services actually ordered by LF/WAFB and provided by appellant. *See Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1306 (Fed. Cir. 1998).

Konitz Contracting, Inc., ASBCA No. 52113, 00-2 BCA ¶ 31,121 at 153,717; and (2) under this unenforceable contract, appellant cannot recover the cost of idle equipment, manpower and resources for the 1998 construction season claimed in ASBCA No. 52299.

In July 2001, appellant responded to the Government's motion for summary judgment and moved for summary judgment on the limited issue of the use of the FAR 52.217-8 OPTION TO EXTEND SERVICES (AUG 1989) clause of the contract for the period 10 July 1998 to May 1999. Appellant argues that the unenforceability of the contract terms with respect to minimum quantities does not impair its right to recover the added costs it allegedly incurred as a result of the invalid unilateral extensions which were constructive changes or cardinal changes, or formed a new and separate contract.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTIONS

1. On 12 April 1996, the Air Force awarded Contract No. F48608-96-D0007 (contract 7) to Konitz Contracting, Inc., for contours restoration and fence repairs at the launch facility of Warren Air Force Base, WY. Contract 7 included a base year and an option year. (R4, tab 1 at 2-3, 5, 8)

2. Contract 7 incorporated by reference the FAR 52.216-18 ORDERING (OCT 1995) clause, which provided:

> Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from Date of Award through 365 days from Date of Award. [Underlining in original.]

(R4, tab 1 at 15)

3. Contract 7 incorporated by reference the FAR 52.217-8 OPTION TO EXTEND SERVICES (AUG 1989) clause, which provided:

> The Government may require continued performance of any services within the limits and at the rates specified in the contract . . . . The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The [CO] may exercise the option by written notice to the Contractor within the period specified in the Schedule [*viz*, "15 calendar days before the contract expiration date"]. [Underlining in original.]

(R4, tab 1 at 11, 16, tab 2)

4. Contract 7 incorporated by reference the FAR 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989) clause, which provided:

> (a) The Government may extend the term of this contract by written notice to the Contractor within 15 days; *provided*, that the Government shall give the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.
>
> (b) If the Government exercises this option, the extended contract shall be considered to include this option provision.
>
> (c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed two years. [Underlining and italics in original.]

(R4, tab 1 at 16, tab 2)

5. Contract 7's base year term expired on 11 April 1997. On 20 March 1997, the CO exercised the option year from 12 April 1997 through 11 April 1998 by unilateral Modification No. P00003, citing the FAR 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT clause. (R4, tab 4)

6. The FAR 52.217-9 clause required the CO to give preliminary notice of intent to extend 60 days before the contract term expired on 11 April 1997, *viz*, by 10 February 1997, and to give written notice to extend 15 days before such expiration date, *viz*, by 27 March 1997. The present record contains no evidence that the CO gave appellant any 60-day preliminary notice of intent. The CO gave appellant written notice to extend 22 days before the expiration of the base year (R4, tab 4).

7. On 21 November 1997, the CO issued Delivery Order (DO) No. 5003 (ASBCA No. 52113, R4, tab 11). Appellant asserts that it completed Delivery Order 5003 "in early July of 1998" (Blair aff., ¶ 7; Konitz aff., ¶ 6).

8. On or about 20 March 1998, respondent began preparations for another contract for Warren AFB launch facilities contours and fence repairs to run consecutively after contract 7 (Swan depo., ex. M).

9. Citing the FAR 52.217-8 OPTION TO EXTEND SERVICES clause, by four unilateral modifications the CO extended contract 7 for a total of 182 days (*i.e.*, not exceeding six months). Those four modifications were dated and extended services as follows:

Mod.	Dated	Extension to

P00004	3-20-98	7-10-98
P00005	6-26-98	8-15-98
P00006	8-12-98	9-18-98
P00007	9-15-98	10-10-98

(R4, tabs 5-7, 9)

10. The FAR 52.217-8 clause required the CO to give written notice of extension 15 days before the contract term expired (R4, tab 1 at 11, 16, tab 2). The dates by which such written notice was required and was provided for each of those four modifications were as follows:

Mod.	Date Req.	Date Given	Days Late
P00004	3-27-1998	3-20-1998	0
P00005	6-25-1998	6-26-1998	1
P00006	7-31-1998	8-12-1998	12
P00007	9-3-1998	9-15-1998	12

(R4, tabs 5-9)

11. Appellant asserts that it did not provide any services or products to respondent between 10 July 1998 and approximately 25 September 1998, although all its equipment and gravel crusher were at the Warren AFB site. Several times during that period appellant began to demobilize its equipment for return to Montana, but each time it received a unilateral extension. (Blair aff., ¶¶ 21, 23; Konitz aff., ¶¶ 14, 16)

12. During the fourth extension period under Modification No. P00007, the CO issued DO Nos. 5004 on 23 September 1998 and 5005 on 30 September 1998 (ASBCA No. 52113, R4, tabs 13, 16).

13. Appellant's 18 December 1998, certified, $724,046.44 claim alleged that respondent improperly extended contract 7 beyond the two-year maximum term provided in the contract's FAR 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989) clause, thereby obliging appellant to keep its equipment, manpower and resources for the 1998 construction season available until respondent awarded another contract for contour restoration and fence repairs at Warren AFB (R4, tab 17).

14. The CO's 4 May 1999 final decision denied appellant's 18 December 1998 claim, asserting that: (a) the FAR 52.217-9 clause deals with exercise of the second year option, but the CO extended the option term four times pursuant to the FAR 52.217-8 clause, which provided no right to an equitable adjustment for such extensions, (b) such

extensions formed no new contract, and (c) DO No. 5003, which the CO issued on 21 November 1997 and appellant signed on 2 December 1997, which was to be performed from 1 April to 22 July 1998, and which appellant did not complete until 7 August 1998, required appellant to commit its construction equipment for the 1998 construction season (R4, tab 20).

DECISION

I.

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. When the parties have filed cross-motions for summary judgment, as in the instant case, the tribunal must evaluate each motion on its merits. The fact that both parties argue in favor of summary judgment and allege there are no genuine issues of material fact does not relieve the tribunal of its duty to decide whether summary judgment is appropriate. The making of such inherently contradictory claims does not establish that if one is rejected the other must necessarily be allowed. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

With respect to the Government's motion, it appears that the parties do not genuinely dispute the material facts set forth in SOF ¶¶ 1-6, 8-10, 12. Thus, respondent's motion presents solely issues of law, which are appropriate for summary judgment. *See Motorola, Inc.*, ASBCA No. 51789, 01-1 BCA ¶ 31,233 at 154,152 (disputed interpretation of statutory and regulatory provisions resolvable by summary judgment).

Respondent's motion and appellant's response thereto present two legal issues: (1) whether the FAR 52.217-9 clause's limitation of the total duration of contract 7 to two years invalidated the CO's four extensions of contract 7 under the FAR 52.217-8 clause beyond such two-year limit, as appellant contends; and (2) whether the Board's holding in ASBCA No. 52113, 00-2 BCA ¶ 31,121, that contract 7 is not enforceable as either a requirements or an indefinite quantity type contract, and as such appellant is entitled to payment only for services actually ordered and provided, bars appellant's present claim for idle equipment costs allegedly resulting from the Government's improper exercise of its option to extend the term of the contract or its option to extend services, as respondent contends.

As to the first issue, the limitation of the contract term by the FAR 52.217-9 clause does not preclude extensions beyond such term under the FAR 52.217-8 clause. A 1992 Air Force contract for operating and maintaining base vehicles at Wright-Patterson AFB contained both the FAR 52.217-8 and 52.217-9 clauses. The CO exercised four annual options under the FAR 52.217-9 clause, extending the completion date to 30 September 1996. Thereafter, in four modifications pursuant to the FAR 52.217-8 clause, the CO

extended services in one or two-month increments through February 1997. This Board held that the CO had the right to extend the contract for those short periods. *See Tecom, Inc.*, ASBCA No. 51880, 00-2 BCA ¶ 30,944 at 152,739.

As to the second issue, when a contract is unenforceable as a requirements or indefinite quantity type contract, and is valid and binding only to the extent performed, as in *Willard Sutherland & Co. v. United States*, 262 U.S. 489, 494 (1923), and hence the contractor is entitled to payment only for services actually ordered and rendered, as in *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1306 (Fed. Cir. 1998), and *Konitz Contracting, Inc.*, ASBCA No. 52113, 00-2 BCA ¶ 31,121, it is not self-evident, as respondent argues, that "unenforceability" of contract 7 with respect to liability to pay for the minimum quantity under an indefinite quantity contract, or for respondent's requirements under a requirements contract, *ipso facto* bars an equitable price adjustment for the work or services ordered and performed if the facts support such an adjustment.

Indeed, the legal authorities are to the contrary. In *Sanz School of Languages*, ASBCA Nos. 9571, 9572, 1964 BCA ¶ 4257, this Board held that the two contracts in issue were unenforceable for lack therein of minimum orders or clear requirements to satisfy all the agency's needs, yet stated:

> However, appellant may have a valid claim under the Changes article of the Washington contract to the extent that lateness of calls extended its performance beyond 30 June 1963.

1964 BCA at 20,612. Likewise, in *Ralph Const. Inc. v. United States*, 4 Cl. Ct. 727, 733-34 (1984), the contract was held to be unenforceable as either a requirements or an indefinite quantity type contract, and valid only to the extent performed. Nonetheless, the court denied the contractor's claim for additional payment for materials ordered by an unauthorized Government official, and reserved ruling on two other contractor claims for additional compensation for alleged material mispayment and erroneously ordered "go backs" (*i.e.*, reworking of defective performance), since disputed material facts made those claims inappropriate for summary judgment. In *Sanz* and *Ralph* the contractor did not recover for such claims, not for lack of enforceability of the contract, but rather for lack of proof of their merits. Accordingly, we deny respondent's motion for summary judgment.

II.

With respect to appellant's cross-motion for summary judgment, it appears that the parties dispute the material facts of whether (1) respondent's extensions of the contract term pursuant to the FAR 52.217-8 clause idled appellant's site equipment and manpower from 10 July to 25 September 1998, or whether DO No. 5003 required appellant to commit its equipment and manpower on site for such period (SOF ¶ 11, 13, 14), and (2) DO No.

5003 was completed in early July 1998 or 7 August 1998 (SOF ¶¶ 7, 14). Accordingly, summary judgment in favor of appellant is inappropriate. We deny appellant's motion for summary judgment.

Dated: 20 August 2001

DAVID W. JAMES, JR.
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

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. 52299, Appeal of Konitz Contracting, Inc., rendered in conformance with the Board's Charter.

Dated:

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