ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Janice L. Cox d/b/a Occupro Limited	)	ASBCA No. 50587
	)	
Under Contract Nos. 240-BPA-91-494	)	
240-BPA-92-458	)	

APPEARANCE FOR THE APPELLANT: Ms. Janice L. Cox
Owner

APPEARANCE FOR THE GOVERNMENT: Jeffrey Robbins, Esq.
Trial Attorney
Department of Health and
Human Services
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

Janice L. Cox d/b/a Occupro Limited (appellant or Cox) appealed from a deemed denial of her claim for $95,949.04 under two Blanket Purchase Agreements (BPAs). Only entitlement is before us for decision (tr. 63-64). On 12 April 2001 we issued a decision on several motions. We denied the Government's motion for partial summary judgment as to portions of the claims. We granted the Government's motion to strike appellant' s amended claim for incidental, treble and punitive damages. Finally we denied appellant' s motion to refer selected actions to the General Accounting Office (GAO) and the Department of Justice (Justice). *Janice Cox d/b/a Occupro Limited*, ASBCA No. 50587, 01-1 BCA ¶ 31,377, *recon. denied*, 01-2 BCA ¶ 31,619. What remains before us is the original claim for $95,949.04.

FINDINGS OF FACT

1. Janice L. Cox received her B.S. and M.A. degrees from Tennessee Tech University and an M.S. degree in environmental health from the University of Cincinnati College of Medicine (tr. 77-78). At all times relevant to this appeal she was a certified industrial hygienist (CIH) (tr. 73), having received that certification from the American Board of Industrial Hygiene (tr. 78).

2. In 1990, Cox resigned her position as a consultant with the State of Ohio in order to relocate to the Montgomery, Alabama area due to her husband's job transfer. Prior to leaving Ohio, in May 1990, while attending a professional conference, she was approached by Paul Pryor (Pryor), industrial hygiene manager for the Federal Employee Occupational

Health Program (FEOH) (Region III) who had heard she was moving to Alabama. Pryor suggested she come to work for FEOH, telling her that Clifford Moseley (Moseley), a friend of hers since 1977, was heading up the Atlanta, Georgia FEOH office. (Tr. 84-85)

3. Moseley received a B.S. degree from Virginia Polytechnic Institute and State University, a M.S. in environmental science from the University of Florida and pursued doctoral studies in industrial hygiene at the University of Cincinnati. He became a public health officer in 1975, became a certified industrial hygienist in 1979, and had several positions within the U. S. Public Health Service until 1991 when he went with the FEOH as a program management officer. (Tr. 433-34)

4. FEOH offered services to other federal agencies on a fee-for-service basis, including clinic services in federal buildings, wellness and fitness programs for federal employees, law enforcement physicals and exit exams, and environmental health. Industrial hygiene was included under the environmental health service. (Tr. 434-35)

5. The basis for the FEOH operation was section 1535 of the Economy Act of 1932 which permits agencies to spend appropriated money on services benefiting federal employees (tr. 437). FEOH and the client agencies enter into interagency agreements, the client agencies issue task orders (tr. 438) and FEOH sees that the task is performed, either in-house or in most cases, by assigning the work to outside contractors (tr. 439-40).

6. In August 1990, Cox relocated to Alabama where circumstances necessitated that she return to work. It was difficult finding work however, so Cox contacted Moseley to see if FEOH still needed industrial hygiene consultants. (Tr. 80, 85-86)

7. Pursuant to Moseley's direction, she submitted a resume by letter dated 15 April 1991. On 28 April 1991 Cox signed 240-BPA-91-494 (BPA 494) (tr. 86-87). The contracting officer, Michael A. Douglas, signed BPA 494 on 13 May 1991. Under Article I of BPA 494, Cox was to perform in her capacity as an industrial hygienist and was to conduct an environmental services program for which she was to be paid under Article II, a fee of $50 per hour. The total amount of the BPA was not to exceed $50,000. (R4, tab 14) The BPA did not have any wording regarding the extent of the Government's obligation to place orders.

8. The period of performance for BPA 494 was 13 May through 30 September 1991. The Government contends that the BPA also included a Statement of Work (SOW) for a certified industrial hygienist, dated 10 May 1991, Number E01. SOW E01 set forth a statement of services to be performed when requested by the project officer. Paragraph G of the SOW, Equipment and Furnishings, provided that "[t]he FOH program shall provide equipment necessary for the performance of the services to be provided under this contract with exceptions noted elsewhere in the contract." (*Id.*)

9. SOW E01 also included a chart which set forth due dates for delivery of various work items that might be ordered under the BPA. For example, field data and laboratory reports resulting from sampling of environmental media were to be submitted within two weeks of the site visit and where laboratory support was required, the due date was two weeks after receipt of the laboratory report. For projects requiring the performance of studies and evaluations, copies of field notes, observations, pertinent site visit information and a draft report were due within three weeks of completion of all site visits, laboratory analyses and other activities necessary for the project. (*Id.*)

10. Cox testified that her recollection was that BPA 494 was only a five page document, Optional Forms (OFs) 347 and 348 and a three page Certification Regarding a Drug-Free Workplace (tr. 87) and did not include the SOW alleged to be included by contracting officials (*see* R4, tab 14). Since SOW E01 is dated 10 May 1991 and Cox signed the BPA on 28 April 1991, before the apparent effective date of SOW E01, we find as a fact that BPA 494 did not include a SOW.

11. In late May 1991, a task order was issued under BPA 494 for Cox to perform an audit of respiratory protection use in the General Services Administration (GSA) Southeastern Distribution Center in Palmetto, Georgia (GSA-SEDC) (R4, tab 2).[1]

12. Subsequently, on 28 May 1991, Moseley penned the following handwritten notes to Cox:

> Here's the relevant section from the GSA safety Manual. Look it over; we want to make sure the Palmetto operation conforms to these guidelines, as well as 1910.134. You' ll have to sort out the pages.
>
> Also, a copy of the billing form I developed[.] It' s less than perfect, but it will do. Simply add your hours according to Professional, technical (go-fer type things) admin (travel arrangements, etc.). I assume your travel time is 50% less than the Professional rate?) [sic] I can go over this with you the first time. It's an internal form for my records, in case any one asks for billing details. Generally, our contracts with the Fed agencies call for simply reporting total hours spent.

(R4, tab 2, ex. B; AR4, tab 20)

13. On 16 July 1991, Cox was issued a task order to accomplish environmental sampling of the indoor air quality of the Equal Employment Opportunity Commission (EEOC) space in the Metro Mall Jewelry Center, Miami, Florida. Among other

responsibilities, she was to prepare a draft trip report and a follow-up study protocol for submission to the FEOH regional industrial hygienist for review. (AR4, tab 9A)

14. On 1 August 1991, Cox was assigned a task order under BPA 494 to perform certain investigative work with regard to pigeon dropping contamination of the ventilation system in a GSA leased building occupied by the Defense Contract Audit Agency (DCAA) in Huntsville, Alabama. The work included preparation of a written report, detailing findings, conclusions and recommendations. (*Id.*)

15. On 12 August 1991, Cox was assigned a task order under BPA 494, to investigate indoor air quality of the FAA Automated Flight Service Stations in Jackson and Nashville, Tennessee, and Louisville, Kentucky including preparation of a draft report for each facility visited. (R4, tab 12 at 14; AR4, tab 9B) A substantially identical task order for an investigation of indoor air quality of the FAA Air Flight Service Stations in Gainesville, Florida and Anniston, Alabama including preparation of a draft report for each facility visited was issued on 13 September 1991 (collectively the FAA task order). (R4, tab 12 at 36; AR4, tab 9D)

16. On 28 August 1991, Cox was assigned a task order under BPA 494 for the evaluation of employee noise exposure at Centers for Disease Control facilities at four locations (CDC task order). In addition, the task order required Cox to identify and monitor personnel exposed to ethylene oxide at one of the facilities. (AR4, tab 9C)

17. On 5 November 1991, the parties executed 240-BPA-92-458 (BPA 458) effective for six months. BPA 458 was prepared and issued on OFs 347 and 348. The back page of OF 347 incorporates PURCHASE ORDER TERMS AND CONDITIONS, including FAR 52.249-1, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (SHORT FORM) (APR 1984). BPA 458 was signed by Cox and contracting officer Walter A. Knott. Cox was to be paid at a rate of $65 per hour and the total BPA was not to exceed $50,000. (R4, tab 15; FAR 53.302-347)

18. The version of BPA 458 in the Government's Rule 4 file also included SOW E10, which set forth the objective of the contract and a description of the types of services to be performed. Paragraph F of the SOW, Equipment and Supplies, and Paragraph K, Contractor-Provided Equipment and Supplies, provided in part:

> Some equipment and supplies are available from FEOH for use in the provision of service to Federal client agencies, and the contractor is expected to utilize this equipment and supplies whenever possible. Arrangements must be made through the FEOH Project Officer. Government-provided equipment shall be maintained . . . by the Federal Government.

. . . .

> Equipment and supplies not available from FEOH shall be provided by the contractor . . . .

(R4, tab 15) Cox testified and contends that a different SOW, Number E01, was in the BPA 458 she signed, which required the Government to furnish all equipment (tr. 90; app. br. 3-4) and moreover, the Government surmises that the SOW might have been changed after execution of BPA 458 (Gov' t br. at 8). We find that SOW E01 was included in the version of BPA 458 signed by Cox.

19. Between 30 September 1991, when BPA 494 expired, and 5 November 1991, the effective date of BPA 458, Cox continued to work on and eventually billed for, work on task orders issued during the effective period of BPA 494 (R4, tab 2, ex. H, tab 12 at 8, 15, 23, 30, 37, 46).

20. On 12 December 1991, Cox was issued a task order to conduct annual safety and health inspections for multiple GSA field office locations in Kentucky, Mississippi, Tennessee, Florida and Alabama (R4, tab 2, ex. I). GSA had 99 sites scattered throughout the Southeastern states needing an annual workplace inspection for safety and health, and asked FEOH to develop that inspection program (tr. 442). Moseley worked with one contractor to develop an inspection protocol. He then identified Cox and another contractor, Art Trippett (Trippett)[2] who could perform the inspections based upon the protocol developed. (Tr. 443) He awarded 29 of the sites to Cox and the remainder to Trippett (R4, tab 2, ex. I; tr. 288).

21. While Moseley could not recall exactly why he split up the sites between Cox and Trippett as he did, he surmised that he probably did it based upon capacity, because Trippett was more experienced (tr. 446). There is no indication that Moseley did not intend to honor the task order at the time.

22. The week prior to 24 January 1992, Moseley went to Denver, Colorado for training. Moseley testified that prior to going, he called Cox and Trippett, told them he had the inspection protocol and the survey forms and told them they needed to meet to go over the forms and resolve any questions they might have. (Tr. 446-47)

23. Cox testified that she was told by Moseley to come to his office on 24 January 1992 to pick up training materials for a different GSA project referred to as hazard communication training that she was performing. According to Cox she was not told there was to be a meeting of contractors regarding the GSA annual safety and health inspections. (Tr. 91-92, 110) We find that while Moseley believes he told Cox the purpose of the meeting was to discuss the GSA task order for safety and health inspections, he did not clearly communicate that purpose to Cox.

24. Cox planned to meet Moseley on Friday, 24 January 1992, but she had car trouble the Thursday night before, so she could not drive to Atlanta for the Friday meeting. She called and left a message for Moseley at 7:03 A.M. CST informing him she would not attend the meeting because of car trouble (tr. 92, 448-49). Moseley called her back later that day and she explained her situation to him and made arrangements to meet Moseley on Monday, 27 January 1992 to pick up the training materials (tr. 92, 450).

25. While driving to his meeting with Trippett, after learning that Cox was not attending, Moseley thought about how to expedite the project. Upon arrival, he asked Trippett if he could do all 99 sites and when Trippett said yes, Moseley decided to proceed that way (tr. 450). Moseley rationalized taking the work away from Cox by testifying that he had received negative feedback from client agencies on the issue of timeliness of her work (tr. 453-54).

26. Cox traveled to Atlanta on Monday, 27 January 1992 to obtain the training materials for GSA hazard communication training (tr. 91). According to Cox, during that meeting Moseley asked her to not charge for all of the services she had rendered under an FAA project and further asked her to consider not charging for all of the services she provided under all the task orders generally. Cox told Moseley she expected to be paid for the services she provided and minutes thereafter, according to Cox, Moseley told her he had reassigned her portion of the GSA annual safety and health inspections to Trippett because she did not attend the meeting on Friday, 24 January 1992. (tr. 92, 94) She protested this decision orally and in writing and told Moseley she did not think they could do business together again (tr. 94, 456-57). Cox was paid $845.05 at the proper rate of $65 per hour for 13 hours of work she had already completed on the GSA task order before the work was reassigned (R4, tabs 9, 12; AR4 tabs 9G, 9I, 90).

27. Moseley does not deny he asked Cox to charge at reduced rates for administrative tasks, justifying it by testifying that different levels of service should be compensated for at different rates, but conceding his superiors, after the fact, overruled that view with respect to Cox and the BPAs under which she operated (tr. 601). While Moseley's cancellation of the work may not have been the best choice, we do not find him to have acted in bad faith or to have abused his discretion.

28. After 27 January 1992, Cox stopped communicating with Moseley and for some projects, she failed to send him reports or field work although she did provide some raw data to a client agency which they found useful (tr. 457).

29. Effective 10 March 1992, BPA 458 was unilaterally amended by the Government to change the period of performance from six months to eight months from the date of the order, an extension of two months or to 5 July 1992 (R4, tab 15).

30. Over the next several years Cox lobbied for an investigation of what she considered inappropriate conduct on the part of those involved in contracting for industrial hygiene consulting work, especially focusing on the conduct of Moseley. She corresponded with officials in the Department of Health and Human Resources, the Health Resources and Services Administration, and several members of Congress (*see, e.g*., AR4, tabs 7A, 7C, 7D, 7F, 7M, 7N, 7T, 7X, 7Z, 8D). In addition, Cox filed an amended claim for punitive damages which we struck, and moved to refer matters to GAO and Justice, which we denied, both of which related to her view that the conduct of the officials was inappropriate.

31. Mr. Douglas and Mr. Knott were the contracting officers respectively on the two BPAs, and Moseley did not consult with either of them on questions of authority and Moseley agrees it is fair to state that he functioned on his own (tr. 550). According to Steven Zangwill, a contracting officer with an unlimited warrant, and to whom Knott and Douglas reported (tr. 330-31), Moseley was a project officer and a contracting officer' s technical representative (tr. 430-31). Thus, under both SOW E01 and SOW E10, Moseley was expressly authorized to award projects to Cox (R4, tabs 14, 15).

32. On 14 July 1994, Cox submitted a certified claim to Mr. Zangwill in the total amount of $95,949.04 and requested a contracting officer's decision (R4, tab 6). An additional copy of the claim with detailed back-up documentation was furnished on 23 August 1994 (R4, tab 2). On 18 February 1997, then-counsel for Cox filed an appeal to the Board of the contracting officer's deemed denial of that claim (AR4, tab 8O) and the appeal was docketed on 24 February 1997 (AR4, tab 8P). A final decision was issued on 14 May 1997. Additional findings pertinent to each segment of the claim are set forth below.

Reduction in Hourly Rates

33. It is undisputed that Moseley insisted that Cox bill at a reduced hourly rate (50% or 75%) for administrative work under the task orders she received. She seeks to recover the full rates specified in the BPAs. Under BPA 494 she seeks $431.25 for the EEOC project, $368.75 for the GSA-SEDC Palmetto, Georgia task order, and $543.75 for the DCAA project at Huntsville, Alabama. In addition, she seeks a total of $5,265.75 for task order work at five FAA sites which she alleges was performed under both BPA 494 and 458, but was required by Moseley to be billed under the lower hourly rate in BPA 494.

34. In the final decision, the Government concedes that it was improper to insist that she bill for administrative work at reduced rates and granted $2,069.36 representing underpayments for BPA 494, but nothing under BPA 458. The remaining amount claimed represents work performed under task orders issued during the effective dates of BPA 494, but performed after the issuance of BPA 458. Cox contends that she should be paid $65 per hour for work performed after entering into the second BPA (458), regardless of the

BPA under which the task order was issued and thus underpayments should be the difference between the amount paid and $65.

35. Testimony at trial revealed that, at Moseley's insistence, Cox sometimes billed for travel and other travel related costs based upon an hourly rate lower than the contract rate, rather than billing outright for the actual costs of such travel. Cox concedes that no adjustments are necessary for these costs as they were billed by taking the actual cost, dividing it by the reduced hourly rate and determining a number of hours to claim. (Tr. 241-42)

Claim for Amounts Due for Professional Services

36. Cox makes two claims under BPA 494 for work she claims was completed. She claims $641.03 for a walk-through on the CDC task order and she claims $893.27 for a walk-through on the GSA-SEDC project. While not agreeing to the amounts, Moseley conceded at trial that this work was performed and that Cox is entitled to be paid for it. (R4, tab 2; tr. 472-73)

37. Cox makes two claims under BPA 458. First, she claims $9,162.35 for 140.96 hours during the period 16 October 1991 through 5 May 1992 in connection with the GSA-SEDC Palmetto lead and respiratory protection project. Second, she claims $8,475.96 for 130.4 hours performed between 18 April and 8 May 1992 in connection with the CDC noise monitoring project. (R4, tab 2)

38. The total amount of the claims for work performed but not paid is $19,172.61.

39. In connection with the GSA-SEDC task order for respiratory protection, Cox made a site visit and determined there was a potential lead exposure problem in the warehouses, received permission to include the lead exposure investigation as part of the task order, did the lead assessment and wrote a report on that issue. However, she never provided the respiration protection report according to Moseley. (Tr. 468)

40. Cox testified that she did prepare a report and submitted it to Moseley and knows that he received it because he complained in a later communication about the fact that she had punched and bound it (tr. 202-03). Cox, however, never provided a copy of the report to the Board or evidence documenting that Moseley received it (tr. 204). In Cox's claim of 14 July 1994, where she attributes her failure to complete certain work to the lack of equipment, she states:

> On the GSA-SEDC project, at least two weeks of work remained to complete the project (2-3 days field work; 1 day preparation and travel time; 7 days to produce a written

respiratory protection program and a written project report.)
[Emphasis added]

(R4, tab 2 at 11) Based upon the foregoing, we find as a fact that no report was submitted.

41. Cox ceased working on both the CDC and GSA-SEDC projects at the expiration of the effective period of BPA 458 (tr. 162-64) even though the period of its effectiveness had been unilaterally extended and even though Moseley asked her to continue working and assured her she would be paid for it (tr. 464). We find as a fact that no report other than the report on lead was issued for either project. Notwithstanding that the reports were not furnished, the contracting officer granted $6,627.43 for money expended for travel, travel time, lab analysis and supplies, including the work referred to in finding 36, as some useful data was furnished (R4, tab 18; tr. 457-58, 466).

Breach of Contract Claim

42. This claim has two parts. First, appellant claims $49,364.93 as breach of contract damages because Moseley took the 29 sites away from Cox and gave them to Trippett in connection with the task order for GSA annual health and safety inspections. (R4, tab 2 at 9-10). The claim is computed by estimating the number of hours Cox would have worked if the 29 sites had not been taken away and multiplying those hours by $65 per hour (R4, tab 2, ex. J; tr. 264-66). The second part of the claim is for breach damages resulting from the alleged failure of the Government to provide equipment necessary to perform certain work in connection with the CDC noise project ($15,600) and the GSA-SEDC respiratory protection program ($5,200) (R4, tab 2 at 10-11).[3] Cox explained that the equipment was late arriving such that BPA 458 expired with no time left to perform the remainder of the work (tr. 267). Since the Government in fact furnished the equipment, we find that at some indeterminable time, the parties agreed, despite the doubt with respect to which SOW was applicable, that equipment would be Government-furnished.

43. With regard to these alleged breaches, Cox stated in her claim as follows:

> Pursuant to Work Statement E01, the Work Statement which I agreed to perform the second BPA (458) under, all equipment was to be provided by the Government. However, during the performance of BPA 458 equipment was not provided as required and Occupro was unable to accomplish some of its required tasks. Specifically, completion of the Noise Project work at various CDC locations in Atlanta, and work on the Respiratory Protection project at GSA-SEDC in Palmetto, GA was not done due to lack of equipment.

(R4, tab 2 at 10)

44. Both breach claims are for hours of work which were not performed (tr. 267-68).

DECISION

Prior to deciding these claims, it is necessary to examine the nature of BPAs and determine how they operate generally and how they operated in this case.

BPAs were authorized by FAR Subpart 13.2 (1991). FAR 13.201 provided:

> (a) A blanket purchase agreement (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing "charge accounts" with qualified sources of supply (see Subpart 16.7 for additional coverage of agreements).

We stated in *Mid-America Officials Association*, ASBCA No. 38678, 89-3 BCA ¶ 22,231 at 111,776, that:

> The BPA itself is not a contract of purchase. All that it purports to do is prescribe terms and conditions for any orders that may be awarded. All that is accomplished by issuance of a BPA is the establishment of a "charge account" with the vendor so purchases can thereafter be made without having to issue individual purchase documents each time.

Thus, in the instant case, separate contracts arose each time a task order was issued by the Government and accepted by Cox. Each of those separate contracts included the task order itself and the BPA in effect at the time the task order was issued. Consequently, task orders issued between 13 May and 30 September 1991 became contracts incorporating the terms of BPA 494. Task orders issued between 5 November 1991 and 5 May 1992 became contracts incorporating the terms of BPA 458.

All of the task orders at issue herein were subject to BPA 494 except the GSA task order for annual safety and health inspections at 29 sites. The GSA task order incorporates the terms of BPA 458.

We next determine the terms of the contracts which incorporated BPA 494. Work performed under task orders issued pursuant to BPA 494 was to be paid at a rate of $50 per hour without regard to whether the work was professional or administrative. Our findings indicate that BPA 494, when executed, did not include a SOW. We have no evidence that the contracts issued during the term of BPA 494 were amended in any way to incorporate a

SOW. Thus, there were no due dates applicable to task orders issued thereunder and the contracts were silent as to who was to provide equipment when needed to perform task orders. At some indeterminable time, the parties came to an accord that the Government would furnish the equipment.

As for BPA 458, Cox is of the view that SOW E01, which required the Government to pay for equipment, was included. In addition, our findings indicate that SOW E01 was included in the version of BPA 458 signed by Cox. Accordingly, SOW E01 applies to contracts entered into on and after 5 November 1991.

Work performed on task orders issued on or after 5 November 1991 was to be paid at the rate of $65 per hour and for the work performed on the GSA task order for the 29 sites prior to cancellation, that was done. Thus the only issue to be decided concerning BPA 458 is the effect of the cancellation of that task order.

Reduction in hourly rates

All of the claims for underpayment of the hourly rate for administrative tasks were for task order contracts which included BPA 494, requiring payment at $50 per hour for all work performed, not just professional work. Accordingly, appellant is entitled to recover the difference between $50 and the amounts actually paid for administrative work. She is not entitled to be paid $65 per hour for any of this work.

Claim for Amounts Due for Professional Services

The contracts for the CDC and GSA-SEDC projects were entered into during the effective period of BPA 494 and therefore included it. The expiration of the effective period of BPA 458 on 5 May 1992, when Cox ceased her work on these projects, was irrelevant to contracts pursuant to BPA 494.

Because Cox continued to perform the task orders after 30 September 1991, that is evidence that she agreed with the Government interpretation of their agreement, *i.e.*, that performance of task orders was unrelated to BPA expiration dates. Thus, Cox should have completed the work and delivered the required reports. She is not entitled to be paid for hours of work that did not result in delivery of the reports contemplated by the contracts. The reports were the end products contracted for, not the incremental hours spent amassing data for the reports. The claim for unpaid invoices is denied. We do not disturb the contracting officer's decision to pay for useful data short of the required report.

Breach of Contract

Cox argues that Moseley had no authority to terminate the contract since he was not the contracting officer. Moreover, she argues, even if he had the authority he failed

to terminate the work in accordance with the procedures set forth in FAR 52.249-1, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SHORT FORM), which was specified in BPA 458. Moseley's failure to follow the precise language in that FAR provision, in Cox's view, gives rise to liability for breach damages measured as the estimated earnings for her services had the work been performed. (App. br. at 10-11; app. rebuttal br. at 4).

The Government, on the other hand, argues that FAR 13.203-1(j)(5) contemplates the contracting officer authorizing individuals to make purchases under a BPA. Thus, if an individual has the authority to purchase something, that person should have the authority to cancel the purchase. The Government cites no authority for this proposition, but deems it a moot point "because appropriate termination procedures would still have had to be used." (Gov' t br. at 5) The Government's primary argument in support of its view that the cancellation of the work on the 29 sites should be processed under FAR Part 49, as opposed to a breach of contract, is as follows:

> Part 13 of the FAR deals with "Small Purchase and Other Simplified Purchase Procedures." FAR § 13.3-1 (i) [sic 13.203-1(i)], among other provisions, indicate that the BPA is a type of small purchase to be accomplished with a purchase order. And, FAR §13.504 (2) states: "If the contractor does not accept the cancellation or claims that costs were incurred as a result of beginning performance under the purchase order, the contracting officer shall process the termination action as prescribed by part 49," which are the general termination procedures under the FAR.

(*Id.* at 6)

Moseley awarded the GSA task order to Cox as he did each of the other task orders she received, and as project officer, he was authorized to give her the work. Under the circumstances of this case, we conclude that since Moseley had the actual authority to award task orders, he impliedly was authorized to reassign task orders. *Urban Pathfinders, Inc.* ASBCA No. 23134, 79-1 BCA ¶ 13,709; *see also,* Robert A. Tepfer, *Authority and the Contracting Officer's Representatives*, 24 A.F.L.REV. 1, 2 (1984) ("Authority to bind the Government is generally implied when such authority is considered to be an integral part of the duties assigned to the government employee.").

The threshold question, however, is whether the cancellation after performance commenced should be processed as a termination for the Government's convenience or as a breach of contract. Cox contends that Moseley's failure to follow the procedures in FAR 52.249-1, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (SHORT

FORM) (APR 1984), entitles her to breach damages. We disagree. The Court of Claims stated in *G. C. Casebolt Co. v. United States*, 421 F.2d 710, 712 (Ct. Cl. 1970), as follows:

> The rule we have followed is that, where the contract embodies a convenience-termination provision as this one would, a Government directive to end performance of the work will not be considered a breach but rather a convenience termination - if it could lawfully come under that clause - even though the contracting officer wrongly calls it a cancellation, mistakenly deems the contract illegal, or erroneously thinks that he can terminate the work on some other ground.

Cox has not proved that the termination was in bad faith or an abuse of discretion or any other facts establishing a breach of contract. *See Krygoski Construction Co., Inc. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996) ("When tainted by bad faith or an abuse of contracting discretion, a termination for convenience causes a contract breach"). Thus, Cox has not demonstrated entitlement to breach damages due to the cancellation of the 29 GSA sites.

As to the second breach claim, Cox contends that the work statement in BPA 458 (E01) required the Government to provide all equipment and that such equipment was not provided as required, preventing her from accomplishing some of the work on the CDC and GSA-SEDC task orders. The claim is for money she would have billed for if she had done the work. (R4, tab 2 at 10-11)

This claim is denied. The premise for this breach claim, the applicability of SOW E01 to BPA 458 is erroneous. Both task orders were issued under BPA 494, which did not include a SOW. While the parties at some point came to an understanding that the Government would provide the equipment, there were no due dates specified and, moreover, Cox ceased working after she received the equipment because of her erroneous belief that the final effective date of the BPA was the final day on which she could perform. She could have and should have completed the work and thus is not entitled to compensation for work not done.

The appeal is sustained in part with respect to reduction in hourly rates and amounts due for professional services, as set forth herein, and is otherwise denied.

Dated: 17 March 2003

RICHARD SHACKLEFORD

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

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

NOTES

[1] The actual task order does not appear to be in the record and in fact, might have been issued orally, but there is sufficient reference to the task order in evidence for us to decide the issues in this appeal concerning that task order.

[2] This contractor was sometimes called Art Trippett Services and other times was called CIH.

[3] Cox increased the total of these amounts to $20,802 in her claim summary (R4, tab 2 at 12).

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. 50587, Appeal of Janice L. Cox d/b/a Occupro Limited, rendered in conformance with the Board's Charter.

Dated:

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