

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Dehdari General Trading & Contracting EST. ) ASBCA No. 53987  
 )  
Under Contract No. F38604-99-AJ016 )

APPEARANCE FOR THE APPELLANT: Mr. Mahmoud Dehdari  
General Manager

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF  
Chief Trial Attorney  
CAPT Robert E. Luttrell, III, USAF  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE COLDREN  
UNDER RULE 12.3

This appeal was taken from a final decision of the contracting officer denying appellant's claim for the alleged costs it incurred after the Government's lease of two copiers was terminated for the convenience of the Government after only a few days of the lease. Appellant has elected the accelerated procedures of Rule 12.3 and the parties have elected to have the appeal processed on the record without a hearing under Rule 11. Both entitlement and quantum are in issue.

FINDINGS OF FACT

1. On 16 June 1999, the contracting officer issued a Blanket Purchase Agreement (BPA) to cover the leasing of copiers for the Ahmed Al Jaber Air Base, Kuwait (R4, tabs 11, 12). Block 27b of the BPA was marked indicating that the terms of FAR 52.212-4 were incorporated by reference.

2. FAR 52.212-4 was entitled "CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (APR 1998)." Paragraph (l) of FAR 52.212-4 provides as follows:

Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder . . . Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the

notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. . . . The contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

3. Paragraph one of the BPA states that the “[p]eriod of performance for subject Blanket Purchase Agreement (BPA) is indefinite (R4, tab 11).” Paragraph two states that the Government is only liable to the extent of authorized calls actually placed against the BPA (*id.*). Paragraph six states that those calls will either be made orally or by electronic means, such as fax (*id.*). Paragraph seven states that the completion date for calls will be established when each call is placed unless delivery terms are specified by the contractor in addition to his pricing (*id.*).

4. In January 2001, the Government requested a proposal from appellant to lease two heavy duty, high quality color copiers. Appellant submitted a proposal dated 20 January 2001 to lease two Ricoh Aficio Model No. 6110 Copiers along with labor, parts, and consumables for maintenance at a monthly price of 1,280 Kuwait dollars (KD) for each copier. The proposal stated that the monthly pricing was based on a “minimum” of a one year lease (compl. & answer, ¶ 3; R4, tab 8). This proposal is listed as appellant’s price list for the two disputed copiers in the Rule 4 file (R4, tab 8).

5. By bilateral Contract Modification No. P00001, the parties added the two color copiers described in finding 4 to the BPA (R4, tab 13). This modification states that “[a]ll other terms and conditions of this BPA remain the same and all prices are based on approved price lists” (*id.*).

6. By Call Number A019 dated 1 February 2001, the contracting officer ordered two “Color Copier 6110 Lease, Feb 01” for a monthly unit price of 1,280 KD for each copier plus its maintenance (R4, tab 6; compl. & answer, ¶ 5). The call specifically states that the call was placed using the approved price list (R4, tab 6). Appellant delivered the two color copiers to Ahmed Al Jabar Air Base on 15 February 2001 (compl. & answer, ¶ 5).

7. On 27 February 2001, the contracting officer verbally ordered appellant to remove the two color copiers from the air base. As directed, appellant removed the color copiers. (Compl. & answer, ¶ 6) The reason for the removal was that the planned use for these copiers was to copy classified materials for which leased and commercially maintained copiers were barred for security reasons (R4, tabs 2, 3). In March 2001, appellant was paid one full month’s rent of 2,560 KD for the two copiers.

8. By a letter dated 12 August 2002, appellant filed a breach claim with the contracting officer for terminating the one year lease 11 months early and seeking to recover the remaining 11 months of the alleged lease of the two color copiers in the amount of 28,160 KD, 11 months of storage fees to store the two color copiers in the amount of 616 KD, and professional fees in the amount of 250 KD to help prepare this claim (R4, tab 1). The letter sought a final decision of the contracting officer within 60 days.

9. By a letter dated 30 August 2002, the contracting officer issued a final decision denying appellant's breach claim described in finding 8 (R4, tab 2). The Government declined to pay appellant more than the amount of 2,560 KD previously granted. (*Id.*, ¶ 4).

10. Appellant filed a combined notice of appeal and complaint dated 19 October 2002 from the final decision of the contracting officer.

11. Paragraph 17 of appellant's complaint alleges that appellant "is incurring monthly charges from its supplier because it is contractually bound to pay for one years [sic] lease for these two copiers." The Government in its answer at paragraphs 16 and 17 denied this allegation and states that it had "no independent documentation to verify the claimed charges for storage or the underlying supplier lease."

12. During the evidentiary phase of this appeal, appellant failed to provide the "underlying supplier lease" or any evidence of its terms including whether or not appellant could return the two color copiers by paying a cancellation fee to its suppliers and, if so, the amount of that fee. No evidence was included in the record as to what charges appellant paid to lease the two color copiers it in turn leased to the Government, including, for example, receipts or other proof of payment. In addition, appellant has furnished no evidence of the terms of its storage arrangements including receipts or other proof that these charges were incurred.

13. No proof was included in the record as to the costs appellant allegedly paid a consultant to prepare its claim.

### DECISION

Appellant alleges that Call A019 was based on a minimum of a one year lease and the Government breached its agreement to lease the copiers for one year. The Government responds that the Call A019 only leased the two color copiers on a month to month basis at the monthly price of 1,280 KD per copier.

Modification No. P00001 adds the two color copiers and states that the prices for these copiers will be in accordance with the approved price list (finding 5). The approved price list for these copiers stated that the pricing was based on a minimum of a one year

lease (finding 4). Thus, Call A019 placed against the BPA and approved price list was for a minimum of a one year lease as appellant alleges.

On the other hand, the BPA incorporates a “commercial items” Termination for Convenience (TFC) clause (finding 2). The TFC clause affords the Government well established rights to terminate contracts in circumstances such as are present here. Appellant’s quote providing for a “minimum” one year lease did not abrogate these Government rights. The contracting officer “constructively” terminated the lease for convenience for the two color copiers when he ordered the removal of the copiers from the air base ten days following their installation (finding 7). This termination clause requires the contracting officer to pay appellant for a “percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination” (finding 2). The contracting officer has done so by paying appellant for one month of the leasing of the two copiers (finding 9).

The convenience termination clause also requires the contracting officer to pay for “reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination.” Appellant alleges that it has paid its supplier for 11 months of leasing the two color copiers, storage charges for 11 months for preserving the copiers, and consulting costs to prepare its claim. However, no proof or evidence was submitted to support these alleged costs even though appellant was informed that this evidence was lacking (findings 11-13).

Appellant has failed to comply with the requirement of the TFC clause to establish that “reasonable charges” resulting from the termination were incurred. Nor has it proved that any such costs reasonably could not have been avoided, a further prerequisite to recovery here.

The appeal is denied.

Dated: 18 April 2003

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JOHN I. COLDREN, III  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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ROBERT T. PEACOCK  
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. 53987, Appeal of Dehdari General Trading & Contracting EST., rendered in conformance with the Board's Charter.

Dated:

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