ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Individual Development Associates, Inc. | ) | ASBCA No. 53910 |
| | ) | |
| Under Contract No. M00264-00-C-0004 | ) | |

APPEARANCE FOR THE APPELLANT: Robert A. Klimek, Jr., Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
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Ft. Snelling, MN

OPINION BY ADMINISTRATIVE JUDGE COLDREN
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal was filed from a final decision of the contracting officer granting only $36,575.72 of the $199,714 sought by appellant in its termination proposal for the partial termination for convenience of the contract. Proceedings in this appeal were limited to entitlement as to certain types of costs due to the termination. *See* memorandum of conference call dated 6 November 2003. The cross-motions place these issues before us.

Appellant's summary judgment motion seeks a holding that appellant is entitled to an equitable adjustment in the amount of $199,714 for the increased costs to the non-terminated work caused by the termination because the government breached the contract which appellant alleges could not be partially terminated because appellant's educational services were offered as an "inseparable whole." It further points out that Contract Line Item (CLIN) 0001 was offered as a single lot without regard to how many students under 200 were to be instructed and could not be terminated in part since work had already begun under this CLIN. Its arguments are based upon the phrase "[s]ubject to the terms of this contract" preceding the measure of recovery for the partial termination contained in the language of the termination clause.

The government both in its cross-motion for summary judgment and its response to appellant's motion disputes that appellant's services were offered as an "inseparable whole." It claims that the faxed version of appellant's clarifications altered appellant's price proposal by not including the "inseparable whole" language. Appellant responds that the

clarification sent by mail, which included this "inseparable whole" language, was the version included in the contract. Alternatively, appellant argues that, even if the fax version was the clarification included in the contract, its price proposal still contains the "inseparable whole" language. Thus, according to appellant, the clarification only clarified certain but not all of the pages of the price proposal but even those pages which were clarified were not amended.

The government's summary judgment motion requests that we determine as a matter of law that appellant can only recover 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 . . . have resulted from the termination" and that, after so holding, we remand the matter to appellant for submission of a termination proposal in accordance with the language of the termination clause. It contends that the phrase "[s]ubject to the terms of this contract" preceding the measure of recovery for the termination in the termination clause has been interpreted by case law as modifying only that portion of the clause which deals with recovery for the percentage of work performed. (Gov't mot. at 24) However, the government does not argue that the granting of its motion should result in denial of this appeal. Rather, it requests that we order appellant to submit a termination settlement proposal conforming to FAR 52.212-4(l) if we grant the government's motion. We make the following statement of facts for purposes of resolving this motion only.

STATEMENT OF FACTS (SOF)

1. On 17 July 2000, the government awarded a contract in the amount of $109,546.92 to appellant to "TEACH, TUTOR, TEST, AND COUNSEL AMERICAN ENGLISH FOR THE PERIOD 17 JULY 2000 THRU 31 MAY 2001" (R4, tab 3 at 6 of 62). CLIN 0001 was listed as a single lot at a unit price of $80,625.68 for educational services to 200 resident students for the Amphibious Warfare School (*id.*). CLIN 0002 was also listed as a single lot at a unit price of $28,921.24 for educational services to 70 resident students for the Command and Control System School (*id.*). The contract incorporated by reference appellant's technical and price proposal dated 9 June 2000 and its "clarification letter dated 24 June 00" (*id.*).

2. Every page of appellant's price proposal incorporated into the contract included a legend at the bottom of each page stating, "All items under Schedule A are offered as an inseparable whole and cannot be divided in any way." (R4, tab 3)

3. During the week of 21 June 2000, the government requested that appellant clarify certain aspects of its price proposal and established a due date of 26 June 2000 (app. reply to gov't resp. to mot. to compel, ex. A, Susan Hughes aff.). Appellant faxed a letter dated 24 June 2000 with an attached document containing clarifications to appellant's price proposal (*id.*). Each page of these clarifications contained a legend at the bottom indicating

that the data was proprietary but omitted the language of "inseparable whole" which was contained on every page of its price proposal (R4, tab 3).

4. Appellant sent a second copy of its clarifications to the government by Federal Express on 26 June 2002 (app. reply to gov't resp. to mot. to compel, ex. A, Susan Hughes aff., ex. B, James Hughes aff.). This second copy of the clarifications had the legend at the bottom modified to include the "inseparable whole" language because Mr. Hughes noted that this language had been omitted from the faxed version (James Hughes aff.). The official procurement file only included the faxed version of the clarification without the "inseparable whole" language (gov't mot., ex. G-1, Gale D. Holland aff., ex. G-2, Paul E. Slemons aff.).

5. The parties are in dispute as to whether the "inseparable whole" language was contained in the clarification to appellant's price proposal. However, the record is clear that appellant's price proposal containing this "inseparable whole" language was incorporated into the contract (SOF 2) and neither version of the clarifications specifically removed this language. Thus, we find for purposes of resolving this motion that the "inseparable whole" language was part of the contract.

6. Page 1 of both versions of appellant's clarification to its pricing proposals contains the following language concerning its pricing for CLIN 0001:

> The price of Plan A is based on a guaranteed minimum of 200 students per year. If there are fewer than 200 students, our total bid price for the 200 students applies. If there are more than 200 students, a per participant cost is added for each student over 200.

(R4, tab 3)

7. By Contract Modification No. P00002 dated 22 November 2000, the contracting officer added funding in the amount of $84,670 for CLINs 0003AA, 0003AB, and 0003AC (R4, tab 14 at 2). CLINs 0003AA, 0003AB, and 0003AC were advanced courses for gunnery sergeants, staff sergeants, and sergeants taught over the period of 1 October 2000 to 30 September 2001 (R4, tab 3 at 6, 7 of 62). Thus, the total funded contract price was $194,222.92.

8. The contract included a payment schedule for the work under CLINs 0001 and 0002, which provided as follows:

> Payment #1: 15 August of the current contract year at 35% of the contract value.

> Payment #2: 1 October of the current contract year at 25% of the contract value.
>
> Payment #3: 1 December of the current contract year at 15% of the contract value.
>
> Payment #4: 1 February of the current contract year at 20% of the contract value.
>
> Payment #5: 1 June of the current contract year at 5% of the contract value.

(R4, tab 3 at 2 of 62)

9. By an invoice, appellant billed and was paid $28,218.99 by the government for "[s]ervices from July 17, 2000, to August 15, 2000" for CLIN 0001 (gov't mot., ex. G-3). By another invoice, appellant billed and was paid $20,156.42 by the government for "[s]ervices from August 16, 2000, to September 30, 2000" for CLIN 0001 (*id*., ex. G-4). Thus, appellant has billed and been paid a total of $48,375.41 for services rendered under CLIN 0001 from 17 July through 30 September 2000.

10. By an email dated 16 October 2000, the procurement contracting officer notified appellant that CLIN 0001 was terminated in its entirety for the convenience of the government. A letter dated 24 October 2000 confirmed this partial termination. (R4, tab 13) The letter advised appellant that it would be paid a percentage of the contract price determined by the percentage of work completed. In addition, it stated appellant would be paid for any reasonable charge caused by the partial termination.

11. The contract included the standard clause FAR 52.212-4, CONTRACT TERMS AND CONDITIONS--COMMERCIAL ITEMS (MAY 1999), which provides in pertinent part as follows:

> (c) Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.
>
> (d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601–613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The

> Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.
>
> . . . .
>
> (l) Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. . . . 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 required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(R4, tab 3 at 46-48 of 62)

12. By a termination settlement proposal dated 8 November 2001, appellant claimed $198,843 for the termination of CLIN 0001, which had a price of $80,625.68 (R4, tab 19 at 10). The claimed amount was determined on a total cost basis by re-pricing the entire contract for all CLINS and subtracting the amounts already paid under the contract (*id*.). This proposal did not indicate what price appellant should be paid for the completed work nor did it indicate what charges appellant incurred as a result of the partial termination (*id*.).

13. By a letter dated 8 May 2002, appellant requested a final decision of the contracting officer regarding its termination settlement proposal seeking $199,714 on a total cost basis (R4, tab 40). The contracting officer issued a final decision dated 15 August 2002 denying appellant's claim on a total cost basis but determined that appellant was entitled to $36,575.72 as the percentage of completion of CLIN 0001 he determined that appellant had completed prior to termination based on the information available to him without any input from appellant plus what he determined were reasonable settlement proposal preparation costs (R4, tab 58 at 3).

14. Appellant's counsel filed an appeal on behalf of appellant dated 20 August 2002 with this Board (R4, tab 59).

## DECISION

The parties have filed cross-motions for summary judgment. Summary judgment is appropriate when no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one, which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Company*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corporation*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. However, when cross-motions are filed, counsel are deemed to represent that all relevant facts are before the Board and a hearing is unnecessary. *Aydin Corp. v. United States*, 669 F.2d 681, 689 (Ct. Cl. 1982).

The contracting officer partially terminated the contract for the convenience of the government when he terminated CLIN 0001 in its entirety (SOF 10). The commercial termination clause contained in this contract gives the contracting officer the right to terminate the contract in whole or in part for the convenience of the government and provides for compensation to appellant as follows:

> 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.

(SOF 11)

Appellant argues that the language "[s]ubject to the terms of this contract" from the termination clause makes the "inseparable whole" language (SOF 3), the additional language from appellant's proposal indicating that the unit price for CLIN 0001 applies for any number of students up to 200 (SOF 6), and that portion of appellant's price proposal stating that CLIN 0001 is a single lot makes not only CLIN 0001 indivisible but also all of the CLINs for the contract indivisible. According to appellant's logic, the contract prohibits the termination of CLIN 0001 unless the other CLINs are terminated, or, in the alternative, a part of CLIN 0001 cannot be terminated unless all of CLIN 0001 is terminated.

We are unwilling to accept appellant's interpretation, as it would read out of the contract the government's right to partially terminate the contract for its convenience. No

language in the contract nor any of appellant's proposals made a part of the contract specifically state that the government's right to partially terminate is abrogated. The "inseparable whole" language governs offer and acceptance and does not cover termination, and the single lot and minimum price for 200 or less student's language is pricing language with no specific relationship to termination. In the absence of clear language modifying the termination clause, we hold that the contracting officer had a right to terminate CLIN 0001 which is a partial termination of the contract.

Our decisions in *Dehdari General Trading & Contracting EST*, ASBCA No. 53987, 03-1 BCA ¶ 32,249; and *Hermes Consolidated, Inc. d/b/a Wyoming Refining Co.*, ASBCA Nos. 52308, 52309, 02-1 BCA ¶ 31,767 are controlling. In *Dehdari*, the government entered into a lease for two copiers at a monthly unit price based upon a guarantee of a one-year lease. The lease was terminated after one month. The contractor claimed 12 months rent for the 2 copiers, alleging that the contract could not be partially terminated to a term less than the guaranteed one-year. We held that under the exact language of the termination clause contained in this appeal that the government's right to terminate was not limited by the one-year minimum lease pricing and limited recovery to one month's rent.

In *Hermes Consolidated*, the contract contained a termination clause with the exact language of the one in this appeal but also contained a clause guaranteeing that the government would purchase a minimum amount of jet fuel. The contracting officer terminated the contract in part by reducing the amount of jet fuel to be ordered when he learned that the government's requirements were below the guaranteed minimum amount. The contractor argued that the phrase "[s]ubject to the terms of this contract" contained in the termination clause prohibited the contracting officer from partially terminating the contract by reducing the jet fuel ordered below the minimum guaranteed amount. This Board rejected that argument holding that the quoted phrase modifies only the contractor's "right to payment for performed work." *Hermes Consolidated*, *supra*, at 156,899.

We turn now to appellant's final argument, which is that the termination of CLIN 0001 entitles appellant to an equitable adjustment for the increased costs to the continuing contract work. Appellant admits and we hold that the termination clause does not include any language indicating that such an equitable adjustment is due appellant for this termination. In addition and more importantly, the language of the commercial termination clause permits such a termination. Thus, no change to the contract terms and conditions results from this termination, and even if there were such a change, the changes clause for commercial contracts contained in this contract does not have any equitable adjustment language. (SOF 11)

Appellant correctly points out that paragraph l of the standard FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996) clause provides for an equitable adjustment if the partial termination causes an increase in the

costs of the continued work. However, this clause was not present in this contract because it is a commercial contract. The commercial termination clause contained in this contract does not include this equitable adjustment language (SOF 11).

Equitable adjustments relate to increased costs caused by actions of the government. Thus, termination proposals under the standard Termination for Convenience clause which claim more than $100,000 must be audited. FAR 49.107. On the other hand, terminations under commercial contracts do not relate to such costs because the contractor is not required to adhere to contract cost principles and the government has no right to audit contractor's termination proposals (SOF 11).

FAR 12.403(a) indicates that Part 49 relating to standard terminations does not apply because different principles govern contracts with standard contract termination provisions than ones with commercial termination clauses. It, however, permits the use of Part 49 as a guide when the governing principles are not in conflict. Clearly, the rules relating to equitable adjustment in Part 49 relate to costs, which appear not to be principles used in commercial terminations. Rather, termination under Part 12 allows for recovery of "reasonable charges" in addition to a percentage of price (SOF 11). Appellant's argument for an equitable adjustment to the continuing work due to the partial termination must be rejected.[*]

Appellant's motion for summary judgment is denied. The government's motion is granted as to the issues presented by the motions. Appellant's alternative theories under the commercial termination clause are denied. However, entitlement is clearly present as the government has requested that we direct appellant to submit a new settlement proposal.

The appeal is denied as to appellant's entitlement to breach damages under its theory that the contracting officer had no right to partially terminate the contract. It is also denied as to appellant's entitlement to an equitable adjustment to the unchanged work under the commercial termination clause. Since the government concedes that the terminated work was partially completed, it is sustained as to entitlement under the language of the commercial termination clause.

The appeal is sustained in part and denied in part as to entitlement. The dispute is remanded to the contracting officer for determination of quantum where appellant may submit a termination proposal in accordance with this opinion and the language of the commercial termination clause contained in its contract.

[*] We express no opinion in this decision on the question of whether increased costs to unterminated work can be recovered in ". . . reasonable charges . . . that resulted from the termination."

Dated: 9 September 2004

JOHN I. COLDREN, III
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

CARROLL C. DICUS, JR
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. 53910, Appeal of Individual Development Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals