ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Charitable Bingo Associates, Inc.,	)	
d/b/a Mr. Bingo, Inc.	)	ASBCA Nos. 53249, 53470
	)	
Under Contract No. NAFTH1-97-T-0001	)	

APPEARANCES FOR THE APPELLANT:	James A. Noone, Esq. S. Steven Karalekas, Esq. Karalekas & Noone Washington, DC Donald P. Arnavas, Esq. Alexandria, VA
APPEARANCES FOR THE GOVERNMENT:	COL Samuel J. Rob, JA Chief Trial Attorney LTC David Newsome, Jr., JA Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant has moved for reconsideration of our decision sustaining and denying these appeals in part. *Charitable Bingo Associates, Inc., d/b/a/ Mr. Bingo, Inc.*, ASBCA Nos. 53249, 53470, 05-1 BCA ¶ 32,863. Familiarity with our decision is presumed.

In seeking reconsideration, appellant initially filed a lengthy motion, without a supporting brief, challenging our decision on multiple factual and legal grounds. Thereafter, by leave of the Board, appellant filed a supporting brief, advising that, "[t]o the extent that issues raised in [the motion] are not addressed in this brief, they may be considered abandoned." (Brief in Support of Motion for Reconsideration (app. br.) at 1) We here address only the issues raised in the brief.

With respect to entitlement, appellant advances two principal arguments. First, in arguing that the termination decision did not result from the independent judgment of the terminating contracting officer (TCO), appellant asserts that we misconstrued or mischaracterized the documents underlying our findings 33 and 35. *See Charitable Bingo, supra*, 05-1 BCA at 162,840-41. Second, appellant contends that our conclusion

that respondent did not breach the duties of good faith and fair dealing rested upon a misinterpretation of the CONTINUITY OF SERVICE clause, *see id.*, at 162,837 (finding 11), and that we failed to apply the principle of paragraph 7-24 of AR 215-4. (App. br. at 14-15) With respect to quantum, appellant insists that we improperly characterized its contract as a services, rather than a concession, contract, and misapplied the standards for recovery under fixed-price convenience terminations, subjecting appellant to what was, in effect, a default termination. (*Id*. at 15-24)

In opposing the motion, respondent addresses the various grounds advanced by appellant and contends that appellant has failed to demonstrate that any of our findings of fact were not supported by the record, or that our legal conclusions were erroneous.

We grant the motion and reconsider our decision. We evaluate the motion against the familiar standard of determining whether the motion is "'based upon any newly discovered evidence or legal theories which the Board failed to consider in formulating its original decision.'" *Danac, Inc.*, ASBCA No. 33394, 98-1 BCA ¶ 29,454 at 146,219 *quoting Sauer, Inc*., ASBCA No. 39372, 96-2 BCA ¶ 28,620 at 142,897. A motion for reconsideration is not intended to present a "post-decision bolstering of contentions which we have already rejected." *Mason & Hanger-Silas Mason Co., Inc. v. United States*, 523 F.2d 1384, 1385 (Ct. Cl. 1975). Consistent with this principle, "a party's disagreement with the trier of fact regarding the weight accorded the evidence is not a proper ground for reconsideration." *Grumman Aerospace Corp*., ASBCA Nos. 46834, 48006, 51526, 03-2 BCA ¶ 32,289 at 159,770.

In applying these standards, we reject appellant's first entitlement argument that we erred in concluding that the TCO's decision resulted from her independent judgment. The argument, which focuses upon the documents addressed in findings 33 and 35, is not based upon any newly discovered evidence and does not cause us to alter our summarization in finding 33 that Mr. Isaacs: "(a) lacked contractual authority . . . ; (b) did not make the decision to terminate the contract for convenience . . . ; and (c) did not direct the contracting officer to do so . . . ." *Charitable Bingo, supra*, 05-1 BCA at 162,841. Much of appellant's argument relates to appellant's disagreement with the weight that we accorded to the e-mails and associated testimony, which is "not a proper ground for reconsideration." *Grumman Aerospace*, 03-2 BCA at 159,770. In addition, appellant's lengthy focus upon the November e-mails disregards the TCO's agreement, in response to a question on redirect, that she did not "receive any of these e-mails or notices" (tr. 976).

We also reject appellant's second entitlement argument, which is that we erroneously held that respondent did not breach the duties of good faith and fair dealing. While appellant asserts that the CONTINUITY OF SERVICE clause "is the legal underpinning for [our] conclusion" (app. br. at 14), we also relied upon both the

TERMINATION FOR CONVENIENCE clause and the NONMONOPOLISTIC clause. *Charitable Bingo, supra,* 05-1 BCA at 162,849. Nonetheless, considering only the CONTINUITY OF SERVICE clause, we disagree that the only reasonable interpretation of the reference to "expiration" in the clause is "to the end of the full term of the contract and not to a termination." (App. br. at 15) We must eschew an interpretation that renders part of a contract "useless, inexplicable, inoperative [or] void." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (internal quotation marks omitted). Appellant's interpretation would make meaningless the right articulated in the clause for "a successor, either the Fund or another contractor, [to] continue these services" *see Charitable Bingo, supra,* 05-1 BCA at 162,837, where, as here, the TERMINATION FOR CONVENIENCE clause has been invoked before expiration of the full contract term. Apart from appellant's argument regarding the CONTINUITY OF SERVICE clause, we reject its other contention that paragraph 7-24 of AR 215-4 also shows that respondent breached the duty of good faith and fair dealing. We did not address this argument in our decision because the relevant language of paragraph 7-24 provides that "[t]erminations for convenience are normally used when the NAFI no longer has a need for the supplies or services under contract" (*id.*), and the use of the word "normally" does not limit respondent's right to terminate for convenience when the NAFI still needs the supplies or services.

The chief issue regarding quantum relates to appellant's contention that the contract "had all the characteristics of a concession contract and none of a services contract," as those terms are defined in paragraph 5-17 of AR 215-4. (App. br. at 16) After considering appellant's argument anew, however, we reaffirm our conclusion that "[t]he contract was primarily for services and incidentally for supplies." *Charitable Bingo, supra,* 05-1 BCA at 162,851. Our conclusion was based upon multiple references to the provision of "services" in the contract itself. (*Id*.)

We do not read the general guidance of paragraph 5-17 of AR 215-4 to mandate a different conclusion. Paragraph 5-17 itself recognizes that "[c]oncession contracts [include] those that a concessionaire has a right . . . to provide a specific service . . . ." (App. supp. R4, tab 145A) The regulation then provides that "[c]oncession contracts *normally* involve the direct sale of goods or services to authorized patrons within the military community. Service contracts, by contrast, *normally* provide for a service to the NAFI and, *generally*, the service is not sold directly by the contractor to the military community." (*Id*.) (italics added) From the use of the qualifiers "normally" and "generally" in the foregoing sentences, it is evident that the categories in the regulation are not as ironclad as appellant would like. The regulation does not preclude categorizing the present contract as a services contract.

In any event, the termination was accomplished under the contract's TERMINATION FOR CONVENIENCE clause. *Charitable Bingo, supra,* 05-1 BCA at 162,841-42 (finding 36). In considering costs, the clause does not require us to decide

whether we have a concession contract, but rather to distinguish "[i]f this contract is for supplies" or "[t]o the extent that this contract is for services." *Charitable Bingo*, *supra*, 05-1 BCA at 162,836. In other contracts involving concessionaires, we have followed these distinctions under substantially the same clause. *E.g.*, *Ace Barber Shop*, ASBCA No. 17292, 73-2 BCA ¶ 10,052 at 47,151 (identical holding regarding a similar clause in barber shop concession contract). We accordingly reaffirm our conclusion that the limitations of the third sentence of the TERMINATION FOR CONVENIENCE clause govern the payment for services. *See Charitable Bingo*, *supra*, 05-1 BCA at 162,851.

Appellant also challenges our denial of the portions of its claim relating to two categories of costs incurred prior to termination: charitable donations and additional overhead. (App. br. at 19-20) The challenges regarding both components reflect appellant's disagreement with our finding 55 and the conclusions that we drew from it. *See Charitable Bingo*, *supra*, 05-1 BCA at 162,845, 162,852. With respect to donations, appellant offers nothing to cause us to question our finding, which was based upon Ms. Doherty's testimony, that the donations did not constitute participation in community service activities. With respect to overhead, appellant's disagreement with our reliance in finding 55 on the testimony of Ms. Doherty, rather than on that of appellant's expert, is likewise "not a proper ground for reconsideration." *Grumman Aerospace*, *supra*, 03-2 BCA at 159,770.

We have similar problems with appellant's arguments regarding our denial of the portion of the claim relating to pre-termination profit. Appellant again disagrees with our acceptance of DCAA's conclusion in finding 57 that appellant recouped profit through operations, as well as testimony to the same effect from Ms. Doherty cited in finding 17. *See Charitable Bingo*, *supra*, 05-1 BCA at 162,838, 162,846. Appellant's preference for its expert's testimony is not sufficient. *Grumman Aerospace*, *supra*, 03-2 BCA at 159,770. Contrary to appellant's claim that our "denial of pre-termination profit was unsupported by legal authority" (app. br. at 23), under the comparable short form convenience termination clause for services contracts, "no convenience termination costs, such as . . . profit . . . are allowable." *Mills Trucking, Inc.*, ASBCA Nos. 50163, 50164, 97-1 BCA ¶ 28,907 at 144,115.

Appellant's motion for reconsideration is granted and, upon reconsideration, we reaffirm our decision.

Dated: 29 September 2005

ALEXANDER YOUNGER
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 Nos. 53249, 53470, Appeals of Charitable Bingo Associates, Inc., d/b/a/ Mr. Bingo, Inc., rendered in conformance with the Board's Charter.

Dated:

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