ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Individual Development Associates, Inc.	)	ASBCA Nos. 55174, 55188
	)	
Under Contract No. M00264-00-C-0004	)	

APPEARANCE FOR THE APPELLANT: Robert A. Klimek, Jr., Esq.
Klimek, Kolodney & Casale, P.C.
Washington, DC

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
Chief Trial Attorney
Douglas R. Jacobson, Esq.
Trial Attorney
Defense Contract Management Agency
Ft. Snelling, MN

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT'S MOTIONS TO DISMISS OR STRIKE,
AND FOR SUMMARY JUDGMENT

Individual Development Associates, Inc. (IDA) appeals a contracting officer's final decision that (i) denied its revised termination settlement claim and, (ii) reaffirmed the contracting officer's unilateral determination of the settlement amount, following our decision and remand in *Individual Development Associates, Inc.*, ASBCA No. 53910, 04-2 BCA ¶ 32,740, *aff'd on recon.*, 05-2 BCA ¶ 32,985. The government moves to dismiss entirely or to strike portions of the complaint, and for summary judgment. We grant the motion for summary judgment in part.

STATEMENT OF FACTS (SOF)
FOR PURPOSES OF THE MOTIONS

1. The contract was awarded to IDA on 17 July 2000 in the total amount of $194,216.92 for English language instruction at the Marine Corps University, Quantico, Virginia. The contract had a base term of 17 July 2000 to 30 September 2001 and four successive one-year option terms. At time of award, the government obligated funds of $109,546.92 for work to be performed from 17 July 2000 through 31 May 2001. The balance of the total amount was funded thereafter. (R4-53910, tab 3 at 1, 6-29, tab 14 at 2)

2. The contract included among other provisions the FAR 52.212-4 CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 1999) clause. Paragraph (l) of this clause (hereinafter "the Termination clause") stated in relevant part:

> (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.

(R4-53910, tab 3 at 46, 48)

3. The contract Schedule at Section A-3 included individually priced contract line item numbers (CLINs) for the services to be provided. CLIN 0001 in the base term required IDA to conduct English instruction for 200 students at the amphibious warfare school at a lump sum firm fixed price of $80,625.68 (R4-53910, tab 3 at 6). CLINs 0002, 0003AA, 0003AB and 0003AC in the base term required IDA to conduct English instruction for other student groups, also at lump sum firm fixed prices for each CLIN. The total of the contract prices for these four CLINs was $113,591.24 (R4-53910, tab 3 at 6-7).

4. Each page of IDA's price proposal containing CLIN prices included a note that stated in relevant part: "Pursuant to clause 52.215-16, this offer is qualified to limit the Government's rights under 52.215-16(d) to accept items or groups of items. Said specific limitations are as follows: All items under Schedule A are offered as an inseparable whole and cannot be divided in any way." (Gov't supp. R4-53910, tab 3 at 30-75)

5. The reference to FAR 52.215-16 is to the clause entitled "CONTRACT AWARD (OCT 1995)." Prior to 10 October 1997, that clause was set forth in the cited FAR section

relating to negotiated contracts.[1] Paragraph (d) stated in relevant part: "The Government may accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations." (R4-53910, tab 1)

6. On 16 October 2000, the government terminated CLIN 0001 for convenience (R4-53910, tab 13). Prior to the termination, the government had paid IDA 60 percent ($48,375.41) of the CLIN 0001 contract price (R4-53910, tab 3 at 2). Base term CLINs 0002, 0003AA, 0003AB and 0003AC were not terminated and were fully performed (R4-53910, tab 19 at 4).

7. On 8 November 2001, IDA submitted a termination settlement proposal for CLIN 0001 in the amount of $199,714.[2] This amount was the total cost incurred for performing all of the base term CLINs (0001, 0002, 0003AA, 0003AB and 0003AC), less payments received on all CLINs plus settlement expenses. (R4-53910, tab 19 at 1, 11-12, 15) No agreement was reached on this proposal. On 8 May 2002, IDA submitted the proposal as a certified claim in the amount of $199,714 (R4-53910, tab 40).

8. On 15 August 2002, the contracting officer issued a final decision denying the termination claim on the ground that it did not comply with the payment provisions of the Termination clause. The final decision also included the contracting officer's unilateral determination of the settlement in the amount of $36,575.72. This amount consisted of $28,218.99 for books and materials, $2,091.03 for instructional services performed, and $6,265.70 for termination settlement expenses. Since the allowed amount was less than the contract payments for CLIN 0001 to date, *see* SOF 6, the decision demanded repayment of the difference ($11,799.69). (R4-53910, tab 58)

9. The amount allowed for books and materials in the final decision was the amount of the specified contract payment No. 1 on CLIN 0001. The amount allowed for instruction was the hours of actual CLIN 0001 instruction performed up to the termination divided by the total hours of CLIN 0001 instruction indicated in IDA's technical proposal times the CLIN 0001 price less the amount allowed for books and materials [(13/326) x ($80,625.68 - $28,218.99)] (R4-53910, tab 58 at 3-4).

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[1] The clause at FAR 52.215-16 in effect when IDA's contract was solicited and awarded was entitled "FACILITIES CAPITAL COST OF MONEY (OCT 1997)." It has no paragraph (d) and is meaningless in the context of a note qualifying offered prices.

[2] The narrative "Summary of the Settlement Proposal" stated a net payment requested of $198,843. However, the accompanying SF 1436 showed the detailed computation of the proposal with a net requested payment of $199,714. (R4-53910, tab 19 at 12, 15)

10. On appeal of the 15 August 2002 decision, IDA argued that a total cost claim for all base term CLINs was proper because the government's acceptance of its price proposal with the "inseparable whole" note precluded any partial termination for convenience. In our 9 September 2004 decision, we held that the "inseparable whole" note in IDA's price proposal did not modify the terms of the Termination clause and denied the appeal as to the total cost settlement proposal. We sustained the appeal as to IDA's entitlement "under the language of the commercial termination clause," and remanded the dispute 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." *Individual Development Associates, Inc., supra,* 04-2 BCA at 161,924-25.

11. On 16 June 2005, IDA submitted a revised settlement proposal, purportedly in accordance with the Board's decision (supp. R4, tab 1). As amended by letter dated 3 August 2005, the proposed amount was $1,653,459.79 and consisted of two parts. Part One, entitled, "Schedule of Regular Prices Applied," claimed $833,823.70 for the difference between what IDA called its "non-discounted" prices for CLINs 0001, 0002, 0003AA, 0003AB and 0003AC, less the amounts paid for those CLINs by the government (supp. R4, tab 5 at 3-10). IDA's 3 August 2005 letter explained the basis for Part One as follows:

> [IDA] is not asking for a percentage of Line Item 0001. This line item contains discounted pricing based on the inseparability of Line Items 0001, 0002 and 0003. The [ASBCA] has held that inseparability was part of the offer and acceptance, but is not part of the termination. Therefore IDA is applying its schedule of nondiscounted prices contained in the contract to the work completed in Line Item 0001.
>
> Line Items 0002 and 0003 are part of IDA's discounted pricing. This discounted pricing is based on the inseparability of the first three line items. The ASBCA has held that inseparability was part of the offer and acceptance, but is not part of the termination. Therefore, IDA is applying its schedule of nondiscounted prices contained in the contract to the work completed in Line Items 0002 and 0003.

(Supp. R4, tab 5 at 1)

12. Part Two of IDA's revised settlement proposal was entitled, "Charges Resulting from the Termination that Could not Be Avoided." Part Two claimed $819,636.09 for the following items: $4,001.25 for termination consultant; $3,120.33 for telephone and delivery service; $17,060.04 for termination consultant/accountant;

$27,033.00 for accounting; $207,527.67 for attorney; and $560,893.80 for "Lack of Prices Not Realized" (supp. R4, tab 5 at 11). IDA's 3 August 2005 letter explained the basis of Part Two as follows:

> The settlement charges consist of the prices for accounting, legal work, consulting, and telephone and delivery service necessary to pursue for over five years the money owed by the government as a result of the partial termination . . . .
>
> . . . .
>
> The term "lack of prices not realized" refers to the loss of revenue IDA has experienced as a result of the partial termination for convenience of an item that was complete and accepted in violation of the Federal Acquisition Regulations, Part 2. This amount has been calculated by Geddes & Company, PC, and quoted to capture IDA's pricing strategy.

(Supp. R4, tab 5 at 1-2)

13. By final decision dated 6 September 2005, the contracting officer denied IDA's revised proposal entirely and reaffirmed his 15 August 2002 unilateral determination of the settlement amount (supp. R4, tab 6). These appeals followed.[3] Although the parties have referred to IDA's 16 June 2005 revised termination settlement document as a "proposal," in light of the remand in our prior decision, it is in substance a revision of the 8 May 2002 certified termination settlement claim.

DECISION

The government moves to dismiss these appeals entirely, or in the alternative to strike the revised claim in part for lack of jurisdiction. The government also moves in the alternative for summary judgment denying IDA's claim and affirming the contracting officer's 15 August 2002 unilateral determination of the settlement amount.

The government's jurisdictional motion rests upon a misconception. The government argues that the revised termination settlement claim does not meet the

[3] IDA initially brought its objection to the contracting officer's 6 September 2005 decision to the Board as a motion for reopening proceedings under ASBCA No. 53910. That motion was assigned docket number ASBCA No. 55174. IDA also filed a separate appeal from the same decision. That appeal is ASBCA No. 55188.

requirements for a proper settlement claim under the Termination clause and the Board's entitlement decision. The Board's jurisdiction arises, however, from the appeal of the denial of the 8 May 2002 certified termination settlement claim (ASBCA No. 53910). Where the Board finds entitlement on an appeal and remands for determination of quantum, it retains jurisdiction until quantum is either settled by the parties or decided by the Board. IDA's alleged failure to comply with the remand instructions does not deprive the Board of jurisdiction of the quantum phase of that appeal. *La Limited, La Hizmet Isletmeleri*, ASBCA No. 53447, 04-1 BCA ¶ 32,478 at 160,635; *The Swanson Group, Inc.*, ASBCA No. 53496, 02-1 BCA ¶ 31,800 at 157,080; *Nab-Lord Associates v. United States*, 682 F.2d 940, 943 (Ct. Cl. 1982) Consequently, the Board has jurisdiction as to ASBCA No. 55174 (the quantum phase of ASBCA No. 53910). The protective appeal in ASBCA No. 55188 is duplicative under these circumstances and is dismissed without prejudice.

On the merits, the government also argues that the appeals should be denied because IDA's revised termination settlement claim "does not comply with the termination clause requirements" (gov't mot. at 26). The cited clause specified the payment due for a termination of "this contract, or any part hereof" as "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 . . . using its standard record keeping system, have resulted from the termination." *See* SOF 2. The term "charge" in this context means "[an] expenditure or incurred expense." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged), 377 (8th ed. 1986).

There is no genuine issue of material fact that the amounts in Part One of IDA's revised settlement claim for the "non-discounted" prices of the base term firm CLINs, and the amount in Part Two for "Lack of Prices Not Realized," otherwise described by IDA as a claim for "loss of revenue," were neither percentages of the contract price of the terminated CLIN 0001 reflecting the percentage of the work performed on that CLIN prior to its termination, nor expenditures or incurred expenses resulting from the termination of CLIN 0001. *See* SOFs 11 and 12.

IDA argues that the payment provisions of the Termination clause are expressly conditioned by the prefatory phrase "[s]ubject to the terms of this contract," and that the terms of the contract "do not allow percentage of completion to be used to calculate the quantum to the contractor due to a partial termination" (app. reply at 7). The only specific term of the contract that IDA cites in support of this argument, however, is the "inseparable whole" note on the pages of its price proposal.[4] In our prior decision, we

[4] *See* IDA's reply at 13 where it states: "[u]nder CLIN 0001, the Government purchased a single 'Lot' . . . [and] the TCO took apart the Lot in a narrow minded effort to determine a percentage of completion notwithstanding clear language provided in the contract that the 'Lot' was an inseparable whole."

rejected application of the "inseparable whole" note to the Termination clause. By its express terms, the "inseparable whole" note applied only to "the Government's rights under 52.215-16(d) to accept items or groups of items." The note did not purport to modify provisions of the FAR 52.212-4(l) Termination clause. *See* SOFs 4, 10, and *Individual Development Associates, Inc.*, *supra,* at 161,924-25.

IDA also argues that "good faith and fair dealing" required the repricing of all base term CLINs as set forth in its revised settlement claim (app. reply at 7-8). We disagree and find no violation of good faith or fair dealing in the enforcement of the payment provisions of the Termination clause. Since those provisions do not provide for re-pricing either terminated or non-terminated CLINs in a partial termination, nor for recovery of "loss of revenue," we grant the motion for summary judgment denying the "Schedule of Regular Prices Applied" items in Part One and the "Lack of Prices Not Realized" item in Part Two of IDA's revised settlement claim.

We deny the motion for summary judgment as to the Part Two items for termination consultant, telephone and delivery service, termination consultant/accountant, accounting, and attorney.[5] Those items are at least descriptively within the meaning of "charges" that might have resulted from the termination. Whether they were in fact reasonably incurred as a result of the termination and in the amounts claimed is a genuine issue of material fact for determination in an evidentiary hearing and not on summary judgment.

We also deny the motion for summary judgment as to the contracting officer's 15 August 2002 unilateral determination of the termination settlement amount. IDA contends with some support in the record that the factor used by the contracting office for determining the instructional work performed did not include "[t]he development hours, the grading hours, the preparation hours, and the hours for various other taskings [that] are not included in the instructional hours" (app. reply at 9-10, 11). This contention raises a genuine issue of material fact as to whether the contracting officer correctly determined the percentage of work performed on the terminated CLIN, and IDA is entitled to address CLIN 0001 to that limited extent.

The government's motion for summary judgment in ASBCA No. 55174 is granted in part and denied in part as indicated above. ASBCA No. 55188 is dismissed without prejudice as duplicative.

Dated: 19 July 2006

[5] We express no opinion at this time on the recovery of Equal Access to Justice Act (EAJA) attorney's fees in the appeal.

MONROE E. FREEMAN, 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 Nos. 55174, 55188, Appeals of Individual Development Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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