ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Red River Holdings, LLC	)	ASBCA No. 56316
	)	
Under Contract No. N00033-01-C-3300	)	

APPEARANCES FOR THE APPELLANT: Marc J. Fink, Esq.
Heather M. Spring, Esq.
Sher & Blackwell LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Mark R. Wiener, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
UNDER BOARD RULE 11

Red River Holdings, LLC (Red River),[1] appeals the contracting officer's (CO) 21 November 2007 final decision. That decision denied Red River's 11 September 2007 claim for $668,476.81 resulting from the early redelivery of the MV A1C WILLIAM H. PITSENBARGER under the captioned Military Sealift Command (MSC) Charter contract. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. The parties elected to have the appeal decided on the record without a hearing under Board Rule 11. The record consists of the Rule 4 documents (16 tabs), respondent's supplemental documents (tabs G-17 through G-35) and appellant's supplemental exhibits A-1 through A-4. The Board is to decide entitlement only.

FINDINGS OF FACT

1. On 4 April 2001 Red River and Delmas entered into a Memorandum of Agreement providing that Red River agreed to purchase from Delmas the Bahamanian flagged vessel "Therese Delmas" for $13,075,000, subject to award of an MSC charter under Solicitation No. N00033-01-R-9007 (RFP 9007) by 31 May 2001 for use of such vessel (ex. A-3, ¶ 4, sub-ex. C at 641, 649).

[1] Appellant's prior name, Red River & Van Ommeren LLC (RR&VO), was changed to Red River Holdings, LLC on 31 July 2003 (R4, tab 2 at 131). For convenience, we refer to appellant as Red River throughout.

2. Effective 14 June 2001 MSC accepted Red River's proposal in response to RFP 9007 by awarding Contract No. N00033-01-C-3300 (contract 3300), designated a "Contract for Commercial Items," for the price of $50,913,040.90. Contract 3300 was a 59-month charter of a U.S. flagged vessel, identified as the Therese Delmas, capable of carrying 20 foot ammunition-laden containers, which Red River was to deliver to MSC between 3 and 14 December 2001 at the Military Ocean Terminal, Sunny Point, NC, and from there to be "pre-positioned" at Diego Garcia. (Compl. and answer ¶¶ 3; R4, tab 1 at 001-02, 011, 069)

3. Contract 3300 included: (a) the FAR 52.212-4 CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (MAY 1999) clause, tailored pursuant to FAR 12.302(a), which contained the following pertinent paragraphs:

> (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, 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 that reasonably could have been avoided.

(b) the following "**III. TIME CHARTER COMMON TERMS AND CONDITIONS (Addendum to FAR 52-212-4)**":

> **(a) Charter Hire**
>
> (1) Hire Rates. Charter hire for services under this Charter Party shall be payable at the applicable rates stipulated in Boxes 14A-16C [for the first 365 days, $29,907.86/day; for the contract balance, $27,270.40/day] and shall be earned at the expiration of each 15 days of the charter period. Except as otherwise provided herein, said hire rates shall be considered payment in full for all services of the Vessel and Associated Equipment under this charter.…

and (c) the following "**IV. TIME CHARTER COMMON TERMS AND CONDITIONS (Addendum to FAR 52-212-4)**":

> (b) **Delivery**...
>
> (1) Laydays. The Vessel…shall be delivered to the Charterer at a port or place in accordance with Box 2 [Military Ocean Terminal, Sunny Point, NC]...on the cancelling date stated in Box 5 [14 December 2001].… Hire shall commence upon acceptance of the Vessel by Charterer but not before the commencing date stated in Box 5 [3 December 2001].…
>
> ….
>
> (c) **Redelivery**. Unless lost, the Vessel shall be redelivered at a port or place in accordance with Box 3. [Box 3 stated "Worldwide."] Charterer shall give Owner not less than twenty (20) days notice of expected date and range of redelivery, and not less than ten (10) days notice of actual port or place of redelivery.
>
> ….
>
> (e) **Charter Period**. This charter party shall be for the period designated in Box 4 [59 months], commencing upon Charterer's acceptance of the Vessel and continuing until

> either the date of her redelivery or the completion of the voyage then current, at Charter's sole option.…
>
> ….
>
> (g) **Insurance**
>
> (1) General. During the full period of this Charter Party, Owner shall maintain the customary full-form marine insurance coverage on the Vessel…including Hull and Machinery [H&M], Protection and indemnity (P&I)…[and to name the United States as an additional assured thereunder].

(R4, tab 1 at 005, 011-012, 021-022, 024, 035-038, bolds in original)

4. After contract award, Red River: (a) from 1 November to 10 December 2001 reflagged the vessel and renamed it MV A1C WILLIAM H. PITSENBARGER, as stated in Contract Modification No. P00003, of 16 January 2002 (R4, tab 2 at 115); (b) paid $6,513,957 to a U.S. shipyard, Deytens Shipyards, to install on the vessel specialized equipment required by contract 3300, such as a controlled cargo environment (cocoon) (R4, tab 1 at 073; ex. A-3, ¶ 6, ex. A-4, ¶ 2) and (c) obtained a $17,329,000 loan to finance the vessel's purchase, reflagging and modification costs, whose monthly loan payments of principal and interest Red River included in the contract price (ex. A-3, ¶ 8).

5. Red River delivered the vessel to MSC at the Military Ocean Terminal, Sunny Point, NC, for service on about 10 December 2001 (R4, tab 2 at 113). The 59-month charter required redelivery of the vessel on about 12 November 2006 (R4, tab 1 at 011-012; app. br. at 3, ¶ 7; gov't reply br. at 1).

6. On 18 January 2005 the Air Force, MSC's "customer" for the charter contract, advised Mr. Timothy McLaughlin, of MSC's Operations Manager, that it desired redelivery of the vessel in August or September 2006 due to fiscal year 2007 budget and schedule constraints, which advice Mr. McLaughlin brought to the attention of CO Achille Broennimann. CO Broennimann asked how serious were the Air Force's plans, because he would need to get an estimate of Red River's cost of early redelivery. Mr. McLaughlin replied, "They are very serious." (Supp. R4, tab G-35 at 8, tab G-18 at 1-2)

7. MSC tried, but was unable, to find alternate use of the PITSENBARGER for the last two months of the charter, which could reduce termination costs, depending on the cargo the vessel carried (ex. A-1 at 38-40, ex. A-2 at 19-20, 23).

8. CO Broennimann's 16 March 2005 letter to Red River stated that the Air Force had asked MSC to look into the possible early redelivery of the vessel in September 2006 "solely due to changing Air Force requirements" and requested Red River to provide the estimated cost of such early redelivery. He also told Red River that the Air Force had an ongoing requirement for containerships and he anticipated issuing a follow-on solicitation in early fiscal year 2006. (R4, tab 3)

9. Red River's 15 April 2005 reply to the CO estimated $706,672.47 for early redelivery of the vessel, comprised of loan principal, loan interest, H&M and P&I insurance costs, which the CO thought were "in line with the cost elements [in the PITSENBARGER's] daily rate" (supp. R4, tabs G-20, G-34; ex. 4).

10. According to CO Rollie Burford, on 11 January 2006 MSC issued RFP No. N00033-06-R-3301 (RFP 3301), prescribing lay-days[2] of 15-31 January 2007 (supp. R4, tab G-31 at 241, tab G-32 at 243). Amendment No. 001 to RFP 3301, dated 18 January 2006, changed the lay-days to 16-23 November 2006 (supp. R4, tab G-33 at 249).

11. On 24 January 2006 Red River told MSC that the 16-23 November 2006 lay-days prescribed in RFP No. 3301 prevented Red River from offering the PITSENBARGER for the follow-on contract because it required dry-docking overhaul work to satisfy Coast Guard requirements, and proposed to further advance the redelivery of the vessel under contract 3300 to June 2006 (supp. R4 tabs G-23, G-33 at 249-51).

12. On 25 January 2006 the Air Force determined that its operational requirements and November lay-days could not be changed, as Red River had proposed (supp. R4, tab G-23 at 221, tab G-33 at 250).

13. CO Broennimann's 2 February 2006 letter notified Red River that the "operational requirements for the vessel and her cargoes at this time, require a redelivery date 18-25 September 2006" under contract 3300 (R4, tab 7).

14. Amendment No. 006 to RFP No. 3301, dated 21 February 2006, provided for alternate lay-days of 15-31 January 2007 (supp. R4, tab G-32 at 243).

15. On 1 August 2006 Red River informed MSC that the vessel had departed Diego Garcia for Sunny Point, NC, in accordance with redelivery instructions and requested information about its proposed redelivery costs (compl. and answer ¶ 11).

[2] Lay-days are the period within which the vessel must be delivered to the charterer.

16. On 7 August 2006 MSC notified Red River of award to it of follow on Contract No. N00033-06-C-3301 with 15-31 January 2007 lay-days (supp. R4, tab G-32 at 244).

17. CO Olivia Bradley's 17 August 2006 letter to Red River acknowledged receipt of its settlement proposal for early redelivery of the PITSENBARGER, requested its final figures after the actual redelivery date and a narrative of its efforts to mitigate costs associated with early redelivery, "taking into account the benefits you received as a result of early redelivery" (R4, tab 8).

18. On 12 September 2006 the vessel was redelivered under contract 3300 (R4, tab 10 at 176, 180).

19. Red River's 13 September 2006 letter to CO Bradley stated that its capital and fixed costs to be incurred during the two months remaining on the charter period could not be avoided or reduced, the two month early redelivery did not benefit Red River, and its redelivery claim was $668,476.81 comprised of loan principal, loan interest, H&M and P&I insurance costs (R4, tab 10 at 176-78).

20. Red River's 11 September 2007 letter to CO Burford claimed $668,476.81 under contract 3300 due to the two-month early redelivery of the vessel as directed by CO Broennimann's 2 February 2006 letter to Red River, stated that it was unable to mitigate the foregoing costs due to the short time period between redelivery and the scheduled five year mandatory dry-docking of the vessel by the end of November 2006, and included a proper CDA certification signed by its president, Mr. John P. Morris III (compl., ex. 1).

21. CO Burford's 17 September 2007 letter to Red River requested a detailed explanation of how the charges and costs claimed resulted from redelivery of the vessel on 12 September 2006 and, since such redelivery date "allowed the [vessel] to meet [Red River's] shipyard availability dates that enabled Red River to offer the [vessel] under Contract N00033-06-C-3301," to "explain and justify your position that the redelivery date did not benefit your company" (R4, tab 13).

22. Red River's 12 October 2007 letter to CO Burford stated that it sought to recover the remaining loan principal ($547,118.18), interest ($31,055.84) and insurances ($90,302.79) which it was obligated to pay for the 60-day period eliminated under contract 3300; that the early redelivery was entirely due to the government's needs and circumstances; and that such early redelivery decision was made for the benefit of the government, not the vessel owner (R4, tab 14).

23. CO Olivia Bradley's 21 November 2007 final decision denied Red River's claim in its entirety and treated the early redelivery as a termination for convenience. The CO asserted that Red River had invoiced and been paid the daily rate and for reimbursables through 12 September 2006, the date of redelivery. (R4, tab 16) Appellant has not disputed this assertion.

24. On 13 February 2008 Red River timely filed a notice of appeal from the CO's foregoing final decision and a complaint seeking $795,641.60, composed of the $668,476.81 previously claimed, plus $17,421.12 in general and administrative costs and $109,743.67 in profit (compl. ¶¶ 19-20).

25. Mr. Morris' undated declaration, received by the Board on 18 September 2008, stated in pertinent part (ex. A-3, ¶ 14):

> 14. ...[I]f payment of loan principal and interest is denied under termination for convenience principles, Red River seeks recovery of $667,144.34, consisting of the following:
>
> | | | |
> |---|---|---|
> | (i) | Vessel depreciation (see attached): | $272,845.80 |
> | (ii) | Insurance premiums: | $ 90,302.79 |
> | (iii) | Reflagging costs: | $ 89,423.00 |
> | (iv) | Other Contract specific modifications: | $100,930.54 |
> | (v) | General & Administrative expenses: | $ 17,421.12 |
> | (vi) | Profit at 16%: | $ 96,221.09 |

26. Mr. Morris attached breakdowns for items (i)-(ii), (v)-(vi) allegedly incurred due to the 60 day early redelivery of the vessel: (i) Sept. 2005-Aug. 2006 daily depreciation expense of $4,547.43 x 60 = $272,845.80. (ii) H&M insurance premium $36,739.36 + P&I insurance premium $53,563.43, due in Oct.-Nov. 2006 = $90,302.79. (v) Sept. 2005-Aug. 2006 daily G&A expense of $290.35 x 60 = $17,421.12. (vi) Sept. 2005-Aug. 2006 daily profit of $3,766.44 x 60 = "$225,986.65" (sic, $225,986.40). Mr. Morris did not provide a breakdown for items (iii)-(iv). (Ex. A-3, sub-exhibit B)

DECISION

I.

The subject of this appeal is appellant's claim, submitted after the constructive termination for convenience of the contract, for $668,476.81 (finding 20) based on the recovery provisions of the FAR 52.212-4(l) commercial item termination for convenience

clause. The clause provides that the contractor shall be paid a percentage of the contract price which reflects "the percentage of the work performed" and the "reasonable charges [it] can demonstrate...have resulted from the termination." On 13 February 2008 appellant's complaint modified its claim to $795,641.60, adding G&A costs ($17,421.12) and profit ($109,743.67) (finding 24). On 18 September 2008 appellant presented an alternative quantification totaling $667,144.34 (finding 25).

Appellant argues that it amortized the $17,329,000 loan to be repaid over the 59-month charter period because it incurred the financed costs of vessel acquisition, reflagging and modification for the sole purpose of performing contract 3300, and thus the portion of such loan costs allocable to the final two months of the charter, *viz*., principal of $547,118.18, interest of $31,055.84, H&M insurance premiums of $36,736.36 and P&I insurance premiums of $56,563.43 are recoverable because they are "all costs resulting from the termination, including those costs reasonably incurred in anticipation of performing the Contract," citing FAR §§ 31.205-19, 49.103, 49.113 and 49.201 and court and board decisions (app. br. at 14-17). In the alternative, appellant argues that it is entitled to recover the six items detailed in Mr. Morris' declaration (finding 25; app. br. at 16-17; app. reply br. at 8-10). The government argues that no recovery is due, and that "appellant's position is based largely on wishful thinking that FAR Part 49 governs the issues here rather than FAR Part 12" (gov't reply br. at 1).

II.

We first address the "percentage of the work performed" provision of the FAR 52.212-4(l) TERMINATION FOR THE GOVERNMENT'S CONVENIENCE clause for commercial item contracts (finding 3). Also relevant is FAR 12.403(a), which provides:

> *General*.…[T]he paragraphs in 52.212-4 entitled "Termination for the Government's Convenience" and "Termination for Cause" contain concepts which differ from those contained in the termination clauses prescribed in Part 49. Consequently, the requirements of Part 49 do not apply when terminating contracts for commercial items and contracting officers shall follow the procedures in this section. Contracting officers may continue to use Part 49 as guidance to the extent that Part 49 does not conflict with this section and the language of the terminations paragraphs in 52.212-4.

The conceptual basis of the commercial item clause is wholly different from the FAR 52.249-2 non-commercial item termination for convenience clause, which effectively converts fixed-price contracts to cost-reimbursable contracts for purposes of

termination costs. Under the commercial item provision the contractor receives a percentage of the price regardless of costs (plus reasonable charges resulting from the termination). Thus, to allow such costs as preparatory and insurance costs -- which might be allowable in terminated non-commercial, fixed-price contracts, see FAR 31.205-42(b), (c)(2) -- in this commercial item contract would conflict with FAR 12.403(a) and 52.212-4(l). Moreover, the cases and regulations which appellant cites to support recovery of such items as preparatory and insurance costs apply in the context of recognizing or determining termination costs of non-commercial item contracts under FAR 52.249-2 and its predecessor regulations. Appellant does not cite, and our research has not discovered, any case awarding costs of this type under a terminated commercial item contract.

Appellant has not argued that it failed to receive 57/59 of the contract price. Appellant argues that it obtained the $17,329,000 loan (finding 4(c)) in order to acquire and outfit the PITSENBARGER for the contract, it fully completed acquisition and outfitting at the outset of the contract long before its termination and so it is entitled to the remaining loan principal and interest it paid after such termination under the "percentage of the work performed" provision of the termination clause (app. reply br. at 4-5).

The contract expressly provided that the daily hire rates of $29,907.86 for the first 365 days and $27,270.40 for the remainder of the charter period were in full payment of all services under the charter contract unless otherwise provided (finding 3(b)) and the 59-month charter period commenced upon acceptance of the vessel by the Charterer not before 3 December 2001 (finding 3(c)). The contract did not provide for payment for appellant's obtaining a commercial loan to acquire, reflag and outfit the vessel to comply with specified characteristics. Thus, the contract "work" with respect to the "percentage of the work performed" provision of this contract's termination clause was for appellant to provide a U.S. flag vessel capable of carrying ammunition containers in December 2001 at the Military Ocean Terminal, Sunny Point, NC, for inspection and acceptance and to perform the 59-month charter thereafter.

Therefore, we reject appellant's argument that obtaining the $17,329,000 loan to acquire and outfit the PITSENBARGER for the contract and fully completing acquisition and outfitting at the outset of the contract long before its termination entitled it to the remaining loan principal and interest it paid after such termination under the "percentage of the work performed" provision of the termination clause. Those efforts were not "work performed" under the cited contract provisions.

III.

Next we address the FAR 52.212-4(l) provision, "reasonable charges the Contractor can demonstrate…have resulted from the termination." We construe this provision to include charges in the nature of settlement expenses. *See Individual Development Associates, Inc.*, ASBCA Nos. 55174, 55188, 06-2 BCA ¶ 33,349 at 165,370 (settlement charges are at least descriptively within the meaning of "charges" that might have resulted from the termination of the commercial item contract).

Appellant's contention that it obtained the $17,329,000 commercial loan to finance the vessel's acquisition, reflagging and modification for the sole purpose of performing contract 3300, and so the loan principal and interest for the two terminated months of the charter are reasonable charges that resulted from the termination (app. br. at 14-16), is unpersuasive. Incurrence of costs solely for the purpose of contract performance, or incurrence of costs in anticipation of such performance, are not criteria under the FAR 52.212-4(l) "reasonable charges" provision (finding 3). Moreover, appellant obtained such loan to finance the vessel's acquisition, reflagging and modification shortly after contract award (finding 4(c)), more than four years before the CO in 2006 constructively terminated the last two months of the charter (finding 13). We hold that the costs of the loan, reflagging and vessel modification did not "result from" the termination.

Appellant argues that it is entitled to recover $662,270.61 for the six items listed in ¶ 14 of the Morris declaration (app. br. at 16-17), or $670,667.29 (app. reply br. at 8-10).[3] Those six items arose out of the same operative facts of constructive termination as in appellant's September 2007 claim, and so are properly for consideration. *See Aerojet Ordnance Tennessee*, ASBCA No. 36089, 91-3 BCA ¶ 24,130 at 120,773 (when the essential character of a claim remains the same, revision of the amount is permitted). However, Mr. Morris' six items all suffer from the same infirmity: they are not charges that "have resulted from the termination."

Finally, in its reply brief appellant argues that it should "be compensated under the 'termination for convenience' clause for its attorney fees and costs in pursuing this appeal" (at 11). Attorneys' fees incurred in connection with preparation of a termination settlement proposal may be allowable as settlement expenses. Fees claimed in pursuing this appeal, however, are recoverable under the Equal Access to Justice Act, 5 U.S.C. § 504, if at all.

[3] Since we decide only entitlement, we do not address the unexplained differences between the reflagging, special equipment and profit figures Mr. Morris stated and those asserted in appellant's briefs.

For the reasons set forth above, the Board denies the appeal.

Dated: 4 November 2009

DAVID W. JAMES, 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 No. 56316, Appeal of Red River Holdings, LLC, rendered in conformance with the Board's Charter.

Dated:

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