

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Boeing Company) ASBCA No. 57409
)
Under Contract No. F34601-97-C-0211)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

The Boeing Company (Boeing) appeals a final decision of the Termination Contracting Officer (TCO) denying ratification of most of a subcontract termination settlement agreement. The parties have stipulated that the only issues for decision in this appeal are (i) whether the Limitation of Funds (LOF) clause of the contract limited the recovery sought by Boeing, and (ii) the net amount payable to Boeing (Bd. corr. dtd. 23 August 2011, ¶ 8).¹ We find that the LOF clause limited Boeing's recovery and that the net amount payable to Boeing is \$7,450,141.53 plus interest pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 7109(a).

¹ Apart from the LOF issue, the parties have stipulated that the settlement agreement otherwise met the legal standard for contracting officer ratification (*id.* ¶¶ 4-5).

FINDINGS OF FACT

1. Contract No. F34601-97-C-0211 (Contract 0211) was awarded to Boeing on 1 March 1997. The contract was an incrementally funded cost-plus-award-fee contract for the performance by Boeing of engineering assignments as ordered from time to time by the government. The initial term of performance was from award to 30 September 1997 with nine successive fiscal year options thereafter. The contract "SCHEDULE," specified, among other things, the services to be performed if ordered, the fixed prices or time and material rates for those services, and the initial allotment (obligation) of funds for performance of the contract. (R4, tab 1 at 1-4, 7)

2. Contract 0211 incorporated by reference, among other provisions, the FAR 52.249-6, TERMINATION (COST-REIMBURSEMENT) (SEP 1996) clause, and pursuant to bilateral Modification No. P00107, dated 3 April 2000, the FAR 52.232-22, LIMITATION OF FUNDS (APR 1984) clause (R4, tab 1 at 16; app. supp. R4, tab 87 at 2-4). The LOF clause stated in relevant part:

(a) The parties estimate that performance of this contract will not cost the Government more than (1) the estimated cost specified in the Schedule....

(b) The Schedule specifies the amount presently available for payment by the Government and allotted to this contract.... The parties contemplate that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government specified in the Schedule....

....

(f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause –

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of (i) the amount then allotted to the contract by the Government...until the Contracting Officer notifies the Contractor in writing that the amount allotted by the

Government has been increased, and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.

....

(h) No notice, communication, or representation in any form other than that specified in subparagraph (f)(2) above, or from any person other than the Contracting Officer, shall affect the amount allotted by the Government to this contract. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the total amount allotted by the Government to this contract, whether incurred during the course of the contract or as a result of termination.

FAR 52.232-22.

3. The preface to the text of the LOF clause in FAR 52.232-22 stated in relevant part: "Task Order' or other appropriate designation may be substituted for 'Schedule' wherever that word appears in the clause." The government did not make this substitution when it incorporated by reference the LOF clause into Contract 0211.

4. Contract 0211 also included a Special Contract Requirements clause H-841, entitled "ASSIGNMENT OF ENGINEERING TASK (SEP 1996)." This clause stated in relevant part:

(a) Engineering tasks as required by paragraph 3.2 of the attached Statement of Work (SOW) shall be authorized and funded by issuance of a unilateral modification by the PCO....

....

(c) ...All effort directed is subject to the availability of funds. Notification will be given to the PCO upon 85% usage of the funds obligated and upon 100% usage the contractor will cease work until additional funds are provided.

(R4, tab 1 at 8-9)

5. On 31 March 2000 bilateral Modification No. P00112, incorporated into Contract 0211 an engineering assignment for Boeing to design, develop, fabricate, install, test and FAA certify a Global Air Traffic Management System for the

KC-10 aircraft (hereinafter “the KC-10 GATM assignment”). The specified total estimated cost-plus-award-fee for the assignment was \$79,250,000. The specified completion date for the assignment was 30 April 2003. Modification No. P00112 also increased the obligated (allotted) funds in the contract Schedule to a total amount of \$133,123,763.97. (R4, tab 6 at 1-2, 9)

6. On 7 January 2002, bilateral Modification No. P00179 increased the total estimated cost-plus-award-fee of the KC-10 GATM assignment to \$97,477,602.00 and extended the performance time to 31 March 2004 (ex. G-1 at 3). On 11 August 2003, Boeing reported to the government that the GATM assignment would not be completed until 31 March 2005 and that it wanted “a Cost Share Arrangement to Complete the Program.” (R4, tab 90 at 1, 17-18)

7. On 10 September 2003, Boeing and the government agreed in principle that the KC-10 GATM assignment would be continued on a cost-reimbursable basis “upon agreement of a new EAC [estimate at completion] and schedule between Boeing and the Government” (R4, tab 130 at 5).² On 24 September 2003, Boeing provided the government with a schedule showing completion of the assignment (“Final Materials and Devices Delivered”) on 30 September 2005 and an estimated cost at completion of \$154.7 million (R4, tab 95 at 4, 9).³

8. There is no credible evidence that the 24 September 2003 EAC and performance schedule were accepted by the government. To the contrary, on 15 October 2003, Boeing and the government in bilateral Modification No. P00220 increased the total estimated cost-plus-award-fee for the KC-10 GATM assignment to only \$107,309,826 and extended its performance time to 31 March 2005 (ex. G-2 at 1, 3).

9. By letter dated 17 December 2003, the procuring contracting officer (PCO) requested Boeing to submit a proposal for the changes to Contract 0211 and the KC-10 GATM assignment documentation necessary to implement contractually the 10 September 2003 agreement in principle (R4, tab 130 at 2-4). In February 2004, Boeing and the government had three meetings to develop a proposal in response to the PCO’s 17 December 2003 request. An internal Boeing memorandum dated 1 March 2004 stated that it would submit its proposal to the PCO on 12 March 2004. (R4, tab 102)

² The quoted summary of this meeting is from the 3 October 2003 letter of the Boeing contracts manager to the government contracting officer (R4, tab 130 at 5).

³ This EAC included \$11,000,000 for a Request for Equitable Adjustment (REA) on a subcontract being performed by Honeywell Defense Avionics Systems. Honeywell “briefed” its REA to Boeing and the government on 17 September 2003, but did not formally submit an REA with supporting documentation until 31 August 2004. (R4, tabs 15, 93, 95 at 9) Boeing has authorized Honeywell to prosecute this appeal in Boeing’s name (Notice of Appeal dtd. 1 November 2010).

10. On or about 1 March 2004, the PCO prepared a draft Modification No. P00223 to Contract 0211 proposing to add \$6,398,000 to the allotted funding of the contract. The purpose of the additional funding was to continue the KC-10 GATM assignment for another three months beyond March 2004. However, the draft Modification No. P00223 was never signed by the PCO or issued to Boeing. At the time the draft modification was prepared, the total funding allotted to the KC-10 GATM assignment was \$121,603,858.17. (Ex. G-7; tr. 2/168-71)

11. On 10 March 2004 the PCO issued a stop work order on the GATM assignment (R4, tab 14 at 1). On 24 March 2004 he notified Boeing that he would not be obligating any additional funding to the GATM assignment "at this time" (R4, tab 106 at 1). On 26 March 2004 he issued a notice to Boeing terminating the assignment for the convenience of the government. The termination notice was received by Boeing on 2 April 2004 and the termination became effective on that date. (R4, tab 14; tr. 2/190-91) When the assignment was terminated, a Boeing proposal in response to the PCO's 17 December 2003 request for a proposal had not been submitted.

12. By letter dated 14 April 2004, Boeing terminated for convenience the Honeywell subcontract (R4, tab 15 at 2). On 31 August 2004, Honeywell submitted to Boeing its "SUBCONTRACT TERMINATION PROPOSAL AND REQUEST FOR EQUITABLE ADJUSTMENT" in the net amount of \$22,100,059 (*id.* at 1, 109-11).

13. On 16 November 2004, Boeing notified the TCO that it had expended 95.02 percent of the funds allotted to the KC-10 engineering assignment and that its termination settlement estimate was \$154 million, "based upon the proposals we have received from the suppliers." This message continued with the following request: "Therefore in an effort to allow the Contractor to continue to negotiate, subject to TCO approval, for settlement with each supplier we are requesting that the Government increase the funds as soon as possible." No specific amount of increased funding was requested by Boeing. (R4, tab 16 at 1) The TCO replied to this request on the same date as Boeing's request for additional funds as follows:

It is rare that the TCO requests additional funds to be added to the terminated cost type contracts. There are, at times, the PCO may have reason(s) to add additional funds to the terminated cost type contracts. However, the Government, usually, will stand by the "Limitation of Funds" clause. Per your funding status, we only have \$4,719,870.15 remaining in the contract.

(R4, tab 16 at 6)

14. On 10 December 2004, Boeing again requested the TCO for additional funding to “cover the Contractor’s project completion price for the termination of the KC-10 GATM program.” The TCO again replied on the same day that:

I have discussed with you before in that this contract is a cost type contract, and the “Limitation of Funds” clause does apply; therefore, no additional funds will be requested. The amount remaining in the contract is it. As discussed earlier, if for some reason the PCO wants to obligate more funds to the contract, he can do so.

(R4, tab 121 at 3)

15. In messages to the TCO and PCO dated 13 December 2004, Boeing expressed “confusion” as to the TCO’s responsibility for obtaining additional funding and asked specifically: “Is the Government going to obtain additional funding?” The TCO replied that “I will not request for additional funds because this contract is a cost type contract, and that the Limitation of Funds clause does apply.” (R4, tab 124 at 1-2) The PCO replied that: “It depends on the amount of remaining obligated funds, and the final negotiated settlement price” (R4, tab 121 at 1).

16. By email to the TCO dated 15 February 2005, Boeing submitted a “Settlement ROM Proposal” in the amount of \$37.1 million with a request for \$20,000,000 to be obligated within 60 days of receipt of the letter with the balance “after our negotiations is [sic] completed.” The email to which the proposal was attached stated: “The Contractor understands your position on the Limitation funds clauses, but want[s] to assure our suppliers that once negotiations has [sic] been completed and approved by you that funding will soon follow.” (R4, tab 137 at 1-3, 5) There is no record of a written response by the TCO to the 15 February 2005 request. However, no additional funds were allotted to the KC-10 GATM assignment in response to that request. Moreover, in light of the answers to the first three requests and the statement in the fourth request that “[t]he Contractor understands your position on the Limitation [of] [F]unds clauses,” the absence of a government written response to the fourth request cannot be reasonably understood as a reversal of the government’s position.

17. The Boeing contract manager testified at hearing that “We had several discussions with the TCO on the need for additional funding that ultimately culminated with an understanding that we would complete settlement negotiations with all our suppliers so that the final settlement costs were known. And then funding could be obligated based on the final settlement figures.” On this testimony, we find that the understanding was no more than an agreement that additional funding would be considered when the final settlement figures were known and that agreement was not

inconsistent with the LOF clause which expressly allowed for additions to the allotted funds. (Tr. 1/152, 164-65, 174-75)⁴

18. On 31 August 2005, Boeing and Honeywell entered into an agreement settling the Honeywell subcontract termination and REA for a net payment to Honeywell of \$10,800,000.⁵ The agreement provided that it was subject to approval by the TCO. (R4, tab 22 at 7, 10-11) The parties have stipulated that as of 31 August 2005, the total amount of the obligated funding for Contract 0211 was \$249,303,309.70, and the total payments to Boeing as of that date were \$241,853,168.17 (Bd. corr. ltr. dtd. 4 September 2013).

19. The Honeywell subcontract termination settlement agreement (hereinafter the "Honeywell settlement agreement") was included in Boeing's certified termination settlement proposal for the KC-10 GATM assignment submitted to the DCAA for audit on 8 August 2006.⁶ The initial audit report dated 29 September 2006 questioned all but \$1,825 of the \$10.8 million Honeywell settlement agreement (R4, tab 161 at 10). A revised audit report was issued on 26 February 2007, but with no changes to its initial report on the Honeywell settlement agreement (R4, tab 32 at 9-10).

20. On 29 July 2008, the TCO refused to ratify the Honeywell settlement agreement except for \$182,185 (R4, tab 33). By letter dated 19 December 2008, Boeing requested further discussions on the issue or a contracting officer's final decision under the CDA (R4, tab 34). By letter dated 17 March 2009, the TCO rejected further discussions and stated that he would issue a final decision (R4, tab 35). We find that on 17 March 2009 the parties reached an impasse and the termination settlement proposal was converted to a claim.

⁴ Boeing states in its brief that the understanding was that the government "would" provide the additional funding after the subcontract settlements were negotiated (app. br. at 33-34). The brief rendition of the understanding is not the testimony of the Boeing contracts manager who testified that additional funding "could" be obligated (tr. 1/165). "Could" expresses possibility, not certainty. See NEW OXFORD AMERICAN DICTIONARY, 394 (3d ed. 2010).

⁵ The negotiated settlement amount consisted of \$9,500,000 for "Net Contract & REA" and \$1,300,000 for "Termination Settlement" (R4, tab 22 at 5).

⁶ Boeing's SF 1437 certified termination settlement proposal was initially submitted on 3 March 2005 with an estimated amount for the Honeywell settlement (Bd. corr., ltr. dtd. 23 September 2013, attach. 1). However, when audited, the proposal had been amended to include the actual settlement agreement amount. A CDA certification of the claim was provided by Boeing on 23 September 2013 (*id.*). Attachments 1 and 3 were submitted by appellant in response to a 10 September 2013 Board Order. We admit them into evidence as Board exhibits 1-3.

21. On 3 August 2010, the TCO issued a final decision denying ratification of all but \$280,294 of the \$10,800,000 Honeywell settlement agreement. The final decision was based primarily on cost allowance and cost allocation grounds, but also invoked the LOF clause as a bar to recovery of any amount that would exceed the funds allotted to the KC-10 GATM assignment. (R4, tab 180 at 2, 4) This appeal followed.

DECISION

The first of the two stipulated issues for decision is whether the LOF clause limited Boeing's recovery for the cost of the Honeywell subcontract settlement agreement incurred as a result of the government's convenience termination of the KC-10 engineering assignment. The government impliedly argues that the LOF clause applies to the allotted funds for each engineering assignment, as well as to the total funds allotted to the contract, and that the allotted funds for the KC-10 GATM assignment had been substantially if not entirely expended when the Honeywell settlement agreement was entered into. Boeing argues that the LOF clause applied to the contract funding as a whole and not individually and independently to the funding of each engineering assignment (app. reply br. at 7). Boeing further contends that in any case, the government by its conduct waived or is otherwise estopped to invoke the clause as a bar to recovery.

We agree with Boeing that the LOF clause in Contract 0211 applied only to the funding of the contract as a whole. The preface in FAR 52.232-22 to the text of the LOF clause states in pertinent part that "'Task Order' or other appropriate designation may be substituted for 'Schedule' wherever that word appears in the clause." When the government incorporated the LOF clause by reference in Contract 0211, it did not substitute "task order" or "engineering assignment" or any other such term for "Schedule." (See findings 2, 3) Moreover, Contract 0211 included a specific provision for limitation of funds in individual engineering assignments at paragraph (c) of the Special Contract Requirements clause H-841 (see finding 4). Giving a reasonable meaning to both the LOF clause and the H-841 clause, we find that the LOF clause applies to the funding of the contract Schedule as a whole and the H-841 clause governs the funding allotted to each individual engineering assignment. See *Lockheed Electronics Company*, ASBCA No. 17566, 73-1 BCA ¶ 9871 at 46,166. We conclude that this appeal does not fit within our line of cases holding that LOF or Limitation of Cost clauses apply to individual orders. *Electro Nuclear Systems Corp.*, ASBCA No. 10746, 66-2 BCA ¶ 6008 (contract definitions required individual application); *Systems Engineering Associates Corp.*, ASBCA No. 38592 *et al.*, 91-2 BCA ¶ 23,676 (terms of contract required individual application); *Parsons-UXB Joint Venture*, ASBCA No. 56461, 11-1 BCA ¶ 34,680 (contract specified individual application). Pursuant to the parties' 23 August 2013 stipulations, the government is not arguing and we are not deciding whether the H-841 clause limited Boeing's recovery in this appeal.

We do not agree with Boeing that the government by its conduct otherwise waived or is estopped from invoking the LOF clause as a limit on Boeing's recovery for the Honeywell settlement agreement. The alleged conduct cited by Boeing is (i) that the government "renege[d]" on a commitment to increase funding during performance of the KC-10 GATM assignment, and (ii) that by directing the termination settlement activities, with full knowledge of the cost overrun, the government led Boeing to reasonably believe that it was waiving the LOF clause (app. br. at 66, 74-75).

We find no basis in the record that the government "renege[d]" on a commitment to increase funding for the KC-10 GATM assignment during performance of the assignment. The alleged commitment was an agreement at the 10 September 2003 meeting to continue the assignment "upon agreement of a new EAC and schedule" (finding 7). However, up to the termination of the assignment on 2 April 2004, no agreement on a new EAC or schedule had been concluded by the parties (findings 8-11). To the extent that the government made a commitment on 10 September 2003, to fund completion of the assignment, the commitment was conditional and the condition was never met.

We also find no basis in this record for the contention that government direction of termination activities with knowledge of the cost overrun led Boeing to reasonably believe that the government was waiving the LOF clause. Following the termination and before Boeing entered into the Honeywell settlement agreement, the government on three occasions denied Boeing requests for additional allotted funds to cover the supplier and subcontractor termination settlements that were yet to be negotiated.⁷ On each of these three occasions, the government expressly advised Boeing that the LOF clause was applicable. (Findings 13-15) Boeing's "understanding" from oral discussions with the TCO was that it would complete settlement negotiations with its suppliers so that "funding could be obligated based on the final settlement figures," was nothing more than an understanding that additional funding would be considered when the final settlement figures were known. This understanding was consistent with the LOF clause which itself expressly provided for additions to the allotted funding by written notice of the contracting officer to the contractor.

In *Optical E.T.C., Inc.*, ASBCA No. 53350, 04-1 BCA ¶ 32,608 (OETC), we held that where the government knew that the allotted funds were exhausted, a terminated contractor could reasonably interpret termination directions as implying a government promise to reimburse the costs. But we also held that, when the government notified the contractor that it would not pay costs in excess of the allotted funds, "agreement by the government to reimburse OETC for termination settlement activities could no longer be implied," and the costs incurred thereafter "were for OETC's own account." *Id.* at 161,385.

⁷ If Boeing truly believed that the government had waived the LOF clause, why was it requesting additional funds to be added to the allotted funds in the contract?

Boeing had notice that the government considered the LOF clause to be applicable to the termination settlements eight months before it concluded the Honeywell settlement agreement. Boeing also knew, or is chargeable with knowing, the terms of the LOF clause, the amount of the allotted funding in the contract and the amount of its incurred costs in performing the contract. Subparagraphs (f) and (h) of the LOF clause expressly provided that Boeing was not obligated to incur, and the government was not obligated to reimburse, any costs of performing the contract, including termination activities, that would exceed the allotted funding in the contract. If Boeing did incur termination costs in excess of the allotted funding, it was a volunteer and did so for its own account.

On issue 2 of the stipulated issues for decision, we find that Boeing's recovery for the Honeywell settlement agreement is limited by the LOF clause to the undisbursed allotted funding for Contract 0211 on the date the agreement was entered into. That amount was \$7,450,141.53 (finding 18). Recovery of the remaining amount of the Honeywell settlement agreement (\$3,349,858.47) is barred by the LOF clause. Accordingly, the net amount due Boeing is \$7,450,141.53 with interest pursuant to 41 U.S.C. § 7109 from 17 March 2009 until paid (finding 20).

CONCLUSION

The appeal is sustained to the extent indicated above and denied in all other respects.

Dated: 3 December 2013



MONROE E. FREEMAN, JR.

Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



MARK N. STEPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals



REBA PAGE
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. 57409, Appeal of The Boeing Company, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals