

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Symbion Ozdil Joint Venture) ASBCA No. 56713
)
Under Contract No. W91GXY-06-C-0064)

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APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
MAJ Brian K. Hill, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

The parties agree that Symbion Ozdil Joint Venture (Symbion) is entitled to an adjustment to the price of the captioned contract for additional piling and foundation work required to perform the contract prior to its termination for convenience, and that the sole issue in dispute is the method for calculating quantum (compl. and answer ¶¶ 46). Symbion contends that it is entitled to be paid based on the unit prices in the contract. Respondent contends that, in view of the termination for convenience, Symbion is only entitled to be paid its actual costs plus a reasonable profit. On 31 July 2009 Symbion moved for summary judgment on this disputed issue. On 21 August 2009 respondent opposed Symbion's motion and cross-moved for summary judgment. On 28 August 2009 Symbion replied to and opposed the Government's Cross Motion for Summary Judgment.

Symbion does not dispute any of respondent's undisputed material facts (RUMF) set forth below. Respondent does not dispute any of Symbion's "Statement of Undisputed Material Facts" (SUMF) set forth below.

STATEMENT OF FACTS (SOF)

1. The United States Joint Contracting Command-Iraq (JCC) awarded firm-fixed-price Contract No. W91GXY-06-C-0064 (the contract) to Symbion on 27 June 2006 for the design, supply and testing of equipment, construction and installation

necessary to provide a new, fully functional 132kV electric line for Hilla-Hashimiya-Shamiya¹, approximately 85 km in length (RUMF, ¶ 1; SUMF, ¶¶ 2-3).

2. Contract § B-2 required lump sum unit pricing for three contract line items (CLINs): CLIN 0001, Engineering Design and Procurement Services, CLIN 0002, Construction, and CLIN 0003 Training (RUMF, ¶ 2).

3. Contract § J, Attachment 1, “Bill of Quantities” (BOQ), set forth JCC’s estimated quantities for the work required by CLIN 0002 (RUMF, ¶ 3).

4. The technical specifications, incorporated by reference in the contract, Vol. 1, ¶ 2.3.1a, provided: “Estimated quantities are for tender purposes only; final payment shall be made on the basis of quantities as finally erected and confirmed by measurement” (RUMF, ¶ 4; SUMF, ¶ 4).

5. Specification Schedule G, stated: “Unit prices are fixed and firm for the duration of the Contract and not subject to variation for any reason including, but not limited to, changes in the actual quantities used as compared to the estimated quantities use [sic] for the purposes of tendering” (SUMF, ¶ 6). Symbion bid unit prices for the estimated quantities of each work item in Schedule G1 for CLIN 0002, including foundations and piles (RUMF, ¶ 4; SUMF, ¶¶ 5, 7).

6. Piling and foundation work additional to that estimated by JCC was required for performance of the contract, and such additional work entitled Symbion to an adjustment to the contract price pursuant to ¶ 2.3.1a (RUMF, ¶ 5; SUMF, ¶ 22).

7. The contract included in § I, Contract Clauses, FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (MAY 2004), ALT. I (R4, tab 1 at 65 of 67). FAR 52.249-2 Alternate I states in pertinent part:

(g) If the Contractor and Contracting Officer [CO] fail to agree on the whole amount to be paid the Contractor because of the termination of work, the [CO] shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of—

(i) The cost of this work;

¹ South of Baghdad (R4, tab 1 at 4 of 67).

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(1)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the [CO] under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the [CO] shall allow no profit under this subdivision (g)(1)(iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including—

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(RUMF, ¶ 6)²

8. On 19 December 2007 Symbion submitted an uncertified request for equitable adjustment (REA) for piling work in the amount of \$10,276,587.82 (SUMF, ¶ 35).

9. On 1 February 2008 the CO terminated “for convenience the remaining portion of the...contract” (RUMF, ¶ 7; SUMF, ¶ 38).

10. On 11 July 2008 Symbion filed a certified claim with the CO for a contract price increase of \$10,276,587.82 (based on unit prices) for additional piling needed to support tower foundations, which the CO received on 15 July 2008 (RUMF, ¶ 8; SUMF, ¶ 43; joint statement of facts, ¶ 5).

² Section I also incorporated the FAR 52.215-8 ORDER OF PRECEDENCE—UNIFORM CONTRACT FORMAT (OCT 1997) clause (R4, tab 1 at 64 of 67).

11. Symbion submitted to the CO its certified, 30 October 2008, “Termination for Convenience Settlement Proposal and Claim” in the amount of \$1,098,167.42 which stated: “This T4C Settlement Proposal expressly excludes claims for (1) Tower Foundation Piling...” (app. supp. R4, tab 11 at 5 of 54; joint statement of facts, ¶¶ 9-10). The CO has not issued a decision on this proposal.

12. The CO’s 13 January 2009 final decision partially approved Symbion’s certified claim, on the basis of termination for convenience cost principles, to the extent of \$2,696,819.32 (SUMF ¶ 46). Symbion timely appealed that decision on 22 January 2009, which the Board docketed as ASBCA No. 56713.

13. The 18 November 2009 affidavit of the CO, Lt Col Jeffrey G. Moody, USAF, states with respect to his foregoing final decision:

Per the subject line, it is the final determination on Symbion’s request for equitable adjustment. The REA was treated under the termination for convenience clause as the REA was submitted on 11 Jul 2008, seven months after the termination for convenience. Thus, the REA was handled IAW the termination for convenience. It was not a T4C settlement....

(Joint statement of facts, ¶ 13).

DECISION

I.

Appellant’s motion “seeks an upward contract price adjustment for the extra piling work” it performed and payment of the amount of the increase (\$10,672,710.81) (app. mot. at 1, 3). It argues that all its extra piling work was performed before the contract was terminated, the contract expressly mandated that such work was to be priced at appellant’s bid, firm fixed prices regardless of the quantity required, and its claim was not “merged” into a cost quantification by operation of the convenience termination clause, citing *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1546-48 (Fed. Cir. 1996) and other cases (app. br. at 1-2, 8).

Respondent argues that this construction project was not completed, that there was no government acceptance of the foundation pilings, that appellant’s right to be compensated for work performed merged into the contract’s termination for convenience clause under which “the cost provisions...apply when the work performed is not accepted prior to termination,” citing FAR 52.249-2(g) and ASBCA cases, and that “*Ellett* simply stands for the proposition that the CDA creates a statutory entitlement to interest on certain

claims and this statutory entitlement is not merged into the termination for convenience clause” (gov’t opp’n at 21-27).

Ellett Construction Co., 93 F.3d at 1546-48, concerned in relevant part the contractor’s 17 November 1988 claim for equitable adjustments pursuant to the Changes clause and lost profits. It held that the government cannot avoid liability for statutory interest on an independent CDA claim by terminating a contract for convenience. It stated that its conclusion was buttressed by the requirement in the FAR that, where the contract was completely terminated, the termination contracting officer settle “all ‘related unsettled contract changes’ as part of the final settlement” (93 F.3d at 1547, quoting FAR 49.114(a)). The court did not determine whether any amount was due, remanding the case to the Court of Federal Claims.

II.

“[Summary] judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In cross-motions for summary judgment, a tribunal must evaluate each motion on its merits and decide whether summary judgment is appropriate. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). There is no genuine issue as to any of the material facts stated in the parties’ cross-motions and included in the foregoing SOF. Thus, we must decide whether Symbion or respondent is entitled as a matter of law to judgment based on such undisputed material facts.

III.

The principal issue in this appeal is whether appellant properly can recover the fixed unit prices for the actual quantity of piling work performed, rather than its actual costs and profit for such work. Although Symbion’s claim apparently was based on the Changes clause, its 25 November 2009 response to the government’s jurisdictional brief stated: “As for the application of the Changes clause to appellant’s claim, it is believed to be the appropriate means by which the contract price may be adjusted for the added piling work. Appellant would entertain payment of the adjusted price which it seeks...by other terms, if appropriate.” (App. resp. at 3) As shown in our following analysis, the appropriate way to resolve appellant’s claim is to apply the pricing provisions in specification ¶ 2.3.1a and Schedule G to the piling work performed, rather than the Changes clause.

In partially denying appellant’s claim, respondent relies on the so-called “merger doctrine.” *Worsham Construction Co.*, ASBCA No. 25907, 85-2 BCA ¶ 18,016 at 90,370, allowed 122 days of unabsorbed home office overhead costs claimed by the contractor,

which costs were to be included in the convenience termination settlement, based on the following rationale (85-2 BCA at 90,369):

As a general proposition, a fixed price contract is converted into a cost reimbursement contract once it is terminated for convenience and the contractor is allowed to recover, *inter alia*, its allowable costs incurred in performance of the terminated contract [footnote omitted]. [Citations omitted.] Equitable adjustment claims normally are “merged” into the pricing provisions of the termination for convenience clause and determining specific costs attributable to claim events generally is superfluous *unless* a “loss contract” is alleged or *an increase in the contract price is sought*. [Emphasis added.] *H&J Construction Co.*, ASBCA No. 1852[1], 76-1 BCA ¶ 11,903 at 57,082. As we stated in *Seven Science Industries*, [ASBCA No. 23337, 80-2 BCA ¶ 14,518] at 71,555:

Accordingly it is necessary to ascertain the extent to which appellant incurred costs in the performance of the terminated contract but it is not relevant to assign such costs to changes, delays, or “damages” which might be recoverable absent a Termination for Convenience clause.

Worsham is not applicable to appellant’s claim for two reasons. First, appellant seeks an increase in the contract price. Second, the price increase sought is not based on costs incurred – as in a Changes clause adjustment – but rather is based on specification provisions ¶ 2.3.1a, “Estimated quantities are for tender purposes only; final payment shall be made on the basis of quantities as finally erected and confirmed by measurement” (SOF ¶ 4) and Schedule G, “Unit prices are fixed and firm for the duration of the Contract and not subject to variation for any reason including...changes in the actual quantities used as compared to the estimated quantities use [sic] for the purposes of tendering” (SOF ¶ 5). Therefore, this case does not come within the merger doctrine. Accordingly, we hold that the foregoing specification provisions entitle appellant to an increase of the contract price at the specified unit prices to reflect the quantity of actual piling and foundation work performed, subject to the further adjustments and calculations required by the Termination for Convenience clause.

Our holding does not mean that the principal amount of the increased price for the piling work is due to appellant. Rather, since the contract was terminated for the convenience of the government, the FAR 52.249-2 convenience termination clause provisions control the amount ultimately due to appellant. Those provisions include the

determination of the total cost of all the work performed under the contract, subcontract termination settlement costs, fair and reasonable profit on terminated work and settlement costs on the terminated work (SOF ¶ 7). Those convenience termination settlement provisions and the net amount due the appellant have not been agreed upon by the parties or unilaterally determined by the CO (SOF ¶ 11), and are not jurisdictionally before this Board to decide in ASBCA No. 56713.

The FAR 52.249-2 convenience termination clause procedures prescribed for computing convenience termination costs are not inconsistent with the contract specification ¶ 2.3.1a and Schedule G provisions, which do not expressly refer to the FAR 52.249-2 clause (SOF ¶¶ 4, 5). We interpret those specification provisions to give appellant the right to a contract price increase at the prescribed fixed unit price multiplied by the additional quantities of piling work performed. Such interpretation assures that a FAR 52.249-2(g)(1)(iii) loss contract reduction, if any, will be based on such increased price. But those specification provisions do not limit or supersede the calculations required by the FAR 52.249-2 clause to determine the final amount due to appellant.

Even if, *arguendo*, the FAR 52.249-2 and specification provisions were deemed to be inconsistent, the former take precedence over the latter in accordance with the contract's FAR 52.215-8 ORDER OF PRECEDENCE clause, which subordinates "(e) The specifications" to "(c) Contract clauses," including FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT. *See also Southwest Marine, Inc.*, ASBCA No. 34058 *et al.*, 91-1 BCA ¶ 23,323 at 116,985 (Navy "AGR" clause that contravened DFARS Changes clause which was essentially the same as the standard FAR Changes clause, "was legally unenforceable").

We turn next to the question of how the interest due on the claim should be calculated in the context of a convenience termination, a question which *Ellett Construction Co.* did not reach. The CDA provides in 41 U.S.C. § 611:

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to § 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

In *Raytheon Co. dba Ratheon Systems Co.*, ASBCA Nos. 50166, 50987, 01-1 BCA ¶ 31,245 at 154,205, the government terminated for convenience a contract for Chaparral missile guidance sections in January 1995, and in June 1995 the contractor submitted a multi-million dollar claim alleging a defective government technical data package (TDP).

Based on superior government knowledge and misrepresentation of the maturity of the TDP, we held that the contractor was entitled to a net \$7,421,271 price increase and stated:

Interest pursuant to 41 U.S.C. § 611 will run on the incurred cost component of the allowed amount [\$7,421,271], as determined by the auditor, from the date the [CO] received [the contractor's] 27 June 1995 claim. The equitable price adjustment allowed herein will be applied to determine the final payment, if any, due in accordance with the parties' settlement of the termination claim under [the contract].

The Federal Circuit affirmed our decision in part and vacated and remanded in part. *Raytheon Co. v. White*, 305 F.3d 1354, 1364-65 (Fed. Cir. 2002). In affirming our holding on the foregoing CDA interest issue, the court stated:

The Board did not award interest on the amounts the Board allowed as prospective costs....

....

[T]he Board has not yet established an amount "found due" and did not limit its analysis of Raytheon's claim to costs actually incurred before termination. The Board's decision was instead focused on determining the correct theoretical "estimate to complete" [ETC] cost. Raytheon will not be paid that amount; instead, that number will help establish how much money, if any, is due to Raytheon pursuant to the contract's termination for convenience clause. The government agrees that once an amount is found due in that process, it will be subject to the interest provision of [41 U.S.C. §] 611. The Board's ruling was correct.

On the issues the court remanded to the Board, we increased the net price adjustment to \$11,280,199 and stated: "Since the added price adjustment is for ETC costs that were not in fact incurred, no interest is due on the added adjustment, and the added adjustment is a basis for payment only to the extent provided for in the convenience termination settlement of the contract." 03-2 BCA ¶ 32,359 at 160,071.

In *Richlin Security Service Co. v. Chertoff*, 437 F.3d 1296, 1301-02 (Fed. Cir. 2006), the contractor claimed reformation arising from a mutual mistake in employee classification, which prompted the Labor Department to determine a \$636,818 underpayment of Service Contract Act wages to underpaid employees. The government paid the \$636,818 into an escrow account managed by the contractor, who distributed the

funds to the underpaid employees. No termination for convenience was involved. The court affirmed the DOT BCA's ruling that since the contractor did not advance its own funds to pay the employees, there was no amount "found due" to the contractor on which CDA interest accrued. In support of its holding the court cited the Congressional concern in enacting CDA interest, 41 U.S.C. § 611:

"Congress was concerned with fully compensating contractors for additional costs incurred in a continuing performance under a contract." [Citation omitted.]

....

In keeping with the purpose of the statute, our prior decisions are clear that the contractor can recover interest only on amounts it actually paid.... [S]ection 611 did not authorize interest on costs never actually paid by the contractor. *Raytheon*, 305 F.3d at 1365.

In summary, the net principal amount of the increased price for the piling work, in the words of *Raytheon, supra*, is a number that will help establish how much money is due to appellant pursuant to the FAR 52.249-2 convenience termination clause. CDA interest is not payable on appellant's claimed \$10,672,710.81 price increase for a simple, yet critical reason: this amount does not correspond to the amount due pursuant to the termination for convenience clause. Moreover, the appeal record does not show the costs appellant actually incurred to perform additional piling and foundation work, whose costs plus reasonable profit, however, will be included in the settlement or determination of the convenience termination amount due to appellant.

We grant appellant's motion for summary judgment to the extent of the \$10,276,587.82 contract price increase held above and otherwise deny it. We sustain the appeal to the extent indicated, and remand it to the parties for resolution of the interest issue once the "amount due" for the additional work is determined in connection with the termination for convenience clause.

Dated: 25 January 2010

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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. 56713, Appeal of Symbion Ozdil Joint Venture, rendered in conformance with the Board's Charter.

Dated:

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