

PSBCA 6220

APPEALS OF ELTON T. COLVIN JR.

Under Contract No. HCR 39711

November 18, 2009

APPEARANCE FOR APPELLANT: Elton T. Colvin, Jr.

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APPEARANCE FOR RESPONDENT: Jessica Y. Brewster-Johnson, Esq.

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OPINION OF THE BOARD

Appellant, Elton T. Colvin, Jr., appeals a decision by Respondent, United States Postal Service, terminating for convenience his contract for transportation of mail. Appellant also appeals Respondent's final decision denying any recovery of termination for convenience costs.

We conclude that Respondent was within its contractual rights to terminate the contract for convenience. We also conclude that Appellant has demonstrated that he incurred compensable termination for convenience costs. Because the record is incomplete regarding the precise amount due, we remand to the parties for negotiation of those costs, consistent with this Opinion.

The parties elected to submit this appeal on the record, pursuant to 39 CFR § 955.12. The parties jointly requested that entitlement and quantum be resolved, and it was so ordered. (Order of March 3, 2009).

FINDINGS OF FACT

1. Renewal contract No. HCR 39711 provided for the transportation of mail by Appellant between Columbus, Mississippi and Jackson, Mississippi. The contract term began July 1, 2005, and was due to expire June 30, 2009 (PSBCA No. 6220 Appeal File Tabs (AF) 5-10).

2. Appellant had provided this mail transportation for over 32 years as the contract repeatedly had been renewed by the parties (Declaration of E. Colvin (Colvin

Decl.) p. 2).

3. The contract award was signed by Appellant on May 31, 2005, and signed by Respondent on June 3, 2005. The award was for a three month period, and the contract subsequently was amended to cover the four year term. (AF 5-10).

4. Section B.1.3 of the contract, Service Requirements, provided:

Section 2.3.3.d of the terms and conditions, Termination for the Postal Service Convenience, is incorporated in this contract; Section 2.3.3.c, Termination with Notice, does not apply.

(AF 10, p. 32).

5. Section 2.3.3b of the contract, For Transportation Routes (i.e., Not Box Delivery or Combination Routes), provided:

Based on negotiations prior to contract award or renewal, the contracting officer or the supplier may terminate the contract or the right to perform under it, in whole or in part under 2.3.3c [Termination with Notice] or 2.3.3d.

(AF 11, p. 64).

6. Section 2.3.3d of the contract, Termination for the Postal Service's Convenience, provided, in pertinent part:

The Postal Service reserves the right to terminate a regular contract, or any part thereof, for its sole convenience. In the event of such termination, the supplier must immediately stop all work and must immediately cause any and all of its suppliers and subcontractors to cease work. After termination, the supplier may submit to the contracting officer a termination claim in the form and with the certification prescribed by the contracting officer. The claim must be submitted promptly, but in no event more than 180 days after the effective date of termination, unless an extension in writing is granted by the contracting officer. However, if the contracting officer determines that the facts justify such action, any termination claim may be received and acted upon at any time after the 180-day period. Upon failure of the supplier to submit a termination claim within the time allowed, the contracting officer may determine, on the basis of information available, the amount, if any, due the supplier by reason of the termination and will pay that amount. The supplier will not be required to comply with the cost accounting standards and principles for this purpose. The supplier will not be paid for any work performed or costs incurred which reasonably could have been avoided. The supplier and the contracting officer shall agree upon the whole or any part of the amount to be paid (including an allowance for the fee) to the supplier by reason of the termination. The supplier has the right of review through the contracting officer to the next higher level contracting authority and/or under the Claims and Disputes clause of the determination made by the contracting officer pertaining to the financial amount ONLY except that if the supplier fails to request an extension of time, the supplier will have no right of review.

(AF 11, p. 64).

7. Respondent decided to move certain mail processing operations from Columbus, Mississippi to Grenada, Mississippi (Declaration of D. Amos (Amos Decl.) ¶ 2).

8. This decision was based on Respondent's review of its mail processing and transportation operations and was intended to achieve efficiencies, eliminate redundancies, and improve operational performance (Amos Decl. ¶¶ 3-4). In support of this change in postal operations, eight postal employees and two mail sorting machines were moved from Columbus to Grenada (Declaration of T. McQuarter (McQuarter Decl.) ¶¶ 2-3; Amos Decl. ¶ 6).

9. Postal operational personnel informed Respondent's contracting officer that mail processing would transfer from Columbus to Grenada. The contracting officer was further informed that this operational change would result in the lack of an operational need for Appellant's contract transporting mail between Jackson and Columbus because there were other existing transportation contracts in place to move the mail between Jackson and Grenada, and between Grenada and Columbus. Essentially, due to the change in processing method, Appellant's contract became redundant with other existing and under-utilized contracts. (Declaration of B. Mays (Mays Decl.) ¶ 4; Amos Decl. ¶¶ 5, 7). The contracting officer decided to terminate Appellant's contract for convenience based on this operational redundancy (Mays Decl. ¶ 6).

10. On July 11, 2008, the contracting officer notified Appellant that his contract would be terminated for convenience by leaving Appellant a telephone message. On the same date by Express Mail, the contracting officer transmitted formal notice of the termination effective July 13, 2008, styled as a final decision (Colvin Decl. p. 2; AF 2, 4).

11. The termination notice stated:

Under the provisions of 2.3.3d Termination for Convenience (Transportation), you are not entitled to indemnity. Highway Contract Route 39711 is being terminated because the service is no longer needed.

(AF 4). An Amendment to Transportation Services Contract was attached to the notice. It stated that the reason for the termination was that mail would be dispatched directly to Grenada rather than Jackson, and that mail from Columbus would be dispatched to Grenada for processing under another existing contract, rendering HCR 39711 "no longer needed." (AF 4, p. 10). Appellant was paid the contract rate for service through the effective date of termination (AF 3).

12. Appellant filed a timely appeal challenging the termination decision, contending that Respondent was not entitled to terminate the contract because the service it provided was still needed and because the termination notice was inadequate (AF 2). That appeal was docketed as PSBCA No. 6220.

13. By letter dated December 17, 2008, Appellant submitted to the contracting officer a termination cost proposal in the amount of \$54,030.60. The proposal was based on 180 days of compensation at the contract rate for what Appellant asserted would have been a reasonable period of notice for the termination. (PSBCA No. 6241 Appeal File Tab (Supp. AF) 5).

14. By letter dated December 23, 2008, a different contracting officer for Respondent replied to Appellant's termination cost proposal, in relevant part, as follows:

This office would consider a claim for actual expenses you incurred in the dis-

continuance of service. A detailed analysis of the unavoidable costs you incurred due to the termination of this contract is required. This office also requests that you provide a detail (sic) description of the efforts you have made to mitigate the costs associated with the termination.

(Supp. AF 4).

15. By letter dated January 3, 2009, Appellant replied to the contracting officer. Appellant stated that he had spread his contract expenses out over the four year term of the contract, and the termination left him with a truck that he could not use on other contracts as well as insurance on that truck. He further stated that he was trying to sell the truck without success. However, Appellant did not identify specific dollar amounts associated with those costs. He again asked for 180 days' compensation (Supp. AF 3).

16. By letter dated January 8, 2009, without further discussion, Respondent's contracting officer issued a final decision denying Appellant's termination cost proposal in its entirety. The final decision was based on Appellant's failure to have shown attempts to mitigate damages and his failure to have demonstrated "any specific costs you incurred in ceasing operations." It did not address Appellant's statements concerning his costs for the truck used on the contract, his representations that he had been trying to sell the truck and could not use it on other contracts, nor did it request dollar amounts for those costs. (Supp. AF 2).

17. By letter dated February 21, 2009, Appellant timely appealed the final decision. Appellant's notice of appeal asserted that Respondent should have terminated the contract under clause 2.3.3c, which would have provided 60 day's notice, rather than the "24 hours notice" he received. (Supp. AF 1). The record does not contain a response from Respondent.

18. Appellant's experience had been that the contract for this route was repeatedly renewed for four-year terms. He intended to recover his truck expenses over the four-year period of the contract with the expectation that the contract would run its course. When the contract was terminated, Appellant was left with an unneeded truck the cost of which was not fully recovered by contract proceeds. Appellant has attempted, without success, to sell the truck. (Colvin Decl. pp. 1-2).

19. The contracting officer has indicated that he "remains willing" to provide appropriate payments under the termination for convenience clause but has not issued any payment because Appellant did not assert a compensable monetary claim or provide supporting documentation (Declaration of D. Dilges (Dilges Decl.) ¶ 8; Supp. AF 4).

#### DECISION

Contract termination - PSBCA No. 6220.

Respondent terminated this contract for convenience by its exercise of section 2.3.3d, a termination for convenience clause that does not identify the grounds upon which its exercise may be based and does not include a specifically required period of notice. Appellant argues that Respondent could only terminate the contract under this clause where the service provided by the contract is no longer needed. He contends that is not the case here since the service was being provided by other contracts. Appellant also argues that he was not given adequate notice of the termination, which caused him financial harm.

This termination for convenience clause allows Respondent to terminate "for its sole convenience" without reciting a limitation on its applicability, including the limitation argued for by Appellant. Appellant's testimony that he was told by postal officials that the termination for convenience clause only could be used where the service at issue was no longer needed at all by the Postal Service, (see Colvin Decl. p. 1), is too nonspecific to be credited. Appellant does not identify the officials who allegedly made those statements nor does he state when and under what circumstances the statements were made. [FN1] Under the Termination for Convenience clause (Finding 6), the contracting officer had broad discretion to terminate the contract, and we will uphold the termination unless the contracting officer's decision was made in bad faith or constituted an abuse of discretion. See Erol A. Guvenoz, PSBCA No. 5150, 06- 2 BCA ¶ 33,423, recon. denied, 08-2 BCA ¶ 33,960.

In order to demonstrate bad faith, Appellant must satisfy a heightened standard of proof. Bad faith in this context must be proved by the equivalent of clear and convincing evidence, see *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-1240 (Fed. Cir. 2002), that demonstrates a specific intent to harm Appellant. See Gary W. Noble, PSBCA No. 4094, 00-1 BCA ¶ 30,602 (on reconsideration).

With regard to bad faith, we credit the testimony of Respondent's contracting officer that he terminated the contract for the operational reasons that have been demonstrated and not for malicious reasons (Finding 9). Appellant has not alleged any bad faith acts of the contracting officer. Accordingly, we find that bad faith has not been demonstrated.

Proof of abuse of discretion must be "clear." See *Mary Jackson*, PSBCA No. 6193, 09-1 BCA ¶ 34,112, citing *John Reiner & Co. v. United States*, 325 F.2d 438, 442 (Ct. Cl. 1963). Analysis of clear abuse of discretion involves four considerations: (1) whether the contracting officer acted with subjective bad faith; (2) whether the contracting officer had a reasonable basis for the decision; (3) the degree of discretion vested in the contracting officer; and (4) whether a statute or regulation was violated. See *Charitable Bingo Associates, Inc. d/b/a Mr. Bingo, Inc.*, ASBCA Nos. 53470, 53249, 05-1 BCA ¶ 32,863, recon. denied, 05-2 BCA ¶ 33,088, citing *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999); *James Hovanec*, PSBCA No. 4767, 04-2 BCA ¶ 32,805, *aff'd*, *Hovanec v. Potter*, 170 Fed. Appx. 129 (2006) (unpublished). We review the four considerations of the abuse of discretion analysis.

As discussed above, there is no showing of subjective bad faith.

The second consideration - whether the contracting officer had an objectively reasonable basis for the decision - favors Respondent. The change in Respondent's operations resulting in the redundancy of Appellant's contract (Findings 7-9), satisfies this factor. The change in mail processing allowed other existing contracts to suffice, rendering the service under this contract unnecessary.

The third consideration - the degree of discretion vested in the contracting officer - also favors Respondent. The termination for convenience clause at issue is written in very broad terms, vesting considerable discretion with the contracting officer.

Consideration of the fourth factor - whether a statute or regulation was violated - also favors Respondent. No such violation has been suggested and we are aware of

none. Appellant has not proved that the termination represented a clear abuse of discretion.

Accordingly, Appellant's appeal of the termination decision is denied.

Termination costs - PSBCA No. 6241.

We find that Appellant is due certain compensable costs. We need not, however, determine the extent of permissible recovery of termination costs allowed by this termination for convenience clause. [FN2] The only termination costs identified by Appellant involve the unrecovered costs of the truck used to perform the contract and the insurance costs for that truck (Findings 15, 18), and we conclude that the clause provides for recovery of such types of costs. Cf., *Fiesta Leasing and Sales, Inc.*, ASBCA No. 29311, 87-1 BCA ¶ 19,622, recon. denied, 88-1 BCA ¶ 20,499 (awarding depreciation expenses, insurance and other continuing costs for buses that contractor was unable to lease elsewhere in applying standard government termination for convenience clause under contract for bus leases).

Appellant has proved that he should recover the unavoidable expenses he incurred for the truck used to perform the contract, to the extent he was unable to recoup those costs over the full term of the contract as expected. As he has testified, Appellant was entitled to recover his truck costs over the four year term of the contract. He was prevented from doing so by the termination, and the termination for convenience clause allows for recovery of the unrecovered portion of those costs unless they could have been avoided. Appellant's unchallenged testimony that he attempted to sell the truck, (see Finding 18), demonstrates reasonable efforts to avoid those costs. Accordingly, Appellant is entitled to the unrecovered portion of his truck costs, including insurance costs, and his appeal is sustained to that extent.

While we rule in Appellant's favor on entitlement for his convenience termination costs claim, the record is insufficiently developed to allow the Board to issue a dollar-amount award. We believe that the circumstances surrounding Appellant's termination costs claim, and its rejection by Respondent, together with the contracting officer's expressed continued willingness to entertain payment of properly documented termination costs, justify payment by Respondent despite Appellant's failure to have included dollar-amount information during this appeal. [FN3] When a termination for convenience clause is exercised, Respondent must compensate the terminated contractor fairly and to make it whole for the costs incurred in connection with the terminated portion of the work within the limits of the clause. See *Nicon, Inc. v. United States*, 331 F.3d 878, 885 (Fed. Cir. 2003). Respondent has not done so, and under the unusual circumstances of this appeal, we remand to the parties negotiation of the dollar amount of the quantum to which Appellant has proved he is due. See *Teller Environmental Systems, Inc. v. United States*, 802 F.2d 1385 (Fed. Cir. 1986); *U.A. Anderson Construction Co.*, ASBCA No. 48077, 99-2 BCA ¶ 30,565 (on reconsideration).

The appeal of the termination for convenience of the contract, docketed as PSBCA No. 6220, is denied. The appeal of the denial of Appellant's termination costs, docketed as PSBCA No. 6241, is sustained to the extent indicated above, and negotiation of the amount payable is remanded to the parties for further action consistent with this Opinion.

Gary E. Shapiro

Administrative Judge

Board Member

I concur:

William A. Campbell

Administrative Judge

Chairman

I concur:

David I. Brochstein

Administrative Judge

Vice Chairman

FN1. Moreover, the parol evidence rule would prevent the Board's addition, based on Appellant's testimony, of the limitation Appellant urges when the plain language of the clause does not include such a limitation. See ITT Avionics Div., ASBCA Nos. 50403, 50961, 52468, 03-2 BCA ¶ 32,378 (on reconsideration).

FN2. The clause does not expressly describe the costs that are recoverable. Rather, it prohibits recovery for any costs incurred which reasonably could have been avoided. (Finding 6). In the absence of an affirmative declaration of recoverable costs therefore, by negative implication, costs which could not have been avoided are recoverable unless otherwise precluded - e.g., by the clause or by applicable regulation.

FN3. We also believe that this unrepresented Appellant may have been confused by the process involved in proving his quantum claim. This confusion may have been exacerbated by the terminating contracting officer having notified Appellant that "[u]nder the provisions of 2.3.3d Termination for Convenience (Transportation), you are not entitled to indemnity" (Finding 11), and by the current contracting officer's failure to have attempted to resolve the termination claim despite his expressed continued willingness to do so. See fn. 2, supra; see also 39 CFR § 601.109(b) (efforts to resolve differences should be made before the issuance of a final decision on a claim).