UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 23, 2008

CBCA 693, 762

CORNERS AND EDGES, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

John E. Larson, Secretary of Corners and Edges, Inc., Hamilton, MT, appearing for Appellant.

Daniel J. Barry and Mogbeyi E. Omatete, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **SHERIDAN**, and **KULLBERG**.

BORWICK, Board Judge.

Appellant, Corners and Edges, Inc. (appellant or C&E), through its corporate secretary, Mr. John Larson, seeks to recover damages of $13,568,546.49 for its claims against a purchase order for courier services with an original contract value of $23,928. Appellant provided the services at the Rocky Mountain Laboratory (RML), Department of Health and Human Services (respondent). Appellant alleges that respondent wrongfully reduced the scope of work of the purchase order through a bi-lateral modification, wrongfully deprived appellant of the use of government-furnished property, increasing its contract risk by millions of dollars; and in bad faith terminated the contract for convenience. The contracting officer denied the claims in their entirety. We sustain

the decisions of the contracting officer since the claims do not withstand scrutiny either in fact or in law. Consequently, the Board denies the appeals.

Findings of Fact

Layout of the Rocky Mountain Laboratory

The RML is a campus that consists of thirty-one numbered buildings and four lettered complexes of buildings. Appellant's Supplemental Appeal File, Exhibit 8. The complex's buildings were Building A (Seminar Room, Library, Glassware and Media), Buildings HD 1-4 (maintenance), Armco 1&2 (Animals), and Buildings Hazmat 1-3 (Hazardous Materials). *Id*.

The Government defines its requirements

Before 2006, all shipments to the RML came into Building 22, which was located in the center of the campus. Appellant's Supplemental Appeal File, Exhibit 8; Transcript at 387. When shipments arrived at Building 22, the receiving office would notify the appropriate scientist, who would then walk to pick up the package. Transcript at 387. In early 2006, the RML opened a new shipping and receiving building, which was numbered Building 29. *Id.* As that building was located on the perimeter of the campus, RML management concluded that RML scientists would not want to walk there to retrieve deliveries. Consequently, respondent's management decided to establish a courier service to the laboratories within the RML complex. *Id*.

With that objective in mind, respondent issued a request for purchase order using simplified acquisition procedures. Appeal File, Exhibit 2a; Transcript at 388.[1] Because this was a new requirement and RML management did not know how long it would take a contractor to perform the services, respondent established an eight-hour time frame--7:30 a.m. to 4:30 p.m. each working day--for performance of the courier services. Appeal File, Exhibit 2c; Transcript at 388. According to the statement of work (SOW) in the contract file, the prospective contractor was to make deliveries to thirty-five single and multi-level buildings within the RML campus. Appeal File, Exhibit 2c. The contractor was to load government-provided carts or vehicles with incoming freight for delivery to appropriate buildings within the RML campus, including delivery to the Building 22 stockroom and to offices, laboratories, libraries, and storage facilities, and make delivery within one day

[1] Unless otherwise noted, appeal file citations are to the appeal file submitted by respondent in CBCA 762.

of receipt. *Id*. Perishable items were to be delivered to the proper owner not later than 4:15 p.m. the business day of receipt or were to be returned to a supply specialist or technician to be appropriately stored. *Id*.

An amendment to the solicitation made it clear to prospective vendors that the courier contractor would not be required to pack boxes; all outgoing boxes would be packed by the scientists in the laboratories and be ready for pick-up by the courier. Appeal File, Exhibit 2fiii.

The contractor was to accurately sort and distribute incoming mail twice daily to all designated mail stops and was to pick up outgoing mail from designated mail stops and transport the mail to Building 29 for pick-up by the appropriate delivery service. Appeal File, Exhibit 2c. All outgoing shipments were to be delivered to Building 29 by 2:00 p.m. each business day. *Id*.

The SOW contained a Government-Furnished Property clause, which provided:

> The Government will supply the following equipment to the contractor for official use only:
>
> Government-owned vehicles and carts, including van, forklift, 4wd ATV [four wheel drive, all terrain vehicle], pallet jacks.

Appeal File, Exhibit 2c. The SOW in the contract file stated that the hours of service "shall be from" 7:30 a.m. to 4:30 p.m., and specified that the contractor shall work forty hours per week, with no overtime. *Id*. The contractor was to provide a sufficient number of "full-time workers" to perform the work required under the contract, although the contract did not specify the number of workers required. *Id*.

The solicitation notice sent to prospective contractors stated that courier services were to be provided "between the hours" of 7:30 a.m. and 4:30 p.m. Appeal File, Exhibit 2f. The contracting officer stated she saw no difference between the statement of duty hours as articulated in the version of the SOW in the contract file and the statement of duty hours as contained in the solicitation notice sent to prospective offerors. Transcript at 476. Both the solicitation notice and the SOW in the contract file contained the requirement for "full time workers." Appeal File, Exhibit 2f.

Appellant responds to the solicitation

Appellant offered two workers to perform the courier contract, Mr. John Larson and Mrs. Desi Larson, Mr. Larson's spouse. Appeal File, Exhibit 7a. Appellant bid $2500 per month for the courier portion of the work. *Id*., Exhibit 6 at 17. However, that bid also contained the yearly number $23,928 on the first page of the bid.

Prior to receiving bids, respondent conducted a pre-bid meeting attended by appellant's representative, Mr. Larson, and other prospective contractors. Appeal File, Exhibit 2fii. Mr. Larson asked questions concerning the prospective contract, but did not raise a question about duty hours set forth in the solicitation. *Id*.

The Government awards the contract

On May 19, 2006, respondent advised appellant that it had been awarded the contract and asked appellant to attend a kick-off meeting. Appeal File, Exhibit 7b. The kick-off took place on May 24. At the meeting, when the contract was presented to him, Mr. Larson realized that appellant would be required to spend eight hours on site daily. According to his testimony, that was not how he had interpreted the solicitation. Transcript at 97.

Mr. Larson testified that appellant's plan was to have Mr. and Mrs. Larson each work a half day on the courier contract. By working a half day on the courier contract, Mrs. Larson could also work other jobs, including a job she had at a courthouse and a janitorial contract appellant had with respondent. Transcript at 96-97. Mr. Larson saw the requirement to be at the RML campus for eight hours as "foul[ing] our plan," because Mrs. Larson would be unable to leave the courier job earlier than 4:30 p.m. to go to her other jobs. *Id.* at 97.

Despite these concerns on Mr. Larson's part, both parties signed the purchase order for twelve months of courier services from June 1, 2006, through May 31, 2007, at a unit price of $1994 per month for a total price of $23,928 per year. Appeal File, Exhibit 2a. The purchase order incorporated the requirements as stated in the SOW. *Id*., Exhibit 2c.

The Government adjusts the contract hours and price with the parties signing a bilateral modification

Mail deliveries and commercial service deliveries from outside the RML did not arrive early in the morning, so that the contractor was left with nothing to do in the morning. Transcript at 390. In fact, Mr. Larson testified that he and Mrs. Larson "sat at a

little round table from 7:30 [a.m.] until 11[:00 a.m.] each day just sitting, silently not talking." *Id.* at 100.

About twenty days after the award of the contract, the contracting officer determined that the required number of hours for courier services had been overestimated. Transcript at 99, 389. Respondent wanted to reduce the daily contract service hours to five and a half hours to correspond to the time that commercial deliveries would be made to the RML receiving room. *Id.* at 101, 389. The contracting officer spoke with Mr. and Mrs. Larson about reducing the number of hours referenced in the contract. *Id.* at 394. She testified that the Larsons were not surprised that she raised this subject with them because they were experiencing a lack of work in the early hours of the morning. *Id*.

According to Mr. Larson, the contracting officer proposed a reduced price that Mr. Larson did not think was fair. Transcript at 101. He stated that both parties finally agreed on a price of $1458 per month for the reduced daily hours of work under the courier contract. *Id*. The contracting officer testified that the $1458 figure was suggested by Mr. Larson. *Id*. at 395.

Mr. Larson testified that while he signed the bilateral modification, he felt that it was "forced and coerced." Transcript at 98. Mr. Larson does not explain how appellant was forced and coerced into signing the modification. Based upon the record before us, it is evident that the parties mutually agreed upon the reduced hours and negotiated a new price for the shortened courier service hours. Mr. Larson signed the modification on July 17, 2006; it was retroactive to June 21, the day appellant commenced working the reduced hours. Appeal File, Exhibit 2b; Transcript at 393.

Mr. Larson's unfortunate adventures with a Government-provided van

During the week of July 7, 2006, an RML employee complained that appellant had used a Government-provided van and left it almost empty of gas without informing appropriate persons of the lack of fuel. Appeal File, Exhibit 7c. On July 18, a National Institutes of Health police officer reported that "someone" had left the van running for about one and one half hours. *Id.*, Exhibit 7g. In the opinion of the officer, this oversight constituted a major security and safety risk. *Id*. Further investigation established that Mr. Larson was the individual last seen using the van. *Id*.

On August 10, 2006, at sometime between 11:30 a.m. and 12:08 p.m., Mr. Larson backed the van down a road and hit the guard shack chain link fence and post. Appeal File, Exhibits 7h-i. One observer stated that the van backed up about five car lengths at a speed of ten miles per hour. *Id*., Exhibit 7j. The official police report stated that the

guards who were in the guard shack observed that the van did not slow down while backing up. Appellant's Exhibit 2. The police report found no visual obstructions and no oncoming traffic during the time of the incident that could have obstructed Mr. Larson's view and determined that the van had sufficient room to back out. *Id*. The accident caused an estimated $554 of damage to the van. Appeal File, Exhibit 7k.

By letter of August 17, 2006, the contracting officer informed appellant that Mr. Larson would not be allowed to use the van except in case of inclement weather, i.e., rain or snow, and then, only after the specific approval of two named officials. Appeal File, Exhibit 7p. During clear weather, Mr. Larson was instructed to use hand dollies to make deliveries. *Id*. The letter stated that this action was being taken as a result of the police report which concluded that the accident was caused by Mr. Larson's inattentiveness. *Id*. The restriction on Mr. Larson from using the van use did not apply to Mrs. Larson, who was always allowed to use the van. Transcript at 455.

On August 21, 2006, Mr. Larson wrote the contracting officer, refusing to take responsibility for the accident. He blamed the environment, arguing that the fence post should have been painted with brilliant yellow caution paint; the east, west, and north sides of the guard shack should have been painted with brilliant yellow caution paint; and the pavement itself should have been painted with brilliant yellow arrows. Appeal File, Exhibit 7r. Mr. Larson then blamed the van itself, arguing that it should not have had tinted windows. *Id*. He also blamed the alleged lack of adequate turn-around space in the delivery area near the building. *Id*.

At the hearing on the merits of this appeal, Mr. Larson conceded that he had used the van since the start of the contract on June 1 through August 10 and was familiar with the environment of the building and the guard shack where the incident occurred. Transcript at 48-49. The investigating officer testified at the hearing that there was sufficient room at the beginning of the road for appellant to make a three-point turn with the van instead of backing out. *Id.* at 138-41. Respondent presented pictures of the guard shack and building to confirm the investigating officer's conclusion. Appellant's Exhibits 1a-1c.

Alleged risk associated with courier deliveries by dolly instead of by van

Fifteen percent of the courier deliveries were to Building 22. Transcript at 37. Mr. Larson testified that between seventy-five and eighty percent of the deliveries were between Building 29 and a group of buildings known as "the Quad." *Id*. at 36. The Quad buildings are buildings one through seven and a building designated as "A". Appeal File, Exhibit 5 (campus map). The distance from Building 29 to the Quad is four hundred feet.

Transcript at 456. The contracting officer testified that it was inefficient to use both the van and a dolly, rather than just the dolly, to make deliveries from Building 29 to the Quad because use of both a van and a dolly involved two sets of loading operations, one for the van and one for the dolly. *Id*. Indeed, Mr. Larson admitted that he had to use the dolly to deliver packages to individual offices within the Quad. *Id*. at 34-35. Before respondent entered into the courier contract, RML scientists used dollies for deliveries. *Id*. at 458-59.

At the hearing, Mr. Larson testified about the dangerous nature of the materials appellant delivered. Mr. Larson maintained appellant delivered bacteria, which he misnamed "streptomyses aureus." Transcript at 380. RML's biomedical safety officer, who holds a doctorate in biomedical sciences, testified at the hearing. *Id*. at 354. She testified that the correct name of the bacteria mentioned by Mr. Larson was staphylococcus aureas. *Id*. at 81. She stated that the Group A staphylococcus aureas, popularly known as "the flesh-eating bacteria," caused necrotizing fasciitis, but that RML did not use that strain in its research. Rather, RML used the benign form of staphylococcus aureas present on almost all people that might cause boils, at most. *Id*. at 382-83. At one point in the hearing Mr. Larson maintained that appellant delivered dangerous prions. *Id*. at 359. However, respondent clarified that appellant carried prion antibodies, which carry minimal risk, under the contract, not the prions themselves. *Id*. at 359-61. Later, Mr. Larson admitted that appellant did not transport prions under the courier contract. *Id*. at 384. Mr. Larson maintained appellant carried a dangerous chemical ethidium bromide. *Id*. at 188. Respondent clarified that appellant carried clean ethidium bromide filters which had never been used to filter the chemical. *Id*. at 192.

RML's Occupational Health and Safety Manager testified that appellant did not carry what RML considered life-threatening biological agents; rather, it only delivered class one or class two somewhat benign biological agents. Transcript at 180. The manager explained that any hazardous material that appellant carried would have been appropriately pre-packaged for safe transport according to guidelines issued by the International Air Transport Association (IATA). IATA guidelines are more restrictive than other guidelines because the IATA guidelines control world-wide shipping of hazardous material by air. *Id*. at 185, 241. He explained that such packaging prepares material for any mode of transportation, be it by rail, air, dolly, cart, or truck. *Id*. at 178.

The class one or two biological agents appellant did carry were triple or quadruple contained. Transcript at 180-81. For example, living bacteria were put in a small vial, sealed, and then placed in bubble wrap. That assembly would then be placed in a robust pressure container, which would be packed in a box designed to withstand a variety of physical forces. *Id*. at 181. Dry ice might be packed as needed in the voids of the boxes

to keep perishable agents refrigerated. *Id*. at 182; s*ee also* Respondent's Exhibits 2A-B (photographs).

Mr. Larson did not identify an actual release of hazardous materials that occurred because of respondent's restricting his use of the Government van and limiting him to the use of a dolly in making his courier deliveries. Transcript at 94. Appellant's own industrial hygiene consultant testified that he knew of no release of hazardous material at the RML, and that if there had been a release, it would have been immediately apparent. Transcript at 275-75. He further testified that:

> There is a highly unlikely possibility of a serious release because of the quantities of chemicals [you are] dealing with, the safety precautions that are being used, and for the most part, if everything works with the transport. If it does occur, which is not going to happen very often, you have more gas spilled at a gas station than [you are] going to have diesel spilled at RML. However, if it does happen with a hazardous substance, the results are going to be way more severe.

Id. at 276. His evaluation of the relative risks of transporting the material by dolly versus by van was based on a worst-case scenario. *Id*. at 342. However, appellant presented no evidence indicating that such a scenario occurred during the performance of the contract.[2]

The Government reviews its requirements for the courier contract and terminates the contract for convenience

The courier contract contained a Termination for Convenience clause, which provided in pertinent part:

> The Government reserves the right to terminate this contract, or any part thereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. 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

[2] For this reason we consider the expert's evaluation of the relative risks of transport of allegedly hazardous material by dolly rather than by van to be worthless in the context of this case.

> 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 the contract cost principles for this purpose.

Appeal File, Exhibit 2a, 52.212-4 Contract Terms and Conditions-Commercial Items ¶ (l) (emphasis supplied).

According to the contracting officer, she kept track of the hours appellant spent in courier delivery. Transcript at 451. It became evident to her within the first month of tracking the hours that respondent did not have sufficient courier work to justify a separate contract for those services. *Id*.

The contracting officer's study of courier hours worked tracked daily deliveries from the shipping and receiving room to the scientists' laboratories. Appeal File, Exhibit 5. The delivery log showed a total of sixty-eight hours worked over a period of forty-five working days from July 26 through September 28, 2006, or an average of one and one half hours per day of delivery work. *Id*. Scientists delivered packages to the mail room themselves. Transcript at 602. The analysis did not include appellant's deliveries from the mail room to shipping and receiving at Building 29 because delivery logs were not kept for that activity. *Id*. at 602-03. The contracting officer admitted that the delivery log would be off by five minutes per day, because she estimated that was the length of time it would have taken appellant to deliver packages from the mail room to shipping and receiving. *id*. at 603. The compilation also did not include occasional deliveries of dry ice and copying paper to offices that appellant may have made during the contract period that were not included in the statement of work. *Id.* at 610.

According to Mr. Larson, he made one delivery of dry ice every two weeks--of fifteen-to-twenty-minutes duration--that was not accounted for in the contracting officer's compilation. Transcript at 628. He testified, without contemporaneous back-up corroboration, *Id.* at 632-33, that it took appellant twenty hours per week to perform the courier services contract. *Id*. at 630.

On October 5, 2006, the contracting officer terminated the contract for convenience, effective on October 6. The contracting officer determined, based upon review of the delivery logs, that there was no longer a bona fide need for the services. The contracting officer treated the termination as a no-cost termination for convenience. Appeal File, Exhibit 7cc. Appellant was paid the contract price for all months up to the

termination, including a final invoice that appellant had submitted for the period October 1 through October 6, 2006, for $336.45. *Id*., Exhibit 2d.

After the contract was terminated, the courier services were assumed by individuals working in the shipping and receiving unit. Transcript at 496. The shipping and receiving unit is staffed by two contract employees and one federal employee. *Id.* The contract employees were hired under a government wide agency contract (GWAC) contract for personal services and are considered non-federal employees. *Id*. at 500-01. The courier requirement was not re-procured. *Id*.

The claims submitted by appellant

On September 27, 2006, appellant filed a claim seeking an additional $500 per day for the alleged increased risk of bodily injury to Mr. Larson due to the Government's restricting Mr. Larson's use of the van. Appeal File, Exhibit 7v. Appellant also claimed unspecified increased costs arising from the restriction, but did not quantify those costs. *Id*. By decision of September 29, 2006, the contracting officer denied that claim. *Id*., Exhibit 7x. She stated that the RML safety officer confirmed that there was no greater risk in traversing the RML campus by foot than in walking in any city street, particularly since the speed limit on the campus is fifteen miles per hour. *Id*. Appellant appealed the denial of that claim to the Armed Services Board of Contract Appeals before January 6, 2007. *Id*., Exhibit 7aa.[3]

On January 11, 2007, appellant submitted a claim to the contracting officer seeking an additional payment of $15,578.49, maintaining that respondent had breached the contract by issuing the modification reducing the hours of courier service to be provided. Appeal File, Exhibit 3. Appellant asserted that the modification exceeded the twenty-five

[3] Until January 6, 2007, the Armed Services Board of Contract Appeals (Armed Services Board) possessed jurisdiction over appeals of respondent's contracting officer's decisions under the Contract Disputes Act. Appellant filed that appeal at the Armed Services Board before January 6, 2007. Upon the consolidation of civilian agency boards of contract appeals under the National Defense Authorization Act of 2006, Pub. L. No. 109.163, § 847, 119 Stat. 3136, 3391-95 (2006), this Board has jurisdiction over such contract disputes. Since there was no provision in the statute providing for the transfer of appeals filed prior to January 6, 2007, that appeal remains with the Armed Services Board.

percent limit "established by the courts defining a cardinal change" and that respondent had wrongfully terminated the contract for convenience. *Id*. Appellant also alleged that the original contract value was $23,928 and that $21,535.20 of that amount was profit, since "the contract [Government] provided all equipment, supplies and materials for the performance of the contract." *Id*. Appellant claimed $15,578.49, which is the difference between the alleged lost profits of $21,535.20 and the $5956.71 appellant had already been paid under the contract. *Id*.

On February 23, 2007, the contracting officer denied the claim. Appeal File, Exhibit 1. She concluded that the reduction in work hours was the product of a bi-lateral agreement with a new price and a schedule of work agreed upon by both parties. *Id*. Regarding the termination for convenience, she stated respondent properly exercised its termination rights under that clause. *Id*. As for the alleged damages arising from the termination for convenience, she stated that since the purchase order was a firm fixed price order, there was no profit. She also maintained that "under a services contract, the Government is only liable for services rendered before the date of termination." *Id*. at 3. She noted that the contract was for specified delivery services at a specified per month rate and that since all equipment, supplies, and materials had been provided by the Government, appellant suffered no financial loss. *Id*.

On January 10, 2007, appellant submitted a certified claim seeking $9,980,490, or $255,910 per day for the thirty-nine days of contract performance between August 10 and October 6, 2006. Appellant claimed that respondent's restriction of Mr. Larson's use of the van caused "the risk of catastrophic accident harming people other than [appellant's] employees increased to an amount insupportable by the then existing contract price." Appeal File, Exhibit 7ii. Appellant stated that risk was:

> based on the increased danger that a biological, chemical and radiological (BCR) accident could occur from a vehicular accident (collision) involving a motorized vehicle and the transport dolly utilized by [appellant's] employee John Larson during the transport of hazardous agents that could harm the local residential community and the workforce community at RML.

Id.

On February 23, 2007, the contracting officer denied that claim. She noted that the contract did not guarantee that appellant's employees would have exclusive use of the van for contract performance, or that the van would be the exclusive method of conveyance. Appeal File, Exhibit 7jj. She wrote that appellant was never required to transport

radioactive materials and that an accident never happened, so that the risk of a BCR accident could not be substantiated. *Id*. She denied that there was an undue danger of an accident, and stated that all packages coming in and out of the RML were triple contained except in the rare circumstance that the outer cardboard box was opened to obtain shipping papers. In that case, the material would have been protected by double containment. *Id*. She informed appellant that the RML had a fully staffed hazardous material response team, and that no release of hazardous material had ever been reported to that team. *Id*. As she had done in her decision of September 29, 2006, she reminded appellant that the speed limit on the RML campus was fifteen miles per hour, not the twenty-five miles per hour on city streets. *Id*.

Appellant filed timely notices of appeal from the contracting officer's decisions of February 23, 2007, which were docketed as CBCA 693 and 762.

Discussion

Contentions of the parties

Appellant maintains that the modification it entered into reducing the contract work hours was a cardinal change and entered into under duress, constituting a bad faith breach of contract. Appellant maintains that the Government's restriction of Mr. Larson's use of the van caused appellant undue risk to appellant's employees and the public at large.[4]

In addition to the $15,578.49 lost profits claim for the modification and the termination, appellant now states that due to these actions of respondent, it lost its cash flow to support maintenance of three European patents, one patent in Hong Kong, and two United States patents. Appellant states that it is about to lose two other United States patents due to its financial inability to pay United States Patent and Trademark Office patent fees. Appellant's Brief at 45.

[4] Appellant's original claim to the contracting officer was $9,980,490 for the van restriction. In its brief, appellant increases the claimed amount of damages by $3,572,478, which is the sum of an alleged "hazards proximity risk" of $2,608,092 and an alleged personal injury at two-person risk level of $964,386. The total damage claimed arising from the van restriction is $13,552,968. Appellant's Brief at 42.

Respondent argues that the bi-lateral contract modification reducing the number of courier service hours is an accord and satisfaction which bars appellant's claim on the modification. Respondent posits that the restriction of Mr. Larson's use of the van was reasonable in view of Mr. Larson's negligent use of the van and that the restriction was not a breach because only Mr. Larson, not appellant, was restricted from using the van. Use of the van was always available to Mrs. Larson, the other employee designated by appellant to provide the courier service under the contract. Finally, respondent argues that it properly exercised its rights under the termination for convenience clause in the contract. We address these issues below, starting with the issue of the bi-lateral modification.

The bi-lateral modification

The bi-lateral modification did not, as appellant maintains, amount to a cardinal change. A cardinal change is one in which the Government effects a change in the work so drastic that it effectively requires the contractor to perform duties materially different from those in the original bargain. *International Data Products Corp. v. United States*, 492 F.3d 1317, 1324-26 (Fed. Cir. 2007). Generally, a cardinal change arises from a unilateral modification resulting in a large increase in the contract burden. *General Dynamics Corp. v. United States*, 585 F.2d 457, 462 (Ct. Cl. 1978). In this instance the contract work-- courier services--remained the same, although with a reduced period of delivery services and a reduced price.[5]

Furthermore, the modification was bi-lateral, with no reservation of appellant's right to submit a claim for the reduced scope of work. Such a modification operates as an accord and satisfaction as to the subject matter of the modification. *Trataros Construction, Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,459. A bi-lateral modification reducing the scope of contract work and repricing work on the basis of the reduced scope bars any claim of breach or equitable adjustment arising from the modification. *Cygnus Corp. v. United States*, 63 Fed. Cl. 150, 156 (2004), *aff'd*, 177 Fed. Appx. 186 (Fed. Cir. 2006) (no Government liability arising from bi-lateral modification eliminating database from option year of contract and repricing option year work).

[5] Furthermore, contrary to appellant's assertion, a twenty-five percent reduction in contract price does not trigger a finding of a cardinal change. There is no formula to determine whether a change is cardinal or not; each case is judged on its facts. *General Dynamics*, 585 F.2d at 462.

Appellant asserts it was under duress when it signed the modification. Duress may void a bi-lateral modification if the party claiming duress establishes that: (1) one side involuntarily accepted the terms of the other; (2) circumstances permitted no other alternative; and (3) the circumstances were the result of the coercive acts of the opposite party. *Louisiana Pacific Corp. v. United States*, 656 F.2d 650, 652 (Ct. Cl. 1981). The record in this case does not show duress. The contracting officer and Mr. Larson calmly discussed the issue of excessive service hours in the original contract. After a process of negotiation, the contracting officer accepted a reduced price proposed by Mr. Larson. In short, the record establishes a process of negotiation, not a process by which the terms of the modification were imposed on appellant against its will by the coercive acts of respondent.

The van restriction

Respondent stated in the purchase order that it would provide appellant a variety of government-owned conveyances to assist appellant in making deliveries -- i.e., vehicles and carts, including a van, forklift, ATV, and pallet jacks. The Government may be held liable to a contractor under a Government-Furnished Property clause if the contractor can establish that the Government failed to provide suitable property and that the failure adversely affected the contractor's performance. *Precision Dynamics Inc.*, ASBCA 50519, 05-2 BCA ¶ 33,071; *see S.S. Mullen, Inc. v. United States*, 389 F.2d 390, 397-98 (Ct. Cl. 1968).

Appellant's claim fails for a number of reasons. Here, respondent provided the van to appellant and did not restrict appellant's use of the van, per se. Respondent acted reasonably in restricting Mr. Larson's use of the van, because based on Mr. Larson's prior use of the van, it could not trust Mr. Larson to use the van in ways that did not pose a danger or inconvenience to those around him. The restriction was not placed on appellant generally or on other of appellant's employees. In short, appellant has not shown that respondent deprived it of Government-furnished property.

Second, appellant has not shown that the van restriction adversely affected the contractor's performance. It appears from the record that Mr. Larson's use of the van actually resulted in inefficiencies in the courier delivery process, since using the van caused Mr. Larson to engage in additional loading and unloading operations between the van and the dolly for most of its contract work, i.e., deliveries between Building 29 and the Quad. Appellant has failed to provide evidence that using only the dolly adversely affected its costs of performance or the time specified for performance by the contract.

The risk of release of hazardous material claim

Appellant claims that the use of the dolly instead of the van to make deliveries caused increased risk of release of hazardous materials. Appellant has the burden of establishing the fundamental facts of liability, causation, and resultant injury. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991). It is not enough for appellant to claim that there was a risk of leakage of hazardous materials; appellant must show that it suffered physical or financial harm as a result of an actual leak. *Hooker v. United States*, 79 Fed. Cl. 480, 485 (2007), *appeal docketed, No.* 08-5059 (Fed. Cir. Mar. 25, 2008). In *Hooker*, a case involving beaver and pig tracking contracts, the court granted judgment for the Government on a claim for damage due to radiation leakage when the plaintiff could not establish that an actual leak occurred and that the leak financially or physically harmed the plaintiff.

In this case, there was no liability on the part of the Government because respondent acted reasonably in restricting Mr. Larson's use of the Government van. Furthermore, appellant has failed to prove a release of hazardous material by appellant or its employees during contract performance.[6] As there was no release, there was no resultant injury to which appellant can point.[7] The risk claim is denied.

Termination for convenience

The termination for convenience clause grants the contracting officer exceptional authority; indeed, the clause gives the Government the right to terminate the contract without cause. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 415, et al., 07-2 BCA ¶ 33,619, at 166,510. A termination for convenience will not be overturned unless a contractor can show that the Government entered into the contract with no intention of fulfilling its terms or that the contract was terminated to allow the Government to acquire a better bargain from another source. *Krygoski Construction Co.*

[6] In any event, Mr. Larson's description of the hazardous nature of the materials he delivered for appellant was hyperbolic. At the hearing he testified that he carried flesh eating bacteria, prions, and ethidium bromide. He actually carried a benign strain of the bacteria, prion antibodies, and ethidium bromide filters, which the record shows are not hazardous.

[7] In its reply brief, appellant suggests that a "release" of allegedly hazardous substances should be construed as a state of not being contained in accordance with the rules and regulations governing the packaging of hazardous materials. Appellant's Reply Brief at 102. We find appellant's argument utterly unpersuasive, since the contravening evidence shows that the materials provided to appellant for transport were appropriately packed and there was no physical release of allegedly hazardous material.

v. United States, 94 F.3d 1537, 1541, 1543-44 (Fed. Cir. 1996). When respondent awarded the contract, it had every intention of fulfilling the contract; indeed, it paid appellant the contract price for about four months -- from June 1, to October 6, 2006. It was only after respondent observed and tracked the services that appellant was providing that it took steps to modify and ultimately terminate the contract.

Appellant disputes the tracking methodology the contracting officer used in making her determination to terminate the contract for convenience. The contracting officer's compilation is not precise, as it failed to include certain work that appellant performed under the contract, such as deliveries of packages from the mail room to the shipping and receiving building of the RML, and the occasional dry ice deliveries that appellant made. Beyond that, we have considered the credibility of the witnesses and the fact that Mr. Larson's testimony as to how many hours appellant had actually worked was not supported by contemporaneous backup and that the contracting officer's testimony was. Considering the record as a whole, we conclude that the contracting officer's compilation, while not perfect, is a reasonable estimate of the number of hours worked by appellant on the courier contract. Any adjustments for missing work activities such as dry ice or mail room deliveries would not have materially changed the contracting officer's conclusion as to whether or not there was a bona fide need for continuation of the courier services.

In short, the contracting officer made a reasoned determination that respondent no longer needed to contract-out courier services; instead, she decided that the RML's in-house shipping and receiving unit could meet respondent's needs for courier service. Appellant sees this as respondent's terminating appellant's contract and turning the work over to a contractor favored by respondent. The record does not support appellant's view of the facts. Appellant does not appreciate the subtle, but real, distinction between re-procuring the requirement and switching the requirement to an in-house operation partially staffed by contract employees. Appellant has not established a bad faith termination for convenience. Since the termination for convenience was valid, appellant is only entitled to the remedy available under the contract's Termination for Convenience clause. We turn, therefore, to the remedy.

Termination for convenience remedy

Appellant claims lost profits on the work it did not perform because of the termination. In its brief, it mentions unquantified damages from alleged inability to maintain various patents. However, lost profits and consequential damages are not available under the Termination for Convenience clause in this contract. *International Data Products Corp.*, 492 F.3d at 1324-24; *Praecom v. United States*, 78 Fed. Cl. 5, 12

(Fed. Cl. 2007). Under that clause, appellant was entitled to "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination."

Since respondent paid appellant the contract price for the full months appellant performed the contract, and the appropriate ratio of the monthly price for the period of October 1 through 6, 2006, the payments appropriately reflect the percentage or work performed prior to the notice of termination.

The contracting officer's generalized statement in her decision on appellant's termination claim that "under a services contract, the Government is only liable for services rendered before the date of termination" paints with too broad a brush. Under the Termination for Convenience clause of this contract, appellant was also entitled to reasonable charges that a contractor could demonstrate to the satisfaction of the Government resulted from the termination. Boards have recognized a terminated contractor's entitlement to reimbursement for those charges under service contracts containing a similar clause. *Divecon Services, L.P. v. Department of Commerce*, GSBCA 15997-COM, et. al, 04-2 BCA 32,656, at 161,636-67; *Jon Winter & Associates*, AGBCA 2005-129-2, 2005 WL 1423636 (June 20, 2005). However, in this case, since the Government supplied all materials and supplies for the performance of this contract, appellant has not demonstrated that such charges exist.[8] We have considered appellant's other contentions and find them unpersuasive.

Decision

For the above reasons, the appeal is **DENIED**.

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[8] Appellant says in its brief that it paid $1500 for a $1,000,000 liability insurance policy for the original contract. Appellant's Brief at 24. Appellant might have been able to recover any difference in cost between a four-month insurance premium and a yearly premium under the reasonable charges portion of the Termination for Convenience clause. However, appellant did not demonstrate that appellant's insurance cost increased with the length of the policy, and, if so, what appellant's cost for a four-month premium would have been. Appellant also argues that it incurred un-quantified "executive time" and postage costs in establishing its claims. Appellant's Reply Brief at 4. Such litigation costs are unallowable. 48 CFR 31.205-47(f)(1) (2006).

ANTHONY S. BORWICK
Board Judge

We concur:

H. CHUCK KULLBERG
Board Judge

PATRICIA J. SHERIDAN
Board Judge