



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF DENIED: October 26, 2009

CBCA 1598

V.I.C. ENTERPRISES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Victor S. Carlson, President of V.I.C. Enterprises, Inc., Willow, AK, appearing for Appellant.

Glen Woodworth, Office of Regional Counsel, Department of Veterans Affairs, Anchorage, AK; and Anna Maddan, Office of the General Counsel, Department of Veterans Affairs, Palm Desert, CA, counsel for Respondent.

Before Board Judges **STERN**, **VERGILIO**, and **SHERIDAN**.

Opinion for the Board by Board Judge **SHERIDAN**. Board Judge **VERGILIO** concurs.

SHERIDAN, Board Judge.

This is an appeal from a Department of Veterans Affairs (VA) contracting officer's final decision denying a certified claim filed by V.I.C. Enterprises, Inc. (VIC) seeking \$546,000 in termination for convenience settlement costs.

In issuing this decision, the Board considered the record consisting of the pleadings, the appeal file (Exhibits 1 through 10); the appeal file supplement (Exhibits 1 through 27); appellant's schedule of costs submission; respondent's motion for summary relief; appellant's response to respondent's motion for summary relief; appellant's motion for summary relief; and respondent's response to appellant's motion for summary relief.

Respondent moves for summary relief, asserting that the contracting officer reasonably considered the termination to be in the best interests of the Government, that there is no evidence she acted in bad faith in terminating the contract, and that the costs appellant seeks are breach damages, not recoverable under the contract's termination for convenience clause. Respondent's motion for summary relief is denied because the record fails to provide with any degree of reliability the reason(s) the contract was terminated and why the contracting officer considered the termination to be in the best interests of the Government. The existence of these, and other outstanding unresolved material facts, make this matter inappropriate for summary relief in favor of respondent.

Appellant moves for summary relief, arguing that bad faith conduct on the part of the VA and the timing of the convenience termination resulted in its incurring termination for convenience settlement costs totaling \$546,000. Appellant contends that the contracting officer acted improperly in terminating the contract and turning the work over to another contractor simply because the VA feared VIC would be unable to perform. While we see no evidence that the contracting officer acted in bad faith, the facts are not sufficiently developed to determine whether the contracting officer abused her discretion in terminating the contract. Until we are able assess more fully the contract type and the facts surrounding the termination we cannot determine whether the termination was proper or improper. Notwithstanding these outstanding questions, we note that, based on the summary record, the damages appellant seeks appear to be speculative and without a sufficient nexus to the termination, whether it is determined to be a proper termination for convenience or an improper termination representing a government breach. Appellant's motion for summary relief is denied.

Background

On May 26, 2000, VIC was awarded contract V910P-0103-00 to provide interment and headstone services at the Fort Richardson National Cemetery, Fort Richardson, Alaska. Appeal File, Exhibit 2. The contract document stated "this is a performance-based contract," set forth data on work performed during fiscal year 1999, and contained VIC's unit pricing for each of the services to be provided. The term of the contract was from April 1, 2000, to March 31, 2001, with four additional option years. *Id.*, Exhibit 3.

On February 27, 2004, the contracting officer, Sandra Magers, issued amendment 2 extending the term of the contract from April 1, 2004, through March 31, 2005, at the unit pricing for the final option year. Appeal File, Exhibit 4.

VIC's owner, Victor Carlson, personally performed much of the on-site work. Appeal File Supplement, Exhibit 7a at 9. VIC had been providing interment and headstone services at the cemetery since 1992, during which time Mr. Carlson had undergone six back surgeries. Appeal File Supplement, Exhibit 1. During previous periods when Mr. Carlson was incapacitated, Mr. Carlson's wife and son helped perform the contract work. Appeal File, Exhibit 6 at 3. The VA accommodated VIC by scheduling the burials during certain times as requested by VIC. Appeal File Supplement, Exhibits 6, 7a at 9, 12-13. While Mr. Carlson was undergoing a seventh back surgery on July 19, 2004, Virginia Walker, who was both the cemetery director and the contracting officer's technical representative (COTR), approached his wife to talk about "ending the contract early with a settlement." Appeal File, Exhibit 7 at 3. Mr. Carlson spoke to Ms. Walker on July 21, 2004, and then called the contracting officer to discuss terminating the contract and "what would be good for the cemetery and [VIC]." *Id.*, Exhibits 7 at 3, 6 at 3.¹ No settlement proposal costs were discussed at that time. *Id.*, Exhibit 6 at 3-4.

On August 23, 2004, the contracting officer terminated VIC's contract for the convenience of the Government, effective August 31, 2004. Appeal File, Exhibit 5. The termination letter noted: "The requirements for the National Cemetery have changed to the extent that interment [and] headstone services are no longer needed as a separately contracted function. The National Cemetery has determined that interment [and] headstone services can be performed with in-house capabilities." *Id.* The notice went on to inform VIC that it should remove any materials and equipment from the cemetery by no later than September 10, 2004, and it had the right to request reasonable charges that resulted from the Government's termination for convenience. *Id.*

Section B.12 of the contract contained a Termination for Convenience clause which stated in pertinent part:

- (1) Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all

¹ Mr. Carlson represented in later correspondence that this discussion occurred on August 12, 2004. Appeal File, Exhibit 6 at 3. The discrepancy in these dates is not considered relevant to this decision.

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 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.

Appeal File, Exhibit 3 at 22-23.

At the time the termination notice was issued, the contracting officer planned to use in-house comprehensive work therapy [CWT] workers and VA-owned equipment to perform the interments until the VA was able to award a single full-service contract that covered all the services required for the cemetery. Appeal File, Exhibit 6 at 5-6; Appeal File Supplement, Exhibit 7a at 8. The record is not clear as to the extent to which the contracting officer's plan was realized. However, post-termination, the contracting officer used a credit card to purchase at least some, if not all, of the cemetery's needed interment and headstone services from another contractor. Appeal File Supplement, Exhibit 7a at 8.²

On September 4, 2004, Mr. Carlson wrote the contracting officer asking to meet with her "about the VA purchasing the remaining [seven] months of the VIC contract" saying that the termination letter "did not address my situation and the hardship this will place on myself and family - without an income." Appeal File, Exhibit 6 at 1. Mr. Carlson wrote the contracting officer again on September 16, 2004, stating, "After reviewing billings, a good average . . . would be \$65,000.00. I would settle this matter of the contract buy-out for the amount of \$55,000.00, and the remaining balance due from past billings." *Id.*, Exhibit 6 at 2.

² It appears from the record that post-termination the VA paid its lawn maintenance contractor, Yard Chief Yard Care, Inc., to provide interment and headstone services. Appeal File Supplement, Exhibit 7a at 8. From September 1, 2004, through March 31, 2005, the VA paid for forty-six interments of in-ground casket remains, two second interments of in-ground casket remains, twenty-one first interments of in-ground cremated remains, receipt and inspection of seventy-seven headstones, and installation and replacement of forty-nine headstones. *Id.*, Exhibit 24. As of April 2006, the VA still did not have a full-service contract in place and continued to pay for the interment and headstone services it needed with a credit card. *Id.*

A meeting was held on September 29, 2004, among the contracting officer, the COTR, and Mr. Carlson, to discuss settlement. Appeal File, Exhibits 6 at 16, 7 at 3. A transcript of the meeting indicates that at the meeting the contracting officer was prepared to justify a settlement in the range of \$17,000 to \$20,000 for the work performed on the contract. However, at that time, VIC was unwilling to accept a settlement in that range and continued to demand at least \$55,000. Appeal File Supplement, Exhibit 7a at 10.

During January 2005, Mr. Carlson and the contracting officer worked together to ascertain all the work VIC had performed under the contract. The parties reached an agreement for the amount owed on performed work. On January 24, 2005, the VA paid VIC \$26,347.40 for the completed work. Exhibit 6 at 9-20.

On March 1, 2009, VIC submitted a certified claim to the contracting officer seeking \$546,000, consisting of:

- 1) Loss of equipment (dump truck impounded) - \$10,000.00;
- 2) Loss of maintenance facility - \$96,000.00 (to date);
- 3) Loss of personal residence - \$240,000.00; and
- 4) Loss of income due to loss of bonding capacity - \$200,000.00

Appeal File, Exhibit 9.

The contracting officer's final decision was issued on March 10, 2009, denying the claim in its entirety. Appeal File, Exhibit 10. The parties agree VIC has been paid for all the work it performed under the contract, and that the only issue that remains is VIC's claim for its termination costs. *Id.*, Exhibit 6 at 14-15.

Discussion

Each party has asked the Board to resolve this appeal by granting its own motion for summary relief and denying the opposing party's motion. Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant after a hearing. *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, et al., 08-2 BCA

¶ 33,975, at 168,055-56 (citing *Fred M. Lyda v. General Services Administration*, CBCA 493, 07-2 BCA ¶ 33,631).

When both parties move for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The mere fact that both parties have moved for summary relief does not impel a grant of one of the motions. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

The termination for convenience clause grants a contracting officer exceptional authority, and "[i]n no other area of contract law has one party been given such complete authority to escape from contractual obligations. This clause gives the Government the broad right to terminate without cause." *Greenlee Construction, Inc. v. General Services Administration*, CBCA 415, et al., 07-2 BCA ¶ 33,619, at 166,510 (citations omitted). "In the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive." *John Reiner & Co. v. United States*, 325 F.2d 438, 442 (Ct. Cl. 1963); *see also Salsbury Industries v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990).

The Federal Circuit has determined that the Government's right to terminate a contract for its convenience is very broad, but may be improper if the termination was motivated by bad faith, if the contracting officer clearly abused his or her discretion, or if the Government entered into the contract with no intention of allowing it to be completed. *T & M Distributors, Inc. v. United States*, 185 F.3d 1279, 1283 (Fed. Cir. 1999); *Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1541, 1543-44 (Fed. Cir. 1996); *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995); *see also Oregon Woods, Inc. v. Department of the Interior*, CBCA 1072, 09-1 BCA ¶ 34,014, at 168,202 (2008), *appeal docketed*, No. 2009-1271 (Fed. Cir. Mar. 25, 2009); *Greenlee Construction*, 07-2 BCA at 166,510. If a termination for convenience is issued under one of the aforementioned circumstances, the termination can constitute a breach of contract, which would give rise to a right to damages outside the termination for convenience clause. *Krygoski*, 94 F.3d at 1541-44.

The Federal Circuit has also stated that:

[T]he government breaches a requirements contract when it has requirements for contract items or services, but diverts business from the contractor and does not use the contractor to satisfy those requirements. In that case, the contractor is entitled to recover damages in the form of lost profits, provided it is able to meet the requirements for lost profits recovery.

Rumsfeld v. Applied Cos., 325 F.3d 1328, 1339 (Fed. Cir. 2003). The Government is entitled to reduce or otherwise change its requirements for legitimate business reasons. A termination for the Government's convenience is one way to do this, but to withstand scrutiny, the termination must be in the best interest of the Government.³

VIC urges us to find that the termination for convenience here was issued in bad faith because of Mr. Carlson's back problems and the damages VIC seeks are reasonable. In alleging bad faith, appellant posits that the work was terminated because VA officials believed VIC would be unable to perform the contract. VIC also points to the fact that the VA did not execute its plan to use in-house CWT workers to perform the services VIC was providing under the contract. Instead, for the seven months remaining in what would have been VIC's contract, the VA purchased the services it needed from another contractor.

In granting summary relief and dismissing a bad faith claim, we recently reiterated well-established case law:

A contractor who asserts that a government official was motivated by bad faith in the conduct of his duties bears the burden of proving its assertion by clear and convincing evidence -- "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is *highly probable*."

AFR & Associates, Inc. v. Department of Housing and Urban Development, CBCA 946, 09-2 BCA ¶ 34,226 at 169,170 (citing *Greenlee Construction*, 07-1 BCA at 166,062). To prove bad faith, appellant must provide facts to show by clear and convincing evidence that VA officials had something akin to a "specific intent to injure" appellant, engaged in a "proven conspiracy to get rid of" appellant, or were "motivated alone by malice" against appellant. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002).

³ When a contractor alleges that the Government breached the contract by reducing its requirements, the contractor bears the burden of proving that the Government acted in bad faith, for example, by reducing its requirements solely to avoid its contractual obligations. In the absence of a showing that the Government acted in bad faith, it will be presumed to have reduced its requirements for valid business reasons. *Technical Assistance International, Inc. v. United States*, 150 F.3d 1369, 1373 (Fed. Cir. 1998) (Government did not breach or constructively change a requirements contract for vehicle maintenance and repairs when it increased the rate of vehicle replacement, thereby decreasing its repair and maintenance requirements).

Viewed in their context, the facts reveal that the parties had a long history of working together, with the VA making certain accommodations when Mr. Carlson was incapacitated due to back problems. At the time the contract was terminated, the contracting officer believed that a convenience termination would be in the interests of both the VA and VIC. The record is not clear whether Mr. Carlson agreed, but it appears that a disagreement as to the termination was realized only after the termination was issued - when it came time to negotiate how much compensation VIC was due for the termination settlement. In viewing the existing record for summary relief, we see no compelling evidence that the contracting officer acted in bad faith in terminating the contract. However, the record is not sufficiently developed to determine the reason the contract was terminated or whether the contracting officer abused her discretion.

The document respondent proffers as the contract vehicle is also problematic as to contract type.⁴ It does not state that the VA would order all its requirements from the contractor, contain minimum or maximum quantities, or include clauses indicating the type of contract contemplated by the parties. It is unclear from the current record whether the document proffered as the contract is a requirements contract, or an indefinite delivery/indefinite quantity (ID/IQ) type contract, or is more in the nature of a basic ordering agreement.

For the Board to discern whether there was an enforceable contract and if so, what type of contract it was, the record must be more fully developed as to the facts leading to and following the termination. Until then, we are reluctant to find the contracting officer's termination of the contract was proper or improper. The existence of outstanding unresolved material facts makes this matter inappropriate for summary relief in favor of respondent.

As to appellant's motion, the record does not contain undisputed facts that the costs appellant seeks were a direct result of the termination. VIC has not demonstrated that its alleged losses represent actual, reasonable, recoverable costs. The bare record, viewed for the purpose of summary relief, lacks support. The contractor must provide reliable proof of the factual basis of the claimed amounts. As the record currently stands, the Board cannot conclude that the alleged losses were in fact incurred and reasonable and resulted from the termination. At this stage, the losses appear to be speculative and without a sufficient nexus

⁴ The determination of a contract type is a matter of law. *Maintenance Engineers v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984). The Board is not bound either by what the contract is called or by the label attached to it by the parties. *Mason v. United States*, 615 F.2d 1343, 1346 (Ct. Cl. 1980).

to the termination, whether the Board determines this was a proper termination for convenience or an improper termination representing a government breach.

Decision

The Board **DENIES** each motion for summary relief.

PATRICIA J. SHERIDAN
Board Judge

I concur:

JAMES L. STERN
Board Judge

VERGILIO, Board Judge, concurring.

As explained below, I concur with the conclusion of the panel to deny each motion for summary relief.

Contractor's motion for summary relief

In seeking summary relief and immediate payment of the entirety of its claim, the contractor contends that the "manner and timing in which this termination was executed directly caused the financial injury to VIC Enterprises." Further, the contractor asserts that the correspondence contained in the appeal file, as supplemented, demonstrates that the contracting officer terminated the contract so as to knowingly cause maximum hardship and harm to it. Contractor's Motion at 1.

When reviewed for purposes of resolving the contractor's motion for summary relief, the record does not contain undisputed facts that establish that the contracting officer terminated the contract so as to knowingly cause hardship or that the termination directly caused financial hardship. Apart from not establishing that the termination for convenience was improper for the stated reasons, the contractor has not demonstrated that its alleged losses represent actual, reasonable, recoverable costs. The limited record, viewed for summary relief, lacks support, such that the Board cannot conclude that the alleged losses were in fact incurred, reasonable, and resulted from the termination. That is, at this stage, the losses appear to be speculative without a sufficient nexus to the termination (whether a proper termination for convenience or an improper termination constituting a Government breach).

Because the existing record does not adequately support the contractor's motion, I concur in the conclusion to deny the contractor's motion for summary relief.

Government's motion for summary relief

In seeking summary relief, the Government references the Termination for Convenience clause and notes that the contractor has been paid for all work performed. It concludes that the contractor is entitled only to charges it can demonstrate directly resulted from the termination of the contract.

The Government's motion is premised on the assumption that the termination for convenience was valid. That conclusion is not borne out by the party moving for summary relief. Although not addressed by the parties, the contract appears to be a requirements contract, obligating the Government to order from the contractor the services required at the cemetery, and obligating the contractor to perform the services. Appeal File, Exhibit 3 at 2 (¶ A.1), 8-9 (¶ A.3(c), (f), (g)). For the post-termination, remainder of the option year, the Government had a continuing need for interment/headstone services; it fulfilled those requirements using other than the contractor. To resolve the Government's motion, the guidance of the Federal Circuit here is applicable:

The combined teaching of *Locke*, *Torncello*, and *Ace-Federal* is that the government breaches a requirements contract when it has requirements for contract items or services, but diverts business from the contractor and does not use the contractor to satisfy those requirements. In that case, the contractor is entitled to recover damages in the form of lost profits, provided it is able to meet the requirements for lost profits recovery noted in *California Federal Bank*. The critical point is that the government's breach of its obligation "to fill all its actual requirements . . . by purchasing from the awardee," *Medart*,

967 F.2d at 581, has the effect of taking away from the contractor the opportunity to earn a profit.

Rumsfeld v. Applied Cos., 325 F.3d 1328, 1339 (Fed. Cir. 2003). The Government has not established that the contractor's relief must be limited to that described in the Termination for Convenience clause. The contractor is not precluded from attempting to demonstrate the substance of its claim that the termination for convenience was improper. Nor, under the Government's assumptions in its motion for summary relief, is the contractor precluded from attempting to demonstrate its costs that have resulted from the termination.

The Government has not demonstrated that it is entitled to summary relief. Accordingly, I concur in the conclusion to deny the Government's motion.

JOSEPH A. VERGILIO
Board Judge

