



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: July 30, 2015

CBCA 3964

XEROX CORPORATION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Donald J. Walsh of Offit Kurman, P.A., Owings Mills, MD, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **POLLACK**, and **SULLIVAN**.

SULLIVAN, Board Judge.

By motion filed May 13, 2015, appellant, Xerox Corporation (Xerox), seeks summary relief on its appeal of the contracting officer's deemed denial of its claim seeking payment of early termination charges arising from the termination for convenience of its delivery order with the National Navy Medical Center (NNMC) for the lease of copiers and other office equipment. Respondent, General Services Administration (GSA), admits that Xerox is entitled to recover the early termination charges and offers no challenge to Xerox's calculation of the charges it is owed. For the following reasons, the Board grants Xerox's motion and appeal.

Statement of Facts

I. Schedule Contract with GSA

On October 1, 2001, GSA awarded Xerox a schedule contract that allowed federal agencies to lease copiers and other equipment from Xerox. Appeal File, Exhibit 1 (contract no. GS-25F-0062L).¹ The schedule contract contained the terms and conditions that were to govern the delivery orders issued by the ordering agencies, several of which are at issue in this appeal. The first concerns the length of the leases agencies would enter into with Xerox:

1. Statement of Government Intent

Lease Term is defined as the duration of the lease in months (not to exceed 60 months) as shown on the Ordering Agency's initial delivery order. It is understood by all parties to this contract that this is a leasing arrangement. In that regard, the Government anticipates fulfilling the leasing contract subject to the availability of appropriated funds and the continued needs of the Ordering Agency. The Ordering Agency, upon issuance of any delivery order pursuant to Special Item Numbers (SIN) 51 58, 51 58a or 51 58b, intends to use the equipment for the lease term specified in the initial delivery order so long as the needs of the Ordering Agency for the equipment or functionally similar equipment continues to exist and adequate funds are appropriated.

Exhibit 2 at 3. The schedule contract advised ordering agencies that Xerox would receive early termination charges if the agency decided to terminate early the delivery order for reasons other than the lack of (1) "a bona fide need for the equipment or functionally similar equipment;" or (2) appropriated funds sufficient to make the lease payments. *Id.* at 4, 9 (¶¶ 3, 14). The ordering agency and Xerox were to agree upon the early termination charges and incorporate them into the delivery order:

13. Early Termination Charges

Equipment leased under this agreement may be terminated at any time during a Government fiscal year by the Ordering Agency's Contracting Office responsible for the delivery order in accordance with FAR [Federal Acquisition Regulation] 52.212-4, paragraph (l) Termination for the

¹ All exhibits are found in the appeal file, unless otherwise noted.

Government's Convenience. The Termination Ceiling Charge is a limit on the amount that a contractor may claim from the Ordering Agency on the termination for convenience of a lease or failure to renew a lease prior to the end of the lease term for reasons other than those set forth in paragraph 14, Termination for Non-Appropriation. Termination ceiling charges will apply for each year of the lease term (See FAR 17.1). The Ordering Agency and contractor shall establish a Termination Ceiling amount. The Contracting Officer shall insert the Termination Ceiling Charge for amount of the first year in the order and modify it for successive years upon availability of funds.

Id. at 8. The schedule contract incorporated by reference FAR 52.212-4, Contract Terms and Conditions—Commercial Items (Mar 2009) (Deviation Feb 2007), which provided, in part, that the “ordering activity reserves the right to terminate the contract, or any part hereof, for its sole convenience.” Exhibit 2 at 88; *see* 48 CFR 52.212-4 (2009) (FAR 52.212-4).

II. Delivery Order with NNMC

On October 8, 2009, NNMC executed a delivery order against the GSA schedule contract for the supply of copiers and printers for several Navy facilities (order number N00168-10-1800). Exhibit 3. Each of the line items for the equipment to be provided stated that it was a sixty-month best value lease and that a “termination ceiling charge schedule is attached hereto and made a part hereof.” *Id.* at 89-96. The termination ceiling charge schedule identified, for each type of equipment leased the charge that would apply based upon the month the lease was terminated. *Id.* at 97-109. These charges decreased as the number of the months increased, with no charge being assessed after month sixty.² *Id.*

In July 2012, NNMC notified Xerox that it was not exercising the option on Xerox's delivery order and asked that Xerox remove its equipment no later than July 31, 2012. Appellant's Supplement to the Appeal File, Exhibit 4 (e-mail chain between NNMC officials and Xerox representatives, dated July 10, 2012). Several Xerox representatives attempted to explain in e-mail messages to NNMC officials that the term of the delivery order had not

² FAR 8.406-5 provides that the ordering agency shall follow FAR 12.403, the provision regarding termination of commercial items, when terminating a delivery order for convenience. FAR 12.403 provides that the termination procedures set forth in FAR part 49 do not apply to terminations of contracts for commercial items; instead, agencies are to follow the procedures set forth in 12.403 itself. Here, the parties have agreed to a different set of procedures for the payment of early termination charges on the schedule contract at issue.

expired and, if NNMC did not exercise the option to extend the contract, Xerox would seek payment of the early termination charges permitted by the contract. *Id.* In response, NNMC maintained that it had the right to terminate the contract by not executing the options without the payment of termination charges and reiterated the demand that Xerox remove the equipment by the end of July 2012. *Id.*

III. Proceedings Before the Board

By letter dated April 15, 2013, Xerox submitted a certified claim to the contracting officers for both NNMC and GSA, seeking payment of charges arising from the early termination of the lease delivery order. Exhibit 4. To its claim, Xerox attached twenty-one invoices for the termination charges totaling \$184,753.87.³ *Id.* The amounts invoiced were based upon the remaining months in service for the equipment and the termination charges set forth in the delivery order. Appellant's Statement of Uncontested Fact ¶ 11. Neither contracting officer issued a decision and, on July 9, 2014, Xerox filed an appeal of the GSA contracting officer's deemed denial of its claim. Exhibit 5.

After the parties unsuccessfully tried to resolve the appeal themselves, the Board ordered the GSA contracting officer to render a decision on Xerox's claim and add that decision to the appeal file. By decision dated March 13, 2015, the contracting officer determined that NNMC's right not to exercise the options on the contract without the payment of early termination charges was limited to two conditions, neither of which NNMC had asserted as a basis for the termination. Exhibit 6 at 4. Therefore, Xerox was entitled to early termination costs in accordance with section 13 of the schedule contract. *Id.* The contracting officer further stated that "GSA and Xerox should resolve the issue of damages in accordance with [the early termination charge] provision, including the application of the appropriate termination ceiling charge for the affected copiers." *Id.* Finally, the contracting officer surmised that "Xerox may have sustained less fiscal harm than otherwise would have occurred" because the "affected leased copiers were Xerox copiers that were apparently replaced with new Xerox copiers." *Id.*

After receipt of the contracting officer's decision, the Board again allowed the parties time to try to resolve the issue of quantum on Xerox's appeal, but also set a briefing schedule for Xerox to file a motion for summary relief in case those efforts were unsuccessful. Xerox

³ In its motion, Xerox asserts that its claim totals \$184,760.77. Statement of Uncontroverted Facts ¶ 11. In its claim to the contracting officer, Xerox sought payment of \$184,753.87, an amount supported by the accompanying invoices. Exhibit 4. The Board finds that the properly supported claim amount is \$184,753.87.

filed its motion for summary relief on May 13, 2015, and GSA filed its response on June 2, 2015. In its response, GSA stated that it did not challenge the calculation of the charges sought by Xerox:

After soliciting input from the Department of the Navy's National Naval Medical Center ("Navy"), the Navy could not provide the GSA with any information that would substantiate or contest the damage calculations in Appellant's Motion for Summary Relief on the issue of quantum. As such, GSA has no substantive response to Appellant's motion for summary relief.

The Board has reviewed the invoices and finds that the amount Xerox claims is supported by the invoices provided.

Discussion

I. The Board Has Jurisdiction to Decide Xerox's Appeal

With its appeal, Xerox seeks payment of early termination charges as required by the provisions of the schedule contract. Because there are two agencies involved – GSA and NNMC – and appeals from decisions of these agencies are to different boards of contract appeals, the Board must first determine that it has jurisdiction to decide this appeal.

The administration of schedule contracts often involves two or more agencies, with the GSA serving as the contracting agency for the schedule contract itself and the other federal agency, identified as the ordering agency, placing delivery orders against the schedule contract. The FAR provides guidance as to which agency is to resolve a dispute arising from a schedule contract depending upon the nature of the dispute. FAR 8.406-6 provides that the contracting officer for the ordering agency may issue final decisions on claims arising from "disputes pertaining to the performance of orders under a schedule contract." FAR 8.406-6(a). However, "disputes pertaining to the terms and conditions of schedule contracts" must be referred to the GSA contracting officer for decision. FAR 8.406-6(b). The United States Court of Appeals for the Federal Circuit has construed this regulation to be a "bright line rule" that requires any dispute requiring interpretation of the terms or conditions of the underlying schedule contract to be referred to the GSA contracting officer. *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367, 1374 (Fed. Cir. 2013). Pursuant to this rule, the GSA contracting officer is to decide the dispute even if it requires interpretation of both the schedule contract and the delivery order or resolution of performance issues on the delivery order, although the ordering agency contracting officer "clearly has a better command of the facts than would the schedule contract" contracting officer. *Id.* at 1374-75.

The dispute in this appeal arose when Xerox submitted invoices for the payment of early termination charges and NNMC refused to pay those charges, believing that its actions did not constitute termination of the contract. Because resolution of the dispute turns on the terms of the underlying schedule contract and the provisions for sixty-month leases and payment of early termination charges, Xerox properly submitted its claim to the GSA contracting officer and appealed the deemed denial of that claim to this Board. Having satisfied ourselves that we have jurisdiction, we now turn to the merits of Xerox's appeal.

II. Standard of Review

Summary relief is appropriate where there is no genuine issue of material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "Only disputes over facts that might affect the outcome of the case under governing law will preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. The moving party has the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the pleadings, depositions and affidavits, admissions, and answers to interrogatories, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party is required to point to "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324.

III. Xerox May Recover Its Early Termination Charges

Xerox does not challenge the decision not to extend the options on the delivery order. Pursuant to the schedule contract, NNMC had the right to terminate the delivery order for its sole convenience. FAR 52.212-4. Instead, Xerox seeks to be paid the early termination charges flowing from this decision not to exercise the additional option years and terminate the contract before October 2014, the end of the sixty-month lease term.

The terms of the schedule contract require that early termination charges are to be paid if the sixty-month lease term is not fulfilled absent a showing that the ordering agency either (1) no longer has a need for the goods or services provided or (2) does not have sufficient appropriated funds to make the lease payments. Based upon a review of the record, NNMC offered neither of these explanations as its reason for not extending the options on the delivery order. Therefore, Xerox may recover the early termination charges.

Xerox submitted as part of its claim to the contracting officer invoices for the early termination charges totaling \$184,753.87. These invoices contain the charges for the specific types of equipment for the remaining months of the lease determined by the date the

equipment was put into service. GSA does not challenge Xerox's calculation of the charges owed.

Xerox, in its motion, disputes the contracting officer's statement that the leased copiers were replaced with new Xerox copiers. Xerox explains that "although there were initial discussions with the Navy about Xerox supplying replacement equipment, contrary to the [contracting officer's] suspicions noted in the final determination, Xerox did not replace the equipment." Appellant's Motion at 3 n.2. GSA provides no response to this point in Xerox's motion; the contracting officer's supposition that Xerox may have suffered less harm because it supplied replacement copiers is without support. Because GSA has failed to identify a material fact in dispute, the Board has no basis upon which to deny Xerox's motion for summary relief or reduce the termination charges sought by Xerox.

Decision

The Board **GRANTS** Xerox's appeal and finds that Xerox is to be paid \$184,753.87, plus applicable interest pursuant to the Contract Disputes Act calculated from April 15, 2013. 41 U.S.C. § 7109 (2012). Payment may be made through the permanent indefinite judgment fund, 31 U.S.C. § 3104.

MARIAN E. SULLIVAN
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

HOWARD A. POLLACK
Board Judge