



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON
APRIL 20, 2017**

GRANTED IN PART: April 10, 2017

CBCA 5517

DREAM MANAGEMENT, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Timothy Sullivan and Jayna Marie Rust of Thompson Coburn LLP, Washington, DC, counsel for Appellant.

Kasey Podzius, Office of the Principal Legal Advisor, Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent.

BEARDSLEY, Board Judge.

Appellant, Dream Management, Inc. (DMI), appealed the denial of its claim for costs incurred in performing a language services contract for the Department of Homeland Security, Immigration and Customs Enforcement (ICE). Appellant asserts that the agency breached the contract, or in the alternative, the agency terminated the contract for its convenience. Appellant has elected to proceed under the Board's expedited procedure for small claims. Rule 52 (48 CFR 6101.52 (2015)). Decisions issued under the small claims

procedure are final and conclusive and shall not be set aside except in cases of fraud affecting the Board's proceedings. Rule 52(b); *see* 41 U.S.C. § 7106(b) (2012); *Palmer v. Barram*, 184 F.3d 1373 (Fed. Cir. 1999). This decision has no value as precedent.

Background

Federal Supply Schedule Contract

DMI holds a Federal Supply Schedule (FSS) contract (FSS contract) with the General Services Administration (GSA), contract number GS-10F-222BA, to provide Spanish-language translation and interpretation services. The GSA FSS contract terms and conditions (GSA terms and conditions) contained Federal Acquisition Regulation (FAR) clause 52.212-4(l) (48 CFR 52.212-4(l) (2015)), "Contract Terms and Conditions - Commercial Items (May 2014) (Alternate I - May 2014) (Deviation I - Feb 2007)." Stipulated Facts ¶ 3. That clause, titled "Termination for the Ordering Activity's Convenience," stated:

The ordering activity 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 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 an amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the contract, less any hourly rate payments already made to the Contractor plus reasonable charges the Contractor can demonstrate to the satisfaction of the ordering activity using its standard record keeping system that have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the ordering activity any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred that reasonably could have been avoided.

Exhibit 1 at 15.¹ The only other clause that allowed for any type of cancellation of the contract was a "Termination for Cause" clause. *Id.* The FSS contract included a price list for services provided, including hourly rates for Spanish-language interpretation services. *Id.* at 5. The FSS contract included the following terms:

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

Maximum order: \$1,000,000.00

Minimum order: \$100.00

Id. at 2.

On April 15, 2015, ICE posted a request on GSA's eBuy website for "Kiche² and other indigenous language translations." Stipulated Facts ¶ 4. K'iche' is an indigenous Guatemalan dialect spoken by less than ten percent of Guatemalans. On May 14, 2015, the agency issued a request for quotations (RFQ) and statement of work (SOW)³ to eligible vendors. Stipulated Facts ¶ 13; Exhibit 2 at 2. The RFQ stated that "[t]he basis for award of any resulting Task Order will be lowest price and technical acceptability, in accordance with FAR 8.405-3 and 8.404-(d). . . . Multiple awards may be made, if determined to be in the best interest of the Government." Exhibit 2 at 3. The RFQ required quoters to provide, "[f]or estimation and quote submission," pricing for a twelve-month period of performance based on the following estimates:

4,583 Base Hours

2,000 Optional Hours

2,000 Additional Optional Hours

Maximum Hours: 8,583

Exhibit 2 at 3 (emphasis omitted). The SOW also provided that "[t]he awardee will have 60 days from the date of the award to hire all required staff for this requirement. The awardee will need to be operational No Later Than (NLT) 60 days after the award has been made." Exhibit 3 at 3. ICE executed a determination and findings (D&F) justifying entering into a task order on a time and materials basis. Exhibit 27 at 2.

To arrive at the estimated number of base hours for the task order, an ICE contracting officer's representative (COR) used the estimated amount of interpretation services used by ICE under another contract and multiplied that number by the percentage of families detained. Transcript at 234-36, 283-84, 285-87. The resulting number was an estimated minutes total. *Id.* The COR used that estimated minutes total, but mistakenly labeled it hours, and multiplied that number by the percentage of Guatemalan detainees to arrive at an

² The documents contained various spellings of the K'iche' language, but for the purposes of this decision, we will spell it "K'iche'."

³ The original SOW was revised by the agency and sent to bidders that same day. Exhibit 3. This decision will address the revised SOW.

estimated total. *Id.* The COR, therefore, arrived at an estimated 4583 base hours, or 274,980 minutes needed. *Id.* Had the COR been consistent and used minutes throughout his calculations, the agency estimate would have been 99 base hours, or 5940 minutes. *Id.*; *see also* Appellant's Post-Hearing Brief at 5. ICE records show that the agency used approximately 156.98 hours of language interpretation services for the entire twelve-month period of performance. Transcript at 307-13.

The SOW required the provision of certain minimum services, which were:

An 800 telephonic number and/or tele-video services with preference for 24-hour, 7 days per week basis, billed in 15-minute increments rounded to the nearest quarter hour with 1 hour minimum requirement. At a minimum, the Government requires translation services that can be conducted within 24 hours of being scheduled.

Exhibit 3 at 2. The SOW also stated that, "[t]he average length of a call for telephonic interpretation is 30 minutes. [Enforcement Removal Operations (ERO)] estimates calls will consume 75% of the 4,583 hours for the base year." *Id.*

Various vendors submitted questions to the agency, which responded in an email message to all vendors. One question asked:

So are you saying that I can bid on ONLY the telephonic (OPI) portion of the SOW? Am I correct that the volume for OPI is approximately 30K minutes per month? Of this, how much is for K'iche and Mam? That seems like a very high volume for such obscure languages.

Exhibit 4 at 1. The agency answered by stating:

We estimate that about two-thirds to three-quarters of the time is for oral translations while the rest will be to create documents and record DVDs with voiceovers describing activities and regulations at each center. And we will record those DVDs each time we expand or change a configuration of our detention facilities or a policy.

Id. Another question asked:

What is the actual number of minutes projected monthly for the telephonic portion of this project? (Based on the calculation of 75% of 4583 hours, interpreting volume appears to be approximately 30,000 minutes per month).

Does this include on-site and if so, can you please provide the telephonic volume only with a breakdown by language?

Id. (emphasis omitted). The agency's response was as follows: "The average length of a call for telephonic interpretation is 30 minutes. ERO estimates calls will consume 75% of the 4,583 hours for the base year. Estimates are for 3,437 hours for the Base Year." *Id.* DMI stated that the high agency estimate was a "critical factor" in the company's decision to bid on the task order. Transcript at 54. The company stated that the agency's actual requirement of ninety-nine hours would have been too low for DMI to provide services priced within its GSA schedule rate. Exhibit 4 at 1 ("As stated within the RFQ, all pricing has to be in accordance with GSA rates."). DMI understood, however, that the estimated hours were not a guaranteed minimum, but instead thought that the hours were a target. Transcript at 56, 137, 210; Exhibit 30 at 2.

DMI also understood that the agency may not order the estimated number of base hours. Transcript at 128. DMI's president and chief executive officer testified that in his experience, Government orders came "pretty close to the base numbers that they provide," but may not reach those estimated number of hours. *Id.* at 129. DMI also understood that "the number of hours probably were for different languages" and thus the required services for the K'iche' language may not reach the 4583 hours estimated. *Id.* at 127.

DMI emailed ICE its quote on June 2, 2015. The quote provided a total price based on the estimated number of base and option hours. Specifically, the quote provided, "Base hours, 4583 at \$1.38 per minute = \$379,472.40." Exhibit 8 at 8. The quote also stated that "[w]e expect to cover broad business hours. We are not able to offer 24 hour coverage at this time." *Id.*

Task Order Award

On June 4, 2015, ICE awarded DMI order no. HSCEDM-15-F-00031 (the task order). Stipulated Facts ¶ 34; Exhibit 8 at 1. The task order stated: "This is an incrementally funded, Time & Materials, Task Order against the contractor's GSA schedule contract identified above. All services shall be provided and invoiced for in accordance with the Contractor's GSA terms and conditions and rates proposed in the Contractor's quote, attached to this Task Order." Exhibit 8 at 2. Attached to the task order was the SOW and DMI's quoted price of \$1.38 per minute for 4583 hours, which equals \$379,472.40. *Id.* The GSA terms and conditions were specifically referenced. *Id.* The task order also incorporated by reference the clause at FAR 52.232-7, "Payments under Time-and-Materials and Labor-Hour contracts (AUG 2012)," *id.* at 3, which provides in relevant part:

The Government will pay the Contractor as follows upon the submission of vouchers approved by the Contracting Officer or the authorized representative:

(a) Hourly rate. (1) Hourly rate means the rate(s) prescribed in the contract for payment for labor that meets the labor category qualifications of a labor category specified in the contract that are—

(i) Performed by the Contractor;

(ii) Performed by the subcontractors; or

(iii) Transferred between divisions, subsidiaries, or affiliates of the Contractor under a common control.

....

(4) The hourly rates shall include wages, indirect costs, general and administrative expense, and profit. Fractional parts of an hour shall be payable on a prorated basis.

48 CFR 52.232-7.

The task order provided for a ceiling price of \$379,472.40, which was directly taken from DMI's quotation. Exhibit 8 at 8. There was no minimum price listed on the task order. *See id.* The task order's stated period of performance was from June 4, 2015, to June 3, 2016. *Id.* DMI had sixty days from June 4, 2015, to become operational, which required the interpretation line to function on August 3, 2015. *See* Exhibit 3 at 3. ICE made two additional task order awards with similar hourly estimates to two other contractors. Stipulated Facts ¶¶ 40, 41; Transcript at 288-89. There is no evidence that DMI knew of the other two awards.

Prior to award of the task order, a DMI language specialist had identified through research the subcontractor DMI intended to use for the work. Transcript at 189, 195-96. Following award of the task order, DMI negotiated with this subcontractor for twenty-four hours a day, seven days a week interpretation services. On July 14, 2015, prior to finalizing the subcontract agreement, DMI sent a clarification email to ICE asking:

I have just left a phone message to the effect that we believe we have very close to 24/7 telephonic coverage ready, yet in order to pay for 24/7, the influx of calls has to pay for it by approaching the base of 4583 hours. Any technical or administrative considerations which must be handled prior to commencement of service we wish to handle quickly. Please comment on how the agency assesses demand relative to the base hours and we will assemble a

compendium of all end-user information to be used for interpretation—the number to call, the billing code to enter, etc.

Exhibit 9 at 1-2. ICE responded that same day by stating: “As far as the contractual aspect goes, there is no guarantee in the number of hours we may order. The specified hours simply state the maximum hours we may require under each [contract line item number (CLIN)].” *Id.* After a series of email messages between a DMI language specialist and the subcontractor, only one of which was sent by DMI’s chief executive officer, DMI executed a subcontractor agreement on July 17, 2015, for K’iche’ interpreters. Stipulated Facts ¶¶ 49; Exhibits 29, 30, 31, 32. The agreement required “[a] minimum of 21,500 minutes per month” and stated that “[i]n the event DHS does not meet the minimum required 21,500 minutes in a month, [the subcontractor] will bill Dream Management for 22,500 minutes.”⁴ Stipulated Facts ¶¶ 49; Exhibit 32 at 6. The agreement did provide that the 22,500 minute minimum would only cover three months and that DMI could “reset the agreement” after DMI assessed the agency’s actual demands. Transcript at 74. The agreement further stated that DMI would be charged \$1.25 per minute. Exhibit 32 at 6.

Performance of Task Order

On July 24, 2015, DMI informed the agency by email that “staff has been hired and is being trained for service. If we can beat 3 August and start sooner I’ll tell you immediately.” Stipulated Facts ¶¶ 51. The agency COR’s response stated, “Ok, Good news. I will be on leave from July 31 until August 5.” *Id.* On August 5, 2015, DMI again contacted ICE to inform the agency that “although [DMI] projected a 3 August start-up we encountered slow onboarding, training and vetting of staff.” Exhibit 33 at 2. The email message further stated that DMI would be ready for service on August 9, 2015, and would send access information to the language line by the evening of August 7, 2015. *Id.* The COR responded, “No problem. Thanks for the update.” *Id.* at 1.

On August 10, 2015, DMI emailed ICE with the call-in information and explained that the line was “live.” Exhibit 10 at 2. The ICE COR responded that same day, stating that he would need to send instructions and sign-in sheets to the field offices, which “may take until early next week to make its way through the approval process.” Exhibit 10 at 1. However, unbeknownst to DMI, the call-in information was required to go through “at least four or five

⁴ It is not clear whether the minimum number of minutes in the subcontract is 21,500 or 22,500. The subcontract states two different numbers and the representations of the parties provide no clarification. Stipulated Facts ¶¶ 49; Exhibit 32 at 6; Transcript at 71-72. This decision will use 22,500 minutes.

steps” before being distributed to the ICE field offices and could take around thirteen days. Transcript at 239-40, 242.

On August 18, 2015, an email message was sent to ICE field offices with call-in information for the other two awardees, but not for DMI. Stipulated Facts ¶ 54; Transcript at 238-39. The other two awardees had gone live before August 3, 2015. Transcript at 238. DMI’s delay in going live caused the approval process to be delayed and behind the other two awardees. *Id.* at 237-38. ICE anticipated that a “third vendor will come on-line in September with capability to provide 24-hour service with immediate response.” Stipulated Facts ¶ 54. ICE, however, never sent call-in information for DMI to its field offices, and it never informed DMI of the fact that while it was live and on standby, no ICE user had the number or could call in. Transcript at 269.

DMI informed ICE on August 21, 2015, that it had not seen any usage on the account. Exhibit 11 at 2. The email message further stated, “If we need to modify our resource deployment over time we rely on your input. Please share your observations on how service usage is projected.” *Id.* The ICE COR responded on August 24, 2015, informing DMI that “on Friday, a judge ordered our three family centers closed by October 23. We are currently awaiting to hear how the agency will proceed. I will keep you in the loop once I know more.” Exhibit 11 at 1. The email message did not explain that ICE had not yet distributed DMI’s call-in information to its field offices, which would have accounted for the lack of usage of the line. *Id.*

ICE emailed DMI with an update on September 1, 2015. In the email message, the ICE COR explained that the court ruling limited the amount of time families may remain in ICE custody but that the agency still had a need for DMI’s services. Exhibit 12 at 1. DMI responded to ask whether the services should be “paused” until the agency was ready, to which the ICE COR replied, “I’d say idle them for at least 2 weeks . . . more likely 3-4, but I won’t know until mid-Sept.” Exhibit 13 at 1. At noon on September 3, 2015, DMI informed its subcontractor that it should “expect to be idle,” so the subcontractor “put a hold” on the account for one week, during which time the agency would not be able to reach an interpreter if it called the line. Exhibit 35 at 3; Transcript at 88, 144-45, 220-21. Neither the GSA terms and conditions nor the task order contained a suspension clause. *See* Exhibits 1, 8.

Contract Modification

On September 9, 2015, DMI attempted to clarify with ICE “when lines should be live” again after the pause. Exhibit 14 at 1. The agency COR responded, “I’ll need to confer later

this week with my chief who is still out from the long weekend.” *Id.* A few days later, on September 14, 2015, DMI emailed the ICE contracting officer stating:

Since we received communication from Mr. Caruso on the court ruling . . . we have analyzed the situation about the K’iche line and determined that this situation as it is, is not sustainable for us. The K’iche interpreter line had not been used at all in the past month we had it live, and we have incurred in [sic] significant costs to set it up and maintain it based on the contract estimated amounts.

In order to maintain this line we have to have interpreters standing by around the clock to satisfy the requirements in the contract. The dialect is very difficult to source, [e]specially when it is a 24/7 operation. We cannot longer [sic] keep interpreters just waiting.

We are asking you to entertain the possibility of cancelling the contract if you think we won’t have the stated activity outlined in the contract, because we both cannot continue to incur in [sic] costs that are unnecessary. This is an attempt to mitigate costs.

Exhibit 15. The email message further stated that “[s]o far the costs of setting the line up and keeping the interpreters on stand by has made us to incur in more than \$25,000.” *Id.* The ICE contracting officer in turn, emailed the COR for advice, stating that “Dream Management has reached out to us requesting that we terminate their contract. I assume they don’t want to default and then we terminate it.” Appellant’s Hearing Exhibit 1. The email message included a few options that ICE could take in regards to the DMI contract, “let them off the hook and amicably terminate the remainder of their contract, require them to perform and see if they decide to just default, restructure the contract and give them a guaranteed minimum monthly amount regardless of our actual usage. Please let me know what you think.” *Id.* The ICE COR’s response stated, “Please terminate the remainder of their contract per their request.” *Id.*

On September 16, 2015, DMI received an email message stating, “Per your request, please review, sign and return the attached modification for the above mentioned Task Order.” The modification stated that its purpose was “to change the period of performance to end on 9/16/2015” and that “[a]ll other terms and conditions remain the same.” Exhibit 16 at 2. DMI signed the modification that day; the ICE contracting officer signed it the following morning. *Id.*

Payment Negotiations

On October 26, 2015, DMI emailed an invoice to ICE for \$39,630.84. Exhibits 17, 18. The invoice requested payment for 22,500 minutes per month prorated, which DMI described as the “minimum amount.” *Id.* ICE rejected the invoice on November 2, 2015, because according to ICE, the contract “had no guaranteed minimum” and DMI had not performed any services. Exhibit 19.

DMI subsequently sent a letter on January 13, 2016, to the ICE contracting officer requesting relief. Exhibit 20. The total amount requested was \$60,296.87, which included \$48,645 for the “minimum hours under the Contract” and \$11,651.87 for costs in pursuing resolution of the issue. Exhibit 20 at 10. After receiving no response from the contracting officer, DMI sent a letter on March 21, 2016, converting the January 13th request to a claim. Exhibit 21.

On June 8, 2016, ICE stated, “Although I agree . . . that your purchase order contained no guarantee as to the number of hours we would order[,] I do agree that you would have incurred start-up costs to prepare for performance under the purchase order.” Exhibit 49. ICE then asked for an explanation “of the actual costs [DMI] incurred to set up the line, hire the K’iche interpreters, and have them on stand-by.” *Id.* DMI responded on July 1, 2016, outlining its costs incurred.

DMI’s explanation included two invoices from its subcontractor and a table with a breakdown and explanation of costs. The invoices received from the subcontractor totaled \$35,897.50. Exhibit 22 at 6. These invoices are further supported by four checks DMI sent to its subcontractor. Exhibits 45, 46, 48, 50. The checks are dated, in order, February 15, 2016, for a sum of \$10,000; March 22, 2016, for a sum of \$12,948.75; June 6, 2016, for a sum of \$6000; and June 9, 2016, for a sum of \$6948.75. *Id.* The table of costs claimed included:

costs incurred in setting up the line	\$4,816
costs incurred in hiring the interpreters and having them on standby	\$35,897.50
[general & administrative (G&A)] costs	\$2,442.81
profit	\$2,157.82
the costs incurred in seeking a resolution to the issue	\$17,316.91
[Total]	\$62,001.04

Exhibit 22 at 3 (emphasis added). DMI presented a further breakdown of its costs incurred in setting up the line:

Administrative Costs			
	Researching for sources to staff the line	\$1,456	56 hours (language specialist) X \$26/hour
Recruitment Staffing			
	Interviewing interpreter candidates to staff the line	\$520	20 hours (language specialist) X \$26/hour
	Interviewing partners companies to staff the line for DMI	\$338	13 hours (language specialist) X \$26/hour
	Discussions with [subcontractor] to act as a sub for DMI	\$2,450	7 hours (president) X \$350/hour
Line Set Up			
	Testing the line to route the calls the proper way	\$52	2 hours (language specialist) X \$26/hour
Total Costs		\$4,816	

Id. DMI provided no documentation or other evidence to support the hourly rates charged for each employee, or to prove that the above costs were, in fact, incurred. Transcript at 172-73. Instead, DMI admitted that it had just estimated the time and costs incurred in order to provide costs to the agency. Transcript at 171-75.

Settlement Discussions and Appeal

ICE responded on August 5, 2016, offering “to offset a portion of the costs [DMI] incurred preparing for service” in the amount of \$31,189.51. Exhibit 51. DMI made a counteroffer to the agency on August 17, 2016. The counteroffer stated that DMI would be willing “to accept \$54,000 to resolve this matter.” Stipulated Facts ¶ 78. The agency responded with its final decision on October 5, 2016. The decision stated that the claim was “denied with the exception of \$100.” Exhibit 23. In addition, the decision stated that “the minimum for this task order is \$100 and the maximum ceiling is \$379,472.40, which reflects 4,583 hours of translation services.” Exhibit 23. The minimum amount was taken from the FSS contract. *Id.* The maximum ceiling was taken from the task order and had been derived from DMI’s quote for 4583 hours.

DMI timely appealed to the Board on October 17, 2016.

Discussion

Jurisdiction

The Board has jurisdiction to decide this matter pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). Resolving the disputes in this appeal does not require the interpretation of a disputed contract provision in the FSS contract. The ordering activity (ICE) contracting officer, therefore, had authority to decide the disputed issues in this case, thereby giving us jurisdiction to entertain this appeal. *See* 48 CFR 8.406-5(a); *Sharp Electronics Co. v. McHugh*, 707 F.3d 1367, 1374 (Fed. Cir. 2013).

The Task Order is a Time and Materials Contract

A threshold issue in this case is the question as to the type of contract used by the parties. The parties agree that the contract was a task order for commercial services placed against DMI’s FSS contract. DMI maintains that the task order was an indefinite-delivery, indefinite-quantity (IDIQ) contract, while ICE contends that it was a time and materials contract. The answer can be found in the plain language of the task order.

The determination of contract type is governed by an objective reading of the language of the written agreement, “not by one party’s characterization of the instrument.” *Champion Business Services v. General Services Administration*, CBCA 1735, et al., 10-2 BCA ¶ 34,539, at 170,345, *modified on reconsideration*, 10-2 BCA ¶ 34,598 (citing *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002)); *see LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (citing *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). The contract must be read as a whole

and reasonable meaning must be given to all parts so as not to interpret any provision as meaningless or so as to create a conflict with other provisions of the contract. *Hercules Inc. v. United States*, 292 F.3d 1378, 1380-81 (Fed. Cir. 2002); *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285, at 176,954. Extrinsic evidence can serve to confirm that the Board's interpretation of the plain meaning of the contract was in fact the parties' understanding. *TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006).

DMI argues that because the task order is for an indefinite number of hours, it must be an IDIQ contract. In support, DMI cites to *Mason v. United States*, 222 Ct. Cl. 436 (1980), and FAR part 16 to assert that an indefinite-delivery contract must be one of three types: "Definite-quantity contracts, requirements contracts, [or] indefinite quantity contracts." 48 CFR 16.501-2(a); see *Mason*, 222 Ct. Cl. at 444. Of the three choices, DMI asserts that the task order is best characterized as an indefinite quantity contract because it is one in which the Government must order a minimum, but can order up to a maximum, of supplies or services. To interpret the task order as an IDIQ contract, however, would ignore the parts of the task order that indicate that it is a time and materials contract, thereby rendering parts of the contract meaningless.

Here, the plain language of the task order indicated that it is a time and materials task order placed against an FSS contract. The task order specifically stated that "[t]his is an incrementally funded, Time & Materials, Task Order against the contractor's GSA schedule contract identified above." The RFQ also indicated that a time and materials contract would be awarded. The task order incorporated the Time and Materials Payments clause and met the requirements of FAR 8.404.

FAR 8.404 and FAR part 38 govern task orders placed against FSS contracts. 48 CFR 8.404, 38.301; see *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1974 (2016). The only types of order preferences for services listed in FAR 8.404 are firm fixed-price, time and materials, and labor-hour contracts. 48 CFR 8.404(h)(1). FAR part 16, while it discusses time and materials contracts, is not relevant to FSS contracts. Specifically, FAR 8.404 requires a determination and findings, a ceiling price, and an inability by the agency to accurately estimate its needs. The agency wrote a determination and findings, incorporated a ceiling price, and indicated that estimating its needs was problematic. We find that the parties entered into a time and materials contract.⁵

⁵ A question as to whether a time and materials task order was an appropriate contract vehicle for interpretation services remains.

There was No Breach Under Either the FSS Contract or the Task Order

DMI asserts that, regardless of whether the task order is a time and materials or IDIQ contract, ICE breached the contract by preparing a materially misleading estimate and requiring DMI to rely on the estimate in submitting its bid. The agency counters that, by definition, a time and materials contract cannot contain a negligent estimate.

The type of contract is relevant to the determination of whether there was a negligent estimate. A time and materials contract is used when “it is not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.” 48 CFR 8.404(h)(3)(i); *see also Coastal Government Services, Inc.*, ASBCA 49625, 97-1 BCA ¶ 28,888, at 144,049. To use a time and materials contract, the Government is not required to provide a minimum amount of services requested; it need only provide a ceiling price. 48 CFR 8.404(h)(3)(ii).

The Board has held that in estimating service hours, the Government does not guarantee that those hours will be ordered, and the “Government [is] not required under the contract to order the number of hours listed.” *Brink’s/Hermes Joint Venture v. Department of State*, CBCA 1188, 09-2 BCA ¶ 34,209, at 169,115 (finding no negligent estimate when total services used was only three percent of hours estimated in contract under time and materials portion). DMI argues that the Government can be held liable for a negligent estimate, and relies on *Womack v. United States*, 389 F.2d 793 (Ct. Cl. 1968), for support. *Womack*, however, only considered the question of negligent estimate in a requirements contract. *See also Medart, Inc.*, GSBCA 8939, 91-2 BCA ¶ 23,741, *aff’d*, 967 F.2d 579 (1992) (applying *Womack* to a requirements contract). The concept of a negligent estimate in a time and materials contract is antithetical to the contract vehicle. A time and materials contract is used, as in this case, where the amount of services needed is unknown and difficult to predict.

Nonetheless, retracing the mathematical calculations for the agency’s estimated base hours in the request for quotes shows that the agency made a significant error. The estimated number of base hours that ICE should have included was approximately ninety-nine, not 4583. Although the agency erroneously estimated the number of base hours expected, the agency was not required to provide a minimum and cannot be held liable for a negligent estimate. Thus, there was no breach of contract.

DMI argues that the Board should now read the stated number of base hours (4583) as a required minimum. However, DMI knew or should have known that the estimate was the maximum (not minimum) number of hours for CLIN 0001 and was not guaranteed. Not only was this a time and materials task order, which does not require a minimum, but also

the ceiling amount identified in the task order for CLIN 0001 was \$379,472.40 (equaling 4583 x 60 x \$1.38), which was DMI's quoted price. The agency even reduced the base hour estimate by 25% and indicated that the hours would be for all languages, not just K'iche'. There is no evidence that the agency intended the base hours to constitute a minimum, just the opposite. Moreover, DMI knew that there was no guaranteed minimum. In fact, before executing a contract with its subcontractor, DMI was told by the agency that it could not guarantee the number of hours it may order and that it was only providing a maximum number of hours.

DMI argues that the high number of estimated hours enticed the company into submitting a quotation, and speculates that it would not have submitted one had it known the correct estimate. Contract law precludes recovery for speculative damages, however. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562–63 (1931); *System Fuels, Inc. v. United States*, 666 F.3d 1306, 1311 (Fed. Cir. 2012). We cannot know and cannot guess whether DMI would have bid on the contract if the number of estimated base hours was less, and we, therefore, cannot base our decision on what DMI may have done.

The Government Terminated the Task Order for Its Convenience

DMI contends in the alternative that ICE terminated the contract for its convenience with the bilateral modification ending the period of performance. ICE argues that DMI signed the modification, making it a mutual agreement to end the contract that did not invoke the Termination for Convenience clause.

Parties may change or delete parts of the services required under a contract through modifications to the contract. *John N. Brophy Co.*, GSBCA 5122, 78-2 BCA ¶ 13,506, at 66,173. Major deletions of contract work, however, may not be accomplished through modifications. *J.W. Bateson Co. v. United States*, 308 F.2d 510, 513-14 (5th Cir. 1962); *Praecomm, Inc. v. United States*, 78 Fed. Cl. 5, 11 (2007), *aff'd*, 296 F. App'x 929 (Fed. Cir. 2008). Furthermore, if a contract contains a termination for convenience clause and the contracting officer could have invoked the clause instead of terminating the contract on some other, invalid basis, the tribunal will “constructively invoke the clause to retroactively justify the government's actions, avoid breach, and limit liability.” *Best Foam Fabricators, Inc. v. United States*, 38 Fed. Cl. 627, 638 (1997) (citing *John Reiner & Co. v. United States*, 325 F.2d 438, 444 (Ct. Cl. 1963)). A directive to end performance of the work will be considered a termination for the Government's convenience. *Maxima Corp. v. United States*, 847 F.2d 1549, 1553 (Fed. Cir. 1988); *G.C. Casebolt Co. v. United States*, 421 F.2d 710, 712 (Ct. Cl. 1970). Such a clause substitutes termination for convenience recovery costs for any breach of contract damages that plaintiff might otherwise have had. *See Inland Container, Inc. v.*

United States, 512 F.2d 1073, 1081-82 (Ct. Cl. 1975); *Drain-A-Way Systems*, GSBCA 7022, 84-1 BCA ¶ 16,929, at 84,214-15 (1983).

The bilateral modification to end performance of all work under DMI's contract was, in effect, a termination for convenience. The task order explicitly incorporated the GSA terms and conditions, which included a termination for convenience clause. Because the modification did more than change part of contract performance, and the contract included a termination for convenience clause, the modification will be treated as a termination for convenience by the agency.

The agency's use of a bilateral modification was, therefore, an invalid method with which to end the contract. The cases cited by the agency to support the argument that the Board should not disturb a "voluntary, bilateral contract action in favor of a constructive termination," *Olbeter Enterprises, Inc. v. United States Postal Service*, PSBCA 6543, 16-1 BCA ¶ 36,281, at 176,943, concerned only partial changes to contract work and are distinguishable from the current facts. See *Justman Freight Lines, Inc. v. United States Postal Service*, PSBCA 6428, 15-1 BCA ¶ 35,819, at 175,163 (2014) (refusing to disturb mutually agreed upon change deleting only a portion of contract work); *Honeycomb Co. of America*, ASBCA 44612, 02-1 BCA ¶ 31,703, at 156,588 (2001) (considering partial reduction in work not a termination because was voluntary bilateral modification designating the reduction as a change); *Seaboard Surety Co.*, ASBCA 6716, 1962 BCA ¶ 3407, at 17,488 (applying changes clause when parties agreed to elimination of some contract work and downward adjustment of contract price). *Olbeter*, cited by ICE to support its argument that a voluntary agreement should not be disturbed, does not concern a partial change, though it too does not apply here. *Olbeter* held that the agency could not invoke a retroactive termination to limit the Government's damages because the contract remained in force until the Government terminated the contract under the termination clause in the contract. 16-1 BCA at 176,943. Here, the agency never invoked the termination clause, but, nevertheless, attempted to end the contract. The agency could not terminate the entire contract without using the termination clause.

ICE argues that the Government cannot be found liable for declining to issue a termination for convenience because it is never obligated to terminate a contract for convenience. Simply because the Government is not obligated to do so does not mean that its actions cannot constitute a termination for convenience, as they did here.

The agency also argues that DMI waived its right to termination costs by signing the bilateral modification. The modification, however, did not contain no-cost termination or release language. See 48 CFR 43.204(c), 49.603-6. The modification made no mention of

how DMI's incurred costs would be treated. The determination of damages, therefore, is determined by the Termination for Convenience clause in the task order.

Termination for Convenience Remedy

Compensation under the termination for convenience clause in the task order is not limited to a percentage of work performed prior to termination plus settlement charges, but may include other expenses based on a consideration of "reasonable charges" a contractor incurred. *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,155 (citing *Russell Sand & Gravel Co. v. International Boundary and Water Commission*, CBCA 2235, 13 BCA ¶ 35,455, at 173,869); *Corners & Edges, Inc. v. Department of Health and Human Services*, CBCA 693, et al., 08-2 BCA ¶ 33,961, at 168,022-23. One of our predecessor boards observed that "[i]t is axiomatic that . . . one must strike a balance between the need for technical compliance with regulatory requirements and the need for basic fairness." *Spectrum Leasing Corp. v. General Services Administration*, GSBCA 12189, 95-1 BCA ¶ 27,317, at 136,185-86 (1994).

The basic principles governing a termination for convenience settlement are stated in the FAR and provide that:

A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract. . . . Fair compensation is a matter of judgment and cannot be measured exactly. . . . The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement.

48 CFR 49.201(a).

During the task order period of performance, DMI provided no interpretation services. However, DMI did incur costs in preparing to perform the task order, primarily the cost of providing a live line to K'iche' interpreters twenty-four hours a day and seven days a week. This cost was incurred from August 10, 2015, the day DMI's line went live, to September 3, 2015, the day DMI instructed its subcontractor to pause.

The costs to which DMI is entitled are the reasonable costs paid to its subcontractor for the time period of August 10 to September 3, 2015. The standards for determining the allowability of a contractor's costs when settling a subcontractor's claims are the "reasonableness and prudence of the settlement, including the competence and good faith with which the negotiations were conducted and the adequacy of the information upon which the settlement was based." *General Dynamics Land Systems, Inc.*, ASBCA 52283, 02-1

BCA ¶ 31,659, at 156,411 (2001) (citing *Boston Towing & Salvage Co.*, ASBCA 41357, 92-2 BCA ¶ 24,864, at 124,031).

DMI's subcontract, while reasonable, did not accurately reflect the hours of work expected. DMI guaranteed its subcontractor a fixed monthly payment based on the agency's 4583 estimated hours. Despite the fact that the agency's estimate turned out to be wrong, at the time it executed the subcontract, DMI knew that 4583 was the maximum (not minimum) number of hours for interpretation services estimated by the agency. DMI also knew that the agency did not guarantee that it would order 4583 or any other number of hours. In fact, the agency specifically told DMI to expect only 75% of the maximum estimated 4583 hours if only providing interpretation services, which DMI was. DMI also expected the hours to be divided among the different languages that ICE needed interpreted, yet DMI was only interpreting K'iche'. In addition, while the agency preferred "24/7 coverage," such coverage was not required, and DMI had not promised to provide "24/7 coverage" in its bid proposal.

Nonetheless, because it was so difficult to find K'iche' interpreters, DMI accepted the subcontractor's terms (guaranteed payment for 22,500 minutes per month at \$1.25 per minute) in order to provide the services required. DMI believed that 4583 was a target and that the agency would come close to its estimate based on DMI's previous contract experience. Even so, DMI provided for a ninety-day trial period for the subcontract, after which time it would assess the actual agency demand. DMI, however, did not have the opportunity to reassess its subcontract based on demand due to the agency's termination.

In determining DMI's termination for convenience costs, we must take into consideration that ICE's estimate was erroneous, that ICE failed to pass on DMI's number to its field offices, and that ICE failed to tell DMI that its interpretation line had not been made available to anyone. The erroneous estimate led DMI to enter into a subcontract that, in hindsight, was unnecessarily costly. The agency's failure to pass on DMI's number to the field offices not only operated to DMI's detriment, but also was a failure by ICE to mitigate DMI's costs. Effectively, the agency let DMI incur costs that it had no chance to recoup either at the time, or during the remainder of the contract. The agency also allowed DMI to make decisions about DMI's performance and termination without significant information as to why it had received no calls on its interpretation line. As such, DMI remained in the preparation stage until it was terminated. Fairness dictates that DMI recover some of those costs.

DMI paid its subcontractor for August 10 to September 16, 2015, in the amount of \$35,897.50. DMI did, however, mitigate the agency's costs by pausing its subcontract from September 3 to 16, 2015. During this time, the interpretation line was not active. We do not

find that simply because DMI chose to pay its subcontractor for services while the line was not active, DMI is entitled to these costs.

DMI paid its subcontractor the prorated share of 22,500 minutes per month, which came out to \$19,960 for August and \$15,937.50 for September. However, these costs should be reduced to reflect the fact that DMI could only have reasonably expected 75% of the 4583 hours, or 3437 hours, as the maximum number of hours for interpretation services. That number should have been even less because DMI was only providing interpretation of one language. DMI, however, could not know that 4583 or even 3437 hours was far beyond the number of hours of services actually possible. Thus, for the month of August, 22,500 minutes-per-month equals 725.80 minutes per day. For the twenty-two days in August during which the line was live, DMI would owe the subcontractor for 15,967.60 minutes. Based on the \$1.25 rate per minute DMI was charged, we find that, for August, DMI would be entitled to \$19,959.50 of its subcontractor costs. Taking the reasonably expected 75% of those hours equals \$14,969.63.

For September, 22,500 minutes per month equals 750 minutes per day. For the three days in September during which the line was live, DMI would owe the subcontractor for 2250 minutes. Based on the \$1.25 rate, we find that, for September, DMI would be entitled to \$2812.50 of its subcontractor costs. Again taking 75% of those hours, DMI is entitled to \$2109.38. Taking the total for August and September, DMI is therefore entitled to a total recovery of its preparation costs of \$17,079.

DMI has also asked for G&A costs and profit. DMI is not entitled to any of these costs. Under the FAR payments clause for time and materials contracts, the hourly rates must “include wages, indirect costs, [G&A] expense, and profit.” 48 CFR 52.232-7(a)(4). As such, these costs are already built into the contract prices and cannot be claimed by the contractor in addition to its recovery for hours performed. Since DMI did not perform any interpretation services, however, there is no recovery for G&A or profit. Additionally, anticipatory profits and consequential damages are not recoverable. *See International Data Products Corp. v. United States*, 492 F.3d 1317, 1323-24 (Fed. Cir. 2007); *Shin Enterprises, Inc.*, ASBCA 16542, 72-1 BCA ¶ 9391, at 43, 614 (determining that if the contractor has incurred no costs, no profit recovery is allowed); *see also* 48 CFR 49.202(a). DMI’s claim for G&A expenses and profit is, therefore, denied.

DMI also seeks compensation for costs incurred in seeking a resolution of the issues in the amount of \$17,316.91. DMI has suggested that these costs included attorney fees, accountant fees, and consultant fees. While settlement expenses, including accounting, legal, clerical, and similar costs reasonably necessary for the preparation and presentation of settlement claims to the contracting officer are generally allowable, 48 CFR 31.205-42(g),

the contractor has the burden of proving these costs were incurred “with sufficient certainty so that the determination of the amount . . . will be more than mere speculation.” *Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636, at 170,698 (2010) (quoting *Benmol Corp. v. Department of the Treasury*, GSBCA 16374-TD, 05-1 BCA ¶ 32,897, at 162,979); *see also Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987). DMI failed to substantiate its costs. DMI did not provide legal bills, consultant or accountant invoices, or any other substantiating documentation. In fact, DMI’s president testified that he did not believe that accounting or consultant costs were even incurred. Award of these costs would be mere speculation. For these reasons, this portion of DMI’s claim is denied.

DMI has failed to meet its burden of proving that it is entitled to the \$4816 in costs it claims for setting up the line. DMI only estimated the time expended after-the-fact and failed to maintain a log or keep track of the time claimed. DMI also failed to provide any payroll records, canceled checks, or project documentation to support these costs or hourly rates. Moreover, the hours claimed and hourly rates are not supported by the record. Fifty-six hours spent on research seems unreasonably high given that DMI had a prior relationship with the subcontractor and had already identified the subcontractor prior to its bid. Therefore, the costs DMI claimed for researching sources to staff the line are not allowable. The seven hours spent by DMI’s CEO in discussions with the subcontractor prior to execution of the subcontract also seem to be unreasonably high and are not allowed. The hourly rate charged lacks support. The other charges claimed by DMI are similarly unsupported by the record and are therefore not allowed.⁶

Decision

The appeal is **GRANTED IN PART** in the amount of \$17,079. The balance of the costs claimed is denied.

ERICA S. BEARDSLEY
Board Judge

⁶ ICE argues that the \$100 minimum in the FSS contract applies to the task order. As a result of the damages awarded for the termination for convenience, the application of the \$100 minimum to the task order need not be decided.