



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON APRIL 27, 2021**

GRANTED: April 14, 2021

CBCA 6654

FORCE 3, LLC,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Joseph J. Petrillo and Karen D. Powell of Smith Pachter McWhorter PLC, Washington, DC, counsel for Appellant.

Terrius Greene, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

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

BEARDSLEY, Board Judge.

This matter is before us on the Department of Health and Human Services's (HHS) motion to dismiss for failure to state a claim upon which relief could be granted, and cross-motions for summary judgment. For the reasons set forth below, Force 3, LLC's (Force 3) motion for summary judgment is granted. HHS's motion to dismiss and motion for summary judgment are denied.

Statement of Undisputed Facts

In May 2016, HHS placed a fixed-price delivery order under a multiple-award government-wide acquisition contract with Force 3 for FireEye support services for certain appliances previously purchased by HHS.¹ The FireEye appliances, software, and support services together made up a computer security system that protected HHS data systems from malware such as viruses, ransomware, and other attacks. The parties contracted for a base year and two one-year option periods. The base year of the contract ran from May 5, 2016, to May 4, 2017. HHS exercised the first option year, which extended the period of performance to May 3, 2018. HHS did not exercise the second option year.

Each contract year had a price of \$1,130,000, which included FireEye's per-year cost plus Force 3's margin (indirect costs and profit). Force 3 purchased, in advance, a three-year subscription to the FireEye support services, including software rights and maintenance, in order to offer HHS competitive pricing. FireEye provided license keys to HHS for the support services on June 16, 2016. An email from FireEye to HHS indicated that the end date for the licenses was March or May 2019. FireEye's standard practice is not to sell support services for less than one year and not to provide refunds to customers that want to discontinue services before the end of the purchased term.

The HHS order incorporated the terms and conditions of Force 3's May 11, 2016, proposal by express reference. The proposal's terms and conditions stated that, "[a]fter the date of expiration, non-renewal or termination of the contract, the Government shall certify in writing that it has deleted or disabled all files and copies of the software from the devices on which it was installed and is no longer in use by [sic] Government."

In July and August 2018, FireEye notified Force 3 and Force 3 notified HHS that HHS "continued to download software updates and security updates" and to seek technical support after the delivery order expired. HHS had also failed to certify that it had deleted or disabled

¹ The support services purchased by Force 3 from FireEye enabled HHS to obtain from FireEye (1) continuous intelligence (security) updates; (2) content packages; and (3) software updates. Security updates provided new security signatures and detection capabilities; content packages included updates to virtual machine guest images and associated security information; and software updates provided access to new software releases and emergency fixes. The order also included a subscription to an upgraded form of security updates and content packages called Advanced Threat Intelligence (ATI) that provided updated and contextual information about malware and other threats, and 24x7x365 technical support by FireEye by live chat, phone, email, and web.

all files and copies of the software from the FireEye devices. The parties then unsuccessfully attempted to negotiate a payment for the services. Force 3 proposed payment of the full option period with no reinstatement penalties. HHS asked for a six-month quote. Force 3 responded that FireEye would not provide renewals for less than twelve months. On September 10, 2018, HHS's information specialist stated that, "[a]fter further discussion with leadership, we would like to pay what we owe from 5/3/2018–10/3/2018 and cancel the rest of the contract."

The contract specialist notified the contracting officer on September 10, 2018, that HHS continued to use the FireEye support services, despite failing to exercise the second option period. "Once the responsible contracting officer was apprised of the situation, she made it very clear to Force 3, through the contract specialist, that Force 3 was not authorized to continue services after the expiration of the first option year." The contracting officer maintained that the services were not ordered, requested, authorized, or required by HHS, and instructed the contract specialist to ask Force 3 to discontinue the service. The contract specialist notified Force 3 on September 12, 2018, that "it is FORCE 3, INC's responsibility, as the contractor, to discontinue support when the servers are no longer under contract with the Federal government."

Because Force 3 purchased three years of support services for the FireEye appliances owned by HHS, Force 3 could not discontinue the updates or software, stop HHS from using the software, or stop FireEye from providing the services to HHS. "FireEye devices, once enabled with the 36-month FireEye software licenses, could not be shut off remotely by FireEye." According to FireEye's vice-president of the U.S. Public Sector, in his sworn affidavit, there were several ways for HHS to stop the downloads of security content or software delivery: "unplug the FireEye appliances," "disable internet access to the appliances," or "change configuration settings" in the appliances. "None of these actions required the support or cooperation of FireEye." HHS could also "disable the operation of term-limited software and/or updates to perpetual software on their appliances" without FireEye's support or cooperation. HHS, however, "would generally require support from FireEye" in order to remove previously downloaded items (such as security updates, content packages, and software updates) from the system. Nonetheless, not until early 2019 did HHS "attempt to identify and disable any government-owned equipment that was 'checking in' with FireEye in order to prevent the equipment from receiving software updates and maintenance." "HHS directly contacted the original equipment manufacturer (OEM), FireEye, via email on January 30, 2019 to determine whether the software files could be deleted or disabled by HHS." HHS also states that it was told by FireEye representatives on a follow-on telephone call on or around January 31, 2019, that it was unlikely that the agency, or even FireEye's higher level program managers, could delete or disable the software files short of deleting or disabling all other installed software from the equipment.

FireEye records show that HHS continued to download updates (security content or software updates) until January 22, 2019, and continued to operate the FireEye appliances at least through March 19, 2019. FireEye records also show that HHS users contacted FireEye for technical support on several occasions during the period from May 4, 2018, to January 7, 2019. HHS failed to ever certify that it had deleted or disabled the content and software updates it had downloaded between May 4, 2018, and January 22, 2019.

Force 3 submitted a certified claim to the HHS contracting officer in December 2018. As a result of HHS's questions regarding the claim, Force 3 submitted a restated claim to the contracting officer in May 2019. In its claim, Force 3 sought recovery of \$1,130,000 in costs for HHS's continued use of software services and technical support after the contract expired. Force 3 advanced several legal theories to justify recovery, including breach of contract, constructive execution of an option, and breach of the implied duty of good faith and fair dealing. HHS denied the claim in its entirety, contending that Force 3 failed to show that HHS continued to download software updates or that HHS was still using the software, failed to prove that HHS breached the contract because it was Force 3's duty, not HHS's, to disable and delete the software services when HHS did not exercise the second option period, and failed to prove that the breach of contract was the proximate cause of Force 3's damages. Force 3 timely appealed the contracting officer's final decision to the Board.

Discussion

Motion to Dismiss

To survive a motion to dismiss, a party “must allege facts ‘plausibly suggesting (not merely consistent with)’ a showing of entitlement to relief.” *SRA International, Inc. v. Department of State*, CBCA 6563, et al., 20-1 BCA ¶ 37,543 (quoting *American Bankers Ass'n v. United States*, 932 F.3d 1375, 1380 (Fed. Cir. 2019)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the [tribunal] to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “In reviewing a motion to dismiss for failure to state a claim, ‘we accept as true the complaint’s well-pled factual allegations,’ though not its ‘asserted legal conclusions.’” *Id.* (quoting *American Bankers Ass'n*, 932 F.3d at 1380). “We decide legal issues for ourselves, and we may treat any document that is incorporated in or attached to the complaint as part of the pleadings.” *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272 (citing *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, and Fed. R. Civ. P. 10(c)).

HHS moves to dismiss the entire appeal because Force 3 “does not present a facially plausible breach-of-contract claim.” HHS, however, has not moved to dismiss Force 3’s other two claims—constructive exercise of the option and breach of the implied duty of good faith and fair dealing—which are alternative claims for damages in the amount of the second option price of \$1,130,000. We find, therefore, that, at the least, these two claims survive HHS’s motion to dismiss.

HHS asserts that Force 3’s breach of contract claims should be dismissed for failure to state a claim upon which the Board could grant relief because Force 3 cannot demonstrate that HHS’s alleged breach of contract caused Force 3’s damages. “It is fundamental in contract law that in order to recover on a breach of contract claim, a plaintiff must prove damages—that it has been harmed.” *Northrop Grumman Computing Systems, Inc. v. United States*, 823 F.3d 1364, 1368 (Fed. Cir. 2016) (citing Restatement (Second) of Contracts § 346 (1981) (“The injured party has a right to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged.”)). “This harm can be expectancy damages, measured relative to expected profits; restitution damages, measured relative to a plaintiff’s position when the contract was signed; or reliance damages, as a sum of damages sustained as a result of a breach.” *Id.* (citing *Glendale Federal Bank, FSB v. United States*, 239 F.3d 1374, 1380-82 (Fed. Cir. 2001)). “Contract damages take into account both a party’s losses and the losses that a party avoided.” *Id.* at 1369 (citing Restatement (Second) of Contracts § 347 (1981)). Assuming HHS’s continued use of the support services without exercising the option resulted in a breach of contract, we are not convinced that Force 3 is precluded from recovering its damages just because it purchased the support services in advance. Force 3 should reap the benefit of the bargain it negotiated, specifically, that if HHS wanted to continue to use the support services offered by Force 3, it would exercise the second option period and pay Force 3 \$1,130,000 for the services.

In support of its motion, HHS relies on cases in which the contractor could not recover incurred costs that it assumed it would recover if the Government had exercised the option, as expected. *See Centennial Leasing v. General Services Administration*, GSBCA 11409, 93-2 BCA ¶ 25,609 (1992), *aff’d*, *Centennial v. Austin*, 17 F.3d 1443 (Fed. Cir. 1994) (table) (finding that the contractor could not recover the cost of financing leased vehicles incurred after the option expired even though the contractor believed that the Government had invalidly cancelled the option); *Vehicle Maintenance Services*, GSBCA 11663, 94-2 BCA ¶ 26,893 (holding that a contractor assumes the risk of its financial planning if it is based on an assumption that an option will be exercised). These cases, however, can be distinguished because in these cases, the Government did not continue to use the services after the contract expired.

HHS is correct that it had no obligation to exercise the option period, and Force 3 accepted the risk that HHS would not exercise the option period to its financial detriment. HHS, however, cannot rely on the propriety of its decision not to exercise the option to receive services at no cost, even if those services had already been paid for by Force 3. HHS's motion to dismiss is denied.

Motions for Summary Judgment

Both parties moved for summary judgment, asserting that there are no genuine issues of material fact in dispute. Summary judgment is appropriate when there is “no genuine issue of material fact and the movant is entitled to judgment as a matter of law.” *Proveris Scientific Corp. v. Innovasystems, Inc.*, 739 F.3d 1367, 1371 (Fed. Cir. 2014). “‘The moving party bears the burden of demonstrating the absence of genuine issues of material fact,’ and ‘[a]ll justifiable inferences must be drawn in favor of the non-movant.’” *Ahtna Environmental, Inc. v. Department of Transportation*, CBCA 5456, 17-1 BCA ¶ 36,600 (2016) (quoting *General Heating & Air Conditioning, Inc. v. General Services Administration*, CBCA 1242, 09-2 BCA ¶ 34,256). “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.” *Id.* We agree that there are no material facts in dispute, and Force 3 is entitled to judgment as a matter of law.

Force 3 contends that HHS constructively exercised the second option period by continuing to utilize the FireEye support services. The Government, however, cannot exercise an option by doing something other than strictly complying with the terms of the contract which created the option. *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1366 (Fed. Cir. 2000) (“The Government must exercise the option in exact accord with the terms of the contract.”). Here, HHS did not even attempt to exercise the second option period in strict compliance with the terms of the contract.

Boards and other tribunals have held, however, that “the government’s failure to exercise an option in strict compliance with its terms, while requiring the contractor to perform, is a constructive change, absent waiver or estoppel against the contractor.” *General Dynamics C4 Systems, Inc.*, ASBCA 54988, 08-1 BCA ¶ 33,779 (citing *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 323-24 (Fed. Cir. 1997); *Chemical Technology Inc.*, ASBCA 21863, 80-2 BCA ¶ 14,728; and *Holly Corp.*, ASBCA 24975, 83-1 BCA ¶ 16,327); *see also Tecom, Inc.*, IBCA 2970, et al., 94-2 BCA ¶ 26,787 (finding that if the option exercise was defective, the contractor may be entitled to an equitable adjustment under the Changes clause taking into account all of its costs incurred, plus a reasonable profit). “The constructive change doctrine has been applied historically even though

Changes clauses often do not precisely cover the circumstances of an improperly exercised option.” *Tecom, Inc.*, IBCA 2970 A-1, 95-2 BCA ¶ 27,607. These boards and other tribunals “referred to the concept of ‘constructive change orders’ as a basis for compensating a contractor whom the Government directed to perform extra-contractual work.” *Pembroke Machine Co.*, ASBCA 39028, 90-1 BCA ¶ 22,528 (1989) (citing *International Telephone & Telegraph, ITT Defense Communications Division v. United States*, 453 F.2d 1283, 1293 (Ct. Cl. 1972) (untimely notice of fund availability for multi-year contract); and *Chemical Technology, Inc.* (invalid option)). “Although the additional work directed by the Government in such contexts was beyond the express scope of the Changes clause, the notion of ‘constructive change orders’ served as a way to fashion a remedy ‘arising under the contract.’” *Id.* (citing *General Dynamics Corp.*, ASBCA 20882, 77-1 BCA ¶ 12,504 (invalid option)).

Most of these cases finding a constructive change involve the ineffective attempt by the Government to exercise an option. Here, however, HHS did not even attempt to exercise the option, much less exercised the option ineffectively. Moreover, the fact that HHS did not direct Force 3 to perform extra-contractual work argues against the application of the constructive change theory of recovery. *Cf. International Telephone & Telegraph, ITT Defense Communications Division v. United States*, 453 F.2d 1283, 1293 (Ct. Cl. 1972) (when the contracting officer required plaintiff to furnish the equipment at contract prices, despite the fact that the contract had been cancelled, it amounted to a constructive change for which plaintiff was entitled to an equitable adjustment).

We find, instead, that HHS ratified its commitment to use the Force 3 support services. By contract, HHS agreed that when the last exercised option period ended so did HHS’s right to use the support services. Nonetheless, HHS continued to use the support services at no cost and with the knowledge of the contracting officer. “Both the Court of Claims and the Comptroller General have held that acceptance of benefits with the actual or implied knowledge of the contracting officer who does nothing to deter a contractor will, in the proper case, result in a ratification by inaction or implication entitling the contractor to recover.” *HFS, Inc.*, ASBCA 43748, et al., 92-3 BCA ¶ 25,198 (citing *Williams v. United States*, 130 Ct. Cl. 435 (1955); and *Equal Employment Opportunity Commission*, B-207492, 82-2 CPD ¶ 112 (July 30, 1982)). “It is recognized that the acceptance of benefits by [authorized] representatives of the Government with knowledge of the circumstances may, in the proper case, result in a ratification of an unauthorized act by implication on a quantum meruit basis.” *Id.* (citing *To Mr. Prentice*, B-164087 (July 1, 1968)).

“Ratification is the adoption of an unauthorized act resulting in the act being given effect as if originally authorized,” and “unauthorized contracts become binding,” as written, “if they are ratified.” *Parking Co. of America*, GSBCA

7654, 87-2 BCA ¶ 19,823, at 100,296; *see Schism v. United States*, 316 F.3d 1259, 1289 (Fed. Cir. 2002) (“Ratification is ‘the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.’” (quoting Restatement (Second) of Agency § 82 (1958))). There is no one specific test that applies to every situation to determine whether ratification has occurred, *Americom Government Services, Inc. v. General Services Administration*, CBCA 2294, 16-1 BCA ¶ 36,320, at 177,079, but ratification ultimately must “be based on a demonstrated acceptance of the contract.” *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1434 (Fed. Cir. 1998).

Crowley Logistics, Inc. v. Department of Homeland Security, CBCA 6188, et al., 20-1 BCA ¶ 37,579.

Force 3 points to *HFS* to support its argument that HHS ratified the unauthorized commitment. In *HFS*, the Government had to pay software license fees and on-call maintenance in instances in which the contracting officer was aware that agency users were ordering support services that were not covered by the contract. The board held that the contracting officer’s knowledge plus inaction amounted to “a ratification by implication or inaction by the authorized official.” Here, the contracting officer knew that HHS was using the support services and took no action to stop that use until nine months after the contract expired. HHS benefitted from the support services received at no cost, hiding behind its discretionary decision to not exercise the option period. The contracting officer’s failure to curtail the use of the support services once notified resulted in a ratification of that commitment by implication or inaction. Accordingly, Force 3 is entitled to receive payment for the support services “under the terms and conditions which existed” under the contract. *Id.*

HHS argues that the contracting officer did not ratify the commitment because the support services were provided without her authorization and against her explicit direction to the contrary. We disagree. “Implicit ratification is a fact-based action that occurs when those with the authority to ratify gain actual or constructive knowledge of an unauthorized contract commitment and then affirmatively act, or fail to act, in a manner that implicitly adopts or approves that commitment.” *Crowley Logistics, Inc.* (citing *Villars v. United States*, 126 Fed. Cl. 626, 633 (2016); and *Parking Co. of America*). By failing to take action to stop the use of the support services or to disable or delete the software updates and content, the contracting officer implicitly ratified and adopted the commitment for HHS’s continued use of the support services. *Americom Government Services* (“[O]ne of the situations that will support ratification is one in which an agency overreaches by allowing

the continuation of the services and benefits but denies payment.” (citing *Janowsky v. United States*, 133 F.3d 888, 892 (Fed. Cir. 1998))). HHS continued for at least nine months to use the FireEye support services at no cost and for almost five months with the knowledge of the contracting officer.

HHS’s contention that the contract required Force 3, not HHS, to disable and delete the software has no merit. This interpretation of the contract would violate the rule of contract construction requiring us to “‘give[] a reasonable meaning to all parts of an instrument’ and not to ‘leave[] a portion of it useless, inexplicable, inoperative, void insignificant, meaningless or superfluous.’” *P.K. Management. Group, Inc. v. Department of Housing. & Urban Development*, CBCA 6185, 19-1 BCA ¶ 37,417, *aff’d*, 987 F.3d 1030 (Fed. Cir. 2021) (quoting *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36, 285). By incorporating the Force 3 proposal into the contract, the contract terms specifically required that HHS, not Force 3, discontinue its use of the support services and delete and disable all files and copies of the software from the appliances once it decided not to exercise the option.

HHS argues that, unknown to it at the time of contracting, it was impossible or impracticable for HHS to delete or disable the software or to stop using it once Force 3 had purchased the three-year subscription. “A party has no duty to perform a contractual obligation if ‘performance is rendered impossible or impracticable, through no fault of the party, because of a fact, existing at the time the contract was made, of which the party neither knew nor had reason to know and the non-existence of which was a basic assumption of the party’s agreement.’” *Hicks v. United States*, 89 Fed. Cl. 243, 258 (2009) (quoting *Massachusetts Bay Transportation Authority v. United States*, 254 F.3d 1367, 1372 (Fed. Cir. 2001)). To establish the defense of impossibility, HHS must show that performance was “objectively impossible.” *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2002) (citing *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 409 (Ct. Cl. 1978)). There is no evidence that it was objectively impossible for HHS to delete or disable the software or that performance was rendered impracticable. Force 3 has provided proof in the form of sworn testimony that HHS could have stopped the downloads of security content or software delivery and, with FireEye’s help, HHS could have deleted the downloads. Moreover, HHS did not even ask FireEye how to stop the downloads until nine months after the contract expired, and even then, according to HHS, FireEye told HHS it could delete or disable the software files by deleting or disabling all other installed software from the equipment. While maybe not ideal, it was not impossible. Nonetheless, by January 2019, the downloads stopped, suggesting that HHS found a way to stop the software updates.

HHS argues that Force 3’s payment in advance to FireEye for the second option year of support services discharged HHS’s obligation to pay Force 3 for the support services used

after May 3, 2018. This advance payment, however, does not preclude Force 3's recovery of the costs for HHS's continued use of the support services. While Force 3 accepted the financial risk that HHS would not exercise the second option period, it did not assume the risk that HHS would not pay Force 3 for its continued use of the support services. By contract, HHS had a duty to disable, delete, and stop using the support services. It failed to do so.

Damages

We find that HHS ratified an unauthorized commitment, and therefore, Force 3 is entitled to recover damages for HHS's continued use of FireEye support services. Force 3 is entitled to "the same rights to compensation, reimbursement, and indemnity as [it] would have had, if this act had been previously authorized." *Crowley Logistics, Inc.* (quoting *Leviten v. Bickley, Mandeville & Wimple, Inc.*, 35 F.2d 825, 827 (2d Cir. 1929)). Given that Force 3 has established that FireEye only sells the services that HHS utilized in twelve-month increments and customers discontinuing support services prior to the expiration of the purchased term are not entitled to a refund from FireEye, Force 3 is entitled to the cost of a full year of FireEye services. Moreover, HHS provided no evidence that it ever disabled or deleted or stopped using the downloaded FireEye support services. Since the cost of the FireEye services for that second option year had already been agreed to by the parties, Force 3 is entitled to an award of \$1,130,000.

Decision

For the foregoing reasons, the Board denies HHS's motion to dismiss and motion for summary judgment. The Board grants Force 3's motion for summary judgment and awards damages in the amount of \$1,130,000. The appeal is **GRANTED**.

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

We concur:

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge