UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 31, 2021

CBCA 6772

MICROTECHNOLOGIES LLC dba MICROTECH,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Joseph J. Petrillo and Karen D. Powell of Smith Pachter McWhorter, PLC, Tysons Corner, VA, counsel for Appellant.

Robin M. Fields and Matthew Vince, Office of General Counsel, Executive Office for United States Attorneys, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **DRUMMOND**, and **CHADWICK**.

GOODMAN, Board Judge.

Appellant, Microtechnologies LLC dba Microtech, has filed this appeal from the decision of a contracting office of respondent, Department of Justice (DOJ), denying its claim for termination for convenience costs. Appellant and respondent have filed motions for summary judgement. We grant respondent's motion, deny appellant's motion, and deny the appeal.

Background

Appellant holds a multiple-award government-wide acquisition contract (the contract) for information technology products and services. On September 25, 2017, respondent issued a fixed-price delivery order (the order) under the contract, effective September 27, 2017, for a brand name of workstation perpetual software licenses, plus travel and software maintenance. The period of performance included one base year (September 29, 2017, to September 28, 2018) and two potential option years (September 29, 2018, to September 28, 2019; and September 29, 2019, to September 28, 2020). The cost of software maintenance during each option year, if exercised, was $688,051.80.

On September 29, 2017, at the beginning of the base year of performance, appellant purchased the perpetual software licenses and software maintenance for the base year and both option years and paid the invoice for this purchase on October 31, 2017.

Two days after the base year period of performance ended, on Sunday, September 30, 2018, at approximately 2:30 p.m., appellant's financial services manager emailed respondent's Executive Office for United States Attorneys acquisitions staff, chief of operations, indicating that she had not heard from the contracting officer's representative (COR) regarding the exercise of the first option year. Later that day, at approximately 6:30 p.m., respondent transmitted via attachment to email a proposed bilateral modification designated P00002 (modification 2), which stated in part: "To exercise option year 1 for [brand name] Workstation Perpetual Software License for the period of September 29, 2018, through September 28, 2019, in the amount of $688,051.80." Appellant accepted, signed, and returned modification 2 the same day at approximately 9:10 p.m.

On Monday, October 1, 2018, at 8:37 a.m., the assistant director of respondent's acquisitions staff sent an email to appellant's financial services manager informing appellant that the option year had been exercised in error. Attached to the email was modification P00003 (modification 3), which read in part as follows: "The purpose of this modification is to terminate Option Year One. The option year was exercised in error." At 9:09 a.m., appellant received an email from respondent requesting signature on a modification terminating the option year. Appellant did not sign that modification, and on October 2, 2018, respondent sent appellant a unilateral modification dated October 1, 2018, terminating the option year, which was signed by the contracting officer.

By letter dated November 29, 2018, appellant informed respondent that the manufacture of the brand name work stations does not sell software maintenance for less than a one-year term, and so respondent will be liable, as the result of the termination of the modification, for the full cost of a one-year maintenance subscription. Therefore, appellant suggested that respondent rescind the termination, and requested a response so that it could

send a termination cost proposal if the termination was not rescinded. The letter also stated that the "short form" Termination for Convenience clause referenced in the modification was not in the order or in the contract; instead, the correct convenience termination clause was the one for commercial item contracts, Federal Acquisition Regulation (FAR) 52.212-4(l).

By letter dated May 17, 2019, appellant sent respondent a claim for termination costs in the amount of $688,051.80, which represented the price of one year of software maintenance in modification 2. On February 18, 2020, respondent's contracting officer transmitted an undated letter denying the claim, stating that appellant had not provided any data to substantiate that any work was performed between the issuance of the modification exercising the option year and its termination, nor any data to substantiate that any costs were incurred between the issuance of the modification and its termination. Additionally, the decision stated that confirmation that the option year services would not be required was provided by telephone to appellant by the COR on Friday, September 28, 2018, and respondent is not responsible for the reimbursement of costs associated with appellant's decision to pre-pay for the three years of software maintenance which it purchased at the beginning of the contract.

Discussion

Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986); *Harris IT Services Corp. v. Department of Veterans Affairs*, CBCA 5814, et. al., 20-1 BCA ¶ 37,533 (2019). A material fact is one that will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139.

Appellant contends in its motion for summary judgment that it is entitled to be paid the cost of one year of maintenance for the erroneously exercised option year pursuant to the termination clause of the contract, which reads in relevant part:

> the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges . . . [that] have resulted from termination.

FAR 52.212-4(l). Appellant alleges that the cost of one year of maintenance for the option year was a reasonable charge that resulted from the termination of the modification, even though it purchased the maintenance for the option years at the beginning of the base year, not knowing whether or not the option year would be exercised, and the modification was terminated within twelve hours. Appellant states:

> Since [the manufacturer] sells such maintenance in increments of one year, MicroTech was required to purchase a minimum of one year's worth of software maintenance in order to fulfill its performance requirements when the Order was extended. DOJ complains that MicroTech actually purchased the software maintenance in advance, but this is irrelevant. MicroTech was not only justified in purchasing a year's software maintenance as of September 30 (the date of the bilateral modification), it was contractually obligated to do so. The termination for convenience did not occur until a day or two later. That the actual purchase occurred earlier than September 30 does not make it unnecessary or improper.

Appellant's Motion at 7-8.

Appellant states further:

> MicroTech has acted reasonably and responsibly to mitigate its costs. [The manufacturer] does not refund software maintenance costs once paid.[1]

Appellant's Motion at 9 (footnote omitted).

Respondent states in its motion:

> MicroTech is not entitled to termination costs for $688,051.80, the price of one-year of software maintenance under Option Year 1 of the [order] . . . after the Government terminated Modification P00002 . . . on October 1, 2018. First, MicroTech seeks to recover termination costs relating to its advanced payment to [the manufacturer] for option years . . . even though no options had been exercised at the time of MicroTech's payment to [the manufacturer]. Those costs are not recoverable because the Government did not terminate the Order; it expired by its own terms on September 28, 2018 when the Government did not exercise Option Year 1. Indeed, there was no guarantee that the Government would exercise its options under the contract. Therefore, MicroTech can only claim termination costs resulting from the Government's termination of Mod[ification] 2, which was a separate agreement the Government entered into by mistake on September 30, 2018 and subsequently terminated within 12-hours.

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[1] The manufacturer's Support and Maintenance Services Agreement does not address whether the purchase is refundable. Appeal File, Exhibit 4 at 6.

> Second, preponderant record evidence shows that MicroTech cannot recover under the first prong of the commercial items termination for convenience clause because it did not perform any work during the 12-hours that Mod[ification] 2 was in effect prior to the Government's termination for convenience. Third, preponderant record evidence further shows that MicroTech is not entitled to recovery under the second prong of the commercial items termination for convenience clause because MicroTech's decision to prepay [the manufacturer] for a three-year term of software maintenance was not a reasonable charge resulting from the termination of Mod[ification] 2 a year later. And it certainly was not a reasonable charge resulting from the natural expiration of the underlying Order.

Respondent's Motion at 4-5 (footnotes omitted).

Thus, appellant maintains that software maintenance costs for which it seeks recovery as a termination cost was a reasonable charge in connection with the termination of the modification.[2] Respondent emphasizes in its motion for summary judgement that appellant has offered no evidence that appellant has supplied work under the modification. Rather, respondent contends that appellant's purchase of the software maintenance at the beginning of the base year, with no assurance that the option years would be exercised, did not result from the issuance of modification 2, nor had any work been performed in the short period between the erroneous issuance of modification 2 and the termination for convenience of the modification.

By pointing out this lack of evidence of work performed, respondent has shifted to appellant the burden to show that there exist disputed factual issues.[3] While the scope of

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[2] Appellant relies upon *Dream Management, Inc. v. Department of Homeland Security*, CBCA 5517, 17-1 BCA ¶ 36,716; *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537; *Rex Systems, Inc.*, ASBCA 59624, 16-1 BCA ¶ 36,350; *SWR, Inc.*, ASBCA 56708, 15-1 BCA ¶ 35,832 (2014); and *Information Systems & Networks Corp.*, ASBCA 46119, 02-2 BCA ¶ 31,952. These decisions do not address the issue of entitlement to termination costs arising from a termination of an erroneously exercised option period.

[3] "[W]hen the non-moving party bears the burden of proof . . . , the moving party can simply point out the absence of evidence creating a disputed issue of material fact. The burden then falls on the non-moving party to produce evidence showing that there is such a disputed factual issue in the case." *Simanski v. Secretary of Health & Human Services*, 671 F.3d 1368, 1379 (Fed. Cir. 2012).

modification 2 was the supply of software maintenance for the second option year, appellant alleges that it purchased non-refundable software maintenance almost a year previously when it did not know if the maintenance would be required, and that it was contractually obligated to purchase the maintenance when it received the modification and the purchase was not refundable. These are allegations without evidence, which fail to set forth specific facts showing that there is a genuine issue of material fact, and as such cannot defeat the motion for summary judgment. *Michael Johnson Logging v. Department of Agriculture*, CBCA 5089, 18-1 BCA ¶ 36,938 (2017).

Appellant fails in its burden of proof, as it rests on allegations that do not offer specific facts evidencing entitlement to recover the costs at issue or showing genuine issues of fact. Appellant does not set forth specific facts that prove that the one year of software maintenance at issue that was purchased at the beginning of the base year was required under the contract when purchased. Appellant further fails to prove its allegation that this purchase was non-refundable, when the purchase allegedly became non-refundable, or if the alleged non-refundability was the result of the issuance and termination of modification 2. There is no evidence that appellant took action to activate or apply the software maintenance upon receipt of modification 2, or during the approximately twelve-hour period between the execution of the modification and notice that the modification was an erroneous exercise of the option, that would have resulted in appellant supplying the software maintenance to the Government pursuant to modification 2. Accordingly, appellant has not proved that the software maintenance at issue was supplied to the Government under modification 2, and therefore the cost of that software maintenance is not a cost arising from the termination of modification 2.

Decision

Respondent's motion for summary judgement is granted. Appellant's motion for summary judgement is denied. The appeal is **DENIED**.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Kyle Chadwick
KYLE E. CHADWICK
Board Judge