THE FOLLOWING ARTICLE IS AN EXCERPT FROM:

GovCon Report

A Publication of DHG Government Contracting

November/December 2018 Vol 24, No. 6

Cases/Decisions

TERMINATION FOR CONVENIENCE COSTS RECOVERABLE DESPITE CONFLICT OF INTEREST

Despite the appearance of a conflict of interest, the Armed Services Board of Contract Appeals (ASBCA) determined that Phoenix Data Solutions was entitled to recover the costs associated with the termination for convenience of a contract with the Defense Health Agency (DHA). The award of the contract was protested by the incumbent contractor and subsequently sustained by Government Accountability Office (GAO) on the basis of the appearance of an organizational conflict of interest. Six months after GAO issued its decision, and more than nine months after issuing the stop-work order, DHA terminated the contract for the convenience of the government. DHA failed to issue a final decision in response to Phoenix Data Solutions' claim for fair compensation under FAR 49.201, which outlines the general principles for fixed-price contracts terminated for convenience.

- The government argued that the contractor's responsibility in creating the conflict of interest limits its ability to recover its costs. The Board determined that DHA was essentially asking the Board to convert the termination for convenience of the government into a termination for default, which is not permitted. Since the provisions for terminations for convenience do not require the contractor to be without fault, the Board ruled in favor of Phoenix Data Solutions and ordered the government to pay its allowable costs incurred. *(Phoenix Data Solutions LLC, ASBCA No. 60207)*

VARIOUS PROTESTS OF IT AWARDS SUSTAINED

The Comptroller General sustained four protests of contract awards related to the Systems Engineering, Technology and Innovation (SETI) contract issued by the Defense Information Systems Agency (DISA). The RFP anticipated the award of multiple IDIQ contracts, and DISA awarded contracts to 14 contractors. The separate protests were sustained for a variety of reasons including: agency failure to determine fair and reasonable prices; unreasonable evaluation of the innovation factor; and instances where the agency failed to meaningfully consider price in its best-value tradeoff analysis. *(Technatomy Corp., B-414672.5; Solers, Inc., B-414672.3; B-414672.8; Novetta, Inc., B-414672.4; B-414672; OGSystems, LLC, B-414672.6; B-414672.9)*

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SALE & LEASEBACK RENTAL COSTS DENIED

The Board denied an appeal to recover disallowed rental costs. The Board concluded that a sale and leaseback arrangement had occurred, and that the entities involved in the lease are under common control. Per FAR 31.205-36, rental costs in these circumstances are limited to the normal costs of ownership, such as depreciation, taxes, insurance, facilities, capital cost of money and maintenance. *(Adams and Associates, Inc. v. Dept. of Labor, CBCA No. 5642)*

CONTRACTOR AWARDED WITHHELD COSTS DUE TO LACK OF GOVERNMENT NOTICE

MOX Services' motion for partial summary judgment with regard to subcontractor labor cost increases was granted since the government failed to follow mandatory procedures for providing notice of a disallowance.

The Department of Energy, National Nuclear Security Administration (NNSA) awarded a cost reimbursement contract to MOX Services, an unpopulated entity, for the design, construction and operation of a fuel fabrication facility. MOX Services' parent company CB&I Project Services Group (CPSG) is a principal subcontractor under the contract. In 2015, CPSG engaged in an employee "re-slotting" process for its non-craft employees that resulted in an extensive overhaul of employee duties, titles and compensation. As a result of this process, CPSG increased the pay and billable rates charged to the government for 55 out of the 863 employees.

In April 2016, the government discovered the billing rate increases and requested justification. The government did not agree with the justifications provided by MOX Services and notified MOX Services that it needed further supporting materials to facilitate a cost allowability decision. NNSA then alerted MOX Services that if additional documentation was not provided, the Agency would take "appropriate action". This action was undertaken beginning in October 2017 when the Agency began to withhold two percent of the total direct non-craft labor expenses.

MOX Services successfully argued that the government never issued proper notice of its intent to disallow, as required by 48 CFR 942.803. The Board held that the "imprecise phrase 'appropriate action' does not convey to MOX Services that NNSA intended to disallow costs." As a result, the Court ruled that since no notice was ever issued, the government cannot be said to have disallowed the costs. *(CB&I Areva MOX Services, LLC b. U.S., FedCl No. 16-950C, 17-2017C, 18-80C, 18-522C, 18-677C, 18-691C, 18-921C)*

PROTEST SUSTAINED DUE TO LACK OF STAFFING EVALUATION

The Comptroller General sustained a protest of a contract award because the agency failed to properly evaluate the awardee's proposal under the staffing factor. The RFP stated that under the staffing factor, the government would "evaluate the combination of skills and experience of the offeror's proposed non-key personnel to determine the overall experience and qualifications of the contractor's proposed team." However, there was no evidence that the winning proposal included information concerning the skills and experience of the non-key personnel. As a result, the Comptroller General recommended a reevaluation of the proposal in accordance with the terms of the solicitation and documentation of a new source selection decision. *(AOC Connect, LLC, B-416658; B-416658.2)*

DESPITE WARTIME CONDITIONS, REQUESTS FOR EQUITABLE ADJUSTMENT REQUIRE DETAILED COST RECORDS

In a case related to a contract that dates back to the war in Iraq, the Board ruled delay claims paid by Kellogg Brown & Root Services, Inc. (KBR) to its subcontractor, First Kuwaiti Trading Co. of Kuwait (FKTC), were not reimbursable due to a lack of detailed cost records. This ruling involved the government's The Logistics Civil Augmentation Program (LOGCAP) III cost-reimbursable contract, which was for support services during the United States military operations in Iraq. A piece of the contract included providing housing accommodations to military personnel stationed within Iraq, which KBR subcontracted the majority of to FKTC.

The original statement of work regarding the housing accommodation piece of the contract issued on October 17, 2003 stated that it was, "the Commander's intent to rapidly bed down the remainder" of the soldiers in the various locations in Iraq, and as such, required that the accommodations be provided no later than December 15, 2003. However, due to increased instability on the main supply transportation route into Iraq and new military imposed movement restrictions, the convoys carrying the housing accommodations were significantly delayed, pushing the performance of the contract well into 2004.

KBR agreed to pay FKTC for increased costs associated

with double handling of housing accommodations and delay costs related to truck drivers, fuel, land leasing and truck leases. KBR argued that due to the contingency conditions present in wartime Iraq, many international contractors lacked records of their costs. As a result, the request for equitable adjustment was based on a model that approximated the total number of delay days and a reasonable cost per day for each truck, as well as rates and prices for equipment and other services, rather than cost.

The Board stated that KBR was required by its subcontract to support the equitable adjustment with "detailed cost breakdowns in conformance with FAR Part 31 and the DoD FAR Supplement." Furthermore, it was not reasonable for KBR to consider the absence of cost records acceptable, regardless of the ever-changing, contingency environment. As a result, the Board ruled that a prudent person conducting a competitive business would not have resolved FKTC's delay claim without actual cost data, therefore stating KBR was entitled to zero recovery. *(Kellogg Brown & Root Services, Inc., ASBCA Nos. 57530, 58161)*

GOVERNMENT CAN TAKE PERFORMANCE RELATED PRICE REDUCTIONS UNDER MULTIPLE CONTRACT CLAUSES

OMNIPLEX World Services provides guard services under a labor-hour IDIQ contract with the Department of Homeland Security. The contract included multiple clauses allowing the government to take price deductions for contractor failure to staff an open guard post or to provide resources meeting contract performance requirements (e.g., required training, certifications and fitness determinations). The price deduction clauses were incorporated into the contracts, stating that, "where security guard services are concerned, there is no way for the government to obtain re-performance of un-provided or unacceptable work by the Contractor's employees." The contractor maintained that the government was limited to taking only the lesser of the specified deduction amounts for an open guard post or performance deficiency.

The Board denied the contractor's appeal citing that the contract was clear and the provisions were specific and not mutually exclusive. The Board further stated that the provisions addressing deductions could be read together, and nothing prohibits the agency from taking a deduction under each clause that addresses a deficiency in performance. *(Omniplex World Services Corporation, CBCA No. 5971)*

CONTRACT PAYMENT TERM PREVENTED CONTRACTOR RECOVERY OF OTHERWISE ALLOWABLE AND ALLOCABLE INDEMNIFICATION COSTS

Expresser Transport Corporation entered into a "time charter" contract with the Military Sealift Command for the prepositioning of military equipment and supplies where the contractor remained responsible for operating the ship under the contract. The government was allowed to place civilian contractors aboard the ship for various service or support needs but agreed to indemnify Expresser for liabilities resulting from the carriage of such personnel. The contract contained an Article which specified that all claims for moneys due under the contract must be submitted within two years of the redelivery of the vessel, and also that all claims not submitted within that two-year limit shall be deemed to have been waived by the contractor.

In May 2007, a government contract employee was severely injured aboard the ship. The charter contract was terminated on July 15, 2009, and the vessel was redelivered on that date. The injured party sued the government and the contractor in June of 2008. The government was subsequently dismissed from the case and Expresser settled with the injured party for $2.5 million in in March 2011.

In March 2017, nearly six years later, Expresser submitted a certified claim for $2.8 million seeking reimbursement for the settlement costs and legal fees under the indemnification terms of the contract. The Board denied the appeal, therefore granting summary judgement to the government. The board held that the two-year time limitation for claims under the contract barred the contractor from recovery of the otherwise allowable and allocable contract expenses. The settlement with the injured party occurred within the two-year claim period after redelivery of the vessel, yet the contractor waited almost six more years to submit its claim for cost recovery. *(Expresser Transport Corporation, ASBCA No. 61464)*

GOVERNMENT NOT ALLOWED TO DISMISS CLAIMS OF CONTRACTOR BACK PAY AND RELATED COSTS AS CLAIM INVOLVES ALLOWABLE COST AND PAYMENT, NOT A LABOR DISPUTE

Centerra Group appealed a contacting officer's final decision that denied reimbursement for back pay and related costs under a contract to provide fire services at

the NASA Ames Research Center. A union presented a written grievance alleging that the contractor had failed to pay overtime compensation under the contract. The union represented covered workers under a collective bargaining agreement that had been incorporated into the contract under the Service Contract Act. In February 2016, an arbitrator awarded the affected union members over $5 million in back pay, damages and interest. In April 2017, Centerra presented a certified claim for approximately $6.2 million, including the settlement amount and related interest, legal and tax expenses.

The government moved for dismissal of the claim on the grounds of being a labor dispute falling within the exclusive jurisdiction of the Department of Labor. Centerra contended that the dispute was not about labor standards, but rather about the government's obligation to reimburse for costs of an arbitration award under a collective bargaining agreement. The Board ruled that the underlying labor dispute had already been settled. Accordingly, any remaining dispute related to the Allowable Cost and Payment clause was a matter for consideration under the contract's Disputes clause. The government's motion to dismiss the appeal was denied. (*Centerra Group, LLC f/k/a The Wackenhut Services, Inc., ASBCA No. 61267)*

UNDER CHRISTIAN DOCTRINE, CONTRACTOR COULD CLAIM REIMBURSEMENT OF LEGAL FEES

After its successful defense against a qui tam False Claims Act suit alleging improper certification of compliance to a technical data package, the Tolliver Group submitted a claim to its Contracting Officer for reimbursement of 80 percent of its legal fees. The Contracting Officer denied the claim on the basis that at the time of the claim the contract was firm-fixed-price and contained no provisions for the government to assume the risk of legal costs. In response, Tolliver filed a Complaint to the Court of Federal Claims under the Contract Disputes Act and FAR 31.205-47, asserting that its legal costs incurred in successfully defending the qui tam suit were allowable and properly recoverable, and that at the time of the suit, the contract was fixed-price, level-of-effort. The government moved to dismiss this claim.

In consideration of the motion to dismiss, the court noted that under the Christian Doctrine, "a mandatory contract clause that expresses a significant or deeply ingrained strand of procurement policy is considered to be included in the contract by operation of law." In this case, cost principles would apply by operation of law if the contract required a cost analysis or if reimbursement of legal fees claimed by Tolliver represented a significant or deeply ingrained aspect of a fixed-price, level-of-effort development contract. Because the fixed-price, level-of-effort development contract as it existed at the time of the suit was manifestly established on the basis of cost principles pursuant to FAR 15.404-1 and 31.103, the court determined that the provisions of FAR 31.205-47 appeared to apply.

Tolliver contended that its legal costs were "incurred specifically for the contract" and its performance of the contract per the government's direction created the issue litigated in the qui tam suit. FAR 31.205-47 provides that in successful defense of a qui tam suit, up to 80 percent of the legal costs may be allowable to the extent that the costs were reasonable and were not otherwise recovered. The court noted that Tolliver successfully defended its qui tam suit and asserted that its expenses were reasonable, as well as observing that Tolliver bore the costs.

Therefore, the court concluded that Tolliver did in fact state sufficient legal support and factual allegations to constitute a plausible claim for reimbursement of legal costs as allowable under Tolliver's contract with the government. The court denied the government's motion to dismiss. *(Tolliver Group, Inc. v. U.S., FedCl, 62 CCF ¶81,507)*

REOPENING OF DISCUSSIONS TO ADDRESS NEW EXCEPTIONS NOT REQUIRED

Ellwood National Forge (ENF) Company protested the award of a contract for penetrator warhead production issued by the Air Force to Superior Forge and Steel Corporation. ENF challenged the Air Force's evaluation of its proposal as technically unacceptable.

Upon discussions, the protestor was informed that their proposal and two others were technically acceptable. They were then invited to submit a Final Proposal Revision (FPR) with the instructions that the technical approach was currently assessed as acceptable, any changes in its FPR had to be clear and substantiated and there would be no further discussions. Upon review of the FPR, the protestor had the lowest price, however, the protestor introduced changes in the technical design package requirements. The Source Selection Authority found the technical FPR changes and lack of explanations made the FPR unacceptable. The protestor claimed that the government unreasonably failed to reopen discussions.

GAO ruled that the government had no obligation to reopen discussions on the protester's proposal for penetrator warhead production because the protester's final revised proposal was technically unacceptable. *(Ellwood National Forge Company--Protests and Costs, B-416582; B-416582.2; B-416582.3; B-416582.5)*

PROPOSAL EVALUATION FACTORS

In Metrica Team Venture (MTV) vs the United States, MTV (a joint venture) alleged that the contracting officer improperly evaluated its proposal in connection with a solicitation issued by the GSA for information technology services by deducting the points MTV claimed for having an acceptable cost accounting system (CAS). MTV asserted that it was entitled to those points, claiming that one of its members, which possessed an acceptable CAS, would perform all of MTV's accounting under the contract. MTV's motion was denied as the solicitation clearly only permitted joint ventures to claim points if the joint venture or each of the members possessed a DCAA certified CAS rather than just one of the members. *(Metrica Team Venture v. USA, FedCl, 62 CCF ¶81,521)*

UNDULY RESTRICTIVE SOLICITATION

Grant Thornton LLC filed a protest challenging the terms of a request for quotations (RFQ) for auditing support services. The protester argued that the solicitation, which was issued under the Federal Supply Schedule provisions of FAR subpart 8.4, is unduly restrictive of competition because it requires vendors to quote labor categories from their FSS contracts which "align precisely" with the minimum years of experience in the RFQ.

For example, the RFQ defined labor category of Systems Analyst IV to require 12 years of experience and a master's degree. To fill the services of the Systems Analyst IV, a vendor could not quote an FSS labor category that provides for only ten years of experience and a master's degree. The RFP stated that a vendor may not quote such labor category for the Systems Analyst IV even if the FSS pricelist description uses wording such as "minimum of 10 years," "10+ years," "at least 10 years," etc. The minimum number of years of experience listed in the FSS pricelist description must be no less than the minimum number of years listed in the definition of the RFQ labor category.

The GAO's sustained the protest where the labor category in the solicitation states a requirement for a minimum number of years of experience, a labor category on a vendor's FSS contract that identifies a "minimum" of a lesser number of years of experience does not mean the vendor cannot quote employees with higher years of experience, and should be considered within the scope of the solicitation. *(Grant Thornton, LLC, B-416733)*

URGENT CIRCUMSTANCES JUSTIFIED SOLE-SOURCE TASK ORDER AWARD

The GAO recently denied a protest in relation to the issuance of a Network-Centric Solutions-2 multiple award, IDIQ contract. The task order was awarded on a sole-source basis because the government reasonably concluded urgent circumstances. Instead of exercising a second-year option on the protestor's task order, the government issued a justification under FAR 16.505(b)(2)(i)(A), finding that due to urgent circumstances, it was in the best interest of the government to award a sole source task order. The protestor, a small business, was the incumbent provider of communication support services and argued that the urgency arose from a lack of advanced planning. *(Technica Corporation, B-416542; B-416542.2)*

TERMINATION FOR CAUSE - DISSOLVED LLC HAD STANDING TO PURSUE APPEAL

The ASBCA denied an appeal for Bulova Technologies Ordnance Systems LLC (BTOS), which appealed under the Contract Disputes Act from the Contracting Officer's final decision to terminate an order issued by the U.S. Army under a blanket purchasing agreement for the delivery of nonstandard weapons and related items in Afghanistan. However, BTOS was completely dissolved, and according to the ASBCA, under state law the company continued to exist with the power to prosecute or defend proceedings. To determine the contractor's rights, the Board applied the laws of the state in which it was organized; therefore, the contractor had the legal capacity to prosecute the appeal. In summary, the appeal was denied based upon the premise that as a dissolved company, the contractor could not perform the order and had transferred contract administration to a sister company, which lacked the licenses required to perform the contract. *(Bulova Technologies Ordnance Systems LLC, ASBCA No. 59089)*

TERMINATION FOR CAUSE - DEFAULT AND DELAYS

LKJ Crabbe Inc.'s appeal was denied pertaining to the Army's termination for cause. The appeal contended that the Army's termination was unjustified, and that

the Army breached the contract by failing to reform the contract after learning of an alleged mistake in LKJ Crabbe's bid. LKJ Crabbe also alleged that the Army breached the contract by violating its duty of good faith and fair dealings. The contract award was conducted in accordance with FAR Part 14, Sealed Bidding Procedures, and was awarded to LKJ Crabbe as the lowest total bid amount received.

In summary, LKJ Crabbe made multiple statements that constituted anticipatory repudiation of the contract and served as justification for the government's termination for convenience. Although LKJ Crabbe made several allegations portraying the government's breach of contract, a termination for cause was justified because the breaches were not material. Lastly, LKJ Crabbe's response to the cure notice failed to provide reasonable assurance of its ability to perform. *(LKJ Crabbe Inc., ASBCA 60331)*