No. 97-148C

(Filed March 17, 1998)

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T & M DISTRIBUTORS, INC.,	*	
Plaintiff,	*	
v.	*	Contracts; Termination for convenience; Bad faith; Clear abuse of discretion; Cardinal change
THE UNITED STATES,	*	
Defendant.	*	
* *		

Joseph J. Petrillo, Washington, D.C., attorney for plaintiff. ***Karen D. Powell, William E. Conner***, and ***Petrillo & Associates***, of counsel.

John Warshawsky, Department of Justice, Washington, D.C., with whom was ***Assistant Attorney General Frank W. Hunger***, for respondent. ***David M. Cohen***, Director; ***Sharon Y. Eubanks***, Deputy Director; and ***Kim Churchill***, Office of the General Counsel, of counsel.

OPINION

***Futey*, Judge**.

This contract case is before the court on defendant's motion for summary judgment. The parties dispute the propriety of the contracting officer's decision to terminate for convenience plaintiff's contract.[(1)] Defendant maintains that, in the absence of bad faith or clear abuse of discretion, the contracting officer's election to terminate the contract is conclusive. Defendant asserts that no such bad faith or clear abuse of discretion is present. In response, plaintiff avers that a number of material factual disputes preclude the granting of defendant's motion.

Factual Background

On December 23, 1994, the United States Department of Navy (defendant) issued Solicitation No. N00406-95-R-3038 (solicitation) seeking offers for automotive and related vehicle parts and accessories, as well as parts for special purpose equipment, in support of the United States Public Works Center located on the island of Guam. Further, the solicitation required the awardee to operate and maintain a Contractor Operated Parts Store (COPARS) on Guam, and contemplated a two-year fixed price requirements contract consisting of one base year and one option year.

On January 13, 1995, defendant issued Amendment I to the solicitation, which extended the full term of the contract to five years consisting of one base year and four one-year option periods. Moreover, in response to a clarification request, defendant stated, in pertinent part: "The contractor shall assume that the Government does not have a supply of parts on hand to supplement contractor inventory."[(2)]

Three offerors responded to the solicitation, but one offeror withdrew prior to the submission of best and final offers. After evaluating the remaining two proposals, on October 10, 1995, defendant awarded the contract to plaintiff and notified plaintiff that performance was to begin on December 1, 1995. The total estimated value of the contract for the base year and the option years was $1,130,000.[(3)]

Plaintiff experienced difficulties compiling a comprehensive parts inventory list in preparation for contract performance, and thus, plaintiff's president, Thomas W. Daly, visited Guam in early November 1995. Upon returning from Guam, Mr. Daly wrote a letter to the contracting officer regarding certain observations he made during his trip. Among the observations noted, Mr. Daly stated:

> [I]t was revealed to us that the Public Works Facility at Guam had an existing "base store" which provided them with replacement parts for their vehicles. This was troubling for two reasons; the contract clearly calls for the establishment of a COPARS to supply the [Department of Public Works (DPW)] with repair parts and this also affects our ability to put together a workable inventory if the DPW "base store" already stocks some parts.
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> * * * *
>
> I discovered the following: the base store maintains an inventory of approximately $700,000.00 with a total number of 4000 line items. This is a long way from no inventory as had been stated. I was also informed that the DPW was required to go to the base store as their first source of supply, to [Fleet and Industrial Supply Center] next and then to the contractor. I also learned unofficially that the DPW also had [Basic Purchase Agreements] with local parts distributors. As you can imagine this all plays a part in how we structure our inventory and our ability to do business with DPW.[(4)]

Based upon the concerns raised by Mr. Daly, the contracting officer initiated an inquiry regarding plaintiff's contract and became aware of the following:

> a. The government did have an existing inventory in the approximate amount of $700,000 and had Basic Purchase Agreement's (BPA's) with local firms. This information had not been disclosed to the

Contracting Officer and this office during the solicitation process.

b. *The estimated amount in the contract was grossly understated*. A review of the historical usage indicated the estimated amount for the base period and option periods should have been $4,455,911 rather than the [$]595,250 as awarded by the contract.

c. There were conflicting opinions among Navy managers at the [Public Works Center], Guam as to the type of contract desired. Ultimately, however, the decision was made to

utilize an indefinite requirements type of contract with performance to begin April 1, 1996.[(5)]

The contracting officer also ascertained that a number of required items were not included in plaintiff's contract. These items included: (1) tires; (2) batteries; (3) hazardous/flammable materials; (4) anti-freeze; and (5) non-price listed parts. Further, the contracting officer determined that substantially more space would be required in the facilities provided by defendant in order to accommodate the increase of estimated requirements.

Based upon this information, on December 21, 1995, the contracting officer "determined that it was in the best interest of the government to terminate [plaintiff's] contract for convenience of the government and re-solicit in accordance with the changed requirements under conditions of full and open competition."[(6)] On January 17, 1996, defendant issued Solicitation No. N00406-96-R-5063 (second solicitation) for a new COPARS contract on Guam. Pursuant to the second solicitation, defendant revised its estimates, and increased the total value of the base year and option years to approximately $5,048,590.[(7)] Plaintiff and one other offeror responded to the second solicitation, resulting in the contract being awarded to the other offeror.

On September 3, 1996, plaintiff submitted a claim for damages to the contracting officer, alleging that its contract was improperly terminated. The contracting officer denied plaintiff's claim on January 3, 1997, stating in pertinent part:

[Y]our contract no longer resembled that which was originally contemplated. It certainly would have been unfair to proceed with the contract if the reversal was true i.e. that the government estimate for all five years under your contract had decreased from $5.0 million to $1.1 million just after award.

* * * *

After a careful detailed in-depth comparison of your contract (N00406-96-D-4026) with the needs of the government, *it was determined that the changes required were out of scope and so profound that they could not be incorporated into your contract.* The changing circumstances such as increased quantities, increased parts/materials, and the added items that would be paid or provided by the government *resulted*

in a cardinal change to the government's requirement. The re-solicitation under conditions of full and open competition was warranted as these changes were not contemplated in the solicitation that resulted in your contract.[(8)]

Plaintiff filed suit in this court on March 17, 1997, seeking damages for the alleged wrongful termination of its contract. On May 21, 1997, defendant filed its motion for summary judgment, maintaining that a cardinal change in defendant's requirements necessitated the termination of plaintiff's contract. Plaintiff asserts that no cardinal change occurred, and thus, defendant wrongfully terminated the contract. On February 11, 1998, the court heard oral argument on defendant's motion.

Discussion

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. **RCFC** 56; ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247 (1986). A fact is considered material if it might significantly affect the outcome of the suit under governing law. ***Anderson***, 477 U.S. at 248. The party moving for summary judgment bears the initial burden of demonstrating, by a preponderance of the evidence, either the absence of any genuine issues of material fact or the absence of evidence to support the non-movant's case. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 325 (1986). If the moving party demonstrates an absence of genuine issues of material fact, the burden then shifts to the non-moving party to show that a genuine factual dispute exists. ***Sweats Fashions, Inc. v. Pannill Knitting Co.***, 833 F.2d 1560, 1563 (Fed. Cir. 1987). Alternatively, if the moving party shows an absence of evidence to support the non-moving party's case, the burden shifts to the non-moving party to proffer such evidence. ***Celotex***, 477 U.S. at 325. The court must resolve any doubts over factual issues in favor of the party opposing summary judgment, ***Litton Indus. Prods., Inc. v. Solid State Sys. Corp.***, 755 F.2d 158, 163 (Fed. Cir. 1985), to whom the benefits of all presumptions and inferences run. ***H.F. Allen Orchards v. United States***, 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985).

The subject contract incorporated by reference a Termination for the Convenience of the Government clause, which provides in pertinent part:

> The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of the termination and the effective date.

48 C.F.R. § 52.249-2 (1984).

In the absence of bad faith or a clear abuse of discretion, the contracting officer's decision to terminate a contract for the convenience of the government is conclusive. ***Krygoski Constr. Co. v. United States***, 94 F.3d 1537, 1543 (Fed. Cir. 1996), *cert. denied*, 117 S.Ct. 1691 (1997); *see also* ***Salsbury Indus. v. United States***, 905 F.2d 1518,1521 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991); ***Kalvar Corp. v. United States***, 543 F.2d 1298, 1304 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977); ***John Reiner & Co. v. United States***, 325 F.2d 438, 442 (1963), *cert. denied*, 377 U.S. 931 (1964); ***Best Foam Fabricators, Inc. v. United States***, 38 Fed. Cl. 627, 637 (1997). "The decision to terminate the contract is a discretionary decision based on the business judgment of the contracting officer." ***Florida, Dep't of Ins. v. United States***, 33 Fed. Cl. 188, 196 (1995), *aff'd*, 81 F.3d 1093 (Fed. Cir. 1996). "When tainted by bad faith or an abuse of contracting discretion, a termination for convenience causes a contract breach." ***Krygoski***, 94

F.3d at 1541.

It must be presumed that the contracting officer acted in good faith in effecting the termination. ***A-Transport Northwest Co. v. United States***, 27 Fed. Cl. 206, 220 (1992), *aff'd*, 36 F.3d 1576 (Fed. Cir. 1994); *see also* ***Aero Corp., S.A. v. United States***, 38 Fed. Cl. 408, 413 (1997) ("contracting officials are presumed to act in good faith when executing their procurement functions"). Because good faith is presumed, plaintiff bears a significant burden to prove defendant acted in bad faith. ***Krygoski***, 94 F.3d at 1541. Indeed, plaintiff must present "'well-nigh irrefragable proof' to the contrary to induce the court to abandon the presumption of good faith dealing." ***Kalvar Corp.***, 543 F.2d at 1301-02 (quoting ***Knotts v. United States***, 121 F. Supp. 630, 631 (Ct. Cl. 1954)).

Plaintiff alleges that a material factual dispute exists whether the contracting officer acted in bad faith when terminating plaintiff's contract. In this regard, plaintiff maintains that defendant "admits that the contracting officer was influenced in his decision by the fact that [defendant] would pay only nominal costs if it disavowed its contractual obligations under the guise of termination for convenience."(9) Further, plaintiff argues that defendant "should have known" that the solicitation contained errors and communicated this information to the offerors. Plaintiff asserts that defendant's failure to fully understand its requirements rose to the level of bad faith and relies on ***Travel Centre v. General Servs. Admin***., GSBCA No. 14057, 98-1 BCA ¶ 29,422 (Nov. 26, 1997), in support of its position.

The contracting officer's consideration that plaintiff's performance had not yet begun, however, does not taint his decision to terminate for the convenience of the government. Rather, as defendant correctly noted during oral argument, the contracting officer "prevent[ed] [plaintiff] from incurring unusual--extraordinary expenses."(10) Moreover, the Federal Circuit in ***Krygoski*** acknowledged the contracting officer's consideration that the contractor had yet to begin performance, and nevertheless, did not conclude that he acted in bad faith. *See* ***Krygoski***, 94 F.3d at 1540.

Further, plaintiff's reliance on ***Travel Centre*** does not support its argument. In that case, the General Services Board of Contract Appeals (GSBCA) held that the General Services Administration (GSA) breached its contract with Travel Centre when it withheld from offerors vital information which indicated that the estimates provided in the solicitation were grossly overstated. The GSBCA found that "the irrationally-arrived-at estimate (and the resulting lack of income) caused the contractor to lose money and fail to meet its financial obligations." ***Travel Centre***, 98-1 at 146,138. Importantly, the GSBCA found that "GSA entered the contract 'with no intention of fulfilling its promises.'" ***Id***. at 146,139 (quoting ***Krygoski***, 94 F.3d at 1545 (footnote omitted)). In the present case, however, plaintiff has not provided the court with any evidence indicating that defendant entered the subject contract with no intention of fulfilling its promises. Rather, upon learning the estimates contained in the solicitation were vastly understated, the record indicates that the contracting officer sought to promote full and open competition by re-soliciting the contract to correctly address the government's requirements. Accordingly, the court determines that the contracting officer did not act in bad faith when terminating plaintiff's contract.

Alternatively, plaintiff argues that the contracting officer abused his discretion in terminating its contract. According to plaintiff, no cardinal change in the government's requirements occurred. Plaintiff, therefore, maintains that the subject contract was improperly terminated.

In reviewing the contracting officer's actions, "[i]t is not the province of the court to decide *de novo* whether termination was the best course." ***Salsbury***, 905 F.2d at 1521. Rather, the court should "avoid a finding of abused discretion when the facts support a reasonable inference that the contracting officer terminated for convenience in furtherance of statutory requirements for full and open competition." ***Krygoski***, 94 F.3d at 1544.

The Competition in Contracting Act (CICA), Pub.L. No. 98-369, 98 Stat. 1175 (codified as amended in scattered sections of U.S.C.), requires the promulgation of regulations and procedures to ensure full and open competition. ***Krygoski***, 94 F.3d at 1542; *see* ***ATA Defense Indus. v. United States***, 38 Fed. Cl. 489, 499 (1997) ("CICA embodies a strong commitment to achieving the benefits of competition in government procurement"). In this regard, CICA mandates, in pertinent part:

Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services--

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation; and

(B) shall use the competitive procedures that is best suited under the circumstances of the procurement.

10 U.S.C. § 2304(a)(1) (1994).

In order to conform with CICA's competitive fairness requirement, the contracting officer may need to terminate a contract for the government's convenience to foster full and open competition. ***Krygoski***, 94 F.3d at 1543. To advance "its full competition objective, CICA permits a lenient convenience termination standard." ***Id***. Thus, "[o]nly 'modifications outside the scope of the original competed contract fall under the statutory competition requirement.'" ***Id***. (quoting ***AT&T Communications, Inc. v. WilTel, Inc.***, 1 F.3d 1201, 1205 (Fed. Cir. 1993)).

A cardinal change is a drastic modification beyond the scope of the contract. ***Id***. In this regard, a cardinal change occurs:

when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach.

Id. (quoting ***AT&T***, 1 F.3d at 1205). In defining a contract's scope, the court looks to the solicitation estimates; "[t]he purpose of the[se] estimate[s] is to provide bidders with an idea of the magnitude and scope of the contract, and to allow them to bid accordingly." ***Datalect Computer Servs., Inc. v. United States***, No. 95-328C, 1997 WL 780906, at *9 (Fed. Cl. Dec. 18, 1997) (citing ***Shader Contractors, Inc. v. United States***, 276 F.2d 1, 7 (Ct. Cl. 1960); *see also* ***Womack v. United States***, 389 F.2d 793, 801 (Ct. Cl. 1968) (in promulgating estimates for incorporation into solicitations, "the Government is not required to be clairvoyant but it is obliged to base that estimate on all relevant information that is reasonably available to it").

In the present case, a comparison of the estimated value of the two solicitations for the base year indicates $226,000 for the first solicitation and $1,016,918 for the second.[(11)] The disparity between the two

becomes even greater when comparing the total value of the proposed contracts, including the additional option years: $1,130,000 versus $5,048,590, respectively. Under these circumstances, the scope of the second solicitation, as evidenced by the estimates, is well beyond that of the first. Moreover, it is conceivable that the two solicitations could attract a different pool of bidders. Defendant observed during oral argument:

[W]hen the Government goes to the market with a procurement, say, of $200,000 a year, you are going to interest a certain pool of prospective bidders. If the Government goes to the market seeking two million dollars a year, ten times that, it may be a different group of bidders. It might not include the same people as the first set. There might be economies of scale achieved through larger procurements.

* * * *

[The contracting officer] had to consider [defendant's] mandated responsibilities under CICA and put out a solicitation that would properly inform perspective bidders what was required by the Government to ensure that through full and open competition, the Government got the best pool of candidates to . . . provide these parts.[(12)]

In comparing the differential between the two estimates, the contracting officer "determined that it was in the best interest of the government to terminate [plaintiff's] contract for convenience of the government and re-solicit in accordance with the changed requirements under conditions of full and open competition."[(13)] The contracting officer reasoned that the differences between plaintiff's contract and the new requirements resulted in a cardinal change in the contract awarded to plaintiff.

This conclusion is supported by the contracting officer's denial of plaintiff's claim for damages. The contracting officer stated, in pertinent part:

The changing circumstances such as increased quantities, increased parts/materials, and the added items that would be paid or provided by the government *resulted in a cardinal change* to the government's requirement. The re-solicitation under conditions of full and open competition was warranted as these changes were not contemplated in your contract.[(14)]

These findings support a reasonable inference that a cardinal change in the government's requirements had occurred, and the contracting officer could terminate plaintiff's contract for the convenience of the government. *See* ***Krygoski***, 94 F.3d at 1544-45. Indeed, the approximately 450 percent increase in the estimated value of the contract indicate that the contracting officer complied with the directives mandated by CICA.[(15)] Accordingly, the court determines that the contracting officer did not abuse his discretion in terminating plaintiff's contract.

Plaintiff, however, argues that the court should employ the "change in circumstances" test enunciated in ***Torncello v. United States***, 681 F.2d 756 (Ct. Cl. 1982). According to plaintiff, the Court of Claims in ***Torncello*** held that "for a termination for convenience to be valid, there must exist some change in the circumstances of the parties' expectations after award to warrant termination."[(16)] In this respect, plaintiff asserts that no change in circumstances existed with regard to its contract.

Plaintiff's reliance on ***Torncello*** is misplaced. ***Torncello*** "stands for the unremarkable proposition that

when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause." ***Salsbury***, 905 F.2d at 1521; *see also* ***Krygoski***, 94 F.3d at 1545 ("***Torncello*** applies only when the Government enters a contract with no intention of fulfilling its promises"). As stated above, plaintiff has not come forward with any evidence indicating that defendant entered the subject contract with no intention of fulfilling its obligations. Thus, ***Torncello*** is unavailing to plaintiff.(17)

Conclusion

For the above-discussed reasons, the court concludes that the contracting officer neither acted in bad faith nor abused his discretion in determining that a cardinal change in the government's requirements had occurred. Thus, the contracting officer properly invoked the contract's termination for convenience clause. Accordingly, the court grants defendant's motion for summary judgment. The Clerk is directed to dismiss plaintiff's complaint. No costs.

BOHDAN A. FUTEY

Judge

1. Plaintiff submitted a termination settlement proposal to the Termination Settlement Office at the Defense Logistics Agency. The parties have settled that claim. *See* Transcript at 32 (Tr.).

2. [2] Appendix to Defendant's Motion for Summary Judgment at 199 (Def.'s App.).

3. Defendant's Proposed Findings of Uncontroverted Fact at 4 (Def.'s PFOF).

4. [4] Def.'s App. at 7-8.

5. [5] ***Id***. at 3-4 (emphasis added). The submissions to the court indicate that the estimated total value of the contracts varies from $595,250 to $1,130,000 for the first solicitation, and from $4,455,911 to $5,084,590 for the second. Irrespective of these discrepancies, it is undisputed that the estimated value of the first contract was $1,130,000 and the estimated value of the second contract was $5,048,590. *See* Def.'s PFOF at 4; *see also* Plaintiff's Statement of Genuine Issues at 3.

6. [6] Def.'s App. at 4.

7. Def.'s PFOF at 4.

8. [8] Def.'s App. at 17 (emphasis added).

9. Plaintiff's Opposition to Defendant's Motion for Summary Judgment at 6 (Pl.'s Opp.) (citing Def.'s PFOF, number 16).

10. Tr. at 13.

11. Def.'s App. at 5.

12. Tr. at 12, 16.

13. Def.'s App. at 4.

14. ***Id***. at 17-18 (emphasis added).

15. Because the court determines that the increase in the estimated value of the government's requirements constituted a cardinal change, it needs not to consider the issue of whether the additional items such as tires, batteries, etc., by themselves, constituted a cardinal change.

16. Pl.'s Opp. at 8.

17. Plaintiff also alleges that its contract contained the wrong Changes clause. According to plaintiff, its contract contained the "Changes-Fixed Price (AUG 1987)" clause of 48 C.F.R. § 52.243-1, while the proper clause is "Alternate II (APR 1984)" of that section. Both clauses limit changes to *the general scope of the contract*. Because the court has determined that the revised estimates were beyond the scope of plaintiff's contract, it need not determine which clause was appropriate for plaintiff's contract.