

GOVERNMENT CANNOT EXTEND A CONTRACT AFTER IT EXPIRES

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In an interesting case, the Armed Services Board of Contract Appeals (“ASBCA”) held that the government cannot unilaterally extend services under FAR 52.217-8 (Option to Extend Services) after an ineffective attempt to exercise an option year. *Fluor Fed. Solutions, Inc.*, ASBCA No. 62343, August 9, 2022. As a result of a failure of the government to properly exercise an option year, the contract expires and the government cannot resurrect the parties’ obligation under an expired contract.

FAR 52.217-8 is as follows:

OPTION TO EXTEND SERVICES: The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within 30 calendar days.

The Naval Facilities Command awarded Fluor a contract for regional base operations support at four Navy installations. The contract contemplated a period of performance of a base year, four option years, and three award option years. Fluor performed the base year, and the Navy exercised all of its non-award options. The Navy did not exercise award option years 1 or 2, and deleted them from the contract in accordance with the contract’s option plan. The Navy, however did exercise option year 4, which covered performance from July 2016 to June 2017. Days prior to the expiration of option year 4, the Navy purported to issue a modification allegedly exercising award option year 3 with a 12 month performance period from July 2017 through June 2018. Fluor objected to the modification, contending that the Navy’s exercise of award option 3 was invalid and contrary to the contract terms. Fluor advised Navy that it would perform award option 3 under protest.

Fluor submitted a claim for an equitable adjustment of its costs plus reasonable profit for work performed under award option 3. In January 2019, the ASBCA granted summary judgment in Fluor’s favor, holding that the Navy’s exercise of award option year 3 was not enforceable. *Fluor Fed. Sols., LLC*, 19-1 BCA ¶ 37237.

In April 2018, while Fluor was performing award option 3 under protest, the Navy informed Fluor of its intent to extend Fluor’s services by six months under FAR 52.217-8. Fluor objected to the Navy’s unilateral modification, protested its continued performance and submitted a claim. Fluor asserted that Navy’s failure to properly exercise the option year resulted in the expiration of the contract on in June 2017.

The ASBCA carefully examined the legal precedents and concluded that the government may not extend a contractor’s performance under FAR 52.217-8 after an ineffective attempt to exercise an option year. The government’s failure to properly exercise award option 3 (as noted in the previous ASBCA decision noted above) did not provide a mechanism to resurrect the

parties' obligations under an expired contract. The Board held that when the contract expired, the government's right to exercise the option to extend services under FAR 52.217-8 expired with it. Thus, Fluor was entitled to an equitable adjustment. The ASBCA held that just because Fluor continued to perform under protest, that performance did not preserve the government's right to extend services. Specifically, a contractor's continued performance under protest and pursuant to the disputes clause (which Fluor cited) does not give the government the right to extend the contractor's performance.

Takeaway. As known to these readers, the government exercise of an option must be unconditional and in exact accord with the terms of that option. Any attempt by the government to alter terms or conditions of the option will render the option ineffective. Subsequent attempts to "revive" the contract (such as the use of FAR 52.217-8) will be of no avail. And, the government bears the burden to provide that it exercised an option in strict compliance with the option provision.

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