DON'T BUY SOFTWARE OR OTHER NEEDS FOR AN OPTION BEFORE IT IS EXERCISED

This blog has frequently explained that options in a government contract are exercisable at the government's discretion, and there is nothing a contractor can do to "force" the government to exercise an option it does not need or want. In conjunction with that, it is not a good idea for a contractor to purchase things it needs (such as software, parts, etc.) to perform an option, until the government has exercised the option. This was clearly the case in *Microtechnologies LLC, DBA MicroTech v. US Attorney Gen'l, No. 2021-2169 (Fed. Cl July 28, 2022).* MicroTech failed to recover any costs for the non-exercised option, even after it was exercised and then terminated for convenience.

In 2017 the Executive Office of U.S. Attorneys ("Exec. Office") awarded a contract to MicroTech for perpetual software licenses and maintenance for Nuix. The period of performance was one base year ending Sept. 28, 2018, and two potential option years each ending one year later. The government could exercise one or both of the options at its discretion, with a price of $688,051 for each year.

On the first day of performance, MicroTech purchased the perpetual software licenses and software maintenance not just for the base year, but also for both option years. In the litigation, MicroTech admitted that the purchases for the option years at its own risk (the risk being that the government might not exercise either of the option years).

On the last day of base year performance, in response to a MicroTech email, the contracting officer's representative left a voicemail for MicroTech stating that the first option would not be exercised by the government. MicroTech's financial services manager did not listen to the voicemail until three days later. But two days after the base year ended, an Exec. Off. Chief of Operations (also a contracting officer) responded to MicroTech's inquiries proposing a bilateral contract modification for one further year of performance at the previously agreed price. MicroTech signed and return that modification.

The day after the signature on the mod, at 8:37 AM, the Exec. Office assistant director of acquisitions, also a contracting officer, sent an email informing MicroTech that the option year had been erroneously exercised, and attaching a new modification which terminated option year one because the exercise was in error. Although MicroTech didn't sign that modification, the next day the Exec. Office contracting officer sent a signed, unilateral modification terminating the option year pursuant to FAR 52.249-4 (convenience termination for non-commercial item contracts). The parties agreed that the modification was actually pursuant to FAR 52.212-4(l), the commercial item contract's termination for convenience. This clause states that:

> The government reserves the right to terminate this contract…for its sole convenience. In the event of sch termination, the contractor shall immediately stop work hereunder...[T]he 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 the contractor can demonstrate to the satisfaction of the government…have

> resulted from the termination…The contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

MicroTech asserted that the cost of software and maintenance for option year one was a reasonable charge that could not have been avoided, and produced evidence that the Nuix software could only be purchased in increments of one year and was nonrefundable. When the case came before Civilian Board of Contract Appeals, the Board agreed with the government in denying the appeal because (1) the contract existed only for 12 hours and MicroTech hadn't shown it performed any work during that period; and (2) the cost of the software and maintenance was not a reasonable charge under the second prong of the termination clause because it had been purchased one year before the start date of the first option—at MicroTech's risk.

The Court of Federal Claims sided with the Board, stating that the cost of software maintenance for the option year was not a reasonable charge that resulted from the termination, as required by the clause. These costs were incurred well before the initial exercise was signed, and then terminated. MicroTech had conceded that incurring the cost was not required when it was incurred (at the start of contact performance) and further, MicroTech admitted that it understood that it purchased the software maintenance at its own risk.

Takeaway. Don't buy parts, software, maintenance (or anything) for performance of an option prior to the option exercise. If there is some type of supplier's requirement to buy more than the base year of anything needed, make sure this is clearly stated in your proposal (e.g. "the supplier only sells these things in three year increments, nonrefundable, therefore we will buy three years at the beginning of the base contract, and have included the cost in the base contract. If the government will not agree to that, you will need to find another supplier, or agree to bear the risk).

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