FULL PERFORMANCE OF COMMERCIAL CONTRACT TERMINATED FOR CONVENIENCE REQUIRES FULL PAYMENT

In a recent "by-the-book" termination for convenience, the Armed Services Board concluded that even though there was a valid termination for convenience by the government, the full amount of the contract was owed to the contractor because of the language of the Commercial Items, FAR 52.212-4(l) convenience termination clause. *Atech, Inc.,* ASBCA No. 62764, Oct. 13, 2022.

Atech submitted a proposal to the Air Force ("USAF") for a standard arresting system for decelerating landing aircraft. This is a system used to engage and safely stop a hook-equipped aircraft. The USAF determined that the offer was technically acceptable and awarded the contract to Atech on a sole source basis. The contract included FAR 52.212-4, Contract Terms and Conditions-Commercial Items.

At some point, the USAF asked Atech not to send anything to the USAF customer, but did not direct Atech to stop work. However the USAF decided it no longer wanted to buy the parts from Atech, and discovered that Atech was not a qualified source to provide these parts—even though the contract never mentioned a qualification requirement.

The USAF terminated the contract for convenience, stating that Atech was not qualified to provide the items in the contract. The contracting officer's termination letter quoted the commercial items clause (FAR 52.212-4(l)), which provides that if the government terminates for convenience, "the Contractor shall be paid a percentage of the contract price reflecting the percentage of work performed prior to the notice of termination." Atech informed the contracting officer that it had completed 100 percent of the work and requested that it be paid the full contract price. The government refused to permit delivery of the products. At that point, the USAF demanded that Atech demonstrate to the government's satisfaction the actual costs Atech had incurred. Also, the CO demanded proof that Atech was authorized to provide these items (even though there was no qualification requirement). The USAFE refused to reverse the convenience termination and denied Atech's settlement cost claim because "Atech has not adequately supported its termination costs." Atech appealed.

The ASBCA found that the USAF had made a mistake by issuing a contract that failed to protect its own interests. ASBCA stated "[T]he CO was well within her discretion to err on the side of safety by accepting the recommendation of subject matter experts [who raised the qualification issue] and terminating the contract for convenience." However, this conclusion did not negate the operation of the relevant clause regarding entitlement. The fact that the USAF refused to permit the delivery of goods provided no basis for demanding a reduction in price based on the delivery of nonconforming goods. Based on the plain language of FAR 52-212-4(l) convenience termination, if Atech performed 100 percent of the work, it was entitled to 100 percent of the contract price.

The ASBCA considered the evidence and concluded that Atech had proven by the preponderance of evidence that it completed 100 percent of the contract work. The USAF made

arguments of non-completion of the work that the Board found were "based on pure conjecture of innuendo and [were] not well received by the Board." The USAF never identified any contract term that Atech had violated (USAF never agreed to receive or inspect the parts).

Takeaway. The Boards will enforce the language in the commercial convenience termination on payment. If a contracting officer doubts the completion of contract work, it could take delivery of the parts, inspect them, and find them unacceptable (or partially unacceptable), and adjust the payment under the convenience termination clause. The Board clearly faulted the USAF because "it never examined the parts."

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