

TERMINATION FOR CONVENIENCE SETTLEMENT MUST BE BASED ON COST

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The Armed Services Board of Contract Appeals (“ASBCA”) recently explained that a settlement of a termination for convenience must be based on the costs incurred by the contractor, not on either contract line item number (“CLIN”) prices or some type of jury verdict (because of the contractor’s inability to document its costs). *Atlas Sahil Const. Co.*, ASBCA No. 58951, Nov. 9, 2017.

The Army awarded Atlas a design-build, firm-fixed-price construction contract for expansion of a forward base in Afghanistan that supported U.S. forces. Eighteen months later, the contract was terminated for convenience pursuant to FAR 52.249-2 Alt I, because the base was going to be closed and there was no longer a need to expand it.

Atlas submitted a termination settlement proposal of \$4.0 million, which the contracting officer rejected, concluding that “no settlement amount can be reached.” Atlas then submitted a claim for \$4.2 million, including its settlement expenses. The settlement and claim were based on two methods of recovery: (1) the CLIN pricing in the contract, which Atlas asserted provided “the most reliable method for determining fair compensation; and (2) where CLIN pricing was not applicable, a “jury verdict” (i.e. an estimated amount where specific proof of cost was lacking) because Atlas was unable to present the determination of its costs.

The Board rejected *both* bases for the settlement amount, noting that CLIN prices are based on price, whereas termination settlements are based on cost—the cost of the work done and preparations made for the terminated portions of the contract. FAR 49.201(a), Additional Principles for Fixed-Price Contracts Terminated for Convenience. The CLIN prices do not reflect the contractor’s actual costs.

The Board also rejected the request for a jury verdict as unwarranted. A jury verdict is only used where a contractor has demonstrated a justifiable inability to substantiate the amount of its injury by direct and specific proof, citing *Grumman Aero. Corp v. Wynne*, 487 F. 3d 1350, 1358 (Fed. Cir. 2007). Here, Atlas asserted that it had a conflict with its subcontractor Sambros, which led to the subcontractor’s denying Atlas access to its records. But Sambros never testified regarding the dispute, the location of the records or their present condition. Further, Atlas’s claim ignored FAR 31.201-2(d) which requires a contractor to be responsible for accounting for costs and maintaining records and supporting documentation adequate to demonstrate its costs and comply with cost principles. The Board regarded the evidence in the record as sufficient to reach a decision without use of a jury verdict.

The Board then summarized each category of cost, plus profit (which it allowed at 5 percent, not the 25 percent claimed by Atlas, because of the difficulty of the actual work performed per FAR 49.202(b)(1)), and concluded with settlement amount of \$1.5 million to Atlas.

The Takeaway: A contractor will not be permitted to base a convenience termination settlement on CLIN prices. It must use costs incurred. Nor will a contractor be allowed to receive a jury

verdict, unless there is a justifiable inability to document its costs—and such an inability flies in the face of the FAR requirement that makes a contractor responsible for adequate documentation of its costs.

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