UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED; APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT DENIED: November 17, 2023

CBCA 7637

BEN HOLTZ CONSULTING, INC. dba CALIFORNIA AVOCADOS DIRECT,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Joshua D. Schnell and Rhina M. Cardenal of Cordatis LLP, Arlington, VA, counsel for Appellant.

Elin M. Dugan, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **GOODMAN**, and **KANG**.

KANG, Board Judge.

Appellant, Ben Holtz Consulting, Inc. dba California Avocados Direct (CAD), appeals a final decision by a contracting officer of respondent, Department of Agriculture (USDA), Agriculture Marketing Service (AMS or agency), regarding appellant's contract to deliver boxes of food to people affected by COVID-19. The parties have filed cross-motions for partial summary judgment with regard to appellant's claim for entitlement to termination settlement costs. We grant respondent's motion for partial summary judgment and deny appellant's cross-motion for partial summary judgment.

Background

On April 24, 2020, AMS issued a request for proposals (RFP) seeking to award multiple contracts to "conduct food distribution supply chain activities to get USDA procured food to Americans impacted by COVID 19" in seven regions across the United States.[1] Appeal File, Exhibit 1a at 5-7.[2] The RFP identified five contract line item numbers (CLINs) for delivery of boxes of food: (1) fresh fruit/fresh vegetables, (2) dairy products, (3) precooked meat, (4) combination box (containing a combination of CLINs 1–3 and 5), and (5) fluid milk. *Id.* at 5. The solicitation required offerors to "submit a product description and unit price" for each proposed box of food. *Id.*

With regard to delivery of the boxes of food, the RFP provided the following instructions:

> The contractor is solely responsible for establishing a network of recipient entities (i.e. food banks, food pantries, churches, schools, community groups, and other non-profit and governmental organizations for distribution to Americans who need food). . . . The contractor is responsible for all supply chain and logistic activities necessary to ensure the boxes are distributed to persons in need of food assistance in the United States. The offeror[']s technical proposal should demonstrate the offeror[']s proposed approach to constructing that supply chain, distributing commodity boxes and tracking and evidencing deliveries.

Id. at 6.

The delivery instructions also stated that "[p]rices should be inclusive of all transportation costs, including multiple stops." *Id.* at 6. In response to a question regarding the cost of freight, the agency further advised in RFP amendment 1 that "[t]he box price you offer to the Government should be the comprehensive price including all components (including but not limited to freight)." Exhibit 1c at 3.

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[1] The RFP provided that AMS's "Master Solicitation for Commodity Procurements Emergency-Master Solicitation for Commodity Procurement (E-MSCP)" was incorporated into the solicitation. Exhibit 1a at 5. The E-MSCP in turn provided that contracts awarded under a solicitation that incorporated the E-MSCP would incorporate the following documents: (1) the E-MSCP, (2) the solicitation, (3) the applicable USDA commodity specification and/or supplement, (4) the contractor's offer, and (5) the contract or purchase order. Exhibit 1b at 12.

[2] All exhibits are found in the appeal file, unless otherwise noted.

The RFP incorporated Federal Acquisition Regulation (FAR) clause 52.212-4 (48 CFR 52.212-4 (2019) (FAR 52.212-4)), "Contract Terms and Conditions–Commercial Items (Oct 2018)." Exhibits 1a at 1, 1b at 1. Of relevance here, the clause's termination for convenience provision has two prongs for what costs a contractor may recover: (1) "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination" and (2) "reasonable charges the Contractor can demonstrate[,] to the satisfaction of the Government using its standard record keeping system, have resulted from the termination." FAR 52.212-4(l).

CAD submitted a proposal to provide boxes of food under CLIN 1 for $40 per box with the number of boxes to be determined. Exhibit 1d at 2, 3. On May 8, 2020, AMS awarded a contract to CAD.[3] Exhibit 1e. The award letter stated that CAD was awarded a contract for a not-to-exceed value of $40,000,000 based on a not-to-exceed amount of 1,000,000 boxes of fresh fruit and vegetables under CLIN 1 at a price of $40 per box.[4] *Id.* Deliveries were to occur from May 15 through June 30, 2020.[5] *Id.*

AMS conducted a post-award conference for CAD and other awardees on May 12, 2020. Complaint ¶ 22; Answer at 4. During the conference, the contracting officer authorized contractors, including CAD, to begin contract performance prior to the contract start date of May 15, 2020. Complaint ¶ 23; Answer at 4.

On May 15, 2020, the contracting officer issued a stop work order to CAD based on concerns regarding the firm's financial capability. Exhibits 5, 8. On May 20, 2020, the contracting officer terminated the contract for the convenience of the Government. Exhibit 7 at 5. By approximately May 20, 2020, notwithstanding the stop work order, CAD delivered 29,536 boxes of food to recipients, for which AMS paid $1,181,440. Respondent's Statement of Undisputed Material Facts ¶ 8; Appellant's Statement of Genuine Issues ¶ 8.

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[3] The solicitation provided that "[a] written notice of award or acceptance of an offer mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party." Exhibit 1a at 16-17. The parties dispute whether the award letter issued by AMS was incorporated into the terms of the contract. Because the terms of the award letter are not necessary to the resolution of the cross motions for summary judgment, we need not further address the dispute at this time.

[4] Although the price is not specifically stated in the award letter, it can clearly be inferred to be $40 per box.

[5] The RFP provided for a base performance period of May 15 through June 30, 2020, and three two-month options. Exhibit 1a at 6.

CAD submitted a termination settlement proposal and certified claim to the contracting officer on June 5, 2020, seeking costs of $11,313,626.38. Exhibit 9 at 10. CAD submitted a revised termination settlement proposal and certified claim on April 27, 2022, seeking costs of $12,856,999.86. Exhibit 30 at 37. The revised claim sought costs under prong one of the termination for convenience provision of FAR 52.212-4(l) based on CAD's position that the contract contained five distinct performance requirements and that it had performed part of these requirements. In this regard, appellant's revised claim characterized the RFP's delivery instructions as establishing five performance requirements: (1) establish a network of qualified recipient non-profit entities; (2) source 18 million pounds of produce for food boxes; (3) purchase produce and food boxes; (4) package and prepare one million food boxes for delivery; and (5) transport and deliver the one million food boxes. *Id.* at 31-33.

CAD explained that it calculated the percentage of performance by estimating that "it would have purchased $10,440,000 [of] fruit to perform" had the contract not been terminated, which represented 26.1% of the contract value. Exhibit 30 at 26. Appellant then equally divided the remaining four requirements, which it argued totaled 73.9% of the $40 million contract value, thereby attributing to each of those four requirements a value of 18.475%, or $7,390,000 per requirement. *Id.* at 27. Appellant next estimated the amount of work it had performed with respect to the five requirements, arguing that it represented the percentage of work performed under prong one of the termination for convenience provision. *Id.* at 32-33.[6] In addition, appellant sought other costs under prong two of the termination for convenience provision for reasonable charges resulting from the termination. *Id.* at 33-36.

On October 22, 2022, the contracting officer issued a final decision, granting costs of $146,508.37 and denying all other costs. Exhibit 35 at 4. CAD appealed the contracting officer's final decision to the Board. Appellant seeks recovery of termination costs with regard to both prongs of the termination for convenience provision of FAR 52.212-4(l), as set forth in its revised settlement proposal.[7] Appellant and respondent have filed cross-

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[6] CAD estimated that it had performed 100% of requirement one, establishing a network of recipient entities; 51.48% of requirement two, sourcing product for inclusion in boxes; 2.95% of requirement three, conducting all aspects of preparing boxes; 2.95% of requirement four, transportation and delivery of boxes; and 6.12% of requirement five, purchasing the fruit and boxes. Exhibit 30 at 33.

[7] Appellant's complaint requests termination costs of $12,856,999.86. Complaint ¶ 56. In its revised claim, appellant contends that it is entitled to recovery of $12,269,866.95 under prong one for the percentage of contract price based on the percentage of work performed and $1,768,572.91 under prong two for reasonable charges resulting from

motions for partial summary judgment concerning appellant's entitlement to costs for the percentage of work performed under prong one of the termination provision. Neither party seeks summary judgment regarding appellant's claim under prong two regarding reasonable charges arising from termination.

Discussion

Summary judgment is appropriate when there are no genuine disputes of material fact and the movant demonstrates it is entitled to judgment as a matter of law. *Carmazzi Global Solutions, Inc. v. Social Security Administration*, CBCA 6264, et al., 19-1 BCA ¶ 37,439, at 181,950. Genuine disputes of material fact exist when a rational finder of fact could resolve an issue in favor of either party and the resolution of that issue would impact the outcome of the case under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). We must view all inferences in a light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). Interpretation of contract language is primarily a matter of law, and disagreements concerning the legal interpretation of contract documents do not create factual disputes that preclude summary judgment. *South Texas Health System, v. Department of Veterans Affairs*, CBCA 6808, 23-1 BCA ¶ 38,420, at 186,707; *Partnership for Response & Recovery, LLP v. Department of Homeland Security*, CBCA 3566, 14-1 BCA ¶ 3580, at 175,114; *see M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1205 (Fed. Cir. 2004).

Prong One of the Termination Provision

We first address the type of work that is compensable under prong one of FAR 52.212-4(l). Generally, a settlement of a contractor's claim arising from the termination of a contract for the convenience of the Government "should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract,

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termination, for a total of $14,038,439.86. Exhibit 30 at 8. Appellant acknowledges that it was paid $1,181,440 for delivering 29,536 boxes prior to termination, which appellant states reduces its overall claim to $12,856,999.86, i.e., the amount cited in the complaint. *See id.*; Complaint ¶ 56. Although appellant does not specifically address how the payment for delivered boxes affects the value of its prong one and two claims, the payment for delivered boxes appears to relate to "work performed" under prong one rather than charges resulting from termination under prong two. Thus, removing the prong two claim amount of $1,768,572.91 from the overall claim amount of $12,856,999.86 yields a prong one claim of $11,088,426.95.

including a reasonable allowance for profit." FAR 49.201(a);[8] *see Russell Sand & Gravel Co. v. International Boundary & Water Commission*, CBCA 2235, 13 BCA ¶ 35,455, at 173,868; *SWR, Inc.*, ASBCA 56708, 15-1 BCA ¶ 35,832, at 175,223 (2014) (citing *Nicon, Inc. v. United States*, 331 F.3d 878, 885 (Fed. Cir. 2003)).

Decisions by this Board have not directly addressed how to distinguish between prongs one and two of the termination for convenience provision, nor has the Court of Appeals for the Federal Circuit directly addressed this matter. However, relevant decisions by the Court of Federal Claims (COFC) and Armed Services Board of Contract Appeals (ASBCA) provide persuasive guidance relevant to this appeal.

In *ACLR, LLC v. United States*, 157 Fed. Cl. 324 (2021), the court found that prong one looks to the amount of payment the contractor is entitled to be paid under the terms of the contract. The court concluded that the contractor was not entitled to compensation under prong one because the contract provided for payments based solely on contingency fees, and no contingency fees were earned prior to termination. *Id.* at 333. In contrast, the court concluded that the term "reasonable charges" in prong two refers to "costs separate from those charges associated directly with the completed work," including "such things as 'start-up costs; unrecovered running expense; preventive maintenance; settlement charges; and other charges that are normally paid pursuant to a long form termination [under FAR part 49] for convenience provision to fairly compensate a contractor.'" *Id.* at 332-33 (quoting *SWR, Inc.*, 15-1 BCA at 175,223).

In *TriRAD Technologies Inc. v. Department of the Air Force*, ASBCA 58855, 15-1 BCA ¶ 35,898, the ASBCA found that for contracts with unit prices, the term "work performed" was not limited to work that was tendered and accepted by the Government. Instead, work performed includes both the completed units at the contractually specified price and the partially completed units. *Id.* at 175,496. The price for partially performed work should be determined for each unit by: (1) looking to the percentage of completion of each unit required by the contract and (2) multiplying the percentage of completion for that unit by the unit price. *Id.* Implicit within the ASBCA's interpretation of prong one was that

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[8] The termination for convenience provision of FAR 52.212-4(l) differs from the provisions set forth in the clauses required by FAR part 49 for non-commercial contracts. *See* FAR 49.002. As this Board has noted, however: "In analyzing the parameters of [FAR 52.212-4(l)], . . . the basic principles governing the purpose of a termination for convenience settlement apply to both commercial and non-commercial item contracts." *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,155. Moreover, FAR 12.403(a) explains that "[c]ontracting officers may continue to use part 49 as guidance to the extent that part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4."

work performed or partially performed refers to the deliverables and their unit prices. In contrast, the ASBCA found that startup costs are excluded from prong one and must be addressed under prong two as costs arising from the termination. *Id.* at 175,498.

With regard to prong two of the termination for convenience provision, decisions by this Board, the ASBCA, and the COFC have found that contractors may recover costs that were incurred prior to the termination, including start-up costs. *E.g.*, *Value Recovery Holding, LLC v. United States*, No. 21-1467, 2022 WL 3641779, at *8 (Fed. Cl. Aug. 23, 2022); *ACM Construction & Marine Group, Inc.*, CBCA 2245, 14-1 BCA ¶ 35,537, at 174,156; *TriRAD Technologies*, 15-1 BCA at 175,498-99. Of relevance here, the COFC, in *Value Recovery Holding*, found that obtaining an authority to operate (ATO) certification was a contractual requirement that was necessary prior to performance, but it was not a contractual deliverable with a specified price that was compensable under prong one. *Value Recovery Holding*, 2022 WL 3641779, at *8-9. Instead, the court found that the Government's termination of the contract precluded the contractor from recovering the costs incurred in obtaining an ATO through contract performance and that the costs were therefore compensable under prong two. *Id.*

In sum, we find that prong one of FAR 52.212-4(l) covers work for which the contractor is entitled to be paid under the terms of the contract. Where a contract provides for payment of deliverables at unit prices, prong one permits compensation for completed or partially completed deliverables. Prong one does not permit the contractor to recover separately for work performed or work partially performed that was contractually required to be included in the unit price for deliverables, including startup or preparatory activities. We also find that prong two provides for recovery of reasonable costs that "resulted from the termination," including preparatory or startup activities that are not separately priced under the contract and not otherwise covered by prong one.

Interpretation of the Contract Performance Requirements

We next address appellant's claim for costs under prong one of FAR 52.212-4(l). The parties dispute the scope of the work required by the contract and, therefore, what should be considered "work performed" under prong one.

Appellant contends that the five contract performance requirements it identifies are the "work" within the meaning of prong one, rather than startup costs, and that all efforts toward performing the work are therefore compensable under prong one. For example, appellant contends that it performed 100% of the requirement to establish a network of recipient entities and is therefore entitled to $7,390,000 as the value it assigned to this work based on the analysis discussed above. Appellant's Partial Cross-Motion for Summary Judgment at 19-21.

Respondent argues that the term "work performed" in prong one refers to the deliverables under the contract. Respondent contends that the contract required delivery of boxes of food and that the other activities identified by appellant were not separate deliverables. Moreover, respondent asserts that the contract specified that all other costs were to be included in the unit price for the boxes. Because CAD delivered 29,536 boxes and was paid $1,181,440 for those deliveries at the contract's $40-per-box rate, respondent argues that appellant has been paid in full with regard to the "work performed."[9]

We agree with appellant that the five activities it identifies were requirements of the contract. However, we agree with respondent that the activities were to be included in the contract's per-box price. For these reasons, we agree with respondent that the contract did not set forth five distinct performance requirements in the manner claimed by appellant.

The contract did not require, for example, delivery to the Government of a network of recipients, nor did it provide a separate price for that requirement. Instead, the contract specified that appellant would deliver boxes of food to recipients at a unit price of $40 per box. All other activities, including the five tasks identified by appellant as performance requirements, were the contractor's responsibility as part of the delivery of boxes and were to be included in the unit prices for the boxes. *See* Exhibit 1c at 3.

As in *Value Recovery Holding*, other startup or preparatory costs the contractor was not able to recoup through performance of the contract may be eligible for recovery under prong two of the termination for convenience provision to the extent that they are "reasonable charges the Contractor can demonstrate[,] to the satisfaction of the Government using its standard record keeping system, have resulted from the termination." FAR 52.212-4(l). Of relevance to the cross-motions to dismiss, however, such costs are not eligible under prong one of the termination for convenience provision.

In sum, we find no genuine issues of material fact that preclude partial summary judgment for respondent. All of the matters addressed here are appropriate for summary judgment because they concern the interpretation of the termination for convenience provision of FAR 52.212-4(l) and the terms of CAD's contract. Based on our review of the undisputed terms of the contract, we find that the contract did not provide entitlement to payment in connection with the five activities as characterized by appellant. Rather, the contract provided for payment based on the delivery of boxes at a per-box price. We therefore find that prong one of the termination for convenience provision does not permit

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[9] We note that appellant does not contend that it partially completed any boxes. Instead, appellant contends that the contract contained five distinct performance requirements and that appellant is entitled to prong one costs based on the percentage completion of those five requirements. As discussed above, we find no merit to that argument.

recovery of any of the costs sought by appellant. We also find that there is no genuine issue of material fact that appellant delivered and was paid for 29,536 boxes. CAD is therefore not entitled to any additional payment under prong one of the termination provision.

Decision

For the foregoing reasons, with regard to CAD's claim for termination costs under prong one of FAR clause 52.212-4(l), we **GRANT** the agency's motion for partial summary judgment and **DENY** appellant's motion for partial summary judgment. The appeal is denied as to the claims concerning prong one FAR clause 52.212-4(l). The Board will schedule further proceedings by separate order.

Jonathan L. Kang
JONATHAN L. KANG
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge