UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: December 12, 2008

CBCA 1331

DREAMSCAPES, LLC,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Robert J. Wagman, Jr., of Baker Botts L.L.P., Washington, DC, counsel for Appellant.

James L. Weiner, Division of General Law, Department of the Interior, Washington, DC, counsel for Respondent.

**WALTERS**, Board Judge.

Appellant, Dreamscapes, LLC (Dreamscapes), and respondent, the United States Department of the Interior (DOI or Government), had entered into a tree thinning contract. The contract was terminated for the Government's convenience. Dreamscapes submitted several convenience termination settlement proposals, the Government provided several counterproposals, and ultimately Dreamscapes filed a claim in the total amount of $59,635, under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. The contracting officer issued a final decision, allowing Dreamscapes a total of $36,045.62. The present appeal is from that final decision. Dreamscapes elected the small claims procedure for small businesses under Board Rule 52, and the parties both elected to submit their respective cases on the record, pursuant to Board Rules 18 and 19. For the reasons set forth below, the Board finds Dreamscapes entitled to recover a total of $34,821.79. Because this case is being decided under the small claims procedure, the Board's decision is being issued by a single judge, and that decision is final and conclusive and shall not be set aside except for reasons of fraud. 41 U.S.C. § 608(d). The decision has no value as precedent. Rule 52(b).

Factual Background

On April 12, 2006, Dreamscapes and the DOI Bureau of Land Management's (BLM's) Royal Gorge Field Office executed contract no. CAP065005 (the contract) for the provision of mechanical thinning, piling, and chipping of trees on a ninety-eight acre tract in the Turkey Gulch area, some fifteen miles southwest of Canon City, Colorado. The contract had a unit price of $496 per acre and a total contract price of $48,608. Appeal File Exhibit 1 at 100-02, 112. The contract called for completion within ninety days. *Id*. at 112. Among numerous other provisions in the contract were two special clauses pertaining to partial payment and to the Government's right to terminate the contract for its convenience.

The payment provision states:

**Payment:**

Partial Payment may be authorized by the COR assuming acceptable work has been completed in a time frame that will allow the project to be completed within the contract period. No payment will be authorized while the contractor has only partially completed a unit. The units to be completed with acreages are listed below. The contractor is responsible for bidding on the work to be completed based on his/her estimates of actual treatable acres determined from the site visit.

| Unit Number | Total Acres |
|---|---|
| Unit #1 | 98 |
| Total | 98 |

Appeal File, Exhibit 1 at 121.

The convenience termination clause reads:

Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the 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 that the Contractor can demonstrate to the satisfaction of the Government, using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred that reasonably could have been avoided.

Appeal File, Exhibit 1 at 127-28. The contract also incorporated by reference the standard Stop-Work Order clause under Federal Acquisition Regulation (FAR) 52.242-15 (48 CFR 52.242-15 (2005)) as well as the standard Suspension of Work clause under FAR 52.242-14. *Id*. at 123, 125.

DOI issued Dreamscapes a notice to proceed dated August 31, 2006. Appeal File, Exhibit 3. Shortly thereafter, the parties began to quarrel over whether Dreamscapes was making adequate progress in contract performance. *Id*., Exhibits 6, 7 and 9. At the contracting officer's request, *Id*., Exhibit 15, the contracting officer's representative issued Dreamscapes such a stop work order on November 3, 2006, indicating that the order was being issued for "irreconcilable differences." *Id*., Exhibit 12. The stop work order was received by Dreamscapes on November 6, 2006. *Id*., Exhibit 20. Dreamscapes ceased work at the site thereafter.

On November 20, 2006, the contracting officer by telephone notified Dreamscapes that the contract was being terminated for the convenience of the Government. Appeal File, Exhibits 13, 15. The contracting officer also issued contract modification no. 2, dated November 20, 2006, under which the contract was "partially terminated for the convenience of the government." *Id*., Exhibit 14. By letter to Dreamscapes dated December 3, 2006, the contracting officer confirmed her telephonic instructions of November 20, 2006, that Dreamscapes was to submit to the contracting officer an invoice with its estimation of completed acreage under the contract, along with "'reasonable' demobilization costs." *Id*., Exhibit 15. Dreamscapes received that letter on December 7, 2006. *Id*., Exhibit 20 at 2.

Dreamscapes, by letter of January 8, 2007, instead of complying with the contracting officer's instructions, i.e., invoicing for a percentage of the contract price based on its estimate of completion and for its reasonable demobilization costs, submitted a "final invoice" for **"**all**"** "reasonable costs" incurred for the project in the total amount of $48,425.47. Appeal File, Exhibit 16.

The contracting officer, by letter dated April 4, 2007, determined that Dreamscapes was entitled to recover a total of $28,445.67 for the convenience termination. This amount, in part, was derived based on the percentage of contract completion reflected in an earlier Dreamscapes progress payment request. The contracting officer also allowed $5220.71 for demobilization and associated transportation, per diem (at the Government's per diem rates) as well as $1837.44 for labor costs (including health and welfare benefits) for two laborers during the pre-termination suspension period -- which the contracting officer calculated as being nine working days between November 8 and 20, 2006[1]. *See* Appeal File, Exhibit 17.

By email message dated May 31, 2007, Dreamscapes responded to and rejected the contracting officer's determination, asserting that termination settlement necessarily would have to be calculated based on Dreamscapes' costs, rather than on the basis of percentage of contract completion, and challenging the accuracy of DOI's findings regarding that percentage. Appeal File, Exhibit 18.

By letter dated June 28, 2007, Dreamscapes, notwithstanding its earlier contention that there was "no way" to "accurately determine" a percentage of contract completion, asserted that it had actually completed 39% of the contract work prior to the suspension and ultimate termination and, on that basis, submitted a revised termination settlement proposal in the total amount of $46,413.02. That total included, among other things, the same $5220.71 that the contracting officer had allowed for demobilization and related costs. Dreamscapes' computations relating to the pre-termination suspension of work were based on the same daily figures as DOI had used in its April 4, 2007, counterproposal, although Dreamscapes' totals were based on twenty-two working days[2], rather than the nine days DOI had been using. In the June 28, 2007, letter, Dreamscapes also stated that, unless DOI accepted its proposal within thirty days, it intended to submit a certified settlement proposal, i.e., a certified claim under the CDA, which would include an additional $5000 of anticipated settlement costs (presumed to mean attorneys' and accountants' fees for settlement proposal preparation). Appeal File, Exhibit 20.

---

[1] The suspension, which had begun, not on November 8, 2006, but on November 6, 2006, the day Dreamscapes received the stop work order, and which ended on November 20, 2006, the day it was orally notified of the termination, did contain only nine work days, since a federal holiday, Veterans Day, which was observed on Friday, November 10, 2006, is not counted as a work day.

[2] The twenty-two work days Dreamscapes was using was the period from November 6, 2006, a Monday, when it received the stop work order, through December 7, 2006, the day it received the official termination letter. Another federal holiday within that period, Thanksgiving Day, November 23, 2006, likewise is not counted as a work day.

In a letter dated August 30, 2007, the DOI contracting officer responded to Dreamscapes' June 28, 2007, proposal. In the response, the contracting officer countered with an offer totaling only $24,780.23. That amount again included the same $5220.71 total that both parties had included for demobilization/transportation of the equipment, truck and trailer back to Enid, Oklahoma, and associated labor and per diem costs. Appeal File, Exhibit 21.

Dreamscapes submitted to the contracting officer a final settlement proposal by an undated letter, which was received by DOI on January 28, 2008. *Id*., Exhibit 24. That letter sought a total of $59,635: (1) $35,095, representing 72.2% of the contract price, which Dreamscapes calculated based on its having spent sixty-five days of the specified ninety-day contract performance period prior to the Government stop work order; (2) $2703 for overhead on the uncompleted work -- representing 20% of the remaining 27.8% of the contract price; and (3) $20,000, representing an estimate of the overall anticipated cost for legal and accounting fees associated with Dreamscapes' termination settlement proposal preparation and submission. Dreamscapes indicated that, as of the proposal submission, it had already expended $16,100 for such fees. *Id*. By letter to the contracting officer dated April 1, 2008, this proposal was again submitted as a formal claim under the CDA. That letter, which was received by the contracting officer on April 7, 2008, specifically requested a contracting officer's decision on the claim within sixty days, "pursuant to 41 U.S.C. § 605(c)(1)." *Id*., Exhibit 25.

The contracting officer rendered a final decision by letter to Dreamscapes dated June 6, 2008. *See* Appeal File, Exhibit 26. The final decision allowed Dreamscapes a total of $36,045.62. To derive that amount, the contracting officer abandoned entirely the methodology DOI had earlier used. In addition to allowing the $2703 sought by Dreamscapes for overhead on uncompleted/terminated work, the contracting officer, instead of putting forth DOI's own estimate of percentage of the work completed prior to termination, decided to include in the termination settlement an amount for total costs expended, based on the Government's own estimates of the actual costs expended, plus an allowance for legal and accounting costs of $4975. As to this latter item, the contracting officer had the following to say:

> This amount represents the *reasonable* cost of settlement and preparation fees. I understand that you are claiming $20,000, $17,181.87 of which you have allegedly incurred for preparation of this case up to this point. However, the Government can only pay reasonable fees for this purpose. By the receipts and invoices you provided, it appears that there are charges of upwards of $477 per hour of work. The Government will pay the reasonable costs of what it would cost the average claimant with a similar case using an attorney

> in the locality with the skill and acumen required for this type of case. Therefore, the Government can only pay $4975 of the claimed settlement costs.

*Id*. at 4.

Dreamscapes timely appealed from this final decision. In accordance with their joint request and the Board's order, the parties submitted both initial record submissions and reply submissions on the record. Dreamscapes has filed a motion to strike the Government's reply submission in its entirety, and DOI has opposed that motion.

## Discussion

As a preliminary matter, we will address appellant's motion to strike. In its motion, Dreamscapes seeks to strike the entirety of the Government's reply submission, since, in Dreamscapes' view, it goes beyond replying to appellant's initial record submission. Nothing in Board Rules 18 and 19 restricts what may be included in record submissions, initial submissions, reply submissions or otherwise. The motion has no legal basis or validity and is frivolous. Accordingly, the motion is denied.

For a proper convenience termination settlement here, the amount due Dreamscapes must be derived based on and be "consistent with" the language of the contract's convenience termination clause. *See* FAR 49.107(a). That clause provided for two things, first that the contractor be paid "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination," and next any further "reasonable charges that . . . resulted from the termination." In our view, at this stage, neither party's proposal adheres appropriately to the clause. Resorting to a total cost settlement -- as Dreamscapes did initially and as DOI did ultimately -- is clearly inconsistent with the clause.

The only viable estimate of "the percentage of the work performed prior to the notice of termination" that appears in the record is Dreamscapes' estimate of 39%. The 20% figure DOI had earlier used was based on the Government's estimation of the status of completion of 20.5%[3] on or before October 25, 2006, some eleven days prior to the Dreamscapes' receipt

[3] The 20.5% Government estimate of work completion reflected in Dreamscapes' letter of November 1, 2006, in conjunction with its request for a "progress payment," is computed by adding 3.8 acres, 7.3 acres (14.6 acres x 50%), and 8.95 acres (17.9 acres x 50%) and dividing that sum, 20.05 acres, by the overall contract acreage of ninety-eight acres. As the letter itself noted, Dreamscapes considered that estimate to be low.

of the stop work order. Accordingly, we will use the 39% figure here for purposes of deriving the amount due Dreamscapes. On this basis, Dreamscapes is entitled to $18,957.12 (the contract price of $48,608 x 39%) for work completed prior to termination. The Board must reject out of hand the notion in Dreamscapes' final claim submission that it is entitled to 72.2% of the contract price merely because it spent sixty-five days on the project, or 72.2% of the time scheduled for completion. The contract's termination for convenience clause provides for payment to "reflect[ ] the percentage of the work performed," not the percentage of time on the job. Additionally, the 72.2% figure cannot be squared with Dreamscapes' own prior completion estimate of 39%.

In terms of "reasonable charges" that may have "resulted from the termination," as DOI eventually realized, and what Dreamscapes appears to have accepted, is that, other than in conjunction with judgments or arbitration awards obtained against Government prime contractors by their subcontractors, *see* FAR 49.108-5, anticipatory profit on work not completed by reason of the termination would not be recoverable. FAR 49.202. What neither party understood was that recovery of overhead for such unperformed work likewise is precluded. *See Edgar M. Williams*, *General Contractor*, ASBCA 16058, et al., 72-2 BCA ¶ 9734 at 45,510; *Technology, Inc.*, ASBCA 14083, 71-2 BCA ¶ 8956 at 41,631. In *Chamberlain Manufacturing Corp.*, ASBCA 16877, 73-2 ¶ 10,139, the Armed Services Board of Contract Appeals observed that, while the Government may be liable to a contractor for "continuing costs," i.e., those costs directly related to the terminated contract that might not be able to be shut off immediately, it has no responsibility for overhead -- costs not directly related to any particular contract and that will continue of necessity so long as a contractor remains in existence. In this regard, the Armed Services Board stated:

> It is obvious that appellant's overhead is a cost which will continue so long as appellant continues to exist as an ongoing organization and is thus not directly related to the terminated contract. . . . In practical effect, if claims such as presented by appellant were allowed the Government would be guaranteeing a contractor's overhead costs, without receiving any benefit therefrom, as a "penalty" for exercising its contractual rights [of terminating a contract for its convenience].

*Chamberlain Manufacturing*, 73-2 BCA at 47,679. Thus, the $2703 both parties would include for overhead is not properly recoverable by Dreamscapes.

On the other hand, even in the context of a convenience termination, overhead costs associated with pre-termination suspensions of work such as was experienced here may be recoverable. *See Richerson Construction, Inc. v. General Services Administration*, GSBCA 11161-R, et al., 93-3 BCA ¶ 26,206 at 130,440. The suspension that resulted from the

Government's stop work order in this case caused Dreamscapes to halt its work for a period of fourteen calendar days, from November 6, 2006, when it received the stop work order, until November 20, 2006, when it was notified telephonically that the contract was being terminated. Here, the parties both have based their calculations on fixed overhead costs representing 20% of the overall contract price -- or $9721.60 ($48,608 x 20%). The fourteen calendar day suspension period would represent 14/90 of the total scheduled contract period. This would translate to $1512.25 of overhead costs (14/90 x $9721.60) generated during the period of suspension.

In addition, Dreamscapes would be entitled to recover for idle labor costs and idle equipment costs incurred during the pre-termination suspension. As to idle labor costs, we find the Government's earlier allowance of $1837.44 for nine work days of direct labor costs and associated health and welfare expenses to be appropriate. The Board also would permit in connection with idle labor the recovery of nine work days[4] of per diem food and lodging, or $891. As to idle equipment, Dreamscapes, by its letter and invoice of January 8, 2007, had initially claimed as actual costs $6515.17 for "Equipment Cost," a cost item that appears to relate to the fixed costs of ownership (e.g., depreciation) or rental, and another $6888.87 for "Fuel, Oil, Maintenance and Repair of Equipment Cost," a cost item that appears to relate to equipment operation. This latter cost item would not seem to be involved for the fourteen calendar day suspension period. Overall, Dreamscapes spent a total of sixty-five calendar days on the project prior to its termination. The suspension period therefore should represent 14/65 of the $6515.17 in Equipment Cost -- or $1403.27 in idle equipment costs.

Also, at some juncture, the parties had both allowed $5220.71 for the post-termination demobilization and transport of equipment back to Enid, Oklahoma ("'reasonable' demobilization costs" per the contracting officer's initial instructions -- *see* Appeal File, Exhibit 15). We find this figure appropriate and reasonable.

Finally, there is the matter of the $20,117 now being claimed by Dreamscapes for its total actual legal and accounting fees associated with assembling and presenting its final convenience termination proposal. The Board is in agreement with DOI that entitlement to these generally allowable termination costs must be governed by a rule of reasonableness. Although the Board does not doubt that Dreamscapes' attorneys regularly command the hourly rates being claimed or question that they actually spent the hours claimed, for reasons that should be obvious from the above discussion, we do not find the final proposal that

[4]Dreamscapes presented figures for per diem food and lodging based on work days, rather than calendar days.

Dreamscapes submitted with their assistance and that of Dreamscapes' accounting consultant to have represented significant value added for Dreamscapes or the termination settlement process. Moreover, in light of the relatively small amount of money involved in the claim, we find the expenditure on legal and accounting fees to have been excessive. The total expended quadrupled the $5000 Dreamscapes itself had estimated it would expend for such fees, and the Board cannot justify holding the Government responsible for the overage. Accordingly, we limit the amount allowed for legal and accounting fees to $5000.

We award Dreamscapes a total of $34,821.79 for the instant convenience termination. This total amount due consists of the following:

| | | |
|---|---|---|
| Due for work completed through termination | | $18,957.12 |
| Due for pre-termination suspension: | | |
| Idle labor, health and welfare costs | $1837.44 | |
| Per diem costs for idle labor | 891.00 | |
| Idle equipment costs | 1403.27 | |
| Unabsorbed overhead | 1512.25 | |
| Subtotal | | 5,643.96 |
| Due for demobilization and transport of equipment to Enid, Oklahoma | | 5,220.71 |
| Due for professional fees for proposal preparation | | 5,000.00 |
| TOTAL DUE | | $34,821.79 |

## Decision

The appeal is **GRANTED IN PART**. The Board finds appellant entitled to recover a total of $34,821.79.

RICHARD C. WALTERS
Board Judge