UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 3, 2023

CBCA 6926, 7338

ANGLIN CONSULTING GROUP, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Yashieka S. Anglin of Anglin Consulting Group, Inc., Washington, DC, appearing for Appellant.

Gabriel D. Soll and Korey J. Barry, Office of Acquisition and Procurement Law, United States Coast Guard, Department of Homeland Security, Washington, DC, counsel for Respondent.

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

GOODMAN, Board Judge.

Appellant, Anglin Consulting Group, Inc. (Anglin or ACG), has filed these consolidated appeals from decisions of a contracting officer of respondent, the Department of Homeland Security, United States Coast Guard (USCG). The parties have submitted the case to be decided on the written record pursuant to Board Rule 19 (48 CFR 6101.19 (2021)). We deny the appeals.

Background[1]

USCG awarded contract no. HSCG23-16-C-PAC019 (the contract) to Anglin on August 15, 2016, as a direct award under the Small Business Administration's (SBA's) 8(a) Small Disadvantaged Business Program. Appeal File, Exhibit 1 at 1.1.[2] The contract included clause 52.219-71, Section 8(a) Direct Awards (Deviation) (Nov 2005), requiring USCG to administer the contract on behalf of the Government. Appeal File, Exhibit 1 at 22-23. The contract was for "accounting and general clerk support services" for USCG Recruiting Command, with an initial period of performance from August 16, 2016, through August 15, 2017, funded at $303,360. Appeal File, Exhibit 1 at 1-2.

The funding divided the fixed price for the two categories of services, clerical support services and clerical accounting support services, each on a separate contract line item number (CLIN) by a quantity of twelve, permitting monthly billing. Appeal File, Exhibit 1 at 2. Appellant asserts that, while this was a fixed-price contract, it provided for an economic price adjustment on the basis of the contractor's cost experience in performing the contract. The contract included labor rates governed by a wage determination under the Service Contract Act. Therefore, adjustments were made to the contract price to allow for increased labor rates. Appellant's Reply Brief at 1.

The awarded contract included four, year-long option CLINs for each type of service, creating the potential for four additional years of performance. The total potential value, if all options were exercised, was $1,562,991.72. Appeal File, Exhibit 1 at 2-3. The contract included clause FAR 52.217-9, regarding the options to extend the term of a contract. Appeal File, Exhibit 1 at 22. The contract was awarded as a commercial services contract and included the FAR clauses providing the terms and conditions for Commercial Items, including FAR 52.212-4 and 52.212-5. Appeal File, Exhibit 1 at 6-22.

The parties bilaterally executed modification P00001 (mod. 01) to the contract on May 4, 2017. Appeal File, Exhibit 2. Mod. 01 increased the funding available under the clerical support services CLINs and deleted the CLINs relating to the clerical accounting services. Appeal File, Exhibit 2 at 39. The revised statement of work (SOW) reflected the

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[1] Appellant states in its reply brief that "ACG adopts herein the Government's Proposed Findings of Fact . . . in its Initial Brief . . . . While ACG generally agrees with the statements in the Government's proposed Statement of Facts, ACG disagrees with the Government's Statement of the Facts as follows." Accordingly, we include here the Government's proposed statement of facts and appellant's disagreements with the Government, citing appellant's reply brief.

[2] Citations to the appeal file refer to the revised appeal file submitted on April 25, 2022.

increased general clerk duties and the removal of the clerical accounting portion of the contract. Appeal File, Exhibit 2.a at 47-49. Among other revisions, this revised SOW changed the accounting support to "administrative" support. Appellant avers that, "although Modification P00001 was executed bilaterally, it was done so on behalf of appellant under duress." Appellant's Reply Brief at 1.

On May 2, 2017, before sending modification P00002 (mod. 02) for Anglin's signature, the contracting officer sent an e-mail which explained the changes in scope and the methodology employed to price the changed work. Appeal File, Exhibit 9. The contracting officer explained that he endeavored to price the modification without requesting a revised quote from Anglin as it was "in the best interest of both parties to get the new general clerk on board as quickly as possible." *Id*. at 82. The e-mail invited Anglin's review and acceptance of the changes with an entreaty to "let [the contracting officer] know what you think." *Id*. The contracting officer received no objection from Anglin. Appellant avers, "As this was an 8(a) contract, ACG expressed its objections to the proposed changes to the SBA's Business Operations Specialist (BOS). ACG's understanding of the Contract mechanism was that any changes or concerns ACG had should be addressed directly to the SBA." Appellant's Reply Brief at 2.

The parties bilaterally executed mod. 02 to the contract on July 20, 2017. Appeal File, Exhibit 3. Mod. 02 exercised the CLIN for option period 1, in accordance with FAR 52.217-9, for the clerical support services (CLIN 10001). *Id*. at 50. Mod. 02 extended the period of performance through August 15, 2018, and obligated $216,324.00 for this period. *Id*. Appellant avers that, "after realizing the USCG was moving forward with the Modification, there was no other choice but to sign the Modification." Appellant's Reply Brief at 2.

The parties bilaterally executed modification P00003 (mod. 03) to the contract on November 8, 2017. Appeal File, Exhibit 4. Mod. 03 added obligated funding to the contract in the amount of $806.40 for the remainder of the option period to account for an updated wage determination from the Department of Labor. *Id*. at 62. Mod. 03 further added sub-CLINs for the remaining option periods to account for the same change in labor rates. *Id*. at 63.

The parties bilaterally executed modification P00004 (mod. 04) to the contract on August 13, 2018. Appeal File, Exhibit 5. Mod. 04 exercised the CLIN for option period 2 for the clerical support services (CLIN 20001). *Id*. at 64. Mod. 04 extended the period of performance through August 15, 2019, and obligated $84,000 for this period. *Id*. at 65. Appellant avers that it "again attempted to get assistance through the SBA, as this was an 8(a) contract. The SBA was non-responsive, refusing to intervene on ACG's behalf. Finally, two days before the Contract was set to expire, ACG signed the Modification." Appellant's Reply Brief at 2.

Mod. 04 also incorporated a revised SOW which reflected the changed requirements. Mod. 04 and the revised SOW noted the removal of two of three positions no longer needed to perform the work. Appeal File Exhibits 5 at 64, 5.a.

Before signing mod. 04, the parties exchanged discussions regarding the changes that would be reflected in mod. 04. On July 10, 2018, the contracting officer e-mailed a large group, including representatives from appellant, the SBA, and the Program Office. Appeal File, Exhibit 10. The stated purpose of the e-mail was to "resolve pending issues" surrounding the contract and invited Anglin to provide additional information or to correct the statement of the situation. *Id*. at 83. Appellant avers, "Against this backdrop, ACG was still protesting the changes and asking the SBA to intercede on its behalf. The impact to ACG's business, a disadvantaged small business, was never addressed." Appellant's Reply Brief at 2.

Central to the issue in these appeals, this e-mail noted the removal of work performed by various individuals from the contract and that the reduction in work was based on the availability of government personnel to perform the requirements. Appeal File, Exhibit 10 at 83-84.

On July 31, 2018, Anglin e-mailed the contracting officer regarding the status of the in-sourcing analysis to be performed by DHS's Balanced Workforce Assessment Tool (BWAT). Appeal File, Exhibit 10.a at 86. Appellant avers, "This email was sent to the Head of the USCG's Small Business Office as well but not to the SBA." Appellant's Reply Brief at 3.

On August 3, 2018, the contracting officer responded, providing the results from the BWAT performed on July 30, 2018. Appeal File, Exhibit 10.a at 85. The e-mail invited Anglin to ask questions regarding the analysis and included USCG's then-head of Small Business as a recipient. Appellant avers that, "[a]gain, this email was not sent to the SBA." Appellant's Reply Brief at 3.

The final conclusion of the BWAT analysis was that the USCG "may use a greater percentage of federal employees to carry out this function." Appeal File, Exhibit 10.a at 85.

On July 18, 2019, USCG informed Anglin that it did not intend to exercise additional option periods, permitting the contract to expire on August 15, 2019. Appeal File, Exhibit 7. On May 2, 2021, USCG sent modification P0006 (mod. 06), the only unilateral contract modification, documenting the contract's closeout in accordance with FAR 43.103(b). Appeal File, Exhibit 8. This modification noted that all obligated funds had been disbursed in the amount of $580,330.40 and stated that "[a]ll awarded funds were disbursed during the period of performance . . . [a]ll deliverables have been received and accepted by USCG." *Id*. at 80.

On January 29, 2020, Anglin submitted a request for equitable adjustment (REA) in the amount of $111,442.23, stating that "de-scoping and deletion of work . . . under Modification P0001 and P0004 required [Anglin] to absorb losses in already incurred costs." Appeal File, Exhibit 11 at 88. On March 2, 2020, the contracting officer denied the January 29 REA. Appeal File, Exhibit 12 at 107.

On March 9, 2020, Anglin submitted a certified claim in the amount of $108,742.23. Appeal File, Exhibit 13 at 109. The claim states that the basis for its submission is that the deleted work under mod. 01 and mod. 04 required Anglin to "absorb costs and lose profits." *Id*. On June 26, 2020, the contracting officer denied the certified claim. Appeal File, Exhibit 15. Anglin appealed this final decision to this Board, docketed as CBCA 6926. The Board granted respondent's motion for partial dismissal. *Anglin Consulting Group, Inc. v. Department of Homeland Security*, CBCA 6926, 21-1 BCA ¶ 37,918.

On November 17, 2021, Anglin submitted another certified claim (designated as another "Request for Equitable Adjustment") in the amount of $173,558.84. Appeal File, Exhibit 16 at 174-75. This claim included the aspects of the initial appeal which the Board previously dismissed—that USCG failed to follow applicable in-sourcing guidelines and that the bilateral modifications were signed under economic duress. Anglin states that the amount of this claim was based on "[e]stimated direct cost of deleted work not already performed; [i]ndirect costs (Overhead) affected by the modification; and [p]rofit/fee affected by the modification." *Id*. at 174.

On February 16, 2022, the contracting officer denied the second claim. Appeal File, Exhibit 17. On February 28, 2022, Anglin appealed this final decision to this Board, which docketed the appeal as CBCA 7338 and consolidated it with the earlier appeal.

Discussion

Appellant entered into a fixed-price contract with respondent to provide accounting services for a base year and four option years. The base year and option years 1 and 2 were performed. However, respondent deleted a portion of the work from the contract after determining that the work could be performed by federal employees. Respondent decided not to exercise option years 3 and 4. Appellant alleges that respondent breached its duty of good faith and fair dealing by deleting the work, that it entered into the two modifications deleting the work under economic duress, and that the work should not have been deleted without the SBA's guidance and assistance. Additionally, appellant alleges that respondent attempted to avoid consulting with the SBA to receive consent and ignored its own in-sourcing guidelines. Appellant claims overhead and profit for the deleted work in the base year and option years 1 and 2, as well as profit for the deleted work for option years 3 and 4.

Respondent asserts that it properly deleted work from the scope of work of the fixed-price contract as the result of a change in agency requirements. Citing FAR 16.202-1 and the Changes clause of the contract, respondent states that appellant is therefore not entitled to additional compensation as the result of the deletion of work. FAR 16.202-1 states in relevant part:

> A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties.

The contract included the FAR 52.212-4 (c), Changes, which reads "Changes in the terms and conditions of this contract may be made only by written agreement of the parties." Appeal File, Exhibit 1 at 6. Pursuant to this provision, respondent deleted portions of the initial scope of work from the contract, and the parties adjusted the fixed price accordingly. The deletion of the work was accomplished by written agreement of the parties, i.e., bilateral modifications.

Summary of Appellant's Claim

Appellant's certified claim states in relevant part:

> [W]e seek an equitable adjustment to the contract in the amount of $173,558.84, plus additional CDA [Contract Disputes Act] interest. Our equitable adjustment is based Reasonable cost [sic], The difference between the reasonable cost of performing the contract without the deletion and the reasonable cost of performing the contract with it. Our calculations include:
>
> - Estimated direct cost of deleted work not already performed;
> - Indirect cost (Overhead) affected by the modification; and
> - Profit/fee affected by the modification.
>
> This amount represents the lost profits for all years of the contract, as well as the cost of the deleted FTE [full time equivalent] for Option years 1 and 2. See the attached Excel spreadsheet . . . .

Appeal File, Exhibit 16 at 174.

The spreadsheet referenced in the claim summarizes the costs as follows

Base Year	$13,493.64
Option Year 1	62,487.46 [Mod 2]
Option Year 2	73,501.65 [Mod 4]
Option Year 3	11,988.05
Option Year 4	11,988.05
Consultant Fee	498.00
Total	$174,056.84

Appeal File, Exhibit 17.[3]

The spreadsheet calculates and itemizes the component costs of the above totals for the base year and four option years. The cost of the direct labor for deleted work is not included in the claim. The costs claimed for the base year and option years 1 and 2 that were exercised are designated as overhead and profit calculated from the cost of direct labor for the deleted work. The costs claimed for option years 3 and 4 that were not exercised are designated as profit on deleted work.

Claim for Base Year and Option Years 1 and 2

The two bilateral modifications that deleted work from the contract were entered into pursuant to the Changes clause of the contract. Appellant seeks overhead and profit on deleted work. Appellant is not entitled to overhead and profit on work deleted by a deductive change, as the Government is entitled to calculate a deductive change by including overhead and profit on the deleted work. *PJ Dick, Inc.* v. *General Services Administration*, GSBCA 12215, 95-1 BCA ¶ 27,574; *G&M Electrical Contractors Co.*, GSBCA 4771, 78-2 BCA ¶ 13,452.

[3] This spreadsheet was not attached to Appeal File Exhibit 16 and was included in the appeal file when appellant filed it at the request of the Board on February 14, 2023.

Claim for Option Years 3 and 4

The contract included FAR 52.217-9, regarding the options to extend the term of a contract. Appeal File, Exhibit 1 at 22. Respondent was under no obligation to exercise the option years. The non-exercise of an option can provide a vehicle for relief only if the contractor proves that the decision not to exercise the option was made in bad faith or was so arbitrary or capricious as to constitute an abuse of discretion. *Attenuation Environmental Co. v. Nuclear Regulatory Commission*, CBCA 4920, et al., 16-1 BCA ¶ 36,521. As we do not find bad faith or arbitrary or capricious conduct, appellant is not entitled to the costs claimed for profit in these unexercised option years.

Appellant's Claim of Economic Duress

Appellant states that the bilateral modifications were entered into under economic duress. As this Board held in *Lynchval Systems Worldwide, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 3466, 14-1 BCA ¶ 35,792, to prove economic duress, a party must establish that it involuntarily accepted the terms of an agreement, that circumstances permitted no alternative, and that such circumstances were the result of the other party's coercive acts. The Board stated:

> "Economic duress may not be implied merely from the making of a hard bargain." *Johnson, Drake & Piper* [*v. United States*], 531 F.2d [1037,] at 1042 [(Ct. Cl. 1976)] (quoting *Aircraft Associates & Manufacturing Co. v. United States*, 357 F.2d 373, 378 (Ct. Cl. 1966)). "In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. . . ." *Fruhauf Southwest Garment Co. v. United States*, 11 F. Supp. 945, 951 (Ct. Cl. 1953).

14-1 BCA at 175,067.

Appellant has not proved economic duress. The reduction in scope of work of a fixed-price contract as the result of a change in agency requirements and resulting receipt of less revenue than originally anticipated is a foreseeable risk. Respondent was entitled to reduce the scope of work of a fixed-price contract pursuant to a written agreement of the parties. To reduce the scope of work based upon the changing requirements of the agency was not a coercive act by respondent. Appellant's reluctance to accept the bilateral modification, allegations that it had no choice but to accept the modifications and therefore signed them involuntarily, and allegations of financial embarrassment do not support economic duress. If financial hardship alone were sufficient to establish economic duress, no agreement resulting in financial hardship would ever be free from attack. *Asberry v. United States Postal Service*, 692 F.2d 1378, 1381-82 (Fed. Cir. 1982).

Appellant's Claim of Breach of the Covenant of Good Faith and Fair Dealing

Appellant's factual allegations supporting its claim of the breach of the covenant of good faith and fair dealing focus on the following:

> [T]he Government's actions had the express impact of frustrating Anglin's reasonable expectations regarding the fruits of the Contract. The improper descoping and discontinuation of work directly resulted in [appellant's] loss of profits, which were the contemplated benefit of the Contract.
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> . . . .
>
> Descoping the Contract . . . was inconsistent with the purpose of the Contract, as well as the USCG's own internal policies regarding insourcing and federal/SBA regulations requiring consultation with the SBA.

Appellant's Initial Brief at 13.

This Board has described the legal basis of the covenant of good faith and fair dealing and the difference between the covenant and bad faith in *Sigma Services, Inc. v. Department of Housing & Urban Development*, CBCA 2704, 12-2 BCA ¶ 35,173, at 172,591-92.

> The covenant of good faith and fair dealing is inherent in every contract. *Precision Pine & Timber, Inc. v. United States*, 696 F.3d 1344, 1365 (Fed. Cir. 2009). Government officials are presumed to exercise their duties in good faith. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002).
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> . . . .
>
> A claim that [respondent] breached the implied covenant of good faith does not require a showing of bad faith. *See Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). This is because a claim that the government breached the covenant of good faith and fair dealing is not the same as a claim that the government acted in bad faith. An allegation of breach of the covenant of good faith and fair dealing is an allegation that the party's contracting partner deprived it of the fruits of the contract . . . while bad faith is motivated by malice . . . and does not necessarily result in a deprivation of the fruits of the contract. *Rivera Agredano v. United States*, 70 Fed. Cl. 564, 574 n.8 (2006) (citations omitted).

> The covenant of good faith and fair dealing can be breached upon proving, *inter alia*, lack of diligence, negligence, or a failure to cooperate. *See Malone v. United States,* 849 F.2d 1441, 1445 (Fed. Cir. 1988); *see also Peter Kiewit Sons' Co. v. United States*, 151 F. Supp. 726, 731 (Ct. Cl. 1957). In fact, one can violate the obligation of good faith through "[s]ubterfuges and evasions . . . even though the actor believes his conduct to be justified." *Restatement (Second) of Contracts* § 205(D) (1981) (emphasis added).

Respondent has only exercised rights that it had from the original contract—to delete work and not to exercise an option. While appellant asserts that it has been deprived of the fruits of its contract and its reasonable expectation, i.e., its profits, the reduction of profits as the result of deletion of work due to a change in agency requirements and the decision not to exercise option years is a foreseeable risk when entering into a fixed-price contract.[4] There is no proof that respondent's actions in deleting the work were the result of lack of diligence, negligence, or failure to cooperate. Respondent did not breach the covenant of good faith and fair dealing.

Appellant's Claim of Bad Faith

Appellant's certified claim alleges "[t]he Government did not act in good faith by not following their own internal insourcing policy" and specifically states that USCG failed to submit the sourcing decision documents to DHS for approval. Appeal File, Exhibit 16 at 173. However, appellant does not address the claim of bad faith in its record briefing but only states that "[b]y contrast, bad faith has a much higher standard of proof." Appellant's Initial Brief at12.

The Government is entitled to reduce or otherwise to change its requirements for legitimate business reasons. When a contractor alleges that the Government breaches a contract by reducing its requirements, the contractor bears the burden to prove that the Government acted in bad faith, for example, by reducing its requirements solely to avoid its contractual obligations. In the absence of such a showing that the Government acted in bad faith, it will be presumed to have reduced its requirements for valid business reasons. *OWL, Inc. v. Department of Veterans Affairs*, CBCA 7184, 22-1 BCA ¶ 38,013.

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[4] Appellant's assertions that respondent failed to follow its own internal policies regarding in-sourcing (Balanced Workforce Strategy) and SBA regulations are rebutted by respondent in its briefings. Such policies and regulations do not deprive respondent of its contractual rights to delete work based on agency requirements or to decide not to exercise option years.

Appellant has not proven that respondent has reduced its requirements solely to avoid its contractual obligations, and its allegations of bad faith therefore fail.

Decision

The appeals are **DENIED**.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge