

COURT FINDS CONTRACTOR'S TERMS AND CONDITIONS INCORPORATED BY REFERENCE INTO GSA SCHEDULE CONTRACT

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A contractor's own terms and conditions infrequently appear in procurement contracts with the federal government. For the most part these contracts are "take it or leave it" propositions with the agency's own terms and conditions defining the agreement of the parties. Recently, however in *CSI Aviation, Inc. v. Department of Homeland Security*, 31 F.4th 1349 (Fed. Cir. 2022), the U.S. Court of Appeals took the opportunity to address circumstances when a contractor's standard terms and conditions may be incorporated by reference into a federal contract.

In this case, the contractor, CSI, brought an action against the Department of Homeland Security (DHS) and General Services Administration (GSA) seeking review of decisions of the Civilian Board of Contract Appeals, denying CSI's requests for payment from DHS for \$40,284,549 in flight cancellation charges it was allegedly owed under its schedule contract to provide air charter and auxiliary services. The contract at issue was a federal supply schedule contract which, compared to other procurement contracts, offers contractors greater opportunity to insert their own terms and conditions into the agreement.

Facts

CSI is a worldwide services broker that provides passenger and cargo air charter, aircraft leasing, and comprehensive aircraft management. It responded to a solicitation from the GSA seeking air charter services by means of a non-mandatory, indefinite delivery/indefinite quantity multiple award schedule contract. CSI submitted a proposal to the GSA. This proposal included its commercial price list and the CSI Terms and Conditions. These terms and conditions contained a cancellation clause providing for payment to CSI of a 25% non-refundable cancellation charge applicable to flights cancelled less than 14 days prior to departure, and a 100% charge for flights cancelled thereafter.

Contracting Officer's Decision

CSI was denied payment of invoices for flight cancellation charges. Accordingly, it submitted a certified claim to the agency. While the contracting officer found that the CSI terms and conditions were incorporated into the contract, the contracting officer further found that the charges were directly in conflict with FAR 52.212-4(l), Termination for the Government's Convenience, a clause which is required in all GSA schedule contracts. The contracting officer explained that since the CSI terms and conditions "were an attachment to the contract buried within its 2008 offer submission," the incorporated document "fall[s] to the eighth level ... when establishing precedence." Thus, the contracting officer

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decided that the termination clause took precedence over CSI's terms and conditions and denied the claim.

Rulings on Appeal

CSI appealed the contracting officer's decision to the CBCA and the Board found, on summary judgment, that the schedule contract did not incorporate the CSI terms and conditions by reference. Next, CSI appealed the Board's ruling to the Federal Circuit. The court defined the issue on appeal as a question of law as to whether the CSI terms and conditions are incorporated by reference into the schedule contract.

Before discussing the issue on appeal, the Federal Circuit provided a nutshell primer on the Federal Supply Schedule. Under this program, the GSA "acts as the contracting agent for the federal government" and negotiates "base contracts with suppliers of commercial products and services." These schedule contracts streamline the acquisition process for federal agencies. Instead of "evaluating prices head to head ... in a competitive environment," said the court, the GSA assesses pricing "as it relates to [the offeror's] commercial selling practices." An offeror submits a completed commercial sales practices sheet along with supporting documentation that discloses commercial pricing, market participants, sell price, and terms and conditions for the offeror's "most favored customer" in a competitive environment. Relying on this information and in accordance with the FAR, a GSA contracting officer determines whether the pricing is "fair and reasonable" not as it relates to the competitive environment but "as it relates to [the offeror's] commercial selling practices."

The court defined incorporation by reference as providing a method for integrating material from various documents into a host document by citing such material in a manner that makes clear that the material is effectively part of the host document as if it were explicitly contained therein. To incorporate material by reference, "the incorporating contract must use language that is express and clear, so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract." In other words, "the language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history)."

Turning to the facts of the case, the court said the proper inquiry is whether the schedule contract employs express and clear language, "so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract." Applying this test, the court found that the subject contract, through the incorporated offer, unambiguously identifies the CSI terms and conditions and specifies that such terms and conditions will apply to all operations and therefore the contract incorporates these provisions by reference.

The court reversed the CBCA and sent the case back to the Board for further proceedings consistent with the ruling on appeal. The Federal Circuit further noted however, that it does not foreclose the possibility of the Board finding the CSI terms and conditions inapplicable for some other reason or that the cancellation provision is inconsistent with other provisions in the contract, such as the termination clause.

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Lessons to be Learned

Contractors seeking to incorporate by reference their standard terms and conditions into a contract with the federal government ought to be aware of *CSI Aviation v. DHS*. This case offers at least two takeaways of importance. First, for an incorporation by reference of terms and conditions to be effective, the terms and conditions must be explicitly identified and the language used must clearly communicate that the purpose of the reference is to incorporate the referenced material as contractual provisions.

The second takeaway is that even if the contractor's terms and conditions are successfully incorporated into a contract, these provisions may still be displaced by other contract provisions by the order of precedence clause. Before entering into the contract, the contractor ought to review for conflicting language the provisions granted greater precedence by the contract and/or negotiate for a higher order of precedence being conferred upon on its terms and conditions.

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