NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 31, 2021

Adam S. Nadelhaft
CHARLSON BREDEHOFT COHEN & BROWN, P.C.
11260 Roger Bacon Drive, Suite 201
Reston, VA 20190

Mark E. Sharp
CULIN, SHARP, AUTRY & DAY, P.L.C.
4124 Leonard Drive
Fairfax, VA 22030

Re: *Technica LLC* v. *AOC Logistics, LLC*, CL 2021-408

Dear Mr. Nadelhaft and Mr. Sharp:

This matter is before the court on AOCL's demurrer to Technica's First Amended Complaint ("FAC").

**ANALYSIS**

1) AOCL first asserts that the FAC does not state a breach of contract claim because, in the FAC, Technica claims that "it is owed 49% of the entire Prime Contract, plus 49% of Incentive Fees, plus supporting data for the workshare allocated by AOCL to Technica." *AOCL's Memorandum* at 1. The court agrees with AOCL that the FAC seeks 49% of the entire Prime Contract when it alleges the full amount paid to AOCL (FAC ¶ 40) and alleges that Technica is owed 49% of that full amount. FAC ¶ 42. Technica, however, is entitled to only "49% of the labor value of the contract . . . ." *Letter Subcontract Agreement*, Attachment 3 at 2 (**Workshare**). Thus, with respect to the amount that is owed to Technica, the FAC does not state a claim upon which relief can be granted and AOCL's demurrer is SUSTAINED as to this issue.

2) While AOCL is correct that the FAC does not state a claim with



**OPINION LETTER**

respect to the amount Technica is owed, the court rejects AOCL's argument concerning the interpretation of the **Workshare** paragraph. *See AOCL's Memorandum* at 3, 8. That paragraph states:

> AOCL will subcontract to Technica 49% of the labor value of the contract (CLINs X001 and X005) to the extent that it is possible to allocate this percentage in whole Full Time Equivalent (FTE) headcount numbers while also meeting the Prime's obligations under FAR 52.219-14, Limitations on Subcontracting.

*Letter Subcontract Agreement*, Attachment 3 at 2 (**Workshare**).

AOCL reads into the above the word "and" as follows:

> AOCL will subcontract to Technica 49% of the labor value of the contract (CLINs X001 and X005) to the extent that it is possible **[and]** allocate this percentage in whole Full Time Equivalent (FTE) headcount numbers while also meeting the Prime's obligations under FAR 52.219-14, Limitations on Subcontracting.

*AOCL's Memorandum* at 3, 8.

AOCL's addition of the word "and" is not a natural reading of the paragraph. First, the addition makes AOCL's obligation to subcontract to Technica 49% of the labor value of the contract merely an aspiration, not a duty, and it is highly unlikely that Technica would have agreed to such a result. Second, AOCL's addition would mean that the "to the extent that it is possible" language would not apply to the allocation of the percentage in "whole FTE headcount numbers," despite the fact that it would make far more sense that the "to the extent that it is possible" language applied to the allocation of the percentage because the allocation of the percentage might result in a fraction.[1]

Because AOCL's addition of the word "and" materially changes the meaning of the "Workshare" provision, it follows that AOCL's contention that "AOCL would attempt to subcontract to Technica 49% of the labor value" (*AOCL's Memorandum* at 8) is without merit -- although AOCL is correct that this language could not in any way be read to subcontract to Technica "the full value of the the Prime Contract" (*Id.*) as discussed, *supra*. Accordingly, the court finds that Technica is owed 49% of the labor value of the contract, subject to the "Maximum Obligation AOCL

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[1] A natural reading of the paragraph would allow that the word "and" (as well as commas) be inserted as follows:

> AOCL will subcontract to Technica 49% of the labor value of the contract (CLINs X001 and X005) **[and,]** to the extent that it is possible**[,]** allocate this percentage in whole Full Time Equivalent (FTE) headcount numbers while also meeting the Prime's obligations under FAR 52.219-14, Limitations on Subcontracting.

would owe to Technica for work performed by Technica . . . ." *See, infra*. Because, as to "Workshare," the FAC claims that Technica is owed 49% of the amount DLA has paid to AOCL, Technica's FAC does not state a claim upon which relief can be granted and AOCL's demurrer is SUSTAINED as to this issue.

3) AOCL is also correct that neither the *Letter Subcontract Agreement* nor any of the Modifications "call for Technica to receive 49% of Incentive Fees or supporting data for the workshare." *AOCL's Memorandum* at 8. Technica's assertion that it has a right to incentive fees is based upon the fact that the *Letter Subcontract Agreement* uses the word "Incentive":

> formulates a combination Fixed Price **Incentive** Firm (FPIF)[,] Target Fee (Labor), Cost Plus Fixed Fee (Surge), Firm Fixed Price (Transition), Cost Reimbursable (Other Direct Costs), type subcontract for the supplies/services described in Attachment 1 hereto.

*Letter Subcontract Agreement* at 1 (emphasis added).

Technica's FAC alleges that:

> Federal Acquisition Regulation (FAR) 16.403-1, "Fixed Price Incentive Firm" describes a contract that specifies a target cost, a target profit, a price ceiling (but not a profit ceiling or floor), and a profit adjustment formula.

FAC at ¶ 25.[2]

There is, however, nothing in FAR 16.403-1 which suggests that Technica is owed incentive fees because the contract is a "fixed-price incentive (firm target) contract"; this term is merely a description of the type of subcontract being used ("formulates a combination . . . type subcontract") and is:

> appropriate when the parties can negotiate at the outset a firm target cost, target profit, and profit adjustment formula that will provide a fair and reasonable incentive and a ceiling that provides for the contractor to assume an appropriate share of the risk.

FAR 16.403-1(b).

Because, as to an incentive fee, the FAC claims that Technica is

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[2] The FAC, as well as the *Letter Subcontract Agreement* itself, slightly misstate FAR 16.403-1. There are "two forms of fixed-price incentive contracts, firm target and successive targets . . . ." FAR 16.403(a). Accordingly, the type of contract referenced in the *Letter Subcontract Agreement* appears to be a "fixed-price incentive (firm target) contract . . . ." FAR 16.403-1(a).

owed "49% of the labor value . . . of any incentive fee awarded" to AOCL, Technica's FAC does not state a claim upon which relief can be granted and AOCL's demurrer is SUSTAINED as to this issue.

4) AOCL argues that "Section III.C of Attachment 2 provided that Technica's acceptance of payments from AOCL for amounts due under the Letter Subcontract released AOCL from further claims" and that "Technica admits it accepted payment from AOCL for all work performed." *AOCL's Memorandum* at 3. In support thereof, AOCL purported to quote the "Final Payments" language from Attachment 2 as follows:

> Final Payments: By virtue of acceptance of payment and as a condition thereof, it is understood and agreed that the Subcontractor releases the Buyer and its customer of any and all liabilities, claims and obligations whatsoever under or arising from this Agreement.

*AOCL's Memorandum* at 4.

AOCL has materially misquoted the "Final Payments" language from Attachment 2 by omitting the word "final"; in full, the paragraph states:

> Final Payments: By virtue of acceptance of **final** payment and as a condition thereof, it is understood and agreed that the Subcontractor releases the Buyer and its customer of any and all liabilities, claims and obligations whatsoever under or arising from this Agreement. (Emphasis added).

By omitting the word "final," AOCL has attempted to alter significantly the meaning of "Final Payments" language. Rather than meaning as AOCL suggests, *i.e.*, that Technica's acceptance of payments released AOCL from further claims, the language actually only releases AOCL from further claims upon final payment. Because Technica has not admitted it accepted payment from AOCL for all work performed -- indeed, that is the basis for its claim in the instant case (see ¶ 39 of FAC) -- AOCL is not released from liability because of Technica's acceptance of payments from AOCL. Accordingly, AOCL's demurrer is OVERRULED as to this issue.

5) AOCL argues that the modifications to the *Letter Subcontract Agreement* by the Letter Subcontract Modifications resulted in the *Letter Subcontract Agreement* being "no longer operative, as it had been superseded" due the "SUPERCEDING EFFECT" paragraph found in each modification. *AOCL's Memorandum* at 4. AOCL asserts that the "SUPERCEDING EFFECT" paragraph found in each modification states that "the modification 'supercedes any and all prior conditions, commitments and agreements between the parties, either oral or written.'" *Id.*[3] AOCL again has materially misquoted a provision of the contract between the

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[3] AOCL repeats this argument at pages 6-7 of its *Memorandum*.

parties.

In full, the "SUPERCEDING EFFECT" paragraph states:

> SUPERCEDING EFFECT
> **This constitutes the only changes to the agreement between the parties and** supercedes any and all prior conditions, commitments and agreements between the parties, either oral or written. This Agreement may be further modified only upon mutual agreement of both parties and in writing. (Emphasis added).

It is apparent that AOCL has omitted the bolded portion of the paragraph preceding "supercedes any and all prior conditions, commitments and agreements between the parties, either oral or written . . . ." The omitted language substantially limits the scope of the "SUPERCEDING EFFECT" paragraph to superceding only the changes made by the Letter Subcontract Modifications. The "SUPERCEDING EFFECT" paragraph does not, therefore, make the entire Letter Subcontract "no longer operative"; rather, it remains in full force and effect, except for the specific changes made in the Modifications.

Accordingly, AOCL's argument that the Letter Subcontract "is not the operative contract" (*AOCL's Memorandum* at 6) and that consequentially the "Workshare" requirement ("49% of the labor value of the contract," *Letter Subcontract Agreement*, Attachment 3 at 2) was superceded is without merit. The "Workshare" requirement remained a part of the agreement between the parties through the ninth and last modification. AOCL's demurrer is thus OVERRULED as to this issue.

6) While AOCL has materially misquoted the "SUPERCEDING EFFECT" paragraph of the Modifications, it is nonetheless correct that the final modification, Modification 9, established that the "Maximum Obligation AOCL would owe to Technica for work performed by Technica, through April 30, 2020 was $3,876,000." *AOCL's Memorandum* at 7. AOCL's demurrer is SUSTAINED as to this issue.

**CONCLUSION**

In light of the above, AOCL's demurrer is SUSTAINED in part and OVERRULED in part.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

**V I R G I N I A :**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

| | | |
|---|---|---|
| TECHNICA, LLC | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| v. | ) | CL 2021-408 |
| | ) | |
| AOC LOGISTICS, LLC | ) | |
| | ) | |
| Defendant | ) | |

ORDER

THIS MATTER came before the court on the Defendant's demurrer to Plaintiff's First Amended Complaint.

IT APPEARING to the court, for the reasons stated in the court's letter opinion of today's date, that Defendant's demurrer should be SUSTAINED in part and OVERRULED in part, it is hereby

ORDERED that Defendant's demurrer should be SUSTAINED in part and OVERRULED in part, and it is further

ORDERED that Plaintiff shall have 14 days to file a second amended complaint and that, if Plaintiff fails to do so, this matter shall be deemed dismissed with prejudice.

ENTERED this 31st day of August, 2021.

[redacted]

Richard E. Gardiner
Judge

**ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA**

Copy to:

Adam S. Nadelhaft
Counsel for Defendant

Mark E. Sharp
Counsel for Plaintiff