

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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MOTION FOR SUMMARY RELIEF DENIED: June 26, 2006

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GSBCA 16367

NORTHROP GRUMMAN COMPUTING SYSTEMS, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

David C. Aisenberg of Looney, Cohen, Reagan & Aisenberg LLP, Boston, MA, counsel for Appellant.

Lisa A. Dall, Office of Regional Counsel, General Services Administration, Chicago, IL, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **DeGRAFF**.

**DANIELS**, Board Judge (Chairman).

Northrop Grumman Computing Systems, Inc. (Northrop) leased a storage area network to the General Services Administration (GSA), acting on behalf of Wright-Patterson Air Force Base (WPAFB). The lease was made pursuant to a delivery order which GSA issued under a contract between the parties. Northrop claims that it is entitled to be paid for the third year of the lease. GSA maintains that no payment is due because it did not exercise its option to continue the lease for the third year.

GSA has moved the Board for summary relief, urging us to deny Northrop's appeal because undisputed facts demonstrate that GSA must prevail as a matter of law. Northrop opposes the motion. We deny the motion because viewing disputed facts in a light most favorable to Northrop, GSA cannot prevail.

### Background

We recite below the uncontested facts relevant to the dispute and the additional relevant facts the parties call to our attention.

On or about April 1999, GSA awarded to Federal Data Corporation contract number GS-35F-0279J. Respondent's Statement of Facts (Respondent's Facts) ¶ 1; Appellant's Statement of Facts (Appellant's Facts) ¶ 1; Exhibit 39.<sup>1</sup> On July 31, 2002, the contract was amended to incorporate a change in the name of the contractor from Federal Data Corporation to Northrop Grumman Computing Systems, Inc. Respondent's Facts ¶ 1 n.1. The parties refer to the contractor as "Northrop," and we will, too.

The contract included "Terms and Conditions Applicable to Leasing of General Purpose Commercial Information Technology Equipment," a compilation of clauses which is also known as Special Item Number (SIN) 132-3. Respondent's Facts ¶ 2; Appellant's Facts ¶ 2; Exhibit 40. The version of SIN 132-3 which is included in the contract contains the following paragraphs:

It is understood by all parties to this contract that this is a leasing arrangement. In that regard the Government, as lessee, anticipates fulfilling the leasing agreement. The Government, upon issuance of the delivery order, contemplates the use of the equipment for the life of the lease (N months as specified in the delivery order). However, unless the ordering office has funding which exceeds a Government fiscal year, the initial term of the leasing agreement is from the date of the equipment acceptance through September 30 of the fiscal year in which the order is placed. . . .

. . . .

Annual Funding. When annually appropriated funds are cited on an order for leasing, the following applies: (1) Any lease executed by the Government shall be on the basis that the known requirements may exceed the initial

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<sup>1</sup> Except where noted, all exhibits are contained in the appeal file submitted by GSA and supplemented by Northrop.

leasing term of twelve (12) months, or the remainder of the fiscal year. Due to funding constraints, however, the Government cannot normally commit to a longer term at the commencement of the lease. In order to permit the exercise of renewal options granted to the Government under the lease, the total leasing term will be specified in the delivery order. . . . Orders under the lease shall not be deemed to obligate succeeding fiscal year's funds or to otherwise commit the Government to a renewal. In consideration, however, of the fact that in order to provide any such lease, the Governmet [sic] agrees that it shall use its very best efforts to effect an extension of each lease (which shall be under its original terms) into subsequent fiscal years, until the original order's specified lease term is satisfied.

Exhibit 40 at 1.

On June 11, 2001, GSA, on behalf of WPAFB, issued a delivery order to Northrop for the lease of an EMC Storage Area Network (EMC SAN). The delivery order, number T0501BM1748, said that it "is issued subject to the terms and conditions of the above numbered contract," GS-35F-0279J. The order also stated, "The initial period of performance is 06/11/2001 to 06/10/2002. The overall period of performance is 06/11/2001 to 06/12/2004.<sup>[2]</sup> Refer to [Northrop] quote 93766 for the specific values of this task." Respondent's Facts ¶ 5; Appellant's Facts ¶ 3; Exhibit 2 at 4. Quote 93766 stated that the term of the lease was three years and that a payment of \$453,839 for lease of the equipment and \$152,724 for maintenance of it would be due annually on June 1. Appellant's Facts ¶ 3; Exhibit 48.

The record contains a June 2001 response by a WPAFB official to a leasing questionnaire. According to this response, the EMC SAN was to be used at WPAFB in the Information Technology Application Center (ITAC) as "the 'storage area network' we will use in our facility to store all test and data for the many projects and processes we currently address to utilize new technology." The response to the questionnaire also stated that the EMC SAN "is the only SAN utilized as part of the operational infrastructure." Appellant's Facts ¶ 4; Exhibit 36.

The record contains what is labeled a contract modification dated August 22, 2001. The modification says that is an "Administrative Change" and that "Contractor IS NOT required to sign this document and return copies to the issuing office." The document states:

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<sup>2</sup> Here and elsewhere in the documentation, the dates of the performance periods are inconsistent. No matter which dates are correct, the periods were essentially June to June.

This is a no cost administrative modification to add Supplemental Terms and conditions to this task order. This lease is a “Fair Market Value” (FMC) [sic] for 36 months subject to the availability of annual appropriates [sic]. . . . The Government warrants that the use of, requirement for, and maintenance of the Asset(s) are essential to the Government’s [sic] proper, efficient and economic operation for the full 3-year term of the lease agreement and any renewals thereof. . . . Further it is clearly understood by all parties that the Government has an option to renew the lease for subsequent fiscal years beyond the initial fiscal year, and needs to obtain the necessary funds for continuation of this contract. The Government agrees not to replace any such non-renewed equipment or otherwise terminate the equipment (through non-appropriation, termination for convenience or otherwise) with functionally similar equipment or services. The pre-agreed charges for termination for convenience under FAR52.249-2<sup>3</sup> will be the present value of the remaining lease payments to include all option years at equivalent U.S. Treasury (H.15) T-bill rates as of the date of the Delivery Order.

Respondent’s Facts ¶ 7; Appellant’s Response to Respondent’s Statement of Uncontested Facts (Appellant’s Response) ¶ 7; Exhibit 2 at 1-2.

The August 22, 2001, document also included a lease payment schedule which provided for the payment of \$453,838.74 for lease of the EMC SAN and \$152,724 for maintenance of it on September 30 of each of years 2001, 2002, and 2003. Respondent’s Facts ¶ 9; Appellant’s Response ¶ 9; Exhibit 2 at 2.

On May 20, 2002, the parties entered into contract modification P00358. This modification contains a different SIN 132-3 from the one included in the original contract. Appellant’s Response ¶ 2; Exhibit 15 at 2-8. Paragraph 4(c) of the SIN 132-3 contained in modification P00358 states:

Termination for Non-Appropriation: The ordering office reasonably believes that the bona fide need will exist for the entire Lease Term and corresponding funds in an amount sufficient to make all payment for the lease Term will be available to the ordering office. Therefore, it is unlikely that leases entered into under this option will terminate prior to the full Lease Term. Nevertheless, the ordering office’s contracting officer may terminate or not

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<sup>3</sup> Section 52.249-2 of the FAR, or Federal Acquisition Regulation, is a contract clause entitled “Termination for Convenience of the Government (Fixed-Price) (Sep 1996).” 48 CFR 52.249-2 (2001).

renew leases at the end of any initial base period or option period under this paragraph if (a) it no longer has a bona fide need for the product or functionally similar product; or (b) there is a continuing need, but adequate funds have not been made available to the ordering office in an amount sufficient to continue to make the lease payments. If this occurs, the Government will promptly notify the Contractor, and the product lease will be terminated at the end of the last fiscal year for which funds were appropriated. Substantiation to support a termination for non-appropriation shall be provided to the Contractor upon request.

Exhibit 15 at 4.

On June 4, 2002, GSA exercised its option for the year of performance from June 11, 2002, through June 10, 2003. Respondent's Facts ¶ 10; Appellant's Response ¶ 10; Appellant's Facts ¶ 10; Exhibit 3.

Lt. Col. Randy Raper, chief of the WPAFB Materiel Systems Group's Innovation Division, provided an affidavit which states that on or about January 29, 2003, he was briefed that funding allocated to his unit "was inadequate to support continued leasing of the EMC SAN for the next option year." The affidavit further states that "[a]s a result of the inadequate allocation of . . . funding," the unit "was unable to exercise the final option" for lease of the EMC SAN. Respondent's Facts ¶ 11; Exhibit 19. In testifying at a deposition, however, Lt. Col. Raper explained that after he learned that ITAC "didn't have the funding to support everything that we needed to support or needed," he "had to look at what is it that I'm sustaining in the ITAC now that I won't be able to sustain due to this reduction in our budget." He concluded that "there was no mission impact relative to the EMC. We had storage area network capability that could handle the requirements of the ITAC . . . , so we exercised what we thought was a legitimate option of terminating based upon the contract anniversary dates for the piece of equipment." Lt. Col. Raper said that he could have fought for the funds necessary to continue leasing the EMC SAN but did not do so because he was not "convinced that there was a pressing need for that equipment." Appellant's Response ¶ 11 & Exhibit A thereto at 17-19.

On January 29, 2003, Lt. Col. Raper sent an electronic mail message to Michael Croll at EMC and Rita Wozniak, WPAFB's ITAC manager. The message states in pertinent part:

Based on MSG/ES's projected funding and resulting budget decisions, the existing EMC SAN lease will not be supported after the June 03 expiration. However, to ensure that the ITAC remains fully capable of supporting our customers' projects with a reduced budget environment, the ITAC will seek to upgrade the existing Clarion system to 3.6Tb [terabytes] this fiscal year.

Respondent's Facts ¶ 12; Appellant's Response ¶ 12; Appellant's Facts ¶ 12; Exhibit 4.

On April 8, 2003, a GSA contracting officer wrote to Northrop:

This letter is regarding EMC Storage Area Network (Equipment Lease) T0501BM1748. Due to unavailability of funding the Government had decided not to exercise the option on the above task for the period 12 [?] June 2003 - 11 Jun 2004. This notice is issued pursuant to Federal Acquisition Regulation clause 52.217-9, Option to Extend the Term of the Contract.

Respondent's Facts ¶ 13; Appellant's Response ¶ 13; Appellant's Facts ¶ 13; Exhibit 5.

On June 3, 2003, Northrop acknowledged receipt of the contracting officer's April 8 letter. Respondent's Facts ¶ 14; Appellant's Response ¶ 14; Exhibit 6.

In response, on June 12, 2003, the contracting officer told Northrop that "the SAN is no longer in use" and asked the contractor to provide a de-installation schedule. Respondent's Facts ¶ 15; Appellant's Response ¶ 15; Exhibit 7.

On or about June 27, 2003, GSA issued a new contract to Park Place International for the Clarion upgrade described in Lt. Col. Raper's electronic mail message of January 29, 2003. Complaint ¶ 13; Answer ¶ 13. The Clarion upgrade is a replacement, in part, of the EMC SAN. Appellant's Statement of Additional Uncontested Facts ¶ 18; Respondent's Response to Appellant's Statement of Additional Uncontested Facts ¶ 18; Exhibit 47 at 4 (admission by respondent).

Northrop calls to our attention a memorandum in the record which is signed by a technical engineer of Haverstick, Inc. According to the memorandum, on August 25, 2003, "an inventory [of EMC machines located in the ITAC laboratory] was conducted by [Northrop] leasing company representatives." The representatives "determined the EMC SAN leased system was installed and running." Appellant's Facts ¶ 15; Exhibit 46.

On October 20, 2003, Northrop submitted to the contracting officer a certified claim under delivery order T0501BM1748 in the amount of \$453,838.74 plus interest. In the claim, Northrop asserted:

Northrop submits this claim to recover damages resulting from the Government's breach of the provisions of the Contract. Our record shows that the Government has breached the provisions of the Contract by failing to exercise the second and final option for the period June 10, 2003 through June 11, 2004 and instead utilized functionally similar equipment to perform

the functions to be performed under the Contract. Further, under the terms of the contract, these actions by the Government constitute a constructive termination for convenience entitling Northrop to recover as damages the \$453,838.74 lease payment due and owing as of September 30, 2003.

Respondent's Facts ¶ 16; Appellant's Response ¶ 16; Appellant's Facts ¶ 16; Exhibit 12.

By letter dated January 26, 2004, the contracting officer denied the claim. In her only substantive statement regarding the denial, the contracting officer told Northrop that contract modification P00358 "specifically deals with the claim you have submitted" and that paragraph 4(c) of its SIN 132-3 "states that if there are not adequate funds available [t]o the ordering office the lease is terminated at no cost to the government." Respondent's Facts ¶ 17; Appellant's Response ¶ 17; Appellant's Facts ¶ 17; Exhibit 15.

With regard to the adequacy of funds, Northrop asserts, with reference to government documents the contractor has included in the appeal file, that ITAC's budget for fiscal year 2004 was well in excess of the \$453,883.74 shown on the delivery order to be the cost of leasing the EMC SAN for one year. Exhibits 54, 61.

### Discussion

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. *Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999).

The dispute in this case revolves around four documents and facts applicable to their provisions. The four documents are the April 1999 contract between the parties – and in particular, SIN 132-3 which is contained in that contract; the June 2001 delivery order issued under the contract for the lease of the EMC SAN; the August 2001 modification to the delivery order; and the May 2002 modification to the contract, which contains a different SIN 132-3 from the one included in the April 1999 contract.

According to GSA, the April 1999 version of SIN 132-3 and the June 2001 delivery order afforded the agency the option to renew the lease for the third year, and in not exercising that option, the agency was acting in compliance with those documents. Further, GSA says, the August 2001 modification was invalid for want of consideration. GSA also

posits that Northrop interprets the delivery order as being for a three-year lease of the SAN. The agency maintains that a three-year lease would be in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341 (2000). That Act says that “[a]n officer or employee of the United States Government . . . may not involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.” *Id.* § 1341(a)(1)(B).

Northrop contends that both versions of SIN 132-3 restricted GSA’s ability to decide not to exercise its option to renew the lease, and that viewing facts in a light most favorable to nonmovant Northrop, GSA did not abide by those restrictions.<sup>4</sup> The contractor also urges that the August 2001 modification was supported by consideration and is therefore binding. Northrop seems to advance an interpretation of the delivery order which makes GSA’s argument with regard to the Anti-Deficiency Act unnecessary.

We conclude first that as GSA asserts, the delivery order provided for the lease of the SAN for one year and gave the agency the option of extending the lease for each of the next two succeeding years. We gather from Northrop’s opposition to the motion that it does not contest this conclusion. To the extent that making the determination may be helpful, however, we set out our holding and explain why we reach it. In making our analysis, we assume, as the parties seem to, that all funds used to pay for the lease were subject to fiscal year limitation.

The delivery order provided for a one-year “initial period of performance” and a three-year “overall period of performance.” The order referenced Northrop’s quote in response to which the order was placed “for the specific values of this task,” and the quote said that the term of the lease was three years. The other three documents on which we focus are clear that the firm duration of the lease was only one year, however. SIN 132-3 of the contract under which the order was placed, as in existence at the time of placement of the order, stated that the Government could not commit to a longer term than twelve months at the commencement of the lease. The August 2001 contract modification said that the lease was subject to the availability of annual appropriations and that the Government had an option to renew the lease for each of the two fiscal years subsequent to the initial one. SIN 132-3 of the contract, as it appeared in the May 2002 contract modification, permitted the

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<sup>4</sup> As Northrop notes, the agency’s current reliance on the April 1999 version of SIN 132-3 is at variance from its contracting officer’s January 2004 statement that the August 2002 version controls. Although the August 2002 version appears to have replaced the April 1999 version, a definitive pronouncement on this matter is not necessary to resolve the pending motion for summary relief because the same result would obtain under either version.

contracting officer to terminate or not renew the lease at the end of the initial base period or any option period.

A contract must be considered as a whole. It must be interpreted so as to harmonize all of its provisions and to effectuate its spirit and purpose. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978). Taking all of the above provisions together, it is clear that the duration of the lease was only one year for certain and that GSA had the option of extending the lease for each of the next two years. Furthermore, “[w]here a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted.” *Cray Research v. United States*, 44 Fed. Cl. 327, 333 (1999) (quoting *Hobbs v. McLean*, 117 U.S. 567, 576 (1886)). Any contrary reading of the lease would make the lease contravene the Anti-Deficiency Act, so for that reason also we cannot find that the term of the lease was a firm three years. See *Leiter v. United States*, 271 U.S. 204 (1926); 48 Comp. Gen. 497 (1969).

We conclude next that no matter which document governs GSA’s determination not to exercise its option to renew the lease for the third year, the agency’s right to exercise the option was restricted. The version of SIN 132-3 which is included in the original contract states that “the Governmet [sic] agrees that it shall use its very best efforts to effect an extension of each lease (which shall be under its original terms) into subsequent fiscal years, until the original order’s specified lease term is satisfied.” The August 2001 modification to the delivery order states, “The Government agrees not to replace any . . . non-renewed equipment or otherwise terminate the equipment (through non-appropriation, termination for convenience or otherwise) with functionally similar equipment or services.” The version of SIN 132-3 which was contained in the May 2002 contract modification provides that “the ordering office’s contracting officer may terminate or not renew leases at the end of any initial base period or option period . . . if (a) [the ordering office] no longer has a bona fide need for the product or functionally similar product; or (b) there is a continuing need, but adequate funds have not been made available to the ordering office in an amount sufficient to continue to make the lease payments.”

Because the contract, taken as a whole, restricts GSA’s determination not to exercise its option to renew the lease, this case is dissimilar from the cases to which the agency analogizes it, *Pacificorp Capital, Inc. v. United States*, 25 Cl. Ct. 707 (1992), *aff’d*, 988 F.2d 130 (Fed. Cir. 1993) (table), and *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811 (Fed. Cir. 1988). In each of those cases, the court distinguished a situation in which the Government had an unfettered ability to exercise options from one in which an agency’s ability was limited. The example cited for the second type of situation was the one presented in *Municipal Leasing Corp. v. United States*, 1 Cl. Ct. 771 (1983), and 7 Cl. Ct. 43 (1984). *Pacificorp Capital*, 25 Cl. Ct. at 720; *Government Systems Advisors*, 847 F.2d

at 813. The language of the contract in *Municipal Leasing* was much like the language of the contract provisions here: “The Air Force shall use its best efforts to obtain appropriations of the necessary funds to meet its obligations and to continue this contract in force. The Air Force shall not replace the leased equipment with functionally similar equipment during the term of this contract.” 1 Cl. Ct. at 772; 7 Cl. Ct. at 45. The court held that because the Air Force did not seek funds to renew the contract for an option year, it had breached its promise to use its best efforts to obtain necessary appropriations. The court also held that because the Air Force repaired other equipment to use in lieu of the leased equipment, it had breached its promise not to replace the leased equipment with functionally similar equipment. 7 Cl. Ct. at 46-47. As Northrop suggests, the *Municipal Leasing* cases are highly pertinent to this one.<sup>5</sup>

We also agree with Northrop that if the facts presented are viewed in a light most favorable to the contractor, GSA did not comply with contract restrictions when it decided not to exercise the option to extend the contract for a final year. The original SIN 132-3, which GSA says is controlling, committed the Government to “use its very best efforts” to extend the lease through all option years. Although defining what the term “best efforts” means is difficult, *see* 15 *Nash & Cibinic Report* ¶ 45 (Aug. 2001), “best efforts contracts are routinely held valid.” *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 957 n.7 (Fed. Cir. 1993). The most complete definition of the term we have found is contained in *In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1375 (Fed. Cir. 1999), where the Court of Appeals for the Federal Circuit quoted approvingly a state court decision which explains that “‘best efforts’ requires ‘that the party put its muscles to work to perform with full energy and fairness the relevant express promises and reasonable implications therefrom.’” The WPAFB officer most intimately involved in the determination not to exercise the option, Lt. Col. Raper, testified in deposition that he decided that given reduced appropriations, he would not fight for funds necessary to continue leasing the EMC SAN for the upcoming year because (in his view) other projects had a higher priority and upgrading other equipment would give ITAC sufficient functionality to support those projects. Documentation presented by Northrop indicates that ITAC had more than enough money, even with reduced appropriations, to continue the lease. These facts, viewed most favorably to Northrop, demonstrate that the Government did not use its very best efforts to extend the lease.

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<sup>5</sup> In this regard, a statement in a decision by this Board is also relevant: “[R]enewal of an LTOP [a lease-to-purchase contract] is within the discretion of the leasing party unless there is language in the LTOP provisions which limits or places restrictions on the circumstances under which that party may decline to exercise its option to renew.” *Planning Research Corp. v. Department of Commerce*, GSBCA 11286-COM, 96-1 BCA ¶ 27,954, at 139,636 (1995).

The August 2001 modification to the delivery order committed the Government “not to replace any . . . non-renewed equipment or otherwise terminate the equipment (through non-appropriation, termination for convenience or otherwise) with functionally similar equipment or services.” As stated above, WPAFB decided to substitute upgraded other (Clarion) equipment for the EMC SAN leased from Northrop. WPAFB carried through on this plan by hiring another contractor to perform the upgrade. GSA admits that the upgrade is a replacement, in part, of the SAN leased from Northrop. These facts, viewed most favorably to Northrop, demonstrate that the Government replaced the Northrop equipment with functionally similar equipment.

The version of SIN 132-3 which was contained in the May 2002 contract modification allows the ordering office to terminate or not renew leases at the end of any period only “if (a) it no longer has a bona fide need for the product or functionally similar product; or (b) there is a continuing need, but adequate funds have not been made available to the ordering office in an amount sufficient to continue to make the lease payments.” As stated above, the facts viewed most favorably to Northrop demonstrate that the Government had a bona fide, continuing need for a product functionally similar to the EMC SAN leased from Northrop and that adequate funds were made available to the office in an amount sufficient to continue to make the lease payments. The facts viewed most favorably to Northrop also demonstrate that the Government had a bona fide, continuing need for the EMC SAN itself: a memorandum in the record states that the EMC SAN “was installed and running” in WPAFB’s ITAC more than two months after the final option year began.

To this point, we have not had to decide whether the August 2001 modification to the delivery order was valid (as contended by Northrop) or not (as contended by GSA) because the validity of the modification has not been essential to our conclusions. The two different versions of SIN 132-3 both contain requirements which are similar to those in the modification, and Northrop has persuaded us that GSA’s motion for summary relief must be denied because material facts in dispute, viewed most favorably to Northrop, show that the agency has not complied with those requirements. Thus, even if the modification were invalid, our conclusions would not change. The one unique aspect of the delivery order modification which is at issue is the provision specifying how much money Northrop will be paid if the Government breaches a promise in not exercising an option to renew the lease. This modification, like the May 2002 version of SIN 132-3, provides that the non-exercise of an option will be considered to be a termination. The modification states that “[t]he pre-agreed charges for termination for convenience under FAR52.249-2 will be the present value of the remaining lease payments to include all option years at equivalent U.S. Treasury (H.15) T-bill rates as of the date of the Delivery Order.”

Should the case proceed to the point at which interpretation and application of this statement would be discussed, we would need to know, before considering that matter,

whether the modification is valid. The parties have briefed the question thoroughly, and to ensure that they have our guidance as they proceed with the case, we address the question now.

“To be valid and enforceable, a contract must have both consideration to ensure mutuality of obligation and sufficient definiteness so as to provide a basis for determining the existence of a breach and for giving an appropriate remedy. Performance of a pre-existing legal duty is not consideration.” *Gardiner, Kamy & Associates, P.C. v. Jackson*, 369 F.3d 1318, 1322 (Fed. Cir. 2004) (quotations and citations omitted). This rule applies to contract modifications as well as to contracts themselves. *Institutional & Environmental Management, Inc.*, ASBCA 32924, et al., 90-3 BCA ¶ 23,118, at 116,072. With particular relevance to government contracts, a contracting officer has no authority, absent consideration, to change a contract in a way which would adversely affect the Government. *Parcel 49C L.P. v. General Services Administration*, GSBCA 16447, 05-2 BCA ¶ 33,013, at 163,607 n.3, *aff’d sub nom. Parcel 49C L.P. v. Doan*, No. 05-1525 (Fed. Cir. June 14, 2006); *Edward Hines Lumber Co.*, AGBCA 75-125, 76-1 BCA ¶ 11,854, at 56,792.

Courts evaluate the existence of consideration, however, not the adequacy of it. Any consideration, even if tenuous, is adequate to make a contract or a contract modification enforceable, as long as no indication of fraud or misrepresentation is present. *Silverman v. United States*, 679 F.2d 865, 871 (Ct. Cl. 1982); *Axion Corp. v. United States*, 68 Fed. Cl. 468, 476 (2005); *Parcel 49C*, 05-2 BCA at 163,607 n.3.

Northrop points to two ways in which the August 2001 modification may be considered to have amended the June 2001 delivery order to the Government’s advantage:<sup>6</sup> First, the duration of the contract is explicitly stated to be one year with two one-year options; it is not the three years stated in the referenced Northrop quote on which the June 2001 order is based. Second, the payment schedule is changed so that annual payments are due on September 30 rather than June 1 and the amount of each payment is decreased by twenty-six cents. As we have already discussed, the first of these differences is not a change at all, since the June delivery order properly construed already provided for a duration of one year with two one-year options. The second difference conveyed a real benefit to the Government, however – it allowed the Government to have the use of the money which would pay for lease and maintenance of the EMC SAN for four additional months of each contract year (as well as saving the Government twenty-six cents per year in lease payments). This may not have been much consideration, relative to the benefit Northrop may have

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<sup>6</sup> Northrop suggests other ways, as well, in which the August modification is different from the June order, but we do not perceive that any of these differences change the order to the Government’s benefit.

received in the “pre-agreed charges for termination for convenience,” but it was consideration nonetheless – consideration adequate to make the modification enforceable.

We continue to have questions regarding the application of the concept of consideration to the August 2001 delivery order modification because that modification was unilaterally issued by a Government contracting officer. Northrop has directed our attention to one decision of a board of contract appeals which indicates, the contractor fairly says, that “[t]here may even be consideration where the modification is unilaterally issued by the Government.” Appellant’s Opposition to Respondent’s Motion for Summary Relief at 12-13 (citing *Automated Power Systems, Inc.*, DOT BCA 2928, et al., 98-2 BCA ¶ 29,783, at 147,586). Whether this issue needs to be addressed is uncertain, since Northrop also asserts that the August 2001 modification “specified other terms which had been under discussion between the parties (e.g., including the non-substitution covenant and the pre-agreed charges for termination for convenience).” Appellant’s Opposition at 13. A unilateral contract modification has equal standing to a bilateral contract modification where it incorporates the precise change to which both parties have agreed. *D & H Distributing Co. v. United States*, 102 F.3d 542, 546 (Fed. Cir. 1996). Might the August 2001 modification have been agreed to by both parties before it was issued unilaterally by the contracting officer? We will appreciate further briefing and presentation of evidence on these matters as the case goes forward.

Decision

GSA's motion for summary relief is **DENIED**.

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STEPHEN M. DANIELS  
Board Judge

We concur:

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ANTHONY S. BORWICK  
Board Judge

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MARTHA H. DeGRAFF  
Board Judge