

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Loral Aerospace Corp.) ASBCA No. 48250
)
Under Contract No. F19628-83-C-0019)

APPEARANCES FOR THE APPELLANT: Kenneth M. Bruntel, Esq.
Jeffrey P. Weaver, Esq.
Crowell & Moring
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
Diana S. Dickinson, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE COLDREN
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Appellant filed a motion for summary judgment alleging that the Government's claim for defective pricing should be denied because the Government cannot prove that the data it claims appellant failed to provide was cost and pricing data. It points to an internal memorandum of the Government trial attorney addressed to the Government auditor which opines that the data at issue was not cost and pricing data and claims that appellant in preparing its proposals and in negotiating relied on factors approved by the Government to calculate supervisory management (CSOW) and clerical support (CSOL) and not on the historical data from which those factors were based.

The Government argues in opposition that the memorandum was a privileged document, that each page was clearly marked that the document was privileged, and that the inadvertent transfer as an attachment to an audit report did not waive that privilege or make it a binding admission of the Government. It also claims that the Government placed the accuracy of the factors at issue during the negotiations. We conclude that there is sufficient evidence to raise the factual issue as to whether the disputed data is cost and pricing data and deny the appellant's motion.

STATEMENT OF FACTS
FOR PURPOSES OF THE MOTION

1. In 1983, the Government awarded appellant a contract to assist with the implementation of a Space Defense Operations Center (SPADOC) at the United States Air Force command in the Cheyenne Mountain Complex. The project was to be completed in three separate blocks which were to be separately priced and negotiated. (app. motion, Gov't opp. ¶ 1)

2. Block A was the first contract. Negotiations for the contract for Block B had not commenced as Block A was nearing completion. The parties negotiated a "bridge" contract to maintain a portion of appellant's staff on the project as the contract for Block B was being negotiated. The work under the "bridge" contract was primarily systems engineering to prepare for the Block B contract effort. (App. motion, Gov't opp. ¶ 2)

3. Appellant's standard practice in pricing proposals was to use a factor of 10% of the total technical labor hours for supervisory management (CSOW) and 5% of the total technical labor hours for clerical support (CSOL). (App. motion, Gov't opp. ¶ 3)

4. Appellant's factors for CSOW and CSOL were audited by the Defense Contract Audit Agency (DCAA) in 1985 and specifically approved in a DCAA audit report dated 10 April 1985. (App. motion, Gov't opp. ¶ 4)

5. In July, 1985, appellant submitted its initial proposal for the Block B effort and updated that proposal on 27 September 1985, 23 January 1986, 5 February 1986, and 18 February 1986. Its initial proposal and all of the updates used the CSOW and CSOL factors approved by DCAA in developing its proposed labor hours. (App. motion, Gov't opp. ¶ 5)

6. Appellant's initial proposal itemized the technical labor hours being proposed and showed the application of the supervisory management factor (CSOW) of 10% and clerical support (CSOL) of 5% applied to the technical labor hours. (App. motion, Gov't opp. ¶¶ 6, 7)

7. During fact finding, appellant's negotiators reiterated to the Government's negotiators that appellant had used factors in estimating hours associated with supervisory management and clerical support. (App. motion, Gov't opp. ¶ 8)

8. During Block B negotiations, Government negotiators questioned why the CSOW and CSOL factors proposed by appellant for Block B were greater than the historical data indicated for Block A contract performance. Appellant's negotiators

replied that the historical data for these factors in Block A was not reliable because the charges had not been properly reflected in its accounting system. The historical data for the CSOW and CSOL factors during the bridge effort in the period between Block A and Block B performance was consistent with the historical data for Block A but was not disclosed to the Government prior to agreement on price. (Phillips Affidavit, ¶ 3; ex. 2 of Bruntel Affidavit at 8-10)

9. Negotiations for Block B concluded on or about 5 March 1986. Appellant submitted a certificate of Current Cost or Pricing Data on 24 March 1986. (App. motion, Gov't opp., ¶ 9)

10. DCAA conducted a post-award audit of the Block B negotiations and proposals and asserted in audit reports dated 28 January 1993, 17 February 1993, 12 July 1993, 10 June 1994, and 7 October 1994 that appellant had failed to disclose current, accurate, and complete cost or pricing data relating to the CSOW and CSOL factors. (App. motion, Gov't opp. ¶ 10)

11. By a final decision dated 12 December 1994, the contracting officer imposed a price reduction of \$3,046,816, plus interest from 16 January 1991 (App. motion, Gov't opp. ¶ 11). Appellant filed a timely notice of appeal to this Board. (App. motion, Gov't opp. 12)

12. At a meeting of the parties on 9 January 1997, the Government contract specialist inadvertently provided appellant's counsel with a copy of the internal Government trial counsel memorandum dated 11 April 1996 addressed to DCAA when he furnished a copy of a DCAA audit report with that internal legal memorandum attached (Johnson Affidavit, ¶ 3). This internal legal memorandum opined that the non-disclosed historical data was not cost and pricing data because only the CSOW and CSOL factors recommended by DCAA were cost and pricing data (ex. 3 to Bruntel Affidavit).

DECISION

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The party seeking summary judgment has the burden of establishing both elements. *Mingus Constructors, Inc. v. United States*, 812 F. 2d 1387, 1390 (Fed. Cir. 1987). In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corporation*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851; *General Dynamics Corporation*, ASBCA No. 36985, 89-3 BCA ¶ 22,009 at 110,643.

Appellant correctly argues that the Government has the burden of establishing its claim including that information the appellant failed to disclose was “cost or pricing data.” *Rosemount, Inc.*, ASBCA No. 37520, 95-2 BCA ¶ 27,770 at 138,454; *The Boeing Company*, ASBCA No. 20875, 85-3 BCA ¶ 18,351 at 92,032. It is also true that Government trial counsel was of the opinion in her internal memorandum to DCAA that the Government could not meet this burden (SOF 12). However, her legal opinion is not binding on this Board. *Space Age Engineering, Inc.*, ASBCA Nos. 25761 *et al*, 86-1 BCA ¶ 18,611 at 93,471.

Appellant also argues that its proposal, its updates to that proposal, and its position throughout the negotiations relied solely on the CWOS and CSOL factors (SOF 5-7). It further claims that these factors were at the suggestion of DCAA which audited and approved them. Thus, appellant argues that the only relevant cost and pricing data was the factors themselves.

We must also, however, examine the Government negotiators’ actions. During the negotiations, the Government questioned the reliability of these CWOS and CSOL factors in light of the historical data for both supervisory management and clerical support for Block A (SOF 8). Looking at the record as it exists at this early stage and weighing it against the movant, we find there is sufficient evidence to raise a dispute of fact as to whether a prudent buyer and seller would consider the bridge historical data as facts which would affect price negotiations significantly. FAR 15.801. Accordingly, we deny appellant’s motion for summary judgment.

Dated: 14 March 2000

JOHN I. COLDREN, III
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures Continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 48250, Appeal of Loral Aerospace Corp., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals