

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Motorola, Inc.) ASBCA No. 51789
)
Under Contract No. DAAK20-84-C-0879)

APPEARANCE FOR THE APPELLANT: Peter B. Jones, Esq.
Jones & Donovan
Newport Beach, CA

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
LTC Richard B. O'Keeffe, Jr., JA
CPT Melissa Miller, JA
John H. Eckhardt, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE JAMES ON
PARTIES' CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Respondent moved, and appellant cross-moved, for partial summary judgment on the issue of the period for which interest is payable for overpayments under the captioned contract occasioned by the submission of defective cost or pricing data, under the Truth in Negotiations Act (TINA), and its implementing regulations. The parties submitted stipulations of fact and a joint statement of the issues for these motions.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. Contract No. DAAK20-84-C-0879 (contract 879) is a fixed-price incentive contract that was executed by appellant, Motorola, Inc. and respondent, U.S. Army Communications & Electronics Command (CECOM) on 10 August 1984, with an effective date of 1 May 1984 (stip. ¶ 1.a).

2. Contract 879 incorporated the clauses at DAR 7-104.29(a) PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (1970 JAN), and DAR 7-104.42(a) SUBCONTRACTOR COST OR PRICING DATA (1982 DEC), and has never been modified by the parties to include any other clauses providing for price or cost reductions based on defective cost or pricing data (stip. ¶ 1.b).

3. Contract 879 incorporated the clause at DAR 7-104.39 INTEREST (1983 FEB) and has never been modified by the parties to include any other clause providing for payment of interest on amounts that become due to the Government (stip. ¶ 1.c). The DAR 7-104.39

clause requires the contractor to pay interest from “the date due,” defined as the earliest of various dates, including “the date of the first written demand for payment, consistent with this contract” (app. mot., app. A).

4. Respondent sought to modify the contract to add raster display subsystems which were to be provided by Aydin Computer Systems Division (Aydin), Aydin Corporation. In November 1985 Aydin submitted a proposal to Motorola to meet the raster display subsystem requirement. (Stip. ¶ 2.a)

5. CECOM and Motorola agreed to target and ceiling prices for the raster display modification and executed Modification No. P00031 (P00031) to contract 789 on 30 September 1986. The effective date of Motorola’s certificate of current cost or pricing data was 24 September 1986. (Stip., ¶ 2.b)

6. Aydin and Motorola negotiated the raster display subsystem subcontract during March and April 1987, culminating in a firm fixed price of \$5,222,863. On 9 April 1987, Aydin executed a certificate of current cost or pricing data for the raster display subsystem subcontract, with an effective date of 3 April 1987. (Stip. ¶ 2.c)¹

7. After a series of audits, the contracting officer (CO) concluded that defective cost or pricing data had been submitted in connection with P00031, and the Government was therefore entitled to a reduction in the contract price. The CO issued a final decision, dated 10 April 1995, which sought to reduce the prime contract price by \$798,504. Appellant subsequently appealed the final decision to the Board in ASBCA No. 48841. (Stip. ¶ 3.a)

8. The Board’s decision sustained appellant’s appeal in part and denied it in part. *Motorola, Inc.*, ASBCA No. 48841, 96-2 BCA ¶ 28,465. The Board’s decision was affirmed by the Court of Appeals for the Federal Circuit Court of Appeals in *Motorola, Inc. v. West*, 125 F.3d 1470 (Fed. Cir. 1997). (Stip. ¶ 3.b)

9. The appeal was then remanded to the parties, who were unable to settle the matter, trading correspondence over two years regarding the amount of appellant’s liability (R4, tabs 4-6, 9-10, 13, 16). On 2 September 1998, the CO issued a final decision in which he demanded a reduction of the prime contract price in the amount of \$452,486, plus interest in the amount of \$436,509 (R4, tab 18). (Stip. ¶ 4) This timely appeal resulted.

10. The parties’ JOINT STATEMENT OF ISSUES CONCERNING INTEREST presented by their cross-motions for summary judgment states:

¹ The parties agree that the Government’s claim accrued on April 3, 1987. *Motorola, Inc. v. West*, 125 F.3d 1470, 1472 (Fed. Cir. 1997).

Assuming that it is entitled to recovery of a principal amount in the form of an adjustment reducing the prime contract price, can the Government recover interest pursuant to the 1985 and 1986 statutory amendments to the Truth in Negotiations Act from the date or dates of overpayments to the prime contractor, or is the Government's right to interest limited to that provided by the prime contract's "Interest" clause, DAR § 7-104.39 (1983 Feb)?

TINA LEGISLATION AND AGENCY IMPLEMENTATION

11. Effective 1 December 1962, Pub. L. 87-653 was enacted, and was codified at 10 U.S.C. § 2306(f). That subsection set forth the circumstances under which contractors and subcontractors were required to submit certified cost or pricing data, and provided:

Any prime contract or change or modification thereto under which such certificate is required *shall contain a provision* that the price to the Government . . . shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which . . . was inaccurate, incomplete, or noncurrent [emphasis added].

(76 Stat. 528.)

12. Revision No. 12, dated 26 November 1962, to the Armed Services Procurement Regulation (ASPR) (1960 Edition Revised), implemented Pub. L. 87-653 by prescribing for mandatory use "in procurement actions taken after 30 November 1962" the ASPR 7-104.29(a) PRICE REDUCTION FOR DEFECTIVE PRICING DATA (NOV 1962) clause, which provided the Government the right to a contract price reduction for incomplete, inaccurate or noncurrent cost or pricing data.

13. Section 934(a) of Pub. L. 99-145 provided that a defense contractor shall be liable to the United States for interest on any overpayment made "under a contract with the Department of Defense" subject to TINA due to inaccurate, incomplete or noncurrent cost or pricing data "from the date the [over]payment was made to the contractor to the date the Government is repaid by the contractor." Section 934 applied "only to contracts entered into on or after the date of the enactment of this Act." Pub. L. 99-145 was enacted effective 8 November 1985. (App. mot., app. B)

14. On 18 October 1986, Pub. L. 99-500 was enacted, repealing Pub. L. 99-145, § 934(a). Section 952 of Pub. L. 99-500 recodified 10 U.S.C. § 2306(f) to new § 2306a. Subsection (d) provided, similar to the statute as enacted in 1962, that a prime contract or

modification thereto under which a certificate of cost or pricing data is required, “shall contain a provision” that the contract price shall be adjusted to exclude any significant amount determined to have been increased due to defective cost or pricing data. Subsection (e) provided for payment of interest on an overpayment “under a contract” with DoD due to defective cost or pricing data “for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of such overpayment to the United States.” Section 952(d) of Pub. L. 99-500 provided:

EFFECTIVE DATES.—(1) Except as provided in paragraph (2), section 2306a of title 10, United States Code [as hereby added] . . . shall apply with respect to contracts or modifications on contracts entered into after the end of the 120-day period beginning on the date of the enactment of this Act [*viz.*, 15 February 1987].

(2) Subsection (e) of such section [10 U.S.C. § 2306a] shall apply with respect to contracts or modifications on contracts entered into after November 7, 1985.

(App. mot., app. B)

15. Pub. L. 99-591 (a corrected version of Pub. L. 99-500) was enacted on 30 October 1986, and Pub. L. 99-661 was enacted on 14 November 1986. Subsection (e) of § 2306a of both acts provided for interest on overpayments “under a contract” with DoD due to defective cost or pricing data in the same manner as Pub. L. 99-500. Both Pub. L. 99-591 and Pub. L. 99-661 included a § 952(d)(2) identical to that in Pub. L. 99-500, quoted above. (Gov’t mot., attachs. 3-4)

16. The legislative history of Pub. L. 99-661 included House Conference Report No. 99-1001, dated 14 October 1986, which stated:

Finally, this provision [defining “cost or pricing data” and recognizing contractor offsets] was amended to clarify that it applies to contracts and modifications to contracts entered into after the effective date of this Act.

Thus, the provisions of this Act apply only as to information provided to support a new contract or the exercise of an option or modification of an existing contract but not to the cost or pricing data provided to support an existing contract entered into prior to the effective date.

(Gov’t mot., attach. 7)

17. Federal Acquisition Circular (FAC) No. 84-35, dated 1 April 1988, to the Federal Acquisition Regulation (FAR) (1984 Edition), implemented Pub. L. 99-500 and Pub. L. 100-180 by adding new ¶¶ (c) and (d) to the FAR 52.215-22 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (APR 1988) and 52.215-23 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-- MODIFICATIONS (APR 1988) clauses, which eliminated four defenses to cost reductions for defective pricing and prohibited contractor offsets of understated cost or pricing data in certain circumstances (but did not address the right to interest on price reductions for defective pricing). FAC 84-35 stated: “These revised clauses shall be included in contracts or contract modifications entered into by DoD . . . on or after April 4, 1988.” (53 Fed. Reg. 10828)

18. FAC No. 90-3, dated 21 December 1990, to amend the FAR, included “Item No. 11” to require interest and penalties on price reductions for defective cost or pricing data, in implementation of the requirement in 10 U.S.C. § 2306a(e)(1). FAC 90-3 stated: “Unless otherwise specified, all . . . (FAR) and other directive material contained in FAC 90-3 is effective January 22, 1991” and with respect to Item No. 11:

The statutory requirements on interest and penalties for overpayments apply only to contracts awarded on or after November 8, 1985. Repayments required as a result of defective pricing on contracts awarded prior to that date should be sought in accordance with debt collection procedures in existence as of the date of contract award. Any interest charged on these contracts should be calculated in accordance with the Interest clause contained in the contract.

FAC 90-3 modified ¶ (d) in the FAR 52.215-22 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA clause and ¶ (e) in the FAR 52.215-23 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-- MODIFICATIONS clause to add the statutory interest and penalty provisions under date of January 1991. (55 Fed. Reg. 52782)

POSITIONS OF THE PARTIES

Respondent argues: (i) The phrase “entered into after November 7, 1985” modifies both “contracts” and “modifications” within the § 952(d)(2) effective date provision of Pub. L. 99-500, and such terms are “plain” and “unambiguous.” P00031 was entered into on 30 September 1986 (SOF ¶ 6), so it was “entered into after November 7, 1985” within the effective date provision, and was prospective. (ii) Respondent’s interpretation gives meaning to all the relevant statutory terms, leaving none inoperative or superfluous, and is supported by the House Conference Report’s explanation of the effective date provision in Pub. L. 99-661 (SOF ¶ 16). (iii) If the Congress had intended that no modification of a contract entered into before the November 8, 1985 effective date comes within the effective provision, as appellant contends, then there would have been no reason to include

the phrase “or modifications on contracts” therein, rendering such phrase superfluous. (iv) Thus, the Pub. L. 99-500 interest provision applies to P00031.

Appellant argues: (1) The phrase “entered into after November 7, 1985” modifies only the word “contracts” in the effective date provision. (2) The legislative history of Pub. L. 99-661 on which respondent relies is irrelevant to Pub. L. 99-500. (3) The pertinent TINA amendments were for the purpose of strengthening the Government’s contract rights, and had no public, sovereign purpose. (4) Pub. L. 99-500 cannot alter, retrospectively and without consideration, the obligations of P00031, which was executed 18 days before Pub. L. 99-500 was enacted, in derogation of contract 879’s Interest clause. (5) Respondent’s interpretation (that the phrase “entered into after November 7, 1985” in the effective date provision modifies both “contracts” and “modifications”) makes superfluous the phrase “on contracts,” but appellant’s interpretation does not make any words superfluous. (6) The phrase “modifications on contracts” in the § 952(d)(2) effective provision parallels “modification to the contract” in § 2306a(a)(1)(B). (7) Contract 879’s DAR 7-104.29(a) PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (1970 JAN) clause did not provide for interest on overpayments due to defective cost or pricing data, and contract 879 has never been amended to include a provision implementing the TINA interest provision (SOF ¶ 2), such as respondent issued later in ¶ (d) of the FAR 52.215-22 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (JAN 1991) clause. (8) The Pub. L. 99-500 TINA interest provision does not apply to P00031; only the DAR 7-104.39 INTEREST clause in contract 879 applies from the date of respondent’s first written demand for repayment of the overpayment.

DECISION

I.

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Here, the parties have stipulated most of the material facts. The public laws and their legislative histories are a matter of public record. Thus, these motions present solely an issue of law, which is appropriate for partial summary judgment. *See Boeing Defense & Space Group*, ASBCA No. 50048, 98-2 BCA ¶ 29,779 at 147,560 (dispute over interpretation of contract or regulatory provisions may be resolved by summary judgment).

Contract 879 was awarded effective 1 May 1984 (SOF ¶ 1). The DAR 7-104.29(a) PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (1970 JAN), and 7-104.42(a) SUBCONTRACTOR COST OR PRICING DATA (1982 DEC), clauses in contract 879 do not provide for interest overpayments due to defective cost or pricing data, and contract 879 has not been modified to include any clause providing for payment of such interest other than as provided in the clause entitled “Interest” (SOF ¶¶ 2, 3).

The parties agree that the interest provision in Pub. L. 99-145 applied only to contracts entered into on or after 8 November 1985, and therefore that interest provision is not applicable to contract 879, which was awarded in 1984 (SOF ¶ 1). This dispute focuses on the interpretation of § 952(d)(2) in Public Laws 99-500, 99-591, and 99-661: “Subsection (e) of [10 U.S.C. § 2306a] shall apply with respect to contracts or modifications on contracts entered into after November 7, 1985.” (SOF ¶¶ 14, 15)

II.

The TINA, as first enacted in Pub. L. 87-653, and as amended by Pub. L. 99-500, was not self-enforcing with respect to price reductions of negotiated contracts and all modifications within the statutory criteria, but instead expressly required that such contracts “shall contain a provision” to enforce TINA price reductions (SOF ¶ 11, 14). We know of no decision allowing a TINA price reduction in a contract lacking a price reduction provision. Indeed, to allow a TINA price reduction under a contract lacking the ASPR 7-104.29(a) PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA clause, the Board, citing *G. L. Christian & Associates v. United States*, 312 F.2d 418, 160 Ct. Cl. 1, *reh. den.*, 320 F.2d 345, 160 Ct. Cl. 58 (1963), *cert. den.*, 375 U.S. 954 (1963), incorporated such clause by operation of law. See *Palmetto Enterprises*, ASBCA No. 22839, 79-1 BCA ¶ 13,736 at 67,339. Incorporation by the Christian Doctrine would have been superfluous if the TINA were self-enforcing. Since the January 1991 FAR clauses implementing the TINA interest requirement (SOF ¶ 18) were not in effect in 1986-87, however, such clauses cannot be incorporated by operation of law into contract 879.

On 8 November 1985, Pub. L. 99-145, § 934(a), prescribed interest on any overpayment due to defective pricing “under a contract with the Department of Defense” and subject to TINA. Pursuant to § 934(c) of that law, TINA interest applied “only to contracts entered into on or after the date of the enactment of this Act,” *viz.*, 8 November 1985. (SOF ¶ 13) Pub. L. 99-500, enacted on 18 October 1986: (i) repealed § 934(a) of Pub. L. 99-145, (ii) recodified 10 U.S.C. § 2306(f) as § 2306a, (iii) prescribed TINA interest in § 2306a(e) “under a contract with the Department of Defense” (just as in § 934(a) of Pub. L. 99-145), and (iv) added the phrase “or modifications on contracts” in the 7 November 1985 “Effective Date” provision, § 952(d)(2) (SOF ¶ 14). 10 U.S.C. § 2306a(e) retained that same phrase, “under a contract with the Department of Defense,” in the later 1986 TINA amendments by Pub. Laws 99-591 and 99-661 (SOF ¶ 15).

Establishment in § 952(d)(1) of Pub. L. 99-500 (the amending act) of a prospective effective date for the new defenses and setoff provisions added in 10 U.S.C. § 2306a(d), and retention in § 952(d)(2) of the 8 November 1985 effective date for interest in Pub. L. 99-145 (the repealed act), when the interest provision in 10 U.S.C. § 2306a(e) was repeated without change, are consistent with the rules of statutory interpretation:

Provisions of the original act or section which are repeated in the body of the amendment, either in the same or

equivalent words, are considered a continuation of the original law . . . even though the original act or section is expressly declared to be repealed The provisions of the original act or section reenacted by the amendment are held to have been the law since they were first enacted, and the provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect. Thus, rights and liabilities accrued under the provisions of the original act which are reenacted are not affected by the amendment.

1A SUTHERLAND STAT. CONST. § 22.33 (5th Ed.).

The phrase “or modifications on contracts” in § 952(d)(2) clarified that the 1986 TINA amendments applied to contracts and to modifications, and set the 8 November 1985 common effectivity date for interest on overpayments under “contracts” and “modifications on contracts” awarded thereafter. Thus, one can reasonably conclude that Pub. L. 99-145 prescribed TINA interest for defectively priced contracts entered into after 7 November 1985, and modifications to such contracts. This interpretation of § 952(d)(2) is consistent with the rule: “[t]he Government-as-contractor cannot exercise the power of its twin, the Government-as-sovereign, for the purpose of altering, modifying . . . the particular contracts into which it had entered with private parties.” *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569, 1575 (Fed. Cir. 1997), *cert. den.*, 524 U.S. 951 (1998); *see also General Dynamics Corp. v. United States*, 47 Fed. Cl. 514, 542-44 (2000) (disallowance of executive salaries exceeding limit in FY 1998 authorization act in a contract awarded two years previously was a breach of that contract).

The parties’ briefs have cited, and our research has located, no decision that expressly addressed and decided whether either § 952(d)(1)’s phrase “entered into after the end of the 120-day period beginning on the date of enactment of this Act,” or § 952(d)(2)’s phrase “entered into after November 7, 1985,” modified the phrase “modifications on contracts,” set forth in both (d)(1) and (d)(2). In a decision addressing setoffs of understated cost or pricing data in an original contract, we cited “§ 952(d)” (and thus necessarily construed § 952(d)(1)) of Pub. L. 99-661, stating:

[W]e conclude that the contracts at issue are governed by the law in effect before 1986, when the . . . (TINA), was amended to disallow offsets for intentional understatements. 10 U.S.C. § 2306a(D)(4)(B) By its terms, that amendment applied only “with respect to contracts or modifications . . . entered into after” the date of enactment. Public Law 99-661, § 952(d), 100 Stat. 3949. Each of the three contracts at issue here was entered into well before the date of enactment . . . and hence is governed by the prior law permitting the use of certain understatements as offsets.

United Technologies Corp./Pratt & Whitney, ASBCA No. 43645, 98-1 BCA ¶ 29,577 at 146,633, *aff'd-in-part and rev'd-in-part on other grounds*, 215 F.3d 1343 (Fed. Cir. 1999) (table). *Pratt & Whitney* did not address or decide the issue of TINA interest on a contract modification.

In a 1999 U.S. District Court decision cited by neither party's brief, a Navy contract awarded in January 1984 included the DAR 7-104.29(a) PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (1970 JAN) clause (as was in Motorola's contract). Material was defectively priced under the Navy contract Modification No. P00013, signed on 17 January 1986. The court rejected the argument that the 1986 TINA amendment for interest on contract modifications did not apply to Modification No. P00013, which was entered into after the 8 November 1985 effective date of the

TINA amendment, and awarded TINA interest to the Government. *See United States v. United Technologies Corp., Sikorski Aircraft Division*, 51 F. Supp. 2d 167, 194-95 (D. Conn. 1999). We are not persuaded to follow *Sikorski*, because it did not analyze whether, but apparently assumed that, the phrase, “entered into after November 7, 1985” in § 952(d)(2), qualified “modifications on contracts”; did not address or analyze the legal effect of the absence of a contract clause implementing TINA interest; did not analyze the potential application of the rule in *Yankee Atomic Electric Co, supra*; and is not a precedent binding on the ASBCA.

Our construction of § 952(d)(2) is consistent with the 1988 and 1990 FAR revisions that implemented the 1986 TINA amendments to limit offset and defective pricing defenses prospectively (SOF ¶ 17) and to add interest on defective pricing recoveries in 1990 (SOF ¶ 18). Moreover, the FAC 90-3 revision to implement the TINA interest requirement provided the following regulatory guidance (SOF ¶ 18):

Repayments required as a result of defective pricing on contracts awarded prior to [November 8, 1985] should be sought in accordance with debt collection procedures in existence as of the date of contract award. ***Any interest*** charged on these contracts should be calculated in accordance with the Interest clause contained in the contract. [Emphasis added.]

Respondent’s interpretation retroactively applies the TINA interest provision to modifications of contracts entered into before 8 November 1985. The legislative history upon which it relies, in context, refers to the new 1986 provisions, not to the existing 1985 provisions which were reenacted (SOF ¶ 16), and is inconclusive. We conclude that respondent’s statutory construction is less persuasive than appellant’s with respect to § 952(d)(2).

Consistent with our foregoing conclusions drawn from the TINA legislation and its agency implementation, we hold that any interest for overpayments arising from defective cost or pricing data under contract 879 must be charged in accordance with contract 879’s DAR 7-104.39 INTEREST (1983 FEB) clause.

We grant appellant's motion for partial summary judgment, and deny respondent's motion for partial summary judgment.

Dated: 15 December 2000

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
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. 51789, Appeal of Motorola, Inc., rendered in conformance with the Board's Charter.

Dated:

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