

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
International Technology Corporation) ASBCA No. 54136
)
Under Contract No. N62474-93-D-2151)

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

APPEARANCES FOR THE GOVERNMENT: Craig D. Jensen, Esq.
Acting Navy Chief Trial Attorney
James T. DeLanoy III, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON
MOTION FOR RECONSIDERATION

Appellant, International Technology Corporation, timely seeks reconsideration of our decision, *International Technology Corporation*, ASBCA No. 54136, 06-2 BCA ¶ 33,348, that denied reimbursement of its costs and those of a subcontractor in excess of the cost ceiling of its delivery order (DO), in the amount of \$1,148,545, on the grounds that appellant inexcusably failed to comply with the Limitation of Cost (LOC) clause and the related notice requirements in the DO. The Navy opposes appellant’s motion. Familiarity with our decision is presumed.

The gravamen of appellant’s motion is that the Board overlooked or misperceived the testimony of appellant’s subcontracts manager, Ms. Safreed, or otherwise treated her testimony inconsistently on the issue of whether appellant complied with the notice requirements of the LOC clause and the DO. First, appellant contends that the Board failed to credit her testimony that she gave the government “prompt oral notice” of the subcontractor claim (app. reply at 4). Appellant contends that Ms. Safreed’s testimony was uncontroverted, and it was error not to accept it, citing *Quock Ting v. United States*, 140 U.S. 417 (1891).

Appellant’s contentions are without merit for a number of reasons. First, *Quock Ting* does not stand for the proposition asserted by appellant. In fact, the Court held contrary to the proposition asserted by appellant here, affirming the court below that held uncontroverted witness testimony was *not* worthy of belief under the circumstances. In support of its holding the Court cited with favor, *inter alia*, the following authority:

In *Koehler v. Adler*, 78 N.Y. 287, it was held that a court or jury was not bound to adopt the statements of a witness simply for the reason that no other witness had denied them, and that the character of the witness was not impeached; and that the witness might be contradicted by circumstances as well as by statements of others contrary to his own, or that there might be such a degree of improbability in his statements, as to deprive them of credit, however positively made.

(140 U.S. at 422)

Second, the evidence relied upon by appellant here was not uncontroverted. Ms. Safreed did not testify that she gave the Navy “prompt oral notice” of the REA. Rather, she testified (tr. 1/26) to the truth of a statement in a “memo to file” that she prepared when she was employed by appellant, dated 6 June 2001, in which she stated as follows:

Receipt of the request [REA] was reported to the Navy in the next Delivery Order monthly Cost Performance Report, dated December 16, 1999 as well as in written and verbal correspondence with the Administrative Contracting Officer (ACO) and Contract Specialist of record at the time; Mr. Myles Jones and Mr. Mark Feinberg respectively.

(App. supp. R4, tab 213 at 3) Ms. Safreed’s statement in this memorandum was controverted by the subject cost performance report. As we found in our decision (finding 21), appellant did not report to the Navy the receipt of the REA in the monthly cost performance report dated 16 December 1999 (*International Technology Corporation, supra*, 06-2 BCA at 165,362). Furthermore, notwithstanding Ms. Safreed’s suggestion above that she issued “written” correspondence of notice to the Navy in this late 1999 time frame, appellant offered no such writing in evidence.

To the extent appellant relies on this 2001 memorandum to substantiate any oral notice to the Navy in 1999, we find this reliance hollow and unpersuasive since the so-called substantiating document was inaccurate and not credible in this respect. Ms. Safreed testified unequivocally that she did not transmit the REA document dated 15 November 1999 to the Navy (tr. 1/84).

We found in our decision that appellant failed to provide substantiating details of any oral notice (finding 20). For reasons stated above, we reaffirm this finding. Insofar as Ms. Safreed vouched for the accuracy of the above memorandum statement, we find her testimony lacked credibility in this respect as well. We add these findings to our decision.

Appellant's contention of timely notice of the REA to the Navy also flies in the face of the undisputed letter from its subcontractor to appellant, dated 2 June 2000 (finding 26), which appellant ignores in its motion. As we quoted in our decision, this letter complained of appellant's failure to timely provide the REA to the government (*International Technology Corporation, supra*, 06-2 BCA at 165,363).

As we stated in our decision, we question whether prompt, oral notice of the REA was given to the Navy in late 1999. Even assuming, *arguendo*, that Ms. Safreed advised the government of the simple fact that appellant received an REA in 1999, such a mention falls far short of the detailed, cost notice mandated by the contract pursuant to the LOC clause. Appellant has not demonstrated any error in the Board's evaluation of this evidence, or in the Board's conclusions based upon that evidence.

Appellant also contends that we erred by ignoring Ms. Safreed's testimony to the effect that she interpreted the LOC clause to require written notice to the government at the time she believed additional costs may be incurred and its subcontractor might be entitled to an equitable adjustment and she did give such written notice through her written communications to the government dated 27 May 2000 and 8 August 2000 (app. mot. at 4). This contention is also without merit.

Assuming that Ms. Safreed interpreted the LOC clause in this manner – which is not altogether clear on the record – it is clear that these letters did not provide the notice required under the LOC clause. Appellant knew how to file a notice pursuant to the LOC clause when it intended to do so. The record shows that appellant filed such a notice by letter to the government dated 23 July 1998. The "Subject" line of this letter was "Notification of 75% Limitation of Cost within 60 days for Delivery Order 0102". Appellant stated in the first sentence of the letter as follows:

Pursuant to FAR Clause 52.232-20, entitled "Limitation of Cost," and in accordance with Section G-3 (f) of the subject contract, this letter will serve as official notification that within the next 60 days, IT Corporation (IT) will have expended 75% of the funding provided by this delivery order.

(R4, tab 57) We add these findings to our decision.

To the extent that appellant construes Ms. Safreed's testimony, cited in the motion, as an affirmative statement that the subject letters were LOC notices and/or provided the information required by the LOC clause, we conclude such construction to be unreasonable and the testimony unpersuasive.

Appellant argues--without supporting citation -- that a trier of fact that accepts certain testimony from a witness cannot question other portions of that testimony (app.

mot. at 3-4). Clearly, this is not the law. It is hornbook law that a trier of fact, in the context of making witness credibility determinations, may believe or reject testimony in its entirety, or may believe parts of testimony and reject others. 98 C.J.S., Witnesses, § 559.

We believe that appellant misperceives the meaning and purpose of the LOC and related DO clauses. These clauses do not prescribe mere time requirements for the filing of claims or REAs. Indeed, these clauses do not even mention claims or REAs, which in certain circumstances may be presented to the government after the completion of the contract work. Rather, in a cost-reimbursement contract, these clauses contemplate the timely written notice to the government of performance problems and their projected, claimed additional costs during contract performance and prior to reaching the estimated cost ceiling in the DO or contract so that the government is able to make an informed decision regarding the termination or continuation of the contract.

The Board concluded that appellant failed to provide the government with such timely written notice, and appellant has not shown that the Board erred in this respect. As we found (finding 22), appellant's monthly cost performance report dated 16 December 1999 did not notify the Navy of the subcontractor's claimed additional costs, of which appellant was plainly aware at this time and which, if added to cumulative incurred cost, would have exceeded the estimated cost ceiling of the DO. Appellant also has not shown any error in this finding.

In conclusion, we affirm our holding that appellant inexcusably failed to timely comply with the LOC clause and related DO notice requirements. Upon reconsideration, our decision, as modified herein, is affirmed.

Dated: 20 December 2006

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur
(Signatures continued)

I concur

MARK N. STEMLER
Administrative Judge

EUNICE W. THOMAS
Administrative Judge

Acting Chairman
Armed Services Board
of Contract Appeals

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. 54136, Appeal of International Technology Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals