

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Interstate Electronics Corporation) ASBCA Nos. 55064, 55250
)
Under Contract No. F04701-98-C-0033)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Interstate Electronics Corporation (IEC) appeals from three contracting officer decisions disallowing as indirect costs, costs allegedly incurred in performing IEC's share of the above captioned cost-sharing contract (hereinafter "Contract 0033"). Both parties move for summary judgment. There are genuine issues of material fact. Both motions are denied.

STATEMENT OF FACTS
FOR PURPOSES OF THE MOTIONS

1. IEC has been a provider of Global Positioning Systems ("GPS") and related applications since the 1980's. In January 1998, IEC began an independent research and

development (IR&D)¹ project in the area of “Military GPS.” IEC’s budget for this project was \$6 million. (R4-55250, tabs 5 at 3, 6 at 3) It is not disputed that this work was not required in the performance of any government contract until the award of Contract 0033. On 15 April 1998, the NAVSTAR Global Positioning System Joint Program Office (JPO) of the Air Force Space and Missile Systems Center solicited proposals for a cost-sharing research and development contract in support of JPO’s “GRAM-SAASM” military GPS program (R4-55250, tab 8 at 1).

2. On 21 May 1998, IEC submitted technical/management and cost proposals, both dated 22 May 1998, in response to the solicitation. The Statement of Work (SOW) in IEC’s technical/management proposal provided for the design, development and test of two “form factor” cards for the GRAM-SAASM program. (R4-55250, tab 9 at 1, 3, 117) IEC’s cost proposal showed a total estimated cost for the effort of \$9,999,232 of which \$6,000,000 would be provided by “IEC IRAD” and \$3,999,232 by “JPO.” The cost proposal also stated that: “Of the \$6M of IEC IRAD planned over the next two calendar years, IEC has expended \$897,192 to date from the start of the development program in January ’98.” (R4-55250, tab 9 at 134)

3. By memorandum to IEC dated 30 June 1998, the JPO contracting officer, Charles D. Watson, stated that the government was “contemplating” awarding a cost-sharing contract to IEC for its proposed effort. The memorandum further stated in relevant part:

3. Attached is a model contract which includes Representations and Certifications for you to review, complete and sign. Request you return the completed and signed Representations and Certifications and any other page(s) requiring contractor input. . . . The model contract provides the basis for negotiations on all contractual requirements, terms and conditions. However, because there were no exceptions taken to the proposed estimated cost, cost share percentage, terms and conditions and statement of work, there should not be a need for negotiations. Any exceptions to the terms and conditions in the model contract can be discussed with the negotiator prior to finalizing the contract.

¹ IEC abbreviates independent research and development as “IRAD.” The Federal Acquisition Regulation (FAR) uses the abbreviation “IR&D” (FAR 31.205-18). Throughout this opinion we use the FAR abbreviation except where “IRAD” is in a direct quote.

(App. supp. R4-55250, tab 1 at 1)

4. Among the provisions in the model contract was a Special Contract Requirements (SCR) clause H29 entitled “ESTIMATED COST AND COST SHARING (APR 1984) (JUNE 1998).” Paragraph (d) of SCR H29 stated:

The Contractor shall maintain records of all contract costs claimed by the Contractor as constituting part of its share, and such records shall be subject to audit by the Government. Cost contributed by the Contractor shall not be charged to the Government under any other grant or contract (including allocation to other grants or contracts as part of an independent research and development program) [emphasis added].

(App. supp. R4-55250, tab 1 at 13)

5. The JPO Director of Contracts at the time the GRAM-SAASM R&D solicitation was issued, Barney Klehman, has declared under penalty of perjury that:

[JPO] specifically intended that companies awarded contracts under [the solicitation] would provide their own corporate funding (i.e. not reimbursable by the Government) for their share of the efforts specified under the contract. [JPO] included a clause in each contract . . . that prohibited companies from charging their cost share to any Government contract. I specifically recall verifying with Charles Watson, the Contracting Officer assigned to [the solicitation] that such a clause was included in each contract issued under [the solicitation]

(Gov’t mot., Klehman decl.)

6. Mr. Watson has stated by declaration under penalty of perjury that: “I did not tell any company that submitted a proposal in response to [the solicitation], including IEC, that it could use IR&D to fund its cost share” (Gov’t mot., Watson decl.).

7. IEC took no exception to the model contract. On 24 July 1998 the government and IEC entered into Contract 0033 on substantially the same terms as in the model contract including the express prohibition on charging the contractor’s cost share to its other contracts as IR&D. Mr. Klehman executed the contract on behalf of the

government and IEC's president, Richard E. Tierney executed it on behalf of IEC. (R4-55250, tab 1 at 1). IEC has submitted no affidavits or declarations by Mr. Tierney or its contracting personnel corroborating its contention of a mistake in the executed agreement as to charging its cost share as IR&D.

8. Contract Line Item No. (CLIN) 0001 of Contract 0033 required IEC to produce and deliver two separate GRAM-SAASM form factor interface control documents (ICDs) in accordance with the contractor's SOW at an estimated total cost of \$9,999,232. The specified government share of the estimated total cost was 39.9953 percent. The specified contractor share was 60.0046 percent. (R4-55250, tab 1 at 1, 2)²

9. Contract 0033 included, among other provisions, the FAR 52.216-7 ALLOWABLE COST AND PAYMENT (FEB 1998) clause, the FAR 52.230-2 COST ACCOUNTING STANDARDS (APR 1996) clause, the FAR 52.232-22 LIMITATION OF FUNDS (APR 1984) clause, and as SCR clause H25 an ESTIMATED COST AND COST SHARING (APR 1984) (JUNE 1998) clause in substantially the same terms as the SCR clause H29 in the model contract with no change in paragraph (d) (R4-55250, tab 1 at 11, 13-14).

10. On 20 April 2000, JPO requested IEC to provide its actual incurred cost, estimates to complete (ETC) and estimate at completion (EAC) for Contract 0033 showing by specific tasks both the government and the contractor share of the funding (R4-55250, tab 14). On 3 May 2000, JPO requested IEC to "confirm that your share of this [Contract 0033] effort comes exclusively from company funds (i.e. profit) and not from funds that are charged to other government contracts (i.e. IR&D/BP, overhead accounts, etc.)" (R4-55250, tab 15).

11. On 4 May 2000, IEC replied to JPO's 20 April 2000 request. IEC's reply showed that the government share and the IEC share of total incurred costs as of 31 March 2000 were respectively \$3,876,590 and \$7,074,155. The total EAC was \$13,181,270. The contractor's cost-share was shown as being charged to "Job 6781." (R4-55250, tab 16 at 1-3) This was the same job number to which the costs of the IR&D project started in January 1998 had been charged (R4-55250, tab 7 at 19-20).

12. IEC replied to JPO's 3 May 2000 inquiry on 9 May 2000 as follows: "As noted in our proposal . . . for the subject contract, and as per the FAR, we are funding our

² The dollar amounts of the percentage cost shares in Contract 0033 (\$3,999,222.84 for the government and \$5,999,999.16 for IEC) are substantially, but not exactly, the same as the monetary cost shares in IEC's cost proposal. For convenience we hereinafter refer to the Contract 0033 original cost shares at award as \$4 million for the government and \$6 million for IEC.

portion of this contract with IRAD funds” (R4-55250, tab 17). On 10 May 2000, the JPO contracting officer directed IEC’s attention to SCR clause H25 of the contract and stated: “This clause make[s] Government Reimbursed IRAD accounts unallowable for use on cost share contracts” (R4-55250, tab 18).

13. On 22 June 2000, IEC and the JPO began what turned out to be a protracted series of discussions over a period of 22 months aimed at modifying the cost share provisions of Contract 0033 (R4-55250, tabs 19, 20, 21, 22, 25; gov’t opp’n, ex. 21). While these discussions were proceeding, IEC on 31 January 2001 delivered the two form factor ICDs required under CLIN 0001 of the contract as awarded (R4-55250, tab 26 at 3).

14. In a memorandum of a 31 January 2001 discussion regarding revision of IEC’s cost share, the JPO project “lead” assigned in July 2000 (CAPT Brennan) wrote: “due to a IEC/JPO misunderstanding, IEC incorrectly allocated IR&D funds as their cost share portion for [Contract 0033] hence the reason for re-negotiating the cost share portion” (R4-55250, tab 21 at 2). CAPT Brennan was not a contracting officer and had not participated in the solicitation or award of the contract. CAPT (now MAJ) Brennan states in his declaration under penalty of perjury that:

“IEC/JPO misunderstanding” was the phrase I used to explain the situation that had been explained to me wherein IEC improperly allocated its cost share of [Contract 0033] to an IR&D account. By using the phrase “IEC/JPO misunderstanding,” I did not mean there was a “mutual mistake” in any legal sense. I was not aware what the phrase “mutual mistake” meant in a legal sense.

(Gov’t mot., Brennan decl. ¶ 7)

15. On 5 March 2001, IEC submitted to the Defense Contract Management Command (DCMC)-Santa Ana its indirect cost proposals for its fiscal years (FYs) ending 31 December 1998 and 1999. On 21 December 2001, it submitted to DCMC-Santa Ana its indirect cost proposal for its FY 2000.³ These proposals included among other items in the general and administrative (G&A) indirect cost pools, IR&D expenses of \$4,355,070 for FY 1998, \$4,164,495 for FY 1999, and \$4,113,753 for FY 2000. The proposals also showed that government “participation” in the allocation of the G&A cost pools on a total cost input basis was 92.72 percent in FY 1998, 80.13 percent in FY 1999,

³ DCMC Santa Ana was the specified contract administration office for Contract 0033 (R4-55250, tab 1 at 1).

and 86.14 percent in FY 2000. (R4-55250, tabs 23 at 1, 14, 39, 24 at 1, 14, 28, and R4-55064, tab 2 at 1, 14, 38)

16. The discussions on modifying the cost share provisions of Contract 0033 culminated in bilateral Modification No. P00006 executed by the JPO contracting officer on 1 April 2002 and by IEC on 11 April 2002. The specified effective date of the modification was 15 April 2002. (R4-55250, tab 26 at 1)

17. Modification No. P00006 revised CLIN 0001 of the contract to read in relevant part as follows:

Descriptive Data:

The Contractor shall provide a GRAM-SAASM Interface Control Document in accordance with Attachment 1, Contractor Statement of Work (CSOW), and Attachment 2, Integrated Management Plan (IMP), attached hereto and made a part hereof (3600)

(Estimated Cost:	\$4,657,112)
(Government Share:	\$3,999,223)
(Contractor Share:	\$ 657,889)

(R4-55250, tab 26 at 3)

18. Modification No. P00006 revised the contract delivery schedule to read in relevant part as follows:

Descriptive data:

SEM-E ICD delivery date is 31 Jan 2001
Projectile ICD delivery date is 31 Jan 2001
Reliability Evaluation of Non-Hermetic MCM-L SAASM
Surface Mount Package Using a Tamper Resistant Coating
Test Report delivery date is 30 June 2002

(R4-55250, tab 26 at 3)

19. Modification No. P00006 added a clause H34 to the Special Contract Requirements. This clause, entitled “**GOVERNMENT LIMITED LICENSE FOR USE OF RELIABILITY EVALUATION OF NON-HERMETIC MCM-L SAASM SURFACE MOUNT PACKAGE USING A TAMPER RESISTANT COATING TEST REPORT**” stated:

The Contractor agrees that the Independent Research and Development (IR&D) activities described in the contract Statement of Work shall be completed by the Contractor and made available for use under the contract at no increase in the direct cost to the Government on this contract. The Government shall have the right to use, modify, reproduce, release, display or disclose this report, in whole or in part, within the U.S. Government. This includes the right to disclose it to GPS Joint Program Office support contractor personnel identified in Special Contract Requirement Clause H33. Description of the IR&D activities in the Statement of Work shall not be construed to imply that the efforts described therein are required for the performance of this or any other contract. The Contractor agrees that it is at risk to perform the IR&D activities described in the Statement of Work. Any adverse impact on the GRAM-SAASM contract effort as a result of the Contractor's failure to perform these activities will be considered in the Contractor's performance assessment.

(R4-55250, tab 26 at 4).

20. Modification No. P00006 also included the following provision: "In consideration of the modification agreed to herein the Contractor and the Government hereby release each other from any and all liability solely attributable to the facts and circumstances giving rise to the changes made in this modification" (R4-55250, tab 26 at 4).

21. The SOW attached to Modification No. P00006 was the same SOW attached to the contract at award plus an Addendum A specifying the work to be performed in producing the proprietary and non-proprietary versions of the Reliability Evaluation of Non-Hermetic MCM-L SAASM Surface Mount Package Using a Tamper Resistant Coating Test Report (hereinafter "the Reliability Test Report") (R4-55250, tab 26 at 6-21).

22. IEC's cost share of \$657,889 under Modification No. P00006 was the mutually agreed amount for IEC producing the Reliability Test Report, granting a limited license to the government to use the proprietary version of that report, and providing "support" for ICD-163 (gov't mot., ex. 21 at 7). ICD-163 was the projectile form factor ICD delivered to the government on 31 January 2001 as one of the end products required by the original SOW (R4-55250, tab 21 at 1, 26 at 3).

23. A JPO Price Negotiation Memorandum dated 2 October 2001 describes the “Acquisition Background” for the “Descope and Cost Share Renegotiation” in Modification No. P00006 as follows:

In early 2000 the JPO became aware that IEC was not performing to the contract requirement of using corporate funds as their 60% cost share of the estimated cost of the [Contract 0033] effort. Rather, IEC was using Internal Research and Development (IRAD) funds for their share of the effort. This method of cost share allocation was in IEC’s source selection proposal, but was excluded from the contract. It was and is IEC’s position that IEC has made a significant commitment to GRAM-SAASM by investing in excess of \$13M of IRAD funds toward this segment of GPS development.

Since becoming aware of contractual deficiency, the JPO and IEC have been striving to arrive at a fair and meaningful resolution to the issue. Numerous proposals have been reviewed with the current proposal yielding the most promise.

It is the consensus of both Government and IEC personnel that the [original contract] scope of work has been completed. The proposed consideration for renegotiating the cost share ratio of the contract exceeds the requirements of the contract.

(Gov’t mot., ex. 21 at 5-6)

24. The JPO contracting officer who supervised the negotiation of Modification No. P00006 and approved the JPO Price Negotiation Memorandum states in his declaration under penalty of perjury that:

[JPO] did not intend to enter into any agreement with IEC about whether the IRAD funds IEC originally identified as its cost share would be allowable IR&D costs under the Federal Acquisition Regulations. We also did not intend to reach an agreement with IEC about how the IR&D costs IEC originally identified as its costs [sic] share could be allocated under the Cost Accounting Standards or IEC’s disclosed accounting practices. [JPO] also did not negotiate

modification P00006 to [Contract 0033] because [JPO] erroneously included clause H-25 in the Contract or because [JPO] intended that IEC could use IR&D as its cost share.

(Gov't mot., Trader decl.)

25. The JPO contracting officer who signed Modification No. P00006 states in his declaration under penalty of perjury that:⁴

In April 2002, I reviewed and signed modification P00006 to [Contract 0033]. In agreeing to Modification P00006, [JPO] did not agree that the costs IEC had already incurred as its original cost share for [Contract 0033] and which IEC asserted were IR&D, were actually allowable IR&D costs under the Federal Acquisition Regulations ("FAR"). We accepted the assertion by IEC that it had paid its cost share with IR&D and never understood the allowability of costs under the FAR to be an issue. [JPO] also did not reach agreement with IEC regarding how the costs IEC had incurred for its original cost share of [Contract 0033] that it claimed were IR&D should be allocated.

(Gov't mot., Wright decl.)

26. On 27 June 2002, 8 July 2002, and 9 January 2004, the Defense Contract Audit Agency (DCAA) issued audit reports respectively on IEC's indirect cost proposals for its FYs 1998, 1999, and 2000. The audit reports questioned, among other items, \$2,872,268, \$3,707,927, and \$3,487,154 respectively in the proposed FY 1998, FY 1999 and FY 2000 G&A cost pools. The FY 1998 and FY 1999 costs were questioned on the ground that they were "the contractor's share of a cost sharing contract." The FY 2000 cost was questioned on the ground that it "directly related to a contract." (R4-55250, tab 27 at 1, 14-15, tab 28 at 1, 16-17; R4-55064, tab 3 at 1, 16)

27. On 20 September 2004, the DCMC-Santa Ana Administrative Contracting Officer (ACO) issued final decisions on IEC's indirect cost rates for 1998 and 1999. The ACO-approved G&A rates for 1998 and 1999 did not include the IR&D costs questioned

⁴ There is no affidavit or other statement of intent in the record on the motion by Candace Lee, IEC's signatory on Modification No. P00006, or by any other IEC personnel.

by the DCAA. (R4-55250, tabs 47 at 1, 50 at 1) These decisions were timely appealed on 27 October 2004. The appeal was docketed as ASBCA No. 54797.

28. On 1 December 2004, the DCMC-Santa Ana ACO issued a notice of intent to disallow the IR&D cost questioned in the DCAA audit report on IEC's FY 2000 indirect cost proposal (R4-55064, tab 5 at 1). By letter dated 31 January 2005, IEC submitted a certified claim for a contracting officer's final decision "concerning the treatment of the disputed IR&D costs in light of the parties' dispute concerning the interpretation of SCR H25 and Modification P00006." (R4-55064, tab 6 at 1-2)

29. On 30 March 2005, the DCMA⁵ ACO issued a final decision on IEC's 31 January 2005 claim. The ACO decided that the claimed IR&D costs "are not proper IR&D costs since the costs were incurred on effort required in performance of the Contract" (R4-55064, tab 11 at 1). This decision was timely appealed on 21 June 2005. The appeal was docketed as ASBCA No. 55064.

30. To avoid a potential jurisdictional dispute with respect to ASBCA No. 54797, IEC submitted a certified claim on 18 October 2005 for a contracting officer's interpretation of the Contract 0033 provisions regarding the disputed IR&D costs in IEC's FY 1998 and 1999 indirect cost proposals. On 25 October 2005, the DCMA-Santa Ana ACO issued final decisions holding that the disputed costs were "not proper IR&D costs since the costs were incurred on effort required in performance of the Contract." (Gov't mot., exs. 19 at 1, 20 at 1) These decisions were timely appealed on 2 November 2005. The appeal was docketed as ASBCA No. 55250.⁶

DECISION

IEC moves for summary judgment on the grounds that (i) the government accepted IEC's proposal to use IR&D funds as its cost share for the proposed contract, (ii) the provision in Contract 0033, as executed by the parties in July 1998, that precluded IEC from charging its cost share as IR&D was a "mistake," and (iii) this mistake was corrected and all claims related thereto were released in bilateral Modification No. P00006 executed by the parties in April 2002 (app. mot., memo. at 1-2; app. opp'n,

⁵ At or about this time, the name of the Defense Contract Management Command was changed to Defense Contract Management Agency (DCMA). For purposes relevant herein there was no change in functions.

⁶ Per the parties' joint proposal, ASBCA No. 54797 was dismissed as superseded by ASBCA No. 55250.

memo. at 1-2). IEC's claim, if valid, apparently would permit it to recover from the government between 80.13 and 92.72 percent of its \$6 million cost share in addition to the government's \$4 million cost share under the original contract (*see* SOF ¶ 15).

The government denies that there was a mistake in the formation of the contract, that Modification No. P00006 was intended to correct a mistake, or that the scope of the release in Modification No. P00006 was intended to apply to the allowability or allocability under FAR and CAS of the disputed costs (gov't opp'n, memo. at 32-40). The government moves for summary judgment on the grounds that (i) the costs in question that were incurred after Contract 0033 was entered into were incurred for work required in performance of that contract, and (ii) the JPO contracting officer had no authority to agree to convert costs that were direct costs when incurred into IR&D indirect costs contrary to the applicable FAR and CAS provisions. (*Id.*, at 40-52)

Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). IEC's allegations of a mistake in the original terms of Contract 0033 precluding the charging of its \$6 million cost share as IR&D, and correction of that mistake in Modification No. P00006, are contested by the government with support from the contemporaneous documents and declarations under penalty of perjury of the contracting officers for the original contract and Modification No. P00006 (*see* SOF ¶¶ 1-7, 14, 23-25). IEC's allegations and the government's response present genuine issues of material fact as to the alleged mistake in the original contract. *See Bromion, Inc. v. United States*, 411 F.2d 1020, 1023 (Ct. Cl. 1969). They also present genuine issues of material fact as to the context of, and intentions of the parties in, Modification No. P00006. The purpose and intent of that modification is not self-evident from its text.⁷ *See Metric Constructors, Inc. v. NASA*, 169 F.3d 747,

⁷ Among other things, Modification No. P00006 reduced the estimated cost of the contract work but did not reduce the scope of that work specified in the SOW. The delivery schedule in Modification No. P00006 confirmed that the two form factor ICDs required by the original SOW had been received on 31 January 2001. (*See* SOF ¶¶ 2, 7, 17, 18, 21). The reduced estimated cost (\$4,657,112) was also less than 50 percent of the actual cost (\$10,950,745) reported by IEC 19 months earlier (*see* SOF ¶¶ 11, 17). Clause H34 of the modification further confused matters by first stating that "Independent Research and Development (IR&D) activities described in the contract Statement of Work shall be completed by the Contractor," and then, two sentences later stating that: "Description of the IR&D activities in the Statement of Work shall not be construed to imply that the efforts described therein are required for the performance of this or any other contract" (*see* SOF ¶ 19).

752 (Fed. Cir. 1999). These issues must be addressed before the authority issue in the government's motion is reached. Both motions are denied.

Dated: 25 July 2007

MONROE E. FREEMAN, 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 Nos. 55064, 55250, Appeals of Interstate Electronics Corporation, rendered in conformance with the Board's Charter.

Dated:

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