

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Lockheed Martin Corporation) ASBCA No. 57525
Under Contract No. F33657-01-D-2029)

APPEARANCES FOR THE APPELLANT: Thomas A. Lemmer, Esq.
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Denver, CO

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
DCMA Chief Trial Attorney
Arthur M. Taylor, Esq.
Deputy Chief Trial Attorney
Defense Contract Management Agency
Manassas, VA

OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON APPELLANT'S MOTION TO DISMISS

Lockheed Martin Corporation (LMC or appellant) has appealed a decision of the Divisional Administrative Contracting Officer (DACO) asserting a claim of \$29,900,000, plus interest, for increased costs paid by the government for appellant's alleged noncompliance with CAS 418, CAS 420 and FAR 31.205-18(a). The government contends that appellant's claimed Independent Research and Development (IR&D or IRAD) costs are unallowable because they were required in the performance of the contract, FAR 31.205-18(a), and as such, they were wrongly allocated as IR&D under CAS 420, "Accounting for Independent Research and Development costs and bid and proposal costs," and CAS 418, "Allocation of direct and indirect costs."

Appellant has filed a motion to dismiss this appeal, contending that the government's claim is time-barred under the Contract Disputes Act (CDA) because it was filed more than six years after the claim accrued. 41 U.S.C. § 7103. The government opposes appellant's motion and contends that its claim was timely filed. Appellant's motion has been briefed and the Board has heard oral argument. We have jurisdiction under the CDA. 41 U.S.C. §§ 7101-13.

For reasons stated below, we deny appellant's motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. In March of 2001, the Air Force (AF) issued Solicitation No. F33657-01-R-2029 for an Advanced Targeting Pod (ATP) system. In response LMC submitted its proposal for its Sniper XR in April 2001. As part of the proposal, LMC's letter to the AF dated 16 April 2001, Attach. 2, entitled "DISCLOSURE OF RELATED AND/OR CONCURRENT IR&D," listed "88D-Sniper XR," among other tasks, as an ongoing IR&D task that involved "research and development related to and/or concurrent" with performance of the contract, but which LMC "consider[ed] not to be required" by the contract:

[REDACTED]

(App. supp. R4, tab 7 at LMC115)

2. Appellant's proposal described its proposed IR&D as a "company-funded" effort or "LM IRAD fund[ing]" (app. supp. R4, tab 5 at LMC71-72, -76). To the same effect were the following references in the proposal at section 5.1.11, "(U) Independent Research and Development Disclosure:"

We will continue to perform company-funded risk reduction efforts during the course of the ATP contract....

....

LM has supported the development of the Sniper pod, and the improvement of the design known as Sniper XR, on company funds over the last decade....

....

LM has approved company IRAD and capital funds to upgrade two Sniper pods to a Sniper XR configuration.

....

Specifically, we are upgrading our drawing package and completing the necessary engineering documentation on company IRAD funds.... [Note that in Section 2.0, we disclosed that all development efforts described in that section were funded on LM IRAD and that completion of design details was continuing on IRAD].

(*Id.* at LMC88) Appellant's slide presentations at meetings with the government during contract performance also referenced this company-funded IRAD (*e.g.*, app. supp. R4, tab at LMC 231).

3. The AF and LMC entered into a firm fixed-price contract for the Sniper XR on 20 August 2001 (R4, tab 1).

4. Post-award, the Defense Contract Audit Agency ("DCAA") conducted annual audits of LMC's fiscal year IR&D costs, which included audits for Contractor Fiscal Year ("CFY") 2001, CFY 2002, CFY 2003, CFY 2004, CFY 2005, and CFY 2006. In connection with its CFY 2001 audit of LMC's IR&D costs, DCAA issued a letter to LMC on 31 December 2002 – copied to the DACO – questioning LMC's Sniper XR Project 88D costs on the ground that they were not allowable IR&D under FAR 31.205-18. Insofar as pertinent, DCAA's letter stated:

The results of technical evaluation disclosed that the MFCO [LMC] Sniper XR project 88D does not appear to be Independent Research, Development, and Studies costs under FAR 31.205-18's definition for basic research, applied research, development, and systems and other concept formulation studies. In the opinion of the government technical team, the Sniper XR Development project satisfies the current performance base of Sniper XR Contract F33657-01-D-2029 and is required for product delivery....

At the present time, these results are considered our final position pending receipt and evaluation of any rebuttal evidentiary matter your office would care to provide.

(App. supp. R4, tab 15 at LMC246)

5. DCAA's 31 December 2002 letter also attached the relevant sections from DCMA's technical evaluation, which provided:

Sniper XR IRAD project 88D includes technical efforts that are expended in engineering manufacturing and developing (EMD) to make product changes as well as preparing technical data to directly support a specific contract. The EMD efforts for Sniper XR IRAD project are for redesigning and developing existing product design and manufacturing systems, processes, methods (produce ability), test equipment, fixtures and tools (testability), and other techniques intended for direct product sale.

....

The contract F33657-01-D-2029 is dependent and related/mutual [sic] inclusive to Sniper XR IRAD project 88D work and has continued in year 2002 for engineering manufacturing and development for insertion into the current firm fixed price contract product/program at LMM&FC.

A separate distinction between contract/IRAD works cannot be made. The results of the IRAD project and any costs of any adaptation efforts necessary to fulfill contract requirements should be charged either against the contract, or at company expense.

(*Id.* at LMC250, -252) DCAA recommended a net downward adjustment to LMC's proposed G&A expense pool and an upward adjustment to direct costs and associated indirect costs in the G&A base pools (*id.* at LMC246). DCAA did not identify any overbillings or increased costs paid by the government resulting from the alleged inappropriate charges.

6. On 30 March 2004, DCAA issued a letter to LMC with a copy to the DACO reporting the results of its CFY 2002 audit of LMC's IR&D costs as it related to LMC's charging of Sniper XR efforts to IR&D. DCAA noted that "[t]his same issue was also cited in our examination of the [LMC] CFY 2001 Final Incurred Cost Claim, Audit Report No. 1461-2001A10100001 dated July 1, 2003." (App. supp. R4, tab 20 at LMC265) DCAA's contentions were based on a government technical evaluation for CFY 2002, which drew the same conclusion as its technical evaluation for CFY 2001 (R4, tab 9 at G178-81). For CFY 2002, DCAA contended that certain costs recorded as Research, Development, Study & Proposal should "be removed from the G&A pool and charged as direct costs to the Sniper firm-fixed price production Contract Number F33657-01-D-2029"

(app. supp. R4, tab 20 at LMC265). DCAA did not identify any overbillings or increased costs paid by the government resulting from the alleged inappropriate charges.

7. LMC responded to DCAA's review of its CFY 2001 and CFY 2002 IR&D costs on 14 October 2004. LMC disagreed with the government's contentions, explaining that its proposal contained numerous references to its continuing IR&D efforts and that its efforts were properly charged as IR&D because the contract Statement of Work contained no requirement or funding for LMC's design and development efforts. (App. supp. R4, tab 22 at LMC270-79)

8. On 25 March 2005, DCAA issued a letter to appellant in connection with its review of LMC's IR&D incurred costs for CFY 2003, essentially reiterating DCAA's position above (app. supp. R4, tab 24). DCAA issued similar letters to appellant questioning the subject costs for CFY 2004 and CFY 2005, on 11 May 2006 and 30 March 2007 respectively (app. supp. R4, tabs 31, 34).

9. In September of 2005, DCAA issued a draft/preliminary audit report to appellant, with a copy to the DACO, contending that LMC was in noncompliance with CAS 420, FAR 31.205-18 and CAS 418 beginning in CFY 2001 for reasons discussed herein. DCAA calculated the impact of the noncompliance on appellant's G&A rates for CFY 2001, 2002, and 2003, and stated that appellant's noncompliance resulted in overbillings to the government. DCAA stated in pertinent part as follows:

MFCO [LMC] inappropriately charged costs incurred in the performance of the SNIPER firm-fixed price Contract Number F33657-01-D-2029 (SNIPER Advanced Targeting Pod) and other contracts to SNIPER IR&D Project 88D. However, these costs do not meet the definition of IR&D as defined in CAS 420 and FAR 31.205-18(a) because they are required to meet the delivery requirements of these contracts....

....

In our opinion, effort charged to SNIPER IR&D Project 88D, as reported in this noncompliance audit report, was incurred from CFY 2001-2003 (the CFY 2004 audit of SNIPER IR&D Project 88D is currently in process) to meet these testing and conformance requirements of the SNIPER ATP contract SOW.

....

This CAS 420, CAS 418 and FAR 31.205-18 noncompliance results in overstated CFYs 2001 through 2003 G&A rates as summarized above. *In our opinion, the noncompliance results in overstated G&A rates and overbillings to the U.S. Government.*

(App. supp. R4, tab 27 at LMC292-93, -295, -302) (emphasis added). LMC responded with a letter disagreeing with DCAA's conclusions (app. supp. R4, tab 33).

10. DCAA issued its audit report to appellant in final form on 2 February 2007, with copy to the DACO, reiterating its position and including the questioned costs pertaining to CFY 2004 (R4, tab 14). DCAA reiterated that appellant's noncompliance resulted in overstated G&A rates and overbillings to the government, and added calculations of the G&A rate impact for CFY 2004 (*id.* at 13).

11. The DACO issued to appellant an "Initial Notice of Noncompliance" with respect to this IR&D issue on 16 February 2007, referencing the DCAA audit report of 2 February 2007 above. The DACO requested that appellant provide "a general dollar magnitude of the noncompliance" (R4, tab 15). By letter dated 31 May 2007, LMC responded, disagreeing with the government's conclusions (R4, tab 17).

12. On 12 September 2008, the DACO issued a final decision on noncompliance (FDN) to appellant, and sought the cost impact on appellant's government contracts (R4, tab 20). LMC again disagreed with the government's position, but provided a cost impact as requested on 31 March 2009. According to appellant's figures, the cost impact of the purported noncompliance on its government contracts was roughly 13 million dollars; the cost impact on the Sniper program was calculated as \$144,000, approximately 1% of the total impact. (R4, tab 21 at G-334)

13. On 8 December 2010, the DACO issued her final decision, seeking \$29,900,000 plus interest for the noncompliance. Insofar as pertinent, the final decision stated as follows:

In summary, Lockheed Martin incorrectly charged costs as Independent Research and Development.... By doing so, Lockheed Martin recovered costs which should have been charged direct to Firm Fixed Price NDI Sniper Contract. In addition, since the majority of Lockheed Martin's business base is Army, the Army primarily paid the costs, through the indirect rates, of correcting deficiencies on an Air Force Contract.

Based upon the above, it is my FINAL DECISION under FAR 33.211 that Lockheed Martin Missiles and Fire Control is in noncompliance with CAS 420 and CAS 418, and also that the IR&D costs are unallowable under FAR 31.205-18....

(R4, tab 23) (emphasis in original). This appeal followed.

DECISION

The timely assertion of a claim within the CDA's six-year presentment period for contractor and government claims, 41 U.S.C. § 7103(a)(4)(A), is a prerequisite to our jurisdiction. *Arctic Slope Native Association v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009). See also *The Boeing Company*, ASBCA No. 57490, 12-1 BCA ¶ 34,916 (government claim for CAS voluntary accounting change).

For purposes of this appeal, the government claim before us is the DACO final decision dated 8 December 2010, timely appealed to this Board, in which the DACO asserted a monetary claim against appellant for CAS noncompliance. By its express terms, the government's 8 December 2010 claim addressed the basis for the noncompliance and the dollar impact of the noncompliance (SOF ¶ 13).

As of the date of the award of this contract, FAR 33.201 defined accrual of a claim as follows:

33.201 Definitions.

As used in this subpart –

“Accrual of a claim” means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

In determining when a claim accrues and the alleged liability is fixed, we must examine the legal basis of the claim. *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,475. We agree with the government that its monetary claim is based upon the government's payment of increased costs to appellant under its government contracts resulting from alleged CAS noncompliance. 41 U.S.C. §§ 1502(f)(2), 1503(b); 48 C.F.R. § 52.230-2(a)(5). On the other hand, the accrual

definition and the case law make clear that a claimant need not be aware of the full impact of its increased costs/damages for its claim to accrue; however, for liability to be fixed at least some injury to the claimant must be shown. *Gray Personnel*, 06-2 BCA ¶ 33,378 at 165,476.

Appellant, as moving party, must show that the government's monetary claim seeking to recover increased costs paid to appellant under its government contracts accrued more than six years before the date of its assertion, 8 December 2010. We believe that appellant has not made such a showing on this record. Appellant sets out a number of potential claim accrual events and dates, but as discussed below, none of them satisfies the requisites for claim accrual.

Appellant's proposal to the government of April 2001 generally disclosed its intentions regarding 88D-Sniper XR and IR&D, but appellant's IR&D tasks were identified as company funded, not government funded, and they were also so identified in slide presentations to the government after award (SOF ¶ 2). Hence, the government did not know or have reason to know of any potential liability or CAS noncompliance as of these dates. This lack of knowledge would similarly apply to appellant's billings to the government under this contract in 2001 and early 2002. When the DCAA questioned the IR&D costs in late December 2002 (SOF ¶ 5), appellant's subsequent billings and the government's payments under the Sniper contract in late 2002 and thereafter also did not necessarily make known to the government any potential monetary CAS claim to recover increased costs because the Sniper contract was a firm fixed price contract. The record also does not show that the government knew or should have known at this time that the contract price itself was increased as a result of the alleged misallocation of these costs. Appellant's own figures of cost impact to the government in 2009 indicated that the impact of the purported noncompliance on the Sniper program was negligible (SOF ¶ 12). Appellant has not persuaded us on this record that the government knew, or should have known of any injury to the government at or around the time of the 31 December 2002 DCAA letter arising out of the Sniper contract. As for the impact of the costs questioned by DCAA on appellant's other government contracts during this period, the record also does not show that the government knew, or should have known of any injury to the government on those contracts at that time.

It is true that DCAA's letters to appellant of 31 December 2002 and 30 March 2004 recommended adjustment of certain accounts of appellant – some downwards and some upwards – for CFY 2002 and CFY 2003 but there were no statements in either letter regarding overbillings to, or overpayments made by the government on government contracts (SOF ¶¶ 5, 6). As far as this record shows, it was the DCAA draft/preliminary report of September 2005, copied to the DACO, that indicated that appellant's CAS noncompliance resulted in overbillings to the government (SOF ¶ 9). The CO's 8 December 2010 final decision asserting the government's monetary claim was issued within six years of this report.

We have duly considered all of appellant's arguments but are not persuaded that they support a claim accrual date such as to render the government's monetary claim untimely on this record.¹

CONCLUSION

For reasons stated, we deny appellant's motion to dismiss this appeal for lack of jurisdiction.

Dated: 28 March 2012



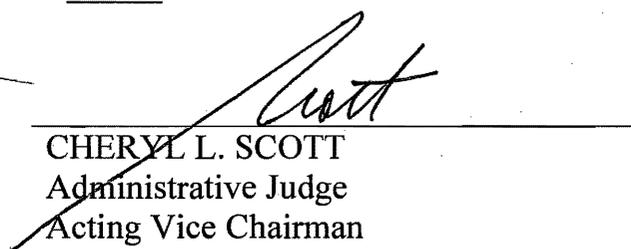
JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



CHERYL L. SCOTT
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. 57525, Appeal of Lockheed Martin Corporation, rendered in conformance with the Board's Charter.

Dated:

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

¹ As indicated, our conclusion is based on the evidence currently of record. To the extent that the parties may provide additional, relevant evidence at the hearing addressing these jurisdictional issues, we are prepared to revisit the matter.