

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
International Computers)
& Telecommunications, Inc.) ASBCA No. 51725
)
Under Contract No. DAHC77-96-C-0004)

APPEARANCE FOR THE APPELLANT: Mr. Thierry Janssens
Senior Vice President

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Army Chief Trial Attorney
LTC Richard B. O’Keeffe, Jr., JA
MAJ Jeffrey D. Stacey, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal involves the issue of whether the contract’s currency fluctuation clause should be operative when appellant claims it made payments only in dollars and engaged in no foreign currency transactions. The parties waived a hearing pursuant to Board Rule 11. Only the Government filed a brief.

FINDINGS OF FACT

1. Request for Proposals (RFP) No. DAHC77-94-R-0028 was issued on 19 January 1995. Section B of the RFP, entitled “SUPPLIES OR SERVICES AND PRICES/COSTS,” was structured by contract line items (CLINs). The CLINs ending in AA (AA CLINs) provided for site support services in Hawaii, Japan and Korea. The CLINs ending in AD (AD CLINs), identified as “ADJUSTMENT FOR FLUCTUATION IN EXCHANGE RATES,” offered International Computers & Telecommunications, Inc. (ICT) the option of indicating how much of each month’s site support cost, shown in the AA CLINs, would be affected by the clause. CLINs 0002AD through 0004AD, for services in Japan and Korea, and corresponding CLINs for two option periods, provided as follows:

In the event the exchange rate fluctuates more than 20% during the contract period, line item _____ will be adjusted to compensate for the fluctuation. Adjustment will be made only for the percentage over or under 20%. Offeror shall

provide below, the portion of the monthly rate of the line that would be effected by such a fluctuation.

\$_____ per month.

CLIN 0002AD provided the following example of how this clause worked:

If the dollar to yen ratio was 1.00 to 100 and it fluctuates to 1.00 to 75 (plus 25%), the monthly rate for [the subject CLIN(s)] will be adjusted upwards by the amount listed above times 25%. The exchange rate in effect at the time of receipt of the initial offer or the best and final offer (if requested) will be used as the basis for implementation of any adjustment.

Offerors were advised that the AD CLINs were “NOT SEPARATELY PRICED.” (R4, tabs 1, 38)

2. ICT submitted prices for the AD CLINs in its initial proposal, subsequent revised proposals, and best and final offers (BAFOs) in over 15 separate places in each document. Appellant’s 25 September 1995 and 27 October 1995 submissions substituted the notation “Will be priced when the fluctuation occurs” for “NOT SEPARATELY PRICED.” (R4, tabs 39, 41 through 45, 47) During negotiations, the Army informed ICT, by letter dated 30 September 1995,¹ that the ADJUSTMENT FOR FLUCTUATION IN EXCHANGE RATES clause applied only to site support and therefore the amount for the monthly adjustment could not exceed the total monthly amount for the site support. ICT then submitted in its final BAFO the same cost-per-month for the AD CLINs as the unit price offered for the AA site support CLINs for each base and option year in both Japan and Korea, which was the maximum adjustment permissible. (R4, tabs 46, 47)

3. By date of 6 November 1995, the United States Army awarded ICT a firm fixed-price contract to provide maintenance and repair services of automated data processing equipment at various locations: Fort Shafter, Hawaii; Camp Zama, Japan; and Taegu and Yongson, South Korea. The contract term included a base period from 1 December 1995 to 30 September 1996, with two option periods: 1 October 1996 to 30 September 1997 and 1 October 1997 to 30 September 1998. The procurement was a 100 percent small business set-aside. (R4, tabs 1, 37, 38)

4. At award, the contract consisted of Standard Form 26, Award/Contract; Solicitation No. DAHC77-94-R-0028; Solicitation Amendments 0001 through 0009; ICT’s initial proposal with revisions; and ICT’s BAFOs. Standard Form 26 indicated that any adjustments to the contract related to exchange rate fluctuations would be calculated

according to a Japanese yen to dollar ratio of 100:1 and a Korean won to dollar ratio of 768:1. (R4, tab 1)

5. The contract incorporated standard contract clauses including FAR 52.222-41 SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989) and FAR 52.222-43 FAIR LABOR STANDARDS ACT, AS AMENDED (MAY 1989). Clause H.4, entitled “FAIR LABOR STANDARDS ACT (FSLA) AMENDMENT” stated, in pertinent part:

....

2. FOR OVERSEAS LOCATIONS: The Service Contract Act requirements are not applicable.

(R4, tab 1)

6. By date of 26 February 1996, ICT executed a subcontract with Orange Systems² (Orange) which contained the same ADJUSTMENT FOR FLUCTUATION IN EXCHANGE RATES clause as in ICT’s contract with the Army. Orange had submitted amounts subject to the AD CLINs exchange rate fluctuation clause on all AA site support CLINs for only the Camp Zama, Japan location. Included with each of these AD CLINs in the subcontract was the notation, “Will be priced when the fluctuation occurs.” (R4, tabs 1, 38, 97)

7. By date of 9 July 1997, the Army requested that ICT adjust its monthly invoice to reflect the more than 20 percent increase of the yen and won exchange rates that occurred in early fiscal year 1997. The Army subsequently inquired numerous times about the status of ICT’s application of the exchange rate fluctuation clause adjustment. By letter dated 22 October 1997, ICT determined that a \$3,016.96 credit was due the Army for the contract’s AD CLINs because the yen to dollar exchange rate had exceeded the twenty percent fluctuation range established by the contract. (R4, tabs 48, 49, 50, 51, 55, 56)

8. In November 1997, ICT paid the Army \$3,016.96 in accordance with its calculation of what it owed the Army pursuant to the terms of the rate fluctuation clause (R4, tab 93). Thereafter, by letter dated 11 December 1997, ICT questioned whether the AD CLINs were applicable to its contract since it invoiced the Army in dollars and all its employees and subcontractors were paid in U.S. dollars regardless of their work location. ICT requested an official interpretation of the applicability of the AD CLINs. (R4, tabs 60) It is not disputed that the Army paid appellant in dollars (complaint and answer). There is no evidence appellant paid all its employees and subcontractors in dollars or relied on the interpretation now argued at the time of award.

9. ICT continued to include the exchange rate fluctuation adjustments in its invoices through the second option period, crediting the Army when applicable (R4, tabs 66 through 92). We find, therefore, the exchange rates fluctuated more than 20 percent for the won and yen during contract performance.

10. By date of 3 April 1998, ICT submitted a certified claim in the amount of \$93,819.36 to the Army for reimbursement of the moneys it paid to the Army as a result of the exchange rate fluctuation clause. ICT also requested the contract be modified to delete the AD CLINs. (R4, tab 62)

11. By date of 10 June 1998, the contracting officer issued a final decision denying both ICT's claim for reimbursement and its request to be released from future adjustments resulting from exchange rate fluctuations. This timely appeal followed. (R4, tabs 64, 65) Subsequently, by date of 14 August 1998, Modification No. P00036 was issued which extended contract performance at the Korean and Japanese service centers for an additional three months and deleted the AD CLINs effective 1 October 1998. Deletion of the AD CLINs was in consideration for withdrawal of a claim not at issue here. (R4, tab 37)

DECISION

We have found that the exchange rates fluctuated between the yen and won and the dollar during contract performance beyond the range stated in the ADJUSTMENT FOR FLUCTUATION IN EXCHANGE RATES clause (finding 9). The dispute centers on whether the Army may have recourse to this contract clause when ICT claims it has not engaged in foreign currency transactions.

Absent a relief granting clause, a fixed-priced contractor accepts the risk and responsibility for all costs under or over the firm fixed-price, including currency fluctuations. *ITT Arctic Services v. United States*, 524 F.2d 680 (Ct. Cl. 1975). In this case, the RFP gave offerors the option to include a relief granting clause. ICT chose, in its discretion, to offset some of the risk inherent in dealing in foreign labor markets by bidding on the AD CLINs. It exercised its business judgment and chose the maximum amount of the site support costs to be subject to the ADJUSTMENT FOR FLUCTUATION IN EXCHANGE RATES clause (finding 2). ICT was not obligated to do so. It could have shouldered all the risk and accepted the possible consequences of an economic injury or windfall by leaving the AD CLINs blank.

ICT argues that it interpreted the AD CLIN as applying only if foreign currency transactions occurred. It is not disputed that ICT was paid in dollars. It points to these facts as being relevant: under the terms of the Service Contract Act, ICT was required to make all payments to its employees in dollars; the Government paid ICT in dollars; and,

ICT paid its employees and subcontractor in dollars. Accordingly, ICT contends, since only one currency was involved and it engaged in no foreign currency transactions, the ADJUSTMENT FOR FLUCTUATION IN EXCHANGE RATES clause should not apply to its contract. However, ICT has offered no evidence in the form of affidavits or documentary evidence to support its position. Moreover, we have found that by the terms of the contract the Service Contract Act did not apply to overseas locations (finding 5). Thus, appellant's theory of recovery relies on a factual predicate it has failed to prove.

Assuming, *arguendo*, that ICT had received and made all payments in dollars, including site support costs to its subcontractor, this is not the dispositive issue. The AD CLIN provided for an amount which was to be adjusted if the exchange rate fluctuated by more than 20 percent. The amount in the AD CLIN affected by a possible fluctuation was expressed in dollars, as were all of the costs in the subject contract and ICT's subcontract with Orange. But there is nothing in the language of this clause making the ADJUSTMENT FOR FLUCTUATION IN EXCHANGE RATES clause contingent on receiving or making payments in the foreign currency. The contingency was "in the event the exchange rate fluctuates" and not whether the contractor engaged in foreign currency transactions. Where the terms of a contract are phrased in clear and unambiguous language, "the words of those provisions must be given their plain and ordinary meaning by the court in defining the rights and obligations of the parties. . . ." *Elden v. United States*, 617 F.2d 254, 260-61 (Ct. Cl. 1980). *See also Intelcom Support Services, Inc.*, ASBCA Nos. 43208, 44399, 95-2 BCA ¶ 27,894. In this case, we find no ambiguity in the ADJUSTMENT FOR FLUCTUATION IN EXCHANGE RATES clause. By its terms, this clause was operative in the event that the exchange rates fluctuated beyond a twenty per cent range above or below the established exchange base rates, regardless of whether ICT engaged in foreign currency transactions.

We find ICT's interpretation of the clause as operative only in the event it engaged in foreign currency transactions to be unreasonable.³ Accordingly, the ADJUSTMENT FOR FLUCTUATION IN EXCHANGE RATES clause was applicable to the contract performance period through 30 September 1998 (finding 11) according to its terms whenever the exchange rates fluctuated more than twenty percent above or below the established exchange base rates in the initial award.

CONCLUSION

The appeal is denied.

Dated: 12 September 2000

CARROLL C. DICUS, 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

NOTES

- ¹ The letter references appellant's "second best and final offer dated 29 September 1995." We assume this to be the submission at R4, tab 45, dated 25 September 1995.
- ² Orange Systems became Orange Technologies by novating the subcontract (R4, tab 107).
- ³ Even if we found the clause ambiguous, the Army's interpretation is reasonable and appellant has not established reliance. *Lear Siegler Mgt. Services Corp. v. United States*, 867 F.2d 600 (Fed. Cir. 1989).

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. 51725, Appeal of International Computers & Telecommunications, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services

