

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
General Atronics Corporation) ASBCA No. 49196
)
Under Contract No. N00189-93-C-0082)

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OPINION BY ADMINISTRATIVE JUDGE PAUL
PURSUANT TO BOARD RULE 11

This is a timely appeal of a deemed denial by the contracting officer of appellant General Atronics Corporation's (GAC) claim in the amount of \$327,000 for software license fees. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601 *et seq.*, is applicable; only issues of entitlement are before us for decision. The parties elected to submit the appeal on the record pursuant to Board Rule 11. Thereafter, each party filed two sets of briefs; the parties also submitted a voluminous "joint statement of facts as to which there is no genuine issue" (JSF).

FINDINGS OF FACT

1. On 30 October 1991, the Regional Contracting Department, Naval Supply Center (NSC), Norfolk, Virginia, issued a notice in the *Commerce Business Daily*, stating an intent to "negotiate a fixed-price contract for the design, development, manufacture, and delivery of . . . AN/USQ-XXX Data Terminals (DTs) with complete mounting hardware, mating connectors, and backshells, associated data, and support services." (R4, ASBCA 46784, tab 1)

2. On 10 April 1992, the Navy's contracting officer issued Solicitation No. N00189-92-R-0039 which stated a requirement for 194 DTs during the base year and four option years (R4, ASBCA 49196, tab 2). The solicitation incorporated by reference several regulations, including DFARS 252.227-7027, DEFERRED ORDERING OF TECHNICAL DATA OR COMPUTER SOFTWARE (APR 1988) which provided:

In addition to technical data or computer software specified elsewhere in this contract to be delivered hereunder, the Government may, at any time during the performance of this contract or within a period of three (3) years after acceptance of all items (other than technical data or computer software) to be delivered under this contract or the termination of this contract, order any technical data or computer software generated in the performance of this contract or any subcontract hereunder. When the technical data or computer software is ordered, the Contractor shall be compensated for converting the data or computer software into the prescribed form, for reproduction and delivery. The obligation to deliver the technical data of a subcontractor and pertaining to an item obtained from him shall expire three (3) years after the date the Contractor accepts the last delivery of that item from that subcontractor under this contract. The Government's rights to use said data or computer software shall be pursuant to the "Rights in Technical Data and Computer Software" clause of this contract.

(R4, ASBCA 49196, tab 2)

3. The solicitation also incorporated DFARS 252.227-7013, "RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE (OCT 1988)," which provided, in pertinent part:

(a) Definitions.

(1) "Commercial computer software", as used in this clause, means computer software which is used regularly for other than Government purposes and is sold, licensed, or leased in significant quantities to the general public at established market or catalog prices.

(2) "Computer", as used in this clause, means a data processing device capable of accepting data, performing prescribed operations on the data, and supplying the results of these operations; for example, a device that operates on analog data by performing physical processes on the data.

(3) "Computer data base", as used in this clause, means a collection of data in a form capable of being processed and operated on by a computer.

(4) "Computer program", as used in this clause, means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or be designed to satisfy the requirements of a particular user.

(5) "Computer software", as used in this clause, means computer programs and computer data bases.

....

(c) *Rights in Computer Software.* - (1) *Restricted Rights.* (i) The Government shall have restricted rights in computer software, listed or described in a license agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights. Notwithstanding any contrary provision in any such license agreement, the Government shall have the rights included in the definition of "restricted rights" in paragraph (a)(17) above. Unless the computer software is marked by the Contractor with the following legend:

Restricted Rights Legend

Use, duplication or disclosure is subject to restrictions stated in Contract No. _____ with _____ (Name of Contractor) and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software, the Government shall have unlimited rights in the software. The Contractor may not place any legend on computer software restricting the Government's rights in such software unless the restrictions are set forth in a license agreement made a part of this contract prior to the delivery date of the software. Failure of the Contractor to apply a restricted rights legend to the computer software shall

relieve the Government of liability with respect to unmarked software.

(ii) Notwithstanding subparagraph (c)(1)(i) above, commercial computer software and related documentation developed at private expense and not in the public domain may be marked with the following legend:

Restricted Rights Legend

Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights In Technical Data and Computer Software clause at DFARS 252.227-7013.

(Name of Contractor and Address)

....

(2) *Unlimited Rights.* The Government shall have unlimited rights in:

....

(ii) Computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract;

....

(v) Computer software which is otherwise publicly available, or had been, or is normally released, or disclosed by the Contractor or subcontractor without restriction on further release or disclosure.

(d) *Technical Data and Computer Software Previously provided Without Restriction.* Contractor shall assert no restriction on the Government's rights to use or disclose any data or computer software which the contractor has previously delivered to the Government without restriction. The limited or restricted rights provided for by this clause shall not impair the right of the Government to use similar or

identical data or computer software acquired from other sources.

(e) *Copyright.* (1) In addition to the rights granted under paragraphs (b) and (c), above, the contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world, of the scope set forth below, under any copyright owned by the contractor, in any work of authorship prepared for or acquired by the Government under this contract, to reproduce the work in copies or phonorecords, to distribute copies or phonorecords to the public, to perform or display the work publicly, and to prepare derivative works thereof, and to have others do so for Government purposes. With respect to technical data and computer software in which the Government has unlimited rights the license shall be of the same scope as the rights set forth in the definition of 'unlimited rights' in (a)(19) above. With respect to technical data in which the Government has limited rights, the scope of the license is limited to the rights set forth in the definition of 'limited rights'. With respect to computer software which the parties have agreed will be delivered with restricted rights, the scope of the license is limited to such rights.

....

(f) *Removal of Unjustified and Nonconforming Markings.*

....

(3) *Unjustified and Nonconforming Computer Software markings.* Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may correct cancel, or ignore any marking not authorized by the terms of this contract on any computer software furnished hereunder if:

(i) The Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings; or

(ii) The Contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of the restricted rights markings.

In either case, the Government shall give written notice to the contractor of the action taken.

....

(h) *Limitation on Charges for Data and Computer Software.* The Contractor recognizes that the Government is not obligated to pay, or to allow to be paid, any charges for data or computer software which the Government has a right to use and disclose to others without restriction and Contractor agrees to refund any such payments. This provision applies to contracts that involve payments by subcontractors and those entered into through the Military Assistance Program, in addition to U.S. Government prime contracts. It does not apply to reasonable reproduction, handling, mailing, and similar administrative costs.

....

(k) *Identification of restrictions on Government rights.* Technical data and computer software shall not be tendered to the Government with other than unlimited rights, unless the technical data or computer software are identified in a list made part of this contract. This list is intended to facilitate review and acceptance of the technical data and computer software by the Government and does not change, waive, or otherwise modify the rights or obligations of the parties under the clause DFARS 252.227-7013. As a minimum, this list must –

(1) Identify the items, components, processes, or computer software to which the restrictions on the Government apply;

(2) Identify or describe the technical data or computer software subject to other than unlimited rights; and

(3) Identify and describe, as appropriate, the category or categories of Government Rights, the agreed-to time

limitations, or any special restrictions on the use or disclosure of the technical data or computer software.

4. Amendment No. 0001 to the solicitation, dated 15 May 1992, included several clarifications relating to the bid sample, the evaluation factors, the specifications and the video “walk-through” (R4, ASBCA 46784, tab 7). Amendment No. 0002, dated 3 June 1992, gave further guidance concerning the bid sample (R4, ASBCA 46784, tab 9); and Amendment No. 0003, dated 7 July 1992, extended the receipt time for bid samples (R4, ASBCA 46784, tab 13).

5. GAC submitted the sole offer in response to the solicitation. This proposal, dated 10 July 1992, included several pertinent documents. Among them were: Volume I – Part A – Engineering; Volume I – Part C – Management; Appendix B – Software Development; and Appendix F – Bid Sample Manual (R4, ASBCA 49196, tab 6).

6. GAC listed several “Deviations/Enhancements” in the engineering section of its technical proposal. Under this heading, it stated: “GAC takes no exceptions to the specification, but does offer some unique capabilities and enhancements not required by the specification.” GAC described one such enhancement, the “Wireline/Digital Interface,” in these terms:

Wireline/Digital Interface (Additional, Unspecified Feature). The proposed AN/USQ-XXX includes GAC’s standard wireline/satellite 2400 bps, RS-232 digital data interface. This interface bypasses the HF modem sections of the DT and transmits and receives compatible Line-11 data at 2400 bps. This digital signal contains all the control codes, address codes, error correction and data frames used in conventional Line-11. It enables a DT to operate a variety of system applications and to interoperate with AN/USQ-76(V) and MX-512P DTs which have similar capabilities. These applications include:

a) *Point-to-point, two-station digital net* (1 unit is PKT; 1 unit is NCS). This can be used for digital transmission of Link-11 over UHS SATCOM, STU-III, DIAL-UP telephone lines, etc. It is particularly helpful in setting up a two-station net for Link-11 software validation with validation facilities (all of which have MX-512P or AN/USQ-76).

b) *Mixed Mode* (Multi-Media Gateway). Some PUs in a net operate as standard “audio/radio” PUs and some as

“wireline/satellite” PUs. The DT, as an NCS, acts as a gateway and rebroadcasts data received on either medium over the other medium in real time. This is a multi-media mode. It has been standard in all GAC DTs for 12 years.

c) *Translator*. The MX-512PV can be used as a relay between two media such as the wireline and HF or UHF radio link. The DT functionally operates as a picket.

d) *Split Mode*. Two DTs are interconnected with the 2400 bps digital circuit and act together as a single PU. The “remote” DT functions as an HF modem and can be located at an unattended Ground Entry Station. The “local” DT manages the station and interfaces to the KG-40. It is usually at the OPS Center. In this way, a ground-based PU with a remote radio facility can meet the old MIL-STD-188-203-1 transmission and timeout standard (15 frames).

(R4, ASBCA 49196, tab 6)

7. In late October 1992, representatives of the Navy and GAC met to discuss pricing of the optional items – or “enhancements” – contained in GAC’s proposal. GAC provided the Navy with a “matrix” of these options on 29 October 1992 (attach. 1 to GAC’s letter to the Board of 19 July 1994). The matrix clearly referred to the software packages associated with the wireline interface hardware as “Options.” On 30 October 1992, the parties concluded their negotiations relating to the various options offered by GAC. The memorandum of negotiations treated the pricing of the options accepted by the Navy in great detail. However, the software packages associated with the wireline interface hardware were not even mentioned as being among the optional items purchased by the Navy (ASBCA 46784, ex. A-1).

8. On 17 November 1992, NSC awarded fixed-price Contract No. N00189-93-C-0082 to GAC in the amount of \$1,140,030 (R4, ASBCA 46784, tab 19). After award, the parties became engaged in a dispute as to whether GAC was required to provide certain of the software packages along with the wireline interface hardware. GAC supplied the software packages under protest and later submitted a certified claim in the amount of \$203,684 (R4, ASBCA 46784, tab 1M). In a decision issued on 16 August 1994, ASBCA No. 46784, 94-3 BCA ¶ 27,112, the Board ruled that NSC had not purchased the software packages and that they had been offered as options by GAC. We sustained the appeal.

9. As awarded, the contract incorporated various regulations, including DFARS 252.227-7027 (APR 1988) and DFARS 252.227-7013 (OCT 1988), which we have quoted

at length. Viewed together, these provisions gave the Navy unlimited rights in GAC's wireline software unless GAC both marked the software with a specific "Restricted Rights Legend" and, under (c)(i), incorporated the restrictions in a licensing agreement "made a part of [the] contract prior to the delivery date of the software." (Finding 3)

10. Further, the contractual requirements which we have cited make no distinction between computer software which is contained in a diskette and that, like the software at issue here, which is embedded in a memory device. DFARS 252.227-7013(a) defines computer software as "computer programs and computer data bases." Computer program is, in turn, defined very broadly to include software which is "either machine-dependent or machine-independent." The imbedded wireline software supplied by GAC was "machine-dependent"; therefore, the legending requirements applied to it (finding 3; R4, ASBCA 49196, tabs 2, 6, 11).

11. GAC's proposal contained the following proprietary language:

GENERAL ATRONICS PROPRIETARY

This proposal or quotation includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed – in whole or in part – for any purpose other than to evaluate this proposal or quotation. If, however, a contract is awarded to this offeror or quoter as a result of – or in connection with – the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction is contained in sheets marked, "USE OR DISCLOSURE OF DATA CONTAINED ON THIS SHEET IS SUBJECT TO THE RESTRICTION ON THE TITLE PAGE OF THIS PROPOSAL OR QUOTATION."

The data subject to this restriction are contained in sheets ALL. (FAR 52.215-12, APR 1984)

Furthermore, the information contained in this Volume, including, without limitation, proposer's cost, financial and technical data, is subject to exemption from disclosure under the Freedom of Information Act, 5 USC Section 522, paragraphs (b)(4) and (b)(5).

In addition, GAC placed the following language at the bottom of each page of its proposal: “Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal or quotation.” (R4, ASBCA 49196, tab 6)¹

12. When GAC delivered the wireline interface software, it did not mark the software with any specific restricted rights legend. In addition, prior to the delivery date of the software, the parties did not execute a licensing agreement (R4, ASBCA 49196, tab 79). In fact, GAC did not even propose to enter a licensing agreement until 12 October 1994, approximately 16 months after the first DT units had been delivered (JSF, attach. A; R4, ASBCA 49196, tab 67).

13. Although GAC failed to mark the wireline interface software with a restrictive legend, it did place the following legends on the display screen which comprised part of the DT system:

AN/USQ-125 VERSION 1.11
GENERAL ATRONICS CORPORATION 1995

However, these legends did not conform with the specific requirements of DFARS 252.227-7013. In addition, they did not even make reference to any proprietary rights on GAC’s part (JSF, attach. A at 5).

14. During contractual performance, GAC forwarded to the Navy a document entitled “Firmware Update Procedure For The CP-2206/USQ-125 Processor.” The first page of the document contained the following statement: “This document contains information proprietary to General Atronics Corporation. It shall not be published, reproduced, copied, or used, in whole or in part, for any purpose without the expressed [sic] written permission of a duly authorized agent of the company” (JSF, attach. K at 177). This assertion did not make any reference to the wireline interface software. Nor did the document itself refer to the software (JSF, attach. K, *passim*).

15. The memory devices containing the wireline interface software contained the following alphanumeric markings: 20183-34116-V48 and 20183-34115-V47. These markings do not contain any restrictive legends, as prescribed by DFARS 252.227-7013.²

16. Upon receipt of the Board’s decision sustaining GAC’s appeal that it had offered the interface wireline software as an option, ASBCA No. 46784, 94-3 BCA ¶ 27,112, the parties entered into settlement negotiations resulting in the execution of bilateral Modification No. P00020 to the contract on 20 March 1995. The Navy agreed to pay GAC \$230,477 in full settlement of its claim. On 20 September 1994, GAC submitted a request for an equitable adjustment in the amount of \$327,000 for license fees for the software applications. On 12 October 1994, GAC refiled its claim with a proper certification;

however, the Navy's contracting officer never issued a final decision on this claim. In a decision issued on 25 September 1995, ASBCA No. 46784, 96-1 BCA ¶ 28,004, the Board ordered that GAC's appeal for license fees be given a new docket number. The appeal was subsequently docketed as ASBCA No. 49196.

DECISION

In formulating their arguments, both parties rely heavily on the Board's seminal decision in *Bell Helicopter Textron*, ASBCA No. 21192, 85-3 BCA ¶ 18,415. The contract at issue in that appeal contained a "Rights in Technical Data" clause, ASPR 7-104.9(a) (AUG 1969) which was almost identical with DFARS 252.227-7013 (OCT 1988), the provision which governs the present dispute. Appellant's subcontractor, Hughes Aircraft Company (Hughes), repeatedly placed the Government on notice that it considered data relating to a missile launching subsystem to be proprietary. Nevertheless, Hughes delivered 21 out of a total of 103 technical, engineering drawings to the Government without restrictive legends. Citing the specific requirements of the "Rights in Technical Data" clause, the Board ruled that, by failing to mark the drawings at issue with restrictive legends and by not seeking an express determination of limited rights, Hughes had given the Government unlimited rights in the technical data conveyed by the drawings. Accordingly, the Board rejected Hughes' estoppel argument. 85-3 BCA ¶ 18,415 at 92,409, 92,432-33.

Citing the *Bell Helicopter Textron* decision, GAC refers to its assertion of proprietary rights in its proposal and concludes that the Navy should be estopped from contending that it has unlimited rights in the wireline interface software (br. at 15). GAC's reliance on the decision is misplaced. It overlooks the fact that the Government in *Bell Helicopter Textron* was also aware of Hughes' assertion of proprietary rights. Perhaps more significantly, GAC does not emphasize that, like Hughes, it failed to comply with the regulation governing the effective assertion of proprietary rights. Specifically, GAC did not mark the wireline interface software with a restrictive legend. Moreover, it did not incorporate any restrictions into a licensing agreement "made a part of [the] contract prior to the delivery date of the software." Therefore, pursuant to DFARS 252.227-7013 (OCT 1988), the Navy acquired unlimited rights in the software.³

GAC's subsidiary arguments do not detract from this conclusion. For example, it appears to contend that DFARS 252.227-7013 (OCT 1988) applies only to diskettes and not to software embedded in memory devices (br. at 10). GAC is mistaken. Subsection (a) of the regulation makes it clear that the term "computer software" refers to machine-dependent programs. The wireline interface software is embedded in memory devices and is, thus machine-dependent. Therefore, the regulation's requirements are applicable to it (finding 10).

We are also not persuaded that various markings placed by GAC on other elements of the DTs such as the display screen, the firmware update document, or the memory

devices themselves constituted restrictive legends. The requirements of the regulation are very specific, and GAC failed to comply with them (findings 13, 14, 15).

Finally, GAC's belated attempt to place restrictive legends on the two diskettes which it delivered in September 1995 is unavailing. By this point in time, all of the DTs had been delivered and the Navy had gained unlimited rights in the technical data (finding 15).

CONCLUSION

The appeal is denied.

Dated: 19 March 2002

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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 With respect to the software at issue, GAC did not specifically assert any limited proprietary rights in its proposal (R4, ASBCA 49196, tab 6 at 4-5).

² On 8 September 1995, subsequent to delivery of all of the DTs with wireline software, GAC forwarded two diskettes to the Navy which contained restrictive

legends referring to DFARS 252.227-7013 (JSF, attach. A). GAC took this action long after the dispute over licensing fees had arisen between the parties. The contracting officer took exception to the restrictive markings (JSF, attachs. A, F).

³

Our recent decision in *Ship Analytics International, Inc.*, ASBCA No. 50914, 01-1 BCA ¶ 31,253, is inapposite. There, the parties entered into a licensing agreement.

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. 49196, Appeal of General Atronics Corporation, rendered in conformance with the Board's Charter.

Dated:

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