

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Kearfott Guidance & Navigation Corporation) ASBCA Nos. 49271, 49532
) 51873, 52521
)
Under Contract Nos. N00030-88-C-0146)
N00030-89-C-0058)
N00030-90-C-0011)
N00030-90-C-0037)
N00030-90-C-0038)
N00030-91-C-0052)
N00030-91-C-0061)
N00030-91-C-0043)
N00030-92-C-0043)
N00030-93-C-0042)
N00030-93-C-0047)
N00030-94-C-0039)
N00030-94-C-0041)
N00030-95-C-0047)
N00030-87-C-0014)
N00030-92-C-0040)

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON RESPONDENT'S MOTION FOR RECONSIDERATION

Respondent has moved for reconsideration of a portion of our decision in these cost appeals. In our decision, we held that, on the Quarterly Limitation on Payments Statements (QLOPS) for five contracts at issue in ASBCA Nos. 49271 and 49532, and on the QLOPS for one contract at issue in ASBCA No. 52521, appellant was entitled to claim asset write-up costs because those contracts were awarded before the effective date of FAR 31.205-52, ASSET VALUATIONS RESULTING FROM BUSINESS COMBINATIONS (1990). *Kearfott Guidance & Navigation Corp.*, ASBCA Nos. 49271, 49532, 51873, 52521, 04-2 BCA ¶ 32,757. Familiarity with our decision is assumed.

In its four-page motion, respondent contends that Cost Accounting Standard (CAS) 404-50(c), 48 C.F.R. § 30.404-50(c) (1989), “prevents the allocation of these [asset write-up] costs to Government contracts” (Government’s Motion for Reconsideration (resp’t mot.) at 2). Respondent explains that, while the stepped-up asset costs may be allowable, the contracting officer “has not to date issued a final decision addressing the allocation of these costs,” and hence allocability is not properly before us (*id.*). In the alternative, respondent argues that, if we conclude that we do have jurisdiction to address allocability, we should nonetheless hold that CAS 404-50(c) prevents allocating the costs to the six contracts at issue because the October 1988 Astronautics transaction from which they derive “was clearly not an arm’s length transaction” within the meaning of the standard (resp’t mot. at 3). Respondent does not challenge the accuracy of our finding 11, describing the series of transactions constituting the Astronautics acquisition, *see Kearfott, supra*, 04-2 BCA at 162,006, in the motion.

Appellant vigorously opposes the motion. Appellant asserts that our findings 11 and 12, which describe both the Astronautics acquisition and its accounting treatment, “are based on testimony of appellant at the trial to which respondent did not object” (Appellant’s Response to Respondent’s Motion for Reconsideration at 2). Appellant adds that respondent “put on no evidence at trial relating to the [Astronautics] business combination, and certainly none to contend that [it] was not an ‘arm’s length’ transaction” (*id.*). Appellant notes that, in its proposed finding of fact 17, respondent explicitly adopted the portrayal of the Astronautics acquisition in our 1995 decision in *Kearfott Guidance & Navigation Corp.*, ASBCA No. 45536, 95-2 BCA ¶ 27,773 (*id.*).

We deny the motion. By contrast to respondent’s new arguments, the issues that the parties litigated regarding asset write-up costs were two-fold. The parties tried and briefed: (1) whether the parties’ novation agreement precluded asset write-up costs relating to the Astronautics acquisition, or solely precluded such costs arising from the earlier Singer transaction; and (2) whether FAR 31.205-52 could be applied to the 1988

Astronautics acquisition, which preceded the 1990 promulgation of the regulation. *See Kearfott, supra*, 04-2 BCA at 162,026-28.

These issues are distinct from those that are germane to CAS 404-50(c), which respondent now invokes. CAS 404-50(c) provides:

In circumstances where the acquisition by purchase or donation of previously used tangible capital assets is not an arm's length transaction, acquisition cost shall be limited to the capitalized cost of the asset to the owner who last acquired the asset through an arm's-length transaction, reduced by depreciation charges from date of that acquisition to date of gift or sale.

Regardless of whether CAS 404-50(c) relates to allocability, as respondent argues, or simply to cost measurement, *see* 48 C.F.R. § 30.404-20 (1987), we lack the record that would permit us to reconsider our decision based upon respondent's new arguments. That is, the parties adduced no evidence from which we could make the threshold determination of whether there were "circumstances where the [Astronautics] acquisition . . . [was] not an arm's length transaction" within CAS 404-50(c). We also lack the evidence from which to determine the valuation issue of the capitalized cost of the assets to the owner in a previous arm's length transaction.

The evidence regarding the series of transactions constituting the Astronautics acquisition is summarized in our finding 11. *See Kearfott, supra*, 04-2 BCA at 162,006. While respondent now disputes the meaning of those transactions, both parties at trial treated the evidence regarding them as a set of established background facts. Finding 11 was based on the record that we had, *viz.*, on the testimony of Mr. Givant, Kearfott's vice president of finance and former corporate counsel (*see* finding 1(a)), and on certain acquisition documents that Kearfott had furnished to DCAA in August 1992. On direct examination, appellant's counsel questioned Mr. Givant regarding the history of the acquisition and the parties' ensuing positions concerning the accounting treatment of the asset write-up costs (tr. 1263-90). Respondent's counsel interposed one objection, to the form of a question, during this examination (tr. 1273-74). Thereafter, on cross-examination, respondent's counsel posed six questions about the Astronautics acquisition to Mr. Givant. Those six questions related to post-acquisition changes in Kearfott, including changes in the corporate structure and the transfer of any of Kearfott's government contracts. (Tr. 1440-42) Respondent's counsel did not address whether or not the acquisition was an arm's length transaction in any of these questions (*id.*).

In addition, audit reports and auditors' testimony figured prominently in the trial, and they present a similar picture. The audit reports concerning the six contracts that predated the July 1990 change in FAR 31.205-52 are summarized in our findings 47, 48, 51, and 59. *See Kearfott, supra*, 04-2 BCA at 162,012-13, 162,015. They do not address whether the Astronautics acquisition was an arm's length transaction (R4 ASBCA 49271, tabs 8, 9, 18; R4 ASBCA 52521, tab 2). Our review of the testimony of the DCAA auditors—Ms. Richards and Mr. Gotlib—discloses no mention of the arm's length issue (tr. 580-946, 1096-1173), and respondent has cited to none. Moreover, neither ACO Bey nor ACO Jelinek addressed the issue either in their decisions (R4 ASBCA 49271, tab 37; R4 ASBCA 52521, tab 33), or, from our review, in their trial testimony (tr. 406-580, 954-1095).

The parties' briefs are also silent on the arm's length transaction issue. Notably, in its opening brief, respondent proposed that we find that "[m]any of the facts relative to the Business Combination at issue in this case are set forth in this Board's opinion" in our 1995 decision on motions to dismiss and for summary judgment in ASBCA No. 45536. (Respondent's Post Hearing Brief at 9) Those facts closely parallel those appearing in our finding 11 in these appeals. *Compare Kearfott, supra*, 95-2 BCA at 138,463 with *Kearfott, supra*, 04-2 BCA at 162,006. Moreover, the portrayal of the Astronautics acquisition in our finding 11 also mirrors the description of the same transactions in both our 2001 decision in ASBCA No. 45536, and in the court of appeals' affirmance of that decision. *See Kearfott Guidance & Navigation Corp.*, ASBCA No. 45536, 01-2 BCA ¶ 31,496 at 155,553, *aff'd*, 320 F.3d 1369, 1371 (Fed. Cir. 2003). Neither addresses the arm's length transaction issue that respondent now raises for the first time.

Accordingly, respondent's motion for reconsideration is denied.

Dated: 12 January 2005

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman

EUNICE W. THOMAS
Administrative Judge
Vice Chairman

Armed Services Board
of Contract Appeals

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. 49271, 49532, 51873, 52521, Appeals of Kearfott Guidance & Navigation Corporation, rendered in conformance with the Board's Charter.

Dated:

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