

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
L-3 Communications Link Simulation)
and Training) ASBCA No. 54798
)
Under Contract No. N61339-00-C-0002)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

L-3 Communications Link Simulation and Training (L-3) appeals two related contracting officer final decisions under the captioned contract. The government moves for summary judgment on both decisions. We find no genuine issues of material fact and grant the government's motion.

STATEMENT OF FACTS

1. The contract was entered into by the government and L-3's predecessor in interest, Raytheon Systems Company, on 26 October 1999 (R4, tab 1 at 1). L-3 succeeded Raytheon as contractor by a novation agreement on 6 March 2003 (R4, tab 2 at 1). For convenience, we will refer to the contractor as L-3 at all stages of the contract.

2. The contract required the design, engineering development, fabrication, testing, fielding and support of a reconfigurable manned simulator for training rotary wing air crew (R4, tab 1 at 87). Section B of the contract schedule set forth a mix of fixed price incentive fee (FPIF), cost plus award fee (CPAF) and firm fixed price (FFP) contract line items (CLINs) (R4, tab 1 at 5-40). This appeal concerns only the FPIF CLINs.

3. As amended by bilateral Modification No. P00005 (14 April 2000), the FPIF CLINs were 0001-0003 and 0007 in the base contract (Lot I), 0020-0022 in option Lot II, and 0040-0046 in option Lots IVA - IVG respectively. Lots IVA – IVG were production lot options to be exercised respectively in fiscal years 2001 through 2007. Under each production lot option, the government could order from one to four equipment suites. (R4, tab 1 at 5-9, 12-18; R4, tab 2, Modification No. P00005 at 1-2, 6)

4. At award, the specified delivery dates for deliverable items under the FPIF CLINs were 16 months after award for CLINs 0001-0003, 13 months after exercise of the option for CLINs 0020-0022, and 9 to 13 months after exercise of the option for each of the production lot options depending on the number of suites ordered. (R4, tab 1 at 47-48)

5. Section B of the contract at award and in subsequent bilateral amendments established aggregate FPIF final price revision factors (target cost, target profit, target price, ceiling price and overrun/underrun share ratio) for CLINs 0001-0003 as a separate group and for CLINs 0020-0022 as a separate group and individual final price revision factors for CLIN 0007 and for each specified quantity in each of the production lot CLINs 0040-0046 (R4, tab 1 at 12-18; tab 2, Modification No. P00005 at 6, Modification No. P00026 at 8-13, Modification No. P00032 at 3-7).

6. On 14 April 2000, bilateral Modification No. P00005 added to the contract the FAR 52.216-16 INCENTIVE PRICE REVISION – FIRM TARGET (OCT 1997) clause. This clause stated in relevant part:

(a) General. The supplies or services identified in the Schedule as Items 0001 – 0003 and 0007 are subject to price revision in accordance with this clause; provided, that in no event shall the total final price of these items exceed the ceiling price of \$24,495,300 for Items 0001 – 0003 and \$1,077,824 for Item 0007. Any supplies or services that are to be (1) ordered separately under, or otherwise added to, this contract and (2) subject to price revision in accordance with the terms of this clause shall be identified as such in a modification to this contract.

....

(c) Data submission.

(1) Within 90 days after the end of the month in which the Contractor has delivered the last unit of supplies and completed the services specified by item number in paragraph (a) of this clause, the Contractor shall submit

(i) a detailed statement of all costs incurred up to the end of that month in performing all work under the items;

....

(d) Price revision. Upon the Contracting Officer's receipt of the data required by paragraph (c) of this clause, the Contracting Officer and the Contractor shall promptly establish the total final price of the items specified in (a) of this clause by applying to final negotiated cost an adjustment for profit or loss, as follows:

(1) On the basis of the information required by paragraph (c) of this clause, together with any other pertinent information, the parties shall negotiate the total final cost incurred or to be incurred for supplies delivered (or services performed) and accepted by the Government and which are subject to price revision under this clause.

(2) The total final price shall be established by applying to the total final negotiated cost an adjustment for profit or loss as follows:

(i) If the total final negotiated cost is equal to the total target cost, the adjustment is the total target profit.

(ii) If the total final negotiated cost is greater than the total target cost, the adjustment is the total target profit, less 25 percent of the amount by which the total final negotiated cost exceeds the total target cost.

(iii) If the final negotiated cost is less than the total target cost, the adjustment is the total target profit plus 25 percent of the amount by which the total final negotiated cost is less than the total target cost.

(e) Contract modification. The total final price of the items specified in paragraph (a) of this clause shall be evidenced by a modification to this contract, signed by the Contractor and Contracting Officer. . . .

(f) Adjusting billing prices.

(1) Pending execution of the contract modification (see paragraph (e) of this clause), the Contractor shall submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices shall be the target prices shown in this contract.

(2) If at any time it appears from information provided by the contractor under subparagraph (g)(2) of this clause that the then-current billing prices will be substantially greater than the estimated final prices, the parties shall negotiate a reduction in the billing prices. Similarly, the parties may negotiate an increase in billing prices by any or all of the difference between the target prices and the ceiling price, upon the Contractor's submission of factual data showing that final cost under this contract will be substantially greater than the target cost.

(3) Any billing price adjustment shall be reflected in a contract modification and shall not affect the determination of the total final price under paragraph (d) of this clause. After the contract modification establishing the total final price is executed, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the total final price, and any resulting additional payments, refunds, or credits shall be made promptly.

(g) Quarterly limitation on payments statement. This paragraph (g) shall apply until final price revision under this contract has been completed.

(1) Within 45 days after the end of each quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) . . . and for each quarter thereafter, the Contractor shall submit . . . a statement, cumulative from the beginning of the contract, showing –

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government and for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;

(R4, tab 2, Modification No. P00005 at 30-32)

7. On 23 March 2001, the government by unilateral Modification No. P00014 exercised the Lot II option including CLINs 0020-0022 at the final price revision factors, including ceiling price, specified for those CLINs as a group in section B of the contract schedule as amended. The funded amount of the contract was increased by the ceiling price for those CLINs. (R4, tab 2, Modification No. P00014 at 1-2, 4)

8. On 15 November 2001, the government by unilateral Modification No. P00019 exercised the Lot IVA CLIN 0040 option for two suites at the final price revision factors, including ceiling price, specified for that lot and quantity in section B of the contract schedule as amended. The funded amount of the contract was increased by the ceiling price for the two suites. (R4, tab 1 at 12, tab 2, Modification No. P00019 at 1-3)

9. On 25 January 2002, the parties agreed in bilateral Modification No. P00021 that: "In accordance with FAR 32.501-3, the contractor is authorized, for billing purposes, to utilize the ceiling price for Lot I and II as the contract price" (R4, tab 2, Modification No. P00021 at 1-2).

10. The cited authority for the increase in the billing price for Lots I and II, FAR 32.501-3, states in relevant part:

(a) For the purpose of making progress payments and determining the limitation on progress payments, the contract price shall be as follows:

....

(3) Under a fixed-price incentive contract, the contract price is the target price . . . However, if the contractor's properly incurred costs exceed the target price, the contracting officer may provisionally increase the price up to the ceiling or maximum price.

11. On 10 July 2002, a Defense Contract Audit Agency (DCAA) report took no exception to L-3's computation of an aggregate loss adjustment for progress payment purposes on the FPIF CLINs. The report, however, also stated that: "Our examination does not provide a legal determination on L-3 Link's compliance with FAR Part 32.5 and the pertinent contract provisions." (App. supp. R4, tab 13, attach. 6 at 74, 76)

12. On 30 December 2002, the government in unilateral Modification No. P00028 exercised the Lot IVB CLIN 0041 option for one suite at the final price revision factors, including ceiling price, specified for that Lot and quantity in section B of the contract schedule as amended. The funded amount of the contract was increased by the ceiling price for that suite. (R4, tab 2, Modification Nos. P00026 at 8 and P00028 at 1-3)

13. On 10 February 2003, the parties agreed in bilateral Modification No. P00029 that: "In accordance with FAR 32.501-3, the contractor is authorized, for billing purposes, to utilize the ceiling price for Lot IVA as the contract price." (R4, tab 2, Modification No. P00029 at 1-2)

14. When Modification No. P00029 was entered into, L-3's most recent cost schedule status report (CSSR) for Lot IVA showed actual incurred costs at 27 December 2002 of \$12,623,000 and an estimate at completion (EAC) cost of \$18,792,000. The EAC cost was \$339,594 more than the target price of \$18,452,406. (App. supp. R4, tab 93 at 4, 7)

15. On 18 April 2003, the government in bilateral Modification No. P00032 exercised the Lot IVC CLIN 0042 option for two suites. In addition to exercising the option, Modification No. P00032 lowered the final price revision factors for that lot and quantity, and increased the final price revision factors for option lots IVE, IVF and IVG.* The funded amount of the contract was increased by the ceiling price for the Lot IVC two suite quantity. (R4, tab 2, Modification Nos. P00026 at 9-13 and P00032 at 1-7).

* Modification No. P00032 made no change in the final price revision factors for Lot IVD (R4, tab 2, Modification No. P00026 at 10, Modification No. P00032 at 4).

16. L-3 contends that the increased final price revision factors in Modification No. P00032 were negotiated on the basis of ceiling price, and that this somehow indicated agreement that those affected lots would be paid at the increased ceiling prices regardless of costs incurred (app. opp. at 11). However, Modification No. P00032 as executed by the parties included a full set of FPIF final price revision factors (target cost, target fee, target price, ceiling price and cost overrun/underrun share ratios) for the Lot IVC two-suite quantity, and for each of the four quantity alternatives in each of the as yet unexercised option Lots IVD through IVG (R4, tab 2, Modification No. P00032 at 4-7).

17. On 24 July 2003, a DCAA report stated that L-3's computation of an aggregate loss ratio for four FPIF delivered items in a Quarterly Limitation of Payments (QLOP) Statement was "accurate . . . and in compliance with FAR 52.216-16." The report, however, also stated that: "Our examination does not provide a legal determination on L-3 Link's compliance with FAR 52.216-16." (App. supp. R4, tab 13, attach. 2 at 3, 16-18)

18. On 10 February 2004, the government project director questioned the billing for Lot IVA at the ceiling price of \$20.1 million when the actual incurred costs were only \$14.7 million. The project director requested the contracting officer and L-3 to "identify the 'final negotiated cost' per FAR 16.403 so the final calculation can be run" (app. supp. R4, tab 11 at 1-2).

19. On 24 March 2004, the government in unilateral Modification No. P00046 exercised the Lot IVD CLIN 0043 option for one suite at the final price revision factors, including ceiling price, specified for that Lot and quantity in Section B of the contract schedule as amended. The funded amount of the contract was increased by the target price for that suite. (Gov't mot., ex. 14; R4, tab 2, Modification No. P00026 at 10)

20. All of the FPIF option CLINs were expressly identified as "FPIF" in the contract schedule (R4, tab 1 at 5, 9, 12). None of the modifications exercising those CLINs stated that the specified individual or group final price revision factors were to be combined into a single aggregate final price revision for all FPIF work at the completion of that work. (R4, tab 2, Modification Nos. P00014, P00019, P00028, P00032; Gov't mot. ex. 14)

21. On or about 16 April 2004, the government accepted delivery of Suite 6, CLIN 0042 (Lot IVC) at the target (billing) price for that unit and not at the ceiling price invoiced by L-3. (Compl. & Answer, ¶¶ 25; gov't mot., ex. 18 at 2)

22. By letter dated 29 April 2004, L-3 replied to the project director's request for final negotiated costs on the delivered FPIF CLINs. L-3 argued that the final price revision for the FPIF CLINs was to be a single ceiling price for all FPIF CLINs determined at the

conclusion of all FPIF work and that the interim billing for all FPIF CLINs should continue at the ceiling prices for each CLIN (app. supp. R4, tab 13 at 1, 11-12).

23. On 9 June 2004, L-3 filed a certified claim in the amount of \$691,788 for the difference between the ceiling price and the target price for Suite 6, CLIN 0042 (Lot IVC) (gov't mot., ex. 18 at 2).

24. On 29 September 2004, the contracting officer issued two final decisions. One decision asserted a government claim. It interpreted the contract as requiring that the FPIF CLINs be "individually priced" and not aggregated for one price revision at the end of the contract. (R4, tab 4) The second decision denied L-3's certified claim for the difference between the target price and ceiling price for the interim billing on delivery of Suite 6, Lot IVC, CLIN 0042 (R4, tab 5). This appeal from both decisions followed.

DECISION

The government moves for summary judgment on the ground that the contract unambiguously required individual final pricing for each CLIN or group of CLINs for which individual final price revision factors were specified. L-3 contends that the contract clearly provided for a single final aggregate price for all FPIF CLINs ordered under the contract, and that to the extent there is any ambiguity, the parties' conduct over the first four years of the contract supports its interpretation or at least presents a genuine issue of material fact.

L-3 highlights the "plain text" of paragraphs (c)(1)(i) and (d) of the Incentive Price Revision clause, and particularly the use of the singular form of "cost" and "price" in such phrases as "total final price of the items," "total final cost incurred . . . for supplies . . . subject to price revision," "total final price," "total final negotiated cost," "total target cost," etc. (app. opp. 15-18). The "plain text" of paragraphs (c)(1)(i) and (d) of the Incentive Price Revision clause, however, must be read in light of the "plain text" of paragraphs (a), (f)(2), and (g)(1)(i) and (ii) of the same clause.

Paragraph (a) states: "The supplies or services identified in the Schedule as Items 0001-0003 and 0007 are subject to price revision in accordance with this clause; provided, that in no event shall the total final price of these items exceed the ceiling price of \$24,495,300 for Items 0001-0003 and \$1,077,824 for Item 0007." *See* SOF ¶ 6. If the intention of the Incentive Price Revision clause was to have a single aggregate final price for all FPIF work, paragraph (a) would have specified a single ceiling price for CLINs 0001-0003 and 0007.

Paragraph (f)(2) of the clause provides for a negotiated reduction in line item billing prices if it appears that those prices will be substantially greater than the estimated

“final prices” (plural). If the clause intended that there be a single aggregate final price for all FPIF work, the term “final prices” in paragraph (f)(2) would read “final price.” Similarly, multiple final prices for the FPIF CLINs are clearly contemplated in paragraphs (g)(1)(i) and (ii) of the Incentive Price Revision clause. *See* SOF, ¶ 6. We conclude that, reading the clause as a whole, it cannot be reasonably interpreted as dropping the item by item pricing structure of the contract.

With respect to the FPIF option CLINs, paragraph (a) of the Incentive Price Revision clause stated in relevant part: “Any supplies or services that are to be (1) ordered separately under, or otherwise added to, this contract, and (2) subject to price revision in accordance with the terms of this clause shall be identified as such in a modification to this contract.” *See* SOF, ¶ 6. All of the FPIF option CLINs were expressly identified as “FPIF” in the contract schedule. None of the modifications exercising those CLINs stated that the specified individual or group final price revision factors were to be combined into a single aggregate final price revision for all FPIF work at the completion of that work. *See* SOF, ¶ 20.

We considered this issue 17 years ago in *Reflectone, Inc.*, ASBCA No. 34891, 89-3 BCA ¶ 21,962, *aff’d*, 891 F.2d 299 (Fed. Cir. 1989) (table). For purposes relevant here, there is no substantial difference between the February 1980 edition of the Incentive Price Revision clause in *Reflectone* and the October 1997 edition of that clause in L-3’s contract. In *Reflectone* the contract prescribed one set of final price revision factors for the group of FPIF base contract CLINs and a second set of final price revision factors for the FPIF option CLINs. The two separate ceiling prices in those factors were expressly incorporated separately into paragraph (a) of the Incentive Price Revision clause. On appellant’s contention that when the options were exercised, the separate ceiling prices “dissolved and became one large ceiling,” we held that: “the options subject to price revision were separately priced and subject to their own ceiling. The separate ceiling may not be read out of the contract.” 89-3 BCA at 110,473, 110,476. Similarly, in L-3’s contract the specified separate ceiling prices for the base contract FPIF CLINs 0001-0003 and CLIN 0007 and the separate ceiling prices for the option FPIF CLINs may not be read out of the ceiling price limitation in paragraph (a) of the Incentive Price Revision clause of the contract. *See Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965).

L-3 argues that the government in omitting Alternate I, paragraph (o) from the Incentive Price Revision clause opted not to establish separate final price revision factors, including ceiling prices, for each option CLIN. Alternate I, paragraph (o) states:

Provisioning and options. Parts, other services that are to be furnished under this contract on the basis of a provisioning document or Government option shall be subject to price

revision in accordance with this clause. Any prices established for these parts, other supplies, or services under a provisioning document or Government option shall be treated as target prices. Target cost and profit covering these parts, other supplies, or services may be established separately, in the aggregate, or in any combination, as the parties may agree.

(FAR 52.216-16)

We find no significance in the omission of Alternate I, paragraph (o) from the Incentive Price Revision clause in L-3's contract. The parties otherwise established separate final price revision factors, including ceiling prices, for all of the FPIF option CLINs in section B of the contract schedule as awarded and in the amendments to that schedule in bilateral Modification Nos. P00005, P00026 and P00032. *See* SOF ¶ 5.

L-3 argues that there was a practical interpretation of the contract by the parties in favor of aggregation during the first four years of performance. The alleged practical interpretation consisted for the most part of: (i) the aggregation of "funding" in Modification No. P00014 for all ordered CLINs (FPIF, CPAF and FFP) into a total dollar amount for purposes of the Limitation of Government's Obligation clause of the contract; (ii) the increase in contract funding by the ceiling price amounts for the first four option lots exercised; (iii) two contract modifications allowing interim billing of the FPIF CLINs in Lots I, II and IVA at their respective ceiling prices; (iv) two DCAA audit reports allowing aggregation of costs for progress payment purposes; and (v) the alleged negotiation of the increases in the final price revision factors in Modification No. P00032 on the basis of ceiling prices.

With respect to the alleged practical interpretation we note the following: (i), (ii) the aggregation of funding for purposes of the Limitation of Government's Obligation clause and the increases in funding to cover its maximum potential liability, were not admissions by the government of what its actual liability would be when the work was completed; (iii) FAR 32.501-3 and paragraph (f)(3) of the Incentive Price Revision clause respectively provided that adjusting a billing rate to the ceiling price was "for the purpose of making progress payments," and that such adjustments "shall not affect the determination of the total final price under paragraph (d) of this clause"; (iv) both of the cited DCAA audit reports expressly disclaimed making a determination of L-3's legal compliance with the pertinent contract provisions; and (v) whatever may have been the basis for negotiating the increases in the final price revision factors in Modification No. P00032, that modification retained the full set of those factors for each of the alternative quantities in each of the applicable lots, and did not specify only the ceiling prices for each quantity. *See* SOF ¶¶ 6, 10, 11, 16, 17.

We need not, however, determine whether there was a practical interpretation by the parties in favor of a single, aggregate final price revision for all ordered FPIF CLINs. There is no ambiguity in the contract provisions on that issue that requires interpretation. The alleged practical interpretation is irrelevant. See *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) where the Court stated:

[I]f the “provisions are clear and unambiguous, they must be given their plain and ordinary meaning,” *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993), and the court may not resort to extrinsic evidence to interpret them. *Interwest Constr.*, 29 F.3d at 615 (“[E]xtrinsic evidence . . . should not be used to introduce an ambiguity where none exists.”); *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988) (“[E]xtrinsic evidence will not be received to change the terms of a contract that is clear on its face.”). To permit otherwise would cast “a long shadow of uncertainty over all transactions” and contracts. *Trident Ctr. v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988).

For the reasons stated above, the contracting officer’s interpretation of the final pricing provisions of the Incentive Price Revision clause was correct to the extent that by “individually priced” he meant that a separate price revision would be determined for each CLIN for which individual price revision factors were specified and for each group of CLINs (such as CLINs 0001-0003) for which price revision factors were specified for the group.

The contracting officer was also correct in rejecting L-3’s claim for the difference between the target price and the ceiling price for Suite 6, Lot IVC. There was no contract modification adjusting the billing (progress payment) rate for Lot IVC to the ceiling price as there was for Lots I, II and IVA. Therefore, pursuant to paragraph (f) of the Incentive Price Revision clause, the billing rate for Suite 6, Lot IVC was the specified target price, not the ceiling price.

There being no genuine issues of material fact, and the government being entitled to judgment as a matter of law, the motion for summary judgment is granted. The appeal as to both final decisions is denied.

Dated: 23 May 2006

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 No. 54798, Appeal of L-3 Communications Link Simulation and Training, rendered in conformance with the Board's Charter.

Dated:

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