

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
 )  
Computer Sciences Corporation ) ASBCA Nos. 56168, 56169  
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Under Contract No. DAAB07-00-D-E252 )

APPEARANCES FOR THE APPELLANT: Rand L. Allen, Esq.  
Philip J. Davis, Esq.  
M. Evan Corcoran, Esq.  
Scott A. Felder, Esq.  
Lina Soni, Esq.  
Wiley Rein, LLP  
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
Christine Choi, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY  
ON THE GOVERNMENT'S MOTIONS FOR SUMMARY JUDGMENT  
ON COUNTS 7 AND 8 OF THE FIRST AMENDED COMPLAINT

At issue are the Army's separate motions for summary judgment on Counts 7 and 8 of appellant Computer Sciences Corporation's (CSC) First Amended Complaint. In Count 7, ASBCA No. 56168, CSC seeks \$19,612,320 for lost performance bonuses; in Count 8, ASBCA No. 56169, it seeks \$8,997,501 for lost data processing revenues. We combine the motions for decision because they present the same legal issues arising from contractual compensation arrangements. CSC opposed the Army's motions. We deny both motions.

STATEMENT OF FACTS FOR PUPOSES OF THE MOTIONS

Contract No. DAAB07-00-D-E252 was awarded to CSC by the U.S. Army on 29 December 1999 to modernize the Army's logistics processes and practices, subsequently designated the Logistics Modernization Program (LMP) (R4, tabs 12, 174). The Contract Master Schedule was included as Attachment No. 4 to the contract and provided for deployment of the LMP in three phased releases (R4, tab 16; amend. compl. and answer ¶ 39).

Attachment No. 13 to the contract, Monthly Services Pricing and Performance Bonus, Contract Year One Through Contract Year Ten, listed both the fixed-price payments and the maximum performance bonuses CSC was eligible to earn for “Modernization” (sub-CLINs (SLINs) 0015AA and 0015AB) and “Data Processing” (SLINs 0016AA and 0016AB) for the three phased LMP releases. The fixed-price and performance bonus payments for Modernization were to be paid to CSC from the beginning of contract performance; the fixed-price and performance bonus payments for Data Processing were to be paid when the LMP releases commenced. Attachment No. 13 showed the first data processing payments commencing with Release 1 in March 2002 and continuing with Releases 2 and 3. (R4, tab 25 at 2851-52)

Attachment No. 9 to the contract contained the Performance Bonus Plan, which stated in the first paragraph:

The Performance Bonus Plan outlines specific metrics that will be used to measure performance and subsequently apply the Performance Bonus for Transition/Modernization, Data Processing Services, and Time-and-Material labor. This plan is critical for achieving performance that exceeds acceptable levels. Acceptable performance is defined in accordance with the negotiated Contract Master Schedule and the associated acceptance criteria. Unpaid Performance Bonus is not rolled into the next year. A DD250 will be submitted for payment and validated and accepted by the Government as a part of the payment process.

(R4, tab 21 at 2816)

Bilateral Modification No. P00002 (27 April 2001) revised the Contract Master Schedule (Attachment No. 4) and the Monthly Services Pricing and Performance Bonus Schedule (Attachment No. 13) to provide for sequential LMP deployments for five designated Commands (R4, tab 74). Attachment No. 13 continued to provide for fixed-price and performance bonus payments for Modernization from the beginning of contract performance. The fixed-price and performance bonus payments for Data Processing were now scheduled to begin in July 2002 when LMP was deployed to the first Command, Deployment One (*id.* at 3873).

Attachment Nos. 9 and 13 were further revised by bilateral Modification No. P00005 (28 March 2003). The five Commands were now grouped into three deployment periods with fixed-price and performance bonus payments for Data Processing beginning with Deployment One for the first Command, scheduled for 2 June 2003 (amend. compl. and answer ¶¶ 198, 228). Deployment Two for the second and fifth Commands was scheduled for 3 November 2003 and Deployment Three for the third and fourth

Commands on 1 March 2004 (amend. compl. and answer ¶¶ 199, 200, 229, 230). (R4, tab 179 at 5143-44)

Attachment No. 13 identified \$12,017,001 in fixed-price Data Processing revenues available from June 2003 through March 2005 (amend. compl. and answer ¶ 247). CSC was paid \$3,019,500 in Data Processing revenues during this same period (amend. compl. ¶ 248).

Deployment One occurred on 7 July 2003 (amend. compl. and answer ¶¶ 201, 231). Deployments Two and Three did not take place before 31 March 2005 (amend. compl. and answer ¶¶ 202, 232). CSC identifies 522 extra-contractual action items it alleges the Army required it to perform as a precondition to proceeding with Deployments Two and Three (amend. compl. ¶¶ 122, 123).

CSC alleges it earned \$97,118,318.28 of the maximum of \$120,157,650 in performance bonuses it could obtain in connection with Deployment One through March 2005 (amend. compl. ¶¶ 203, 204). The Army does not admit or deny either figure for lack of information concerning the period CSC refers to as Deployment One and avers that performance bonuses were paid from the issuance of the contract through April 2005 (answer ¶¶ 203, 204). The Army avers that the performance bonuses paid from the issuance of the contract through April 2005 were for all services except Data Processing (answer ¶¶ 216, 219, 223).

On 2 May 2005, CSC and the Army entered into a Memorandum of Agreement (MOA). As is relevant here, the MOA provided as follows in paragraph 2:

h. Sustainment (including program governance)

i. For the period April 2, 2005 through September 30, 2005.

1. Firm fixed price of \$25M to be paid in monthly installments of \$4,166,667 starting at a time mutually agreeable to the parties but no later than [sic] 1 June 2005; and
2. Previously unpaid performance bonuses in the amount of \$14,274,951.94 for the 18<sup>th</sup> through 21<sup>st</sup> Contract quarters to be paid on or before May 31, 2005.
3. Performance bonuses activities will be suspended during this period without degradation of service.

(R4, tab 440 at 10569) The 18<sup>th</sup> through 21<sup>st</sup> contract quarters cover the period April 2004 through March 2005 (ASBCA No. 56168, app. opp'n at 10).

In addition, the MOA provided for a mutual release of claims for the period from 29 December 1999 through 1 April 2005. It also contained other provisions such as a payment to CSC of \$205,000,000 in consideration of its foregoing filing claims relating to the period 29 December 1999 through 1 April 2005. (R4, tab 440 at 10566) The MOA was never fully implemented (amend. compl. and answer ¶ 325).

On 10 May 2005, CSC and the Army executed bilateral Modification No. P00007, which included the following pertinent provisions in Section A:

e. In accordance with paragraph 2.h.i.2. of the May 2, 2005 Memorandum of Agreement, CSC (with the timely submission of appropriate DD Form 250s) will be paid \$ 14,274,951.94. Payment will be no later than May 31, 2005.

f. Monthly pricing in Attachment 13 will not be considered applicable after 31 March 2005. The Firm Fixed Price (FFP) for Sustainment (including Program Governance) for the period of 2 April 2005 through 30 September 2005 will be \$ 25,000,000.00. This will be payable in monthly installments of \$ 4,166,667.00 starting no later than 1 June 2005. This amount of \$4,166,667.00 per month will be paid \$ 399,141.00 on Task Order 0069 and the balance of \$ 3,767,526.00 on Task Order 0068.

(R4, tab 445 at 10635) The modification does not contain either a release or reservation of claims (R4, tab 445). CSC was paid the stipulated \$14,274,951.94 in performance bonuses. CSC alleges this payment was in connection with its efforts under Deployment One (amend. compl. ¶ 205). The Army denies the allegation and avers that the payment was for unpaid performance bonuses for LMP contract quarters 18 through 21 (answer ¶ 205).

We understand the \$25,000,000 fixed-price payment amount for the period 2 April 2005 through 30 September 2005 included both Modernization and Data Processing (ASBCA No. 56169, gov't mot. at 9-10; app. opp'n at 8-9).

It is undisputed that Attachment No. 13 remained in effect from contract award through 31 March 2005. CSC does not seek compensation for either Data Processing revenues or performance bonuses after 31 March 2005.

*Count 7 of the First Amended Complaint*  
*ASBCA No. 56168*

In Count 7 of its First Amended Complaint, ASBCA No. 56168, CSC seeks “Lost Performance Bonuses” based upon Attachment No. 13 for Deployments Two and Three through 31 March 2005. It alleges that, due to delays caused by the Army and other contractual breaches and constructive changes, including extra-contractual action items, “CSC was not awarded, and lost the ability to receive, performance bonuses in connection with Deployments Two and Three” and is entitled to recover them as expectancy damages by virtue of the Army’s actions (amend. compl. ¶¶ 209, 210, 215, 217). CSC asserts that the amount of the bonuses can be estimated by applying the performance bonus schedule set forth in Attachment No. 13, the performance plan contained in Attachment No. 9 and its own historic performance on Deployment One (*id.* ¶ 216). It computes the total of the lost performance bonuses it would have earned through March 2005, prior to the date of Modification No. P00007, to be \$19,612,320 (*id.* ¶¶ 223, 224).

Count 7 refers to SLINs 0015AB (Modernization) and 0016AB (Data Processing) (amend. compl. ¶ 196). Count 7 does not specifically limit the claim to Data Processing bonuses; instead, it consistently uses the generic term “performance bonuses” (amend. compl. ¶¶ 195-224). The Army, however, frames the issue in ASBCA No. 56168 as relating only to Data Processing performance bonuses (gov’t reply at 12).

*Count 8 of the First Amended Complaint*  
*ASBCA No. 56169*

In Count 8 of its First Amended Complaint, CSC seeks “Lost Data Processing Revenues” for which it alleges it was eligible under Attachment No. 13 in connection with Deployments Two and Three. It alleges that it earned 100% of the Deployment One Data Processing revenues (amend. compl. ¶ 233). CSC further alleges that the Army’s changes to and breaches of the LMP contract, including extra-contractual work required as a precondition to Deployments Two and Three, caused delays in Deployments Two and Three because of which it lost the ability to receive the Data Processing revenues provided for by the LMP contract (*id.* ¶¶ 237, 238). CSC asserts that it would have received 100% of the fixed-price Data Processing revenues reflected in Attachment No. 13 (*id.* ¶ 239). It computes the total of the lost Data Processing revenues it would have earned through March 2005 to be \$8,997,501 and claims the entirety of that amount as expectancy damages (*id.* ¶¶ 245, 247 through 250).

## DISCUSSION

Summary judgment is appropriate where there are no genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). At issue in ASBCA Nos. 56168 and 56169 is the Army's interpretation of Modification No. P00007. As the moving party, the Army must show the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-26 (1986). As the non-moving party, CSC's version of the underlying facts is to be believed and all reasonable factual inferences are to be drawn in its favor. *Liberty Lobby*, 477 U.S. at 255; *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993).

The Army asserts in its motions that, as long as Attachment No. 13 was in effect (through 31 March 2005), CSC had the right to earn performance bonuses and Data Processing revenues in connection with Deployments Two and Three, whenever they occurred, and that the right to payment was simply deferred along with the deployments. It further asserts that CSC agreed to suspend bonus payments in the MOA for the period 2 April 2005 through 30 September 2005. According to the Army, CSC then "bargained away" its right to performance bonuses and Data Processing revenues in Modification No. P00007 when it agreed to remove the pricing structure set forth in Attachment No. 13 after 31 March 2005 and to replace it with fixed-price payments totaling \$25,000,000 for performance, without bonuses, from 2 April 2005 through 30 September 2005, payment of \$14,271,051.94 for "unmeasured" bonuses, and restructuring of the contract. The Army contends that the first two sentences of paragraph f. of Modification P00007 clearly and unambiguously removed Attachment No. 13 from the contract and that Modification No. P00007 is a complete defense to ASBCA Nos. 56168 and 56169.

CSC asserts in its oppositions that the Army has offered no evidence to support its contentions that CSC somehow deferred performance bonuses and Data Processing revenues for Deployments Two and Three. In its view, the Army prevented it from earning these revenues and bonuses by delaying the deployments. CSC points out that the MOA was not fully implemented and asserts that the Army's interpretation of Modification No. P00007 is unreasonable because the modification applies only to the period after 31 March 2005. CSC further asserts that the Army has not presented any evidence that it "bargained away" its right to pre-31 March 2005 Data Processing revenues or performance bonuses and that it is unreasonable to assume it would have done so without explicitly stating that was its intent. It reminds us that the MOA stated that the \$14,274,951.94 payment represented "[p]reviously unpaid performance bonuses."

The Army's replies assert that the right to any additional fixed-price revenues and performance bonuses for Data Processing was not vested, but instead was conditioned upon deployments and that both were deferred because deployments were deferred. It

clarifies that it relies upon Modification No. P00007 alone to support its argument that CSC “bargained away” its conditional right to fixed-price Data Processing revenues and performance bonuses and contends that the negotiations and discussions preceding Modification No. P00007 are irrelevant and that an inquiry into intent is unnecessary because the modification is clear and unambiguous.

CSC responds that the Army has ignored its allegations of breach and extra-contractual changes that resulted in the delays to the deployment schedule. CSC asserts its entitlement to recovery is not based solely upon the delay in the deployment schedule, but rather that the Army wrongfully caused that delay. It considers the MOA and the underlying negotiations to Modification No. P00007 to be relevant because they provide the context within which to interpret Modification No. P00007.

The question presented in both motions is whether Modification No. P00007 precludes CSC from asserting entitlement to Data Processing fixed-price revenue payments and performance bonuses for Deployments Two and Three through 31 March 2005 under Attachment No. 13. Questions of contract interpretation are amenable to summary disposition where the contract language is unambiguous. *See Muniz v. United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992). In order to prevail upon its motions for summary judgment, the Army’s interpretation of Modification No. P00007 must not only be reasonable, it must be the only reasonable interpretation. *See C. Sanchez and Son*, 6 F.3d at 1544. We do not consider the interpretation advanced here by the Army to be reasonable.

The Army focuses upon the provision in Modification No. P00007 that states: “Monthly pricing in Attachment 13 will not be considered applicable after 31 March 2005.” Not only does the Army read this one sentence in isolation, but it also reads it in a way that is contrary to its plain meaning. *See Hercules Inc. v. United States*, 292 F.3d 1378, 1380-81 (Fed. Cir. 2002).

By its own words, the sentence relates only to the time period after 31 March 2005. The sentence says absolutely nothing about the period prior to 31 March 2005. Indeed, except for reciting the agreed-upon payment of \$14,274,951.94 due to CSC (which represents unpaid performance bonuses under Attachment No. 13), there is not even an implied reference in Modification No. P00007 to the pricing and performance bonuses structure contained in Attachment No. 13. Nor does Modification No. P00007 contain a release of any kind, much less one that relates to either performance bonuses or Data Processing revenues.

In short, we find nothing in Modification No. P00007 itself from which we could possibly conclude that CSC was agreeing to give up any pre-31 March 2005 performance bonuses or Data Processing revenues based upon Attachment No. 13. In any event, to the extent it could be possible to draw any factual inferences relating to these Attachment

No. 13 bonuses and revenues from the modification, we would draw them in favor of CSC and against the Army. *Liberty Lobby*, 477 U.S. at 255.

Finally, it is undisputed that Deployments Two and Three did not occur according to the contractual schedule and did not occur prior to 31 March 2005. Apart from these facts, the Army's assertion that CSC "bargained away" its conditional right to Data Processing revenues and performance bonuses in Modification No. P00007 is made without any factual predicate upon which we can fairly evaluate the context of the modification. *See Allied Companies*, ASBCA Nos. 50593, 52102, 99-2 BCA ¶ 30,554 at 150,885 (lack of factual background raises difficulty in understanding context of contract language). CSC asserts that the Army is responsible for contractual breaches and constructive changes that caused the delay in these deployments. Thus, we also reject the Army's attempt to prevent CSC from the opportunity to develop a record to support the allegations it has made in ASBCA Nos. 56168 and 56169 by advancing a factually unsupported interpretation of Modification No. P00007. In this regard, we note either confusion or disagreement about whether lost performance bonuses for Data Processing only are at issue in ASBCA No. 56168.

#### CONCLUSION

The Army's motions for summary judgment on Counts 7 and 8 of the First Amended Complaint, ASBCA Nos. 56168 and 56169, are denied.

Dated: 23 July 2009

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CAROL N. PARK-CONROY  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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 Nos. 56168, 56169, Appeals of Computer Sciences Corporation, rendered in conformance with the Board's Charter.

Dated:

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