

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
CI², Inc.) ASBCA Nos. 56257, 56337
)
Under Contract No. DABN01-03-C-0007)

APPEARANCE FOR THE APPELLANT: Daniel S. Herzfeld, Esq.
Pillsbury Winthrop Shaw Pittman LLP
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
LTC Patrick Vergona, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

CI², Inc. (appellant) and the Department of the Army (Army or government) have filed motions for summary judgment, each contending that it is entitled to prevail in these appeals as a matter of law. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 11 December 2002, the U.S. Army, Wiesbaden Contracting Center, issued Solicitation No. DABN01-03-R-0001. The solicitation sought the furnishing of non-personal services to support the Installation Access Control System (“IACS”) at Army installations throughout Europe, specifically those in Germany, the Netherlands, Belgium, and Italy. The IACS is a worldwide Army system used to control access to Army installations. It uses a centralized database of records and biometric information, specifically fingerprints and photographs, to allow the Army to control access to Army installations. (Answer ¶ 45)

2. On 3 January 2003, appellant submitted a proposal in response to the solicitation (R4, tab 1). Appellant was the only offeror on the solicitation. On 29 January 2003, the Army awarded Contract No. DABN01-03-C-0007 to appellant (R4, tab 12). The base period of performance was from 10 February 2003 through 9 February 2004 for CLIN 0001 (Project Manager), CLIN 0003 (Registrars), and CLIN 0004 (Temporary Registrars or “TRs”). The base period of performance for CLIN 0002

(Area Managers) was from 10 February 2003 through 9 September 2003, later extended for one area manager until 31 January 2004 by Modification No. P00002 (Mod P00002). (R4, tab 12 at 2-5, tab 14) The contract provided for one option year from 10 February 2004 through 9 February 2005, and three award terms from 10 February 2005 through 9 February 2008 (R4, tab 12 at 6-9).

3. The contract requirement for the base year was for appellant to provide 35 registrars, an ID/IQ figure for TRs, three area managers and one project manager (R4, tab 12 at 2-5). In accordance with the "Performance Work Statement" (PWS), the registrars and presumably the TRs were required to review installation pass applications and supporting documents, register pass applicants and DoD ID-Card holders into the IACS database, and issue IACS-generated installation passes in accordance with the provisions of Army in Europe Regulation 190-16, Installation Access Control Policy (R4, tab 12, attach. 1, PWS ¶ 1.1.1).

4. PWS ¶ 1.3, HOURS OF OPERATION, provided as follows:

Normal operating hours for the Registrar positions are 9 hours per day (including lunch hour) Monday through Friday, excluding U.S. holidays, including German holidays. *Based on planned or unforeseen operational requirements, the U.S. Government reserves the right to change the performance hours of Registrars and Managers, to meet permanent, immediate and temporary changes in operational requirements.* Each Registrar shall receive approximately four hours total of Government furnished initial training during these hours or during extended hours as agreed upon by the Contractor and Government.

(R4, tab 12 at 22) (Emphasis added)

5. PWS ¶ 1.2, LOCATION, required that appellant perform at the locations specified in Annex A to the PWS, "Minimum Manning Requirements" (R4, tab 12 at 33), unless the duty station was otherwise changed by the government (*id.* at 22). Annex A also provided a column of dates corresponding to each work unit/location, which dates appear to reflect the planned fielding date for the work at each site. The record shows that on occasion, the government authorized fielding at a later date than prescribed by Annex A, *e.g.*, 100th ASG/Grafenwoehr location, "17 March 2003" per Annex A (*id.*), actual authorization date "27 May 2003" (R4, tab 61 at 1).

6. PWS ¶ 1.4, PERSONNEL REQUIREMENTS, spelled out employee requirements in detail (R4, tab 12 at 22). Annex B to the PWS outlined the knowledge and skills required of the registrars (*id.* at 35).

7. CLIN 0003AA indicated that appellant would be paid a firm-fixed-price of \$4,080.00 per month for 12 months for each of the 35 registrars, or a total of 420 months (R4, tab 12 at 3). Under Mod P00002, effective 9 September 2003, the government reduced the number of months for the registrars from 420 months to 360.5 months, but also increased the quantity of less expensive temporary registrars from 296 months (Mod P00001) to 354 months (R4, tab 14 at 2). The option year for the registrars was at a fixed-price of \$4,160.00 per month (R4, tab 12 at 6). CLIN 0004AA indicated that appellant would be paid a firm-fixed-price of \$3,440.00 per month for each of the ID/IQ temporary registrars ordered (R4, tab 12 at 5). The monthly price for the TRs for the option year was \$3,509.00 (R4, tab 15 at 3).

8. In accordance with the PWS, the area managers and the project manager generally were responsible for serving as the primary points of contact between the representatives of the contracting officer (CO) and appellant. They were required to provide oversight of the registrars, ensure compliance with the provisions of Army in Europe Regulation 190-16, Installation Access Control Policy, and appellant's "Quality Control Plan" and ensure customer satisfaction with the services provided. (R4, tab 12, PWS ¶¶ 5.2, 5.3) The project manager and area managers were required to be "available either on-site or by telephone during working hours" and to respond to telephone calls within an hour of being notified of an issue (*id.*, ¶¶ 1.4.1.1.3, 5.2).

9. The services rendered by the project manager were reflected in CLIN 0001 for the base year and CLIN 1001 for the option year. CLIN 0001 indicated that appellant would be paid a firm-fixed-price of \$15,705.00 per month for 12 months for this position (R4, tab 12 at 2). The monthly price for the project manager for the option year was \$16,020.00 (*id.* at 6).

10. The services rendered by the area managers were reflected in CLIN 0002 for the base year and CLIN 1005, Mod P00003, for the option year. CLIN 0002 indicated that appellant would be paid a firm-fixed-price of \$11,735.00 per month for 7 months for each of 3 area managers for a total of 21 months (R4, tab 12 at 2), later extended for one area manager to 31 January 2004 by Mod P00002 (R4, tab 14 at 1). The monthly price for one area manager for the option year, effective 10 February 2004, was \$11,970.00 for 9 months (R4, tab 15 at 3). Mod P00006 provided area manager funding in the option year for the same monthly price for an additional 3 months, through 9 February 2005 (R4, tab 18 at 1, 2). The apparent gap from 31 January 2004 to 9 February 2004 is not explained in the record.

11. In accordance with PWS ¶ 8, appellant invoiced the government monthly for services provided in the previous month. As far as the record shows, appellant invoiced for its personnel by billing a fraction of a monthly unit commensurate with that employee's time on the job for that month. For example, if a particular registrar worked at a specified site for the full month, *i.e.*, 21 mandays, appellant billed at the monthly rate of "1.00" for this person, multiplied by the monthly unit price. However, if a registrar worked at a specified site only 15 mandays in that month, appellant billed at the monthly rate of "0.71" for this person, multiplied by the monthly unit price. The government accepted and presumably paid appellant on the basis of these billings. See, *e.g.*, Invoice No. 123, dated 3 July 2003, CLIN 0003AA, lines 16, 18, 19 and attached DD 250s (R4, tab 29).

12. Early in the contract it appears that there was some question as to how appellant's monthly invoices were to be prepared. The record shows that in July 2003, Ms. Victorine Renteria-Silva, Contracting Officer Representative, advised appellant with respect to its May billing for the "Grafenwohr" [sic] location, fielded on 27 May 2003, that the billing "can never exceed the number of hours authorized by the government – per the manning requirements spreadsheet," which in this case was 4 working days for 3 registrars at 8 hours per day or 96 hours (R4, tab 61 at 1). However, we see no readily apparent connection between this purported "direction" and appellant's monthly billing practice. The record also contains no contemporary evidence showing that appellant objected to any such government "direction," or that appellant otherwise put the government on written notice during the performance of the contract that said "direction" constituted a change to or a breach of the contract. It is appellant's monthly invoicing method and the "fractional" adjustments/deductions taken by appellant from the unit contract price that are the subject of the parties' dispute under ASBCA No. 56257.

13. The subject matter of invoice deductions was covered by the PWS ¶ 7.1.2, Performance Requirements, and specifically in the chart entitled "Performance Requirements Summary Matrix" (PRSM) under the column entitled "Incentive (see notes below)." Paragraph 7.1.2 stated as follows:

7.1.2 PERFORMANCE REQUIREMENTS. Performance standards are outlined in the matrix below. The Government reserves the right to adjust acceptable quality levels based on feedback from performance evaluation meetings. The Contractor's input shall be considered when adjusting acceptable quality levels:

Performance Requirements Summary Matrix

Performance Objective (PWS requirement)	Acceptable Quality Level	Monitoring Method	Incentive (see notes below)
1. IACS employees shall be fully qualified IAW Paragraph 1.2, 1.3, and 1.4 PWS.	100% of employees are fully qualified.	Random QAE review of contractor records	Note 1, Note 2
2. IACS employment records shall document all certifications and training IAW 1.4 and 1.5.2 PWS	No more than 3 employee files will contain incomplete documentation of certifications or training	QAE review of contractor records or random observations by COR, SR or QAE.	Note 1, Note 2 if deficiencies noted, Note 3 otherwise.
3. Contractor will provide adequate oversight IAW 1.4.1.1	No reports of designated Project Manager or Area Mgrs. being unavailable	Review of Contractor's QCP records, observation, and COR/SR records.	Note 1, Note 2 if deficiencies noted, Note 3 otherwise.
4. Contractor will provide adequate oversight IAW 1.4.1.2.3	No reports of Senior Registrar not being designated or not present	Review of Contractor's QCP records, observation, and COR/SR records.	Note 1, Note 2 if deficiencies noted, Note 3 otherwise.
5. Registrars accurately and efficiently process personnel (1.4.3)	Processing requirements IAW 1.4.3	Review of Contractor's QCP records, observation, and COR/SR records	Note 1, Note 2 if deficiencies noted, Note 3 otherwise.
6a. Customer Satisfaction	Fewer than 2% of customers processed in any ASG file negative customer comments over any 30 day period.	Review of customer comment cards and ICE surveys submitted to the ASG.	Note 2 if deficiencies noted, Note 3 otherwise.
6b. Customer Satisfaction	At least 2% of all customers processed under the contract file positive customer comments within a quarter.	Review of customer comment cards and ICE surveys submitted to the ASG.	Note 3, Note 4.

Explanatory Notes:

1. When performance is noted below the stated AQL, the contractor shall correct the deficiency within 10 days of notification of the deficiency, at no additional cost to the Government.
2. *When performance is below the stated AQL for a month, 3% of that billing period/month's invoice will be withheld for administrative violations and a prorated share for the quantifiable deficiencies (absences, delays, fewer personnel report per shift, etc.) will be deducted. A month is any 30 consecutive days. Continued poor performance or repeated lapses in performance may result in the loss of previously earned award terms.*
3. When performance is maintained at the stated AQL for this element for three consecutive months, the contractor will be awarded a positive past performance report in PPIMS.
4. If a portion of payments have been withheld under the provisions of Note 2, the Contractor can regain those funds the following quarter if 1) the Contractor has met all AQLs for the quarter and 2) at least 2% of all customers processed under the contract file positive customer comments within the quarter.

(R4, tab 12 at 30-31) (Emphasis added) There is no evidence of record showing that appellant used or otherwise relied upon the PRSM to support its billing practice.

Award Terms

14. PWS ¶ 7.3, provided for Award Terms, stating as follows:

7.3 AWARD TERMS. Excellent performance in accordance with Paragraph 3 of the Award Term Plan (Attachment 2) will result in the award of additional 12-month performance periods. Likewise, poor performance may result in the loss of award terms.

(R4, tab 12 at 31)

15. Attachment 2 of the contract documents provided for the Award Term Plan (ATP). The top paragraph provided as follows:

Attachment 2 (Award Term Plan) for the Installation Access Control System

This award term plan is the basis for the evaluation of the Contractor's performance and for presenting an assessment of that performance to the Award Term Determining Official (ATDO). This plan describes the specific criteria and procedures to be used to assess the Contractor's performance and to determine award terms earned. *Actual award term determinations and the methodology for determining the award term are unilateral decisions made solely at the discretion of the Government.*

(R4, tab 12 at 36) (Emphasis added)

16. In brief, the ATP provided for the creation of an Award Term Review Board (ATRB) that was to review contractor performance in the relevant evaluation period and prepare an evaluation report and recommendation to the ATDO as to whether an award term was earned. This evaluation was to occur in or around April, 2004 for performance in the base year. ATP ¶ 3.3.3 (R4, tab 12 at 38). The ATDO was to review the recommendation of the ATRB, consider all pertinent data and decide whether an award term was earned. The award term decision of the ADTO was not delegable, ATP ¶ 2.1. (*Id.* at 36) Under ATP ¶¶ 3.1, 3.2, Award Term Evaluation, a contractor could earn Award Term I with a "satisfactory" performance evaluation in the base year, defined as meeting 4 of the 6 listed Acceptable Quality Levels (AQLs) (*id.* at 37).

17. The ATP ¶ 5.1, also provided as follows:

5.1 Award Term Conditions. No award term extensions will be exercised unless 1) the Government has a continued need for the services under the contract, 2) funds are available, and 3) price reasonableness is determined.

(R4, tab 12 at 39) There is no dispute that the government had a continued need for these services after the expiration of the option period, and that funds for further performance were available. The parties do dispute whether and to what extent the government made a price reasonableness determination at or about that time (*see below*).

18. By Mod P00003 dated 30 January 2004, the government exercised the option year of the contract, which extended performance 12 months through 9 February 2005 (R4, tab 15). It is unclear whether the government determined the reasonableness of appellant's contract unit prices for purposes of this action. Mod P00003 also required appellant to sign the modification but the record copy is not signed.

19. Insofar as pertinent, Mod P00003, CLIN 1004 provided for "ID/IQ, Temporary Registers", identifying a quantity figure of "216" unit months at the extended contract price of \$757,944.00 (R4, tab 15 at 3). This quantity figure, however, was not identified as a maximum or a minimum figure. CLIN 1004 further stated: "SAME AS CLIN 0004AA OF BASIC CONTRACT, AND AS PER REVISED PWS." CLIN 0004AA in the basic contract provided for ID/IQ quantities for temporary registrars as "Minimum 74, Maximum 150" (R4, tab 12 at 5). The parties dispute the meaning of CLIN 1004 and also dispute how many monthly units of TRs were actually ordered by the government during the option year. Neither party submitted any declarations or affidavits to address these issues.

20. The ATRB did not evaluate appellant's performance in the base year in or around April 2004 for purposes of making an award term determination under the ATP. It also appears that an ATRB was not set up by the government for this purpose. By letter dated 3 December 2004, the CO advised appellant that the government would not exercise the award terms under the contract and that the contract would end on 9 February 2005, the last day of the option period (R4, tab 50). The CO provided no reason for this decision. The CO was not the ATDO under the ATP. There was no indication that the ATDO made this non-delegable decision as required by the ATP.

21. On a date uncertain, the CO became aware of a GSA schedule contract that provided for services similar to those under this contract. In a Memorandum for Record (MFR), dated 11 January 2005, the CO determined, *inter alia*, that use of the GSA schedule for 35 registrars, 1 program manager and 1 area manager for one year would save the government a considerable amount of money as compared to appellant's contract prices (R4, tab 51).

22. Based upon this MFR, the government solicited vendors from the GSA schedule for a new contract after expiration of the option period under appellant's contract. It appears that appellant also submitted a bid to the government (R4, tab 52). Appellant was not awarded the contract (R4, tabs 53, 55).

Appellant's Performance Ratings

23. In May 2004, during the option period, the Army provided appellant with its Contractor Performance Evaluation for the base contract period. The Army provided

appellant with “Outstanding” ratings in four of the five rated areas. The Army provided a “Satisfactory” rating in the other rated area, “INVOICES.” (App. mot., attach. 1)

24. In February 2005, the Army provided appellant “Very Good” ratings on a “Performance Assessment Report” that provided a final performance assessment of appellant’s performance for the base year and option year (app. mot., attach. 2).

25. Notwithstanding the above performance evaluations, the government contends that appellant was not entitled to the award of any award terms because the government had determined that appellant’s prices were unreasonable (SOF ¶ 17). In support of this proposition, the government offers a Declaration of Thomas Copeland, CO, which states in pertinent part as follows:

2. I made the determination, using the FAR as a guide, that CI²’s prices for the award term years were not reasonable in November 2004. I made this determination before I notified CI² that the award terms would not be exercised. I memorialized my decision a few months later in January 2005. While I did not use the word “price reasonableness” in my January 2005 memorandum, I had determined CI²’s prices were not reasonable before informing them the award terms would not be exercised in December of 2004.

(Gov’t mot., encl. 1) Presumably, the “January 2005 memorandum” referred to by Mr. Copeland is the CO’s MFR dated 11 January 2005 above (SOF ¶ 21). Said MFR does not explicitly state that appellant’s prices were unreasonable. There is also no documentation in the present record to support the CO’s claimed price reasonableness determination of November 2004. Appellant challenges whether this determination was ever made.

Claims, CO Decisions & Appeals

26. On or about 13 April 2005, about two months after expiration of the contract, appellant submitted two invoices under the contract to the Army seeking the full unit monthly contract price for all personnel awarded under the contract for each month of contract performance (R4, tab 19). By e-mail dated 7 July 2005, the Army declined to pay the invoices, contending among other things, that appellant was not entitled to payment for less performance than that specified in the contract (R4, tab 20).

27. By letter dated 8 February 2006, appellant submitted a certified claim to the government based on these invoices in the amount of \$865,478.61 (R4, tab 23). The claim included an amount reflecting the government’s alleged obligation to order a

minimum of 216 units of TRs during the option period under CLIN 1004 “ID/IQ, Temporary Registrars” in Mod P00003 (SOF ¶ 19). The Army denied appellant’s claim on 31 August 2007 (R4, tab 24). Appellant appealed to this Board, and the appeal was docketed as ASBCA No. 56257.

28. As we understand appellant’s position in ASBCA No. 56257, it does not dispute that some of its registrars and TRs did not work the normal operating hours on the site each day of each month, PWS ¶ 1.3 (SOF ¶ 4). Notwithstanding, appellant contends, *inter alia*, that the government erroneously directed its invoicing practice; that the normal operating hours were not mandatory in that the government “could (and did) change the operational requirements, including reducing the hours required” (app. reply br. at 1); that appellant performed all the work required in an exemplary fashion, per the government’s performance evaluations; that since this was a firm-fixed-priced contract appellant was entitled to the firm-fixed-price each month for all personnel; and the PRSM, PWS ¶ 7.1.2, provided no basis for the monthly adjustments. As we understand the government’s position, the normal operating hours under PWS ¶ 1.3 were mandatory and the monthly adjustments taken by appellant during performance for personnel absences were supported under the PRSM, PWS ¶ 7.1.2.

29. By letter to the government dated 28 May 2007, appellant requested payment for \$3,996,804.00 related to the first two award terms, contending that appellant was wrongfully denied the award of these terms under the ATP and the contract. Appellant sought \$1,978,596.00 for Award Term 1 and \$2,018,208.00 for Award Term 2. (R4, tab 56) The CO denied this request on 23 August 2007, contending that the award term determination was within the sole discretion of the Army and that the Army had also determined that appellant’s prices were unreasonable (R4, tab 57).

30. On 20 December 2007, appellant submitted a certified claim to the CO, seeking \$1,722,622.65 for the first two award terms (R4, tab 58). The CO denied this claim on 24 January 2008 (R4, tab 59). Appellant’s appeal to this Board was docketed as ASBCA No. 56337.

31. Under ASBCA No. 56257, appellant’s motion for summary judgment seeks judgment on its entitlement to the full firm-fixed-price, per CLIN, for its contract award personnel under the contract schedule, and also to its entitlement to at least the minimum quantity of TR units prescribed under the ID/IQ provision of CLIN 1004 for the option year. The government’s cross motion seeks summary judgment solely on the former claim, but as for the latter it contends there are material disputes of fact that preclude summary judgment. Appellant’s motion withdrew its claim on the CLINs involving overtime hours (app. mot. at 8 n.1). Under ASBCA No. 56337, both parties seek summary judgment on appellant’s entitlement to damages for the denial of the award terms.

DECISION

It is well settled that summary judgment may be granted when the moving party can show that there are no genuine, disputed material facts and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). We draw all justifiable inferences in favor of the party opposing the motion. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

ASBCA No. 56257 – Appellant’s Billing Adjustments to the Monthly Contract Price

In support of its motion for summary judgment, appellant contends, *inter alia*, that it is entitled to rely on the contract schedule, which appellant reads to require the government to pay the project manager, area manager, registrars and TRs on a monthly basis, per each respective CLIN, for a full month at the prescribed monthly rate. One would think that appellant would normally be entitled to these prescribed monthly rates for a full month of performance under each CLIN absent any lawful monthly adjustments taken during the contract term. However, appellant did take monthly adjustments throughout the contract term, *e.g.*, appellant regularly billed the government for less than a month’s time for contract registrars and the government accepted these billings and presumably paid appellant based upon them (SOF ¶ 11).

Based on the present record appellant has not satisfactorily explained the basis of its own monthly adjustments and whether they were the product of mistake, misunderstanding or were otherwise wrongful. No evidence is offered from those involved with appellant’s billing practices under this contract. Assuming, *arguendo*, that an authorized government official directed appellant to bill in the manner it did, appellant must show that the government’s direction was wrongful under the contract. For purposes of its motion, it has not done so. Moreover, if appellant viewed any government direction as wrongful, we would expect to see some contemporaneous evidence that appellant disputed or objected to the government’s direction. We see no such evidence in the present record.

Appellant argues – and the record shows -- that the government changed appellant’s performance hours/months, *e.g.*, see Mod P00002 for the registrars (SOF ¶ 7), but it appears that PWS ¶ 1.3 may allow for such changes under certain circumstances (SOF ¶ 4). In any event, there is no evidence of record connecting the government’s reduction of registrar hours/months under Mod P00002 to the monthly adjustments for registrars taken by appellant throughout the contract term.

We have duly considered all of appellant's arguments but based upon the present record and for purposes of this motion, we are not persuaded that appellant is entitled to judgment as a matter of law on this claim.

As for the government, it contends that it is entitled to summary judgment because appellant's billing practice reflected the failure of appellant's contract employees to work the normal operating hours, per PWS ¶ 1.3, which manpower "deficiencies" were reflected in the monthly adjustments/deductions taken by appellant based upon the PRSM, PWS ¶ 7.1.2. However the record contains no evidence to support the government's position. There is no evidence of record documenting any manpower deficiencies or showing that appellant's fractional billing practice was predicated on any such deficiencies. In addition, appellant's performance ratings (SOF ¶¶ 23, 24) do not document any such deficiencies.

We have duly considered the government's arguments but based upon the present record and for purposes of this motion, we are not persuaded that the government is entitled to judgment as a matter of law on this claim.

Temporary Registrars During the Option Period

In support of its motion for summary judgment, appellant contends that CLIN 1004 under Mod P00003 obligated the government to order a minimum of 216 units for TRs in the option year under the "ID/IQ" provision (SOF ¶ 19), and hence appellant was entitled to payment at the full monthly rate for all units ordered (SOF ¶ 27). Appellant's reply to the government's cross motion states that the Army actually ordered 250 TR units in the option year (app. reply at 13). The government is of the view that the Army ordered only 81 TR units in the option year (govt. mot. at 20). The government also disputes appellant's interpretation of the modification, and also suggests, *inter alia*, that the 216 unit figure in CLIN 1004 was not an ID/IQ figure but an estimated quantity figure for a requirements contract (govt. mot. at 3).

The language of CLIN 1004 under Mod P00003 is unclear (SOF ¶ 19). Neither party has presented any declarations, affidavits or contemporaneous evidence to address the interpretation of this provision. The parties also dispute the number of TR units the government actually ordered during the option period. We believe that a better developed record will assist us to resolve the disputed issues. Based upon the current record, appellant has not demonstrated its entitlement to judgment as matter of law on this claim.

ASBCA No. 56337 – Award Terms

Both parties seek summary judgment on appellant's entitlement to damages for the government's denial of award terms under this contract. As stated in the ATP, the government's award term determination and the methodology used to determine the award were "unilateral decisions made solely at the discretion of the Government" (SOF ¶ 15). However, this contract language does not serve to immunize the government's actions from board or judicial review.

In *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 859-60 (Fed. Cir. 1997), the Court held that a government award fee decision made under this type of discretionary standard was subject to review for abuse of discretion, that is, whether the decision was arbitrary or capricious. *See also George Sollitt Constr. v. United States*, 64 Fed. Cl. 229, 248 (2005) (scope of review re performance award determination is to test for arbitrariness and capriciousness as measured by law and the procedures set out in the contract). We believe this standard of review should apply equally to the award term decision prescribed by this contract.

The record shows that the government failed to follow many of the procedures prescribed for the evaluation of appellant's performance incident to the making of an award term determination under the ATP (SOF ¶ 20). According to the government, these purported deficiencies are of no moment because appellant's contract award personnel did not work the normal operating hours under PWS ¶ 1.3, and thus appellant was not entitled to any award terms because of these manpower deficiencies.

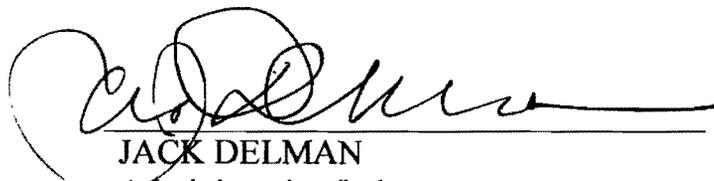
This appears to be a weak argument based upon the existing record. There is no evidence of any manpower deficiencies in appellant's performance ratings (SOF ¶¶ 23, 24), in the CO's decision denying the award terms (SOF ¶ 20) or anywhere in the record. Assuming, *arguendo*, a manpower deficiency of some sort existed in the base year, the government does not show that such a failure disqualified appellant from receiving an award term under the provisions of the ATP in any event. See ATP ¶¶ 3.1, 3.2 (satisfactory performance evaluation – meeting 4 AQLs – earns Award Term I) (SOF ¶ 16).

Alternatively, the government argues that since it had determined that appellant's prices were not reasonable in November 2004 prior to its decision not to award the terms, no award term could have been issued by the government, ATP ¶ 5.1 (SOF ¶¶ 17, 25). The government has offered a Declaration from the CO to this effect, but the referenced November 2004 price analysis is not in the record, and appellant disputes that such an analysis was ever made. We believe there are material disputes of fact between the parties on this claim, and that neither party has shown that it is entitled to summary judgment.

CONCLUSION

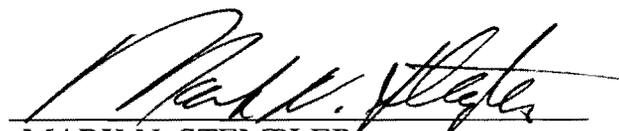
We have duly considered the parties' motions and evidence and conclude that neither party has shown that it is entitled to summary judgment on any of the aforementioned claims. The parties' motions for summary judgment are denied in both appeals.

Dated: 12 August 2011



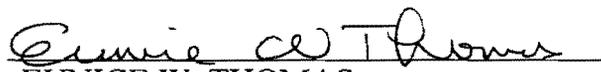
JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



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. 56257, 56337, Appeals of CI², Inc., rendered in conformance with the Board's Charter.

Dated:

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