

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
CI², Inc.) ASBCA No. 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 APPELLANT'S MOTION
FOR PARTIAL RECONSIDERATION

CI², Inc. (appellant) has timely filed a motion seeking partial reconsideration of our decision in *CI², Inc.*, ASBCA Nos. 56257, 56337, 11-2 BCA ¶ 34,823 in which we denied the parties' cross-motions for summary judgment. The Army has filed in opposition to reconsideration. Familiarity with our prior decision is presumed. We address appellant's claimed grounds of error below.

Appellant contends that the Board erred by failing to grant it summary judgment in ASBCA No. 56337 on the grounds that the Army failed to follow the provisions of the Award Term Plan (ATP) in the contract, specifically, that the Award Term Determining Official (ATDO) failed to assess appellant's performance and make an award term determination as required, ATP ¶ 3. However, appellant fails to read the ATP as a whole. The ATP addresses prerequisites other than whether the contractor had earned an award term through its past performance. ATP ¶ 5.1 makes the exercise of an award term subject to the following conditions: that the government has a continued need for the services; that funds are available and that price reasonableness is determined. For purposes of the cross-motions, appellant did not show that the ATDO was responsible for these non-performance related determinations. The government is of the view that the contracting officer had the authority to make these determinations and that he did in fact make such a price reasonableness determination against appellant (see below). The record requires further development on this issue. Drawing all inferences in favor of the nonmoving party for purposes of the cross-motions, neither party showed it was entitled to summary judgment. The Board did not err in this regard.

Appellant also contends that the Board erred by concluding that there was a dispute of material fact about whether the Army conducted a price reasonableness determination. The government provided a Declaration from the contracting officer to the effect that he made a determination in November, 2004 that appellant's prices for the award term years were not reasonable. In essence, appellant contends that this Declaration is not credible and that no determination or analysis was ever made. However, it is not our task on summary judgment to weigh the evidence or to assess credibility; we only determine whether material, factual disputes exist that need to be resolved at trial. *Southern Defense Systems, Inc.*, ASBCA Nos. 54045, 54528, 07-1 BCA ¶ 33,536 at 166,135. Clearly, the parties dispute this material fact on this record, and the Board did not err in so holding.

CONCLUSION

Appellant has not shown any legal error in the Board's decision on summary judgment. Our decision is affirmed.

Dated: 10 November 2011



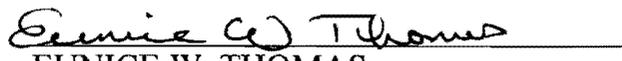
JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

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 No. 56337, Appeal of CI², Inc. rendered in conformance with the Board's Charter.

Dated:

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