ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Lockheed Martin Corp.	)	ASBCA No. 45719
	)	
Under Contract No. DAAL02-89-C-0043	)	

APPEARANCE FOR THE APPELLANT: Roy A. Klein, Esq.
Melville, NY

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
MAJ James A. Lewis, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
PURSUANT TO BOARD RULE 11

Appellant submitted a $4,391,809 claim under the captioned Army contract (contract 43), and certified the claim in April 1992 under the Contract Disputes Act of 1978 (CDA). Our March 1997 decision on entitlement sustained the claim for 23 changes to the defective technical data package (TDP) for 1,653 target detection devices (TDDs) in option CLIN 0006, held the balance of the claimed changes barred by accord and satisfaction, and denied the claim of defective exercise of option CLIN 0006. *Loral Fairchild Corp.*, ASBCA No. 45719, 97-1 BCA ¶ 28,905.

Appellant appealed our decision to the Court of Appeals for the Federal Circuit in July 1997, and noted that it had changed its name to "Lockheed Martin Corporation" (LMC). In July 1998 the Federal Circuit reversed the Board's holding on the exercise of option CLIN 0006, and "did not disturb the Board's finding that the government-prepared technical data package was defective." Because we decided entitlement only, the Court vacated our *dictum* that the defective TDP "does not convert the option CLIN 0006AC to a cost reimburseable basis of recovery." *Lockheed Martin Corp. v. Walker*, 149 F.3d 1377, 1381-82 (Fed. Cir. 1998).

Promptly thereafter, we reinstated ASBCA No. 45719 to resolve quantum. In February 1999 LMC moved for sanctions against respondent and for summary judgment, which motion we denied on 23 March 1999. 99-1 BCA ¶ 30,312. The parties elected a record decision under Board Rule 11. Pursuant to the Board's 17 May 1999 order, LMC filed a "Statement of Costs," respondent replied thereto, and the parties filed briefs.

FINDINGS OF FACT

1. Appellant's 21 April 1992 letter to the CO submitted a—

> certified Claim for Equitable Adjustment in the amount of $4,391,809 . . . . Our claim is the difference between our current cost estimate of $9,654,878, and our current contract value of $5,263,069 for the manufacturing of 1,653 TDD's.

Appellant alleged defective exercise of option CLIN 0006 and TDP defects with respect to 12 identified assemblies and parts. (R4, tab 40; findings 48-51, 97-1 BCA at 144,107)

2. Appellant's April 1992 claim certification was defective, but was corrected later pursuant to Public Law 102-572, enacted on 29 October 1992, which provides that CDA interest is payable on a corrected, certified claim on "the later of the date on which the contracting officer initially received the claim or the date of enactment of this Act." *Loral Fairchild Corp.*, ASBCA No. 45719, 95-1 BCA ¶ 27,425 at 136,681.

3. In our 1999 interlocutory decision, we stated:

> Appellant's December 1990/April 1992 claim for $4,391,809, which was the subject of the contracting officer's March, 1991 and December, 1992 final decisions . . ., of this Board's March 1997 decision, and of the Federal Circuit's July 1998 decision, did not encompass the base year 456 TDDs . . . . Thus, the Board lacks jurisdiction to adjudicate that portion of appellant's 1998 claim for the 456 base year TDDs on which the contracting officer has issued no final decision.

Lockheed Martin Corp., ASBCA No. 45719, 99-1 BCA at 149,885.

4. Based upon an affidavit of LMC's Manager of Business Analysis, Robert Snyder, supported by documents extracted from LMC's books and ledgers, Government audits, and correspondence, LMC incurred costs of $11,218,738 to produce 1,653 TDDs under CLIN 0006. LMC collected those costs for LMC's fiscal years 1991-96 under job orders "OE 5032" ($9,992,882) and "OE 3482" ($1,225,856). OE 3482 included the costs of 456 base year TDDs and 1,653 option TDDs. LMC derived the costs for 1,653 option TDDs by proportioning the OE 3482 costs at a 1,653 to 2,109 (1,653 + 456) ratio. Such ratio did not consider learning curve cost improvement on the option TDDs. LMC's break-down of the $11,218,738 total incurred costs included:

Type Cost	***OE 5032***	***OE 3482***

Material	$5,374,066	$ 132,786*
Labor	865,162	292,616*
ODC	29,936	9,399*
Overhead	2,342,977	662,376*
O/H Adjust.	28,722	(53,209)*
G&A	1,232,924	154,275*
FCCM	119,095	27,613*
Total cost:	$9,992,882	$1,225,856*

* Costs proportioned to 1,653 option TDDs.

To those costs, excluding "FCCM," LMC added a 10% fee, or $1,107,203, producing a total of $12,325,941 for cost and fee. (Snyder affid., ¶¶ 16-49; ex. A-1)

5. As last amended by Modification No. P00049, the price for CLIN 0006 was $7,616,939.55, including equitable adjustments for ECPs and changes. LMC's incurred costs as calculated above plus profit exceeded the price of CLIN 0006 by $4,709,002 ($12,325,941 - $7,616,939). (Snyder affid., ¶¶ 50-51; exs. A-1, -4)

6. The Defense Contract Audit Agency (DCAA) stated, in an unsigned, unsworn report, that: (a) LMC's costs of material and labor "agree with [LMC's] records," (b) LMC's overhead and G&A rates "are currently acceptable," (c) Loral included 10% profit in its proposal for contract 43, (d) CLIN 0006's last revised price was $7,616,939.55 for 1,653 TDDs, (e) LMC's base quantity of 456 TDDs was charged to OE 5106, (f) LMC charged costs incurred on a Ford Aeroneutronic TDD contract (OE 5046) to contract 43, and (g) LMC's claimed costs included change costs barred by accord and satisfaction, and costs incurred due to LMC's "ineptitude" and due to moving the Chaparral production site from Syosset, NY, to Archbald, PA (ex. G-1 at 2, 6, 8, 23-26, 29). DCAA did not question any LMC direct or indirect cost for the option CLIN 0006 as unallowable, nor did it find that any base 456 TDD charges (OE 5106) were included in CLIN 0006 TDD charges (OE 5032).

7. The record does not identify: (a) which costs incurred for performing option CLIN 0006 exceeded the amount for which the accord and satisfaction was reached in contract modifications equitably adjusting ECPs and other changes enumerated in ¶ 47(a) of our 28 March 1997 decision, 97-1 BCA at 144,106, and (b) the specific option CLIN 0006 costs that resulted from LMC's "ineptitude," LMC's move from Syosset to Archbald, or LMC's derivation of the OE 3482 charges applicable to the 1,653 option CLIN 0006 TDDs, without consideration of any learning curve improvement.

8. Respondent contends in its reply to LMC's Statement of Costs, and in an anonymous, unsworn "RESPONSE TO SNYDER AFFIDAVIT," that LMC: (a) filed a "certified claim" on 17 November 1997 and on 17 March 1998 for 2,109 TDDs (which claims are not in the record), whose amounts vary from its 1999 Statement of Costs; (b) perpetrated fraud by charging Ford Aeroneutronic contract costs to contract 43; and (c) failed to segregate the direct costs of change orders, as required by contract 43's Change Order Accounting clause. Respondent states that the "learning curve had already been achieved by the time the option units were being produced." (Ex. G-3 at 12-13, 19, 29-30) [1]

9. LMC's Statement of Costs for the 1,653 option TDDs excluded $54,193 material and $2,257 labor costs chargeable to the Ford Aeroneutronic TDD contract (Snyder affid., ¶¶ 18-19, 21, appendices D, E). LMC agrees with DCAA that two additional items of cost included in its Statement of Costs should be excluded: $15,557 in labor and material for Ford Aeroneutronic costs, and $6,842 for ending inventory of Part Number 11736438, totaling $22,399 (app. br. at 9, 21-22), resulting in a total cost of $11,196,339 ($11,218,738 - $22,399).

10. The record contains no evidence of any intent by LMC to deceive the Government, or that the Government relied on the $72,007 mischarge to its detriment, since LMC excluded (or agreed to exclude) those charges from its Statement of Costs, respondent did not provide any proof that LMC's alleged 17 November 1997 and 17 March 1998 claims included such $72,007, and respondent has not paid LMC any money as a result of LMC's ineffectual option CLIN 0006 claim.

DECISION

I.

Appellant has the burden of proving its quantum claim. *See Bath Iron Works Corp.*, ASBCA Nos. 44618, 45442, 96-2 BCA ¶ 28,475 at 142,218, *aff'd sub nom. Bath Iron Works Corp. v. Dalton*, 113 F.3d 1256 (Fed. Cir. 1997) (table). The ineffective attempt to exercise an option gives the contractor the right to recover the costs it incurred in performing that work, plus a reasonable profit thereon. *See Varo, Inc.*, ASBCA Nos. 47945, 47946, 98-1 BCA ¶ 29,484 at 146,319-20 (recovery measured by the difference between the amount incurred on the option work plus 10% profit, and the price received for the option work), *rev'd on different issue sub nom. VHC, Inc. v. Peters*, 179

[1] LMC objects to the admissibility of respondent's G-3 on the ground that that document is "anonymous" and prejudices LMC, since the Board's 17 May 1999 "Order on Proof of Costs" had told respondent to identify all witnesses who support the Government's exceptions to each element of LMC's claim.

F.3d 1363 (Fed. Cir. 1999); *Chemical Technology, Inc.*, ASBCA No. 21863, 80-2 BCA ¶ 14,728 at 72,642-43 (for defective option exercise, the equitable adjustment considered contractor's actual costs experienced for the period in question).

LMC incurred $11,196,339 to perform option CLIN 0006, as adjusted to deduct amounts which LMC agreed with the DCAA (finding 9). Excluding $146,708 in "FCCM" costs (finding 4) from the $11,196, 339 costs, yields $11,049,631 on which to base LMC's 10% fee, resulting in a fee of $1,104,963. LMC's adjusted incurred costs plus fee add to $12,301,302. Option CLIN 0006's last amended price was $7,616,939.55 (findings 5, 6(d)). The difference between the $11,196,339 incurred cost plus $1,104,963 fee, and the $7,616,939.55 price for option CLIN 0006 is $4,684,362.45. LMC has established, *prima facie*, its right to recover $4,684,362.45.

II.

Appellant objects to the admission of respondent's exhibit G-3 on the ground that it is "anonymous," prejudices LMC, and violates the Board's order to identify all witnesses who support respondent's exceptions to each element of LMC's claim. We overrule that objection, and will receive G-3 in the record, but will consider its anonymity in assigning it probative weight when considering respondent's defenses to LMC's *prima facie* case.

Respondent's defenses against LMC's recovery include alleged fraud in charging of Ford Aeroneutronic costs to contract 43; LMC's failure to segregate change order costs; inclusion in LMC's Statement of Costs of the costs of ECPs barred by accord and satisfaction, costs incurred due to LMC's "own ineptitude," and added costs incurred by moving the Chaparral production site from Syosset to Archbald; and failure to apply learning curve cost reductions in proportioning OE 3482 charges to derive their costs applicable to the 1,653 option TDDs (findings 6, 8).[2]

Respondent argues that LMC's "claim should be denied in its entirety as a result of fraud" (Gov't resp. at 1). To establish fraud, respondent must show a misrepresentation of a material fact, an intent to deceive, and reliance on the misrepresentation by the other party to his detriment. *See Bar Ray Products, Inc. v. United States*, 340 F.2d 343, 351, n.14, 167 Ct. Cl. 839, 851 n.14 (1964). It is not apparent that, in comparison to incurred costs of $11,196,339 for option CLIN 0006, a $72,007 ($54,193 + $2,257 + $15,557) mischarging of Ford Aeroneutronic contract costs (finding 9) to contract 43 is a material

[2] Respondent's brief, submitted on 30 August 1999, enclosed six documents, including affidavits, memoranda and other correspondence. As modified on 16 July 1999, the Board closed the record for factual documents by 4 August 1999. Therefore, the Board disregards the aforesaid six documents.

fact (72,007 ÷ 11,196,339 = .00643). The record contains no evidence whatever of any intent by LMC to deceive the Government, or that the Government relied on the $72,007 mischarge to its detriment, since LMC excluded (or agreed to exclude) those charges from its Statement of Costs, respondent did not provide any proof that LMC's alleged 17 November 1997 and 17 March 1998 claims included such $72,007, and respondent has not paid LMC any money as a result of LMC's ineffectual option CLIN 0006 claim (finding 10). Respondent has not established any of the elements of fraud.

Recovery of the difference between a contractor's incurred costs of performing an ineffectually exercised option plus fee, and the option price, in accordance with the precedents cited above, necessarily includes recovery of the contractor's costs of performing option work changed by ECPs and other changes. Therefore, the cost of LMC's defective TDP performance is moot, variances between its 1997-98 claims for 2,109 TDDs and its 1999 Statement of Costs for 1,653 TDDs are irrelevant, and whether LMC failed to segregate the direct costs of ECPs and other changes is academic.

Assuming, *arguendo*, that an accord and satisfaction on an equitable adjustment for work performed on a contract option survives the ineffectual exercise of the option, the record does not identify which costs LMC incurred for performing option CLIN 0006 exceeded the amount for which the accord and satisfaction was reached in contract modifications equitably adjusting ECPs and other changes enumerated in ¶ 47(a) of our 28 March 1997 decision (finding 7(a)).

The record does not identify the specific option CLIN 0006 costs that resulted from LMC's "ineptitude," LMC's move from Syosset to Archbald, or LMC's derivation of the OE 3482 charges applicable to the 1,653 option CLIN 0006 TDDs, without consideration of any learning curve improvement (finding 7(b)). We hold that respondent did not sustain its burden of proving its defenses to LMC's claim.

III.

LMC requests attorneys' fees from July 1998 to the present, based on what it characterizes as respondent's bad faith conduct in this quantum appeal. LMC does not cite statutory or regulatory authority for the request (*see* app. br. at 31-35). LMC has not submitted an application showing it is eligible for award of attorneys' fees and costs under the Equal Access to Justice Act, such fees incurred during litigation are expressly unallowable under the FAR cost principle 31.205-47(f)(1), and no other legal authority has been cited, or is known to the Board, to allow attorneys' fees under the circumstances of this appeal. The precedent LMC cites, *Sipco Services & Marine, Inc. v. United States*, 41 Fed. Cl. 196, 228 (1998), does not support award of attorneys' fees to LMC, because the COFC held that Sipco was a prevailing party, the Government's position was not substantially justified, and Sipco was entitled to attorneys' fees under the Equal Access to

Justice Act, 28 U.S.C. § 2412, thereby implicitly finding that Sipco was eligible for EAJA recovery. In *Texas Instruments, Inc. v. United States*, 991 F.2d 760, 763 (Fed. Cir. 1993), the court rejected a "breach of contract" theory to recover attorneys' fees otherwise not recoverable under the EAJA, because the Congress had not waived sovereign immunity with respect to ineligible large entities. We deny recovery of attorneys' fees.

We sustain the appeal to the extent of $4,684,362.45 plus CDA interest from 29 October 1992 (finding 2) to the date of payment of the aforesaid principal amount, and deny the balance of the appeal.

Dated: 12 July 2000

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
Acting 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. 45719, Appeal of Lockheed Martin Corp., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals