ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Orbital Sciences Corporation	)	ASBCA No. 50171
	)	
Under Contract No. NAS8-37281	)	

APPEARANCES FOR THE APPELLANT:

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OPINION BY ADMINISTRATIVE JUDGE DICUS
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
AND RESPONDENT'S MOTION TO STRIKE

This appeal is taken from a contracting officer's decision denying appellant's claim in the amount of $8,843,564. The parties have cross-moved for summary judgment. Appellant maintains the costs in dispute represent depreciation of tangible capital assets - Air Support Equipment and Ground Support Equipment (ASE/GSE). Respondent asserts the costs are development costs which are not allowable under the terms of the contract. Appellant has filed a supporting declaration to which respondent, in part, objects. We deny respondent's motion to strike the declaration and deny both motions for summary judgment.

THE DECLARATION

Appellant has submitted the declaration of Louis I. Rosen, D.B.A. (Rosen dec.). Dr. Rosen has substantial education and experience in accounting, and has been accepted as an expert in Government contracts accounting before boards of contract appeals and courts. Respondent does not challenge Dr. Rosen's qualifications, but instead objects to certain paragraphs on the grounds that opinions on contract interpretation issues are expressed therein. Appellant argues that the declaration is admissible in its entirety under the Federal Rules of Evidence. At the outset, we observe that FED. R. CIV. P. 56(e) requires that affidavits submitted in support of a summary judgment motion "shall set forth such facts as would be admissible in evidence . . . ."

Respondent relies heavily on the Board's opinion in *Lockheed Corporation*, ASBCA Nos. 36420, 37495, 39195, 91-2 BCA ¶ 23,903. There, we did not permit the testimony of a legal scholar on issues of law. Referring to the standard in FED. R. EVID. 702[1], we concluded that such testimony would not assist the Board in understanding the evidence or determining facts in issue. *Id.* at 119,750. Although appellant has not formally proposed that the Board accept Dr. Rosen as an expert in Government contract accounting, the nature of the declaration is such that we treat its submission as we would the offer of expert testimony. We note that respondent has treated Dr. Rosen as an expert witness and structured its objection accordingly. Respondent does not challenge Dr. Rosen's qualifications to testify as an expert, but instead objects to portions of the declaration in which it argues that Dr. Rosen goes too far on contract interpretation issues and renders opinions on legal issues. While we agree that Dr. Rosen opines on contract interpretation issues, we conclude that Dr. Rosen's testimony will assist us in understanding the evidence and in the determination of whether facts are in issue. We further conclude that under FED. R. EVID. 704[2] the declaration is admissible even though it "embraces an ultimate issue." Moreover, our own Rule 20[3] gives the presiding judge discretion beyond the Federal Rules of Evidence. Respondent's motion to strike is denied.

FINDINGS OF FACT

The following findings[4] are only for the purpose of resolving the motions.

1. In January 1983 NASA was preparing to procure Phase B studies for Transfer Orbit Stage (TOS).

2. In January 1983 appellant approached NASA and proposed commercial development of the TOS.

3. NASA agreed to appellant's proposed commercial development of the TOS and canceled its procurement activities related to TOS.

4. On 13 April 1983 appellant and NASA signed, "Agreement for the Commercial Development and Operational Use of the Transfer Orbit Stage" (the 1983 agreement).

5. The 1983 agreement provided that appellant would commercially fund development of the TOS, and that in consideration NASA would refrain from initiating or directly funding any new alternative systems for TOS-class missions.

6. On 20 March 1985 NASA issued RFP No. 8-1-5-FA-40100 "Shuttle Upper Stage for the TDRS-E Missions." Appellant bid on this RFP but was not successful.

7. RFP No. 8-1-5-FA-40100 was for two upper stages and included identical articles concerning the recovery of development costs as were contained in the RFP and contract concerning this case.

8. On 22 March 1985 NASA issued RFP No. JM-2-5607-481 "Upper Stage for the Mars Observer Mission."

9. RFP No. JM-2-5607-481 was partitioned into three work packages. Each work package represented a different possible hardware configuration for placing a payload into space.

10. RFP No. JM-2-5607-481 contained Article B-9:

> DEVELOPMENT COST
>
> In recognition of the fact that this contract is a supply type contract and in accordance with previously stated NASA policy, NASA will not pay as a direct charge item any development costs of this Upper Stage system. NASA may pay, as part of this contract price, for an allocable portion of the research and development costs provided that such costs have been amortized over the expected number of hardware sales:
>
> Development cost is defined as all design, development and qualification effort required to satisfy the Government design, development and qualification requirements set forth elsewhere in this contract, and thereby produce an Upper Stage that is capable of being certified for flight worthiness

by the contractor and subsequently accepted by the Government.

Article B-9 was included in the contract (R4, tab 12).

11. RFP No. JM-2-5607-481 contained in the Proposal Instructions, section L-III-4(B)(1) & (2), which stated that the proposed Upper Stage System development and qualification effort and other activities required to establish the System's Initial Operational Capability (IOC) and associated costs are specifically excluded from the proposal. Section L-III-4(B)(1) & (2) also stated that no reusable Upper Stage equipment, *e.g.*, ASE, GSE, handling equipment, etc., would be procured by this procurement, and that the availability of this type of equipment was considered to be part of the Upper Stage System's development/IOC.

12. There was no requirement in RFP No. JM-2-5607-481 that offerors include all of their development costs in the "amortization pool;" development costs not in the pool, however, could not be recovered.

13. In August 1985, appellant submitted its proposal in response to the RFP No. JM-5607-481. A best and final offer was submitted in December, 1985 and several updates followed.

14. Appellant was selected for award in March 1986.

15. In its initial proposal appellant specifically accepted, without objection, the provisions of Article B-9.

16. In its initial proposal appellant stated that all of the Mechanical Ground Support Equipment (MGSE), which is part of the reusable equipment for the TOS system, would be available to the MO/TOS production contract at no cost to NASA.

17. Subsequent to its initial proposal appellant included the costs of procuring the reusable ASE and GSE in the "amortization pool."

18. On 15 August 1986, the Government announced a policy of no commercial flights on the Shuttle (with certain exceptions).

19. In September 1986, after continuing negotiations appellant submitted a final proposal.

20. Appellant was awarded a letter contract for Work Package # 2, "Upper Stage Only" on 13 November 1986.

21. The letter contract was definitized 13 March 1987 (NASA Contract No. NAS8-37281 (the contract)). The contract contained Article B-9 from RFP No. JM-2-5607-481, and four options which could be unilaterally exercised at respondent's discretion.

22. Option One on the contract was exercised on 31 December 1986, adding a second mission, the Advanced Communications Technology Satellite (ACTS). No other options were exercised, and the options exercise periods expired.

23. The Mars Observer mission was flown on a Titan expendable launch vehicle, and the ACTS mission was flown on the Space Shuttle.

24. On 11 January 1988 the Johnson Space Center published letter TA-87-079 which established new design/safety standards which affected the TOS.

25. Appellant's proposed response to these new requirements included appellant's funding of the incorporation of the safety critical interface changes into the ASE/GSE hardware.

26. On 2 March 1992, appellant first raised a claim for depreciation of the ASE/GSE under the contract to the contracting officer. Appellant stated at that time that depreciation was appropriate because it had removed its capital assets from the amortization pool during renegotiations.

27. On 3 March 1992, appellant proposed (by letter) to sell the TOS ASE/GSE to NASA for $8.l million.

28. On 4 March 1992, appellant gave an oral presentation explaining its proposed sale to NASA of the ASE/GSE to the Director, Marshall Space Flight Center.

29. On 10 April 1982, the contracting officer responded to appellant's letter of 2 March 1982, stating that the contract provided for payment for ASE/GSE only through the amortization payments, and that there was no basis for payment of the depreciation bill appellant had submitted.

30. On 5 May 1993, appellant wrote the contracting officer stating that the TOS tangible property investments were part of the amortization pool, but they were being depreciated, and that the depreciation recovery had been merged with the R&D recovery as one payment at the beginning of the contract.

31. On 12 May 1994, the contracting officer responded to appellant's letter of 5 May 1993, stating that the contract provided for payment for the ASE/GSE only through the amortization payments, and that there was no basis for payment of the depreciation bill appellant had submitted.

32. On 10 June 1994, appellant replied to the contracting officer's letter of 12 May 1994, stating at that time that depreciation of capital assets is not payment for research and development expenses.

33. On 17 June 1994, the contracting officer replied to appellant's letter of 10 June 1994, stating that NASA understood the difference between capital assets and research and development expenses, and that the term "initial operational capability" (used in the 12 May 1994 letter, and in section L-III-4(B)(1) & (2) (*see* findings 11, 31)) included the costs of capital assets needed to provide the initial operational capability.

34. On 6 October 1995, appellant submitted its revised final incurred cost proposal which included the certified claim which forms the basis for the instant case.

35. Appellant stated in its revised final incurred cost proposal that depreciation was not billed to the Government earlier due to compensation through amortization payments.

36. Appellant submitted as an enclosure to its revised final incurred cost proposal a brief supporting its certified claim. In the enclosure appellant argues that the ASE/GSE, as tangible capital assets, were not in the amortization pool, even though the costs of building these assets were in the pool.

37. On 10 June 1996, appellant made an oral presentation of its claim at the Marshall Space Flight Center.

38. On 21 June 1996, the contracting officer denied appellant's claim, stating that the contract provided for payment for the ASE/GSE only through the amortization payments, and that there was no basis for payment of the depreciation claim appellant has submitted.

39. The declaration of Dr. Rosen assumes and relies on the facts stated in appellant's summary judgment motion. He concludes that the contract is subject to Part 31 of the Federal Acquisition Regulation (FAR) and that the depreciation costs are allocable and allowable thereunder. He does not express an opinion as to the reasonableness of the costs. Paragraphs 8 and 10 of the declaration provide:

8. As set forth in more detail below, the FAR and [Generally Accepted Accounting Principles] GAAP differentiate between costs incurred for research and development purposes and costs incurred in the production of a capital asset to be used in manufacturing goods or in the provision of services. Pure research and development costs are treated as expenses in the cost accounting period in which they are incurred. Capital asset costs, by contrast, must be capitalized and depreciated over the estimated useful life of the asset. That is, their cost must be spread and expended over the multiple accounting periods in which the asset is expected to be in use. Where an asset, like the ASE and GSE, is part of the activity in both the research and development effort of the contractor and in the actual provision of services, the costs must be appropriately measured and identified to these separate objectives. In this case, the ASE and GSE were to be used in the development and qualification of the Transfer Orbit Stage and also were required to be used as contractor furnished equipment under the contract for actual launches. Because of both of these efforts, the costs incurred for the ASE and GSE must be measured and identified to these two separate categories of costs. In the case of the production phase of their use, the costs must be depreciated over the useful life of the assets. While Orbital was not subject to CAS at the relevant time because of its status as a small business, the treatment of these costs would be the same under relevant CAS standards.

. . . .

10. The FAR and GAAP required Orbital to write off the remaining cost of the ASE and GSE when the assets' previously anticipated useful life was eliminated by a change in Government requirements. Moreover, the allocation of this cost to the contract was required by the FAR because the contract was the sole benefitting or causing final cost objective associated with these costs. Accordingly, the cost of the write-off is an "allowable" cost to the contract within the provisions of the FAR.

(Rosen dec.)

40. A 7 May 1996 DCAA audit report states that appellant could not support the claimed depreciation costs with accounting records (resp. mot., att. 2). There is no evidence of appellant's records of account with respect to the claimed depreciation costs. Appellant's claim references financial statements supporting the depreciation costs (R4, tab 37, enc. 2 at 6).

41. The final price of the contract was to be determined in accordance with the clause at FAR 52.216-16, INCENTIVE PRICE REVISION - FIRM TARGET (APR 1984), which incorporates FAR Part 31 (R4, tabs 12 B and I). Appellant's final cost proposal sought a contract price of $220,033,288 (R4, tab 37). Under that clause a final price is to be negotiated, which shall include an adjustment for profit and loss. If the parties cannot agree, the clause requires the contracting officer to issue a decision in accordance with the contract's Disputes clause. There is no evidence that a final price has been established.

42. Under the Limitation of Funds clause, the total allotted to the contract was $211,562,200 (resp. mot., att. 11) That clause, incorporated in the contract by reference, provides:

> LIMITATION OF FUNDS (FIXED-PRICE CONTRACT)
> (APRIL 1984)
>
> (a) Of the total price of items . . . . . through . . . .. , the sum of $ . . . . . is presently available for payment and allotted to this contract. It is anticipated that from time to time additional funds will be allocated to this contract in accordance with the following schedule until the total price of said item is allotted:
>
> SCHEDULE FOR ALLOTMENT OF FUNDS
>
> Date Amounts
>
> (b) The contractor agrees to perform or have performed work on said items up to the point at which, in the event of termination of this contract pursuant to the Termination for Convenience of the Government clause of this contract, the total amount payable by the Government (including amounts payable in respect of subcontracts and settlement costs) pursuant to paragraphs (f) and (g) thereof, would in the exercise of reasonable judgment by the Contractor approximate the total amount at the time allotted to the contract. The Contractor shall not be obligated to continue

performance of the work beyond such point. The Government shall not be obligated in any event to pay or reimburse the Contractor in excess of the amount from time to time allotted to the contract, anything to the contrary in the Termination for Convenience of the Government clause of this contract notwithstanding.

(c) It is contemplated that funds presently allotted to this contract will cover the work to be performed until . . . . In the event funds allotted are considered by the Contractor to be inadequate to cover the work to be performed until the above date, or an agreed date in substitution thereof, the Contractor shall notify the Contracting Officer in writing when within the next 60 days the work will reach a point at which, in the event of termination of this contract pursuant to the Termination for Convenience of the Government clause of this contract, the total amount payable by the Government (including amounts payable in respect of subcontracts and settlement costs) pursuant to paragraph (f) and (g) thereof will approximate seventy five percent (75% of the total amount then allotted to the contract. The notice shall state the estimated date when such point will be reached and the estimated amount of additional funds required to continue performance to the above or an agreed substituted date. The Contractor shall, 60 days prior to the date above written or agreed substituted date, advise the Contracting Officer in writing as to the estimated amount of additional funds which will be required for the timely performance of the contract for a further period as may be specified in the contract or otherwise agreed to by the parties. If after such latter notification, additional funds are not allotted by the date above written or by an agreed date in substitution thereof, the Contracting Officer will, upon written request of the Contractor, terminate this contract on such date or the date set forth in the request, whichever is later, pursuant to the provisions of the Termination for Convenience of the Government clause of this contract.

(d) When additional funds are allotted from time to time for continued performance of the work under this contract, the parties shall agree on the applicable period of contract performance which shall be covered by such funds. The provisions of paragraphs (b) and (c) above shall apply to

such additional allotted funds and substituted date pertaining thereto, and the contract shall be amended accordingly.

(e) If the contractor incurs additional costs, or is delayed in the performance of the work under this contract, solely by reason of the failure of the Government to allot additional funds in amounts sufficient for the timely performance of this contract, and if additional funds are allotted, an equitable adjustment shall be made in the price or prices (including appropriate target, billing and ceiling prices where applicable) of said items or in the time of delivery or both.

(f) The government may at any time prior to termination, and, with the consent of the Contractor, after notice of termination, allot additional funds for this contract.

(g) The provisions of this clause with respect to termination shall in no way be deemed to limit, the rights of the Government under the Default clause of this contract. The provisions of this clause are limited to the work on and allotment of funds for the items set forth in paragraph (a) above. This clause shall become inoperative upon the allotment of funds for the total price of said work except for rights and obligations then existing under this clause.

(h) Nothing in this clause shall affect the right of the Government to terminate this contract pursuant to the Termination for Convenience of the Government clause of this contract.

(R4, tab 12)

DECISION

The parties are in dispute as to whether the ASE/GSE may be capitalized and depreciated and the depreciation costs charged against the contract. Appellant argues that it seeks only "the costs of the tangible capital TOS assets that, after testing and qualification, were to be used throughout the series of launches comprising the TOS program." (App. mot. at 8-9) According to appellant, Article B-9 does not bar recovery of the depreciation costs it seeks and FAR Part 31 and generally accepted accounting principles mandate recovery. Respondent argues that Article B-9 bars appellant's claim and that various issues of material fact defeat appellant's motion.

SUMMARY JUDGMENT - GENERALLY

Summary judgment is appropriate under FED. R. CIV. P. 56, which we look to for guidance, where no material facts are genuinely in dispute 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). A material fact is one which will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co*., ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp*., ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. Although on cross-motions counsel are considered to represent that a hearing is unnecessary because all relevant facts are before the Board, *Aydin Corp. v. United States*, 669 F.2d 681, 689 (Ct. Cl. 1982), summary judgment may still be denied if material disputes of fact are found. *Town of Port Deposit v. United States*, 21 Cl. Ct. 204, 208 (1990).

APPELLANT'S MOTION

Appellant has filed an affirmative claim and is, therefore, the party with the burden of proof. *Sphinx International Incorporated*, ASBCA No. 38784, 90-3 BCA ¶22,952. Where the movant has the burden of proof his showing must be sufficient that no reasonable trier of fact could find other than for the movant. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986), citing W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Issues of Material Fact*, 99 FRD 465, 487-88 (1984). Appellant's motion fails to meet that standard.

Part 31 of the FAR is included in the contract (finding 41). To be allowable under FAR 31.201-2, costs must be reasonable. Dr. Rosen's declaration supports appellant's assertion that the costs are allocable and allowable, but he does not offer an opinion on reasonableness *per se* (finding 39). Appellant argues that since the ASE/GSE

were essential to the TOS "[i]t therefore was reasonable for Orbital to incur costs, and Orbital did actually incur costs, to acquire and construct theses assets. Accordingly, the 'reasonableness' element of allowability is clearly established in this case." (App. mot at 12-13). However, with respect to depreciation, reasonableness has additional criteria which appellant's argument does not address. FAR 31.205-11, Depreciation, provides, in pertinent part:

> (c) Normal depreciation on a contractor's plant, equipment, and other capital facilities is an allowable contract cost, if the contractor is able to demonstrate that it is reasonable and allocable (but see paragraph (i) below).
>
> (d) Depreciation shall be considered reasonable if the contractor follows policies and procedures that are –
>
> (1) Consistent with those followed in the same cost center for business other than Government;
>
> (2) Reflected in the contractor's books of accounts and financial statements; and
>
> (3) Both used and acceptable for Federal income tax purposes.

Respondent argues that a genuine issue exists with respect to appellant's accounting treatment of the depreciation costs, pointing out that appellant has produced no records of account to support its position (resp. mot. at 8-9; finding 40). We agree. As the record contains no evidence of appellant's records of account (finding 40), appellant has failed to establish that it has met the FAR 31.205-11(d)(2) requirement regarding books of account. Moreover, as to the companion requirement for financial statements in FAR 31.205-11(d)(2), we are able to find only a reference to financial statements, but not the statements, to support appellant's treatment of the claimed depreciation costs (*id.*). A reference in a claim is inadequate to constitute a showing sufficient that no reasonable trier of fact could find other than for appellant. *Calderone, supra.* We conclude that a material issue exists with respect to whether appellant has met the FAR 31.205-11(d)(2) criteria for reasonableness, and therefore allowability, with respect to the claimed depreciation costs. Appellant's motion is denied.

RESPONDENT'S MOTION

Respondent argues that Article B-9 bars appellant's claim. It states that "development includes this equipment, whether reusable or not, because such equipment was essential to satisfy the government development and qualification requirements, and to produce an Upper Stage capable of being certified for flight worthiness." (Resp. mot. at 27). Respondent also argues that the Limitation of Funds (LOF) clause precludes payment because the $220,033,288 (finding 41) sought by appellant in its final cost proposal exceeds the LOF clause ceiling of $211,562,200 (finding 42) by more than the $8,843,564 claimed. Our calculation shows that the difference is $8,471,988, which is less than the amount of the claim. Thus, some recovery would be possible. Appellant counters by arguing that Article B-9 must be read harmoniously with the FAR and generally accepted accounting principles. It is also argued that whether the LOF clause ceiling will be exceeded is dependent on how much of the amount in appellant's cost proposal is ultimately deemed payable by respondent.

Addressing the LOF clause argument first, it does not constitute a complete bar to appellant's claim. We also agree that until appellant's final cost proposal is resolved it cannot be known whether the contract ceiling constitutes a bar to appellant's claim. The contract requires a negotiated final price and, if there is disagreement, a decision of the contracting officer subject to the Disputes clause (finding 41). There is no evidence that a final price has been established.

We agree with appellant that Article B-9 must be read in concert with FAR Part 31. In this regard, evidence of the allowability of the disputed depreciation costs under the FAR has been submitted by appellant in the form of Dr. Rosen's declaration. While the declaration of appellant's expert leaves questions of reasonableness and the proper accounting methods for capitalizing a development item, *cf. Aydin Corporation (West) v. Widnall,* 61 F.3d 1571 (Fed. Cir. 1995) (IR&D costs chargeable in the year incurred and not as depreciation in subsequent years), we nonetheless prefer to give the parties the opportunity to fully develop the case. *Benitez-Allende v. Alcan Aluminio Do Brasil, S.A.,* 857 F.2d 26, 33 (1st Cir. 1988) *cert. den*., 489 U.S. 1018 (1989) Accordingly, respondent's cross motion is denied.

SUMMARY

The parties' motions for summary judgment are denied. Respondent's motion to strike is denied.

Dated: 30 March 2000

CARROLL C. DICUS, 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

NOTES

[1] That rule provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[2] FED. R. EVID. 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

[3] "Appellant and the Government may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding administrative judge . . . ."

[4] Findings 1 through 38 are undisputed (respondent's cross motion at 18-23; appellant's reply at 1-2). The Board has substituted the full text of Article B-9 of the contract for respondent's paraphrase in finding 10.

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. 50171, Appeal of Orbital Sciences Corporation, rendered in conformance with the Board's Charter.

Dated:

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