ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Hydraulics International, Inc.	)	ASBCA Nos. 50325 and 51285
	)	
Under Contract No. F41608-88-D-0065	)	

APPEARANCES FOR THE APPELLANT: Alan Dickson, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
John M. Taffany, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Appellant timely appealed a contracting officer's decision denying its claim in the amount of $1,685,020 for an equitable adjustment in which appellant requested reformation of the ECONOMIC PRICE ADJUSTMENT - PRICE INDEX METHOD (EPA) clause of the contract (ASBCA No. 50325). Appellant also appealed a deemed denial by the contracting officer of its claim for $4,410,805; which in part related to its earlier claim and in which it requested additional relief relating to delayed progress payments, constructive changes, foreign military sale (FMS) packaging costs, and Government caused delays and disruptions (ASBCA No. 51285). Subsequent to the filing of this latter appeal, the contracting officer on 31 July 1998 issued a final decision denying the claim, except as to $135,841.00 for change orders and $51,850.00 granted as a price adjustment for (FMS) packaging.

Appellant filed a motion for partial summary judgment on the price escalation elements of its first and second claims which encompass the entirety of the first claim and portions of the second one. The Government opposes appellant's motion. The parties have not filed a Stipulation of Facts setting forth the relevant material facts not in dispute.

STATEMENT OF FACTS

On 1 April 1988, following negotiations and an extension in the solicitation period, the Government awarded appellant the subject three year multi-year, requirements

type contract (R4, tab 4). For the estimated total amount of $14,931,508, appellant was required to supply to the Government, Type MJ-2A-1 hydraulic test stands. The contract provided for a first article test stand, which upon approval, was to be retained by appellant at its plant for reconditioning if necessary, and to be used as a prototype, or other purpose as requested by the contractor, with final acceptance of the prototype with the production items. The production quantities for each year were expressed in the schedule as a best estimate number and maximum quantity number.

The contract included clause H-900 ECONOMIC PRICE ADJUSTMENT – PRICE INDEX METHOD. The clause provided, in pertinent part:

> A. Prices for the MJ-2A-1 hydraulic test stands under any award resulting from this solicitation shall be subject to economic price adjustment (upward or downward) at the time of acceptance of the first article for orders placed prior thereto, and at the time of placement of any orders thereafter. The unit price so determined for any order shall not again be subject to economic price adjustment, but shall be fixed for that order. . . .
>
> B. Offeror represents, and by acceptance of any contract awarded hereunder warrants, that prices herein do not include allowances to cover anticipated price increases of the nature provided for in this provision, whether called market condition adjustments, cost-of-living adjustments, merit adjustments, or any other designation. The index(es) referred to hereinafter reflect total industry-wide economic effects, and do not require to be supplemented by any additional amount or amounts. . . . Profit is not appropriately subject to escalation.

(R4, tab 4 at 10)

The clause provided that "award unit prices" were "deemed to consist of the following elements for economic price adjustment purposes": direct material = 35%, direct and indirect labor = 35%, and all other costs and profit = 30%. The clause specified that Producer Price Indexes published or announced by the U.S. Department of Labor would be used for adjustment purposes for materials and labor. For material, the contract specified the applicable producer price indexes: "108 Miscellaneous metal products 25%," "114 General purpose machinery & equipment 50 [%]," and "118 Miscellaneous

instruments 25[%]" The price index specified for labor was "Hourly Earnings: machinery, except electrical." This clause further provided:

> F. Each economic price adjustment shall be determined as follows:
>
> (1) Calculate the average of each index for the three months preceding contract award (this having been done for the first economic price adjustment, such average shall be the same for all subsequent adjustments).
>
> (2) Calculate the average of each index for the three months preceding the month in which the first article is accepted, or the affected order is placed, as appropriate.
>
> (3) Calculate the increased (or decreased) amount for direct materials and direct labor in proportion to the change, if any, in the average index applicable to each (this may be done by calculating the percentage expressing the change from the base average index(es) to the new average index(es), and then applying that percentage to determine the new amount for the corresponding cost element, or by an equivalent calculation).
>
> (4) Sum the new amounts for materials and labor with the unchanged amount for other costs and profit; the result is the adjusted price for the affected line item which will apply to the order being placed (or placed prior to acceptance of the first article).

(R4, tab 4 at 11)

The Federal Acquisition Regulation (FAR) 16.203-1 (48 CFR 16.203-1, revised as of 1 October 1987) provided that there were three general types of economic price adjustments, namely adjustments based on established prices, adjustments based on actual costs of labor and material, and adjustments based on cost indexes of labor or material. These later adjustments were "based on increases or decreases in labor or material cost standards or indexes that are specifically identified in the contract." The regulation further provided that:

> A fixed-price contract with economic price adjustment may be used when (i) there is serious doubt concerning the stability of market or labor conditions that will exist during an

> extended period of contract performance, and (ii) contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract.
> . . .
>
> (a) In establishing the base level from which adjustment will be made, the contracting officer shall ensure that contingency allowances are not duplicated by inclusion in both the base price and the adjustment requested by the contractor under the economic price adjustment clause.
>
> (b) In contracts that do not require submission of cost or pricing data, the contracting officer shall obtain adequate information to establish the base level from which adjustment will be made and may require verification of data submitted.

(FAR 16.203-2)

Economic price adjustment clauses were required under certain circumstances under FAR 16.203-4. However, FAR 16.203-4(d) provided that in the case of adjustments based on cost indexes of labor and material, the contracting officer should consider using an economic price adjustment clause based on cost indexes of labor or material, "under the circumstances and subject to approval as described in subparagraphs (1) and (2) below."

> (1) A clause providing adjustment based on cost indexes of labor or materials may be appropriate when –
>
> (i) The contract involves an extended period of performance with significant costs to be incurred beyond 1 year after performance begins;
>
> (ii) The contract amount subject to adjustment is substantial; and
>
> (iii) The economic variables for labor and materials are too unstable to permit a reasonable division of risk between the Government and the contractor, without this type of clause.
>
> (2) Any clause using this method shall be prepared and approved under agency procedures. Because of the variations

> in circumstances and clause wording that may arise, no standard clause is prescribed.

The Defense Federal Acquisition Regulation Supplement (DFARS) listed several factors which "may be considered in preparing" an EPA clause (DFARS 16.203-4(d)(3), [DAC 86-9, 30 Nov. 1987]). Among those, DFARS 16.203-4(d)3) provided that: normally, no more than two indexes should be used (one for direct and indirect labor, and one for direct and indirect materials); "[t]he clause must establish and properly identify a base period comparable to the contract periods for which adjustments are to be made as a reference point for application of an index;" the clause should provide for "adjustment from the beginning of the contract or from such period of time that the rate of expenditure is commensurate with the administrative cost and effort to adjust, but should not provide for adjustment beyond the original contract performance period;" the clause should state the "percentage of the contract price subject to price adjustment." According to this subparagraph, normally adjustments would not be applied to the "profit portion" of a contract. Moreover, the labor and material portions of the contract "must be examined to exclude any areas that do not require adjustment," such as some of the subcontracting, and overhead. "Care should be taken to allocate to labor and material only those costs likely to be affected by fluctuation in the economy." The parties have not presented any undisputed facts regarding the Government's compliance with these requirements or as to the genesis and drafting of the EPA clause.

The Air Force Supplement to FAR (AFFAR 16.203-1) provided that one of the two recognized adjustment methods based upon cost indexes of labor and material is the "constant dollar index method," which was the method used in the referenced contract. (AFFAR 16.203-1 (1987)). According to the AFFAR 16.203-1, "the schedule price is expressed in base year dollars." The price adjustment is determined by the difference between base year index values and actual index values at the scheduled completion of performance, "or at stated times."

DECISION

In its motion, appellant contends that although the Government has generally denied appellant's allegations in the contracting officer's final decision and in the Government's answer in ASBCA No. 50325, the Government did not focus on the policy issues, namely whether or not the EPA clause was in compliance with Government policy, and whether or not it should be reformed as appellant sought in its claim. Appellant contends that the controlling law requires adherence of the EPA clause to the Federal policies and directs reformation of nonconforming clauses. In this regard, appellant contends that reformation is appropriate to correct mistakes in the contract formation process, whether mutual, or unilateral where the Government should have

known of the mistake. More specifically, appellant contends that reformation is appropriate to enforce policies benefiting contractors, and to correct a faulty EPA clause. According to appellant, the EPA clause in the contract violated governing policies and harmed appellant in several regards. First, the measurement of price adjustment must include the period in which the costs were incurred. Second, the clause did not permit inclusion in the escalation formula of the large price increase resulting from the substantial early design change (the "Triple" configuration change) which the Government directed prior to design approval. Third, the EPA clause contained an arbitrary and inaccurate percentage breakdown listed in the portions of the clause setting forth the elements of the unit price subject to upward or downward escalation. Fourth, the EPA clause did not include in the escalation formula the contractually recognized price allowance for special crating costs incurred for all units ordered to be delivered to FMS destinations. Fifth, the EPA clause was defective in that the base indexes were created from three months of data just preceding the contract award date. Implicit in its arguments that the EPA clause violated Government policies as set forth in the FAR and DFARS, appellant raises the issue of whether a deviation was required prior to the inclusion of the EPA clause in the instant contract.

The Government opposes appellant's motion for partial summary judgment, first on the basis that appellant has not met its burden of showing that there is no genuine issue of material fact, and secondly, on the basis that appellant has not met the burden of establishing that it is entitled to judgment as a matter of law. The Government argues that although the Government is bound by its regulations and the FAR and DFARS prescribes clauses, none of these prescribed clauses are prescribed for use in this contract. Therefore, absent a requirement for a specific clause, the policy leaves it to the discretion of the contracting officer to draft an EPA clause that meets the situation in the particular circumstances. Moreover, since no specific clause is prescribed, no deviation was required under DFARS 1.402(a). Further, according to the Government, since the EPA clause does not violate Government policy or regulation, and there is no evidence of mutual mistake, Government bad faith, or unconscionability, there is no basis for granting reformation in this case. There is nothing in appellant's motion that alleges Government bad faith or unconscionability.

Summary judgment is appropriate where no material facts are 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). In deciding a motion for summary judgment, we do not decide factual disputes, rather, we ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

In order to invoke the Board's equity powers to reform the clause on the basis of unilateral mistake, appellant must show that the Government knew or should have known of appellant's mistaken belief. *See Burnett Electronics Lab., Inc. v. United States*, 202 Ct. Cl. 463, 472; 479 F.2d 1329, 1333 (1973). Proof of unilateral mistake must meet the well-established standard that the mistake must not be one of business judgment on the part of the contractor. *Ruggiero v. United States*, 420 F.2d 709, 713 (Ct. Cl. 1970). Appellant has not established that there are no material facts in dispute that the Air Force knew or should have known of any mistake by appellant and that there was any mistake by appellant. There is no undisputed factual basis in the record before us that the EPA clause was included in the contract on the basis of either a mutual mistake or a unilateral mistake of which the Government knew or should have known.

With respect to its argument in favor of reformation of the EPA clause to correct the alleged faulty clause, appellant directs our attention to *Firestone Tire & Rubber Co. v. United States*, 195 Ct. Cl. 21, 444 F.2d 547 (1971), *Beta Systems, Inc. v. United States*, 838 F.2d 1179 (Fed. Cir. 1988), and *Craft Machine Works, Inc.*, ASBCA No. 35167, 90-3 BCA ¶ 23,095. Based on our review of the undisputed facts in the record, we hold that these decisions are not dispositive, and do not, as a matter of law, entitle appellant to reformation of the EPA clause, as sought in its motion for partial summary judgment.

We are not persuaded that there are no material facts in dispute or that appellant is entitled to judgment as a matter of law with respect to its claim relating to an EPA clause adjustment to the FMS special packaging charge. Any possible future judgment in appellant's favor in this regard must await the full development of the record, contract interpretation, and possible reformation of the EPA clause, if at all.

Both parties have conceded that the claim relating to the "Triple" change is moot by reason of the contracting officer's decision of 31 July 1998. Accordingly, we do not address the merits of that claim as addressed by appellant in its motion for partial summary judgment.

We, therefore, deny appellant's motion for partial summary judgment.

Dated: 8 May 2000

ROLLIN A. VAN BROEKHOVEN
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 Nos. 50325 and 51285, Appeals of Hydraulics International, Inc., rendered in conformance with the Board's Charter.

Dated:

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