ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Defense Systems Company, Inc.	)	ASBCA No. 50918
	)	
Under Contract No. DAAA09-92-C-0477	)	

APPEARANCES FOR THE APPELLANT: Gilbert J. Ginsburg, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Christine M. Choi, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING
ON APPELLANT'S MOTION FOR RECONSIDERATION

Defense Systems Company, Inc. (DSC) timely moved for reconsideration of our decision issued on 20 June 2000, 00-2 BCA ¶ 30,991, on two grounds: First, DSC contends that our decision failed to include 10,680 MK-66 rocket motors which the Government also did not separately identify as Foreign Military Sales (FMS) quantities among those rockets as to which we remanded the appeal to the parties for determination of the quantum of equitable adjustment. Second, DSC contends that we failed to discuss its entitlement to "higher contract prices" due to "the Government's material misrepresentation of fact regarding FMS and SDAF [Special Defense Acquisition Fund] quantities for the systems contract" (app. motion at 4). As relief, DSC contends that it is entitled to "reformation of the systems contract" and requests that we remand the appeal "to the parties to establish the contract price(s) which would have been agreed to by the parties if the Government had properly represented in the solicitation the FMS/SDAF quantities which the Government intended to be included in the contract" (app. motion at 10).

I. The 10,680 MK-66 Rocket Motors

In our 20 June 2000 decision, we held that DSC was entitled to an equitable adjustment for 8,908 FMS rockets and 14,212 SDAF rockets because the Government

failed to separately identify them in the systems contract solicitation, contrary to the requirements of the applicable regulations. We also held that DSC was entitled to an equitable adjustment for 7,708 SDAF rockets ordered as a part of Modification Nos. P00018, P00019 and P00022, as a result of the Government's failure to separately identify them, contrary to the requirements of the applicable regulations. 00-2 BCA at 152,966.

DCS's motion asks us to add 10,680 MK-66 rocket motors to our entitlement decision. Of these, 5,004 were rocket motors destined for Bahrain, and not identified as FMS in the basic contract solicitation, and 5,676 were rocket motors destined for the Philippines, and not identified as FMS in Modification No. P00018.

The Government agrees that 10,680 MK-66, rocket motors should have been added to the 8,908 FMS rockets and 21,920 SDAF rockets in our decision (Opposition at 1).

II. Reformation

In its motion DSC asserts that we failed to address its argument that it was entitled to reformation of the contract "due to the Government's material misrepresentation of fact regarding FMS and SDAF quantities in the solicitation for the systems contract" (app. motion at 4). DSC contends that the remedy of reformation does not require intent on the part of the Government to injure a contractor. According to DSC, where material government misrepresentation is involved, whether intentional or unintentional, the courts and the boards have generally permitted the contractor to reform or rescind its contract if it relied on the misrepresentation to its detriment (app. motion at 5). DSC contends the remedy of reformation should put "the relying party in the same position he would have been in had the misrepresentation not been made." Thus, DSC wants us to remand the case to the parties to establish "the contract price(s) which would have been agreed to by the parties if the Government had properly represented in the solicitation the FMS/SDAF quantities which the Government intended to be included in the contract." (App. motion at 10)

A misrepresentation is "an assertion that is not in accord with the facts." RESTATEMENT (SECOND) OF CONTRACTS § 159 (1979). Concealment and in some cases nondisclosure of a fact are equivalent to such an assertion. A misrepresentation may have three distinct consequences. First, in rare cases, it may prevent the formation of a contract. Second, it may make a contract voidable. Third, it may be grounds for reformation. *Id., Introductory Note* at 424-25. Reformation is more broadly available for fraudulent misrepresentation than for mistake. Reformation for mistake is limited to the situation in which the parties, having already reached an agreement, later fail to express it correctly in a writing. Since the remedy of reformation is equitable, a court has the

discretion to withhold it, even if it would otherwise be appropriate. RESTATEMENT (SECOND) OF CONTRACTS § 166 cmt. a. (1979).

In this case, there is no evidence that the Government fraudulently concealed its FMS and SDAF requirements in the systems contract solicitation or in Modification Nos. P00018, P00019 and P00022, in exercising Option A. We have found that the Procuring Contracting Officer's (PCO) failure to delineate FMS quantities as separate CLINs in the solicitation was attributable to the requisition activity's failure to break out the FMS quantities, and because no "ship to" addresses were provided (finding 37). In the case of SDAF quantities, we have found that they were not identified in the solicitation because the PCO was unfamiliar with SDAF procurement, having never had experience with it (finding 54). Additionally, we have found that the Government did not separately identify SDAF quantities in its option exercise because it considered them "U.S. Government, not FMS, purchase[s]" (finding 65). Nor is there evidence that the Government fraudulently concealed the 5,676 FMS rocket motors destined for the Philippines in Modification No. P00018.

Where the Government has failed to follow or violated regulations prescribed for the benefit of the contractor, as in this case, the Federal Circuit and the Court of Claims have authorized reformation as a remedy in some circumstances. *See, e.g., LaBarge Products, Inc. v. West*, 46 F.3d 1547 (Fed. Cir. 1995) (reformation may be appropriate where Government has engaged in auctioning in violation of FAR prohibition; contractor did not establish price was lower than it would have been because of violation); *Applied Devices Corp. v. United States*, 591 F.2d 635, 640-41, 219 Ct. Cl. 109, 119-20 (1979) (holding contractor was entitled to reformation of contract's cancellation charge term because Government had violated regulation in calculating charge); *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1185-86 (Fed. Cir. 1988) (reformation appropriate where the Government violated regulations in setting economic index incorporated into contract, and there appeared to be an intent by both parties to enter into a different contract). Underlying these decisions is the basic assumption that the original agreement or intent of the parties can be established.

We address first DSC's request for reformation of the price terms of the 8,908 FMS rockets, the 21,920 (14,212 + 7,708) SDAF rockets, and the 10,680 MK-66 FMS rocket motors (subject of the instant motion) all of which the Government failed to separately identify, contrary to the requirements of the applicable regulations. With respect to the 8,908 FMS rockets and the 21,920 SDAF rockets, our original decision remanded the appeal to the parties for determination of the amount of adjustment in accordance with the applicable pricing principles. We cited as authority *Hughes Aircraft Co.*, ASBCA No. 21429, 79-1 BCA ¶ 13,641, *aff'd on recon.*, 80-1 BCA ¶ 14,329 and *E-Systems, Inc.* ASBCA No. 21091, 82-1 BCA ¶ 15,774. Both of these cases, however, were pre-Contract Disputes Act (41 U.S.C. § 601 *et seq.*) appeals. Prior to the CDA,

boards of contract appeals had no jurisdiction to grant equitable reformation. *See Applied Devices,* 591 F.2d at 640, 219 Ct. Cl. at 119. Under the CDA, however, boards have authority to grant equitable reformation. *Paragon Energy Corp. v. United States,* 645 F.2d 966, 227 Ct. Cl. 176 (1981); *LaBarge Products, Inc. v. West,* 46 F.3d 1547 (Fed. Cir. 1995).

We have concluded that, in failing to separately identify the FMS and SDAF rockets, the Government effectively precluded DSC from bidding higher prices on these requirements. 00-2 BCA at 152,964. The same conclusion may be reached with respect to the 10,680 MK-66 FMS rocket motors which are the subject of the instant motion. We conclude, therefore, that DSC is entitled to equitable reformation of the price terms of these rocket and rocket motors. *See LaBarge,* 46 F.3d at 1552.

Reformation, however, cannot supply an agreement that the parties never struck or would have struck. The contract can only be reformed to conform to the parties' agreement or intention. The remedy of reformation is a narrow one, bringing a contract into conformity with "the true agreement of the parties on which there was a meeting of the minds." *American President Lines Ltd. v. United States,* 821 F.2d 1571, 1582 (Fed. Cir. 1987). Reformation is not intended to be a vehicle by which a court injects itself into the contracting process to create the contract it determines is best for the situation. *See Atlas Corp. v. United States,* 895 F.2d 745, 749 (Fed. Cir. 1990), *cert. den.*, 498 U.S. 811 (1990). As reflected in *United Service Corporation,* ASBCA Nos. 25786, 25981, 82-2 BCA ¶ 15,985 at 79,269, in discussing the limits of reformation, we have endorsed the well recognized principle set out in *Corpus Juris Secundum* that "If the instrument fails to embody the true agreement or intention of the parties, equity will reform it so as to make it conform thereto, but equity cannot make a new contract for the parties, or add new terms thereto, particularly terms which could not have been written into the agreement on the date thereof . . . " (emphasis omitted).

A distinction must be drawn with respect to reformation of the entire systems contract which appears to be what DSC is seeking, and reformation of the price terms of the specific FMS and SDAF quantities discussed above. We have found that the Government was not privy to DSC's complicated and risky bidding strategy (finding 30). Thus, the parties could not have reached a meeting of the minds with respect to a higher systems contract price based on the business risk that DSC undertook. Consequently, we conclude that DSC has failed to establish that the Government's regulatory violations affected its overall systems contract price.

In our decision, we found that DSC considered the systems contract a "must win" situation for its survival. To win the contract, DSC adopted a strategy to bid as low as it could and to work itself "out of the hole." (Finding 12) DSC's bid was $32 million below its estimated cost of performance (finding 17). To dig itself out of this $32 million

financial hole, DSC assumed that the cash to finance its performance would come from three sources: (1) uninterrupted progress payments, (2) delivery of profitable pre-systems contract backlog, and (3) other new business, primarily direct international sales and FMS. We found that in order to recover from its $32 million built-in loss, all three sources of income not only had to materialize, but had to flow without interruption. We found this strategy left DSC with "no room for error, and left itself at risk if one or more of its assumptions failed to materialize." (Finding 28)

As it turned out, not all of DSC's assumptions materialized. DSC's progress payments were stymied by its first article problems. Its delivery of pre-systems contract rockets was delayed due to its non-conforming lockwires, and its anticipated direct international sales did not materialize. Relying on well-established principles of law relating to remote and speculative damages, we denied DSC's claim for damages including lost profits on its international sales. We said in our decision:

> The evidence shows that DSC's expectation with regard to its direct international sales was highly speculative . . . DSC also knew, before it bid the contract, it had never achieved the level of direct international sales it projected.
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> . . . .
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> . . . DSC's direct international sales were not directly and naturally related to the systems contract; they were DSC's independent and collateral undertakings. Even though such sales were a part of DSC's bidding strategy, they were not a part of the parties' contract and therefore the damages arising out of the lack of such direct international sales were not foreseeable.

00-2 BCA at 152965-966. If DSC is permitted to reprice the entire systems contract, it will have succeeded in recovering through reformation remote and speculative damages which, as a matter of law, are not recoverable even if proven.

CONCLUSION

Because we did not include in our original decision 5,004 FMS rocket motors destined for Bahrain and 5,676 FMS rocket motors (Modification No. P00018) destined for the Philippines, and because the Government acknowledged that these rocket motors should have been included as a result of our decision on entitlement, we hereby add 10,680 MK-66 rocket motors to our decision on entitlement.

Because of the Government's failure to separately identify 8,908 FMS rockets, 21,920 SDAF rockets and 10,680 MK-66 rocket motors, contrary to the requirements of the applicable regulations, we hold DSC is entitled to equitable reformation of the price terms of these rocket and rocket motors only, but is not entitled to equitable reformation of the systems contract as a whole.

DSC's motion for reconsideration is granted to the extent indicated, and is in all other respects denied.

Dated: 30 October 2000

PETER D. TING
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
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. 50918, Appeal of Defense Systems Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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