ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Lockheed Martin Corporation	)	ASBCA No. 53226
	)	
Under Contract No. DAAL02-89-C-0043	)	

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

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Richard L. Hatfield, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Appellant has moved for summary judgment on this appeal arising from its claim regarding the 456-unit base quantity of target detecting devices (TDD) under the captioned contract. Appellant asserts that the decisions of the ASBCA and of the Court of Appeals for the Federal Circuit adjudicating a prior appeal regarding appellant's 1,653 TDD option quantity claim under the same contract are the "law of the case," preclude re-litigation of the facts of the base quantity claim by "collateral estoppel," and entitle appellant to $2,917,444 in uncompensated costs incurred to produce the 456-unit base quantity as a matter of law. The Government responded to the motion, arguing that material facts are disputed and appellant misconstrues and misapplies the prior Board and Federal Circuit decisions on appellant's 1,653 TDD option claim. We deny the motion.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTION

1. Lockheed Martin Corporation is the successor in interest to Lockheed Martin Fairchild Corp., formerly known as Loral Fairchild Corp., which in turn was the successor in interest to Fairchild Weston Systems, Inc., the original contractor to which contract DAAL02-89-C-0043 (contract 43) was awarded (R4, tab 122). These corporate entities are referred to as "LMC" in this opinion.

2. On 4 May 1989, the Government awarded firm, fixed-price contract 43 to LMC for production of the base quantity of 456 TDDs, with, so far as is relevant to this appeal, an option (in CLIN 0006) for 1,653 additional TDDs (comp. & ans., ¶ 2; R4, tab 15).

3. In April 1990, by a unilateral contract modification, respondent attempted to exercise contract 43's option for 1,653 TDDs. LMC contended that such option exercise was ineffective and void because it was out-of-sequence in that the Government had failed to exercise an earlier option (in CLIN 0005) within the applicable time period. LMC produced and delivered the option quantity, but reserved its right to claim for an equitable adjustment. (Comp. & ans., ¶¶ 3, 6; R4, tabs 21, 22, 25)

4. LMC submitted to the contracting officer (CO) a claim for equitable adjustment in December 1990, and re-filed such claim in April 1992, in the amount of $4,391,809. That claim did not address the 456 base units. (Comp. & ans., ¶ 4; R4, tabs 33, 73)

5. The CO denied LMC's April 1992 claim (R4, tab 92). LMC appealed that final decision to the ASBCA, which docketed the appeal as ASBCA No. 45719 (R4, tab 116).

6. In March 1997, the ASBCA decided entitlement only in ASBCA No. 45719, holding that the CLIN 0006 option exercise for the 1,653 units was valid, and the TDD's technical data package –

> was defective with respect to various assemblies, components and parts, which defects were corrected by [designated] ECPs . . . . That fact does not convert the option CLIN 0006AC to a cost reimburseable basis of recovery . . . . LFC is entitled to recover any costs it incurred, beyond those costs already recovered under the foregoing contract modifications, for resolving the technical problems identified in [designated] findings . . . .

(97-1 BCA ¶ 28,905 at 144,109) In July 1997 LMC appealed the foregoing ASBCA decision to the Court of Appeals for the Federal Circuit (R4, tab 121).

7. On 17 November 1997, LMC submitted a "revised certified claim" for a $4,170,783 equitable adjustment in allegedly uncompensated costs in producing 2,109 TDDs (456 base units and 1,653 option units) under contract 43 (R4, tab 122).

8. On 17 March 1998, LMC revised and recertified its claimed amount to $4,375,347. In LMC's claim letter, footnote 1 stated that its appeal of the Board's decision in ASBCA No. 45719 to the Federal Circuit challenged--

> (a) the Board's determination that the option exercise was valid and effective and (b) the Board's ruling potentially limiting LMC's damages arising out of the Government's defective TDP by confining damages to LMC's costs for correcting certain specified technical problems. If LMC prevails on either of

> these arguments, it may be awarded a total cost equitable adjustment – i.e., LMC may be awarded the total actual costs it incurred to produce the 2109 TDDs, plus a reasonable profit, less what it has been paid to date . . . . Based on its actual records, LMC calculates that, under a total cost recovery, LMC would be entitled to $8,147,955.

(R4, tab 126 at 4; comp. at ¶ 12) Respondent's answer admitted only that footnote 1 of LMC's 17 March 1998 amended claim contained the foregoing statements, but did not admit the truth of such LMC statements (ans. at ¶ 12).

9. The July 1998 decision in *Lockheed Martin Corp. v. Walker*, 149 F.3d 1377 (Fed. Cir. 1998), affirmed the Board's decision in ASBCA No. 45719 that the TDD's technical data package was defective, reversed the Board's decision that the exercise of the option was valid, holding that the option was exercised invalidly and, therefore, was void *ab initio*, and vacated the Board's purported "determination" that LMC was not entitled to a "total cost recovery," stating:

> The hearing before the Board was expressly limited to the question of entitlement . . . . Consequently, the parties had no opportunity to present written or oral arguments to the Board regarding the quantum of damages or the appropriate method for measuring damages. Thus, given the bifurcated nature of these proceedings, it was error for the Board to issue a determination on quantum during the entitlement phase. While we must, therefore, vacate the Board's determination that Lockheed was not entitled to a total cost recovery, we express no view on whether a total cost recovery or any other measure of damages is the appropriate method for determining quantum in this case. Such questions must necessarily be decided after an appropriate hearing on remand.

(149 F.3d at 1381-82; R4, tab 128; comp. & ans., ¶ 15)

10. After the parties were unable to resolve quantum on ASBCA No. 45719, the Board reinstated the appeal. The parties submitted documentary evidence of LMC's total costs incurred in producing, and respondent's payments for, the 1,653 option TDDs in issue in ASBCA No. 45719 (comp. & ans., ¶ 18). In the Board's 23 March 1999 decision denying LMC's motion for summary judgment and sanctions, the Board stated:

> [LMC]'s December 1990/April 1992 claim for $4,391,809, which was the subject of the [CO'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 [LMC's 17 March] 1998 claim for the 456 base year TDDs on which the [CO] has issued no final decision.

(99-1 BCA ¶ 30,312 at 149,885; R4, tab 141; comp. & ans., ¶ 19)

11. The Board's 12 July 2000 decision on quantum on ASBCA No. 45719 employed a total cost measure of recovery and held that LMC had established proof of a $4,684,362.45 recovery, calculated by subtracting the $7,616,939.55 price for the 1,653 option TDDs from the $11,196,339 costs LMC incurred in producing those TDDs plus a $1,104,963 fee, together with CDA interest thereon (ASBCA No. 45719, 00-2 BCA ¶ 31,025 at 153,225; comp. & ans., ¶ 20).

12. On 11 October 2000, LMC submitted a $2,917,444 claim for equitable adjustment seeking uncompensated costs (plus a reasonable profit) LMC allegedly incurred in producing the 456 base TDDs, together with interest thereon from 17 November 1997 (R4, tab 155).

13. The CO's 7 December 2000 final decision denied LMC's 11 October 2000 claim in its entirety, stating that LMC's claim certification deviated from the language in FAR 33.211(e) (R4, tab 153).

14. On 2 January 2001 LMC, without conceding that its 11 October 2000 certification was defective, submitted a "new certification" of its 11 October 2000 claim. The only substantive difference between the original and the "new" certification was LMC's substitution of "accurate" for "current" in the second prong of the certification. On the same day LMC filed a notice of appeal from the CO's 7 December 2000 final decision to the ASBCA. (R4, tab 154) The Board docketed this appeal as ASBCA No. 53226.

15. The parties' joint 15 May 2001 letter to the Board stated:

> The Army acknowledges that the [LMC] is entitled to recover any actual, reasonable costs it incurred in connection with its production of 456 base quantity . . . (TDDs) under the subject contract, beyond those costs recovered under the various contract modifications, to resolve the technical problems identified in findings 34(b), 34(c), 35(a)-(d) and (f)-(h), 35(k), 36, 37, 38(a)-(d), 39(a)-(b), 40(c), 40(d) for ECP 24 but not for ECP 49, and 41(a)-(c) of the Board's decision in Loral Fairchild Corp., ASBCA No. 45719, 97-1

> BCA ¶ 28,905 . . . . In light of the Army's acknowledgement, entitlement is no longer an issue in this appeal.

16. With respect to the "total cost" method of establishing quantum for LMC's 456 base TDDs claim, respondent has not had an adequate opportunity to discover material facts regarding the practicality of proving LMC's actual losses in manufacturing those 456 TDDs directly, considering LMC's requirement to maintain separate accounts of all incurred, segregable, direct costs of each change order pursuant to the FAR 52.243-6 CHANGE ORDER ACCOUNTING (APR 1984) clause in contract 43 (R4, tab 15). The present record in ASBCA No. 53226 contains no evidence of the reasonableness of LMC's bid for contract 43 or of LMC's efficiency or inefficiency in producing the 456 base TDDs. DCAA did not complete auditing that portion of LMC's November 1997 claim addressing the 456 base TDDs. The 7 July 2001 affidavit of DCAA auditor Frances F. Grogan states that she anticipates that her audit to determine the validity of LMC's 456-TDD claim should be complete by 31 August 2001.

POSITIONS OF THE PARTIES

LMC argues that: (a) respondent has acknowledged entitlement in this appeal, so all that remains to be established are the determination of the proper formula for recovery of quantum and calculation of LMC's recoverable costs; (b) these two elements have been decided in LMC's favor by the Board's entitlement decision in ASBCA No. 45719, 97-1 BCA ¶ 28,905, the Federal Circuit's decision in 149 F.3d 1377, and the Board's quantum decision in ASBCA No. 45719, 00-2 BCA ¶ 31,025; (c) by virtue of the aforesaid Board and Federal Circuit decisions, LMC has established the four elements to recover under the total cost method of quantifying an equitable adjustment, namely: (1) the impracticability of proving actual losses directly; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) lack of responsibility for the added costs, or under a "modified total cost approach," substituting a reasonable bid amount for a contractor's bid found to have been unreasonable, citing *Servidone Const. Corp. v. United States*, 931 F.2d 860 (Fed. Cir. 1991).

Respondent argues that (1) the prior Board and court decisions with respect to LMC's 1,653-unit option quantity claim did not contain any findings or state any holdings with respect to the instant 456-unit base quantity claim, and hence do not establish any "law of the case" or "collateral estoppel" with respect to the facts or legal issues in the instant appeal, (2) LMC has not adduced evidence of compliance with the four elements of proof of a "total cost" claim set forth in *Servidone*, and (3) there are disputed material facts with respect to the calculation of quantum in this appeal.

DECISION

I.

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001). Summary judgment is inappropriate when a party has not had an adequate opportunity to discover evidence that is essential to its opposition to show a genuine issue of material fact. *See Burnside-Ott Aviation Training Center v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986).

II.

The Board's findings of fact in the entitlement decision (ASBCA No. 45719, 97-1 BCA ¶ 28,905) did not address any of the elements of proof in *Servidone* or any other legal authority on total cost recovery. The Federal Circuit Court in *Lockheed Martin Corp. v. Walker*, 149 F.3d 1377 (Fed. Cir. 1998), did not address or decide any of the elements of proof of a total cost recovery on LMC's option quantity claim. Indeed, the Court expressed "no view on whether a total cost recovery or any other measure of damages is the appropriate method for determining *quantum* in this case." 149 F.3d at 1381. This Board subsequently decided that the appropriate measure of damages was a total cost recovery due to respondent's defective exercise of the CLIN 0006 option for 1,653 TDDs (ASBCA No. 45719, 00-2 BCA ¶ 31,025). Neither the ASBCA nor the Federal Circuit Court decided the appropriate measure of damages for a constructive change to the 456-unit base quantity. That issue was not before them for decision, as required to establish law of the case, see Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4478, and to establish collateral estoppel, see *Comair Rotron, Inc. v. Nippon Densan Corp*., 49 F.3d 1535, 1537 (Fed. Cir. 1995). Therefore, LMC's assertions of "law of the case" and "collateral estoppel" are unfounded.

III.

With respect to the "total cost" method of establishing quantum for LMC's 456 base TDDs claim, respondent has not had an adequate opportunity to discover material facts regarding the practicality of proving LMC's actual losses in manufacturing those 456 TDDs directly, considering LMC's requirement to maintain separate accounts of all incurred, segregable, direct costs of each change order pursuant to the FAR 52.243-6 CHANGE ORDER ACCOUNTING (APR 1984) clause in contract 43. The present record in ASBCA No. 53226 contains no evidence of the reasonableness of LMC's bid for contract 43 or of LMC's efficiency or inefficiency in producing the 456 base TDDs. DCAA did not complete auditing that portion of LMC's November 1997 claim addressing the 456 base TDDs. The 7 July 2001 affidavit of DCAA auditor Frances F. Grogan states that she anticipates that her audit to determine the validity of LMC's 456-TDD claim should be complete by 31 August 2001. (SOF ¶ 16) We hold that LMC has not established that there are no disputed material facts with respect to its proof of quantum.

We deny the motion for summary judgment.

Dated: 7 September 2001

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
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. 53226, Appeal of Lockheed Martin Corporation, rendered in conformance with the Board's Charter.

Dated:

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