ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
General Dynamics Corporation	)	ASBCA No. 49372
	)	
Under Contract No. N00024-88-C-2000	)	

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OPINION BY ADMINISTRATIVE JUDGE HARTY
ON THE GOVERNMENT'S MOTION FOR PARTIAL RECONSIDERATION

The Government filed a timely motion to reconsider only the portion of our decision in *General Dynamics Corporation*, ASBCA No. 49372, 02-2 BCA ¶ 31,888, that denied the Government's entitlement to a penalty under 10 U.S.C. § 2324 for any *Davis*-case costs that may have been associated with the defense of the Frigitemp claims. Familiarity with the decision is assumed.

With respect to the *Davis*-case costs associated with the defense of the Frigitemp claims, the Board concluded that the Government failed to prove that the imposition of a penalty under 10 U.S.C. § 2324, as implemented, was warranted because a three percent cost exclusion offered in connection with General Dynamics's (GD) 9 September 1994 certified 1991 overhead cost proposal had the effect of removing the Frigitemp costs from the proposal. We observed in this regard that "[t]he three percent exclusion provided a 'cushion' for the costs associated with the Frigitemp claims" and GD's proposal had to be understood in light of the three percent exclusion. *General Dynamics*, 02-2 BCA at 157,571.

The Government maintains on reconsideration that the Board overlooked two key "facts" in reaching its conclusion. First, the three percent exclusion was intended to apply only to "adjusted **allowable** costs" (emphasis in original) (Gov't mot. at 1), citing a phrase drawn from a 29 April 1994 letter in which GD proposed to "reclassify three percent (3%) of adjusted allowable costs . . . as unallowable." *Id.* at 157,554. Second, even if the three percent exclusion is construed as removing the costs, GD's withdrawal of its offer of the three percent exclusion shortly after the contracting officer's final decision assessing a penalty had the effect of reinstating the Frigitemp costs in the proposal at a time when the costs were clearly unallowable. The Government emphasizes in this regard that it is "not willing to concede that a contractor's inclusion of a decrement factor in an overhead cost proposal somehow acts to insulate" the contractor from the imposition of penalties when expressly unallowable costs are discovered in that proposal. (Gov't mot. at 1-2, 2 n.1)

We believe the Government's principal argument stems from a misunderstanding of our decision, and its alternate argument is based on an assertion that is without factual support in the record.

Our decision does not require the broad "concession" the Government fears. However, it does require an assessment of the meaning of the particular overhead proposal in light of the surrounding circumstances when gauging the propriety of a penalty assessment. The 29 April 1994 letter was not overlooked. It was an integral part of our evaluation, and was taken into consideration—along with other pertinent documentary evidence, the testimony of the witnesses, and our assessment of their credibility—in reaching our conclusion.

Moreover, the assertion that GD's withdrawal of the three percent exclusion after the contracting officer's final decision operated, in effect, as a retroactive modification of the 9 September 1994 overhead proposal is without factual foundation and tends to minimize the importance of the certified overhead proposal itself as the focal point for assessing the propriety of a penalty assessment. As pointed out by GD in its reply to the Government's motion (app. mot. at 6), we found that the *Davis*-case costs were set-aside in light of the appeal at the time the parties negotiated their tentative settlement of the 1991 overhead costs. *General Dynamics*, 02-2 BCA at 157,561. Given the posture of the parties after the contracting officer's final decision, the absence of factual support for the Government's proposition is not surprising. The evidence is to the contrary. GD's withdrawal was in response to the contracting officer's final decision. It viewed the Government's action as "nullif[ying] the settlement agreement," and, therefore, withdrew the agreement, advising that it would "resubmit 1991 overhead costs without the exclusion." (R4, tab 29)

The Government's motion for partial reconsideration is denied.

Dated: 13 September 2002

MARTIN J. HARTY
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. 49372, Appeal of General Dynamics Corporation, rendered in conformance with the Board's Charter.

Dated:

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