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

This appeal arises from the contracting officer's (CO) final decision denying appellant's claim for costs incurred to resolve technical problems in producing 456 base year target detection devices under the captioned contract. The Board has jurisdiction of the appeal under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. § 607. The parties have stipulated entitlement and the principal amount recoverable. The only disputed issue remaining to be decided is the date from which CDA interest began to accrue on such principal amount.

FINDINGS OF FACT

1. On 4 May 1989 respondent awarded Contract No. DAAL02-89-C-0043 (contract 43) for 456 base year target detection devices (TDDs), with options for additional TDDs, to Fairchild Weston Systems, Inc., predecessor in interest to Loral Fairchild Corp., which, in turn was predecessor in interest to Lockheed Martin Corporation (collectively LMC or appellant) (R4, tab 15 at 1-5, tab 122). On 3 April 1990 respondent issued unilateral Modification No. P00003 to contract 43, which attempted to exercise the Government's option for 1,653 TDDs (R4, tab 22).

2. Appellant's 21 April 1992 claim under contract 43 alleged that respondent's exercise of the 1,653 TDD option was invalid and its technical data package (TDP) for such TDDs was defective, for which appellant sought $4,391,809 on a total cost basis (R4, tab 73). The CO denied that claim in its entirety, which final decision was appealed to this Board and docketed as ASBCA No. 45719 (R4, tabs 92, 104). In March 1997 we held in ASBCA No. 45719 that respondent's exercise of the 1,653 TDD option was valid, but that its TDP was defective with respect to 23 TDP changes (R4, tab 120). *Loral Fairchild*

Corp., ASBCA No. 45719, 97-1 BCA ¶ 28,905. Appellant appealed our decision to the U.S. Court of Appeals for the Federal Circuit (R4, tab 121).

3. The CO received appellant's 17 November 1997 "Revised Claim for Equitable Adjustment" on 21 November 1997 in conjunction with the option claim litigated in ASBCA No. 45719. Appellant: (a) claimed $4,170,783 for changes arising from the defective TDP, alleging that "LMC actually incurred these uncompensated costs in producing some 2109 . . . ('TDDs')," 456 base units and 1653 option units, because the "findings and conclusions in the Board's Decision concerning the Government's grossly defective TDP obviously apply both to . . . the 1653 option units and to . . . the 456 base units"; (b) reserved its right to amend "this claim to seek a total cost recovery" of $8,237,300 for 2,109 TDDs; (c) identified its labor, material and subcontract costs to investigate and correct the 23 TDP defects found in the Board's foregoing decision in ASBCA No. 45719; and (d) did not explicitly identify what part of the $4,170,783 or $8,237,300 was for the 456 base year TDDs and what part was for the 1,653 option TDDs (R4, tab 122 at 1, 3, 5-16; Parties' Joint Statement of Undisputed Facts (JS), ¶ 4).

4. Appellant's 5 February 1998 letter to the CO requested a brief postponement of Defense Contract Audit Agency's (DCAA) audit of appellant's 17 November 1997 "revised claim" because appellant estimated that it would submit an updated claim amount by 15 March 1998 (R4, tab 124).

5. Respondent states: "On 5 February 1999 [sic], LMC withdrew its claim . . . (See R4, tab 140, p. 3)" (Gov't br. at 4). The cited document did not state that LMC withdrew its 17 November 1997 claim on 5 February 1999 or on 5 February 1998. It appended the CO's 12 March 1999 affidavit stating "05 February 1998 Lockheed requests audit be postponed 'briefly', so they can update their claim" (R4, tab 140). Respondent further states: "LMC's . . . Robert Snyder, conveyed appellant's withdrawal of its claim to the DCAA auditor. (R4, tab 139, p. 1)" (Gov't br. at 4). Rule 4, tab 139, DCAA auditor David Paukett's 12 March 1999 affidavit, stated:

> I received a telephone call from Mr. Snyder on 5 February 1998. During this call, Mr. Snyder informed me that Lockheed was withdrawing its claim in order to adjust its claim amount upward by approximately $500,000. According to Mr. Snyder, Lockheed would resubmit it by 15 March 1998 . . . . I documented this in a 9 February 1998 letter . . . .

DCAA's 9 February 1998 memorandum for the CO stated:

> As discussed on 9 February 1998, the contractor is withdrawing and not supporting their 17 November 1997 claim. They are resubmitting the claim and will support the revised

> claim. Accordingly we will postpone our audit until the revised claim is received.

(R4, tab 125) The record contains no document prepared by appellant substantiating DCAA's statement that appellant was "withdrawing" its 17 November 1997 claim.

6. Appellant's 17 March 1998 letter to the CO submitted an "amendment" to its "revised claim . . . [of] November 17, 1997" which changed the claimed amount to $4,375,347 for 2,109 TDDs, reserved the right to amend "this claim to seek a total cost recovery" of $8,147,955 for 2,109 TDDs, and did not explicitly identify what part of the $4,375,347 or $8,147,955 was for the 456 base year TDDs and what part was for the 1,653 option TDDs (R4, tab 126 at 1, 4-15). The CO's 4 September 1998 letter to appellant stated that the 17 March 1998 certified claim "has not been modified or withdrawn" (R4, tab 130). Appellant's 11 September 1998 reply letter confirmed that its 17 March 1998 claim was still valid (R4, tab 131).

7. On 23 July 1998 the Federal Circuit reversed the Board's holding in ASBCA No. 45719 on the validity of the option exercise, did not disturb our findings on the defective TDP, and, because the Board only addressed entitlement, not quantum, vacated our *dictum* (97-1 BCA at 144,109) that the defective TDP "does not convert the option CLIN 0006AC to a cost reimburseable basis of recovery." *Lockheed Martin Corp. v. Walker*, 149 F.3d 1377, 1381-82 (Fed. Cir. 1998). On 16 September 1998 the Board reinstated ASBCA No. 45719 to the docket to adjudicate quantum on appellant's option TDD claim.

8. Appellant's 1 October 1998 Rule 32 report to the Board stated that the "Federal Circuit Judgment also had the effect of mooting [t]he DCAA audit of LMC's Revised Claim, which was based on a measure of recovery set forth in the Board's Decision [in ASBCA No. 45719, *viz*. the cost of resolving the 23 technical problems] that the Federal Circuit has now rejected" and appellant was entitled to a total cost recovery of $8,147,955 for 2,109 TDDs produced to the defective TDP, or to a total cost recovery for the 1,653 option units, and recovery for the 456 base year TDDs (R4, tab 134 at 6-8).

9. From March 1998 to February 1999 the DCAA audited appellant's 17 March 1998 "revised claim" (R4, tab 139). On 12 February 1999, appellant moved for summary judgment in ASBCA No. 45719 on its total cost claim of $8,147,955. Its 22 March 1999 reply brief on the motion referred to its 17 November 1997 and 17 March 1998 "revised claim" as "LMC's Superseded Claim" and stated that "the Federal Circuit decision effectively mooted the Army's audit of LMC's Superseded Claim" (R4, tab 134 at 5, tabs 136, 142 at 3-5).

10. On 23 March 1999 we denied appellant's motion for summary judgment, and held that only the 1,653 option year TDDs were the subject of ASBCA No. 45719, and of the Federal Circuit's decision thereon, so the Board had no CDA jurisdiction of that portion

of appellant's March 1998 claim for the 456 base year TDDs for lack of a CO's final decision thereon (R4, tab 141; *Lockheed Martin Corp.*, 99-1 BCA ¶ 30,312 at 149,885).

11. Appellant's 12 April 1999 letter to the CO stated that an issue requiring the Army's immediate attention was "determining the proper methodology for quantifying LMC's claim for producing the 456 base TDDs pursuant to the Army's defective TDP, so that quantum can be negotiated," advocated a total cost methodology to quantify its March 1998 claim for the 456 base year TDDs, requested that the Army confirm in writing its agreement with such total cost methodology, and concluded--

> For the reasons summarized above . . . both LMC's March, 1998 Claim and the DCAA's ongoing audit thereof have been superseded and mooted by subsequent events. . . . it remains LMC's position that such audit should not continue . . . .

(R4, tab 143 at 3-4)

12. On 10 June 1999 appellant submitted a "Statement of Claimed Costs" in the amount of $4,709,002 for the 1,653 option TDDs on a total cost basis, in ASBCA No. 45719 (AR4, tab 9 at 1-2). We sustained that appeal in the amount of $4,684,362.45 plus CDA interest in July 2000 (*Lockheed Martin Corp.*, ASBCA No. 45719, 00-2 BCA ¶ 31,025; R4, tab 150).

13. On 11 October 2000 appellant submitted to the CO its "revised and amended certified claim . . . seeking $2,917,444 in uncompensated costs" for producing 456 base year TDDs under contract 43, with interest thereon from 17 November 1997, and stating:

> This claim revises and amends that portion of LMC's earlier claim for equitable adjustment – initially filed on November 17, 1997 and later amended on March 17, 1998 ("LMC's Defective TDP Claim") [footnote omitted] – that quantified certain costs that LMC incurred for uncompensated labor and materials in producing all 2109 TDDs required by the Contract (456 base units and 1653 option units).
>
> . . . .
>
> Further amendment and revision of LMC's Defective TDP Claim is necessitated by a July, 1998 decision . . . *Lockheed Martin Corp. v. Walker* . . . [holding] that . . . the Board erred in denying LMC a total cost recovery based on the defective TDP at the then extant stage of the proceedings.

> The Federal Circuit Judgment thereby mooted that portion of LMC's Defective TDP Claim quantifying LMC's costs for producing the 2109 TDDs. Specifically, the decision made clear . . . that LMC was entitled as a matter of law to a total cost recovery on its production of the 1653 option TDDs because the option exercise was invalid.
>
> . . . .
>
> In this connection, the Federal Circuit Judgment held that the Board erred in specifying the method of recovery that LMC followed in its Defective TDP Claim to quantify its costs for producing the 456 base units. Accordingly, this revised and amended claim quantifies such costs on a total cost basis.

Appellant requested a timely CO's final decision on the claim. Appellant did not state that it withdrew its 17 November 1997 claim. The CO received the claim on 13 October 2000. (R4, tab 155 at 2, 5-7)

14. The CO's 7 December 2000 final decision denied appellant's October 2000 claim for lack of a proper CDA certification and on the basis that appellant's certificate of finality upon payment of the Board's judgment in ASBCA No. 45719 released appellant's October 2000 claim (R4, tab 153). Appellant took a timely appeal from that final CO's decision, which we docketed as ASBCA No. 53226.

15. By a joint letter to the Board dated 15 May 2001, the parties agreed that only quantum was in issue. The Army acknowledged that appellant was entitled to recover any actual reasonable costs it incurred in connection with its production of the base (year) 456 TDDs, beyond those costs already recovered, to resolve the technical problems identified in the Board's decision in ASBCA No. 45719. (JS, ¶ 2)

16. In conducting a review of this claim, the auditor concluded that appellant's books and records supported entitlement to $1,437,383 on the current claim (JS, ¶ 5). At the hearing, the parties agreed that "the principal amount of damages to which . . . [LMC] is entitled to compensation is $1,437,383 . . . [a]nd all that remains to be determined then is the starting date of . . . CDA interest on that amount" (tr. 7). The parties stipulate that the only disputed issue is whether interest accrues "from November 17, 1997, when Appellant first submitted the Defective TDP Claim covering the base units, or the October 11, 2000 date on which LMC submitted its $2.9 million total cost claim" (JS, ¶ 6). We understand that interest accrues from the date of receipt of the claim, pursuant to 41 U.S.C. § 611.

POSITIONS OF THE PARTIES

Appellant argues that (1) its certified 17 November 1997 defective TDP claim, which, as revised, alleged entitlement to recover the "sum certain" of $4,375,347 for 2,109 TDDs, *viz*., the 456 base year plus the 1,653 option year TDDs, was a CDA claim for purposes of accruing CDA interest; (2) LMC never withdrew its 17 November 1997 claim; (3) *Lockheed Martin Corp. v. Walker*, 149 F.3d 1377 (Fed. Cir. 1998), did not moot or supersede LMC's 17 November 1997 claim with respect to entitlement to recovery of its additional costs for producing the base units, but rather mooted LMC's methodology for quantifying such recovery; (4) LMC's 11 October 2000 base quantum claim for the $2,917,444 added cost to produce the 456 base year units "related back" and amended, but did not supersede, its 17 November 1997 claim; and (5) therefore, LMC is entitled to CDA interest accrued since 17 November 1997.

Respondent argues that (a) on 5 February 1999, LMC withdrew its 17 November 1997 claim, and (b) LMC's 17 November 1997 claim did not state a sum certain for the 456 base year TDDs, but only $4,170,783 for 2,109 TDDs, with no way to determine how much of that $4,170,783 was for the 456 base year TDDs, so that claim did not meet the CDA criteria for a valid claim.

DECISION

This appeal presents two issues: first, whether appellant withdrew its 17 November 1997 claim, and second, whether appellant's 17 November 1997 claim met the CDA requirement for a valid claim to state a sum certain.

I.

Appellant's 5 February 1998 letter to the CO did not mention "withdrawal" of its claim (finding 4). DCAA said that appellant had "withdrawn" its 17 November 1997 revised claim. The CO interpreted appellant's 5 February 1998 letter to request a postponement of DCAA's claim audit so that appellant could revise the claim amount. The record contains no document prepared by appellant that substantiates DCAA's interpretation that appellant was "withdrawing" its 17 November 1997 claim. (Finding 5) The parties' subsequent correspondence and DCAA's continued audit of appellant's 17 March 1998 "revised claim" until at least February 1999 reflected appellant's intent to change the amount and methodology of its 17 November 1997 claim (findings 6, 9).

Respondent argues further that in March and April 1999 appellant redesignated its 17 November 1997 and 17 March 1998 claims as "LMC's Superseded Claim" (findings 9, 11), so supersession meant withdrawal. Appellant amended its 17 November 1997 claim on 17 March 1998 and on 11 October 2000, each time stating that the amendment related to that 17 November 1997 claim, and nowhere stating that it withdrew its 17 November 1997 claim (findings 6, 13). We believe that the terms "mooted" and "superseded" in appellant's October 1998, and March and April 1999 correspondence meant that the methodology in

appellant's 17 November 1997 and 17 March 1998 claims, *viz*., the cost of resolving each of the 23 technical problems, was "superseded" or "mooted" by the Federal Circuit's 1998 decision, which, appellant thought, sanctioned proof of damages on a total cost methodology (findings 8, 9, 11). We hold that appellant did not withdraw its 17 November 1997 claim.

II.

A valid contractor monetary claim under the CDA must include, *inter alia*, a demand for the "payment of money in a sum certain." *See* FAR 33.201; *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (*en banc*); *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995); *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1580 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992).

Respondent argues that appellant's 17 November 1997 claim for $4,170,783 for 2,109 TDDs did not identify which portion of either sum was for the 456 base year TDDs, and thus was not a valid CDA claim, citing *U.S. General, Inc.*, ASBCA No. 52041, 00-1 BCA ¶ 30,850 and *The Harris Management Co.*, ASBCA No. 27291, 84-2 BCA ¶ 17,378. These cited cases involved unquantified claims. Appellant's November 1997 claim was for the sum certain of $4,170,783 (finding 3).

A close analogy is *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995), which reversed the Board's dismissal of nine claims under one contract, in each of which the contractor stated a sum certain with no further breakdown of costs, and held that a contractor's claim "need not include a detailed breakdown of costs." *See also Applied Technology Associates, Inc.*, ASBCA No. 49200, 96-2 BCA ¶ 28,394 at 141,800 ($91,363 claim stating no dollar amount for each separate allegation was a valid CDA claim).

Respondent further argues that appellant's 12 April 1999 statement that the methodology of quantification, and the quantification of damages in accordance with such methodology were unresolved issues with respect to the 456 base year TDD portion of appellant's 1997-1998 claim, is an admission that before such time appellant had not quantified its 456 base year TDD claim sufficiently for the CO to make an informed decision thereon.

In 1999 the parties took opposing positions on whether the facts of the base year claim permitted LMC to use the total cost or modified total cost method of proving damages (appellant's view), or whether LMC had to prove such damages for each of the 23 TDP changes affecting the 456 TDDs (respondent's view), *for the purposes of negotiating quantum* (finding 11). In that context, appellant's statement about the unresolved issue methodology *for purposes of negotiating quantum* was not an admission that it had not adequately quantified its claim for the CO to make an informed decision *on a total cost basis*.

We hold that appellant's 17 November 1997 claim met the CDA requirement to state a sum certain, and thus appellant is entitled to recover CDA interest accrued since 21 November 1997 when the CO received that claim (finding 3).

Dated: 24 October 2002

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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