ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
BAE Systems Information & Electronic Systems Integration, Inc. (formerly Lockheed Martin IR Imaging Systems, Inc., and Loral Infrared and Imaging Systems, Inc.)	)	ASBCA No. 44832
	)	
Under Contract No. N62269-90-C-0554	)	

APPEARANCES FOR THE APPELLANT: Carter G. Phillips, Esq.
Howard Stanislawski, Esq.
Sidley & Austin
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
Chief Trial Attorney
Gregory T. Allen, Esq.
Trial Attorney

APPEARANCE FOR *AMICUS CURIAE*: Thomas A. Lemmer, Esq.
McKenna, Long & Aldridge, LLP
Denver, CO

OPINION BY ADMINISTRATIVE JUDGE HARTMAN
ON APPELLANT'S MOTION FOR RECONSIDERATION AND
THE GOVERNMENT'S MOTION TO STRIKE APPELLANT'S EXHIBITS

Appellant seeks reconsideration of our decision denying its motion for summary judgment and granting the Government's motion for summary judgment, *BAE Sys. Info. & Elec. Sys. Integration, Inc.*, ASBCA No. 44832, 01-2 BCA ¶ 31,495. The Government opposes appellant's reconsideration motion and moves to strike the exhibits appended to the reconsideration motion, which were not previously before the Board.[1]

Four exhibits are appended to appellant's reconsideration motion. The first exhibit is a 17-page affidavit from a partner in Arthur Andersen, LLP, stating the individual has reviewed this Board's decision and determined "the Board is incorrect in its conclusion" with respect to the purchase method of accounting and with respect to whether Federal

[1] Judge Elmore, who participated in our decision denying appellant's summary judgment motion and granting the Government's summary judgment motion, has retired.

Acquisition Regulation (FAR) 31.205-52 "is in conflict with that required by the Cost Accounting Standards" (CAS). Attached to and referenced in the accountant's affidavit are six documents totaling over 100 pages, which were not previously before the Board and set forth information regarding Generally Accepted Accounting Principles (GAAP), "depreciation accounting," "accounting for preacquisition contingencies of purchased enterprises," Accounting Principles Board Opinion No. (APB) 17 concerning "intangible assets," and Accounting Research Bulletin No. 43 entitled "Restatement and Revision of Accounting Research Bulletins." The second exhibit appended to appellant's motion for reconsideration is a Statement of Accounting Standard, No. 141, issued by the Financial Accounting Standards Board the same month we issued our decision, which supersedes APB 16, but "carries forward without reconsideration the guidance in [APB] 16 . . . related to the application of the purchase method of accounting" and, according to the appellant here, "completely discontinued" use of the "Pooling of Interests Method" of accounting for a business combination (app. recons. mot. at 6, n.7). The third and fourth exhibits appended to appellant's motion are excerpts from two accounting texts.

In its motion seeking reconsideration, appellant does not assert that the exhibits appended to its motion are newly discovered evidence or were unavailable to it prior to the issuance of our decision. Rather, appellant simply states:

> Given the complexity and specialized nature of the issues being considered, expert testimony and a full presentation of available evidence, which is currently absent from the record, will assist the Board in correcting its error of law. Moreover, since the Board's decision addresses issues not raised or briefed by the parties, "fairness dictates that the record be reopened" to develop issues the parties have not presented.

(App. recons. mot. at 2-3)

The Government contends in its motion that we should strike appellant's exhibits because they "do not constitute newly discovered evidence" and the affidavit set forth is conclusory, consisting "of impermissible legal conclusions that intrude upon the Board's function of deciding the legal issues in the appeal." The Government asserts appellant has failed to show any "compelling reasons" why the record in this appeal should be reopened. According to the Government, "[a]ppellant's claim that it seeks to develop issues that were not raised in the original proceeding is not accurate."

In opposing the Government's motion to strike, appellant contends that the Government has waived any objection to the exhibits appended to its reconsideration motion because the Government did not move to strike those exhibits in its opposition to appellant's reconsideration motion, but waited to do so until appellant had appended the documents to an *amicus curiae* brief submitted to the Court of Appeals for the Federal

Circuit in a related appeal, *Kearfott Guidance & Navigation Corp*., ASBCA No. 45536, 01-2 BCA ¶ 31,496, *aff'd, Kearfott Guidance & Navigation Corp. v. Rumsfeld*, No. 02-1039 (Fed. Cir. Feb. 25, 2003). Appellant alternatively contends that we should deny the Government's motion to strike the exhibits because: (a) the Federal Circuit has granted its motions for leave to file its *amicus* brief and appendices in the *Kearfott* appeal so the exhibits "have now been admitted by the Federal Circuit to the Kearfott record" (app. resp. to Gov't mot. to strike at 2); (b) a reopening of the record is not restricted to "newly discovered evidence" (*id*. at 2-3); (c) the exhibits appended to its reconsideration motion should be made part of the record here because they "enable the Board to correct errors of law in its Decision" regarding "issues that were not raised or addressed by the parties" (*id*. at 4-6); and (d) the Arthur Andersen "expert" affidavit is not objectionable under Federal Rule of Evidence 704 "because it embraces an ultimate issue to be decided" where the testimony set forth "is helpful" (*id*. at 7-8).

A timely motion for reconsideration pursuant to Board Rule 29 operates as a motion to amend or make additional findings, as well as to amend our judgment or to secure a new trial. Such a motion allows this Board to correct any errors in its findings and/or conclusions. *See, e.g., BMY, Div. of Harsco Corp*., ASBCA No. 36805, 94-2 BCA ¶ 26,725 at 132,952; *Optic-Electronic Corp.*, ASBCA No. 24962, 84-3 BCA ¶ 17,565 at 87,526.

The receipt of new evidence upon motion for reconsideration is discretionary with the Board. *See, e.g., Optic-Electronic Corp*., 84-3 BCA at 87,526; *G.M. Co. Mfg., Inc.*, ASBCA No. 5345, 60-2 BCA ¶ 2759 at 14,137 (issue of "whether proffered evidence . . . should be accepted in connection with a timely motion for reconsideration rests within sound discretion of this Board"). Appellant thus is correct that a reopening of the record by the Board on a motion for reconsideration is not limited to the presentation of "newly discovered evidence." The test for reopening the record simply is not so narrow. Instead, this Board basically will examine the circumstances of the appeal in which the motion for reconsideration is filed to ascertain whether an "injustice" has occurred and whether the additional evidence offered would permit the Board to remedy that "injustice." *See, e.g., Canadian Commercial Corp*., ASBCA No. 17187, 77-2 BCA ¶ 12,758 at 61,981, 61,985; *Rainbow Valley Corp.*, ASBCA No. 11691, 69-1 BCA ¶ 7655 at 35,519-20. In making this determination, the Board will consider, among other things, the "kind" of evidence being offered, the evidence's prior availability, and whether the opposing party has been prejudiced by the delay in presenting such evidence. *See BMY*, 94-2 BCA at 132,943-46, 132,950-53; *Canadian Commercial*, 77-2 BCA at 61,981, 61,982, 61,984, 61,986.

Because the receipt of new evidence upon a motion for reconsideration is discretionary with the Board based upon the existence of an injustice, this Board must determine if it should admit the new evidence proffered on reconsideration whether the opposing party promptly objects to admission of that evidence or not. We, therefore, need not address appellant's assertion that the Government waived objection to the admission of

its reconsideration motion evidence by not moving promptly to strike that evidence before the submission of appellant's *amicus* brief to the Federal Circuit.[2]

It is abundantly clear that appellant disagrees with legal conclusions set forth in our opinion denying its motion for summary judgment and granting the Government's motion for summary judgment. Appellant's simple disagreement with any or all of our holdings, however, does not constitute an "injustice" requiring reopening of the record here. It is well established that we will require "the most compelling reasons" before we allow a party to "wait until after it receives an adverse decision" from us to offer "evidence that it could easily have presented [us] before the adverse decision was rendered." *E.g*., *Philco-Ford Corp*., ASBCA No. 16198, 73-2 BCA ¶ 10,051 at 47,147. "[G]ood cause must be shown before the losing party is 'given a second bite of the apple.'" *Madison Park Clothes, Inc.*, ASBCA No. 4234, 61-1 BCA ¶ 3054 at 15,809; *accord BMY*, 94-2 BCA ¶ at 132,950; *American Elec. Labs., Inc.*, ASBCA Nos. 17779, *et al*., 78-1 BCA ¶ 12,907 at 62,865 (authority to reopen a record is exercised only in exceptionally rare and unusual situations), *aff'd*, 650 F.2d 285 (Ct. Cl. 1980); *Rainbow Valley Corp*., ASBCA No. 11691, 69-1 BCA ¶ 7655 at 35,520.

While appellant asserts that the Board's decision denying its summary judgment motion and granting the Government's summary judgment motion "addresses issues not raised or briefed by the parties," we agree with the Government that this is an inaccurate assertion. As noted in our decision, appellant argued in its summary judgment motion, opposition to the Government's summary judgment motion, supplemental opposition to the Government's motion, and supplemental brief that a regulation incorporated into its contract, FAR 31.205-52, was "ambiguous." *BAE Sys. Info. & Elec. Sys. Integration, Inc.*, ASBCA No. 44832, 01-2 BCA ¶ 31,495 at 155,522. An "issue" presented for resolution by appellant in this appeal, therefore, was whether FAR 31.205-52 was "ambiguous." *Id*. at 155,522. It is well-established that a contract term is ambiguous if it has more than one "reasonable" interpretation. *See, e.g., PCA Health Plans of Texas, Inc. v. LaChance*, 191 F.3d 1353, 1355 (Fed. Cir. 1999); *Massie v. United States*, 166 F.3d 1184, 1189 (Fed. Cir. 1999). We, therefore, looked to the principles established in this Circuit for construing a contract and examined appellant's interpretation of FAR 31.205-52 to ascertain if it was "reasonable." *BAE Sys. Info. & Elec. Sys. Integration, Inc.*, ASBCA No. 44832, 01-2 BCA ¶ 31,495 at 155,522-24. We subsequently held, based upon APB 16, which both parties

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[2] We also need not address appellant's assertion that, because it was granted leave by the United States Court of Appeals for the Federal Circuit to file an *amicus curiae* brief and appendix containing the materials in a related appeal, it should be allowed to reopen the record here to include the materials. Neither party has apprised us whether it was brought to the attention of the appellate court that the materials at issue were not part of the record here and we have no knowledge of the proceedings before the Federal Circuit in the related appeal. We, therefore, can attach no significance to the filing of an appendix containing those materials.

referred us to in their briefs with respect to the accounting of assets in business combinations, *id*. at 155,523, that the appellant's interpretation of the FAR incorporated in its contract – that the phrase "purchase method of accounting" refers only to a "step-up" in values of assets acquired at time of a business combination – was "not reasonable." *Id*. at 155,524; *see Kearfott Guidance & Navigation Corp. v. Rumsfeld*, No. 02-1039, slip op. at 6 (Fed. Cir. Feb. 25, 2003) (FAR is best understood as providing that, if the amount claimed for any one of the three referenced cost elements is premised on a valuation of assets based upon the purchase method of accounting for a business combination, the regulation bars the claim). Thus, the issue resolved was raised by appellant and we are not persuaded that appellant was unable to anticipate resolution of that issue or matters upon which we based our conclusions regarding the meaning of the FAR incorporated into its contract.

The same is true with respect to whether FAR 31.205-52 "is in conflict with that required by the Cost Accounting Standards." As noted in our decision, appellant argued in its summary judgment motion that FAR 31.205-52 conflicts with the CAS. *BAE Sys. Info. & Elec. Sys. Integration, Inc.*, ASBCA No. 44832, 01-2 BCA ¶ 31,495 at 155,535. Based upon our analysis of the FAR, CAS, and two binding precedents cited us by both parties, we concluded that FAR 31.205-52 did not conflict with the CAS because it was developed to be and operates as an "allowability," rather than an "allocability" provision. *BAE Sys. Info. & Elec. Sys. Integration, Inc.*, ASBCA No. 44832, 01-2 BCA ¶ 31,495 at 155,535-42, *citing Rice v. Martin Marietta Corp*., 13 F.3d 1563 (Fed. Cir. 1993), and *United States v. Boeing Co*., 802 F.2d 1390 (Fed. Cir. 1986). Thus, the second issue set forth in appellant's reconsideration motion was also raised by appellant and we are not persuaded that appellant was unable to anticipate resolution of that issue or matters upon which we based our conclusions regarding the lack of conflict between FAR 31.205-52 and the CAS.

In this appeal, appellant has not contended that the evidence proffered with its motion for reconsideration was not available to it prior to the Board's opinion denying appellant's motion for summary judgment and granting the Government's motion for summary judgment. Further, the evidence proffered is the "expert" testimony of a partner of Arthur Andersen, and accounting literature appellant asserts pertains to that testimony. While appellant asserts that this evidence is being proffered to assist us in understanding "complex" and "specialized" accounting issues, because the proffered testimony is in the form of an affidavit, the Board has no opportunity to present to the "expert" any questions it may have with respect to his testimony and is deprived of the benefit of the information normally elicited by an opposing party in cross-examining the "expert" with respect to his testimony. *See Joseph T. Yamin*, ASBCA No. 35373, 90-2 BCA ¶ 22,657 at 113,836-37; *Canadian Commercial Corp*., ASBCA No. 17187, 76-2 BCA ¶ 12,145 at 58,379. More importantly, because the proffered testimony is presented in the form of an affidavit appended to a reconsideration motion, rather than through conduct of a hearing, the opposing party is not presented with any opportunity to present live testimony from its own accounting expert to assist the Board with resolving the "complex" and "specialized" accounting issues that appellant now believes to be before the Board. The opposing party

here, the Government, therefore, clearly would be prejudiced if we allowed appellant to submit to us "expert" testimony and documentation relating to that "expert" testimony for the first time in this appeal as a part of appellant's motion for reconsideration.

We do not care to speculate or conjecture why appellant did not see a need for the submission of expert testimony and related materials until after its receipt of an adverse decision from us. Under the circumstances discussed above, however, we do not believe appellant would be wronged or treated "unjustly" if the affidavit of its Arthur Andersen accounting "expert" and the materials appended to its motion for reconsideration relating to the testimony in the affidavit were not admitted. *See, e.g., Local Contractors, Inc.*, ASBCA No. 37108, 90-3 BCA ¶ 22,971 (record should be opened for additional evidence only under circumstances fair to both parties); *Kearfott Guidance & Navigation Corp. v. Rumsfeld*, No. 02-1039 (Fed. Cir. Feb. 25, 2003) (FAR 31.205-52 does not conflict with CAS and treats use of the purchase method of accounting as a condition or circumstance necessary for its application).

Moreover, as the Government asserts in its motion to strike, the affidavit of the Arthur Andersen "expert" contains "legal conclusions" that intrude upon the Board's function of deciding the "legal issues" in this appeal. While appellant is correct that, under Fed. R. Evid. 704, "ultimate issue" testimony is admissible, this Board has stated that Rule 704 does not "open up testimony on ultimate issues without limitation." We have held that it remains black-letter law that expert legal testimony on issues of law is not permissible. While an expert may opine on an issue of fact within the jury's province, we stated in *Lockheed Corp.*, ASBCA Nos. 36420, *et al.*, 91-2 BCA ¶ 23,903 at 119,750, that he may not give testimony stating ultimate legal conclusions based upon those facts. *Accord Litton Sys., Inc., Applied Tech. Div.*, ASBCA No. 36976, 93-2 BCA ¶ 25,705 at 127,887-88. Thus, in any event, it would not be appropriate for us to consider the Arthur Andersen accounting "expert's" testimony with respect to the "correct" interpretation of the contract here and the ultimate legal issues in this appeal. *E.g., Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1369 (Fed. Cir. 2003) ("views of the self-proclaimed CAS experts" as to the proper interpretation of those regulations are "irrelevant to our interpretive task").

The record in this appeal is not reopened for the admission of additional evidence proffered by appellant. We have considered appellant's motion for reconsideration absent the additional evidence proffered, and are not persuaded that in our original decision we erred with respect to conclusions of law. *E.g., Kearfott Guidance & Navigation Corp. v. Rumsfeld*, No. 02-1039 (Fed. Cir. Feb. 25, 2003) (FAR 31.205-52 does not conflict with CAS and treats use of the purchase method of accounting as a condition or circumstance necessary for its application).

CONCLUSION

The Government's motion to strike is granted. We have considered appellant's motion for reconsideration and reaffirm our prior decision.

Dated: 28 February 2003

TERRENCE S. HARTMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur with respect to the motion for reconsideration and concur in result with respect to the motion to strike
(See separate opinion)

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

OPINION BY JUDGE THOMAS

In view of the Court of Appeals for the Federal Circuit's decision in the *Kearfott* case, I concur in the decision on the motion for reconsideration. As for the motion to strike, I do not completely agree with the opinion's statement of the standard for consideration of additional evidence on reconsideration. However, in view of the Court's decision, it is clear that the motion to strike should be granted in this case. Accordingly, I join in result in the decision on the motion to strike without joining in the discussion.

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. 44832, Appeal of BAE Systems Information & Electronic Systems Integration, Inc. (formerly Lockheed Martin IR Imaging Systems, Inc., and Loral Infrared and Imaging Systems, Inc.), rendered in conformance with the Board's Charter.

Dated:

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

_____
Front Office

ARMED SERVICES BOARD OF CONTRACT APPEALS
Skyline Six - Seventh Floor
5109 Leesburg Pike
Falls Church, Virginia - 22041

CONCURRENCES IN DRAFT DECISION

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LST spell checked Date Judge Reviewed

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LST cite checked Date Date

If initial draft by staff attorney (name) _____

Appeal of --)
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BAE Systems Information & Electronic) ASBCA No. 44832
Systems Integration, Inc. (formerly Lockheed)
Martin IR Imaging Systems, Inc., and Loral)
Infrared and Imaging Systems, Inc.))
)
Under Contract No. N62269-90-C-0554)

The first undersigned member hereby tenders the attached draft decision in the above-referenced appeal(s) for action by the other members of this division, a Vice Chairman and the Chairman.

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_____
Member Date

I _____ _____
_____
Member Date

I _____ _____
_____
Vice Chairman Date

I ____________ ___________________________________

____________________ Acting Chairman Date