ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of —–	)	
	)	
Grumman Aerospace Corporation	)	ASBCA Nos. 46834, 48006,
	)	51526
Under Contract No. F04606–86–C–0122	)	

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OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON MOTION FOR RECONSIDERATION

The Government has timely filed a motion for reconsideration of our decision in *Grumman Aerospace Corp.*, ASBCA Nos. 46834, *et al.*, 03-1 BCA ¶ 32,203. Appellant has timely filed a memorandum opposing reconsideration. We address the Government's contentions in the order presented.

I. The Board's Disposition of Appellant's Complaint

The Government does not dispute that the Board addressed each of appellant's 28 claims on entitlement. However, the Government contends that the Board's decision did not expressly address each of the counts in appellant's complaint as they related to these claims.

The Board's general practice is to address the contractor's claims in the decision rather than the counts in the complaint since Board jurisdiction is predicated upon the claim, not the pleadings filed on appeal. To the extent that the Board found no entitlement on a contractor claim, it goes without saying that all counts in the complaint related to that claim, whether couched in breach of contract language, violation of implied duty, constructive acceleration or otherwise, were likewise denied. To the extent this was not made clear in our decision we modify it accordingly.

Where we found entitlement on a contractor claim, we determined generally that the claim was remediable under the contract. The context of the claim typically identified the remedy-granting clause in question. Where we found entitlement to an "equitable adjustment" or found entitlement to a recovery of "costs" which also bespeaks an equitable adjustment, the remedy-granting clause was typically the Changes clause, unless the context otherwise indicated. In any event, with the exception of our decision on the MTS Installation Slip claim (03-1 BCA ¶ 32,203 at 159,252), the Board found no breach of contract, no breach of implied duty, and no constructive acceleration by the Government under any contractor claim. We modify our decision accordingly to make this clear.

II. The Board's Characterization of the Contracting Officer's Decision

The Government asks us to reconsider the reasoning we purportedly attributed to the contracting officer in our findings pertaining to the contracting officer's decision. According to the Government, the Board's findings make "it appear that Mr. Taylor was arbitrary or careless in issuing his 1994 final decision." (Motion at 9)

We deny the Government's request. The Government has not shown that the Board's characterization of the contracting officer's decision was erroneous. The Board's findings are supported by the text of the document, and do not convey or imply that the contracting officer was arbitrary or careless. To the extent the Government perceives such an implication, we believe that perception is unreasonable. The Board is not obligated to reconsider every possible implication – real or imagined – that a party may perceive in a Board decision, particularly where, as here, the implication has no real bearing on the merits of appellant's claims. *See Lake Shore, Inc.*, ASBCA Nos. 42577, 42578, 91-3 BCA ¶ 24,227 (Board declined to change its original decision where the distinction raised by the movant had no material impact on the decision).

III. Whether the Board's Decision on Claim No. 27 Was Supported by Substantial Evidence

The Government contends that the Board's finding of entitlement on Claim No. 27 – Software Trouble Reports (STRs) and Field Problem Reports (FPRs) was not supported by substantial evidence.

The Board held that there were at least 1,100 STRs and FPRs issued under the contract, and that the vast majority of them were in-scope and were required to be performed by appellant at no change in contract price (03-1 BCA ¶ 32,203 at 159,257-8). Neither party seeks reconsideration of this finding.

With respect to appellant's claim relating to 152 STRs and FPRs, we believe that the Government has misread our decision. The Government represents in its motion that the Board accepted appellant's evidence and found entitlement on all 152 STRs and FPRs (motion at 10). This representation is not accurate. The Board did not find that all of appellant's claimed 152 STRs and FPRs were out-of-scope, nor did the Board find entitlement on all of these STRs and FPRs. The Board's decision stated clearly that there was entitlement on appellant's claim "except as otherwise provided in this Opinion" (*id*. at 159,258). Many of these exceptions were specifically addressed by category in the STR/FPR section of the opinion (*id*. at 159,258-9). Many other exceptions were addressed throughout the opinion under various claim headings (*i.e*., ballistic data, CARA bug). For some reason, the Government's motion has failed to account for all of these exceptions.

The Government also questions the specific evidence relied upon by the Board. However a party's disagreement with the trier of fact regarding the weight accorded the evidence is not a proper ground for reconsideration. *Walsky Construction Company*, ASBCA No. 41541, 94-2 BCA ¶ 26,698 at 132,784. Specifically, the Government reiterates its argument that Mr. Engel was not a credible witness and that the Board erred when it relied on his testimony and on his 60-page technical analysis in the REA, which was also admitted into the record as an independent trial exhibit (ex. A-39). We again reject the Government's credibility challenge. The Board issued specific findings regarding Mr. Engel's personal knowledge, technical competence, his work product and credibility. The Government has provided no basis for us to reconsider these findings. While we agree with the Government that mere conclusory allegations in an REA are generally not probative, this principle has no application here. We have found that

Mr. Engel's work product was a creditable and credible technical analysis. We have been provided with no good reason to reconsider this determination.

The Government also argues that the Board erred by not giving due consideration to Clause H-1056, Technical and Management Meetings, which in essence protects the Government from any contract direction given by unauthorized Government personnel at job meetings. However the Government fails to show that the Board's decision improperly relied upon any such unauthorized direction with respect to this claim. The Board's decision expressly addressed the issue of authorized direction (*id*. at 159,258). The Board issued findings regarding how the AF prioritized STR/FPR fixes, which system was adopted and used by the contracting officer to authorize and to direct the correction of the work on a prioritized basis as reflected in these reports. These findings are amply supported by the evidence.

IV. Whether the Board's Decision on Claim 2(a) Was Supported by Substantial Evidence

The Government contends that the Board's grant of entitlement on appellant's STS software claim upon behalf of its subcontractor, TRW, was in error because the Board's decision "violates contract interpretation rules and fails to prove causation" (motion at 21).

The Government contends that the Board was, in effect, precluded from making any finding of entitlement for the contractor because the record does not contain a copy of the TRW-Grumman subcontract. This contention is without merit. Based upon the record evidence, it cannot be reasonably disputed that TRW proposed to perform the work in question *i.e.*, the design and test of software modifications for the software test station (STS) on appellant's behalf; that appellant agreed to this performance; and that TRW performed this work. Indeed, the contracting officer acknowledged this contractual relationship at trial (tr. 60/252). To have done otherwise would fly in the face of the undisputed evidence of TRW attendance and participation in numerous technical meetings – called by the Government – related to this work.

We believe that the absence of an express written subcontract in the record is not fatal to the Board's finding of entitlement. The evidence supports a conclusion that TRW and Grumman had, at the very least, a contract implied-in-fact, "founded upon a meeting of minds and [which] 'is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.' *Balt. & Ohio R.R.*

v. United States, 261 U.S. 592, 597, 58 Ct. Cl. 709, 43 S.Ct. 425, 67 L.Ed. 816 (1923)," quoted in *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003). Our decision is modified accordingly to make this clear.

Invoking *Lear Siegler Management Services Corp. v. United States*, 867 F.2d 600 (Fed. Cir. 1989), the Government also argues that the Board committed legal error because it failed to find that appellant relied, prebid, upon its interpretation that the Government had a contract obligation to provide appellant with the GFP FB-STS B-5 and C-5 software specifications prior to January 1987.

The Government's reliance on *Lear Siegler* is misplaced. *Lear Siegler* requires a finding of prebid reliance only where the contractor seeks to prevail under ambiguous contract terms. The Board did not find or conclude that the contract was ambiguous in this respect, nor did the Board find that the contract was susceptible of supporting both the Government's and the contractor's interpretation which would support a conclusion of ambiguity. Indeed, the Board rejected the Government's proffered interpretation because it failed to harmonize all contract requirements (03-1 BCA ¶ 32,203 at 159,193). Appellant's interpretation was the only logical and reasonable interpretation here. Under such circumstances, it is well-settled that proof of prebid reliance is not required. *Philip Environmental Services Corporation*, ASBCA Nos. 53445, 53573, 02-1 BCA ¶ 31,841 (and cases cited). We modify our decision accordingly.

The Government also argues that since appellant's proposal failed to identify and failed to propose need dates for the FB-STS B-5 and C-5 specifications in accordance with Clause L-641, Government Furnished Property, the Government was obligated to furnish these admittedly GFP specifications with the GFP hardware no earlier than 1987. This argument would have some merit if the contract did not contemplate an earlier delivery of these specifications. However, the contract *did* contemplate an earlier delivery of these admittedly GFP specifications as the Board expressly found (findings 37, 40, 41, at 03-1 BCA ¶ 32,203 at 159,188-9), and such a delivery was necessary in order for appellant to perform its work under the CDRLs. The contract required the Government to deliver the FB-STS B-5 and C-5 software specifications in sufficient time to allow appellant to timely perform its work under the contract, as the Board made clear in its decision. The Government did not do so. We have not been persuaded that our findings and conclusions were in error in this respect.

The Government also contends that the Board's decision failed to "prove" causation. We understand this allegation to be that the Board's finding of impact was

unsupported by the evidence. The Government is not correct. The Board expressly cited to the record in support of its findings (*e.g.*, finding 44, *id*. at 159,189). We are not persuaded that our findings or conclusions were in error.

The Government argues that the record also contains evidence showing that TRW was impacted by other events not of the Government's making. However, the Board's decision did not hold the Government liable for any such costs. Appellant, upon behalf of TRW, may only recover those costs reasonably related to the Government's failure to timely provide the GFP FB-STS B-5 and C-5 specifications as the Board determined.

Conclusion

We have carefully reviewed the Government's allegations in its motion, but we do not believe that they provide any legally sufficient grounds to alter the results in our decision. Upon reconsideration, our decision is modified to the extent provided herein. Otherwise, the Government's motion for reconsideration is denied and our decision is affirmed.

Dated: 23 June 2003

JACK DELMAN
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

RONALD JAY LIPMAN
Administrative Judge
Acting 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 Nos. 46834, 48006, 51526, Appeals of Grumman Aerospace Corporation, rendered in conformance with the Board's Charter.

Dated:

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