ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Raytheon Company	)	ASBCA Nos. 51652, 53509
	)	
Under Contract No. DAAH01-88-C-0809	)	

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON MOTION FOR RECONSIDERATION

The Government moves for reconsideration of our 30 July 2003 decision reported at 03-2 BCA ¶ 32,337 on the ground that it contains "an irreconcilable conflict between the Board's Finding of Fact 5 (FOF), the Federal Acquisition Regulation (FAR), applicable case law, and the Board's conclusions" (mot. at 1). FOF 5 stated:

> 5. On 5 September 1996, Raytheon appealed a deemed denial of its price adjustment claim (ASBCA No. 50166). On 27 August 1997, the MICOM PCO issued a COFD allowing $13,577,360 on the claim (R4, tab 10). This amount, being less than the highest amount claimed and insufficient to cover the total estimated cost at completion, was in effect an apportionment of the loss on the contract between the Government and Raytheon. On 29 August 1997, Raytheon appealed the COFD to the Board (ASBCA No. 50987).

The Government argues that (i) FOF 5 was a finding that it was possible to apportion responsibility for the loss on the contract between Raytheon and the Government, (ii) since it was possible to apportion the loss, the "judicial exception" to the loss adjustment required by

FAR 49.203(a) did not apply, and (iii) since the judicial exception did not apply, the TCO had no authority to omit a loss adjustment in the termination settlement amount.

FAR 49.203(a) states the loss adjustment requirement as follows: "In the negotiation or determination of any settlement, the TCO shall not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed. The TCO shall negotiate or determine the amount of loss and make an adjustment in the amount of settlement as specified in paragraphs (b) or (c) below. . . ." What the Government calls a "judicial exception" to the loss adjustment requirement is our statement in *D.E.W. & D.E. Wurzbach, A Joint Venture*, ASBCA No. 50796, 98-1 BCA ¶ 29,385 at 145,059, citing *M.E. Brown*, ASBCA No. 40043, 91-1 BCA ¶ 23,293 at 116,816, that loss adjustment is not applicable where the Government has "substantially contributed to the increased costs and it is not possible to separate that portion of the loss from possible losses caused by the contractor" (mot. at 4-5).[1]

FOF 5 was not a finding that apportionment of the loss was possible. It was a finding that the price adjustment allowed by the PCO in effect apportioned the loss on the contract because in allowing less than the maximum claimed amount, it did not cover the entire estimated cost at completion. We made no finding on either the reasonableness of the PCO's apportionment, or on the possibility of making a reasonable apportionment in the circumstances. Accordingly, there is no irreconcilable conflict between our FOF 5 as to what the PCO determined, and our finding that the TCO acted within her authority in making a determination to the contrary.

The TCO had authority under FAR 49.105(a)(3) and (4), FAR 49.109-7, and paragraph (e) of the FAR 52.249-2 termination clause of the contract to make the determinations necessary to settle the termination proposal. When the TCO determined that the loss could not be apportioned, the PCO's decision, which was on appeal to the Board, was not binding on either party and had no legal presumption of correctness. *See Wilner v. United States*, 24 F.3d 1397, 1402-03 (Fed. Cir. 1994) (*en banc*); *Southwest Welding & Manufacturing Co. v. United States*, 413 F.2d 1167, 1184 (Ct. Cl. 1969).[2]

On reconsideration, we find no merit in the alleged ground for reversing our decision of 30 July 2003. We reaffirm that decision in all respects.

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[1] We do not regard that statement as a judicial exception (which we have no authority to make), but as a statement of circumstances in which the express condition precedent for loss adjustment in the regulation is not met.

[2] The Government's citation of *Boeing Defense & Space Group*, ASBCA No. 50048, 98-2 BCA ¶ 29,779 is inapposite. The issue in *Boeing* was whether a TCO in a unilateral determination could use a loss adjustment formula different from the formula specified in the contract. The issue in Raytheon's case is whether the TCO had authority to omit a loss adjustment from a bilateral settlement agreement.

Dated: 17 October 2003

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

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 Nos. 51652 and 53509, Appeals of Raytheon Company, rendered in conformance with the Board's Charter.

Dated:

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