

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Motorola, Inc.) ASBCA No. 51789
)
Under Contract No. DAAK20-84-C-0879)

APPEARANCE FOR THE APPELLANT: Peter B. Jones, Esq.
Jones & Donovan
Newport Beach, CA

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Robert B. Neill, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR RECONSIDERATION

On 4 November 2002, appellant timely moved for reconsideration of the Board's quantum decision in *Motorola, Inc.*, ASBCA No. 51789, 02-2 BCA ¶ 32,043. Appellant has a fixed-price incentive fee contract with the Government ("contract 879"). In the entitlement phase of this litigation, the Board held that appellant's subcontractor Aydin Computer Systems Division (Aydin) had submitted defective cost or pricing data in negotiations with appellant relating to work to be performed under Modification No. P00031 to contract 879. Aydin failed, as of the date of its Certificate of Current Cost or Pricing Data, 3 April 1987, to disclose to appellant or the Government the unallowable nature of a facilities capital charge (COF) included in its 1986 G&A rate of 30.3%. *Motorola, Inc.*, ASBCA No. 48841, 96-2 BCA ¶ 28,465 at 142,171-72, *aff'd*, 125 F.3d 1470 (Fed. Cir. 1997). In our quantum decision, we determined that including COF in Aydin's 1986 G&A rate increased that rate from 23.1% to 30.3%, and that this increase resulted in an increase of \$253,295 in the price of the Aydin subcontract. As a result, we held that the Government had the right to disallow the cost of the Aydin subcontract, to the extent of \$253,295, for purposes of determining allowable prime contract costs relating to Modification No. P00031. We also denied appellant's claim of an offset relating to alleged understated R&D costs of \$642,000. Familiarity with our quantum decision is assumed in the following discussion.

Appellant cites two grounds for its motion. (1) The statement in the Board's finding 22, that appellant's alleged \$642,000 offset amount "is not substantiated by any 1986 documents in the record," is in error because such amount was substantiated by Aydin's December 1986 Statement of Operations. (2) Since the CO's final decision expressly

“decided only a Government claim for reduction of prime contract target price,” the Board was “without jurisdiction to decide a claim for disallowance of cost” (mot. recon. at 2).

Respondent opposed the motion, arguing that appellant presents no new facts unavailable at trial, demonstrates no mistake of fact or law, and “merely rehashes” its prior arguments and legal theories (Gov’t opp. at 4). Appellant submitted a reply to respondent’s opposition, and respondent responded thereto.

Ground 1. Aydin’s December 1986 Statement of Operations set forth “YTD PLAN” of \$720,000 and “YTD ACTUAL” of \$78,000 for R&D expenses (mot., attach. A). The arithmetical difference between those figures is \$642,000. That Statement of Operations did not identify the cause of the \$642,000 R&D reduction, or mention the Grumman subcontract. The link between the 1986 \$642,000 R&D reduction and the Grumman subcontract was first advanced a decade later in the 17 December 1997 letter of Aydin’s attorney, Peter B. Jones (R4, tab 106), and repeated by his client James Lohr on 16 June 1998 (R4, tab 116). Considering that Aydin’s 1997-98 statements came after the Federal Circuit had affirmed our entitlement decision in ASBCA No. 48841 (*see* finding 20), little probative value can be assigned to its *post litem* explanation.

Moreover, even if the Board’s statement in finding 22 about lack of substantiation of the \$642,000 were regarded as erroneous, such error would be immaterial. It would not alter our finding that the “record contains no evidence that Aydin’s 1986 G&A rate of 30.3% did not encompass and reflect performance of the Grumman subcontract until August 1986 and the termination thereof in September 1986” (finding 24). It would not negate our conclusion that Aydin’s reduced 1986 G&A rate was the result, if anything, of its President’s erroneous belief that “he could move employees from contract work to R&D and bring Aydin’s G&A rate up to 45%,” and our holding that such management judgment cannot offset overstated cost or pricing data. 02-2 BCA at 158,364.

Ground 2. Movant contends that the CO’s “claim for reduction of an FPIF prime contract target price” is “different from a claim for disallowance of a portion of the cost of a subcontract negotiated *after* prime contract price agreement” (mot. recon. at 5). Such contention obfuscates the contractual and regulatory basis for the recovery of subcontractor defective pricing. Our decision based its defective pricing determinations on contract 879’s DAR 7-104.29(a) clause provision that—

If . . . any cost reimburseable under this contract was increased by any significant sums because . . . (ii) a subcontractor . . . furnished cost or pricing data which were not complete, accurate and current as certified in the subcontractor’s Certificate of Current Cost or Pricing Data . . . the price or cost shall be reduced accordingly

and the DAR 3-807.10(d)(3) regulatory provision that

(3) Under cost reimbursement type and under all fixed-price type contracts, except firm fixed-price and fixed-price with economic price adjustment provisions, increases in payments to subcontractors due to defective subcontractor cost or pricing data will be the basis for disallowance or nonrecognition of costs under the defective cost or pricing data clauses [T]he increased costs will be disallowed under cost-type contracts or not considered as actual costs for final pricing of redeterminable or incentive-type contracts.

(Finding 2; 02-2 BCA at 158,363)

The CO's September 1998 price reduction claim was not based on Aydin's subcontract cost or pricing data as of 24 September 1986, when Modification No. P00031 to Motorola contract 879 was agreed upon, as appellant suggests, but rather on its data as of 3 April 1987, when the subcontract was agreed upon and its cost or pricing data were certified (see findings 9, 14, 16). Thus, Government reliance on Aydin's April 1987 subcontract costs in agreeing upon the prime contract price on 24 September 1986, and proof of the extent to which such subcontract costs were included in the original prime contract's target cost and price, are irrelevant and immaterial to the issues in this appeal.

Moreover, movant's contention confuses the basis of the Government's price reduction claim with the theory and mechanics for effectuating such price reduction. The CO's 2 September 1998 final decision stated:

This letter constitutes my Final Decision that . . . the Government is entitled to an adjustment to the contract price in the amount of \$452,486, exclusive of interest This adjustment to contract price does not include or consider any further reductions that may be required, such as adjustment to contract ceiling price. Such reductions will be determined by separate action at a later time.

(R4, tab 118) The Board's decision that the Government has the right to disallow the defective COF subcontract cost, with a calculation based pursuant to DAR 7-104.29(a) and 3-807.10(d)(3) on the non-recognition of cost to the prime, resolved the same issue that the CO decided in his final decision quoted above. The Board did not decide the CO's "excepted" issue of "any further reductions that may be required, such as adjustment to contract ceiling price." See 02-2 BCA at 158,363.

In the relevant context of a fixed-price incentive fee prime contract such as contract 879, the CO's claim for an adjustment of the contract price starts with disallowance or non-recognition of the defective COF subcontract costs. Appellant's 13 February 2002 brief stated correctly that disallowance or non-recognition of a defective cost element is expressly provided for by DAR 3-807.10(d)(3) to effectuate a prime contract defective cost or pricing data price adjustment, and "the Government's remedy when, as here, the subcontractor submits and certifies defective cost or pricing data after pricing of the prime contract[,] is by reducing the allowable cost of the subcontract to the prime and the final price of the prime contract." (App. br. at 17-18)

Additionally, the DAR 7-108.1 INCENTIVE PRICE REVISION (FIRM TARGET) (1980 FEB) clause in contract 879 provided:

(j) Equitable Adjustment Under Other Clauses. If an equitable adjustment in the contract price is made under any other clause of this contract before the total final price is established, the adjustment shall be made in the total target cost and may be made in the maximum dollar limit on the total final price, the total target profit or both. If such an adjustment is made after the total final price is established, adjustment shall be made only in the total final price.

(R4, tab 1, "BASIC" at 195) The record contains no evidence that the parties have already established the "total final price" of contract 879 under the DAR 7-108.1 clause. Thus, the Board's holding that "respondent has the right to disallow the \$253,295 cost element of contract 879 pursuant to its DAR 7-104.29(a) clause" complied with the DAR 3-807.10(d)(3) provision to disallow or not to recognize defective subcontractor cost or pricing data, and with the DAR 7-108.1(j) clause, which requires an adjustment in the "total target cost" of contract 879.

Appellant argues that our finding 13 that "[a]s of 31 December 1986, Aydin's year to date (YTD) G&A costs were \$3,791,000, including \$897,200 for Aydin Corporation's COF," deprived appellant of "due process" because Aydin had no opportunity to introduce evidence and to dispute such \$897,200 COF charge (mot. recon. at n.3). Such argument is specious. Appellant's footnote 4 (mot. recon. at 12) asserts that Mr. Janas "testified that the total corporate charges reflected in that document [R4, tab 139] are \$879,100":

Aydin Computers' Controller, Mr. Janas, testified that the total corporate charges reflected in that particular document are \$879,100 and included a corporate G&A allocation and state taxes. Tr. 2-270

In fact, Mr. Janas was testifying not about R4, tab 139, addressing Aydin's 1986 COF charge, but rather R4, tab 96 (designated R4, tab 52C in ASBCA No. 48841), which addressed Aydin's November 1985 COF charge (tr. 2/266-70). Nonetheless, that testimony shows that appellant had ample opportunity to dispute the Government's evidence of the 1986 COF charge of \$897,200, considering that Aydin's 1986 year-end G&A and COF charges were the subject of our entitlement decision. See findings 4, 7-8, 10-11, 14 in 96-2 BCA ¶ 28,465 at 142,168-69.

For the foregoing reasons, we deny appellant's motion for reconsideration.

Dated: 26 February 2003

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

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting 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 No. 51789, Appeal of Motorola, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services

